

TRANSFORM—DON'T JUST TINKER WITH—LEGAL EDUCATION (PART II)

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Part II of this two-part article presents the Alternative Vision of legal education discernible in the best of clinical legal education—not as a supplement to the at-best-status-quo-plus model that still dominates legal education, but as a complete substitute ready now for a full roll-out. This Vision defines, in ambitious intellectual and pedagogical terms, what lawyers do, describes the capacities superb practitioners demonstrate, and delineates the aims and means to train law students to be as practice-ready as three years of first-rate education allows and to grow better and better at what they do through deliberate choices made over a career. Because the Alternative Vision traces its origins, its implementation, its improvements to the best of clinical programs in the United States, many will likely regard it as presumptively unworthy, even ridiculous: a mongrel rather than a Blue Blood, perhaps practically-minded but at best only spuriously intellectual. Meeting this scorn head-on, Part II sketches the radically different assumptions, methods, and aspirations at the heart of the Alternative Vision, explains why we should ban the Socratic case method and scrupulously scrutinize all familiar learning formats, and measures all of us involved in legal education by how well suited we are (or could become) to the teaching and learning a transformed legal education demands.

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INTRODUCTION

Over roughly the past fifty years clinical programs have developed, refined, and consolidated an Alternative Vision of legal education ready immediately to be implemented across the law school curriculum. Indeed this vision is ready entirely to replace the traditional law school curriculum. This vision defines what lawyers do, describes the capacities superb practitioners demonstrate, and delineates the aims and means to train law students to enter the profession. That training would equip future lawyers to become as practice-ready as three years of first-rate education allows and to grow better and better at what they do through deliberate choices made over the course of a career.

What the best clinical programs offer counteracts the harm inflicted by the basic approach to legal education first introduced in 1870 and still dominant today. That was already true in important ways in 1970, absolutely true in 1990, and still true today. As epidemiologists would say, the best of clinical programs offer downstream treatment of troubles created upstream. But for most law students, that treatment is often too little, too late. Indeed, the more earnest the student—the more inclined to engage the first-year regimen and the second and third years precisely as conventional wisdom exhorts—the more difficult it often turns out to be to undo the damage the rest of law school inflicts.

To frame and understand clinical education’s role merely as “supplementing” or “grounding” or “advancing” students’ growth is entirely to miss the point. This view—the dominant view—severely limits the role of even the best of clinical education. It maintains the sovereignty of the underachieving, self-aggrandizing “core” of legal education that creates the upstream ills clinicians find themselves “counter-acting,” the mentality from which clinicians seek to “de-program” students. What we must see (as some non-clinicians and clinicians and even far more students in the past have) is that the dynamic Alternative Vision implicit in the best of clinical programs provides a coherent way to address at its origins and in all its entailments the unacceptable condition of legal education in 2018.

The Vision embodied in these clinical programs can and should define the fundamental orientation, design, and staffing of every law school across the country. Not just of the clinical program at each

school, of the entire school. Our aim should be to supplant, not to supplement, the traditional core of law school education that has persisted for close to a century and a half. We must scrutinize all formats, methods, and content (clinics, practicums, seminars, colloquia, externships). We must ban—yes, *utterly ban*—the Socratic case method. We must fire or counsel out those unsuited to making this transition a reality and to endlessly improving the transformed law school.

Our students, their future clients, and our national and transnational communities deserve a legal education that starts from day one and continues through and beyond law school graduation to optimally train lawyers and provide them an accurate understanding of what lawyers do, what law is, and how they fit with the rest of our political economy. Nothing—not “tradition” or convention, not indolence or ignorance, not self-aggrandizement or obstinacy—must be allowed to stand in our way.

As I sketch this Alternative Vision, I shall use my own categories and terms. That does not mean I regard what I write as “original,” or “the first,” or “a brand new theory” or any of the other transparently inflated and even counterfeit claims now so routinely employed in law review articles, conference and workshop presentations, law school websites, and law school magazines. Indeed quite the opposite is true. As in writing *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (itself an effort to document and cohere what I treasured in my observations of others’ practices), a central ambition in sketching this Alternative Vision is to emphasize its collective authorship.

I employ terms and categories that others do not necessarily use in describing what lawyers do, in describing how best to teach the problem solving at the heart of all lawyering and as it varies across roles and institutions. Yet people and institutions *of all sorts* created this dynamic vision of how we can ambitiously and effectively train great lawyers. Indeed the assortment—going back not just to 1970 but considerably further still, and extending far beyond law school clinicians and non-clinicians, far beyond university boundaries—is nothing short of astonishing.

I fully appreciate that others I know and respect may divine an Alternative Vision divergent from the one I shall describe. In considering what they regard as the best of clinical education, they may find themselves drawn to features quite different from and perhaps even at odds with those I long ago found myself feeling matter most. And they may offer a distillation that varies, perhaps considerably, from that which I have perceived, internalized, and pronounced as the Alternative Vision. Even within kinship networks, even among allies, such de-

bates always have been and shall continue to be a recurring aspect of everyday life.

Even those who perceive something like the same Alternative Vision in the best of clinical programs likely classify and label matters differently. Though I respect their ways of describing lawyering and educating lawyers, I use my categories and terms because I know them so well. I've used them for decades in describing both the work of lawyers and how best to train law students, new practitioners, seasoned veterans. Together the categories and terms provide the language I share with all those I train, and who in turn teach me to get better at what I do, including improving our shared vocabulary. I'm most comfortable knowing how these categories and terms work and fit together in describing the Alternative Vision I wish to depict.

If others I respect would perhaps use different classifications and labels than those I employ, they would even more likely use the Alternative Vision to design law schools very different from what I might build and from what still others might construct. That's to be expected. Much as I can describe an Alternative Vision of legal education, I myself can easily imagine translating that Vision into many, many concrete variations. Others I know (and others I've studied at a distance) would feel much the same way and would start from their own "best of" list. I'm talking about students as well as teachers, practitioners as well as consultants, clients as well as lawyers. They can generate many worthy options, and the mix of laudable aims, contents and methods would vary across their own constellation of options.

These diversely and even divergently designed law schools, created by those who know the Alternative Vision and daily strive to bring it to life, would be electrifying. The diversity of implementations would allow us to examine how well each law school performs when measured by its particular design, its sequential training opportunities, its qualitative and quantitative results. We could examine, with equal curiosity, ways in which one or another design may yield advantages other transformed law schools may have inadvertently missed or consciously underestimated in importance. An intriguing array of law schools aiming to realize the Alternative Vision would provide feedback loops for everyone to assess and respond to as part of a continuing conversation where everyone aims to get better and to help everyone else get better.

No, that's not a fanciful forecast of the future of legal education. Or at least it shouldn't be. When elite sports coaches can and do open up their training to other coaches against whom they compete (for big-time dollars, prestige, jobs, victories), when elite investors share their strategies (even occasionally their algorithms) with other elite

and nearly-elite investors, when political consultants from across the aisle (aisles) share their data-driven campaign plans, really, law schools can't openly aim to help one another get better at training lawyers? If that's true, the number of people we should "counsel out" of their current faculty and dean and staff and student positions is far larger than anyone may have initially imagined.

In this sketch of the Alternative Vision, I seek parsimony. I don't mean extreme frugality in the implementation; training lawyers can't be done well on the cheap. And I don't mean brevity, either, as even this parsimonious account requires over two hundred pages to deliver. I mean economy of expression in the description: explanations as concise as possible, focused on what most centrally describes and distinguishes the Alternative Vision. Accurate as I believe this definition of parsimony to be, disagreements shall ensue.

What I regard as economy of expression may for some qualify as far too elaborate and for others still as not nearly elaborate enough. For those who would prefer to smother, sidestep, or deny the strata, complications, and tensions in social reality, my sketch shall seem excessively ornate. For those who want a sumptuously detailed depiction of everything covered by this Vision, my sketch shall appear far too austere. Those who yearn for a depiction of the Alternative Vision that serves as either a further distillation (in the strong scientific sense of a theory) or a further amplification (in the strong narrative sense of a story opulently told) will find themselves unsatisfied.

I understand wanting less and wanting more. Indeed, I have chosen less and chosen more in other representations of lawyering, in other descriptions of legal education, and in descriptions of the relationship of one to the other. And in the future, I may choose austere or ornate again. Yet parsimony takes its very definition from the phenomena we aim to describe and from the purposes of the description. At least for Part II of this two-part article, I regard this particular economy of expression as superior to less and to more.

That's not at all because "the truth always lies somewhere in the middle." That familiar maxim is wacky, groundless, and a downright dangerous lie. Instead, as in all human endeavors, we inevitably choose and nearly as inevitably debate what serves as convincingly parsimonious in the face of particular contexts and purposes. That's true of selling a story to a jury, of negotiating pivotal points in a commercial deal, of trying to reach a peace accord. And it's every bit as true in deciding how best to render an Alternative Vision of ambitious and effective legal education.

I do have my regrets, of course. Of the many notable misgivings about my choice of parsimony, I know my sketch too often shall leave

blurry the array of people and experiences contributing over time to the Alternative Vision. I feel disappointed all the more because I keenly appreciate just how much we need fabulously textured and vivid histories of clinical legal education. We have some histories, I realize. I have used them in trainings I offer and in various pieces I write, and I admire them greatly—all the more reason I am dumbfounded by how commonly clinicians and non-clinicians fail to read these histories cover-to-cover.

Yet no one who knows well the mountains of literature about legal education could credibly insist we know anything like what we all should about clinical education. We need histories that aim to sweep across swaths of schools in the United States, across the nation, across countries, all to illuminate common and divergent themes, notable influences and obstacles, conventional and unconventional accomplishments. And we need to read and share them. We need to know well the deep stock stories and challenges to them that, in any era, help explain ways clinical education proved restricted by and yet now and then broke free from underlying ideological, material, and cultural norms.

Every bit as much, and perhaps more, we need decidedly localized histories. We should aim to produce and we should all long to read beautifully rendered, graphic close-ups, about the evolution of clinical programs, about the Alternative Vision immanent in at least some of the work, at law schools across the nation. About some law school clinical programs, we can find only very little published; about others, we can consume certain quality portrayals, but nothing to match all that has happened in and around clinical education at these schools. I know because I routinely search, often with the help of spectacular librarians.

We need these histories to take us all the way up to the current moment. Though my account of *the modern formation* of the Alternative Vision shall focus mainly on the 1970s and 80s, do not misread into this any notion that I believe the best of the “early” or “middle era” clinicians introduced all the key innovations or are somehow better than the best of today’s clinicians or, for that matter, earlier generations. That would be inaccurate—wrong, wrong in every way.

Each generation and moment has its brilliantly gifted, innovative clinicians—and non-clinicians, and law students, and staffers, and clients, and collaborators. All of these actors in each generation and cohort cultivate, expand, and enrich the Alternative Vision. History does not end—or whatever other pithy absurdity may now be making the rounds. The collectively created Alternative Vision inevitably evolves. The everyday job of each cohort entails making changes, tiny to large,

for the better and not the worse. The contribution of the histories not yet published, not yet written, not yet lived—the histories I so yearn to read—would be to educate us about so much we still do not know and need to understand.

Imagine what we could learn, from up close, through the eyes of the people mainly unknown to all but other locals. What would students, staffers, teachers illuminate for us? What would clients have to say? What would others called upon to collaborate, or those ignored when they are exceedingly able and willing to pitch in, report? What would communities tell us—communities understood to be anything but of a single mind? All this is true of elite schools as well as regional schools as well as schools idiotically ignored because of our strongly internalized sense of hierarchy. Often the best stuff, including the genuinely inventive work, goes on in places and through people omitted from any version of an “insider’s list.”

We should and could learn massively captivating stories about, say, Alabama, American, Arizona, Buffalo, BYU, Cleveland-Marshall, CUNY, DePaul, Fordham, Golden Gate, Iowa, New College of Law, New Hampshire, NYU, Northeastern, Northwestern, Santa Clara, Seattle, Southwestern, St. John’s, St. Mary’s, Tennessee, Tulane, UC Hastings, UC Irvine, University of Hawaii Williams S. Richardson, University of St. Thomas, Valparaiso, Vanderbilt, Willamette. About informal working alliances, schisms, breakthroughs never publicized and often never appreciated even within the school itself. About individual and group achievements lost because of departures, both to other schools and to the hereafter. Even the fragments of local histories I already do know typically help me to realize how a sweeping panoramic account can miss so much that has mattered there, here, at some particular school and place.

Just one of the many contributions these histories would make would be to teach about the many people who produced, refined, and improved this Alternative Vision—who embraced the obligation to examine closely huge amounts about lawyering and legal education, to discover the patterns in complexities, to cut deeper and sharper in their analyses, proposals, and programs. Behind the shimmering finish of my compressed Alternative Vision lies this menagerie of folks, very different from one another, variously conscious of what they were helping to build, with the familiar messiness of work and life defining their everyday existence. The downside of the parsimony I have chosen is that it makes room to include only some of these actors and their stories.

Somewhere, at some point, I badly want to share in print a far more detailed narrative of those I have known well for decades, about

those I worked with intensely for a time, about those fellow travelers I learned from at a distance and from the past, and

I could begin with notables from earlier eras (even if nowadays they are nearly unknown) who raised formidable objections and defined exceedingly worthy options to supplant the still dominant vision of legal education, people who worked hard to introduce one or more courses as examples of great training about matters law schools utterly ignored or mangled, people who, in close collaboration with others, persistently championed options that the great majority in legal education and the legal profession ignored, dismissed, derided, deep-sixed.

I could write at length, in reverse order, about various generations of students and teachers and staffers (and many who worked with them, not least clients). To use vocabulary I almost never employ, I want very much to share in print the remarkable virtues of and complex challenges facing Millennials, Xennials, Gen Yers, Gen Xers, Baby Boomers, members of the Silent Generation, the Greatest Generation, the Lost Generation and more.

Like generations before them, my current students have dazzled me with their intellectual, ideological, and emotional hunger for great training, contributing every bit as much as they derived from demanding live and simulated practice and from interdisciplinary readings, helping to improve the lives of clients and client communities, enhancing the work we do together, including the training methods and aims I have spent decades with others developing, leaving all of us feeling honored for having had the opportunity to work with them.

Like most clinicians must feel, I want to offer you a history that features what you cannot otherwise learn from a distance, pulling you inside the work and lives of those students I've worked with just in the immediate past: Anabel Agloro, Kainoa Aliviado, Daysi Alonzo, Melanie Ayerh, Elizabeth Arias, Rekha Arulanantham, Zina Badri, Byron Barahona, Carla Bernal, Alicia Brush, Kathleen Bush-Joseph, Amanda Carlin, Ariana Cernius, Giselle Chang, Kat Choi, Jessica Cobb, Springsong Cooper, Lindsay Cutler, Chad Escalier, Sean Flores, Kathleen Foley, Evan Franzel, Erin French, Natasha Gandi, Rica Garcia, Marina Gatto, Erika Georgiou, Danielle Gies, Simren Gill, Ruhandy Glezakos, Miguel Guerra, Jorge Guerrero, Firass Halawi, Yuri Han, Jessica Hanson, Adam Herrera, Morgan Hecht, Julia High, Christian Holweg,

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There's no escaping these regrets, however. Nor do I wish to. We should experience the possibilities and the limits entailed in every form of parsimony. Living with these regrets, I am proud to depict what together over the past half century (and going back further still) we have collectively developed. In delineating what lawyers do, the capacities splendid practitioners demonstrate, and the methods and goals at the heart of great training, the Alternative Vision provides the standards to design and the metrics by which to measure all we do in legal education. Both paradigm and yardstick, we can evaluate all we already do—the casebook Socratic method, every seminar, colloquium, experiential learning opportunity (externships, practicums, clinics, independent research projects)—and all we propose to do in law schools fundamentally reoriented.

That's not all. Through the Alternative Vision, we can evaluate every faculty member, every student, every employee of the law school, every member of an advisory group and board of trustees. And we can evaluate in advance every potential member of the training team. We can pinpoint ways in which work is terrific or average or failing, and we can guide one another in how we might best sustain terrific work, improve average work, and resurrect failing work. We can do this by comparing what any law school offers with its own mission and detailed plans and by comparing law schools with one another, exploring whether what we see elsewhere offers variations worthy of adaptation.

Skeptics should understand that, for at least fifty years, the best of clinical programs have designed and measured themselves in just this way. I'm including absolutely everyone involved with making clinics run, in particular each succeeding generation, at their best enhancing what they have inherited. And, most often, everyone else with whom they worked: clients from all sectors, communities of all sorts,

and experts with and without degrees and titles. They have demonstrated that, in the hands of able and willing teams, the Alternative Vision works, at its best fabulously. What has been informally going on in parallel with and by contrast to conventional law school training has for decades been ready to transform all of legal education.

What are we waiting for?

I. FORMATIVE, CONSOLIDATING, ENHANCING TIMES

The first waves of modern clinical students and teachers and staffers felt entangled with the political, social, and cultural upheaval of the 1960s, 1970s, and 1980s. Most of us played active roles in one movement or another and typically many movements at once; some routinely helped initiate and sustain major campaigns. Others staffed marches and sit-ins; others still created and made carbon and Xeroxed copies of posters, flyers, and letters to be signed.

It's an exaggeration to say we broke down the law school barricades, though some have tended to describe our arrival in those terms. It's absolutely true, however, that many of us spoke our minds and voted with our feet. As much as traditional legal education aimed, certainly in 1970, to keep the real world outside the classroom and outside of law, we did our best to violate that commandment. Not all were happy with our sinful ways. But many of us didn't much care what traditionalists insisted law school must be like.

I'm often more demanding of our crowd than of anyone else. In one sense, that's perhaps odd and inappropriate. At 21, I entered law school in Fall 1970. I was raw as could be, lacking theoretical sophistication, knowledge of the profession, and any sense of what law school was about. I am forever indebted to many who, almost entirely by virtue of their example, guided me as I created my own feral training regimen to substitute for what law school prescribed.

Much as I am profoundly appreciative, I believe we all should be held to our own standards. Significant numbers of us, myself included, aspired to incite or at least advance a revolution. Those weren't just words, just the rhetoric of the times. We felt that way, put ourselves out there to "make shit happen," and did so over and over again. Many I have known did remarkable work, lived extraordinary lives, over these past decades. From my vantage point, we cannot honor them enough. And, yet, the larger revolution has yet to come to pass. If anything, we share the responsibility for not having fought off effectively enough the White Supremacists and their many disparate enablers who now formally reign over the U.S.

Still, we students, staffers, and clinicians expressed through our work—and through what we said and now and then through what we

wrote—profound dissatisfaction with the status quo approach to legal education, with the remarkable lack of intellectual curiosity about how lawyers lawyer and how best to train students to learn to lawyer well, with the near absence of serious written work or even deep and sustained conversation about teaching and learning and lawyering. Many of us entirely expected to transform law practice and legal education as part of revolutionizing the world. Utopian? Hubristic? Straight-Up Crazy? That's just the way it was.

But we can be even more specific about the students and faculty and staff whose involvement in the first waves of clinics did so much to contribute to what we see and take advantage of today. Even by groups, so much can be said about students, and what can be said hints at strong parallels were I to describe staffers and clinical teachers and many others still:

The embarrassingly small percentage of women admitted to and attending law schools in the late 1960s and early 1970s included large numbers of strong and outspoken feminists, some militantly radical. They made their presence felt in ways far exceeding what fairly might have been expected from a group so small, in some instances at a cost no one should have to pay. At their best, I could hear and sense at work Frances Ellen Watkins Harper, Charlotte Perkins Gilman, and Grace Lee Boggs.

The infinitesimally small (and then just small) number of Natives and Latinos and Asian Americans in law school during those same years were, almost to a person, active participants in various indigenous and Latina and Latino and Asian American movements (land-grant, Red Power, Puerto Rican Independence, Voting Rights, Brown Berets, Farmworkers, The Return of Aztlán, Filipino Farm Worker Justice, Internment, Reparations). Even the wariest, at pivotal junctures, stood shoulder-to-shoulder in the face of nastily racist powers-that-be.

The Black students all carried themselves in ways that did justice to Black Pride, all actively backed the modern Civil Rights Movement, and all appeared to grasp at some level the call for Black Nationalism, even if only some regarded themselves (as did only some women, Latinas and Latinos, Asians, Indians) as out-and-out separatists. Regrettably, in 1970, you could find more Ella Baker and Stokely Carmichael (later Kwame Ture) in nighttime adult school classes than in law schools. But some Black students, along with others, made such names and ideas part of everyday conversation.

Importantly, low-income Whites, never a large number in any law school during those same years, often expressed their more explicit political outrage by delivering their sweat labor in support of the War

on Poverty, Students for a Democratic Society, community and labor organizing, and the Peace Movement. Others balked at such open commitments, not to mention at socialist and Marxist politics, just as certainly did some women and people of color. Within these ranks, deep disagreements proved as understandable as ever-present.

Meanwhile, middle-class and wealthy Whites sorted their way through the fractious relationships by searching for and usually finding some ground to stand on. Some staked out territory brand new to them and absolutely alienating to their families; others held fast to the traditions, the party affiliations, and the ideologies handed down within their kinship networks. Still others grounded themselves in a network of people far more expansive than they had known before, inviting and embracing all that comes with loving others—and being loved by those others—even when backgrounds and perspectives diverge, often dramatically. Friendships and extended families can sometimes transform a lifetime.

However much clinic staff, students, and faculty of these years may have chosen different paths and varied views, we shared at least one thing in common with other law students and with people across the United States. Everyone at least appeared to feel an intense pressure to make choices and to make their choices known. The dynamics of these times forced most to make explicit what they otherwise may have left tacit, what they otherwise may even have hidden, not just from others but from themselves. Even a limited roll call offers a glimpse of the questions posed.

Where do I stand and where do you stand when it comes to women's equality? racial-in-your-faceness? capitalism? the free market? colonial histories outside and within the United States? homosexuality? heterosexual sex as inevitably rape? free love? black- and brown-lung disease? unions? school busing? corporations? corporate law firms? the deserving and undeserving poor? pathology as a label to identify how Latino and Black families differ from all other families? marijuana, LSD, cocaine? ethnic studies programs? Earth Day? monogamy? nuclear families? inter-racial and inter-faith relationships and marriages? Stonewall? Attica? Mao's China? Castro's Cuba? cults as religions and religions as cults? the priesthood? Madalyn Murray O'Hair? God? No, not where do I stand and do you stand "in principle," but when push comes to shove, when you have to throw down or not?

Choices made and stands taken varied and changed over times. And neither political party affiliation nor deeper ideology necessarily led to a certain line-up of views. What could be discerned with more confidence was the very bluntness of the force people felt to declare

the ground they stood on. Some may have found those demands harrowing, others liberating, still others confusing as can be. Many may have experienced the need to make choices and to make them explicit as, at once, tormenting, thrilling, perplexing, and much, much more. When the deep background rules get surfaced, defied, and disputed, much that we typically evade or deny about who I am and who you are gets put into play.

Critical appraisals became perhaps the norm during these years, more than immediately before and more than immediately following. That's not to claim, as do so many, that the 1950s were mindless years, without deep thinkers, all-in activists, distinctive genius. Nor is it to claim, as have plenty before November 8, 2016, that the 1990s or Gen Xers, Gen Yers, Xennials, and Millennials have lacked political fever. That's untrue of everything I know about the 1950s and the generations following the Baby Boomers. We should stop our pigeonholing of those times and those generations, particularly as a way of exalting the various movements and even the insurgent fervor of the many years I regard as The Sixties.

Yet critiques, deep and extensive and in-your-face, did appear to be a central part of the years when modern clinical education first took hold. Some critiques took the form of intellectual tomes written deliberately in obtuse syntax, jargon-laden prose that bigheadedly declared, "This is too difficult even for elites to comprehend." Others took the form of lucidly and even beautifully written modern manifestos and letters, accessible precisely to declare that everyday people both indirectly authored these documents and should read what only they could convert from radical aspirations to everyday realities. Still other critical appraisals took the form of punchy lyrics, elegant jazz riffs, and image-says-it-all posters and t-shirts. Others still amounted to refusals to obey illegal commands, unjust jury instructions, and dogma that made no sense.

These critical appraisals demonstrated, at least the very good ones did, the clout expressed (for better or worse) in giving names to and defining the workings of what you might "feel" or "sense" and still cannot otherwise readily describe and understand. People writing, reading, singing, listening, and otherwise participating could begin to grasp how seemingly unavoidable hardships—more accurately, inequalities—resulted from choices that inevitably redistributed power in some ways and not others. T-shirts, posters, jazz riffs, lyrics, letters, manifestos, quietly determined disobedience, and even the occasional arrogant tome engaged at once people's emotions and thoughts. In this crucial sense, critique itself could be liberating.

Yet critical appraisals were not the end game for the students,

staffers, and teachers who inaugurated and built the early versions of clinical education. Emphatically, we overwhelmingly were not among those who initially offered formidable challenges to the status quo, but ended up very quickly overlooking or downplaying or giving up on what they imagined vaguely as a radically different way of working and living. And, by and large, we were not among those who thought maturity should “naturally” downsize our aspirations or tame our ideologies, our actions, our passions. Settling—out of the purported wisdom of age, rather than what coerced necessity requires—was not among the founding clinical convictions of the 1960s, 70s, and 80s.

Instead, the first waves of students and teachers and staffers in law schools proved to be like the many from these decades who, in quietly uncelebrated ways, aspire no less fervently in their 80s, 70s, and 60s than they did in their 20s and 30s to transform the world. We chose clinical training as one place—for some, *the* place—to begin constructing something like the counter-visions implicit in our biting critiques of lawyering, of legal education, and of all that surrounded and helped define practice and teaching.

Through clinics, we sensed we could learn and teach at least some of what legal education almost had entirely neglected or, worse still, had continued to teach only partially and dreadfully. And we could do so, at least often, by responding to and engaging the very communities most horrifically treated by life, including by too much of law and too many lawyers. Some got to work, literally, in the neighborhoods where they grew up. Others found themselves in communities ostensibly unlike their own and yet revealing from up close details reminiscent of their own low-income, of color, and immigrant pasts. And most dealt with people—up close and personally—living lives almost entirely divergent from their more privileged upbringing.

To construct these training options, clinical teachers and staff and students of these times routinely reached out for guidance. We scavenged around with ingenuity and perseverance. What we introduced and improved and refined reflects influences immense indeed—in scope and depth. It cannot be repeated too often, and I certainly repeat it every opportunity I have: we have borrowed from far outside universities, from other schools and departments within universities and colleges, from “continuing education” for diverse crafts and arts and professions and trades, from pre-school and K-12 education, from schooling offered in other nations, from coaching offered in diverse sports, and yes, absolutely, from training offered over the years by non-clinicians within legal education.

The Alternative Vision reflects important contributions of financial market wizards, human rights campaigners, staff lawyers for state

and federal agencies, management consultants, corporate transaction lawyers, children's advocates, labor organizers, managing attorneys and regional counsel for legal services organizations, executive directors of large organizations, ambitious clinicians, alienated out-groups, solo and small firm practitioners, inspired first-year lawyering (or lawyering skills or legal research and writing) faculty, corporate executives, community activists, radical theorists, savvy staffers, astute administrators, deep-thinking doctrinalists, imaginative academic support teachers, students too motivated to put up with traditional legal education, and more, and more, and more.

Resourceful and persevering and well-organized—at least at our best, at least when pressures permitted—we never hid from a brute fact: To some degree, in our lawyering and in our clinical work, we were making it up as we went along. Not only were we often improvising, we did so with far fewer resources than other parts of the law school and university received for doing far less demanding work. Playing it by ear can be both liberating and terrifying, at least for most. Yet necessity often demands unruly and unpredictable ventures.

In this sense, those students and teachers and staff aiming to create and improve and improve still more the vision at the heart of clinical education worked with whatever materials were available. We were, it's no exaggeration to say, *bricoleurs*. We were, even if most of us did not know the term, much less its intellectual origins, much less the work of Claude Lévi-Strauss. Emulating and learning from the clients we represented and the client communities we worked with, we did all we could with what we had.

Most often, what we could find and work with wasn't enough to achieve our immediate lawyering aspirations. Even in the hands of the ingenious, limited tools often constrain or at least strongly skew the ability to convert what we can imagine into reality. These failures could have proved not just disappointing but damaging to people in need. Yet often enough, at least given the long odds, we were able to create the unimaginably wonderful—in our lawyering and in our training of lawyers. We celebrated those successes because they mattered; though we did not celebrate for long, as other challenges awaited us.

From our disappointments and successes, from our mistakes and correct calls, we aimed to learn all we could. The ongoing and after-the-fact evaluations of our lawyering and our teaching and learning were no-nonsense and straight-ahead. For most of us, our unfolding assessments reflected the influence of exceedingly diverse activists at least as much as any reading of Heidegger or Habermas. Now and then, our critiques slipped into brusque and even heated exchanges

and environments. We intended to get to the heart of the matter, hoping our shared aspirations and smart work would cultivate the mutual trust we so obviously presupposed and just as obviously needed. We held one another accountable.

* * *

As accurate as all this is, there is the danger of making these years sound like a single, well-coordinated clinical movement. Yet there was no such all-encompassing, utterly orchestrated effort—at least not any that contained all the people and all the training and all the lawyering I regard as the best of clinical education. Many clinicians did organize into an estimable force. And by meeting, they enhanced communication, the sharing of knowledge, and the support many needed, particularly as contract workers, most often without any security of status, much less the respect of most non-clinical tenured faculty.

The national coordination did not, typically, include students and staffers, much less clients, community members and the many others (credentialed and uncredentialed) with whom clinical programs worked. In some ways, of course, including all these people might well have felt unmanageable to a new wave of teachers, typically on the margins of their law school hierarchy, scrambling each day to make new ventures work. Yet including students and staffers, and more than occasionally clients and others, would have broadened, deepened, and sharpened the national exchanges of how best to lawyer and how best to train first-rate lawyers. In many local efforts, students, staffers, and clients, community members and many diverse problem solvers outside and inside university boundaries were frequently included and did indeed contribute, with as much to teach as to learn.

Even within the teaching ranks, the national organization of new clinicians hardly included everyone. Many teachers did not attend clinical conferences or meetings (and many still don't). Some of the very best I knew did not even call themselves clinicians. Especially as the numbers of clinics grew between the late 1960s and the 1990s, many involved in the first waves of clinical programs did not know one another. Even when there were more than a few clinics at the same school, each clinic often worked in total isolation. Indeed, a surprising number of teachers I knew worked, most of the time, sequestering themselves and their clinics from all other faculty at their own law schools and most clinicians at other law schools. They found their colleagues in their students, in the clients, in practicing lawyers, in quite variegated and often unexpected allies outside the boundaries of clinical education.

Yet word did spread. Most clinicians did not write scholarship,

conventional or unconventional. Their best work, sometimes their brilliance, was to be discovered in how they designed their clinics, how they chose and organized the materials (in particular, readings and exercises) they assigned, how they intermingled simulated and live trainings, how they supervised their students, how they themselves lawyered. If clinicians worked together at some law schools, studying these materials and talking about choices made proved to be a training-in-residence. Most often, the more senior taught the more junior. But most senior clinicians were, in the early 1970s, themselves new to these challenges. And they were as likely to learn from everyone else (including newer clinicians) as they were to teach. At our best, at our most confident, everyone openly celebrated this truth.

Even when considerable distance separated clinics and their communities, generosity ruled. Almost all were happy to share what they had created. Going way back to the late 1960s, I know of letters being sent from one stranger to another, asking for guidance about this or that or everything. And the response to the letter asking for help was often a lengthy letter, with deep and detailed responses, a guide thorough and detailed about particular clinics and clinical education. And sometimes the lengthy letter provided intellectual and pedagogical explanation for the piles of mimeographed materials sent in large banker boxes, treasures of the sort in 1976 I personally received from Tony Amsterdam, Gary Bellow, Frank Sander, and Charles Knapp (two did not know me, and two had no great reason to remember me).

In my judgment, by the mid-1980s, we could already discern an Alternative Vision of training lawyers suitable to all of legal education. Of course, in the next several years, our collective capacity to strengthen and refine that vision grew. But even by 1990, I could sense from the clinics I studied, from the unpublished and published materials I read, and from many conversations, that the vision I perceived in our collective work had consolidated. Teachers, students, and staffers—and many others—had welded together the pieces. They had done so in fact and in their minds.

What I perceived as an already fused together and certainly describable Alternative Vision reflected the contributions of at least two cohorts of contributors beyond anybody's definition of the "modern founders." These clinicians, non-clinicians, students, clients, staffers, and collaborators working in the late 70s to early 90s had widened the scope and sharpened the focus of our collective efforts. They engaged in training about a much wider range of the work people and organizations and institutions and communities collaborated with lawyers to pursue. While the span proved obviously greater than what typically you could find in the 1970s, so too did the focus become far more

laser-like. Preparation for actual and simulated work, at least among the best of clinical education, grew ever more knowledgeable about the ideas, skills, and sensibilities implicated in particular sorts of problem solving and in problem solving more expansively understood.

Seeing all this work as an intelligible, credible, and convincing alternative—as a consolidated and bolstered Vision—was a vital step. Encouraging others to appreciate it—and to boldly act on that appreciation—remains our challenge today. The past decade bluntly taught us inescapable truths. Exhortations last only so long. Intoning the words “social movement” can itself become a vacuous performance. And plenty of woke folks I know seem as unwoke as they always have been. Can it be we insist on trying to change institutions without at all changing ourselves?

II. ALTERNATIVE VISION

We do not need still more Select Committees. Select Committees that will profess to ascertain, even create, a powerful model around which law schools could transform themselves, while in fact doing nothing of the sort. Indeed, if anything, we need the functional equivalent of Mission Impossible Teams, made up of those who comprehend and have implemented aspects of the Alternative Vision and who are armed with a mandate to root out the destructive and ineffective and to replace it with the best of what clinical programs already have developed and employed. The best of what clinical programs already have improved and refined over the course of the past five decades. The best of what clinical programs already have demonstrated produces graduates worthy of the sternest problem-solving challenges new lawyers confront. And we should exhort these Mission Impossible Teams to realize this vision across the entire three-year curriculum *immediately*, not “with all deliberate speed.”

Justice, of course, rightly should be understood as inescapably everywhere in legal education. Certain realities like this, you would think, would be obvious to all but the most thick-headed and sordid. Yet the Mission Impossible Teams will have to make clear that justice runs through the most belabored empirical analysis of SEC regulations and in the boilerplate terms of gazillions of contracts, every bit as much as in the torture at Guantanamo and Rikers, the hunger within the United States and across the globe, and the violent assaults on girls and women everywhere. You can no more partition justice from problem solving, than you can ideology from law.

This truth has long been watered down and even denied—most importantly, by the nominally “pluralist rules” (status-quo maintain-

ing “objectivists”) demanding the presence of nearly all views.¹ Inevitably and importantly, legal education will reflect quite varied ideas about what justice entails and how we might achieve it. Those disagreements—vividly explicit—ought reflect and influence the conflicts present within and far beyond the United States. Yet insisting justice does not and should not matter is incoherent and ignorant: It’s a lie.² But lies can intimidate students and faculty and staff and others. When feeling pressured to pretend justice is not in every way implicated in all problem solving, faculty and students sign a barely disguised loyalty oath to a viciously dangerous “anti-ideology,” in particular an “anti-social justice” ideology.³

Of course instantiations of an explicitly social-justice-imbued Alternative Vision could and would diverge in particulars, all plenty dedicated to realizing a common idea, yet providing valuable variations on how we might put great training into action, all available to be adopted by others, with open and enthusiastic recognition. As much as anything, I offer this synopsis both to honor the many students and staffers and teachers and clients and administrators and lawyers and faculties (and so many others) who have collectively brought this vision to life, and to evoke an appreciation of what we would find if only we would search absolutely everywhere. Yes, everywhere, including within our own institutions, outside our familiar networks, in places never much publicized, much less romanticized.

To a highly compressed sketch we thus turn.

A. *Animating Insights Driving The Alternative Vision*

How can we understand what lawyers variously do? How can we

¹ See Duncan Kennedy, *The Social Justice Element in Legal Education in the United States*, 1 UNBOUND 93, 103 (2005).

² That’s one’s credible interpretation of Robin West’s recent work, though in her characteristically thoughtful book there’s not much appreciation for the current contributions of clinics to justice openly discussed and debated in legal education. See ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2014).

³ Prominent and much respected clinicians have aired profound concerns about the structure, focus, and personnel *within clinical education*, including among far too many clinicians a perceived shift away from both realities of practice and the inevitably entwined relationship of justice and competence. See, e.g., Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992); Gary Bellow, *Steady Work: A Practitioner’s Reflection on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 1001 (2004-05); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009); April Land, *“Lawyering Beyond” Without Leaving Individual Clients Behind*, 18 CLIN. L. REV. 47 (2011); Sameer M. Ashar, *Fieldwork and the Political*, in SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 288 (2014).

understand the systems and institutions where they work? How can we train them best during their three years of law school? How can we equip them to continue to train over the course of their careers? What changes will this require of us? Of current students, teachers, and the many others directly and indirectly involved? What changes will this require of law schools? In building great training teams? What ripple effects can we begin to imagine?

To answer such questions, the best of clinical programs have employed varied strategies. For all the diversity, we could see, even very early on, shared steps. What we all routinely did was to begin by wildly expanding the shrunken and flattened depictions of the world legal education historically regarded as optimal. Even among early prominent clinicians, and among many clinicians in 2018, this mainstream portrait remains deeply persuasive, tacitly presupposed and projected time and again.

In Ascanio Piomelli's masterful unpacking of "client-centered" interviewing and counseling, he offers this telling sketch:

First published at a time of political tumult, outside and within legal education, David Binder and his colleagues' depictions of client-centeredness harken back to a time when lawyers' work and training could be understood as professional through-and-through, neutral, and anti-ideological, tacitly insisting that the social, economic, political, and legal realms do not overlap, intersect, or inevitably define one another. And yet their ideas simultaneously challenge lawyers to explore emotional and relational dimensions of clients' lives that the profession had long ignored. Client-centeredness continues to make many feel good about the world, their training, and practice, even if—and perhaps because—it overlooks the deeply fractured and divergent settings in which subordinated clients and their lawyers work and live. . . .

Arising in part from the neutral, universally applicable, professional "skills" focus from which it arose, client-centeredness typically presents itself as apolitical. It does not proffer any explicit vision of our society, political economy, or even the legal system. Implicitly, though, it seems to presume that our legal system typically provides meaningful and effective remedies, so long as lawyers and clients attend to legal interventions' possible adverse "non-legal" consequences—most typically on clients' relationships with others. Binder and his colleagues cast the legal realm as the lawyer's primary domain of action and the "non-legal" as the client's realm, with little discussion of the interplay between them.

In these respects, client-centeredness does not break with law school and the profession's image of lawyer as champion or traditional hero. The client-centered lawyer is still the primary actor, the protagonist who enters the fray, skillfully faces adversaries, and de-

livers results at the client's behest. Client-centeredness seeks to ensure that the lawyer is no longer Don Quixote, charging off on behalf of others who have not asked him to act on their behalf or signed off on his plan. But it still presumes that the now well-informed and well-instructed lawyer acts on behalf of her client in the legal realm as a solitary expert, guide, and champion.⁴

In stark contrast, in the efforts to build and strengthen the Alternative Vision, the reality we offered one another looked like Dostoevsky's and Sackville-West's novels, Baldwin's essays, Lispector's stories, Van Gogh's letters, Lorde's and Bishop's poems, Rosaldo's cultural anthropology, Anzaldúa's and White's theory, Abel's sociology, Pitkin's politicized constitutions, Simon's economics and public administration, Austin's and Reagon's coalitional ethnographies, Bruner's psychology and education, Monk's and Nyro's musical compositions.

With this far more accurate account of reality (big structures and fine details and contradictions everywhere, absolutely discomfiting and buoyantly aspiring), we wanted to comprehend as best we could all that lawyers did across roles and institutions and systems. That aspiration bears repeating: We wanted to comprehend all that lawyers did, in all settings and even when the work did not have a handy label. We wanted to do so to know and to understand the phenomena. Only by aiming to better know and understand all that was happening could we begin with greater confidence to appreciate what we ourselves were learning and teaching, what we ourselves were doing when we lawyered. Our knowledge and understanding could be tested, in turn, by our capacity to discern patterns and to depict what we discerned.

Straight-ahead and reliable depictions achieve both aesthetic and instrumental ends. To the degree we students, staffers, teachers, clients, and others could compose elegant depictions of complex phenomena, we ourselves appreciated the beauty of the work we tried to understand and the work we ourselves were doing. To the extent the elegant descriptions equipped us to predict (in real life lawyering, say) and to design (the training of lawyers, say, in law schools almost entirely focused on law), we enhanced our capacity to lawyer well and to teach and learn the first-rate practice of law.

We routinely reported to one another—and sometimes wrote, in unpublished and published form—portrayals we hoped economically captured the patterns we perceived. Predictably enough, our portrayals were often partial, diverging from one another, leaving far more work to be done. Yet in time, more and more basics seemed to be shared, even when produced by people who did not know one an-

⁴ Ascanio Piomelli, *Rebellious Heroes*, 23 CLIN. L. REV. 283, 296, 298-99 (2016).

other, much less routinely work together. It was absolutely a collective effort, but not in the sense of coordinated activity, directed from on-high or by all of us in a formally cooperative fashion.

In any event, I perceived the outlines of both how to understand lawyering and how to train lawyers by the late 1970s. My perception certainly reflected the work of the first decade of modern clinical legal education. But non-clinicians of the same era made important contributions. As did lawyers and legal academics from earlier generations still. Every bit as importantly, I vividly remember how much I, and how much at least some others, learned from an important cluster of interdisciplinary scholars (decades ahead of us in their work on some overlapping themes) and, most prominently, from our clients and their communities.

B. Lawyers As Problem Solvers Among Other Problem Solvers

A coherent way—for me, the only mightily coherent way—to understand what lawyers do, across roles and situations and realms, is to understand they're always engaged in problem solving. No, that absolutely does not mean “problem solving” is one of a long and growing list of “things lawyers do,” as increasing numbers appear inclined now more than ever before to insist.⁵ Those who create these lists confuse the particular names we give to various activities with what lawyers do, no matter the particular task and situation and institution. Whether you prefer to call this comprehensive claim a theoretical or a sociological observation makes no difference. Lawyers always work with others in framing and addressing problems. They're problem solvers.

That does *not* mean, in the least, that the problem solving lawyers pursue is ineffable or unique. To the contrary, the best of clinical programs can and have described what lawyers do when they lawyer. Precisely because these descriptions have been straightforward, they can existentially upset—discombobulate—many within and outside the profession. Demystification can produce such effects. Most, including those who yearn for and indeed help produce methods to rid ourselves of what may be puzzling and even bewildering, can feel newly disoriented by exactly what they discover to be true.

Rather than proving a discontinuous way of dealing with life's endlessly varied circumstances, professional lawyering proves to be a stylized variation of human problem solving—just like the practices of

⁵ For prominent examples of this tendency, see the focus in the reformed curricula at law schools like Harvard, Northwestern, Stanford, UC Irvine, Washington and Lee. Gerald P. López, *Transform—Don't Just Tinker With—Legal Education*, 23 CLIN. L. REV. 471, app. 1 (2017).

every other profession and craft and trade and discipline. Likewise, rather than proving a unique way of reasoning, legal analysis (“thinking like a lawyer”) proves to be a stylized variation on everyday analysis we all engage in as part of everyday living—just like the analysis of every other profession and craft and discipline. Unlike others, the best of clinical legal education did not begin by studying the professions (“major” and “minor” as some wrongheadedly would have it⁶)—either because they have been deemed singular or perceived to be in crisis. Instead, as our point of departure, we have examined the everyday practice of human problem solving.

To understand how we solve problems, the best of clinical legal education has looked to our daily living—to concrete, mundane moments of problem solving. Capturing in explicit and written form what we, at once, feel and think and what we are and what we do in these moments *is* our conception of the practice of human problem solving. (That is our method, and that is our theory.) What do the thoroughly competent everyday folks among us know when we competently frame and address problems? What do the virtuosos in our midst know when they work like virtuosos? What have the efforts of the best of clinical legal education revealed when trying to convert often tacit know-how into explicit descriptions of problem solving practices?

C. Lawyering As Stylized Variation On Human Problem Solving

Oakland.

Standing in my kitchen, I feel the temperature of the room, a draft from the window, the floor under my feet, the clothes on my body, an itch, a bruise, chronic pain. I see light and space and colors and shapes and objects. I smell cooking food, dish detergent, floor cleaner, or perhaps the absence of any of these. I taste the snack I’m munching on (how salty? Bitter? Sweet? Spicy?) or the taste of my own saliva. I hear children playing outside, the dishwasher running, the cars rushing by on Market Street.

If I had to pay attention to all these at once, I would be utterly paralyzed. Fortunately, not all of them are important at any one moment, and I can safely ignore almost everything that’s happening around me. At least, so I tell myself.

Stimuli often indecipherable and always indeterminate wildly exceed our capacity to make meaning. Even a good night’s sleep and a soothing cup of coffee do not rid me of this brute truth. So, how can

⁶ For a nonsense hierarchy of the professions, see Nathan Glazer, *The Schools of the Minor Professions*, 12 *MINERVA* 346 (1974). Glazer’s views, in important respects, trace their origins to Veblen’s unfortunately influential work. See THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA* (1918).

we project onto these data, and in turn experience as actual, an understanding reliable enough to act as a depiction of what is happening? We cannot make sense of our realities, and yet we must. And yet we do. Even circumstances devoid of human interaction, down to the most banal, embody more information than we can possibly process at once.

Only where my perceptions deviate from my expectations, or when I'm focusing on a particular thing for a particular purpose, does any one of these perceptions lay claim to my attention: The smell of gas means danger; if I turn on the dishwasher, the absence of the familiar noise means it's broken, which will require me to act; I hear footsteps on the stairs and pay attention long enough to note the heaviness of the footfalls—the person making them is not my wife.

By virtue of my experiences, I have developed stock structures to sort through the incredible volume of information that floods me during every waking moment. I know what gas smells like, how a running dishwasher sounds, the cadence of my wife's footfalls. Where a stimulus deviates from anything I've experienced (or paid attention to) prior, I use likeness judgments to interpret—to make meaning by comparison. Were I to listen for a friend's footfalls, I'd have more trouble discerning them than picking out my wife's. But I wouldn't likely be fooled by the sound of a closing door.

Make no mistake—I am always, always making meaning. Even where my senses are overwhelmed or where what I'm experiencing is too unfamiliar to sort, I make meaning. I think or say, "This is a mess!" I think or say, "This is overwhelming!" But even to label something an "overwhelming mess" is to label it, to assign it a category and put it in the corresponding box.

Where social interaction is involved, social conventions contribute some of the stock structures I use to make meaning. If I want to ride a bus, I'll pay my fare with money rather than overpowering the driver or offering to barter with my labor. The social conventions that inform my choices reflect society's values: At least in this setting, we value decorum and order, and accept our brand of capitalism. And here too I make likeness judgments; even if I've never before taken a bus in this city, I know that this transaction will likely resemble other bus rides I've taken, where decorum and capitalism ruled, where I stood at a bus stop designated by a sign and the driver stopped the bus and admitted me, where communication with the driver was verbal rather than via gesture or dance.

Of course, particular situations trigger particular stock structures, and some of these situations may be so dissimilar to those I've previously encountered as to test the limits of my ability to make likeness

judgments. If I've never before ridden a public bus, I may need guidance from someone in the know, who can give me the lay of the land, making explicit for me what he as an insider thoroughly understands, and can do so in terms that make sense to me. A public transit guru can tell me which bus to take, where to get on and off, that I should look up from my phone or newspaper as the bus approaches (to avoid being passed up), the amount of the fare, and to bring exact change. Armed with this information, I will be like a person who consults with an attorney or visits a legal self-help center—more likely to be able to obtain for myself the outcome I desire.

But what about situations in which having been taught about the operation of the system isn't enough? Learning the how-tos of bus-riding by tutelage rather than by repeated experience means I lack the facility that would assist me in handling conflicts or obtaining deviations from the convention. I will need to hold the how-tos in my mental hands, carrying rather than having absorbed them, and this will reduce my ability to deal with variations for which my tutelage has not prepared me. The transit guru has not explicitly considered and planned for every bus-riding wrinkle that might come his way, but his internalization of the stock structures that surround and comprise the bus-riding experience put him on much better footing than I, a layperson, to deal with the unexpected. I have a traveler's dictionary, but he speaks the language.

In such situations, it would be to my advantage to prevail upon him to represent me. If we take the bus together, and I've forgotten my fare (while the guru has his own fare but no more), Guru will know far better than I how to persuade the driver to let me ride for free. Using the stock structures he's amassed by virtue of exposure to bus riding, he'll know the tone to strike in speaking to the driver (colloquial but respectful) and how long his communication should be (just long enough to make the driver impatient). He'll know what outsiders and sometime passengers don't: That drivers often view fareboxes as gatekeepers and the payment of a fare as a sign of respect. That in drivers' experiences, a person who pays her fare is less likely to make trouble than one who doesn't. (As one driver told him, "I want them to put some money on the line.") That the driver won't be penalized for letting me ride free, but that nevertheless the decision may be against us for reasons beyond our control, like the driver's mood because of an earlier altercation or traffic jam.

And Guru will tell a story, and not just because those asking for free rides always tell stories— about how they lost their sticker, their transfer, their wallet, about how their check hasn't come and they just spent their last dollar, about a sick mother down the road in need of

her medicine. Guru will tell a story because stories are as important to persuasion as are arguments and as are the categories they create and reflect. In its conceit about the existence of objective truths, the culture at large has cast stories and arguments as separate, but in fact they are intertwined and inseparable. Just as judges do far more than call balls and strikes, there is no such thing as an objective story. And just as the flood of stimuli in which we swim at every moment must be pared down in order to be digestible and navigable, the telling of an intelligible story requires the selection and omission of events, perspectives, details, such that the result is inevitably shaded in some direction and to some degree.

Guru will attempt to tell a story that both makes sense to the driver and that results in a free ride. In doing so, he will draw on his knowledge of the forum, the driver's likely predilections, and the stories he has heard from other passengers asking for free rides, emulating those that have been successful.

But there are limitations on the sort of story Guru may employ. He himself may have compunctions about telling an outright lie, whether because he subscribes to the cultural convention that eschews dishonesty or because he fears for his own reputation in a space where he's a repeat player. But, more to the point, to lie while representing me would be to tread too heavily on my autonomy. I am already giving up an essential piece of myself (control) in allowing myself to be represented; for my re-presented self to be a person quite unlike me, without my explicit consent, would be too much of an imposition, too high a price for me to pay.

As it happens, the driver is not persuaded—and, conveniently enough, there is a supervisor on board. Guru sees her sitting near the front of the bus and calls upon her to intercede. The supervisor is not neutral and objective either, as we might desire such a decision-maker to be, but here she is near enough as to appear dispassionate, which is how we perhaps most often perform neutral objectivity. As a member of management, her role is to both support and check workers like the driver, and as a higher-up in a public agency, she simultaneously supports and checks members of the public like Guru and me. However impossibly contradictory the charges, her role is one of authority, and both the driver and the public are predisposed to listen to her. The three of us will abide by the decision she makes.

One of the reasons supervisors are respected is that their decisions tend to be “rational”—in line with social conventions (stock structures) and seeming to follow (or at least framed as following) from the circumstances presented to them. Her decisions “cohere.” Were supervisors to regularly throw passengers off buses willy-nilly or

publicly chastise bus drivers for no reason, their authority would decline, and one or the other party would cease to respect their decisions. Because of this, supervisors internalize the pressures to be predictable—to make the same decisions when presented with the same sets of circumstances.

This need for predictability means that the stock structures on which supervisors rely for their decisions are reiterated, reinforced, and perpetuated each time such a decision is made. Every time a supervisor kicks a drunk off the bus, the notion that it's not okay to be drunk on the bus is reinforced for everyone present—and because it's not okay to be drunk on the bus, the supervisor's action is validated. The stock structures that inform conflict resolution and the person or system that has the power to enforce them constitute and reinforce one another.

Had Guru seen the supervisor earlier and anticipated her intervention, he might have framed his story differently—as one that would be convincing to the supervisor rather than to the bus driver. In these circumstances, he's now stuck with the story as he framed it for the driver, and the success of our endeavor depends in large part on how well that story fits in with the stock structures that are in the supervisor's interests to uphold.

* * *

The problem solving in which lawyers engage is not special—it is “merely” human problem solving pursued in a particular arena. To privilege the problem solving lawyers do above that engaged in by lay lawyers is both to fail to make the appropriate likeness judgment and to denigrate the abilities of everybody else. Lawyers did not find their problem solving under The Bramble Bush—it was cut in whole cloth from the fabric of everyday life.

D. Legal Analysis As Stylized Variation On Everyday Analysis

A way—and for me, the only deep way—to begin to recognize, understand, and produce quality legal analysis is from this point of departure: Just as the problem solving lawyers pursue is a stylized variation on human problem solving, legal analysis is a stylized variation of all analysis.⁷ Analysis embodies one expression of problem solving,

⁷ This heterodox (some think blasphemous) way of thinking about legal analysis arises through experience, through study and teaching and lawyering, through some sustained combination. See, e.g., Gerald P. López, *Rebellious Theory of Legal Analysis* (2016) (unpublished manuscript on file with author) [hereafter López, *Rebellious Theory*]; Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009) [hereafter López, *Changing Systems*]; DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* (2008); JOHN DELANEY, *HOW TO DO YOUR BEST ON LAW SCHOOL EXAMS* (4th ed.

of all problem solving, not just what lawyers do. We're always making meaning—just to take the next step. And inevitably we employ our standard stocks of meaning-making instruments. We invariably use stock categories, stories, and arguments. And what stocks we use and how we use them depend upon the role we're in, the culture and setting in which we find ourselves, and what effective meaning-making means.

Learning to analyze well, in writing, requires learning how to formulate questions (Yes, formulate questions = frame issues) and how to resolve them (Yes, resolve includes tentatively predicting likely resolution of questions (“predictive”) or assessing how others within the mainstream of some culture are likely to interpret (“objective”)). Learning to analyze well means we must learn how to formulate and resolve questions in ways central to the community in which we're claiming membership. Molecular biologists, plumbers, screenwriters, child care providers formulate and resolve questions in some ways and not others. So do lawyers. If we want *to speak to and as* a molecular biologist, plumber, screenwriter, childcare provider, or lawyer, we must make meaning as they do. We must formulate and resolve questions as they do. Otherwise members of those communities will not regard us as one of them.

We should acknowledge that lawyers have for some time come to treat their way of doing “analysis” as especially worthy. Yet we should not regard that cultural construct as anything but, well, a cultural construct. Perhaps this fact reflects the complicated place of unelected judicial officers in a democratic regime; perhaps Langdell's scientific aspirations; perhaps the way the guild projects special worth. In any event, there's absolutely no reason lawyers ought think “legal analysis” more worthy of veneration or even esteem than the analysis produced by molecular biologists, plumbers, screenwriters, and child care providers. Or anyone else, for that matter, including especially “everyday folks” sorting through life's questions. Each proves worthy of study, of grasping, of learning to produce as our desire and needs—as our jobs—require.

2006); JOHN DELANEY, *LEARNING LEGAL REASONING: BRIEFING, ANALYSIS, AND THEORY* vi-xviii (3d ed. 2006); ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); RICHARD POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016); ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996). Of the robust versions of the orthodox approach, offered particularly by insightful realists, sometimes suggesting far more than authors ever championed or even made explicit, see, e.g., KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960)(1930); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395 (1950); Jerome Frank, *Both Ends Against the Middle*, 100 *U. PA. L. REV.* 20 (1951); EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1963)(1948).

Interpretation always entails—and provides the means to—understanding phenomena. Without understanding, we cannot know. And without knowing, we cannot consciously pursue persuasion with the subtlety and force we aim to achieve. Much as we understandably speak of persuading others, we most often use our stock meaning-making structures to persuade ourselves of one or another meaning. That’s how we come to say to ourselves we understand—or at least act as though we do. That’s true of all of us, including lawyers of every sort. (No, no matter how much Neil Gorsuch or John Roberts or anyone else insists, judges cannot exempt themselves from our shared ways of making meaning.)

E. Rebellious vs. Regnant Vision of Problem Solving

Just in living every day, experiencing how we variously work with one another, (through law and every realm, through relationships of every sort), we can and sometimes do become aware of two competing visions of problem solving practice: the reigning champion (“regnant”) and the insubordinate challenger (“rebellious”).⁸ We can

⁸ My outline sketch of the reigning and rebellious visions—and the relationship between the two—can be further studied in what now has become a substantial literature, across disciplines, if sometimes using different labels. For especially illuminating scholarship produced by clinicians and practitioners as part of this Symposium, see Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLIN. L. REV. 5 (2016); Stephen Carpenter, *Family Farm Advocacy and Rebellious Lawyering*, 24 CLIN. L. REV. 79 (2017); Eduardo R.C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 23 CLIN. L. REV. 37 (2016); Patience Crowder, *What’s Art Got to Do with It: A Rebellious Lawyer Mindset in Transactional Practice*, 23 CLIN. L. REV. 53 (2016); Tara Ford, *Pegasus Legal Services for Children Taking Stock of a Rebellious Non-Profit Practice in New Mexico*, 23 CLIN. L. REV. 107 (2016); Martha L. Gómez, *The Culture of Non-Profit Impact Litigation*, 23 CLIN. L. REV. 635 (2017); Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children*, 23 CLIN. L. REV. 167 (2016); Brenda Montes, *A For-Profit Rebellious Immigration Practice in East Los Angeles*, 23 CLIN. L. REV. 707 (2017); Daria Fisher Page, *Etta & Dan: Seeing the Prelude to a Transformative Journey*, 23 CLIN. L. REV. 251 (2016); Shauna Marshall, *Rebellious Deaning*, 24 CLIN. L. REV. 135 (2017).

For only some of the exemplary scholarship about lawyering developed over the past decades, see, e.g., Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008); Alina Ball, *An Imperative Redefinition of “Community”: Incorporating Reentry Lawyers to Increase the Efficacy of Community Economic Development Initiatives*, 55 UCLA L. REV. 1883 (2008); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999); Bellow, *supra* note 3; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENV’T L.J. 687 (1995); Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1 (2007); Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246 (2002); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual*

identify these rivals in professional lawyering and in every other prob-

Orientation, Physical Disability, and Age in Lawyering Courses, 45 STAN. L. REV. 1807 (1993) [hereafter Hing, *Raising Personal Identification Issues*]; Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLIN. L. REV. 195 (2002); Minna J. Kotkin, *Creating True Believers: Putting Macro Theory Into Practice*, 5 CLIN. L. REV. 95 (1998); Dale Minami, *Asian Law Caucus: Experiment in an Alternative*, 3 AMERASIA J. 28 (1975); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLIN. L. REV. 147 (2000) [hereafter Marshall, *Mission Impossible*]; Charles J. Ogletree, *The Quiet Storm: The Rebellious Influence of Cesar Chavez*, 1 HARV. LATINO L. REV. 1 (1994) [hereafter Ogletree, *Quiet Storm*]; Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000) [hereafter Piomelli, *Appreciating*]; Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395 [hereafter Piomelli, *Foucault's Approach*]; Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLIN. L. REV. 541 (2006) [hereafter Piomelli, *Democratic Roots*]; Piomelli, *supra* note 4; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994); Dean Hill Rivkin, *Lawyering, Power, and Reform: The Legal Campaign to Abolish the Broad Form Mineral Deed*, 66 TENN. L. REV. 467 (1999); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043 (2004); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993) [hereafter Shalleck, *Constructions of the Client*]; Ann Shalleck, *Comparative Family Law: What is the Global Family? Family Law in Decolonization, Modernization and Globalization*, 19 AM. U. J. GENDER SOC. POLICY & L. 449 (2011); Ann Shalleck, *The Feminist Academic's Challenge to Legal Education: Creating Sites for Change*, 20 J.L. & POLICY 101 (2012); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996); Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157 (1994); Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Lucie White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271 (1990-91); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 [hereafter White, *To Learn and Teach*]; Zuni Cruz, *supra* note 3. For a powerful articulation of a rebellious vision of public defender and indigent criminal defense practice, see CMTY. JUSTICE INST., BRENNAN CTR. FOR JUSTICE, *TAKING PUBLIC DEFENSE TO THE STREETS* (2001), http://www.brennancenter.org/page/-/d/download_file_34975.pdf; see also Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996); Kim Taylor-Thompson, *The Politics of Common Ground*, 111 HARV. L. REV. 1306 (1998) (reviewing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)); Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (1995).

For some of my own work elaborating from many angles the rebellious vision, and along the way, demonstrating how it challenges the regnant vision, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) [hereafter LÓPEZ, *REBELLIOUS LAWYERING*]; Gerald P. López, *Economic Development in the "Murder Capital of the Nation,"* 60 TENN. L. REV. 685 (1993); Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004) [hereafter López, *Shaping Community Problem Solving*]; Gerald P. López, *A Rebellious Philosophy Born in East L.A., in A COMPANION TO LATINA/O STUDIES* 240 (Juan Flores & Renato Rosaldo eds., 2007); Gerald P. López, *The Health of Undocumented Mexicans in New York City*, 32 CHICANO/A-LATINO/A L. REV. (2013) [hereafter López, *Health of Undocumented Mexicans*].

lem solving practice, including how we govern ourselves through democracies. And making these contrasting visions explicit proves crucial to the practice of problem solving and to the training of lawyers who pursue such work across roles, situations, and institutions.

That's not at all to say that making such a contrast as apparent as possible and as precise as defensible will automatically (or even likely) incline any group to candidly come to grips with how they do their work and what they would have to do to change it, even if they wanted to. Yet the contrast between regnant and rebellious, evocatively drawn, permits everyone to exercise the capacity to choose how they work and live with one another rather than simply acquiesce in whatever might otherwise appear natural or inevitable. Enhancing that ability has mattered in the past (for women, Queers, communities of color) and could matter in, and to, the future.

In the prevailing ("regnant") vision, experts rule and collaborate principally and often exclusively with one another. Believing or at least behaving as if they can see superbly and widely in all directions, these experts variously offer opinions and issue mandates and formulate policies and distribute protocols and determine strategies. On the receiving end, workers and citizens and clients and patients typically comply, even if in principle they are free to choose otherwise. Our systems and our practices rationalize this division of labor as the product of merit and a demonstration of good sense. Some are simply better suited and better trained to serve as experts, and everyone ought value the wisdom in this particular social order.

Members from any group can cross the line in either direction, of course. Yet most of the time, across millennia, we can anticipate in advance who more likely than not will serve as expert and who more likely than not will be in need of such expertise. From the perspective of its supporters, it is a virtue and not a vice that, in problem-solving relationships and in democracies, the reigning vision does not ask people to do more than they can. And it is an advantage that the reigning vision indicates—to all and in advance—who should rule, who they should collaborate with, and who they should counsel and guide. This sort of hierarchy proves both an accurate reflection of human nature and a programmatic approach to a life well led. Citizens choose regnant democracies, and clients choose regnant lawyers.

The rebellious vision, by contrast, aims to produce, and depends upon, networks of co-eminent practitioners, collaborating with each other, in efforts to frame and address problems from varied perspectives, aiming to produce in the future a radically egalitarian and democratic future, aspiring already to embody such a reality in their current efforts. Especially because no caste and no individual is presumed to

see panoramically or to transcend bounded rationality, these collaborators learn from each other. No, not top-down or bottom-up, but every which way and over and over. Everyone appreciates the need to monitor and evaluate collective and individual efforts precisely to learn how to improve the problem solving itself.

Of course in building and enhancing practice fundamentals, abstracted theories and details of past efforts count equally, as do technical sophistication and street savvy. And of course “warts and all” depictions of performance and generous shout-outs to all contributors must (and already often enough have) become deeply appreciated rather than perceived as too candid for the thin-skinned and too generous for the self-promoting. The collective effort to secure cooperation in the midst of unavoidable complexity, difference, and vulnerability, inevitably through and enmeshed in power strategies, seizes as its launching point and proclaims as its aspiration engaging equals in understanding and enhancing life.⁹

In response to the challenge of the rebellious vision, some advocates of the regnant vision candidly and comprehensively describe why they regard their approach, their theory, as normatively superior and as practicably more doable. From Schumpeter to Posner, these theorists proudly defend their aspirations and methods.¹⁰ From all available evidence, they feel no unease, no defensiveness, no pangs of conscience. Nor should they. Openly, strappingly, and fair-mindedly advocating for what they believe to be true and best is thoroughly commendable. They dig down deep to basic assumptions and aspirations and methods and declare openly the world they regard as worthy of their energetic defense.

Were such a straightforward response only true among lawyers and law professors who believe in, but do not nearly so robustly defend, the regnant vision of lawyering. Instead, most do not respond at all, at least not in writing. Fair enough, many and perhaps the great

⁹ In this sense, as in all others, the rebellious vision of problem solving and radical democratic theory inform one another, a powerful theme about which I have learned much from Ascanio Piomelli. For a deservedly influential account of how radical democratic theory parallels, shares, and reflects rebellious visions of problem solving, see Piomelli, *Democratic Roots*, *supra* note 8. For other perceptive analyses of lawyering and democratic theory, see, e.g., Lucie E. White, *Creating Models for Progressive Lawyering in the 21st Century*, 9 J.L. & POL'Y 297, 303 (2001) (comments of Lucie E. White); Lucie White, “Democracy” in *Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997). For parallel literatures reflecting related aims and methods tied to pragmatic visions of radical democratic life, see, e.g., ROBERTO MANGABEIRA UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* (2007); Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, 9 CONTEMPORARY PRAGMATISM 35 (2012).

¹⁰ See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942), and for a modern defense of Schumpeter by an influential scholar and jurist, see RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

majority of those who believe in the regnant vision feel no threat. Of those who may, some mock the Pollyannaish and dystopian strains they insist the Rebellious Vision embodies.¹¹ A small number even attack the rebellious approach, substituting unsupported assertions and falsifiable claims for the full-bodied elaborations we should all hope to encounter.¹² And others, still, practice regnantly in the name of “client-centered” work.¹³

Perhaps ignoring, making fun of, and attacking through fabrication and distortion will indeed bury the rebellious vision. After all, these strategies parallel what any number of public officials do in seeking and securing electoral victories. Yet even if the rebellious vision again recedes from view, history tells us it shall not vanish. By whatever name, the insubordinate challenger to the reigning vision of problem solving practice will lie dormant, available in future cycles to be surfaced, pushed for, mobilized around through one or more social movements.

Life teaches, though, that there is no correlation between formal ideology and the sort of problem solving practice pursued. Initially that would seem inaccurate. After all, the work of Ascanio Piomelli has convincingly demonstrated the deep relationship between visions of lawyering and visions of democracy.¹⁴ The assumptions, methods, and aspirations of rebellious lawyering and radical democratic theory parallel and shape one another—as do the assumptions, methods, and aspirations of regnant lawyering and experts-rule democratic theory. Yet experience illuminates that formal ideology tells us little reliable about how we all choose to collaborate with others across a range of problem-solving roles and institutions.

¹¹ See, e.g., Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213 (1993). Seasoned rebellious practitioners face similarly inaccurate and dismissive portrayals of their vision of lawyering. See, e.g., Ford, *supra* note 8; Carpenter, *supra* note 8.

¹² In *Appreciating Collaborative Lawyering*, Ascanio Piomelli eviscerates various attacks on the rebellious vision, principally by demonstrating the recurring use of demonstrably inaccurate and wholly fabricated characterizations. See Piomelli, *Appreciating*, *supra* note 8. Some wonder how these very attacks continue to be cited as formulating legitimate questions—especially within the lawyering and clinical literatures—without even a mention of Piomelli’s comprehensive exposure of the unreliability (yes, the “fake news” quality) of this sort of scholarship, raising questions from how well scholars read to how responsibly they cite to how much they may consciously evade the racial dimensions pervading the debate between defenders of the regnant vision and proponents of the rebellious. See Gómez, *supra* note 8.

¹³ For a meticulous exposé of the various ways client-centered practice can and should be understood, see Piomelli, *supra* note 4. Piomelli’s article deserves to join Ann Shalleck’s *Constructions of the Client Within Legal Education*, *supra* note 8, as a classic must-read for all law students and lawyers.

¹⁴ See Piomelli, *Democratic Roots*, *supra* note 8.

Let one encounter, from decades back, stand in for the thousands of stories I could tell. In a room filled with generous donors and would-be donors, a team of law students and I, at the invitation of the Office of Alumni Development, described the vision of lawyering that shaped our work in the Community Outreach, Education, and Organizing Clinic and the training some of us collectively offered interested law students. Almost immediately after hearing our description, perhaps even interrupting our depiction, several prominent alumni, including very well-known elected statewide Democratic officials, challenged our vision.

They regarded the work we did as wildly beneath and beyond what lawyers should do—and how law students should be taught. Especially because we regarded their particular lines of attack as shallow and ill-conceived, and probably because they could not have been more arrogant, we hit back hard. We let them and the rest of the packed room know the brand of regnant lawyering they practiced—and offered a poor and shallow defense of—amounted to precisely what we meant openly to reject as dead wrong. As the exchange grew more extended and biting, and after nearly an hour of debate, the Alumni Development staffers standing at the back of the room began giving me various versions of “enough, enough, enough” signals. We still had plenty more to say, but these fundraisers were good and hard-working people. So I started to wrap up.

Only a few seconds into my short closing riff, I could see to my right a hand suddenly fly into the air. Though looking front and center, and never directly near where the person was sitting, I was confident whose hand I was seeing. Perhaps I would have considered finishing, but everyone in the room was already staring with a mix of glee and awe at the man with his hand raised. They did because he was very well known. And he was very well known because he had founded one of the country’s most famous law firms, because he was the richest person (perhaps by far) in the room, and because he was renowned for being wickedly smart and fiercely independent.

Okay, I said to myself, let Charlie Munger have at us too. We’ll listen carefully to what he offers. Whatever he says will be formidable, doubtlessly requiring us to up our game, especially after dealing too much with the blather of the elected Democratic official and his allies. If the room has to get hotter still, let it be—and I’ll apologize later to my fundraising friends. I stopped my closing rap in mid-sentence, turned to my right, and said “Yes?” As the verbatim notes others took and later shared with me confirmed, here’s what Charlie Munger said:

The good professor and his wonderful students have been describing and defending a vision of law practice completely consistent

with what I have always sought to achieve in my work with clients. Many here in this room find that vision incoherent, wrong, or both incoherent and wrong. That means either I too for many years have been going about my work all wrong or that this way of practicing is a perfectly defensible way for me to pursue with my wealthy clients and an utterly indefensible way for the good professor and his students to work with low-income clients. So . . . (pausing to scan the room) . . . which is it? Do I not know how to practice? Or is the vision of practice I share with the good professor and his students only for working with the wealthy and well-educated and not for working with anyone else?

The room had fallen silent and felt motionless. I consciously waited a long time.

“On that note,” I then said, “we’ll close. Thank you.”

F. *Lawyers As Experts—Experts Differently Conceived*

Of course lawyers can be experts, valuable experts, just as soil engineers and choreographers and Regina Austin’s “bridge people”¹⁵ in the Black Community can be. And if carefully studied, we can discern definable and teachable and learnable ideas, skills, and sensibilities on display in the varied problem-solving roles we ask lawyers to fill, just as we can if we scrutinize the problem-solving practices of expert soil engineers, choreographers, and organic neighborhood peacemakers.¹⁶ Those ideas, skills, and sensibilities will inevitably reflect and influence the organizations, institutions, and systems in which lawyers and others do their work. We can and should abstract how problem solving works. We can and should do so, at various level of generalization, precisely as part of a healthy problem-solving practice, always as parsimoniously and only as parsimoniously as life’s complexities and trial-and-error can achieve, always open to revision.¹⁷

¹⁵ See Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 SO. CALIF. L. REV. 1769 (1992).

¹⁶ For only a few illustrations, a while back and more recently, of the study of the path from novice to expertise that crosses disciplinary and professional boundaries, see William G. Chase & Herbert A. Simon, *Perception in Chess*, 4 COGNITIVE PSYCHOL. 55 (1973); K. Anders Ericsson, Ralf Th. Krampe, & Clemens Tesch-Romer, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCH REV. 363 (1993).

¹⁷ For one elegant depiction of the parsimony we seek in our depictions of problem solving, across roles and institutions and cultures, see Herbert A. Simon, *Science Seeks Parsimony, Not Simplicity: Searching for Pattern in Phenomena*, in SIMPLICITY, INFERENCE, AND MODELING: KEEPING IT SOPHISTICATEDLY SIMPLE (Arnold Zellner, Hugo A. Keuzenkamp & Michael McAleer eds., 2002). Yet the insistence on “parsimony” as a way to defend, say, neo-classical economics against the thrust of behavioral economics amounts to a denial of the need to face realities. See, e.g., Cass R. Sunstein, Christine Jolls & Richard H. Thayer, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471

Yet we must remember productive problem solvers thoroughly—yes, sensually—familiarize themselves with local and global cultures. To be any good at all, they must in order to appreciate how people make things happen and get things done. And they adapt to these cultures, as they must, even to be understood. They adapt (or at least can appear to) even and sometimes especially when they aim to dispute or even defy local and global cultures. Adaptations and abstractions operate in tandem to permit us to generate a theory of problem-solving practice grounded in and having a chance to improve everyday conditions. The same adaptations and abstractions operate in tandem to permit us to generate a problem-solving practice for how we might constructively generate theories of all sorts, grounded in and having a chance to improve everyday conditions. Even for those of us (unlike Marx and MLK) who do not know how it will all turn out, the point is to change life as we know it.¹⁸

G. Mapping Reality

To define and to teach the problem solving at the heart of all lawyering, we must map the deep background rules, the operative conventions, and the customary rhetoric pervading and defining each and every realm lawyers may enter, may evade, may work across. In drawing this sheet of the world, attention naturally focuses on legal organizations, legal institutions, and legal systems. That includes, to be sure, charting and grasping the patterns of categories, stories, and arguments discernable within judicial opinions, within and cross doctrinal boundaries.¹⁹ And plotting and producing the legal analysis

(1997–98).

¹⁸ Of course I paraphrase here Marx and Engels' assertion, in their *Theses on Feuerbach*, that "[t]he philosophers have only interpreted the world, in various ways; the point is to change it." Karl Marx & Friedrich Engels, *Theses on Feuerbach*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY 243, 245 (Lewis F. Feuer ed., Anchor Books 1959) (1888). And I allude to Martin Luther King, Jr.'s conviction that "the arc of the moral universe is long, but it bends toward justice." Martin Luther King, Jr., Address to the Southern Christian Leadership Conference: Where Do We Go from Here? (Aug. 16, 1967), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention.1.html.

¹⁹ For kindred approaches to this teaching and learning of stocks of categories, stories, and arguments, see, e.g., Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in NOMOS XXVIII Justification 71 (J. Roland Pennock & John W. Chapman eds., 1986); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985); Jack Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986); Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988); ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering*

emblematic of opinion letters, internal memoranda, trial and appellate briefs.²⁰

Yet just as everything operates “in the shadow of the law,” everything legal operates in the shadow of the political, economic, social, and cultural.²¹ Each of these realms defines the others, inevitably and thoroughly. To know how to think about and train lawyers as problem solvers we must always focus upon describing explicitly, studying routinely, and tracking the changing nature of mutually defining realms (everything “non-legal” and everything “legal”), then returning to see how the explicit description perhaps should be amended. There is no other way to be ambitious, creative, rigorous, and effective—as problem solvers, as trainers of problem solvers, as problem-solvers-in-training.

If we should unite practice and theory into a theory of practice and a practice of theorizing, if we should do so necessarily through the intermingling of particular adaptations and abstracted representations, if we should do so through a *true-to-life portrayal* of the intimately and mutually defining relationship between the legal, political, economic, social, and cultural realms, then we should recognize, we must recognize, we’re inevitably working with power. The problem solving at the heart of all lawyering inevitably responds to and deploys power. In this important sense, there is no such thing as a “safe place”—only more-secure-than-not, only safe-enough-to-try-out.

Power—the capacity to make things the way we want them—pervades our lives.²² Through and in “big structures,” through and in

Theory Analyses of the First Rodney King Assault Trial, 12 CLIN. L. REV. 1 (2005); Gerald P. López, *Rebellious Theory*, *supra* note 7. In legal literature, the precursor and contributor to these kindred approaches is Llewellyn, *supra* note 7.

²⁰ In law school teaching of the legal analysis produced by lawyers, perhaps the most ignored—and most inexplicably snubbed—are opinion letters. For a classic source, which I have drawn upon extensively in teaching transaction clinics and offering legal analysis workshops, see DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING, AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS* (2008).

²¹ For the modern source of the formulation “bargaining in the shadow of the law,” see, for example, Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

²² For just some of the many accounts of power influencing this vision of problem solving and of training problem solvers, see, e.g., Piomelli, *Foucault’s Approach*, *supra* note 8; Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721 (1996); Richard L. Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998).

For just some of my own work exploring and demonstrating how power works, see

“micro-practices,” through and in everything in between and beyond. We all exercise power all the time—in friendly, in hostile, and in uncertain circumstances, through our problem solving, our love, our jealousy, our everything. Much as some exercise far more power than others, we all put power into effect. We’re all enmeshed within power strategies (yes, including those of our own creation). Power involves us, and we involve power. And our problem solving inescapably expresses that we’re “involved.”

There’s nothing inherently bad and nothing inherently good about power. Yet many appear to regard its presence as somehow escapable—or at least want to so insist. Some regard the essence of power as the antithesis of empathy—treating the two as mutually exclusive. Empathy, in this view, is presumed to be a benign communitarian building block of a just society—a society where power can be elided, discarded, disregarded. Power permits and encourages merciless, unfeeling fights, pitting one individual or group against others, aiming to monopolize clout when dealing with the complexities of everyday life. Sometimes the result is a benign paternalism, and sometimes the disregard for the plight of others.²³

Schematic distinctions between power and empathy that pretend to banish power from the good society are no more persuasive than the equally wrong-headed thinking of some within the Center-Left. This branch, for example, appears to regard the very concept of “problem solving” as necessarily claiming lawyering lies outside of

e.g., LÓPEZ, REBELLIOUS LAWYERING *supra* note 8; Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012). These publications in turn sometimes rely upon and often parallel a range of people who illuminate the nature and workings of power. See, e.g., MARY WOLLSTONECRAFT, *MARIA: OR, THE WRONGS OF WOMAN* (1798); Anna Lætitia Barbauld, *Washing Day* (1797), <https://www.poetryfoundation.org/poems/51901/washing-day> (last visited Feb. 2, 2018); KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS NAPOLEON* (1852); FRIEDRICH W. NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann & R.J. Hollingdale trans., Walter Kaufmann ed., 1967) (1901); RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (1913); SIMONE DE BEAUVOIR, *THE SECOND SEX* (H. M. Parshley ed. & trans., 1960)(1949); JAMES BALDWIN, *THE FIRST NEXT TIME* (1962); KWAME TURE (formerly known as STOKELY CARMICHAEL) & CHARLES V. HAMILTON, *BLACK POWER—THE POLITICS OF LIBERATION* (1967); EDNA O'BRIEN, *NIGHT* (1972); MICHEL FOUCAULT, *DISCIPLINE & PUNISH – THE BIRTH OF THE PRISON* (1972); E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975); JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987); JAY HALEY, *THE POWER TACTICS OF JESUS CHRIST AND OTHER ESSAYS* (1989); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); Dale Minami, *Guerilla War at UCLA: Political and Legal Dimensions of the Tenure Battle*, 16 AMERASIA J. 1 (1990); DUNCAN KENNEDY, *SEXY DRESSING ETC. – ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993); KATHA POLLITT, *PRO: RECLAIMING ABORTION RIGHTS* (2014).

²³ For an illuminating account of empathy as understood within the rebellious vision, see Montes, *supra* note 8.

power. Perhaps these critics have in mind some avowedly “apolitical” technocrats insisting professional judgment somehow operates above raw force. But these Center Left critics are as wrong as the apolitical technocrats. Technocrats can pretend all they want, and yet no one should indulge them, including those on the Center Left, by insisting “problem solving” can or should be understood as anything but an exercise of power strategies.

Meanwhile, in some eras, and perhaps across millennia, a strand of sweet-hearted dreamers would like to think we could gain power and then banish it forever.²⁴ But that’s neither true nor even in any utopian sense obviously desirable. We created our social arrangements through power, and through power we can revolutionize them. History tells us that won’t be easy, indeed will likely be incredibly hard; but nobody can tell us we cannot try, over and over again.²⁵

No less than social, cultural, economic, and political systems, the legal system legitimates and reinforces inequalities in coercive power. Government action and inaction does not “interject coercion into our world but rather (re)distributes the coercion that unavoidably inheres in any system of private property.”²⁶ Most can readily see coercion in, for example, slavery and Jim Crow. Many can openly acknowledge coercion and unequal distribution in the White Nationalism and misogyny pervading 2018, perhaps even understand them as our historical and contemporary norms (racism and sexism “livewired” into our national spirit, endemic and not exceptional, dynamically interacting with classism, homophobia, and still more).²⁷ And most, across political divides, appreciate and celebrate coercion driving criminal and immigration law.

But coercion asserts itself throughout the legal system. The very ideas of freedom of contract and free markets, expressed in brazenly absolute terms, aim to deny or at least hide that, from the outset, we have baked into the legal system a natural-looking disparity in coer-

²⁴ In ending his unpublished *Notes of an Oppositionist*, Duncan Kennedy writes “Maybe you will win power, and then abolish it.” Duncan Kennedy, *Notes of an Oppositionist in Academic Politics* (1980) (unpublished manuscript, on file with author).

²⁵ See generally Louis Menand, *Karl Marx: Yesterday and Today*, THE NEW YORKER (Oct. 10, 2016) (“We invented our social arrangements; we can alter them when they are working against us. There are no gods out there to strike us dead if we do.”).

²⁶ So declares Ian Ayres, in his typically lucidly penetrating style, describing Robert Hale’s contributions. Ian Ayres, *Discrediting the Free Market*, 66 U. CHI. L. REV. 273, 275 (1999).

²⁷ For several examples of a large literature exploring how everyday life in the U.S. actually works, sanctioned by law, see Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 96 B.U. L. REV. 1357 (2017).

cive power, permitting some of us to foist upon others “freely negotiated” relationships with predictably varied distributive consequences.²⁸ That’s true of trade agreements between the United States and Mexico, of confidentiality provisions in the entertainment industry, of mandatory mediation clauses between sellers and consumers, of standardized leases between landlords and tenants.

In the face of top-flight challenges to the very use of terms like freedom of contract and free markets, propagandists respond to such “seditious attacks” by trotting out ready-made back-up definitions, amounting to “no one ever *really* means ‘free’ in the literal sense.”²⁹ (Some libertarian economists so insist, time and again, in the face of insights offered, say, by modern behavioralists.³⁰) In the press of everyday life, though, these concessions go back into hiding, not to be trotted out again unless, yes, forced out by persevering critics. When promoting as “free” an ideologically and materially tilted legal system, we promote as decent and fair a realm that we know to be deeply predisposed in its architecture and content.

Thoroughly systemic bias certainly helps explain why, for example, large swaths of low-income, of color, and immigrant women routinely avoid affirmatively engaging legislative, judicial, and administrative procedures.³¹ Even more particularly, more than other groups, these women most often refrain from converting righteous grievances into legal disputes. Rather than hold accountable those individuals who have injured them, those institutions that have harmed them, they feel coerced to “lump it.” Why sue? They’d have to find a

²⁸ At the heart of E. P. Thompson’s *Whigs and Hunters* lie detailed historical accounts of this phenomena, upsetting people across the ideological spectrum. See Nancy Lee Peluso, *Agrarian Classics Review Series*, 44 J. PEASANT STUD. 309 (2017) (reviewing THOMPSON, *supra* note 22).

²⁹ Certainly Robert Hale’s work was regarded by many as seditious in this strong sense. See, e.g., BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). Hale’s emphasis on the inescapable presence of coercive power and the government’s inevitable role in its distribution ought repeatedly be emphasized in 2018—as much in scholarly literature as in everyday conversation. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

³⁰ For an exchange along some of these fronts, see Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111 (2006). For a sample response by thoughtful behavioral economists, see Oren Bar-Gill, *Exchange—The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008).

³¹ See Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989). For early and influential explorations of these dynamics, see KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC’Y REV. 631 (1980–81); Stephen C. Yeazell, *Convention, Fiction, and Law*, 13 NEW LITERARY HIST. 89 (1982).

solid lawyer, no small matter. And even if the lawyer were awfully good, they would encounter on the other side and on the bench their social superiors, with unfathomably great resources, including the built-in biases in favor of those who most often discriminate (employers, lenders, sellers).

Anyway, these women insist, even with a good lawyer, all the treacherous effort wouldn't likely make any difference. Indeed, it might even worsen circumstances. They feel humiliation, of course. Instead of choosing to fight with all their might, through all available arenas, including law, they come off to everyone, perhaps even themselves, as acquiescing in the practices and policies that left them injured. Yet, for all the contradictory nature of the question, for all their shifts in viewpoints, they perceive their decision to avoid the legal system as at least protecting their limited capacity to cope. They're left no worse off in dealing with the realities of difficult and even harsh lives. Candid recognition of the ideological tilt of the legal system feels, what, sensible. Why be a chump, a dupe, a sucker? Why be twice a victim, initially to the injurer and then to the largely false promises of equal treatment? Facing the truth of life in the United States, especially through and in law, feels awful and wise.

Worse yet, even those who do choose formally to fight often end up inadvertently being co-opted and sometimes left less able than ever. Disputes get altered from ones that challenge basic assumptions driving institutional and interpersonal inequities into fights that most likely will lead, at best, to marginally redistributive and modestly reformist results. Usually hidden from those who challenge their subordination, as befits the subterranean way power can operate, the categories, stories, and arguments that conventions "permit" those who formally fight to employ—the legitimated strategies and tactics—typically strengthen the systems that ensnare them. Rather than questioning fundamental cultures of inequality, they "resist" from within those frameworks, reproducing them even when they now and then "win" battles. Law circumscribes most (*not* all) fights we experience and witness in ways meant to insulate the status-quo—celebrating as "transformative" the tinkering at the heart of the status-quo-plus changes.

Now and then, though, we experience a revolution-in-the-making. Or at least all the bravery, intelligence, and perseverance embodied in an uprising that stands a real chance of fundamentally altering systems, institutions, cultures. #MeToo rebels against all expressions of misogyny. Remarkable women have taken on—to offer just some examples—the movie industry, the television industry, federal and state and local governments, the federal judiciary, the music industry,

and Silicon Valley. They knew they would get bashed. Indeed, many had been bashed before, with their professional and personal lives targeted and often devastated. And yet, like other great whistle-blowers, they keep speaking out, and they have provoked action perhaps only a small number believed they would ever achieve.³²

Consider, most specifically, the remarkable women and girls who, together with some of their families and friends, let the world know what Dr. Lawrence G. Nassar did to them.³³ They understood they would lose their privacy, some friends, their faith communities. They knew they would likely be disbelieved by most, would be ostracized by still more, and would be patronized by others still. Yet, with the open-hearted support of Judge Rosemary Aquilina, they translated their horrifying pain into an effective campaign against Nassar, Michigan State University, and U.S.A. Gymnastics. And they aimed their claims at enablers of virtually every sort: coaches, university and Olympic officials, health professionals, administrative personnel. They not only comprehend how misogyny works, but have chosen to fight it in ways that Simone de Beauvoir envisioned.³⁴

We have yet to learn the details of how so many (institutions and individuals) granted Nassar permission to continue doing what he had been doing to girls for at least thirty years. Even as the #MeToo movement continues to unfold, we have yet to focus the time and energy we should on the experiences of low-income, of color, and immigrant women and girls. We have yet to discover whether the sought-after transformations will be as deep and as lasting as misogynistic evil requires. But we do know everyday people can make explicit and confront seemingly unchallengeable inequalities in coercive power (social, cultural, economic, political, and legal systems overlapping

³² The foundational literature about sexual harassment remains vital today. To take only two very important examples, see Sarah E. Burns, *Engendered Change: Review of Belos' and Fellows' Law and Violence Against Women*, 1 CLIN. L. REV. 665 (1995); Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*?, 21 N.Y.U. REV. L. & SOC. CHANGE 357 (1995); Sarah E. Burns, *Is the Law Male? The Role of Experts*, 69 CHI.-KENT L. REV. 389 (1994); Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, 51 J. SOC. ISSUES 193 (1995); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

³³ Among the many illuminating accounts now available, reading Rachael Denhollander's full testimony before Judge Aquilina remains a must. *Read Rachael Denhollander's Full Victim Impact Statement about Larry Nassar*, CNN.COM (Jan. 30, 2018, 7:34 AM), <http://www.cnn.com/2018/01/24/us/rachael-denhollander-full-statement/index.html?sr=fbCNN012418rachael-denhollander-full-statement0600PMVODtop>.

³⁴ Rereading all of de Beauvoir's work remains a stunning experience, obviously starting and ending with DE BEAUVOIR, *supra* note 22.

and reinforcing one another). And we have learned yet again, in case we had come to doubt, that humans can shine a light on the concealed and denied and rationalized. And perhaps, just perhaps, can change it.

The legal system obscures its exercise of coercive power in still other ways. Sovereigns operate their legal regimes—and the U.S. and Mexico have long run their legal and illegal immigration systems—through prohibitions and permissions. Together, prohibitions and permissions establish the framework of ground rules through which law processes disputes, influences behavior, and distributes power.³⁵ Prohibitions are by far the easier to spot and to experience as law. Permissions prove far more elusive to pick out and to comprehend. To coordinate the mass influx of undocumented Mexicans into the United States, especially in the interest of U.S. employers and the domestic economies of both countries, the U.S. and Mexico combine prohibitions and permissions to accomplish whatever they most want. Over the course of modern history, they have aimed to appear to have played no active role in large flows of undocumented Mexican labor and pivotal roles in the deportation of and creation of opportunities “at home” for Mexican migrants.

Recognize, though, the deployment of coercive power. The U.S. could prohibit employers from hiring undocumented immigrants, landlords from renting to them, and grocers from selling them food. But instead—at least so far, one year into the regime of the 45th U.S. president—it decides to permit (“legally privilege” by not prohibiting) these relationships and transactions and huge numbers of others like them. Lawmakers appear to be doing nothing when they resist demands to prohibit these relationships and transactions, and many experience law as having nothing to do with these results. Savvy participants in (and astute observers of) the legal regime know better, however. These permissions are not inadvertent gaps but choices by lawmakers to let employers, landlords, and grocers—and, not coincidentally, undocumented immigrants—do what they must in order for illegal and legal migration to serve the mutual needs of the U.S. and

³⁵ My own thinking (as teacher, lawyer, scholar) and this passage draw directly upon a series of superb insights, made and extended, resurrected and strengthened, in the scholarship of Wesley Hohfeld and Robert Hale and Arthur Corbin and the too-often-ignored work by Joseph Singer and Duncan Kennedy. See Duncan Kennedy, *The Stakes of Law: Or Hale and Foucault!*, 15 *LEGAL STUD. FORUM* 4 (1991); Joseph William Singer, *Legal Realism Now*, 40 *CALIF. L. REV.* 465 (1988); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975; Arthur Corbin, *Jural Relations and Their Classification*, 30 *YALE L.J.* 226 (1920-21); Robert Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 *COLUM. L. REV.* 149 (1935); Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913). For an elaboration of this point, see López, *supra* note 22.

Mexico. The law is no less involved, and coercive power no less exercised, when it creates ground rules of permission rather than of prohibition.

H. Cross-Cutting Capacities At The Heart Of The Problem Solving All Lawyers Pursue

In the course of challenging how law schools had long defined ambitious, rigorous, and effective education, especially as a product of close study of a wide range of wonderful practitioners, the best of modern clinical programs perceived three slates of cross-cutting capacities at the heart of the problem solving all lawyers pursue. Or at least that's how I characterize everything I've seen, read, and done with others since the 1970s. A rich illustration of each capacity would consume many pages. And the training already developed deserves extended coverage. For now, I must be content to present the capacities and précised explanations.

Even to those who pay little attention, these capacities should feel familiar because they are facets of our everyday navigation system. Together, they explain how we make our way around in the world. We're endlessly dealing with situations, tiny to huge, always evolving, that require us to define and address problems. So routinely is this true, so much of our lives occupied by problems we already know how to address, that most of what we do happens "automatically." We need not give huge amounts of conscious thought to the dynamics—at least if we so choose. We need not if we don't care enough about getting better at what we do routinely. And many may not.

For lawyers, though, that's an unacceptable "luxury." Especially when our job (across roles) is to help others chart the future, find a clear path, avoid obstacles, deal as well as possible with troubles, cut losses, regroup and keep moving, and face catastrophes, we cannot ever accept that what we know is enough. We can and should continuously enhance our navigational abilities: to deal with recurring patterns, to deal with frightening and dangerous and uncertain futures, and to prepare (as best we can) for the unexpected.

1. Every Superb Lawyer Demonstrates The Capacity To Observe Closely, Listen Attentively, And Size Up A Situation Well.

In order to cope, in order to thrive, we work to understand our circumstances. And, typically, in order to survive we do something in response to our understanding. That helps explain the enormous contribution made by our stock meaning-making structures. Almost instantaneously, our stock categories, stories, and arguments help us to

give a situation a meaning and a menu of things we can do. If we perceive threat, we sense the need to flee. Feelings and thinking intersect. Off we may go.

Of course, almost without consciousness, we may double-check our interpretation. Upon another scan or inspection, we may decide we face no threat. Either there's no threat at all or the threat appears obviously aimed at someone or something else. Again, all this can happen so quickly, we don't much think about how we initially sized up the situation only then to reinterpret the surroundings. Yet we do this all the time, and often so rapidly, we rarely take the time to mull over, perhaps even describe "what just happened."

Teachers and students come to law school with a lifetime's experience sizing up situations. They may not think consciously about the process of appraisal, much less about their capacity to observe closely and listen attentively. And they may not realize each lifetime's worth teaches us different and perhaps very different things. Context matters; culture matters. So too do our varied inclinations to make much or not so much of a lifetime's experience. When it comes to our capacity to closely observe, attentively listen, and ably size up, some of us may be spectacularly good, and some of us spectacularly bad. And most of us may fall into a fairly densely occupied domain we might label more or less average.

Where we rank may not matter to many of us. But in certain lines of work, knowing how good we are—or at least how good others perceive us to be at observing, listening, and sizing up—counts hugely. As part of a string quartet, a violinist needs to be good and to get better and better if he's to join the ranks of accomplished musicians. However well we know the Haydn score, we play with others and our capacity to observe, listen, and size up what's unfolding as the score unfolds makes all the difference in the quality of our performance. As a spy, smuggling information from Germans occupying France to the British about the development of V-1 and V-2 rockets during World War II, we better listen, observe, and size up brilliantly or we fail our mission, endanger other members of the resistance, and risk death.

No less than violinists in string quartets and spies for the Resistance fighting Nazi Germany, lawyers should be understood as needing to be at least very good if not downright wonderful in observing closely, listening attentively, and appraising well. Lawyers fill roles across institutions where, almost daily, we're expected to collaborate with others in large part because we are at least tacitly understood to observe, listen, and appraise well. And we're expected to do so vigilantly, reinterpreting circumstances to measure the adequacy of our provisional appraisals, wondering if minor modifications or entire

makeovers may be in order. Every wonderful lawyer I have known well or seen in action demonstrates these capacities. And it's utterly illuminating to collaborate with them, to carefully study them, to comprehend all their doing in unfolding stages, never resting in their assessments, even when they're already acting on a particular understanding of what's happening.

For decades, heading back to the very earliest clinical and clinic-like courses, some teachers understood and emphasized the importance of observing, listening, and sizing up. And though to my knowledge no published writings amply record the activities, these teachers studied these capacities, by consuming diverse literatures, through careful empirical observations, through extended conversations with others every bit as intrigued. Today, decades later, the best of clinical legal education has made advances on what earlier cohorts had achieved. The best clinicians consciously frame work with clients—and the training a clinic offers—in ways that explicitly aim to build observation, listening, and appraising chops.

We have many examples from law schools across the country—in clinics featuring redevelopment plans, sports lawyering, environmental policies, indigent criminal defense, Know-Your-Rights workshops, prison litigation, bankruptcy reorganization. Consider just one—an abbreviated version of a far fuller and thoroughly impressive written problem description focused on creating meaningful access to clemency, presented to clinic students as part of the initial preparation materials:

*Strategic Advocacy to Guarantee DC Code Offenders
Meaningful Access to Clemency*

This project presents an opportunity for students to represent and advise an expert nonprofit organization focused on the reform of judicial systems and access to justice in Washington, D.C. The client organization seeks to design and advocate for the creation of a Clemency Board for the District of Columbia. In nearly every state, offenders can petition the governor for clemency. Yet D.C. Code Offenders (individuals convicted of violations of D.C. "state" law)—because of the complex overlay of D.C. and federal laws and systems—currently have no meaningful access to clemency, which can only be granted by the President of the United States. Moreover, despite President Obama's 2014 announcement of new clemency criteria, which sought to address the plight of thousands of offenders serving long and unjust sentences for non-violent drug crimes, no D.C. Code Offenders have been represented by the Clemency Project 2014 or granted clemency under the initiative to the best of the client's knowledge.

...

The client would like to retain the clinic to create a strategic advocacy plan for the creation and implementation of a D.C. Clemency Board, which would give D.C. Code Offenders the same access to clemency that other state law offenders already enjoy. The project will involve designing a detailed plan for a Clemency Board for D.C.; identifying necessary statutory, policy, or practice changes at District and federal levels and proposing solutions; and advising the client on how to advocate for implementation of the Clemency Board. Over the course of the semester, students may grapple with a range of questions including:

- *What are the origins of clemency as a legal/extra-legal tool?*
- *How are bodies with clemency authority created and constituted in other jurisdictions?*
- *What are the criteria for identifying a best practice? What are the actual best practices of other bodies with clemency authority?*
- *Who are the various stakeholders in D.C. on the issue of clemency? How can they be organized and unified to support a new Clemency Board? What barriers exist for their organization and unification?*
- *How does the lack of access to clemency impact D.C. Code Offenders, their families, and the District as a whole?*
- *How can the voices of D.C. Code Offenders be incorporated into the proposal for a Clemency Board?*
- *What decision-makers have authority to bring about the necessary statutory or policy changes to implement a Clemency Board? What would be persuasive to them? What might make them hesitate to implement such a Board?*
- *What are potential strategies the client could use to push for the creation of a Clemency Board? How can the client prioritize these strategies?*
- *How can the client best present the project findings to a range of audiences?*³⁶

The experiences of that clinic, like many others, might well be written up as a full-blown case study. (To my way of thinking, they should be.) At the heart of such a depiction, we would learn that the work as planned for the clinic, and the work as it actually unfolded in real time, relied heavily on interviews of a wide slate of individuals—individual interviews against the backdrop of the complex dynamics within and across organizations, institutions, and systems, heightened by gender, racial, class, and LGBTQ dynamics, to name only some. For the students, closely observing, attentively listening, and astutely appraising all the interviews proved, in the words of the clinician,

³⁶ Daria Fisher Page, Materials for The Community Justice Project Clinic (Fall Term 2016) (on file with author).

“foundational to working with the client to develop the strategic plan and recommendations the client desired, needed, and requested.”³⁷

Imagine all we can learn about observing, listening, and appraising through ambitiously astute studies of just a tiny cluster of lawyers, the likes of Damon Agnos, Joaquin Avila, Janese Bechtol, Craig Martin, David Duchrow, Perla Esquivel, Willard Fraumann, Marlene Garza, Roger Haber, Colin Cloud Hampson, James (Sákéj) Youngblood Henderson, Robert Hirsch, Katie Hurley, Rafiq Kalam Id-Din, Michael R. Marrinan, Yumari Martinez, John McElroy, Ana Graciela Nájera Mendoza, Jaime Mercado, Dale Minami, Ndidi Oriji, Gary Peck, Darryl A. Piggee, Jeffrey Prieto, Hyeon-Ju Rho, Anne Richardson, Lucía Sánchez, Effie Turnbull Sanders, Dian Keywon Sohn, Meriem Soliman, Vincent Southerland, Janeen Steel, Wendell Y. Tong, A. Mina Tran, Tsui H. Yee.

Or law school’s bigger classroom teachers, folks like Janet Alexander, Philip G. Alston, Devon Carbado, Peggy Cooper Davis, Steve Derian, Ingrid Eagly, Patrick Goodman, Jerry Kang, Sung Hui Kim, Kim Taylor-Thompson, Sherod Thaxton, David Wilkins, C. Keith Wingate, Pavel Wonsowicz, and Noah Zatz. Or clinicians like Alicia Alvarez, Sameer Ashar, Alina Ball, Dania López Beltran, Sarah E. Burns, Susan Bryant, Patience Crowder, Steve Derian, John Elson, Craig Futterman, Bill Ong Hing, Paula Galowitz, Carol Izumi, Elliott Milstein, Michael Pinard, William P. Quigley, Anne Shalleck, Barbara A. Shatz, Anthony C. Thompson, Lucie White, Jennifer Wright, and Theresa Zehn.

Imagine all we can learn through terrific studies of a much larger group still. We have access to eclectically diverse practitioners of observing, listening, and sizing up: the very best of clients, community residents, corporate leaders, poets, union officials, craftspeople, artisans, movement leaders, nurses, musicians, dancers, trade negotiators, epidemiologists, therapists, lawyers in every role, to list just a very limited number of categories. We should study these practitioners—study them in serious and sustained ways, through diverse teams pulled together to learn all we can. In past years, I’ve been on such teams, and we have learned lots. We did, in part, because we did not regard observing, listening, and sizing up, any more than any other aspect of human feeling and thinking, as “too mysterious” to understand.

Still, most of our past efforts lacked the technological and human resources that neuroscientists, cognitive psychologists, and jury consultants now routinely employ in such studies. We should employ these resources too—and all would benefit. We should in part because

³⁷ Email from Daria Fisher Page, Clinical Associate Professor, University of Iowa College of Law, to author (Jan. 29, 2018, 12:08 PST) (on file with author).

we appreciate more today, perhaps than at any point in the past, how much the categories of observing, listening, and appraising are complex on their own terms. And we understand that these capacities both sway and reflect the work of other senses. What we see influences what we feel, and what we feel shapes what we see. What we hear is likely to be shaped by other senses and likely to affect how we subjectively experience circumstances. Appraisals combine emotional and cognitive interpretations, all often utterly incapable of being disentangled, in ways that strongly suggest the wrong-headedness of both the hyper-rationality of certain strains of modeling within academic and professional realms and the polar mistake of regarding emotions as unaffected by cognitive cueing and processing.

2. *Every Superb Lawyer Demonstrates The Capacity To Read Discerningly, To Write Convincingly, To Speak Effectively.*

If only the best of clinicians and non-clinicians explicitly recognize and teach observing, listening, and sizing-up, virtually everyone inside and outside the legal profession regards reading discerningly, writing convincingly, and speaking effectively as perhaps at the heart of what all lawyers do. Given the wide variety of problem solving roles lawyers fill, that presumption may well be flawed. Many lawyers do not write much at all. Others read only a small amount and often of the very same materials. And, at least in public settings, some lawyers never do any speaking.

Still, in the full-bodied study of problem solving, and in vigorously transformed law schools, reading, writing, and speaking will remain imperative to teach resourcefully. Over the decades, the very best of clinical legal education has helped students to grow better at reading, writing, and speaking during their law school years and to grasp how to continue to improve over the course of a career. Borrowing from non-clinicians, practitioners, and teachers and practitioners in other disciplines and fields, and experimenting with methods and aims designed to enhance students' abilities to learn and teachers' ability to teach, those within the Alternative Vision emphasize the significance of reading, writing, and speaking and, as importantly, their relationship to one another across the roles and institutions in which lawyers work.

Points of departure matter. The best of clinical legal education believes law schools ought to train people to read, write, and speak well. Not read and write and speak only as some narrow band of lawyers do. Or worse still, not read and write and speak on the false assumption that "lawyers think differently from normal people." Every realm of life—including the professional ranks—proves a definable

variation on human problem solving. The assertion that somehow lawyers are not “normal people” (whatever that means) misunderstands, well, everything. In the various realms that define our existence, we all may customize how we address problems (“think”) to suit various demands. But it’s damaging to base an understanding of lawyers or the training law students need on a mystifyingly wrong-headed proclamation.

Of course, law students must learn to make meaning with others as others expect lawyers to make meaning. To pass the bar, to fit within any particular local legal culture, to produce in ways recognizably understood as lawyers doing quality work before varied audiences (the SEC, immigration courts, the United States Patent and Trademark Office). The Alternative Vision embraces this obligation, as both intellectually and practically vital. Yet it’s every bit as important to understand that making meaning with others as others expect lawyers to make meaning is, at its core, not entirely a good thing. In fact, it can be awful. Taken to extremes, the necessity to learn to make meaning within the legal culture gets translated into a terrible liability. Variation interpreted as Discontinuity re-produces Elitism.

But we should remind ourselves, as the best of clinical education does, that making meaning in particular ways is true of all professions, trades, crafts, arts, and of the tiniest ecosystem within subcultures within cultures. That’s how we appear to define ourselves—at once, to belong and to cut others out. I am absolutely not offering an excuse for the jargon-laden insider talk many lawyers regularly employ—much less, the inability to communicate lucidly. Instead, I mean to emphasize only that what often passes as a pointed put-down of lawyers and the legal culture ought to be understood as a depiction of how we variously express ourselves within and across all boundaries. We’d like to think “they’re doing it and we’re not,” perhaps especially of privileged classes like lawyers. Yet for every justified critique of legal rituals and mumbo-jumbo, there’s a cousin critique to be made about every human grouping. Chastening, to be sure.

Yet law students can learn to make meaning with others as others expect lawyers to make meaning without insisting law schools should strangle students into believing “reading for lawyers,” “writing for lawyers,” “speaking for lawyers” ought be the only sensible aim, much less the height of intellectual achievement. That suffocating and enervating focus is both empirically inaccurate and prescriptively defective. Great lawyers must be able to read a wide span of materials, write in many different ways, and speak to reach variegated audiences. And great training ought to be grounded in those truths and fashioned to achieve those goals.

Great teaching and learning must recognize, too, that reading discerningly, writing convincingly, and speaking effectively are all performances. When I say reading is a performance, I don't mean merely or even mainly in the sense of a poetry reading. Instead the ability to report what a text says and what a text means itself demonstrates competence or not, special aptitude or not, brilliance or not. The same is true of writing. Choosing not to write a dissent as a member of a committee or a judicial panel signals as much as electing to produce a written dissent. And training to write convincingly means gaining a command over performing convincing writing. When we think of speaking, perhaps insisting it's a performance feels more accurate or at least more commonplace. What may be less conventionally understood is that speaking effectively is a performance when we say nothing as much as when we say something.

To train optimally to read, write, and speak well requires what has become for the best of clinicians and non-clinicians a familiar form of reverse engineering. Exposing students to a wide range of readings, writing assignments, and speaking performances is a start. But it's far from enough. Instead, teachers must simultaneously train students in what it takes to offer quality interpretations of varied readings, quality written products in response to assorted assignments, quality speaking performances tailored to various occasions.

That means "samples" (what other call "models") must always be made available. Samples that reveal what every worthy learner and teacher should be asking: What does quality look like? What does quality look like in diverse forms? Even that is not enough, though. Teachers must help students perceive the identifiable patterns in quality reading, writing, and speaking. How do design and content and sensibility combine? What features routinely can be identified and labeled and reproduced? How do lawyers, teachers, and students learn to generate desired effects in others through their reading, writing, and speaking?

This approach to teaching and learning is fundamental in many realms. Science, music, architecture, linguistics, engineering, surgery, crafts. Modeling quality, discerning its features, practicing to produce certain effect is how outstanding teachers teach and excellent students learn. Learning through experience, at least the only coherently ambitious brands of such an idea, always has imagined helping students to know what they're aiming to achieve, how through practice to begin gaining a command, and how over time to understand how to evaluate their own progress (and, inevitably, the progress of others). Through disciplined repetition mixed with imaginative play, students come to internalize how conventionally to produce quality and how to break

with convention as needed or desired.

In teaching and learning to read discerningly, we can all learn immensely from those who already employ their own variations of this method. Take judicial opinions—by far the most focused-upon texts in traditional legal education. Rather than the scatter-shot techniques employed in the great majority of law school courses and discussions, others have offered systematic and replicable ways of reading cases and reading them as the best lawyers do:

Amsterdam and Bruner employ stock categories, stories, and arguments (from both “inside” and “outside” existing doctrine) to interpret the interpretations made explicit and left implicit by justices (and their law clerks) constructing Supreme Court opinions.

Kennedy offers phenomenological accounts of how judges experience freedom and constraint in making choices in writing opinions and, at the same time, structural explanations of polar meanings (a method anticipated in law by Llewellyn’s thrusts and parries and variously paralleled in the deeply orderly reads of cases offered by Balkin, Bobbitt, Carbado, Harris, Olsen, and Siegel).

Ball, Burns, Eagly, Francois, Hertz, Howell, Marshall, Morawetz, Piomelli, Thaxton, and Zatz offer in their clinical and non-clinical training variations on methodologically rigorous and strategically insightful strategic reads of “apolitical opinions,” variously stressing the open-textured relationship between legal, political, economic, social, and cultural realms.

The same systematic and replicable ways of reading judicial opinions serve every bit as illuminating in teaching students to take on diverse texts produced by diverse authors (all of which have been used, together with far more, as part of teaching by those who have developed the Alternative Vision): E. Abel, R. Abel, Ahern, Alinsky, Anzaldúa, Argyris & Schon, Ayres, Balkin, Bali, Beckert & Rockman, Bell, Bisharat, Brown, Butler, Carbado, Dalton, de Beauvoir, Delgado & Stefancic, Desan, Dewey, Dostoevsky, A. Dworkin, R. Dworkin, Edin, Fadiman, Fallon, Foucault, Gabel, Galeo, Gómez, Hart & Sachs, O. W. Holmes, C. Harris, Jolls, Kang, D. Kennedy, R. Kennedy, Lawrence, Lorde, Michelman, Nietzsche, Olsen, Pitkin, Pollitt, Posner, Rosaldo, Rose, Sackman-West, Sanger, Schmitt, Schumpeter, Schlegel, Shalleck, Simon & Newell, Tarullo, Thaxton, Veblen, Wang, L. White, Unger, Wang, P. Williams, R. Williams, Zatz.

In teaching and learning to write convincingly, the best of clinicians and non-clinicians have employed methods and aims visible in

teaching and learning to read discerningly. Employing variations on reverse engineering, samples of quality writing range far outside lawyering and illustrate diversity within the profession. These samples permit teachers to help students identify patterns present in various genres—design, content, and sensibilities combining to produce particular effects in readers. And these same samples permit students to more or less replicate those patterns in routinely practicing to generate quality products within life-like and real constraints.

Student-generated products provide teachers and faculty, in turn, still more samples to collectively dissect. And as students become more and more able to produce as conventions mandate, they become freer to experiment consciously with the various genres they have begun to command. In engaging this dynamic process, students and teachers imitate what many of history's greatest writers have done to aim toward mastery of their craft. Even if unintentionally, they honor Van Gogh, who, perhaps as much as anyone in history, learned to be fiercely independent by learning how meticulously to emulate.

Emulating superb opinion letters, briefs, investigative reports, bankruptcy reorganization plans (and still more) permits students to begin to understand and reproduce the architecture, content, and affect demanded by other lawyers, clients, and others still. There's nothing quite like practicing producing judicial opinions to get students to understand what judges (their law clerks) do daily on the job. There's nothing quite like practicing editing of diverse legal documents to achieve a functional appreciation of how ideas and feelings get most effectively translated through the written word. In trying on for size what other lawyers do, in improving documents produced by respected practitioners, students move toward the "muscle-memory" they need to develop to produce quality written work within often less-than-optimal conditions.

But as critical as the lessons gained from first-rate samples produced by lawyers can be for teaching and learning writing, the samples employed by clinicians and non-clinicians within the Alternative Vision range far and wide. Alexie, Arenas, Atwood, Austen, Baldwin, Balliet, Barnes, Beckett, L. Berlin, Bishop, Blume, Capote, Caro, Cheever, Cohen, O. K. Davis, Erdrich, Gaitskill, Gates, Greenblatt, Groopman, Hansberry, K. Harrison, Higgins, Highsmith, Hurston, Izzo, Karr, Kung, Kushner, LaGuin, Lahiri, Leonard, Lepore, Lisspector, Lorde, Luisell, Markell, McGuane, L-M Miranda, Moraga, Morrison, Munro, Murakami, O'Brien, Nguyen, Remnick, Sacks, Schulz, Shelley, Smiley, Soto, E. B. White, Woolf, Zhang. Here, as elsewhere, teachers help students identify patterns, label recurring features, emulate through routinized practice design, content,

sensibility.

The insights can be as dazzling as the writings themselves. Perhaps at bottom, though, the most important lesson is the intimate relationship between disciplined control, leaps of imagination, and emotional clout. To write convincingly, lawyers must be as able to produce in readers the experience of neutrality as well as partisanship, of prudence as well as recklessness, of seriousness as well as playfulness. That may seem more obvious in some products than in others. But even ostensibly the dullest and driest document, at least produced by a master, reflects the conscious rendering of dull and dry. Great writers know this, inside and outside the legal profession. And in the *Alternative Vision*, so shall law students.

Speaking effectively is even more ignored and mangled in the current model of legal education than is writing convincingly. Most would disagree. They think of conversations in the classroom, various moot court and negotiation opportunities, and “experiential offerings” as providing ample and even quality training for all law students. But classroom conversations in the typical Socratic case method course offer anything but ambitious and sustained training in speaking (and often amount to the equivalent of an argumentative ambush or a fill-in-the-blank exercise by a teacher lecturing through fake conversations). And the training typically provided for diverse learning opportunities where students do in fact speak proves at best hit-or-miss and, far too frequently, a strange brew of insubstantial, perfunctory, and careless.

This same point can be made another way—and often is. New graduates frequently hear that if you want to feel better about your ability to speak effectively, sit in for a week or more in any courtroom in the country. There you’ll find a variety of lawyers on a variety of matters performing, unintentionally, in tranquilizing and even cringe-worthy ways. If following this advice makes young lawyers feel better about themselves, they often take away the wrong message. They’ll too often find themselves joining their more senior co-workers poking fun at the poor-to-abysmal quality of the speaking they’ve witnessed. But far more often than not, they’re blaming the victim and not the perpetrator. Exactly what sort of training did law schools and employers provide these lawyers? How could legal education permit students to graduate and legal organizations permit lawyers to practice displaying abilities far below any defensible standard of speaking effectively?

Those within the *Alternative Vision*, clinicians and non-clinicians alike, imagine training effective speakers. They condemn teaching “speaking for lawyers” and instead champion training students to become effective speakers across roles and circumstances and institu-

tions. To do so, they offer diverse samples of high-quality speaking—by lawyers, of course, but by a far wider range still. Drawing on diverse literatures and videos, on contemporary technology, and whenever possible live performances, they help students identify and label patterns and provide routine opportunities for students to emulate what superb speakers do. They then review those simulated or live practices, permitting all involved yet another cluster of valuable sample to appraise and learn from—and so the learning process continues.

What the best teachers stress most, perhaps, is an awareness of the relationship between silence and vocalizing. Learning to say nothing may well be the ideal point of departure. Learning to use silence mixed with vocalizing may well be next. And learning how to vocalize well when we do speak begins to fill out the picture—well, fill out the picture, so long as vocalizing well includes not just what we do with words and what we do with pitch and timbre (and the like), but what we do with everything, from our eyes to our body posture. Speaking effectively, after all, involves all the senses and their effects on our audiences.

What those within the Alternative Vision stress emphatically is that every time a lawyer speaks it's a performance. That strikes many as somehow "off." They understand wonderful trial lawyers as practiced performers. They even can appreciate their artistry. (J. Bernard Alexander, Michael R. Marrinan, Charles Ogletree, Anne Richardson, Kim Taylor-Thompson, Gerry Spence—to name only a tiny number.) But lawyers negotiating a redevelopment deal? Delivering a report to an academic personnel committee? Serving as an appointed Special Master? Asking questions as a bankruptcy judge? Interviewing a domestic violence victim? Sorting through the budget details with diverse regulators?

Yet study these lawyers, in these roles and circumstances, and we can find the very same qualities as we readily see in other performers. In the person giving a closing argument or a speech at a mass demonstration. Once we accept the inevitability of performance, we can begin to see, as teachers and as students and as practitioners, how crucial it becomes to borrow from great speakers of all sorts. It's not self-evidently lawyers who offer us the best versions of varied performances. As negotiators, reporters, questioners, persuaders. In any event, it's less that we care at all about debating whether or not lawyers are inferior or superior to others. The aim of the Alternative Vision, in training effective speakers as in everything else, is to learn from wherever we can, always knowing we'll find ourselves surprised and enriched for having opened our hearts and minds

3. *Every Superb Lawyer Demonstrates The Capacity*

a. *To Frame And Understand Problems From Varying Perspectives*

We've got to understand problems before we can effectively attack them.³⁸ After all, how can we remedy environmental degradation or homelessness without having a strong grasp on what exactly we confront? Regrettably, legal education does not robustly reflect this basic truth. Most law schools still teach way more about "thinking like a lawyer," "reading cases," and "sophisticated black-letter law" than about how to comprehend and formulate problems. Indeed, legal education tends to conflate learning to categorize problems into various doctrinal categories with teaching everything lawyers must learn about framing and addressing problems.

To make matters worse, lawyers often litigate, negotiate, and legislate, they often transact deals, formulate policies, and design diplomatic relations (and more) without ever really studying—without ever knowing what it means to regularly study—the very social phenomena they hope to influence. Indeed, history is loaded with accounts of well-intentioned lawyers attacking problems they only vaguely comprehended. Often in the name of justice, people and the problems they face are ill-served. Think of the financial industry, gentrification, and family violence, to name only prominent areas. Think too of law students' social justice fellowship applications, in which would-be fellows must lay out their plans to solve (yes, *solve*) pressing problems in two-year timelines. But we cannot solve what we do not understand—I don't care how much law we know or how good we happen to be in the courtroom, before a legislative committee, or in negotiations, and I don't care how much we enjoy writing a white paper, organizing a teach-in, or drafting a deal.

Teachers must teach and students must learn to study social problems—not just some arguably relevant body of law. We must

³⁸ A massive interdisciplinary literature speaks of the challenges of variously framing problems *precisely to understand them* from varied perspectives, and especially the mid-twentieth-century giants doing this work influenced my own thinking as much as did the practices of those who surrounded me during my childhood years. For only a tiny sample of the literature, see ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING (1972); THINKING: AN INVITATION TO COGNITIVE SCIENCE (Daniel N. Osherson & Edward E. Smith eds., 1991); WAYNE W. REEVES, COGNITION AND COMPLEXITY: THE COGNITIVE SCIENCE OF MANAGING COMPLEXITY (1996). Herbert Simon stressed how much time is spent structuring problems and how relatively little solving once choices are made about framing. Herbert A. Simon, *The Structure of Ill-Structured Problems*, 4 ARTIFICIAL INTELLIGENCE 181 (1973). In more recent years, some clinicians have consciously borrowed themes and insights from this great body of thought. For just one example, see Susan D. Bennett, *Embracing The Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLIN. L. REV. 45 (2002).

learn—all of us—how to become and remain lifetime students of the economic, political, social, cultural, ideological, and legal forces that create and sustain the problems we hope to influence. Of course we must teach and learn how to use a variety of approaches and methods (quantitative as well as qualitative, structural as well as ethnographic, to name only two) to get a handle of what with others we may be trying to affect.³⁹ We must reach and learn to focus on the importance of how problems get framed.⁴⁰ If we think we have already begun to learn how to do all this, in school or in life or in both, then we must learn to do it better still. We cannot know enough about how to study and how to think about problems. It's never-ending work—certainly

³⁹ For several of my published accounts of how such community-participant empirical work we at the Center for Community Problem Solving undertook can shape community problem solving, see Gerald P. López, *Shaping Community Problem Solving*, *supra* note 8; Gerald P. López, *Health of Undocumented Mexicans*, *supra* note 8.

⁴⁰ I routinely use “frame” in the classic sense that influential thinkers about thinking (Simon, Cowell, Bruner, for example) use “represent”—so that, for me, representing a problem and framing a problem describe and evoke the same complex and important interpretive processes and acts. *See, e.g.*, Herbert Simon et al., *Decision Making and Problem Solving, Report of the Research Briefing Panel on Decision Making and Problem Solving*, in RESEARCH BRIEFINGS 1986 at 29 (1986), http://www.nap.edu/openbook.php?record_id=911&page=17 (“The very first steps in the problem-solving process are the least understood. What brings (and should bring) problems to the head of the agenda? And when a problem is identified, how can it be represented in a way that facilitates its solution?”). In my initial written work on human problem solving, the depiction of the lay lawyering of which professional lawyering is a stylized variation, both the text and footnotes reflect important interdisciplinary literatures about such matters. *See* López, *supra* note 19. For another article in those years, authored by a talented lawyer and clinician, sorting through the influence of diverse “representation” and “framing” literatures (among others) in thinking about trials, see Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

A large literature, scholarly and professional, now focuses on “framing,” often defining the term in different ways, though not routinely describing the variations. For only a tiny number of the many salient works I and others use regularly in our teaching, beginning with perhaps the most influential in modern years, see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974); CHARLOTTE RYAN, *PRIME TIME ACTIVISM* (1991). George Lakoff, a respected scholar, has in recent years emerged as a publicly recognized “go-to” expert on how best to frame to understand, persuade, perhaps find common ground. For a sample of popular and scholarly work, see GEORGE LAKOFF & ELISABETH WEHLING, *THE LITTLE BLUE BOOK: THE ESSENTIAL GUIDE TO THINKING AND TALKING DEMOCRATIC* (2012); GEORGE LAKOFF, *THE POLITICAL MIND: A COGNITIVE SCIENTIST’S GUIDE TO YOUR BRAIN AND ITS POLITICS* (2009); GEORGE LAKOFF, HOWARD DEAN, & DON HAZEN, *DON’T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES* (2004); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2003); GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002); GEORGE LAKOFF, *METAPHOR: THE LANGUAGE OF THE UNCONSCIOUS. THE THEORY OF CONCEPTUAL METAPHOR APPLIED TO DREAM ANALYSIS* (1992). Enormously intellectually rich and pedagogically valuable literature, covering a wide-range of phenomena, can in today’s world be understood as all about “framing,” at least if we use the term in the most vigorous sense. *See, e.g.*, AMSTERDAM & BRUNER, *supra* note 19.

for lawyers and, from my perspective, for many others still.

Even if students have no idea what they would most like to understand for future work, teachers should offer and students should pursue training designed to reveal and encourage how to study and how to become lifelong students of some problem (capital markets, job discrimination, law enforcement, domestic violence, dissent in a democratic way of life).⁴¹ Decades within and outside law schools have taught us that learning about any problem, and about how to learn about problems, matters far more than learning about one particular problem directly related with what we think we want to do in our first job or for a lifetime. Once we learn what it takes to learn about and continue learning about a problem, it's been my experience that we are far more likely to be more humble about what we know, far more curious about what we must still learn, and far better equipped to get ourselves up to speed.

Consider only a few examples.

Some phenomena we examine from different angles, through different histories, in the face of varying evidence precisely to understand what has gone on and continues to face us. How should we think about mass incarceration? Should we regard it as *the* answer to the problem of crime and the challenge of protecting law-abiding citizens? Should we appreciate that, at the deepest level, the United States has relied too much on procedural safeguards in the Bill of Rights and not on a substantive idea of justice as a premise and aspiration of the nation and state and local communities? Or should we acknowledge the brute and brutal truth that we simply have rigged up yet another "Jim Crow" system for Blacks, and parallel systems for all communities of color and for all poor White communities, substituting for earlier forms of totalitarian social control?

Or should we locate prosecutors at the heart of the growth and persistence of mass incarceration? Don't they get paid well and elected over and over for using their vast power to lock people up and to trumpet their tough-on-crime credentials, proving themselves time and again more responsible than on-the-street cops, misguided drug laws, or profit-seeking prisons? Or should we openly appreciate that prosecutors are no more responsible than all elected federal, state, and local officials who, even as they insist they have now seen the light and urge ambitious and effective reentry programs, assiduously avoid

⁴¹ In more recent years, law professors (working alone and with others outside of law) have offered imaginative and concrete explorations of problem solving, including particularly how everyday capacity proves powerfully important to any sort of challenge. *See, e.g.,* IAN AYRES & BARRY NALEBUFF, *WHY NOT? HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL* (2003).

challenging the criminal justice system's racially-tilted brutalities, all because they fear being portrayed in the next election cycle as soft on crime, proving once again we cannot trust mainstream officials to transform any system?⁴²

Other phenomena we begin to examine in one way, only to appreciate we may have neglected an alternative way that may well be far more illuminating and yet deeply uncomfortable for most of us openly to investigate and admit. After the campaign and election of November 2016 revealed the considerable numbers of White Supremacists actively supporting and voting for Donald Trump, after many came to believe Donald Trump himself and many within his new administration more than occasionally behaved in ways strongly supportive of White Supremacists, any number of people—from everyday folks to scholars to journalists—began to study earlier fascist states. They hoped to learn how best to oppose (“resist”) effectively, how to strengthen the Democratic Party, how to strengthen anti-White Supremacists within the Republican Party, how to extend Bernie Sanders’ movement. For all the apparent variety of these efforts, most

⁴² These questions draw upon a large and ever-growing body of literature. For only a small sample of sources worthy of careful study and use in legal education, see JOHN PFAFF, *LOCKED IN: THE TRUE CAUSE OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); SABRINA JONES & MARC MAUER, *RACE TO INCARCERATE: A GRAPHIC RETELLING* (2013); ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARY BOSWORTH, *EXPLAINING U.S. IMPRISONMENT* (2009); MICHELLE BROWN, *THE CULTURE OF PUNISHMENT: PRISON, SOCIETY, AND SPECTACLE* (2009); RUTH WILSON GILMORE, *THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); PUNISHMENT: THE U.S. RECORD, 74 *SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY* (No. 2, Summer 2007); BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* (2008); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* (2008); THE PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009); ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE* (2010); TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* (2008); MARC MAUER, *RACE TO INCARCERATE* (2006); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 *HASTINGS RACE & POV*. L.J. 1 (2014). For a thorough and revealing depiction of the Mayor Bloomberg-endorsed, racially-targeted “stop and frisk” practices of the New York City Police Department, read Judge Shira Scheindlin’s 198-page opinion and her 39-page order in *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) (holding New York City’s “stop and frisk” practices unconstitutional), available at <http://www.nytimes.com/interactive/2013/08/12/nyregion/stop-and-frisk-decision.html>.

public commentary insisted Trump's White Supremacists violated "American values," the "democratic tradition in the United States," and our convictions in and outside law about treating all as equals.

At least some, however, already had challenged this way of formulating the question. Scholars of Nazi Germany, perhaps most prominently, spoke about how, at least during its early years, Hitler's regime and especially talented German lawyers assiduously studied the United States history (before and after the Civil War) to learn how best to handle groups of people targeted as less than fully human and certainly not entitled to full membership in the national community. Perhaps to the surprise of those who had never read this superb literature, Nazi Germany looked not just at slavery and Jim Crow but perhaps even more closely at how the U.S. had treated Chinese and Japanese and Filipinos and Mexicans and Puerto Ricans, how it had manipulated immigration and citizenship law, how it had handled its own colonies. Nazi Germany's Nuremberg Laws (the anti-Jewish legislation enacted in 1935 creating a formal race order through new forms of second-class citizenship and bans on interracial sex and marriage) trace their origins to the dominant interpretation of the United States Constitution, laws, and practices. Trump's most extreme White Supremacists speak with authority when they insist they mean to re-establish, in full force, the political racial order that for most years has defined the United States.⁴³

b. To Work Well (Collaborate) With Diverse Others

To solve problems, we have all got to learn to work productively with others—clients and allies and diverse audiences, and, yes, adversaries and, yes, enemies. That's more complicated than it sounds. Obviously, it's hard to cooperate with opposing counsel in the midst of bitter disputes or with ideological antagonists in the midst of endless conflict. But troubles with foes often obscure other profound challenges in lawyering. Many clients, for example, feel deeply ambivalent about the legal system and everyone associated with it, including their own lawyers. And many other people who work with the same populations—professionals and problem solvers of every sort—doubt the

⁴³ For a small sample of the excellent literature, see JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2017); DAVID SCOTT FITZGERALD & DAVID COOK-MARTIN, *CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICIES IN THE AMERICAS* (2014); MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY* (2008); STEVEN H. NORWOOD, *THE THIRD REICH IN THE IVORY TOWER* (2009); IAN KERSHAW, *HITLER, 1889-1936: HUBRIS* (1999); STEFAN KUHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM* (1994).

capacity of most lawyers to work with other problem solvers. In the eyes of many, lawyers are the very antithesis of the collaborative problem solver.⁴⁴

That's a nasty reputation for any problem solver to live down. And it doesn't make it any easier when lawyers have not been equipped in law school to think about, deal with, and constantly adjust to the dynamics of working with others. Collaboration isn't a science, to be sure. And it can't be reduced to mere technique. But we arrive at law school, typically, with vast experience in collaboration. What we know may often be more tacit than explicit. And what we have learned may turn out to be something quite at odds with what we most need if we're to be as successful as we would like. We all have to grow aware of who we are and how we work—not just what we aspire to be on these fronts. Through training, we can nurture and develop the ideas and skills and sensibilities—and the acute awareness necessary to work well with others to understand and address problems.

Such training is as important in cutting a movie deal with HBO as it is in designing new policies to govern the internal practices of Uber as it is about somehow improving the relationship between the Native, Latino, Asian Pacific Islander, and Black communities and law enforcement as it is in addressing violence within the LGBTQ community across the state of Minnesota. All the more bewildering that collaboration has been, for such a long period, central to graduate business and public policy schools and so peripheral to legal education.⁴⁵ No less than business and government personnel, lawyers can and should equip ourselves to appreciate the challenges and advantages of designing with others institutions and relationships suited to the task of collective problem-solving.⁴⁶

Happily, thanks to discerning and persevering and distinguished

⁴⁴ Even if the views develop through media, or especially if they reflect and get reinforced through modern technology, opinions about lawyers are often strongly negative and utterly confident. See, e.g., PAUL BERGMAN & MICHAEL ASIMOW, *REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES* (2006).

⁴⁵ For a small sample of the literature, see Elizabeth C. Lamoste & Peter D. Jacobson, *Collaboration Amid Crisis*, 14 *IND. HEALTH L. REV.* 40, 53 (2017); Devin Lyons-Quirk & Meghan Haggerty, *Managing Cross-Departmental Collaboration: A Performance Scorecard for Boston's Mayoral Sub-Cabinets* (Harv. Kennedy School, Working Paper, 2010); Gary P. Pisano & Robert Verganti, *Which Kind of Collaboration Is Right for You?*, 86 *HARV. BUS. REV.* (Dec. 2008); Lawrence M. Sung, *Collegiality and Collaboration in the Age of Exclusivity*, 3 *DEPAUL J. HEALTH CARE L.* 411 (2000); Howard Anawalt & Karen Robbins, *The Joint Enterprise: Collaboration Between the Public and Private Sectors*, 6 *MICH. J. INT'L L.* 253 (1984).

⁴⁶ The literature produced by clinicians about collaborations—including, working with students—is insightfully powerful, as emotionally open as intellectually courageous. For only a few examples, see Fisher Page, *supra* note 8; Kathleen A. Sullivan, *Self-Disclosure, Separation and Students: Intimacy in the Clinical Relationship*, 27 *IND. L. REV.* 115 (1993).

contributions from the best in clinical legal education, law schools are closing this gap. More than ever before, law students can find within existing curricula, at least if they diligently scout out the offerings, training at law schools structured to teach how to collaborate in the less-than-ideal circumstances in which everyone inevitably finds themselves. That training can be both expanded and enhanced, of course. But existing learning opportunities already establish a baseline worthy of praise and emulation.

We already know much. To offer just some important themes, on a list we should always regard as incomplete, evocative, and open to question: Teaching and learning

- should explicitly define and pointedly call into question customary paradigms of how lawyers regard other problem solvers and of how others problem solvers regard lawyers;
- should deal directly rather than tangentially or implicitly with gender, class, race, sexual orientation, culture, religion, age, disabilities, ideology;
- should explore the interaction of lay and professional know-how in framing issues, designing strategies, and evaluating effectiveness;
- should develop and examine data that illuminate how everyone—particularly, perhaps, clients and lawyers—assesses the value lawyers bring to the diverse work they pursue together;
- should understand how community members interact with one another, with other communities, with diverse other problem solvers when lawyers are nowhere in sight or formally involved;
- should grasp how to work with—how to be a part of—the diverse phenomena commonly referred to as social movements.⁴⁷

⁴⁷ The literatures addressing these and other pivotal themes has grown, and the strikingly insightful contributions by people like Gary Bellow, Leroy Clark, Ron Edmonds, Derrick Bell, Dale Minami, Lucie White, Regina Austin, Ann Shalleck, Bill Ong Hing, Charles Ogletree, Paula Galowitz, Anthony Alfieri, Kathleen A. Sullivan, Shauna Marshall, Kim Taylor-Thompson, Ascanio Piomelli, Susan Bryant, Jean Koh Peters, Muneer Ahmad, Sameer Ashar, Alina Ball, Eduardo R. C. Capulong, Tara Ford, Patience Crowder, Daria Fisher Page, Martha Gómez, Brenda Montes, and Stephen Carpenter have dramatically advanced our knowledge of the infinitely varied world of collaborations. See Comment, *The New Public Interest Lawyer*, 79 YALE L. J. 1069 (1970); Leroy D. Clark, *The Lawyering in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary* 19 KAN. L. REV. 459 (1971); Ron Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L. J. 176 (1974); Derrick A. Bell, *School Litigation Strategies for the 1970's: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257 [hereafter Bell, *School Litigation Strategies*]; Derrick A. Bell, Jr., *Serving Two Masters*, 85 YALE L.J. 470 (1976) [hereafter Bell, *Serving Two Masters*]; Minami, *supra* note 8; White, *To Learn and Teach*, *supra* note 8; White, *supra* note 22; Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Regina Austin, “The

Black Community, " Its Lawbreakers, and a Politics of Identification, 65 SO. CALIF. L. REV. 1769 (1992); Hing, *Raising Personal Identification Issues*, *supra* note 8; Shalleck, *Constructions of the Client*, *supra* note 8; Sullivan, *supra* note 46; Shauna Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U.S.F. L. REV. 911 (1994-1995); Ogletree, *Quiet Storm*, *supra* note 8; Bellow, *supra* note 3; Taylor-Thompson, *Individual Actor*, *supra* note 8; Taylor-Thompson, *Politics of Common Ground*, *supra* note 8; Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997); Galowitz, *supra* note 8; Piomelli, *Appreciating*, *supra* note 8; Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyering*, 8 CLIN. L. REV. 33 (2001); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001); Ascanio Piomelli, *Cross-Cultural Lawyering By The Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L. J. 131 (2006); Ahmad, *supra* note 8; Ashar, *supra* note 8; Ball, *supra* note 8; Capulong, *supra* note 8; Fisher Page, *supra* note 8; Ford, *supra* note 8; Gómez, *supra* note 8; Hing, *Representing Unaccompanied Immigrant Children*, *supra* note 8; Montes, *supra* note 8; Piomelli, *supra* note 4; Carpenter, *supra* note 8.

For illustrations of still other literature I have used in training law students and lawyers, see, e.g., W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS (1903); AUGUSTO BOAL, THEATER OF THE OPPRESSED (Charles A. McBride & Maria-Odilia Leal McBride trans., Theatre Communications Group 1985)(1974); THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldúa eds., 1981); AUDRE LORDE, I AM YOUR SISTER: BLACK WOMEN ORGANIZING ACROSS SEXUALITIES (1985); AUDRE LORDE, SISTER OUTSIDER (1984); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1989); Regina Austin, "A Nation of Thieves": *Securing Black People's Right to Shop and Sell to White America*, 1994 UTAH L. REV. 147; Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); Stephanie M. Wildman with Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (Stephanie M. Wildman ed., 1996); LINDA STOUT, BRIDGING THE CLASS DIVIDE: AND OTHER LESSONS FOR GRASSROOTS ORGANIZING (1996); John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996); KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK (1997); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (June 1997); ANNE FADIMAN, THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A Hmong CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES (1997); DAVID ZUCCHINO, MYTH OF THE WELFARE QUEEN: A PULITZER PRIZE-WINNING JOURNALIST'S PORTRAIT OF WOMEN ON THE LINE (1997); FRED ROSE, COALITIONS ACROSS THE CLASS DIVIDE: LESSONS FROM THE LABOR, PEACE, AND ENVIRONMENTAL MOVEMENTS (2000); Michael Zweig, *Introduction—The Challenge of Working Class Studies*, in WHAT'S CLASS GOT TO DO WITH IT?: AMERICAN SOCIETY IN THE TWENTY-FIRST CENTURY 1 (Michael Zweig ed., 2004); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

In my own and in collectively-authored courses, and in scholarship about lawyering and teaching, I've aimed to feature collaboration of very diverse sorts—without lawyers, within and across communities, with diverse credentialed and un-credentialed problem solvers. See, e.g., Gerald P. López, *Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) [hereafter López, *Anti-Generic Legal Education*]; LÓPEZ, REBELLIOUS LAWYERING, *supra* note 8; Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996); López, *Shaping Community Problem Solving*, *supra* note 8; Gerald P. López, *A Rebellious Philosophy Born in East L.A.*, in A COMPANION TO LATINA/O STUDIES 240 (Juan Flores & Renaato Rosaldo eds., 2007);

We should make available and make use of courses (and other specially designed learning opportunities) that require students to be in role in simulated and real life situations. Of course we ought to include ambitiously taught interviewing and direct examination. But as importantly, we ought to include the many stages of planning work (estate, corporate, election), community outreach and education and mobilization, reorganizing corporations and municipalities, working with and through social media, policymaking and lobbying, mediating, practicing within intensely regulatory regimes. And, yes, more still to match the remarkable diversity of work lawyers do with others.

Find or put into action field experiences and writing projects that force students and teachers alike (and others still), from the diverse perspectives collaboration can entail, to examine the allocation of scarce resources; to evaluate possible options through which to proceed (various dispute resolution mechanisms; corporate buyout plans; child custody arrangements). In the course of collaborations, develop the capacity to learn from others, while together implementing and evaluating strategies that present themselves as a result of the collective process of framing a problem.

Open up to the extraordinary amount we can learn from one another in the course of deep and sustained collaborations. We can always learn from everyone we work with. But we perhaps learn most when we collaborate with others who see the world differently, go about their practices in ways different and even divergent from our own, regard as difficult and as easy challenges we might differently label. So vital is this learning from one another, in all collaborations, that my current students, with a wry appreciation, have come to call it “game stealing”—enhancing our own games by adapting what others think and feel and do that might never before have occurred to us.

To emphasize the significance of collaboration, consider just one example. In 1976, Derrick Bell published *Serving Two Masters* in the *Yale Law Journal*.⁴⁸ The article became prominent and then canonical for its frontal challenge to the ways lawyers autocratically governed the aims and methods of big “impact” cases like the desegregation lawsuits brought in the wake of *Brown v. Board*. Bell wanted to know how, in the name of justice, lawyers and their funders refused to pay close attention to members of diverse Black communities across the country who yearned for quality education for their children rather than the “integration” that White flight, judicial intransigence, and violent White mobilization had rendered increasingly unlikely if not downright impossible.

López, *Health of Undocumented Mexicans*, *supra* note 8.

⁴⁸ Bell, *Serving Two Masters*, *supra* note 47.

Bell's article enraged a significant number of civil rights lawyers and their supporters and funders of all races.⁴⁹ Yet because certain prominent lawyers and funders were White, Bell's message almost immediately became portrayed as an in-your-face calling out of The Man. Bell certainly did not flinch when probing whether the aspirations of large (disproportionately White) donors influenced the views and actions of LDF leaders and lawyers. And in *Serving Two Masters*, and even earlier, it's impossible to miss what would later get labeled his Interest Convergence thesis: Change will ensue if and only if it matches the needs of Whites. Even these depictions, however, miss just how deeply and sharply Bell aimed his critique of the "collaboration" practiced by many (most) LDF lawyers and NAACP members in particular.

Deeply immersed as a litigator in these desegregation suits, Bell knew from the inside just how intensely working-class and poor Black communities for some time had been insisting that LDF's strategies had both utterly backfired and completely ignored growing numbers of Black folks' views. While unafraid to target Whites and the power of dollars, Bell primarily aimed his message to other Blacks. He made explicit divides between poor and working-class communities and middle-class and upper-middle-class elites within Black life. He made explicit the embedded notion of "expertise" that seemed, at least in civil rights litigation, almost by default to adopt the views of lawyers over the views of clients.

But what most pained and incensed Bell was the mounting evidence that, consciously or otherwise, Black LDF lawyers and NAACP members practiced a condescension toward everyday Black communities (as genetically and culturally unable to lead their own lives and their own fight for freedom) that reproduced the very racial order at the heart of slavery and Jim Crow. That way of lawyering, of living life, defiled the idea of collaboration between equals and the very liberation struggle waged by Blacks across the globe. That would not do.⁵⁰

⁴⁹ Bell shared with me in many personal conversations that he was ostracized by LDF, a charge Julius Chambers insists he does not recall, though Bell never was again extended an invitation to the annual Airlie Civil Rights Training Institute.

⁵⁰ For only a small number of publications from a very large literature that, together with many years of working with Bell, shapes this summary, see Clark, *supra* note 47; Edmonds, *supra* note 47; Derrick Bell, *School Litigation Strategies*, *supra* note 47; Bell, *Serving Two Masters*, *supra* note 47; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1984); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars*, 6 ALA. C.R. & C.L. L. REV. 21 (2014).

c. *To Learn About “Local Communities,” “Geographically Dispersed Communities,” And The Intimate Relationship To “Global Forces”*

We cannot understand problems or how to work with others in devising strategies without learning about local and geographically dispersed communities. That’s true whether you’re a legal service lawyer in Boise, a policy wonk in Washington, D.C., or a corporate lawyer in Tampa. Local and geographically dispersed communities are where problems take root, where international, national, regional, and state dynamics manifest themselves, where people suffer injustices and take action to correct them, where problems and actions evolve over time.⁵¹

Learning how to learn about local communities includes developing both reliable methods for excavating historical patterns and contemporary practices and a down-to-earth savvy about interpreting what you discover. Yes, that means we must teach and learn how to find and consume published and unpublished studies (qualitative and quantitative) describing, for example, local housing markets, law enforcement policies, commercial and banking and transportation systems, print and telecommunications centers. Yes, that means we’ve got to keep our eye out for the little-publicized documentary and television special that traces the origins or takes us inside contemporary life of this or that neighborhood.

And, yes, that means we have got to learn to get out of the office—whether as a solo practitioner or a management consultant or a government employee—to check out what’s going on in family farm country, in small towns, in suburban sprawl, in “the streets” of urban centers. That in turn means learning how to ask questions, how to make room for answers, how to follow up—and, perhaps most importantly, how to discerningly find the right people with whom to ally ourselves.

But when the best of clinical programs insist we have got to learn to find and consume published and unpublished studies describing lo-

⁵¹ Problem solving literature—about politics, markets, and civic life—emphasizes now more than ever before the relationship of learning locally and sharing across boundaries. Again for only the tiniest sample of what for years has contributed to trainings I offer inside and outside university boundaries, see Andrea Cornwall & John Gaventa, *From Users and Choosers to Makers and Shapers: Repositioning Participation in Social Policy* (Inst. of Dev. Studies, Working Paper No. 127, 2001); Susan Helper et al., *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443 (2000); Anne Marie Goetz & John Gaventa, *Bringing Citizen Voice and Client Focus into Service Delivery* (Institute of Development Studies, Working Paper No. 138, 2001); Ricardo Hausmann & Dani Rodrik, *Economic Development as Self-Discovery* (2002), https://wcfia.harvard.edu/files/wcfia/files/525_rodrik1.pdf.

cal social conditions, for example, they do not and should not mean *just* during formal law school training. Reading widely and deeply about the places where we find ourselves working is not just a course assignment. It's a never-ending part of first-rate lawyering. When we say, "Keep your eye out for the ignored documentary and television special," we do not mean just every so often when the mood strikes. Tracking what the big and small screens offer should be as habitual as our morning cup of java or black tea or a Califia Cold Brew.

And when we say, "Get out of the office," we do not mean get out of the office in order to attend yet another meeting of elites or even allies or even grass-top leaders. We mean get out of the office to learn about what all people are doing, what all people are thinking, about political life in the broadest sense of honor and justice. To learn about "what all people" do and think and feel is impossible, of course. But aiming high helps eliminate the possibility of doing little or nothing at all, a routine incredibly familiar to most lawyers. When we say "get out," that's true of finding out about the rural and suburban and urban expanse called the Rust Belt and every bit as true about discovering what is variously true of the diverse Asian Pacific Islander populations living in the greater Seattle area. For all the important patterns discernable, by getting out we can discover the different particulars in every community as essential to our capacity to attack problems as anything we might do.

Do not for a moment, though, imagine all this is possible only "in theory." Practitioners and clinicians—and all those working with them, especially students and co-workers—daily demonstrate how we can all do what some would pretend we cannot in dealing with geographically dispersed communities. Think of Brenda Montes working with immigrants spread out across greater Southern California. Consider Tara Ford driving her car to clients and their caretakers and their communities in every imaginable part of the larger-than-you-might-think state of New Mexico. And picture Meg Satterthwaite, with her characteristic mix of humility and daring, trying with her students to practice rebellious lawyering "from afar" with communities living in Haiti and other parts of the globe.⁵²

Even after exhaustive searches, sometimes available resources may fall short—may even fail entirely—in helping us learn what we most need to understand. That's true of less well-known and very well-known places. We may be intensely in need of information about certain residents, certain neighborhoods, and even boroughs in New York City. If we arrived in NYC in 1999—and even perhaps in 2018—

⁵² See Ford, *supra* note 8; Montes, *supra* note 8; Meg Satterthwaite, *Rebellious Lawyering from Afar* (Power Point presentation on file with author) (2016).

far too little could be found, even after exhaustive search, about the growing Mexican immigrant population, about the problems faced by and the problem solvers available to residents of East Harlem and Harlem, Bushwick and Bedford Stuyvesant, Chinatown and the Lower East Side, and about particular swaths of neighborhoods in Staten Island. To generate the knowledge we and others so badly need may then require that we create, implement, and evaluate the data produced by targeted empirical studies—even about New York, a city as studied as it is lionized.⁵³ Yes, justice-seeking problem solving demands as much.

We teachers and students should prepare ourselves well. Create and take advantage of educational opportunities (in and outside the law school) that regard learning about local communities as central to responsible lawyering. Offer and search out readings, simulations, writing projects, and field experiences that require students (often with teachers) to learn the nitty-gritty of how power operates, the details of how strategies have influenced policies and routines, the first-hand accounts of how residents variously perceive how things happen and how they might change. Provide and enroll in courses and field-work projects that train in rigorous empirical work, enabling us to design and put into action our own studies as well as digest and assess the research produced by others. Look for training that cultivates an endless curiosity about what immediately surrounds you, because those communities are endlessly changing, and a healthy skepticism about intervening without reliable local knowledge.

d. To Imagine And Implement Varied Strategies And Ensembles Of Strategies (Across Legal, Political, Economic, Social, And Cultural Realms)

Resourceful lawyers generally decline to rank strategies in advance—to label one necessarily more effective than others. Whether they're planners, transaction lawyers, litigators, mediators, lobbyists, or policy theoreticians, they appreciate the limits as well as the promise of what they happen to do. In collaborating with others, they focus on the particular problem, what might work to solve it, and which practitioners (lay and professional) are best equipped to take the lead and which best equipped to help out in less central ways. Their assessments are always ad hoc, concrete, and provisional. They never design any strategy or constellation of strategies without some ambivalence about how well it suits the task at hand. And they remain alert to the

⁵³ For a tiny illustration of studies undertaken to fill such voids in our knowledge of New York City, see López, *Shaping Community Problem Solving*, *supra* note 8; López, *Health of Undocumented Mexicans*, *supra* note 8.

need to alter or even abandon strategies as the circumstances dictate.⁵⁴

Developing a penetrating strategic sense is a lifetime assignment, one we have all already begun to pursue simply by virtue of our everyday experiences. We should use law school, though, to enhance what we already know and to discover what we have not had much opportunity to think about and nurture. Provide and take advantage of training specially designed to teach how to plan, transact, negotiate, litigate, mediate, lobby, educate, mobilize, organize, form social movements, and work with the media and through social media.

Explore competing theories of how power influences the choice of strategies, how strategies might be conceived and executed, how existing capacities give life to or frustrate strategic planning, how lawyers might best serve strategic ends. Practice doing everything necessary to execute strategies—identifying what particular capacities we need and focusing on their conscious development. Do not just practice them a little. Practice them as much as possible, in simulated and real life settings, with the aim of improving both what we're not so good at and what we may very well be gifted at doing.⁵⁵

Closely study what may already be available to consume. Pour over Stephen Carpenter's description of FLAG (Farmers' Legal Action Group, Inc.), focusing on the incredibly diverse strategies those working there develop and, perhaps even more frequently, proudly borrow from their clients and client communities. Examine closely Bill Ong Hing's exploration of the Eric Cohen-led ILRC (Immigrant Legal Resource Center), gaining a handle on just how magnificently the ILRC staff and its clients and its collaborators improvise as situations demand, sometimes developing entirely novel strategic ensembles required by necessity. And pour over news clippings and television clips piecing together the strategic wisdom of the Nevada ACLU during the years when the astonishingly gifted, persevering, and resilient Gary Peck served as the Executive Director.⁵⁶

Or get inside the relationships cultivated by—and the spirit of—Shauna Marshall. As a lawyer, executive director, clinician, and dean. Begin to recognize the strategic genius that animates her collaboration

⁵⁴ Together with many others, I have long advanced this view. See LÓPEZ, *REBELLIOUS LAWYERING*, *supra* note 8; Gerald P. López, *A Declaration of War by Other Means: Disabling America: The 'Rights Industry' in Our Time*, 98 HARV. L. REV. 1667 (1985).

⁵⁵ Such work can take the form, for example, of “ends-means thinking” that Tony Amsterdam has stressed over the years. See Anthony G. Amsterdam, *Clinical Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

⁵⁶ See Carpenter, *supra* note 8; Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL'Y 265 (2008).

with remarkable numbers of people and organizations, routinely examining what off-the-shelf strategies might well be customized (don't remake the wheel) and breathing into life as necessary novel strategies and tactics when nothing else works (make up what you must). At least for a while, and now and then for longer than a while, Marshall does what most of us find as daunting as any challenge we face: She changes institutions. The imagination at work can feel intimidating. Most of all, though, like so many other brilliant strategists (including clinicians like Bellow, Charn, Eagly, López Beltran, Stevenson, Thompson – to name just some), sweat labor combines with collective creativity to picture what others cannot and to figure out ways to get there.⁵⁷

e. To Monitor And Evaluate The Effectiveness Of Strategies As Pursued And Problems As Framed

A superb lawyer must learn to monitor and evaluate whether strategies pursued bring about the desired change. Ambitious and effective problem solving demands as much. Does the new baseball stadium actually provide the jobs and revenue—all the “multiplier effects” promised by its developers? Does the community bank we may have helped design actually improve the capacity of low-income residents and small business owners to borrow much needed capital? Does the clean water legislation we may have successfully helped push through actually do anything to rid water of dangerous pollutants and, if so, at what cost? Did our “successful” class action lawsuit actually change the investment practices of the trust fund managers? Does the civilian review board we helped create and staff effectively deter police abuse of local residents? Does the community outreach program we helped implement effectively educate immigrants about the current impact of proposed new federal, state, or local legislation? Did the fellowship project we funded achieve its stated purpose?⁵⁸

⁵⁷ See Marshall, *Rebellious Deaning*, *supra* note 8.

⁵⁸ Over the decades, clinicians and lawyers have learned from many about how best to evaluate strategies implemented. For me one important source has been the work of public health specialists, including those leading and working with the Center for Urban Epidemiologic Studies in New York City. For a small sample of publications describing what I regard as the Center's rebellious approach to public health, see Barbara A. Israel et al., *Challenges and Facilitating Factors in Sustaining Community-Based Participatory Research Partnerships: Lessons Learned from the Detroit, New York City and Seattle Urban Research Centers*, 83 J. URB. HEALTH 1099 (2006); Nicholas Freudenberg, *Case History of the Center for Urban Epidemiologic Studies in New York City*, 78 J. URB. HEALTH 508 (2001); Sandro Galea et al., *Collaboration Among Community Members, Local Health Service Providers, and Researchers in an Urban Research Center in Harlem, New York*, 116 PUB. HEALTH REP. 530 (2001); Donna L. Higgins et al., *CDC Urban Research Centers: Community-Based Participatory Research to Improve the Health of Urban Communities*, 10 J. WOMEN'S

These questions can be as difficult as they are important to answer. After all, societies, institutions, and relationships evolve in cycles, taking their definition from and giving rise to ever-evolving strategies and counter-strategies. New or recycled strategies often render useless some previously successful line of attack, and the cycle begins again, leading along the way to new and improvised ways of seeing the world and trying with others to change it. It's always difficult to determine exactly where we are in any cycle, whether current strategies are working, and for how long. The very difficulty of knowing with confidence what's happening and where we are emphasizes the importance of stepping up to the challenges—however indeterminate and even perhaps indecipherable—rather than shirking as if “waiting it out” necessarily tells us when a cycle has run its course.

By and large, lawyers have not been very careful about examining the consequences of our own efforts. Perhaps this state of affairs only reflects time and resource constraints. Like many clients, lawyers may simply be too overwhelmed just getting by day to day to undertake the sorts of studies necessary to evaluate their own strategies. At times, however, the habits of lawyers also seem to reflect a failure to appreciate how central detailed feedback is to effective strategic thinking and successful problem solving—maybe a belief we are above such feedback. Or perhaps we are sometimes afraid of what we might find; after all, who wants to look back on her work and find that the solution she advocated for so zealously turned out not to be a solution at all? For whatever reason, none of them good, too many lawyers fail to take advantage of those studies of our work developed by think tanks, academic institutions, and government agencies. For whatever reason, many law offices fail to integrate into their strategic thinking the relative successes of their own past efforts.⁵⁹

In any event, our job is certainly not to repeat earlier generations' failures, whatever their causes. Instead, teachers and students in and around law schools must equip ourselves to study—as a regular matter, as part of everyday practice—the impact of various strategies. Provide and seize diverse training during formal years in law school (and of course beyond). Through some combination of courses, inde-

HEALTH & GENDER BASED MED. 9 (2001); Donna L. Higgins & Marilyn Metzler, *Implementing Community-Based Participatory Research Centers in Diverse Urban Settings*, 78 J. URB. HEALTH 488 (2001). See also East Harlem Community Resource Guide, April 2012, <https://www1.nyc.gov/assets/doh/downloads/pdf/dc/east-harlem-resource-guide.pdf>; Institute for Urban Health, The New York Academy of Medicine, <http://www.nyam.org/institute-urban-health/> (last visited Feb. 2, 2018).

⁵⁹ Of the various studies of the work of lawyers, some do take on pronounced significance. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

pendent study programs, and field experiences, come to grips with what the historical record may reveal about the demonstrated capacity to change social life. Develop methods for assessing the quantitative and qualitative impact of strategic actions. And, importantly, try these critical methods on for size. In role, participate in evaluating the successes and failures of our own work and that of others.

Consider only one example—but a big one, in terms of its importance and its price tag.

To control soaring health care costs, many U.S. corporations have rolled out wellness programs. Executives have believed encouraging employees to adopt a healthy lifestyle would lead to fewer trips to the doctor and fewer missed workdays. Roughly three-quarters of HR professionals said their organizations offered some sort of a wellness program in 2014. And more than two-thirds of these Human Resources officials reported that their programs were “somewhat effective” or “very effective” in reducing health care costs.

In thinking as they do, these corporations are hardly outliers. For decades, people have heard and many have come to believe that adopting a healthier lifestyle would lead directly to improved health. The fundamental notion can be traced to studies conducted half a century ago. Public health specialists sought to identify particular behavioral risk factors (say, smoking or physical inactivity) that influence mortality and illness. They concluded—and by now it has become conventional wisdom—that “fixing” our lifestyle is the right approach to improve the health of employees.

Yet a closer look at the feedback from all the available studies casts considerable doubt on this very way of framing and addressing the problem. A 2013 RAND Wellness Programs Study, targeting about 600,000 employees at seven large U.S. employers, found wellness programs had little, if any, immediate influence on the amount employers spend on health care. In a follow-up study of PepsiCo’s wellness program, the disease management component of the program produced some return while the lifestyle component did not reduce costs by any significant amount. Yet the percentage of employees enrolled in the lifestyle component of their employers’ wellness programs (covering weight reduction, smoking, and the like) dwarfed by sixfold the percentage enrolled in the disease management component (designed to improve control of chronic conditions).

In evaluating these data, one highly respected epidemiologist, Sandro Galea, thinks the conventional wisdom about wellness programs may reflect a problem poorly represented, leading in turn to strategies doomed to fail. A focus on trying to “fix” lifestyle—the premise driving many corporate wellness efforts—incorrectly elevates the

role of personal agency in health. Yet, says Galea, we know enough to question this focus. It is not at all evident, despite conventional wisdom, that changing lifestyle by itself works to reduce or minimize much disease. Targeted efforts at reducing the onset of gout and of heart disease through individual lifestyle changes offer negligible to no proof that the strategy works.

Indeed, the idea that we have the capacity to predict individual health to any meaningful extent is, says Galea, likely mistaken. Because a person has a gene that increases cancer risk (the premise of genomics applied to cancer prevention) does not mean cancer will develop. The development of disease is far more complex than simple cause and effect—turning, instead, on the interaction between many biological and environmental factors. The unpredictability of individual risk explains why we all know people who smoke or are obese and are quite healthy, and, at the same time, why we know people who have fallen ill despite the most “virtuous” behavior.

Our behaviors can only be understood and altered only in context, insists Galea. By context, he means not only where we live but, to name just two more forces, within what cultures and at what income level. For example, 92 percent of the global population lives in places where pollution levels exceed widely accepted limits, affecting both indoor and outdoor environments. In 2012, approximately 6.5 million deaths were linked to this polluted air. Lifestyle changes, says Galea, will make little to no difference on our lung health if we live in a place where we are breathing polluted air. Much the same is true of culture. The fact that smoking is no longer an accepted behavior, at least among some groups, is tied to the sharp decline in smoking in the U.S.

Income shapes all aspects of our life, from how we live to where we live and who we live with. And, understandably, it remains a tremendously consequential driver of wellbeing. Worldwide, children who are born into the poorest 20% of households are almost twice as likely to die before reaching age five as children born into the richest 20%. Income affects wellbeing through its link to food access, neighborhood safety, educational advantage, and quality of accessible healthcare.

In framing the problem far more accurately, Galea urges us to shift our focus away from individuals, and individual lifestyles, toward programs that target the full set of factors that shape the collective health of populations. Instead of focusing on employee wellness, we may focus on community wellness. Think of the wellbeing not just of employees but of the surrounding population from which they are drawn. For example, even healthy employees often miss work when their children get sick or their parents need care. But in a generally

healthy community, there would be fewer such occurrences.

Galea offers several examples. Consider asthma, afflicting about 25 million Americans and costing the country \$56 billion dollars annually in medical costs, lost work, missed school days, and early deaths. While the work of the health care sector can certainly go a long way towards reducing that burden, he says, we can do just as much, and likely more, by addressing the environmental factors that trigger asthma, factors that are beyond the control of any one individual or corporation.

Or consider the sharp rise in obesity, which costs the country an estimated \$210 billion annually in health care, and contributes to the \$4.3 billion annual cost of days absent from work. Why would Americans be eating so much more today than they did 30 or 50 years ago? Because, among other factors, over the past 20 years, portion sizes for readily available foods have almost tripled, while the price of calorie-dense, nutrient-poor foods has dropped. So though we can certainly counsel individuals to eat less, we could make far more headway by looking to the provision of unhealthy food that contributes to obesity to begin with, or into building environments that favor physical activity over sedentary transportation.

Galea's no pie-in-the-sky problem solver. Defining health problems in this way may be far more accurate and fruitful—but, he openly acknowledges, exceeds what most corporations regard as within their orbit. Engaging health requires corporations to collaborate with other organizations, including many outside their industry sector, and with other entities that may seem still further out there. Familiar or not, desired or not, such a coordinated effort is necessary if we want to make real progress toward having healthier employees and, as a result, healthier businesses and a healthier economy.⁶⁰

f. To Design And Manage The Institutions Through Which We Work And Live

We cannot understand how lawyers might more effectively tackle problems unless we study the design and management of the offices, organizations, coalitions, networks, and institutions in which we inevitably work. That proves true no matter how exactly we structure our problem-solving practice. How we make use of time, resources, and personnel shapes our relationships, our ability to get things done, and our satisfaction with what we achieve. Of course, individual talent, skill, and dedication matter. But certainly over the long haul, we are

⁶⁰ See Sandro Galea, *What Corporate Wellness Programs Get Wrong About Health*, FORTUNE (Oct. 4, 2016), <http://fortune.com/2016/10/04/corporate-wellness-programs-health/>.

ultimately only as good as we collectively equip ourselves to be. The design and management of offices, organizations, coalitions, networks, and institutions play a hugely influential role in determining the nature, quality, and trajectory of work.

Perhaps this is all self-evident. Indeed, many respond to such observations with a “what else is new?” shrug. But these reactions make all the more puzzling why legal education does not already emphasize sustained attention to design and management questions. It is hardly that these questions are foreign to professional schools or professions. Graduate management schools offer a wide variety of courses and produce mountains of scholarship on the organizational structure and practices of business enterprises. And dissimilar for-profit businesses—from monstrous global corporations to “mom & pop stores”—have come to treat such issues as central to their survival and growth.

In fairness to some law schools and some scholars, the organizational structure of corporate law firms has become a topic of increasing interest. Yet the various offices, organizations, coalitions, networks, and institutions within which lawyers work remain far too frequently outside the bounds of formal legal training, in and after law school. If we all really do understand how much our work environments shape what we do in the world, why then don’t we raise design and management questions everywhere we find ourselves—in law schools, at conferences, in law offices, and at coalition meetings?

We must change this state of affairs. We must offer and seek out those learning opportunities where design and management issues already get treated as centrally important. But we cannot stop there. Why not make such issues central to every situation where the nature, quality, and satisfaction of work matter? Certainly the promise of such a shift is already there to be found. Some training opportunities in law schools make these questions central. Consider James Liebman’s Center for Public Research and Leadership (CPRL). Combining interdisciplinary study and practicum training, Liebman and his students—and the diverse span of institutions, communities, and individuals with whom they work—offer us an evocative illustration of how all of legal education might pursue such aims:

The mission of the Center for Public Research and Leadership (CPRL) is to revitalize public education while reinventing professional education. CPRL conducts rigorous coursework, skills training, and research and consulting projects to ready talented graduate students for challenging twenty-first century careers enhancing the education sector’s capacity to improve the outcomes and life chances of all children.

Currently, a serious talent and leadership gap threatens the ca-

capacity for change in U.S. public education. Education and allied organizations need leaders capable of transforming information and experiences into action for constant and rapid learning by those leaders themselves, the educators and other adults with whom they work, and the children, families and communities they serve.

At the same time, many graduate students enter professional programs hoping to help transform public education, yet find that their programs do not provide the experiential problem-solving skills they need to meet their aspirations and those of the forward-thinking education sector organizations they hope to join. Nor do their programs provide career services designed to maximize their access to those organizations.

CPRL fills these gaps by immersing talented graduate students in:

- *The study of P-12 organizational design, democratic accountability, and transformation*
- *Intensive training in a range of twenty-first century team-based problem-solving skills*
- *High-priority research and consulting projects on behalf of public- and social-sector education organizations nationwide*

Supervised by CPRL's exceptionally talented and experienced faculty and Engagement Managers, CPRL's high quality, low cost professional services are highly rated by its clients and run the gamut from diagnostic performance evaluation and continuous improvement to content areas such as personalized and socio-emotional learning, teacher preparation and retention, early childhood education and school integration, to traditional strategic and management support.

Armed with this rigorous preparation and aided by targeted career services, a majority of CPRL graduates embark on promising careers managing change-minded P-12 and allied organizations. These include state and district departments of education, charter management organizations, innovative non-profits, advocacy organizations, and many others.

To date, CPRL has completed more than 100 consulting projects; formed partnerships with two dozen professional schools; and prepared over 300 students, with over 70% of its graduates serving education and allied organizations.⁶¹

And outside of law schools, in the hard-bitten world of over-worked lawyers, there are extraordinary small for-profit offices, massive non-profit organizations, statewide bureaucracies, middle-size

⁶¹ Columbia Law School, Center for Public Research and Leadership, About CPRL, <http://www.law.columbia.edu/public-research-leadership> (last visited, Jan. 27, 2018). For just a sample of Liebman's scholarship about design and management, see James Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 NYU. REV. L. & SOC. CHANGE 183 (2003).

firms, and global corporate firms that have made design and management issues central to their mission and their idea of effective practice. Think only of Tsui Yee and Law Offices of Tsui. H. Yee, P.C. in New York City; Bryan Stevenson and Equal Justice Initiative in Montgomery, Alabama; Tara Ford and Liz McGrath and Pegasus Legal Services for Children in Albuquerque, New Mexico; The Team of Founders (Jim Massey, Lynn Hayes, Sarah Vogel, and the late Dale Reesman) and Current Leaders (including Stephen Carpenter) and Farmers Legal Action Group in St. Paul Minnesota; Dale Minami and Don Tamaki and Miami Tamaki in San Francisco, California; Guy Halgren and Sheppard Mullin with offices in San Diego, Beijing, Brussels, Century City, Chicago, London, New York, North County San Diego, Palo Alto, Seoul, Shanghai, and Washington, D.C.⁶²

We within legal education should follow the lead of such lawyers and organizations, not because they claim to have any one-size-fits-all blueprint, but because they endlessly examine whether their work environments give life to the practices they hope will solve vexing problems, provide a healthy place for their employees to labor, and, yes, change the world for the better.

g. To Learn How To Learn (From Experience And In Every Which Way) Throughout The Course Of A Problem-Solving Career

Problem solving is something we all already know how to do and something we can always get better and better at—along some dimensions, wildly better at. The tired notion that equates expertise with having little or nothing to learn must be discarded, buried, burned. We must cultivate, instead, an image of the expert that makes always learning central to what it means to be any good at all, much less great.⁶³

In some ways, this challenge has as much to do with popular culture as legal culture. But insofar as they intersect, we must not shy

⁶² See <https://www.yeeimmigration.com>; <https://eji.org/bryan-stevenson>; <http://pegasus-law.org/staff/>; <http://www.flaginc.org/about/our-team/>; <http://www.minamitamaki.com/>; <https://www.sheppardmullin.com/ghalgren>.

⁶³ During the past decade, as in earlier eras, some emphasized the importance of learning to learn across the course of a career as a pivotal aspect of a transformed legal education. See, e.g., William Berman, *When Will They Ever Learn? Learning and Teaching From Mistakes in the Clinical Context*, 13 CLIN. L. REV. 115 (2006); Julie A. Oseid, *When Big Brother is Watching (Out For) You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues From My Mentor*, 59 S.C. L. REV. 393 (2008); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decision Making: Lessons From Psychology and From Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549 (2009); Gail B. Agrawal, *Foreword (Symposium: The Future of Legal Education)*, 96 IOWA L. REV. 1449, 1451 (2011); Laurie Barron, *Learning How to Learn: Carnegie's Third Apprenticeship*, 18 CLIN. L. REV. 101 (2011).

away. Not many courses in law school go explicitly by such names as “Learning to Learn” and “From Novice to Master”—though courses elsewhere in and outside the university do.⁶⁴ We can make it our individual and collective job to investigate what teachers and students, what materials and methods, what experiences treat always learning as elemental to what any good problem solver believes and practices. And we can both avail ourselves of existing training and, obviously, develop new and ambitious and effective training about how to learn even and especially as the years unfold.

From the outset, and through today, the best of clinical legal education (and all the realms contributing to its development) has emphasized the importance of law schools consciously training students how imaginatively, resourcefully, and effectively to learn over the course of their career. We can find this exhortation in the teaching of everyone from Aaronson to Abel to Abernathy to Achiume to Adler to Aiken to Alfieri to Alvarez to Amsterdam to Anabtawi to Anderson to Ashar to Austin to Ball to Barnhizer to Bechtol to Bell to Bellow to Binder to Binder to Bergman to Bisharat to Boland to Boswell to Brudney to Bryant to Bruner to Burciaga to Burns to Burns to Bussel to Camp to Capulong to Cazares to Champagne to Charn to Chemerinsky to Cohen to Cole to

Crowder to Dalton to D’Amelio to Davis to Davis to Derian to Dickson to Donald to Eagly to Elke to Elson to Ely to Fendall to Fisher Page to Fei to Francois to Ford to Riedman to Futterman to Galowitz to Gilbert to Goldberg to Goldfarb to Gómez to Goodman to Grillo to Guggenheim to Hamada to Hawver to Hertz to Hing to Holmquist to Horne to Ivey to Johnson to Jones to Kadushin to Kennedy to Kennedy to Kennedy to Kim to Klee to Kotkin to LaRue to Lesnick to Letwin to Liebman to López Beltran to LoPucki to Mabry to Marshall to Martínez to Martínez to McFarlane to Mendez to Mendoza to Mersky to Michelman to Milstein to Minami to

Mirsky to Mónica to Montoya-Lewis to Moore to Moulton to Nelson to Nerney to Ogletree to Patterson to Peck to Piomelli to Prager to Quigley to Rabb to Ramon to Rivkin to Rubin to Sander to Santiago to Satterthwaite to Schatz to Schwartz to Sexton to Shalleck to Shiffrin to Steel to Steinglass to Stevenson to Stone to Sullivan to Taylor-Thompson to Thompson to Tolbert to Tong to Trautman to Valdes to Varat to Warren to Wilkins to White to Wizner to Wonsowicz to Wortham to Wright to Wright to Yamamoto to Zehn to Zuni Cruz. And we can find the same lessons in how they have con-

⁶⁴ Of the scholars producing a large literature, certainly Anders Ericsson is among the most influential. See ANDERS ERICSSON & ROBERT POOL, *PEAK: SECRETS FROM THE NEW SCIENCE OF EXPERTISE* (2106).

ducted themselves over the course of a career—how they practiced what they preached.

When I think of Tom Adler, Ralph Abernathy, Derrick Bell, Gary Bellow, Haywood Burns, Melinda Binder, Cecilia Burciaga, Jerry Bruner, Luke Cole, Skye Donald, Tom Elke, M. Shanara Gilbert, Trina Grillo, Napoleon Jones, Linda Mabry, Miguel Mendez, Chet Mirsky, Dorothy Mónica, Sister Mary Nerney, Kathleen A. Sullivan, Donald Trautman, and Bill Warren, as I often do, I see the excitement on their faces, the joy in their eyes, as they came to appreciate something fresh was dawning on them. For them, learning was a turn-on. If they happened to be doing things pretty well, they wanted to know why. If they happened to have had things quite wrong, they wanted to know even more. They delighted in knowing we can get better.

What I feel honored to have experienced in Adler, Bell, Burciaga, Bellow, Binder, Bruner, Mabry, Mendez, Mónica, Nerny, Sullivan, Warren—and in the others I’ve named, and in the many wonderful people I’ve not—I sensed in one encounter with John Hartford. A renowned and endlessly sought-after musician, a legend in bluegrass and country music, Hartford could play the fiddle and the banjo with the best ever. He could and did sing, alone and with others. And he could write wonderful songs, some hauntingly beautiful. “Gentle on My Mind” is the work of a gifted poet.

Decades ago, hanging out, I played a full night’s worth of music with about five people in a tiny room in a friend’s small apartment. One of the folks was Hartford. He had only his fiddle; he knew only one other person in the room; he knew only a small number of the songs (many original and many obscure compositions) the others of us would play. Not much was said that night. It was almost all music, one song leading to another, folks taking turns with their voices or on their other instruments.

Hartford never took the lead. Instead, he would simply listen for a bit to a song, then gently weave in his fiddle, always careful to be a complement to whatever the lead singer or instrumentalist was trying to make happen, playing off everyone in the room. To experience Hartford just wrap his fiddle playing around what the rest of us were doing proved magical. From my teenage years on, I had known some first-rate studio musicians and some well-known groups. They lit me up and taught me lots. Hartford, though, was other-worldly. He was quieter than low-key, more generous than generous, and an utterly brilliant musician. He always enhanced what the rest of us were doing in that room that night, in ways that made me appreciate why everyone—in every line of music—wanted to experience the high of playing

with him.

When Hartford died of cancer in June 2001, Neil Strauss' obituary appeared in the *New York Times*.⁶⁵ Like the best of obituaries, the entire tribute is worth a read. Or, if you're like me, fairly routine reads. Hartford had many sides. He had studied art, had worked as a commercial artist, a disc jockey, and became a licensed riverboat pilot. He could be very private, now and then public, and had done some acting and some voiceovers (including for Ken Burns' "Civil War"). And he had recorded a ridiculously large number of albums, before and especially after he got famous. And always he was collaborating, with famous folks and not-so-famous folks.

Strauss describes Harford as already having been diagnosed with cancer in the 1980s, and "nonetheless regularly invited local musicians over for bluegrass picking parties, where he would play violin and regale them with his homespun personal philosophy, riverboat adventures, and tales of bluegrass masters. Even after he lost control of his hands after a series of engagements in Texas in the spring [of 2001], he continued to host picking parties, where he watched instead of played." I could easily imagine the picking parties. I am only left to wonder how the same man who said no more than thirty words that one night he played with us strangers could readily "regale" people in his own home. Wish I could have been there.

But one passage in the obituary always sticks with me, about Hartford and so many I've known wonderful at what they do. Straus writes:

Surprisingly, Mr. Hartford always considered himself a mediocre musician. He continued to release records like "Retrograss," with Mike Seeger and David Grisman, and was working on a book about the blind fiddler Ed Haley.

But when he learned several years ago that death was approaching, he became obsessed with practicing, returning to his first instrument, the fiddle. He realized that what had always attracted him to both riverboats and music was craftsmanship, and worked on becoming as good a craftsman as possible in the time he had left.⁶⁶

In my judgment, and more importantly in the judgment of the best musicians, Hartford was crazily wrong in his self-assessment. But his illness made him appreciate all the more what mattered. What always attracted Hartford to many things he did, especially music, was working on becoming as good a craftsman as possible in the time he

⁶⁵ See Neil Strauss, *John Hartford, Composer of Country Hits, Dies at 63*, N.Y. TIMES (June 6, 2001), <http://www.nytimes.com/2001/06/06/arts/john-hartford-composer-of-country-hits-dies-at-63.html>.

⁶⁶ *Id.*

had. Those bluegrass picking parties he hosted when he was very sick must have been about the excitement and joy of playing with and learning from others. And just maybe that night he spent with us decades ago was about that too. Even with unfamiliar folks, hardly in the same league as musicians, Hartford was about helping make music and learning along the way. A craftsperson as artist, an artist as craftsperson.

* * *

To be sure, on a regular basis, different specialties appear to require a greater command over some capacities compared to others. Great courtroom lawyers ought to be good on their feet. Great deals lawyers ought to be able to craft and review language with the (various sorts of) precision required. Great children's advocates ought to be able to listen well. Yet far too much can be made of these capacities and far too little of others. If a trial lawyer at the Public Defender Service cannot size up a situation well, being an impressive-sounding speaker does little good persuading a jury. If a transaction lawyer at Kirkland cannot negotiate particular deal points others would have realized, precision drafting proves to have severe limits. If an advocate for a child Pegasus Legal Services for Children represents cannot effectively play the endless power games of New Mexican state and local politics, all the great listening imaginable will help identify only the gap between what was needed and what was achieved.

Rather than teach these capacities in one-off and otherwise in irregular ways (say, stressing writing on first-year memoranda, speaking in moot court, listening in interviewing courses), rather than half-burying or even never explicitly labeling key abilities (say, sizing up a situation), rather than presuming students already know or must figure out on their own "certain fundamentals" (say, the standards by which others will regard a lawyer as "reading discerningly"), the best of clinical programs have recognized the need to surface these capacities, to define and illustrate them in various illuminating ways, and to develop conventional and experimental methods for drawing out *what already is in students* and *what must be developed and refined*. They have built learning opportunities both focused and demanding. And, over time, especially drawing upon a wide assortment of influences and insights, students and teachers and others have deepened and broadened and sharpened these methods and the aims achievable through them. We in legal education are already able to provide this training and to improve—in conscious and shared ways—as the years unfold.

That it can (and must) be done does not mean it's not difficult. To train students in such capacities means cutting sharply against the

grain, counteracting the tacit image of lawyering that now plays at a low hum behind all of legal education. Though law and not lawyering is front-and-center in modern law schools, don't legal educators nevertheless send messages?⁶⁷ There is no such thing as neutrality in any space, let alone one with such a mystique and a reputation as lawyering. Attuned to this background hum, students graduate thinking that lawyers need look from no perspectives than their own and their clients' to understand problems. That collaboration is pointless and to be avoided. That legal research will tell them all they need to know. That the menu of strategic options is necessarily limited to the legal and that legal solutions are inherently effective solutions. That organizational structure is a limited menu, perhaps containing only large and small firms. That they need know no more than they learn in law school and in their field of expertise. Graduates go out into a professional world that far too often (and erroneously) agrees with them on each of these points. And so many are never truly superb.

Some may think I'm inventing or overblowing the background hum—that no such messages are being sent. But are we really going to claim legal education is agnostic on these issues? Surely we don't claim the profession is. Every law student who has been to a job interview can tell you otherwise. Indeed, even in such a self-proclaimedly sacred space as public interest fellowship applications, the message is clear: Come to the application process knowing all the answers. "What is your two-year plan to resolve issues around crimmigration in Los Angeles? What actions will you take at three months, six months, nine months, a year?" Any applicant bringing an "I don't know" to the process will find himself out of the running before he knows it.⁶⁸

Fortunately (in the narrowest, instrumental sense), applicants to both private sector jobs and public interest fellowships for three years have been socialized, perhaps even formally trained, to give the overblown answers for which those in charge are looking. Those few students who've had the benefit of the best of clinical courses are able to see through it all and be aghast. They either give the answers sought to get in the door, or they abandon the fellowship hunt in favor of greener, but less certain, pastures.

Are these the sorts of lawyers we want to relegate our students to being? Are law school graduates untrained in these capacities the

⁶⁷ For elaborations of how a traditional curriculum focusing on law inevitably sends strong messages about lawyering, see, e.g., Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157 (1989); López, *Anti-Generic Legal Education*, *supra* note 47; López, *supra* note 31.

⁶⁸ See Robert Ian Stringham, Reflection #6 for Rebellious Lawyering (Jan. 9, 2018) (on file with author).

sorts of lawyers we want to turn loose on the world? Why wouldn't we want at least to offer students a choice and a chance? Help them build the capacities they'll need to be truly superb? To be sure, unless and until this sort of education becomes standard, having these knowledge stores will not immunize students from having to deal with the top-down, lawyer-as-expert conceit that props up so much of the legal profession. But they'll be far better off—and far better lawyers.

III. DEFINING A FRESH AMBITIOUS TEACHING AND LEARNING

With their focus on lawyering, especially with the problem-solving developments in formally unrelated fields of work, modern clinicians (and some non-clinicians) and all their students did not take long at all to openly challenge how legal education had long defined ambitious, rigorous and effective training. Perhaps as early as the late 1960s, perhaps in decades earlier still, and certainly by the early 1970s, through some mix of formal study and trained intuition, the best clinical programs put into action training that reflected an educational approach *at one with* the problem solving at the heart of all law practice. The training they developed and implemented even took account (if only half-consciously) of the challenge the rebellious vision already had issued to the regnant.

But subsequent generations, from the 1980s through today, did far more still. Aware that legal education had for some decades seemed stuck with some mix of mainly Socratic case method⁶⁹ and seminars, with a dabble of independent research credit, these clinicians and non-clinicians and students did their best to open up to largely scorned and ignored possibilities, discoverable in their own experiences, learnable from others, imaginable to the open-minded. In the process of opposing the status-quo-plus brand of law school, they extended, deepened, and strengthened the Alternative Vision.

A. *Opening Up To Scorned and Ignored Possibilities*

Rather than presumptively regarding the everyday work of diverse lawyers as beneath or beyond what law schools should entertain, why not put as much into play as possible? And why not put all this into play refusing in advance to pre-define what that might end up looking like and meaning? The best clinical programs presumed, accurately, that close study could discover in the standard patterns and even the seemingly banal rituals of law practice complex empirical

⁶⁹ I use the term “Socratic case method,” and speak of the Socratic method and the case method in tandem, because in legal education the methods are typically paired (and have been since 1870), with many limits and evils, even from the diverse perspectives of defenders. See López, *supra* note 5.

and normative assumptions. Ought not these patterns and rituals be surfaced, described, examined closely? Ought not they be taught and learned and, at the same time, scrutinized and challenged? And certainly in the more advanced practices of experts, might not teachers and students identify aspects that could prove both central to the training of novices and teachable and learnable during three years of training? Ought not all those aspirations be understood as wildly more doable than ever envisioned by all those who have taught only (and only ever have thought of teaching) a steady diet of Socratic case method doctrinal courses and some seminars?

B. Problem Solving—Method And Aim

It is difficult to overstate the importance of live training, simulated training, and a combination of both, whether at once or in sequence. Teachers simply must put students into the diverse roles lawyers fill, either in live or in life-like situations. Only then can students experience the situations lawyers routinely face and begin to grasp while in training the problem solving at the heart of all they will do as licensed lawyers. Only then can students be afforded “the opportunity to learn how to learn from experience”—not in an ad hoc and half-conscious fashion, as they might currently in the course of their summer employment, but systematically through explicit techniques suited to the task.

If at the beginning of the 1970s, for some purposes, Gary Bellow stressed live-client clinics and Tony Amsterdam emphasized simulated life-like clinics, they simultaneously appreciated and employed both methods of having students train in and reflect on the diverse work lawyers do with clients and with diverse others. At bottom, clinical teachers and clinical students and their allies realized then what traditionalists continue to ignore or deny: Problem solving is as much the method as the aim of any ambitious and effective legal education—in every class, no matter the size, through every learning and teaching opportunity.

C. Teaching As Coaching

Teaching, at its most ambitious, amounts to the best sort of coaching. If problem solving is both means and ends, if putting students into role in live and life-like situations must be at the heart of all three years of law school and a career of continuing education, then teachers must be all that great coaches have always been.⁷⁰ They must plan

⁷⁰ In our *Lawyering for Social Change Concentration* at Stanford Law School, and in the ethos that influenced other programs during the 1970s and right up through the best of

and implement “deliberate practice,” aimed directly at particular dimensions and details of problem solving. They must provide students *all* they need to perform, to accept forthright feedback, to reflect deeply on how well they did (measured by shared examples and articulated standards), to adapt to what they had learned, and to prepare themselves yet again (and again and again) to perform, aiming to produce in diverse roles still better results.

But understanding that the best teaching is like the best coaching benefits coaches every bit as much as students. We train students to hold us accountable, just as we insist they meet their obligations. In so doing, we routinely face the gap between our aspirations and our current practices. Well-prepared and engaged students engage the teacher in ways routinely doable and immensely important. Like the greatest coaches, teachers must remain always open to and excited about learning. That never ends, and if and when it does, teachers should consider finding another job.⁷¹

In the time spent together, teachers as coaches ought to put students through “drills.” They should drill, and they should drill routinely. While drilling, teachers as coaches should employ great explanations, vivid demonstrations of what coaches expect, and great examples of insightful reflections about both drilling and preparation for drills. Teachers and students should drill with all those elements melded together precisely in order to produce high quality performance as the new standard they all sought to achieve. If we inevitably default to the mean (in any and every aspect of problem solving and of life), then we ought to aim smartly, for open and defensible rea-

clinical education in 2018, the idea of teachers as coaches proved central to our planning, implementation, feedback, and improvement. As I wrote:

[T]eachers teach by a sort of coaching—by designing, by getting students ready for, through, and reflecting on a set of (broadly defined) practice simulations. In this conception of the big classroom, well-prepared students trigger the very possibility of a reciprocally reflective relationship with the teacher. It is a relationship where it becomes apparent that teachers do learn and students do teach, where the aspiration is to share and exercise power responsibly, and where everyone’s engaged risks change along the way.

López, *Anti-Generic Legal Education*, *supra* note 47 at 316. And, later, in the same article:

And, like any well-conceived practice (including the most extraordinary teaching now going on in the big classroom), these workshops would be outfitted for the task of apprehending and commanding a practice with students learning by doing, teachers teaching by a sort of coaching, and each challenging the other as together they work through, critique and imagine alternatives to available bodies of knowledge.

Id. at 378.

⁷¹ See Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619 (1983); Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604 (1983); Robert J. Condlin, “*Tastes Great, Less Filling*”: *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986).

sons, to drill repeatedly, aspiring to realize the standard we regard as a worthy mean.

That absolutely need not signify, as some insist, that the training of lawyers necessarily leads to unending conformity. Making something “second nature” permits the very planned improvisation central to the best (and, yes, the most radical) problem solving. What is true of jazz and futbol and dance (and so much more) is every bit as true of lawyering and teaching and learning.

D. Learning To Be “Coaches On The Floor”

If teaching resembles the best sort of coaching, then learning looks like everything implicated in aiming to be “a coach on the floor.” In the vernacular of sports that has now spread to many diverse realms, students have to embrace learning to be problem solvers and learning how to coach themselves and others about problem solving. To do so, students like teachers must initially open up to being coachable—to permitting others to bring out the best in them, and to accept feedback not just from their teachers but from their peers. Accepting critique is no small matter, for any of us. Students must learn to prepare smartly for the real or simulated performance, to accept feedback on what they do well and what they must do better, to prepare again to perform aiming for still higher quality performances.

At least as important as an openness to being coached is an openness to coaching. In order for coaching on the floor to be truly effective, to take a deservedly central place in the learning process, it must be practiced in the classroom by every student in relation to every other. Students must willingly and repeatedly open up their own knowledge stores to their compatriots, understanding that their contributions will be reciprocated in kind and that their own knowledge will grow as a result of the exchange.

At the same time, they have to focus on learning to see in performances, including their own, what their teachers (and increasingly their fellow students) can see. To see equips the students, as it does the coach, to commend, to correct, to encourage—to coach both themselves and each other into ever-better performances. To be sure, commending and correcting and encouraging entail their own challenges, complete with ideas, skills, and sensibilities for how to do all this well. Yet seeing (in the full sense) serves as the point of departure for students learning to be coaches on the floor just as it does for teachers learning to coach well.

If a student can see what is effective in her own work, she can repeat and elaborate on those techniques, testing their stretch and their boundaries; seeing her classmates’ strengths allows her to emu-

late their games and incorporate the best aspects into her own; and seeing holes and weaknesses allows her to continue working to fill them, in both her performances and those of her fellow students, as they coach each other and themselves up the learning curve.

E. Teaching and Learning Like This—Doable, Intensive, and Not For Everyone

To reach the heights sought, this approach to great training required certain fundamentals often overlooked or at least largely unappreciated. Much as everyone interested in clinical legal education focuses on the “practices” with the teacher (the live and simulated in-role performances), what gets too often lost is the preparation everyone must undertake to make these experiences all they should be. Teachers must make explicit and available everything imaginable to equip students to prepare and perform well. And students must actively engage everything made available to prepare (and practice in preparation) for live and simulated work.⁷²

1. Preparation—For Teachers and Students

Decades have demonstrated this sort of preparation is eminently doable. Yet equipping others to prepare, and taking full advantage of the opportunity to prepare, requires painstaking, thorough, and imaginative work. For every performance that goes well, not just for one student but for many, peek behind and examine the preparation by the teacher and the students. Long before the term “flipped classroom” became trendy, the best clinical programs had already implemented, experimented with, and gained an admirable command over all of the very best that modern expression encompasses.⁷³ So had coaches and English teachers who, earlier still, took the same approach to great and effective education.⁷⁴ And the Alternative Vision

⁷² For a superb recent contribution to how to think about and implement and improve clinical legal education, in my view a “must-read” for all students as well as all teachers, see BRYANT, ET AL., *supra* note 3.

⁷³ For a small sample of the growing literature on the “flipped classroom,” see JONATHAN BERGMANN & AARON SAMS, *FLIP YOUR CLASSROOM: REACH EVERY STUDENT IN EVERY CLASS EVERY DAY* (2012); LUTZ-CHRISTIAN WOLFF & JENNY CHAN, *FLIPPED CLASSROOMS FOR LEGAL EDUCATION* (2016); *BEST PRACTICES FOR FLIPPING THE COLLEGE CLASSROOM* (Julee B. Waldrop & Melody A. Bowdon eds., 2016) (containing nine examples of flipped classrooms); William R. Slomanson, *Blended Learning: A Flipped Classroom Experiment*, 64 J. LEGAL EDUC. 93, 95 n.13 (2014) (adopting Bergmann & Sams’ “simplified description of a ‘flipped’ classroom” as one where “(a) the professor’s lecture is delivered at home and (b) the student’s homework is done in class”); Ashley A. Hall & Debbie D. DuFrene, *Best Practices for Launching a Flipped Classroom*, 79 BUS. PROF. COMM. Q. 234 (2016); Alex Berrio Matamoros, *Answering the Call: Flipping the Classroom to Prepare Practice-Ready Attorneys*, 43 CAP. U.L. REV. 113 (2015).

⁷⁴ For an illuminating study of John Wooden’s coaching and teaching, see Ronald Gal-

borrowed openly and proudly from folks in every imaginable realm

Including from bus driving instructors like Eyvonne Eagles and Sean Collins, lionhearted people who train their students on the road. These instructors' confidence in their pupils and in their own teaching ability is such that they ride unsecured in buses driven by students who've never before piloted anything larger than a sedan. Trainees drive buses in the yard on their very first day, and a few days later are out on city streets. Every moment on the bus is a teaching moment—not just for the student driving, but for the rest of the class riding along. “All right, what's the protocol here?” “Don't forget to fan your brakes!” At first, every turn and lane change is coached, and then the instructor sits back until there's a sign of trouble. Eventually the trainee is handling all the trouble on her own.

Including from ballet teachers, like Madame Karin von Aroldingen, who taught at the School of American Ballet. Not unlike lionhearted bus driving instructors Eyvonne Eagles and Sean Collins, Madame was bold: She taught with kindness in a place that was often cruel, with joy in a school that prized obedience and precision. While happiness and lightness might not seem brave, they were. She taught her young dancers that rigor was not enough. Rote practice was just that, unless it engaged the light and the joy that movement and music gave you. Madame didn't pine for her days of performing—at least not in front of students—and embraced, indeed seemed to love, her new role as a teacher. Her presence, her ability to be present in the studio and the care with which she taught made her young charges pay better attention to exactly what they were doing in exactly that moment. She essentially taught the same class as all the other teachers—the same repetitions of tendus, adagios, turns, and jumps; but it felt so different. Madame critiqued as often and as pointedly as the other teachers, but then she would laugh or make a little joke, not to suggest the work wasn't important, but as if to say, “Enjoy! We are trying to get better at something we love!” All the young girls in that room, wearing the same colored leotards and the same pink tights, fiercely competing against each other were, for the suspended moment of her classes, working together at something they loved. With a little less fear, and less fear of humiliation in front of their peers, they could absorb what Madame said to them, and what she said to the other girls, experiment with it, and try to dance it.

Including from tennis coaches, like Rance Brown and Stella Sam-

limore & Roland Tharp, *What A Coach Can Teach a Teacher, 1975-2004: Reflections and Reanalysis of John Wooden's Teaching Practices*, 18 *THE SPORTS PSYCHOLOGIST* 119 (2004). For the authors' earlier treatment of Wooden's coaching, see Roland Tharp & Ronald Gallimore, *What a Coach Can Teach a Teacher*, 9 *PSYCH. TODAY* 74 (1976).

pras, who coach the UCLA Women's Tennis Team and run week-long camps for kids. Like Madame and lionhearted bus driving instructors, "Coach Stella" and "Coach Rance" somehow manage to coach young kids who range from never having picked up a racket to nationally ranked, all in the very same camp, often side-by-side, and to focus everyone's attention (*everyone's*) on routinely practicing the basics, on bringing a joyful attitude not just to each day but to each and every drill, and on the importance of profoundly appreciating that "competition is an everyday matter" and "pressure is a privilege." Coach Stella and Coach Rance are outwardly unlike with their campers and their staff of young talented co-coaches, one more openly talkative and the other quieter and even perhaps bashful, and yet they bring, alone and together, the same remarkably caring focus (dare I say loving focus, especially of big-time Division I coaches, especially given all I know about big-time athletics—yes, I dare insist on saying loving focus) on each and every player, on the rhythms of the day and the week, and on how to teach kids to compete intensely while remaining able to laugh at themselves and cheer on their competitors.

Like Eyvonne Eagles and Sean Collins and Madame Von Aroldingen, Coach Stella and Coach Rance can do all this, of course, because they spend massive amounts of time resourcefully preparing. For each camp and each camper, coaching their young assistant coaches on how to teach their way, organizing schemes that permit campers to move from drill to drill, improvising whenever they feel improvisation seems right. Yet always inventing in the way celebrated by Duke Ellington, understanding that there's only "planned improvisation," at least in great jazz and great coaching. Adaptions on adaptations prove something to behold, both genuinely in the moment and the product of the serious homework, the sort only those who treasure teaching seem willing to do, always hoping to get better themselves as coaches so that those they teach can learn more, with more love of themselves, and finding endless joy in the very competition they must confront.

Every school at every stage of life should manage somehow to feel like the week-long camps Coach Stella and Coach Rance run, like Madame's dance training, like Eyvonne Eagles' and Sean Collins' teaching of bus drivers.

2. *Teaching People, Not Teaching Things*

No one should deny how demanding magnificent preparation can be. And that quality of preparation is a routine part of great teaching—not just something teachers do "only at the start of their careers." Yet, exacting as this sort of preparation can be, many consider

shifting the very focus of great education to be *the* most challenging aspect of the vision of education embodied in clinical programs. Rather than teaching contract drafting, cross-examination, or negotiations, to take only obvious examples, the best clinical programs totally embrace that they're training individuals and groups how to draft contracts, conduct a cross, and negotiate ably. *They're not teaching "things," they're teaching people.*⁷⁵

This change of focus strikes some as no big deal and strikes others as impossible. Yet it is a big deal, and it has been proven possible. It's a big deal and possible not only for 8–1 ratio clinics but for everyone teaching. Those non-clinicians and clinicians assigned to teach large classrooms courses, and who have done so through a problem method drawing upon and paralleling clinical methodology, prove capable of knowing how the students as a whole are doing and of diagnosing accurately the strengths and weaknesses of individual students. I know because I have received years of these “progress reports,” and these assessments have proven uncannily accurate. Remarkable teachers like Patrick Goodman and Pavel Wonsowicz give me a strong sense of the scouting reports that, say, the resourceful Becky Hammon now gets to see as an assistant coach in the exceptional organization built by the San Antonio Spurs.

When teachers already have prepared well and already have equipped students to prepare well, they can concentrate on what they can discern in what students produce. (Produce in writing, in simulation, in real-life situations, in reviews of videos, in various meetings.) And through these perceptions, teachers can begin to determine with increasing confidence how to help students train so as to shore up and eliminate their weaknesses and enhance their strengths. Yes, of course, appraisals of that caliber quality entail close study of students, a never-ending evaluation process, systematically pursued through well-targeted methods. But the teaching and the learning become all the more intellectually and emotionally exciting and satisfying when everyone focuses on “training people” rather than “teaching a topic.”

That means, in the shorthand I have heard some of the very best coaches and teachers use, that they must learn the students before they teach them. Of course, these coaches and teachers aim in advance of meeting students to learn all they can about them. But they

⁷⁵ For illustrations of an illuminating literature by and about teachers, see, e.g., Howard Lesnick, *The Practice of Teaching, The Practice of Law: What It Means to Practice Responsibly*, 29 PACE L. REV. 29 (2008); Christine N. Cimini, Bridget M. McCormack & Michael Pinard, *Kathleen A. Sullivan: A True Teacher's Teacher*, 8 CLIN. L. REV. 13 (2001); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1993-94).

mean, too, that even as they teach their students, they're always scouting, looking to understand each and every student, from every perspective. Being able to offer a candid scouting report does not at all mean these coaches and teachers don't care about their students, that they value them only on the basis of their abilities. Natalie Hirsch, the Artistic Director of The 52nd Street Project in New York City, gushes with love for each and every one of her students, just as the famously grumpy Greg Popovich does, at least to those he trusts, and every once in a long while even to the public.

In the Alternative Vision, Natalie Hirsch and Greg Popovich establish the floor and not the ceiling when we speak of teaching people and not things.

F. Neutralizing The Virus Of The Curve

The sum total of the lessons learned so far paint a picture of legal education that is, at once, highly ambitious and very much within reach. Yet standing in the way, at most law schools across the country, is the curve, which for many is at the very heart of law school. Simply put, the curve is destructive to learning and should be eliminated.

The claim that the curve should be done away with is not so outlandish as all that. Criticism of the curve historically has come from many quarters, including from students decrying its inherent subjectivity and its opaque operation and from professors whose grading hands are forced by school policies. Indeed, some schools have done away with the curve altogether.⁷⁶ Yale, for example, assesses all first-year students on a pass-fail basis in their first semester, distributes Honors and Passes purely per teacher preference thereafter, and neither releases a curve nor ranks students.⁷⁷ Some might argue that only Yale and schools of its ilk can get away with such practices. After all, even the lowest-performing Yale student still went to Yale. But a trend away from the curve is visible in other quarters as well. Many clinics have long been graded on a pass-fail basis, and at many schools, the curve only takes hold once class size crosses a certain threshold, allowing small seminars on diverse topics to be carried on outside its reach.

⁷⁶ Stanford and Harvard are examples. See *Stanford Law School Grade Reform—Frequently Asked Questions (FAQ)*, Stanford Law Sch. (Oct. 1, 2008), <https://law.stanford.edu/press/stanford-law-school-grade-reform-frequently-asked-questions-faq/>; *HLS Grading Policy*, Harvard Law Sch., <http://hls.harvard.edu/dept/ocs/employers/hls-grading-policy/?redir=1> (last visited Jan. 26, 2018).

⁷⁷ *J.D. Program, J.D. Degree Requirements*, YALE LAW SCH., <https://law.yale.edu/study-law-yale/degree-programs/jd-program/jd-degree-requirements> (last visited Jan. 26, 2018); *J.D. Program, The Degree of Juris Doctor*, YALE LAW SCH., <https://law.yale.edu/study-law-yale/degree-programs/jd-program> (last visited Jan. 26, 2018).

The most salient criticism of the curve, and the most powerful reason for banning it across the board (including in large doctrinal classes), is that it stifles learning. By mandating that students be evaluated based solely on how well or poorly they do in relation to each other, legal education as currently iterated operates to discourage students from sharing their knowledge through mutual coaching. Why on earth would a right-minded student, whose summer and post-graduation prospects depend in large part on her grade point average, coach those around her to improve their performance? And located as she necessarily is in this closed, competitive mindset, how likely is she to be open to absorbing any knowledge dropped by her competitors, to appreciating any of their ideas, skills, and sensibilities, incorporating them into her game?

Not only that, but the curve is at odds with the very practices of teachers we should most be encouraging. When faced with the curve, a teacher who drills her students until they all achieve mastery, who scouts students and attends to their weaknesses, and who successfully imparts all she set out to teach is left with the unenviable task of separating her students by a point or two and assigning some students much higher grades than others. To avoid this dilemma, a teacher might get a good curve by giving a nearly impossible exam, leaving disappointed (and, in terms of future prospects, disadvantaged) some students who mastered the material and rewarding others who, by virtue of possessing some set or other of qualities not systematically trained up in the course itself, did better (or less poorly) than their fellows.

Despite what law schools as a nearly-harmonious national chorus proclaim, the curve is not an inevitability, not a necessary component of a healthy legal education. There are workable alternatives. In addition to the pass/fail system of many clinics, uncurved seminars, and entirely curve-less law schools like Yale, an intriguing alternative can be found in the practices of a few undergraduate schools like UC Santa Cruz, which until 2000 used a narrative evaluation system instead of letter grades.⁷⁸

Some might protest that adopting an alternative system would frustrate all concerned: students accustomed to or expecting a competitive race to the top, employers seeking to evaluate candidates by the numbers, professors forced to take the time to assess each student individually rather than assigning points based on a rubric. And yes, neutralizing the virus of the curve would be met with frustration and

⁷⁸ Tanya Schevitz, *UC Santa Cruz to Start Using Letter Grades*, S.F. GATE (Feb. 24, 2000, 4:00 AM), <http://www.sfgate.com/education/article/UC-Santa-Cruz-To-Start-Using-Letter-Grades-2773570.php>.

resistance, at least at first. But as increasing numbers of schools inoculated themselves against the curve, the system would adjust, and as recompense, everyone involved—students bolstered by coaches on every side, employers enriched by capable new hires, teachers permitted and encouraged to be effective—would benefit.

G. Coordinated And Sequenced Training

Without pretending to know with perfect confidence what each student shall most need upon graduation and over the course of a career, the best of clinical programs (and the best of every identifiable concentration borrowing from clinical aims and methods) have still recognized and acted upon the need to provide coordinated and sequenced training.⁷⁹ With each capacity in mind, they do all they can to build learning opportunities to facilitate and demand development, growth with lucidly explained and vivid images in mind, improvement from wherever students begin at the start of law school to where they might with training end up after three years. These programs and concentrations embrace, implement, and endlessly review in order to realize aims and methods that established as standards that:

- earlier learning and teaching should provide the deepest and strongest points of departure (thoroughly interdisciplinary, systematically empirical and theoretical, perpetually practical in the fullest sense) precisely so that later learning and teaching can and should draw upon and elaborate and reconsider;
- later learning and teaching should explicitly reinforce, extend, and refine earlier learning in ways students and faculty can identify, appreciate, articulate, and make full use of as *in fact and not just in principle* “cross-fertilizing, reciprocally enlightening, cumulatively reinforcing,”⁸⁰
- earlier and later learning and teaching should be self-consciously synchronized so that teachers and students can respond to and shape how learning opportunities (courses,

⁷⁹ See, e.g., Anthony G. Amsterdam, *The Lawyering Revolution in Legal Education*, in THE CAMBRIDGE LECTURES (1985) at 11 (Frank E. McArdle ed., 1987). For instances of fully coordinated and sequenced training, permitting students and faculty at Stanford and CUNY to experience deliberate development, see, e.g., López, *Anti-Generic Legal Education*, *supra* note 47; Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L. J. 633 (1985); Lesnick, *supra* note 67; Charles Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L. J. 549 (1985); Vanessa Merton, *The City University of New York Law School: An Insider's Report*, 12 NOVA L.J. 49 (1987).

⁸⁰ The quote is from the remarkably gifted and dedicated Frank Michelman, who receives far too little credit for the demanding and superb work he did over years to transform legal education. Frank Michelman, *The Part and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352 (1982).

independent research, and beyond) fit together, one after another, side by side, and as a coherent regimen;

- earlier and later learning and teaching should be “in role,” about lawyering in all its varieties, in which law and the legal culture and the other circumscribing forces and their cultures dynamically interact, grounded actually or through life-like problems in the lives and work of particular people, within particular institutions, enhancing lasting growth of cross-cutting capacities implicated in all problem solving; and
- earlier and later learning and teaching should unite the cognitive, the practical, and the identity in all matters, as they are in life so should they be in great training, condemning once and for all seeing these dimensions or portals as separate, as sequential, as hierarchical, in any year in law school or in any aspect of the practice of problem solving or the careers of lawyers.

In all these convictions, clinicians and non-clinicians in legal education borrow from the best of educational theorists, including the illustrious Jerome Bruner, who deserves to be quoted:

[A] theory of instruction must specify the ways in which a body of knowledge should be structured so that it can be most readily grasped by the learner. “Optimal structure” refers to a set of propositions from which a larger body of knowledge can be generated . . . the merit of a structure depends upon its power for *simplifying information*, for *generating new propositions*, and for *increasing the manipulability of a body of knowledge*. . . .⁸¹

Especially since clinicians and their allies and their students typically have occupied only a part of the second and third years, realizing their aspirations has proven demanding. Even when some clinicians and non-clinicians together managed, often through imaginative means, to build a three-year sequence, the total number of units proved limited compared to the total number required. The strongest clinical and sequential programs at best created a vibrant counter-cultural law school within a law school, aware of the mainstream still embodied and evoked through the Socratic case method, yet less and less defined by it. Indeed, the very mapping of the intersecting capacities has helped students evaluate their own needs and desires, and with those in mind to choose for explicitly defensible reasons from among curricular offerings. They advanced as problem-solvers-in-training and as coaches-in-training. With the foundation provided and pursued, to whatever degree each law school’s courses make feasible, graduates appreciated what they must develop and why if they’re to

⁸¹ See JEROME BRUNER, TOWARD A THEORY OF INSTRUCTION 41 (1966).

become, over time, the superb lawyers they aspire to be.

H. As “Practice-Ready” As Imaginable

Of course law schools should aim to get students as “practice-ready” as possible within the three years of law school. “Why wouldn’t they?”⁸² At least for a fleeting moment, law schools adopted the slogan as a marketing pitch and deans as a talking point, all to demonstrate legal education proved worth the price tag.⁸³ Yet in response to both the term itself and the movement it engendered, some experienced law faculty have openly derided the idea and its feasibility. Some have condemned “practice-ready” as contentless; others a “millennialist” fantasy. They urge law schools to ignore such a goal, to mock it out of existence.⁸⁴

But in the Alternative Vision embodied by the best of clinical programs, the term “practice-ready” makes obvious sense—and gets demonstrable traction—intellectually, pedagogically, practically. Perhaps critics of the targeted aspiration do not know how—or have not themselves achieved success in trying—to meet this goal. That’s too bad. Yet after more than forty-five years, the best of clinical programs do know how to get students ready: trained through problems to become problem solvers, across the capacities implicated in the diverse roles lawyers fill.

Achieved through the most ambitious and effective training, becoming “practice-ready” leaves all graduates still very much on the path from novice to expert. But what in heavens is wrong with that? Of course there’s far more to be learned, about particular roles lawyers fill, about problem solving going on all around us. Why settle for less with legal education than we would in any other demanding education?⁸⁵ If you’ve got decent chops going in, three years of terrific training at a music conservatory may not at graduation yield an Ella

⁸² Seeing this aim as practicable and familiar, some clinicians already have tried seriously to address the effectiveness of clinical and non-clinical education. See, e.g., Symposium, *The Way to Carnegie: Practice, Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Education*, 32 B.C. J.L. & SOC. JUST. 213 (2012).

⁸³ See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J. L. & SOC. JUST. 247 (2012).

⁸⁴ For an example of those who insist no one knows what practice-ready means and hence law schools should not try to and cannot realize this goal, see Harry W. Arthurs, *The Future of Law School: Three Visions and a Prediction*, 51 ALTA L. REV. 705 (2013-14). For those who regard the very aspiration as a millennialist fantasy, incoherent and ignorable, see, e.g., Robert Condlin, ‘Practice Ready Graduates’—A Millennial Fantasy, 31 *TOURO L. REV.* 75 (2014).

⁸⁵ Of course ambitious teachers within law schools have for decades emphasized the contrasting training within other professional schools, from management to medicine. For only one recent example, see Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340 (2003).

Fitzgerald or a Sarah Vaughn. Neither will it likely yield a Wes Montgomery or a Django Reinhardt.

The Alternative Vision does not deny the occasional presence of genius—genius realized through smart hard work. (And Fitzgerald, Vaughn, Montgomery, and Reinhardt were among the smartest, hardest working people we might ever encounter.) Still, three years can make a student “performance-ready” and teach how to learn from experience and everybody and everything else. Much as we should sanctify each day we get to hear Fitzgerald and Vaughn, much as we should feel astonished by Reinhardt and Montgomery, take a night to have your mind blown by the Pat Malones of this world. In unlikely places, there is virtuosity out there to be discovered.

I. Preparing Students To Pass the Bar

What doubtlessly will prove far more inflammatory than embracing “practice-ready,” especially for elite and want-to-be-considered-elite schools, is this public claim made by the best of clinical programs: Law schools absolutely should shoulder the burden of preparing their graduates to pass bar examinations. No, I do not mean in the fashion we long have treated as the norm where law schools confidently insist their graduates have learned through the Socratic case method how to think like a lawyer, remember this or that about some doctrinal areas, and know plenty well enough how to prepare themselves through commercial bar courses. (Insisting that the best preparation for the bar is to take still more Socratic case book courses on bar topics is simply nonsense on stilts.)

Instead, I mean in the ambitious sense of offering training during law school years targeting the bar exam as part of the intellectually bold and practically forceful education in the problem solving at the heart of all lawyering. And this ambitious training should be available to every law student, not just those struggling grade-wise in law school. Learning to pass the bar can be and demonstrably has been made a natural part of learning through the problem method how to be a practice-ready problem solver.

That law schools should prepare students for the bar exam is both an attainable and a compelling goal. At the end of the day, law school is and should be an intellectually ambitious vocational school—vocational in the full-bodied sense of “a calling.” (All vocational schools should help students achieve their calling.) Part of what law schools must do, if they’re as responsible as they claim to be, is to arm students with the chops it takes to become certified in the trade. For law schools to disclaim this obligation—to point to the availability of commercial bar courses and faux loftier goals as reasons for the paucity of

practical preparation—is utterly to fail in their role and in their obligation to students.

Rather than regarding training for the bar exam as beneath or beyond law school education, the Alternative Vision regards preparing law students for final law school exams and the bar exam as naturally entailed within its problem-solving method for teaching problem-solving practitioners. Preparing students to pass the bar exam (Essays, Performance Tests (PTs), Multi-State (MBEs)) can and should be understood as requiring the same approach to training students law schools should and can provide to write high quality memoranda, briefs, opinion letters, white papers, and judicial opinions, and still more.

That approach, in turn, at the deepest level, presupposes and makes explicit to students that “legal analysis” is a stylized variation of everyday analysis, that legal analysis is one expression of the problem solving lawyers pursue in diverse roles they fill within contrasting institutions across the globe, and that conceptual and concrete challenges they face on a brief, in a trial memorandum, on the PTs and the essays are both parallel and manageable. Absolutely no one has to agree with the bar’s decision to choose essays (much less MBEs) as the guild’s way of protecting clients (and itself) in order to be able to understand why in the Alternative Vision students graduate prepared to pass the bar exam.

IV. BANNING THE SOCRATIC CASE METHOD

In renewing support for the Socratic case method system, deans and faculty members and leaders of the bar are perhaps at peace with their born-again allegiance to the traditional Socratic case method. Over the past ten or so years, they have tried on for size and perhaps voted on more comprehensive critiques and options. Now, taking all due credit for having intellectually entertained such appraisals and alternatives, they have returned to the comforts of what they have always done.⁸⁶ In one important sense, that hardly separates deans and faculty members and leaders of the bar from the rest of us. Unless impelled, we all regress to the mean. Regressing to mediocrity, however, is another matter altogether. And celebrating the return of the Socratic case method as the best of all homecomings is perverse, especially in the face of all the smart and hard work of the past decade.

Some utterly celebrate the Socratic case method as both a deeply intellectual exercise and a realistic form of what lawyers look like dis-

⁸⁶ For an extended description and analysis of how this happened, see López, *supra* note 5.

cussing a case.⁸⁷ Others publicly praise the Elliot-Langdell approach but, in confidence, figure they can limit any damage resulting from law school case method by surrounding that mainstay with diverse learning opportunities, expanding and strengthening the training future lawyers receive. In 2018, many have returned to depicting the Socratic case method as magisterially anchoring legal education, providing the legitimating stability law schools need to deliver new emphases on global and comparative and legislative and regulatory and leadership aspects of the world into which law students will find themselves practicing.

I regard this born-again explanation as hogwash, hokum, malarkey, all fancied up as professional and intellectual erudition. In a transformed legal education, aiming to train great problem solvers, the Socratic case method is a hugely circumscribed and covert and bewildered and bewildering way to teach lawyering, creating downward pathologies others (clinicians, employers, clients, judges) later must deal with.⁸⁸ To make matters worse, the Socratic case method routinely treats law and politics as separate, ignoring (at least marginalizing) widespread agreement shared by everyone from political scientists to everyday voters to (plenty of) judges that ideology and law are one, each defining the other—not defining the other out of existence, mind you—but co-existing within the very doctrine “formalists” or “legalists” regard as sanctuaries of “pure law.”⁸⁹

But my disagreement goes straight to the heart of what the Socratic case method is supposedly ideally suited for or at least specially designed to achieve. It is an unambitious and ineffective way of teaching both particular bodies of doctrine in the moment and how to learn law, as needed, over the course of a career. It is a confused and confusing way (rather than a systematic and accessible way) of teaching how to read, interpret, and use cases—scrambled surprises regularly substituting for patterned techniques and conventions. And, yes, the

⁸⁷ See, e.g., Larry Kramer, *Stanford Law School Dean: We Aim to Teach Our Students Not Just to Spot Problems, But to Solve Them*, A.B.A. J. (Mar. 29, 2012), http://www.abajournal.com/legalrebels/article/stanford_law_school_dean_larry_kramer/.

⁸⁸ Richard Posner describes how, in thirty-four years of reading briefs as an appellate judge, he finds “the vast majority of appellate lawyers remain immersed in the culture of formalism that they imbibed in law school.” POSNER, *supra* note 7, at 317.

⁸⁹ Political scientists focus a great deal on the intermingling of law and ideology, confirming through empirical data what through scholarship and teaching realists and clinicians and members of the Critical Legal Studies movement insisted upon, what any savvy lawyer knows thoroughly to be true, and what some highly regarded conservative judges emphatically embrace as true. For illustrations of a vast literature, overwhelmingly ignored in Socratic case method classes, see, e.g., RICHARD POSNER, *HOW JUDGES THINK* (2008); KENNEDY, *supra* note 7; UNGER, *supra* note 7; *LAW STORIES* (Gary Bellow & Martha Minow eds., 1998); Frank, *supra* note 7.

Socratic case method is a terrible and misleading way to teach students to produce the very written legal analysis still celebrated by so many as paradigmatically what lawyers must do well. Ban it, immediately.

In condemning the Socratic case method, in insisting we must ban it from legal education, I am likely parting ways with some of this country's greatest clinicians, non-clinicians, and full-time practitioners. Alison Anderson, Joaquin Avila, Devon Carbado, Roy Cazares, Peggy Cooper Davis, Carole Goldberg, Robert Goldstein, Jerry Kang, Kris Knaplund, (the late) Miguel Mendez, Hector Ramon, Jon Varat, Leah Wortham, David Wilkins come to mind, to name only some. Many others from past generations, all worthy of deep respect, some of whom regarded law school's teaching of legal analysis ('its logic') through the Socratic case method as the one part that *did* (and does) work.

All these wonderful teachers appear to regard far more favorably than do I the basic design of legal education. Certainly they believe they can live with a model that does not ban Socratic casebook classrooms. They may even regard the Socratic casebook courses as necessary and important in order to prepare students for the work they do in short courses in the first year and many other clinical and non-clinical courses in the second and third years.⁹⁰ As one of the country's all-around brilliant teachers said to me only weeks ago, "I need my clinic students to know what they have learned in Socratic casebook courses." (What she/he overlooks is that there are more intellectually ambitious and more practically effective ways to teach all students what at most some manage to learn from those classes.)

Disagreeing with eminent clinicians and imaginative non-clinicians and exceptional practitioners is not something I do lightly. But if these wonderful people regard traditional legal education either as meriting a robust role in transformed training or at least not necessarily damaging students entering their second and third years and their post-graduate careers, then we part ways. The Socratic casebook classrooms (together with mediocre seminars, colloquia and experiential offerings) do not belong in any alternative vision worthy of our enthusiastic support.

Those who pay tribute to the Socratic method are plain wrong. In praising the "critical cognitive thinking" purportedly entailed, they're empirically out of touch with or inaccurately describing what overwhelmingly goes on in classrooms. They routinely fail to identify the

⁹⁰ Perhaps the gifted David Wilkins writes this most emphatically. See BEN W. HEINEMAN, JR., WILLIAM F. LEE & DAVID B. WILKINS, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* (2014).

huge gap between what they claim or presuppose the Socratic case method accomplishes and the reality it most often achieves. And they rarely pinpoint the inherent mismatch between what the Socratic case method can accomplish, even in the hands of its most gifted practitioners, and what students actually need to develop the capacity to produce in writing the very legal analysis regarded as the gateway to all else.

Of course I appreciate how much these teachers may simply be cutting necessary deals. Compromise is inevitable in and central to life. I know first-hand how true that is in all matters, including my efforts with others to transform legal education, lawyering, and even our democratic life. But we ought not conflate what “we can live with”—and perhaps even “celebrate” legitimately as an advance over the status quo—with what we must openly regard as noxious arrangements. The modern version of the traditional Socratic case method is substantially less intellectually high-powered and far less productive at teaching legal analysis (“critical thinking”) and, as routinely practiced, proves far more damaging to law students, lawyers and, yes, law professors, than most apparently perceive or at least publicly acknowledge.

To all those superb clinicians and imaginative non-clinicians and acclaimed practitioners who either believe in or put up with the Socratic casebook method, I am explicitly saying what we too often fail to say openly, directly, and firmly: In 2018, across the country, as in 1870 at Harvard, *legal education is built around a poor idea, haphazardly implemented*. In reality, the Socratic case method is mainly practiced in name rather than in fact, and often practiced poorly, especially compared to how it has been long mythologized. Even in the hands of the very best Socratic professors, among the best teachers in the country, it is and shall remain an underachiever. We should disaggregate the legitimate discernable aims within the Socratic method—and I strongly believe there are some—and we should teach them far better than we do.

Indeed, some people have already done just that—and they have for decades. They include clinicians, academic support faculty, lawyering faculty, and former Socratic case method teachers who have switched to variations of the problem method. They include, at least as prominently, a wide variety of students who since before 1970 figured out much more imaginative and valuable ways to learn than what was happening in their classrooms. Instead of regarding these teachers as the back-up practical and remedial team and these students as shifty slackers, why not see that, for decades, they together and alone have developed a parallel training regimen? And why not at least in-

investigate if the learning and teaching they have undertaken may not entail more ambitious aims and more effective methods than the conventional law school curriculum? Why not learn from, rather than dismiss out of hand, how we might get better and better? As students, as teachers, as a team?

The stubborn refusal to recognize these superior and already available substitutes has led me, for decades now, to wonder how best to explain the resilience of the Socratic case method. Inertia plays its role. Certainly many simply keep doing what we in legal education have always done. And the force of continuing to do what we do inevitably reflects material interests and ideas. Yet that statement, true as it is, almost slides by the challenge of describing what we're all involved (implicated) in. Especially when we consider those less-than-scintillating Socratic case method courses that are bafflingly slow and drawn out, yet still perplexing and obtuse—how exactly should we describe the phenomena? Decades ago, I took to calling it a “ceasefire,” a treaty tacitly negotiated between students and faculty. Yet ceasefire, even a strong-armed detente, does not now seem precise enough to describe what I observe in others and experience myself as part of a law school and legal education. And, at least for me, searching for an apt representation feels crucial.

A. Realistic Portrayal

In the much celebrated portrayal of the 2018 Socratic case method, Langdell's approach to teaching students to think like lawyers continues. To be sure, not many teachers today aspire to prove law a science. Nor do they aim to make a body of doctrine self-evidently cohere. Compared even to the 1970s and 1980s, decreasing numbers rely exclusively on the “cold call.” Yet, goes the 2018 description, teachers still expect students to read cases, to prepare for question-and-answer exchanges, to identify opposing lines of argument, to pick apart inconsistencies within reasoning, to identify “slippery slopes” and exceptions that may swallow the rule, to mull over the policies underlying doctrines, to deal with spare hypothetical variations on the decision, and with equally lean variations on the initial hypotheticals.⁹¹

Through such preparation, through such exchanges, through note-taking and outline preparation, boasts today's marketing of the Socratic case method, students learn to think like lawyers. Students learn to think in the paradigmatic legal ways of litigation and, as cele-

⁹¹ See, e.g., WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SCHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Carnegie Foundation for the Advancement of Teaching 2007).

brated, to think in a far broader sense deservingly labeled “critical thinking.” They learn to think quickly, to improve their capacity to perceive and give voice to argument, and to comprehend and learn to live with an ambiguity defined pithily as “it depends.”

For all the changes that have transpired over the past 148 years, in so many ways today’s Socratic case method still realizes Langdell’s central goals: Students should come to appreciate how few principles actually hold together entire bodies of doctrine and grow through the first year (combined with second and third year Socratic case method classes) to be able “to apply [these principles] with consistent facility and certainty to the ever-tangled skein of human affairs.”⁹² Or so we’re once again told, in daily exchanges and, yes, at 2018 commencement ceremonies.

That the teacher may “know the answer” in advance of a pre-scripted discussion is openly acclaimed as a strength and not a weakness, as the realization rather than the diminution of Socratic case method. Before becoming Dean of Stanford Law School, Larry Kramer, describing himself as “probably the most traditional person” at N.Y.U. School of Law, encouraged other teachers to use the Socratic case method more, endorsing it as “the best way to teach students to build an effective legal argument.” In his own words, “I pick a student and have exactly the same discussion I would have with a group of lawyers in a firm to discuss a case,” he said. “Except that I have control, because I know the answers and I know where I want the discussion to go.”⁹³

Perhaps that very predictability—the pre-scripted nature of the unfolding and the outcome—is what has led far more teachers than ever before to interrupt question-and-answer exchanges with mini-lectures. If the exchanges you imagine and employ are pre-scripted, especially if both teacher and student experience the stilted quality of the ostensibly “open discussion,” then why not just say what you want to say instead of requiring students to provide fill-in-the-blank answers? (Or, better yet, why don’t you just write it in advance, as part of preparing students well?)

As a term, “Soft Socratic” came into being probably to signal relaxation of cold-calling and meanness of spirit, even if the latter is

⁹² See Christopher Columbus Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123 (1887).

⁹³ Emily Bernstein, *Law School Women Question the Teaching*, N.Y. TIMES, June 5 1996, <http://www.nytimes.com/1996/06/05/us/law-school-women-question-the-teaching.html?pagewanted=all>. For among the most staunch of modern defenses of the Socratic case method, see, e.g., Philip E. Areeda, *The Socratic Method*, 109 HARV. L. REV. 911 (1996); Paul D. Carrington, *Hail! Langdell!*, 20 L. & SOC. INQUIRY 691 (1995); Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063 (1986).

simply better disguised. “Very Soft Socratic” emerged to describe lectures, interrupted by some questions here and there. Soft Socratic teachers still use casebooks, but they cannot be described as engaging in the probing questioning trumpeted as emblematic of Langdell’s creation.⁹⁴

Some teachers have been thoroughly flummoxed by the aims and methods of the Socratic case method. Yet, most often, they keep those thoughts and feelings to themselves. Or at most they share them with a small circle of trusted friends and co-workers. Yet, again in the twenty-first century, much as in decades earlier, some have written openly about the rebellion they staged by turning exclusively to lectures. Perhaps most prominently, Stephen Bainbridge published a lecture he gave on the occasion of receiving a prestigious teaching award at UCLA. The article proves uncommonly candid and illuminating about the experience of finding the Socratic case method, as a student and a teacher, disappointing and confusing and even perhaps worse than useless. Particularly in sharing in print his unfolding thinking and decision-making about pedagogy, in a profession where so few legal academics talk in print about Socratic case method teaching, Bainbridge remains a must-read.⁹⁵

So too, among relatively recent writings, does a short 2003 blog written by Brian Leiter entitled *The “Socratic Method”: The Scandal of American Legal Education*.⁹⁶ Perhaps coining the term “recovering Socratic teacher,” Leiter snappily summarizes decades of experiences, lessons, and insights. Because he believes the Socratic case method is “still widely used, more or less, in most law schools, by most professors, at least some of the time,” he calls the situation a scandal. Why? There is no evidence—“none,” as he says—that this approach is an effective teaching method. And there is much evidence “it’s a recipe for total confusion” and worse. New teachers use it (and perhaps more experienced teachers too) because, well, they think that’s what law professors do. Because the claim, the unsupported claim, is that the method leads students to “think like lawyers.” Yet without benefit of the Socratic case method, lawyers in other countries presumably think like lawyers, insists Leiter. So how can it be that the Socratic

⁹⁴ Though using different labels, the study of the use of the Socratic case method at Harvard proves valuably informative. See Orin S. Kerr, *The Decline of the Socratic Case Method at Harvard*, 78 NEB. L. REV. 113 (1999).

⁹⁵ Stephen M. Bainbridge, *Reflections on Twenty Years of Law School Teaching*, 56 UCLA L. REV. DISC. 13 (2008).

⁹⁶ See Brian Leiter, *The “Socratic Method”: The Scandal of American Legal Education*, LEITER REPORTS: A PHILOSOPHY BLOG, (Oct. 20, 2003, 12:15 p.m.) http://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html.

case method is key to that achievement?⁹⁷

“Thinking like a lawyer,” he insists, “is a matter of learning how to reason and argue, in some ways that lawyers share with everyone else, and in other ways that are peculiar to lawyers (e.g., arguments from authority are not fallacious in the law).”⁹⁸ Leiter remains astounded that people still insist getting grilled Socratically about cases teaches any of that. Instead, why not have students study examples of lawyerly thinking, he asks, with teachers helping students to identify what they see and what, in turn, they must learn to produce analysis of the sort anointed as “thinking like a lawyer”?

He notes, with perhaps a mix of admiration and exasperation and “to-further-prove-my-point” conviction, that students seek out through other means what they cannot learn at all or at all well through the Socratic case method. He takes pains to emphasize that, in his view, *all* students (including the highest achieving) look to these many commercial aids precisely to gain some command over what law professors apparently expect them to have learned, but aren’t actually teaching them.

In Leiter’s experience, students almost immediately adopt the lingo and lore that speaks of faculty “hiding the ball” through the Socratic case method and then expecting memorized black letter law to frame answers to law school exam questions.⁹⁹ Calling himself a “fully recovered” Socratic teacher, he urges the American Association of Law Schools to start a self-help program for others in recovery. And he looks forward to the day “perhaps in a generation or two, when the Socratic method has been buried for good, law students, lawyers, and law professors will look back in amazement at how stupidly the law was taught for an entire century in the United States.”

Where are such assessments, a decade later, in today’s renewed celebration of the Socratic case method? Defenders would likely say Leiter and Bainbridge are outliers. In their willingness to speak and write openly about their experiences, their convictions, their choices, perhaps they are. They would appear, however, to be part of a growing plurality of faculty, perhaps even a (mainly) silent majority. That

⁹⁷ Leiter foreshadows a terrific article by Kris Franklin where, in syllogistic form, she makes an allied claim. See Kris Franklin, *Sim City: Teaching “Thinking Like A Lawyer” in Simulation Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861 (2008-09).

⁹⁸ Leiter cites no authority. Otherwise you might expect to see a trail of articles and books and training materials produced by those clinicians and non-clinicians and practicing lawyers who, for the longest time, have described the problem solving of lawyers as a stylized variation of human problem solving and legal analysis as a stylized variation of everyday analysis.

⁹⁹ The literature addressing the phenomena captured by the slogan “hiding the ball” is large, and for one uncommon, too often ignored piece, see Pierre Schlag, *Hiding The Ball*, 71 N.Y.U. L. REV. 1681 (1996).

has been true, in my experience, since the early 1980s.¹⁰⁰

Those in the silent majority still require students to buy and read casebooks. But they otherwise have largely or entirely abandoned the classroom method linked to casebooks originally by Langdell and then by those who at the close of the past decade returned to lavishly praising the Socratic case method as the way to teach thinking like a lawyer. Even as of 1999, Orin Kerr declared, in his empirical study of Harvard Law School, the traditional Socratic method is “more myth than reality.” In 2018, the celebrants write and speak as if most in legal education believe what Kramer insists, even when they must surely know many, if not most, in legal education behave like Bainbridges and Leiters.¹⁰¹

What appears to be an accurate picture of today—and probably accurate going all the way back to the 1980s—may reveal a deeper truth. The much mythologized Socratic case method has always been something of a fake. Neither Langdell nor the overwhelming numbers of faculty since 1870 have ever contemplated systematically providing students all that is necessary to think through in advance—to really prepare for—what then they would be required to do in the classroom. Law schools claimed faculty wanted to engage students in deep thinking about cases, arguments, policies, and doctrine.

Yet the reality almost always has been vastly different. Some faculty drafted in advance the preferred and maybe required discussion, complete with acceptable and unacceptable routes, and pre-determined outcomes. Others had absolutely no coherent idea of what they were doing and why. Like their students, they found themselves trapped in a set of rituals without any deep appreciation of what they did or could mean for learning and teaching. Others still bounced between these poles, never entirely knowing how to explain their own oscillation, put aside what students may have been experiencing.

Worse still, the entire approach to education seems to proclaim one thing in principle and actually do quite another in everyday practice. Claiming to respect students, to want them fully engaged in ways they had not been in the very lectures Langdell condemned and aimed to replace, most faculty had no formal training and little idea what to do to realize these aspirations. Did they really want to work resourcefully and diligently enough to prepare students well for what together

¹⁰⁰ See López, *Anti-Generic Legal Education*, *supra* note 47. In the mid-1990s, Steven Friedman’s survey would seem to have largely confirmed such impressions. See Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996).

¹⁰¹ See Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. (1999).

they would do in the classroom? Did they really want to draw students out, discover what they thought about particular cases, particular doctrines, opposing arguments and policies, how one body of doctrine relates to others?

What Bainbridge and Leiter describe, and what so many other faculty have long since taken to doing, may well in the eyes of the Alternative Vision take them only part of the way to where they should be. (In today's language, they have not yet "flipped their classrooms," though they appear ever so poised to do so.) But the big point, for now, is that the Bainbridge's and Leiter's approach—anticipated by many before them and followed by many after—may well be entirely less hypocritical and more productive than the Socratic case method at communicating sophisticated ideas about bodies of doctrine.¹⁰²

Of course I realize there exist tiny numbers of faculty whose use of the Socratic case method proves about as wonderful as its limitations allow. I know some of these greats, have extensively worked with them, have closely studied them. These teachers actually depend upon precisely what most other law teachers seem to fear most: They *need* to find themselves working with really well-prepared students—students who, before walking into the classroom, have assimilated what the materials say, what the teachers think and what the teachers have asked them to prepare to do "for practice" each day. These teachers see the classroom as a setting primarily geared for the task of apprehending and commanding the practice of lawyering—at least in the limited dimensions permitted through the Socratic case method.

In these settings, students learn by doing—by using, challenging, and improvising their own fledgling alternatives to the stocks of categories, stories, and arguments revealed by individual cases, by particular doctrines, by entire bodies of doctrine, by lawyering, by law. Even within the bounds of the Socratic case method, these teachers already teach as a sort of coaching, by designing, getting students ready for, helping students through, and reflecting on what (very loosely defined) amount to practice exercises in the classroom. And that's a remarkable achievement, one to be emulated and not just commended. To emulate, however, requires hard training, often learning an entirely different philosophy and practice of teaching, and an overall and daily

¹⁰² Again, in every earlier generations, such critiques have been openly and strongly made. For just some from the late 1970s and early 1980s, see Carolyn S. Bratt, *Beyond the Law School Classroom and Clinic - A Multidisciplinary Approach To Legal Education*, 13 *NEW ENG. L. REV.* 199 (1977); Roger Cramton, *The Current State of the Law Curriculum*, 32 *J. LEGAL EDUC.* 321 (1982); Suzanne Dallimore, *The Socratic Method - More Harm Than Good*, 3 *J. CONTEMP. L.* 177 (1976).

implementation that requires years to command.

Not surprisingly, these teachers experiment, too—almost always by breaking away from the typical format strongly linked to the Socratic case method. They introduce some wider mix of interdisciplinary readings; a simulation or two; several problems that in their structure and complexity approach the heart of simulated clinics; one or two simulated essays exams. Much as I appreciate and encourage such experimentation, much as I myself did just all this and far more in a decade of teaching doctrinal courses, these efforts reveal as much about the ultimate limits of the Socratic case method as the ingenuity of these wonderful teachers. Even the greatest teachers I have had the honor of knowing and working with cannot transform the Socratic case method into anything they please—unless transformation means abandoning it.

Were these extraordinary teachers everywhere in legal education, I would still ban the Socratic case method. Even at their marvelous best, these teachers and the smart, diligent students they tend to cultivate still underperform. The current format, even with experimentation, is inefficient and ineffective at teaching the widely-agreed-upon aims of this approach: learning law and learning how to learn law, learning how to read and interpret and use cases, learning to recognize and produce quality written legal analysis. Were we to disaggregate these aims, learn from everyone (including these teachers and students) how best to teach and learn them, then both these magnificent teachers and their wonderful students could be both more intellectually all-out and practically useful.

Again, that's not conjecture, not wishful thinking. As Leiter insists, together with a great many others, there is no evidence the Socratic case method works. He is equally correct in highlighting at least some of the ways students and teachers have combined and collaborated for many decades to realize these widely-agreed-upon aims—in response to and in order to supplant the Socratic case method. These approaches can accomplish more in far less time by explicitly describing aims and methods in ways both teachers and students grasp. When Bainbridge and Leitner prove mystified by the Socratic case method a great many others over history certainly have felt the same way.

Enough.

B. Disaggregating Valuable Aspects And Training Through Targeted Coaching

What we already know about what students and teachers and many others have done to break apart the particular aims of the Socratic case method and to learn and teach them through dynamic and

successful methods could fill a book—or, in my judgment, many. And that claim reflects only the creations of people I know, the efforts of those I have read about, the products I have studied and learned from over decades. To imagine all I have never encountered is to imagine a far larger and more exciting world still. Perhaps most already are at least vaguely familiar with these lessons, though too many may deny or diminish the importance of what we have learned and can learn—if we really want to dramatically improve legal education.

1. *Learning Law*

Few have ever insisted the Socratic case method proves an effective means for teaching and learning law—black-letter law, restatement law, hornbook law, treatise law, synthesized versions of what particular professors regard as law. Most accept that as information transfer, Langdell’s creation, even in its updated 2018 form, is “terribly inefficient.” To use the colorful language of Karl Llewellyn:

[I]t is obvious that man could hardly devise a more wasteful method for imparting information about subject matter than the case-class. Certainly man never has. We face a crisis when we find the curriculum being drowned in unthinking effort to use such a method as the sole means, or the main means, for accomplishing an end so vital.¹⁰³

Of course, you have heard this before, even if the rhetoric differed from Llewellyn’s. At least I hope you already know this. Most, at least if pressed, agree the Socratic case method fails when measured as an information transfer method to teach students black-letter law. That’s why decades ago, Meyer Fisher took William A. (“Bill”) Rutter’s student outline, typeset it, and sold it as the first of Gilbert Law Summaries, and that’s why Rutter created The Rutter Group and he and Richard Conviser created BAR/BRI.¹⁰⁴ And that’s why so many other commercial outfits began producing programs and products,¹⁰⁵

¹⁰³ Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948).

¹⁰⁴ For a brief account of Meyer Fisher’s start, see Stan Chess, *Meyer Fisher Dies at 93; Created Gilbert Outlines*, LAW SCHOOL.COM (Feb. 22, 2011), <http://www.lawschool.com/meyer.htm>. Bill Rutter, a remarkable man, proved over the course of his life a supporter of great teaching and learning, and a strong influence on generations of law students and faculty, law graduates and practitioners of all sorts—and a man I had the honor of knowing starting in my late twenties. See *Obituary: William A. Rutter*, L.A. TIMES, Feb. 8, 2012, <http://www.legacy.com/obituaries/latimes/obituary.aspx?pid=155787077>.

¹⁰⁵ See, e.g., MARTIN J. ADELMAN ET AL., PATENT LAW IN A NUTSHELL (2d ed. 2013); MICHAEL R. ASIMOW, GILBERT LAW SUMMARIES: INCOME TAX I: INDIVIDUAL (20th ed. 2002); MICHAEL R. ASIMOW, GILBERT LAW SUMMARIES: INCOME TAX II (12th ed. 1998); MICHAEL ASIMOW & RICHARD MURPHY, GILBERT LAW SUMMARY ON ADMINISTRATIVE LAW (15th ed. 2014); STEVEN BANK, GILBERT LAW SUMMARIES, TAXATION OF BUSINESS ENTITIES (15th ed. 2016); HIGH COURT CASE SUMMARIES: FEDERAL INCOME TAXATION, KEYED TO BANKMAN (16th ed. 2013); JEFFREY S. BATOFF, LAW SCHOOL SECRETS: OUT-

LINING FOR EXAM SUCCESS (2012); JOHN BAUMAN & KENNETH YORK, GILBERT LAW SUMMARIES: REMEDIES (11th ed. 2003); RICHARD A. BOOTH, BLACK LETTER OUTLINE ON CORPORATIONS (6th ed. 2014); ANN M. BURKHART & ROBERT A. STEIN, LAW SCHOOL SUCCESS IN A NUTSHELL (2017); HIGH COURT CASE SUMMARIES: CONSTITUTIONAL LAW, KEYED TO CHEMERINSKY (4th ed. 2014); JESSE CHOPER, GILBERT LAW SUMMARIES ON CONSTITUTIONAL LAW (31st ed. 2013); HIGH COURT CASE SUMMARIES: CONSTITUTIONAL LAW, KEYED TO CHOPER (12th ed. 2016); MICHAEL A. CHASALOW, ACING BUSINESS ASSOCIATIONS (2016); RICHARD J. CONVISER, GILBERT LAW SUMMARIES: AGENCY, PARTNERSHIP, & LIMITED LIABILITY CORPORATIONS (5th ed. 2002); RICHARD CONVISER, GILBERT LAW SUMMARY ON AGENCY, PARTNERSHIP, AND LLCs (7th ed. 2014); HIGH COURT CASE SUMMARIES: SECURITIES REGULATIONS, KEYED TO COX (7th ed. 2014); SUZANNE DARROW-KLEINHAUS, MASTERING THE LAW SCHOOL EXAM (2006); GEORGE DIX, GILBERT LAW SUMMARY ON CRIMINAL LAW (19th ed. 2015); HIGH COURT CASE SUMMARIES: PROPERTY, KEYED TO DUKEMINIER (8th ed. 2015); HIGH COURT CASE SUMMARIES: WILLS, TRUSTS, & ESTATES, KEYED TO DUKEMINIER (9th ed. 2015); MELVIN A. EISENBERG, GILBERT LAW SUMMARIES ON CONTRACTS (14th ed. 2002); HIGH COURT CASE SUMMARIES: CORPORATIONS, KEYED TO EISENBERG (11th ed. 2015); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: ADMINISTRATIVE LAW (4th ed. 2016); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: BASIC FEDERAL INCOME TAX (4th ed. 2012); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CIVIL PROCEDURE (25th ed. 2014); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CONSTITUTIONAL LAW (34th ed. 2016); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CONTRACTS (11th ed. 2015); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CORPORATIONS (2013); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CORPORATIONS AND OTHER BUSINESS ENTITIES (7th ed. 2013); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CRIMINAL LAW (8th ed. 2015); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: CRIMINAL PROCEDURE (31st ed. 2017); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: ENVIRONMENTAL LAW (2d ed. 2010); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: FAMILY LAW (4th ed. 2014); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: INTELLECTUAL PROPERTY (2d ed. 2009); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: INTERNATIONAL LAW (2d ed. 201); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: PROFESSIONAL RESPONSIBILITY (5th ed. 2016); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: PROPERTY (8th ed. 2012); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: REAL ESTATE (3rd ed. 2014); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: SECURED TRANSACTIONS (2d ed. 2010); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: TORTS (10th ed. 2015); STEVEN L. EMANUEL, EMANUEL LAW OUTLINES: WILLS, TRUSTS, AND ESTATES KEYED TO DUKEMINIER AND SITKOFF (9th ed. 2014); DAVID G. EPSTEIN, A SHORT & HAPPY GUIDE TO BUSINESS ASSOCIATIONS (2016); HIGH COURT CASE SUMMARIES: TORTS, KEYED TO EPSTEIN (11th ed. 2017); HIGH COURT CASE SUMMARIES: CONTRACTS, KEYED TO FARNSWORTH (8th ed. 2014); WILLIAM FLETCHER & JAMES PFANDER, GILBERT LAW SUMMARIES ON FEDERAL COURTS (5th ed. 2013); PAULA ANN FRANZESE, A SHORT & HAPPY GUIDE TO BEING A LAW STUDENT (2014); HIGH COURT CASE SUMMARIES ON FEDERAL INCOME TAXATION, KEYED TO FREELAND (18th ed. 2017); RICHARD D. FREER & DOUGLAS K. MOLL, BUSINESS ORGANIZATIONS (2013); RICHARD D. FREER, THE LAW OF CORPORATIONS IN A NUTSHELL (7th ed. 2016); HIGH COURT CASE SUMMARIES: ADMINISTRATIVE LAW, KEYED TO F FUNK (5th ed. 2015); HIGH COURT CASE SUMMARIES: HEALTH LAW, KEYED TO FURROW (6th ed. 2009); DONNA GERSON, ASKED AND ANSWERED: YOUR GUIDE TO LAW SCHOOL SUCCESS, VOLUME II, ADVICE FOR SECOND YEAR LAW STUDENTS (2d ed. 2009); GILBERT LAW SUMMARIES, GILBERT LAW SUMMARIES ON FUTURE INTERESTS AND PERPETUITIES (5th ed. 2009); HIGH COURT CASE SUMMARIES: PROFESSIONAL RESPONSIBILITY, KEYED TO GILLERS (10th ed. 2016); RANDALL GINGISS, GILBERT LAW SUMMARIES ON ESTATE AND GIFT TAXATION (16th ed. 2002); MICHAEL D. GREEN & JONATHAN CARDI, GILBERT LAW SUMMARIES ON TORTS (24th ed. 2008); DAVID C. GREY ET AL., GET A RUNNING START: YOUR COMPREHENSIVE GUIDE TO THE FIRST YEAR CURRICULUM (2016); JANE GRISE, CRITICAL READING FOR SUCCESS IN LAW SCHOOL AND BEYOND (2017); EDWARD HALBACH, GILBERT

costing students plenty (on top of their tuition) to learn what they need both for law school exams and state bar exams and presumably should be learning during their law school experience, most particularly through the Socratic case method.

Even before the astute Meyer Fisher and the resourceful Bill

LAW SUMMARIES ON TRUSTS (13th ed. 2007); HIGH COURT CASE SUMMARIES: BUSINESS ORGANIZATIONS, KEYED TO HAMILTON (12th ed. 2015); PETER HONIGSBERG & EDITH HO, GILBERT LAW SUMMARY ON LEGAL RESEARCH, WRITING, AND ANALYSIS (12th ed. 2014); MONA HYMEL, GILBERT LAW SUMMARIES ON ACCOUNTING AND FINANCE FOR LAWYERS (2d ed. 2014); MARK D. JANIS, TRADEMARK AND UNFAIR COMPETITION IN A NUTSHELL (2d ed. 2018); STANLEY JOHANSON, GILBERT LAW SUMMARIES ON WILLS (12th ed. 2012); HIGH COURT CASE SUMMARIES: CRIMINAL LAW, KEYED TO JOHNSON (7th ed. 2002); KADISH CASES, HIGH COURT CASE SUMMARIES: CRIMINAL LAW, KEYED TO KADISH (9th ed. 2013); HIGH COURT CASE SUMMARIES: CRIMINAL LAW, KEYED TO KAPLAN (7th ed. 2017); HERMA HILL KAY, GILBERT LAW SUMMARIES: CONFLICT OF LAWS (18th ed. 2005); JAMES KRIER, GILBERT LAW SUMMARY ON PROPERTY (18th ed. 2013); HIGH COURT CASE SUMMARIES: CRIMINAL LAW, KEYED TO LAFAVE (6th ed. 2014); MARY LAFRANCE, COPYRIGHT LAW IN A NUTSHELL (3rd ed. 2017); MARK A. LEMLEY & CHRISTOPHER LESLIE, GILBERT LAW SUMMARIES: ANTITRUST (10th ed. 2004); PAUL MARCUS & MELANIE WILSON, GILBERT LAW SUMMARIES ON CRIMINAL PROCEDURE (18th ed. 2011); RICHARD MARCUS & THOMAS ROWE, GILBERT LAW SUMMARIES ON CIVIL PROCEDURE (18th ed. 2017); HIGH COURT CASE SUMMARIES: CIVIL PROCEDURE, KEYED TO MARCUS (6th ed. 2015); ANDREW J. McCLURG, 1L OF A RIDE, A WELL-TRAVELED PROFESSOR'S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL (3rd ed. 2017); CHARLES R. McMANIS & DAVID J. FRIEDMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION LAW IN A NUTSHELL (7th ed. 2013); ARTHUR R. MILLER, INTELLECTUAL PROPERTY, PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL (5th ed. 2008); THOMAS MORGAN, GILBERT LAW SUMMARY ON LEGAL ETHICS (9th ed. 2017); MICHAEL D. MURRAY, A SHORT & HAPPY GUIDE TO COPYRIGHT (2018); GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW (3rd ed. 2017); JAMES C. OLDHAM & ROBERT J. GELHAUS, GILBERT SUMMARIES ON LABOR LAW (12th ed. 2002); HIGH COURT CASE SUMMARIES: EVIDENCE, KEYED TO PARK (12th ed. 2013); HIGH COURT CASE SUMMARIES: ENVIRONMENTAL LAW, KEYED TO PERCIVAL (7th ed. 2015); WILLIAM A. REPPY, GILBERT LAW SUMMARIES: COMMUNITY PROPERTY (17th ed. 1998); HIGH COURT CASE SUMMARIES: EMPLOYMENT LAW, KEYED TO ROTHSTEIN (8th ed. 2016); ALEX RUSKELL, A WEEKLY GUIDE TO BEING A MODEL LAW STUDENT (2015); HIGH COURT CASE SUMMARIES: CRIMINAL PROCEDURE, KEYED TO SALTZBURG (10th ed. 2015); SHARON K. SANDEEN & ELIZABETH A. ROWE, TRADE SECRET LAW IN A NUTSHELL (2013); ROGER E. SCHECHTER & JOHN R. THOMAS, PRINCIPLES OF COPYRIGHT LAW (2010); ROGER E. SCHECHTER, BLACK LETTER OUTLINE ON INTELLECTUAL PROPERTY (3rd ed. 2006); JOSEPH SHADE, BUSINESS ASSOCIATIONS IN A NUTSHELL (3rd ed. 2010); HELENE S. SHAPO & MARSHALL S. SHAPO, LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS (3rd ed. 2009); S.I. STRONG & BRAD DESNOYER, HOW TO WRITE LAW EXAMS: IRAC PERFECTED (2016); HIGH COURT CASE SUMMARIES: CONSTITUTIONAL LAW, KEYED TO SULLIVAN (19th ed. 2017); JOHN WALTZ ET AL., GILBERT LAW SUMMARIES ON EVIDENCE (18th ed. 2004); HIGH COURT CASE SUMMARIES: DEBTORS & CREDITORS, KEYED TO WARREN (6th ed. 2010); NED WAXMAN, GILBERT LAW SUMMARIES ON BANKRUPTCY (5th ed. 2002); DOUGLAS J. WHALEY, GILBERT LAW SUMMARIES: COMMERCIAL PAPER & PAYMENT LAW (16th ed. 2006); DOUGLAS J. WHALEY, GILBERT LAW SUMMARIES: SALE AND LEASE OF GOODS (13th ed. 2005); DOUGLAS WHALEY, GILBERT LAW SUMMARIES: SECURED TRANSACTIONS (11th ed. 2002); WHALEY CASES, HIGH COURT CASE SUMMARIES: COMMERCIAL LAW (11th ed. 2017); CHARLES H. WHITEBREAD, THE EIGHT SECRETS OF TOP EXAM PERFORMANCE IN LAW SCHOOL (2d ed. 2007).

Rutter recognized and responded to this need, students all over the country realized they had little choice but to prepare fully synthesized outlines customized to each professor and course. Already by 1970, you could find student-created customized outlines that included everything valuable in the casebook and everything valuable in classroom discussion. Indeed these customized outlines could be astonishingly good. They made sense in ways the Socratic case method did not, without in any way “dumbing down” what had gone on. And making sense is a virtue, not a vice, despite the inclination to believe otherwise in depicting the strengths of, say, the first year.

Indeed, at their best, these customized outlines went far further—were deeper and more comprehensive and more practical—than anything the casebook or the teacher or the class sessions ever provided. Students created a lucidity utterly missing from the teacher and the casebook and the classroom discussion. Not false coherence, mind you, the sort far too many classes (if only inadvertently) mean, at once, to encourage and discourage students from believing possible. Instead the customized outlines offered an explicitly sound account of internally contradictory and largely indeterminate doctrine. In those early years, such terms only occasionally had begun to appear, but the students got these themes across. In my view, in 1970 and today, these students should have published their outlines as scholarship—better still, as the materials for “learning the law” in law schools.

For any doubters, for any of you who have not studied hundreds and hundreds of these outlines, I can vouch that these student outlines included all the sophisticated hornbook law, any “pet” twists and turns featured or at least acknowledged by the teacher, the best of student commentary (more often from outside as inside the classroom), and sometimes valuable theories and empirical data a teacher refused to regard as even “relevant” to classroom discussions. Three days with these customized outlines and you learned far more than a year of preparing for and participating in class and creating your own outline. These were the bodies of law the teachers ought to have been making available, and all of teaching ought to have proceeded from the understanding that students had learned this law for the first day of work in the same way they routinely did for their final exam.

Of course a strand of today’s Socratic case method teachers still condemn Gilbert’s, other commercial outlines, and existing customized student outlines. Rarely mentioned is that the authors of these commercial outlines include the top scholars in a field, often the author of the casebook the teacher had chosen for the students (Marc Franklin, Mel Eisenberg, James Krier, to name only some). Like those of earlier generations, these faculty insist students must fully give

themselves over to preparation, attendance and participation, and creating their own outlines to experience what the Socratic case method uniquely offers. Some students do still buy this professorial line, at least for a piece of the first year, when they do not know any better.

But even those students who write their own outline most often take full advantage of the miscellaneous alternatives on the market. Much as they may respect authority (“my teacher can’t be wrong, can he?”), they see no reason not to gain wise guidance from wherever they can, whether for the sake of learning or for besting a classmate in the quest for a grade. Like a fair number in my generation, at least some students today may use the outlines exclusively and bypass class readings. A larger group may attend class without having read at all carefully and then follow a student outline providing, as students like to say, “the transcript for the very class they’re ‘newly experiencing.’” And, at least in Socratic case method classes, students attend class mainly in hopes of picking up any different or important insights about the final exam (or because attendance is part of the final grade). Across disparate student approaches, the constant is the best available outline.

In 2018, though, the militant traditionalists who still insist student must generate their own outlines for learning the law now face in their own colleagues their second-biggest challenge. (Students have always been the fiercest opponents of this necessity). Some faculty, following in the tradition of Bainbridge and Leiter and those who went before them, now provide their students what, in 1970, only students (the Bill Rutters of this world) provided other students. These modern faculty use a casebook and mainly lecture. And they write out and distribute to students valuable notes going into class, and they often produce another set of equally beneficial notes coming out of class. (Yes, twice.)

These teachers provide their students a written roadmap to the readings, lectures, class discussions, and to how to weave them together. They offer the patterns of the very best hornbook law and their very favorite theories, often against the background of interdisciplinary knowledge they think relevant and illuminating, all of which they’re telling students to learn, going into and coming out of class. At their best (and I have closely studied some exquisite faculty-generated notes), these products are terrific. Relying upon them, students can “learn the law.” And teachers generating these written materials ought get credit (in all important senses) for the work required to produce such teaching and learning materials. To the degree we value learning law, and I think we should value it immensely, these teachers prove to be among the best on any faculty.

Yet these same teachers offer further proof, if further proof were ever needed, of three important facts. To learn the law, synthesized outlines and notes always have been radically better than the Socratic case method. And students do not have to struggle to create their own original outlines and notes to fully learn black-letter law, indeed law with all the layered refinement teachers mean to identify as important. And then the big kicker: Why not use these outlines and notes as the point of departure for doing something entirely more demanding in the classroom? To the degree some need aural reinforcement, it never has been and never should be each day of class over the course of a semester. That's an absurd waste of time—absurd at every law school, having absolutely nothing to do with non-elite or elite status. If learning law serves as the predicate for working in the classroom with a teacher, then what should that work entail?

These are not new questions, obviously. These are insights and convictions many have already turned into a counter ethic about how to learn law and how to make that knowledge the predicate for doing lots more. Way back in the 1970s, and doubtlessly before, outlines freed students to skip the Socratic classroom and, as they saw it, do better things with their time. (In the famous Willie Wonka quip, “So much time, so little to do.”) Some chose law offices they would work for. Others audited classes in the Business School, where the “case method” treated classrooms as practice sessions about what to do within and about life-like problems studied carefully in advance. Others read wide and deep literatures only rarely required by anyone teaching in law school. Others still took adult education courses built around topics law school later would regard as important: economic development, history of Black and Feminist thought, the capitalist nature of law in the United States.¹⁰⁶

Some teachers, though, already had seen and implemented possibilities. Consider only the early mid-20th Century. In the 1940s, Addison Mueller and Fleming James created a course designed around a very life-like problem and simulated performances by students dealing with this problem.¹⁰⁷ And both Mueller and James introduced problems around which they taught more central courses like Contracts.¹⁰⁸ During the same years, and for decades, David Cavers

¹⁰⁶ Fast forward only to find first-rate appraisals of various brands of capitalism by an ambitious teacher of economic development and a serious thinker about matters too often taken for granted, see John Schlegel, *Of the Many Flavors of Capitalism or Reflections on Schumpeter's Ghost*, 56 *BUFF. L. REV.* 965 (2008).

¹⁰⁷ See Addison Mueller, *There is Madness to Our Methods*, 3 *J. LEGAL EDUC.* 93 (1950).

¹⁰⁸ See Addison Mueller & Flemin G. James, *Case Presentation*, 1 *J. LEGAL EDUC.* 135 (1948-49); ADDISON MUELLER, *CONTRACT IN CONTEXT* (1951); VERN COUNTRYMAN, *THE*

proselytized even more vigorously than Mueller and James for a problem-method vision of all of legal education.¹⁰⁹ And James Bradway already understood these efforts, as rightly he should, as kindred companions to the intellectual and practical benefits of the live-client clinics he taught and urged on legal education.¹¹⁰

Already by 1970, non-clinicians like Frank Sanders understood both the squandered time consumed by the Socratic case method and the possibilities of having students learn the law through a combination of streamlined and detailed materials. The simulated tax course Sanders created, with realistic problems and classroom time devoted to his coaching of the student teams assigned various aspects of these life-like situations, expected as a point of departure that students could and should learn law through outlines, hornbooks, treatises, and (as necessary for the particular problems) the tax code and relevant case law. In portraying his extraordinary contributions, Sanders pays homage both to the clinical methodology of his then-new colleague Gary Bellow and to the life-like case methods more typical of business schools and medical schools.¹¹¹ Yet in design, content, and method, Sanders' course entailed all the intellectual and practical ambitions we could ever hope for in having students realistically "try on for size" the various roles tax lawyers fill.¹¹²

By the time Sander created his Tax course, the earliest of non-

LAWYER IN MODERN SOCIETY (1961). Felix Cohen perhaps most presciently and insightfully anticipated people like Mueller and Countryman and James and Cavers, a small strand of talented lawyers and teachers and scholars, most of whom arrived on the scene as the principal realists were finishing up their careers and who lasted into the beginning of the modern wave of social and intellectual movements represented most powerfully in legal education by critical legal studies and law and economics and clinical legal education—particularly the focus on an understanding of the work of lawyers and problem solving as aim and method. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

¹⁰⁹ See David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943); David F. Cavers, *A Proposal. Legal Education in Two Calendar Years*, 49 A.B.A. J. 475 (1963).

¹¹⁰ See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930).

¹¹¹ See Frank E. A. Sander, *Learning by Doing*, 25 HARV. L. SCH. BULL., Apr. 1974, at 16.

¹¹² At least one other non-clinicians at the time understood problem solving as method and aim in ways worthy of mention with Sander—David Herwitz. See, e.g., DAVID R. HERWITZ, *BUSINESS PLANNING: MATERIALS ON THE PLANNING OF CORPORATE TRANSACTIONS* (2d ed. 1984). In the immediately following years, some important teachers converted casebooks into problem-method books including, to name one prominent example, LYNN M. LOPUCKI & ELIZABETH WARREN, *SECURED CREDIT: A SYSTEMS APPROACH* (1995). For an appreciative review of LoPucki and Warren's book, see William J. Woodward, Jr., *Empiricists and the Collapse of the Theory-Practice Dichotomy in the Large Classroom: A Review of LoPucki and Warren's Secured Credit: A Systems Approach*, 74 WASH. U. L.Q. 419 (1996).

clinicians understood that students could learn law through well-chosen and well-designed materials, permitting them to practice the work of lawyers. On the West Coast, Anthony Amsterdam created his famous “Sick Seminar” (Clinical Seminar in Trial of the Mentally Disordered Criminal Defendant), a year-long simulated clinic focused on learning criminal defense lawyering, representing clients with many difficulties, including mental illness.¹¹³ Neither Amsterdam nor his students doubted that they could learn the necessary law both at the outset of the course and, as demands unfolded, as the situation progressed in time. On these very assumptions and with these aspirations, Amsterdam built simulated and live-client clinics and progressions of lawyering courses that advanced from first through third year.

Meanwhile, on the East Coast, Gary Bellow’s live-client clinics focused on lawyering in both civil and criminal settings. The law? All learnable through available materials. And to the degree particular clients required more targeted investigation, then research through everything from the federal constitution to Massachusetts statutes to local rules of court (such as they were) could be shouldered by students, most often without the intervention of their supervising attorneys. The real challenge was not the capacity of students to “learn the law” through available materials but what, in heaven’s name, even with a terrific supervising lawyer like Karen Metzger and a magnificent clinician like Gary Bellow, could prove strategically valuable for a client facing judges as arbitrary and unfair and cruel as any modern fiction or even Kafka could imagine.¹¹⁴ (Yes, as a student, I was there.)

Having learned much from such students from 1970 forward, when I began teaching, I chose to make learning the law in this way an option students could pursue under my supervision. With the help of some students, some faculty, and some staff, I gathered the best available outlines for each body of doctrine tested on the bar. Depending upon a student’s schedule, I offered them 2–4 weeks to learn the outline and take law school or bar exams all on top of their regular schedules. And then together we graded these exams. When they passed (at least a B in law school terms and a passing grade in bar terms), they moved on to the next doctrinal area. A majority made their way through all the bar courses not included in the first year.

In some instances, we had access to resources beyond very fine

¹¹³ See Anthony Amsterdam & Donald T. Lunde, *Materials for Clinical Seminar in Trial of the Mentally Disordered Criminal Defendant at Stanford Law School* (Autumn and Spring Terms 1977-78) (on file with author).

¹¹⁴ See Diane Vaksdal Smith, *The Honorable Karen S. Metzger, Colorado Court of Appeals*, 71 DEN. L. REV. 1 (1993).

outlines. Tim Hallahan made available to me state-of-the-art video formats for learning how to learn and use evidence as a trial lawyer might. Products of his collaboration with Donald Trautman and John DeGolyer (a collaboration supported by Gary Bellow), the combination video and computer learning proved a huge success.¹¹⁵ Students could memorize the outlines, test themselves through the video simulations of trials, and get immediate confirmation when right and immediate correction when wrong. How come all Evidence professors don't use these, students asked? How come all law schools didn't support the collaboration's building of a library of videos covering all the law?

With these videos and fine outlines, students understood what Trautman and Hallahan and DeGolyer emphasized: With productive ways to learn law available to students, the classroom could be transformed into an arena for more engaging and demanding work.¹¹⁶ And law school could become a place where, at the very least, no one pretended the Socratic case method was anywhere near as good—or anything other than poor—at teaching law the way students and lawyers need to learn it. Trautman, Hallahan, and DeGolyer preached to all who would listen—and so did the students I supervised. But not many listened. The Gary Bellows who did were the exceptions.¹¹⁷

Others of us had been writing special synthesized outlines for students since the 1970s. Those outlines permitted students to learn the law—at first, quickly conversant—before the first class meeting. Such outlines permitted me, for example, to jump-start clinics of all sorts (Employment Discrimination Clinic, Section 1983 Litigation Clinic,

¹¹⁵ For a short account of how the work got done, including the involvement of law students and undergraduate computer programmers, see Ellen J. Miller, *In Videodisc Veritas: Interactive Video at Harvard Law School*, 17 T.H.E. J. 78 (1990). For a suggestion of what by 1982 Hallahan and Miller had already developed and made available, see <http://www.worldcat.org/title/media-guide-for-lawyers/oclc/9134860> (last visited Jan. 27, 2018).

¹¹⁶ See Testimony of Donald Trautman, Tim Hallahan, and John DeGolyer Before Legal Services Corporation, Provisions for the Delivery of Legal Services Committee, Aug. 7, 1987, <http://www.lsc.gov/sites/default/files/LSC/pdfs/Aug.%207,%201987%20Provisions%20for%20the%20Delivery%20of%20Legal%20Ser.pdf>. For other examples of enthusiastically informed appreciation of both the potential of computers and the need for a different looking legal education, see Donald T. Trautman, *Knowledge Representation in "Default": An Attempt to Classify General Types of Knowledge Used by Legal Experts*, in PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW 199 (1987).

¹¹⁷ Bellow actively collaborated to develop a video disc merging Evidence and Housing Law, see *Brew v. Harris lesson[s] I & II: an interactive video lesson concerning evidence and housing law*, <http://www.worldcat.org/title/brew-v-harris-lessons-i-ii-an-interactive-video-lesson-concerning-evidence-and-housing-law/oclc/18120663> (last visited Jan. 27, 2018). For only a sample of how individuals and some schools experimented in the mid-1980s, see Ronald W. Staudt, *Computers at the Core of Legal Education: Experiments at IIT Chicago-Kent College of Law*, 35 J. LEGAL EDUC. 514 (1985).

Housing Clinic) and permitted others to do the same with their non-clinical and clinical courses. And then, as work on real or life-like problems proceeded, students became increasingly fluent. Had all of us only had available to us the video/computer brilliance of Trautman, Hallahan, and DeGolyer. Still, by the 1980s, we had high quality materials and methods (including computers and videos) available as alternatives to learn law. Yet law schools mainly responded by “mulling over” whether or not such advancements could be productively employed. Everything but that scientific wonder, the Socratic case method, had to be cautiously approached.¹¹⁸

Now in 2018, technology has dramatically altered how we can design, deliver, receive, and interact with information, making an orchestrated effort to pull together how students might most productively learn law eminently doable. Tim Hallahan and those like him (an admittedly high standard) still have a special role to play. We can retool and streamline for optimal consumption, on everything from desktop computers to mobile devices, all students need to memorize, use, and get feedback on as their command of law grows. If memorization proves less than easy for some, we have available programs that help. If fast retrieval proves challenging, we have available techniques (again in various formats) for nudging students to speed up their game. And all this can be delivered for purposes of practicing for the bar exam, practicing to be “practice-ready” in one or many roles, practicing to be in concrete and abstract terms the problem solver lawyers inevitably must be. We need not and should not rely at all on the Socratic case method to achieve this defensible aspiration.

2. *Learning How To Read, Interpret, And Use Cases*

While most concede the Socratic case method is an entirely inefficient way of learning law, overwhelmingly large numbers regard Langdell’s creation as a robust way of teaching how to read, interpret, and use cases. Especially in 2018, fans confidently assert this claim, as if disagreement is not just improbable but impossible. Yet over the course of history, people have protested—and protested pointedly and in print. They have openly doubted just how well suited the Socratic case method is for teaching students to deal at all effectively with case law. Even or especially if you believe judicial opinions ought to be at the center of legal education, the Socratic case method dis-

¹¹⁸ For an example of this sobriety, cast as enthusiasm, about the role of computers in legal education, see Robert Charles Clark, *The Rationale for Computer-Aided Instruction*, 33 J. LEGAL. EDUC. 459 (1983). And for the related impulse to yearn for the return of a modern Langdell and objective, value-free knowledge, see, e.g., Robert Clark, *The Return of Langdell*, 8 HARV. J.L. & PUB. POL’Y 299 (1985).

serves the treasured traditional aim of immersing students in how to move from novice to mastery in the use of case law.

a. Edited Judicial Opinions Promoting Ends Other Than Learning To Read Cases

Of all the available literature, perhaps a single book review published sixty years ago best describes a major problem all too rarely even labeled today. In 1956, the iconoclastic Addison Mueller, a seasoned and gifted practitioner before joining the Yale law faculty, reviewed two remedies casebooks, Charles Alan Wright's *Cases on Remedies* and Judson A. Crane's *Cases on the Law of Damages*, both published by "the same rainmaker, the West Publishing Company."¹¹⁹ Mueller regards Crane's third edition of a casebook first published in 1928 as an academically pedestrian update on the law of damages, abbreviated coverage perhaps not nearly so damning as the "thinness" in the treatment of substantial topics like the valuation of property. By contrast, Mueller praises Wright's brand new book as an intellectually bold effort to combine Equity, Damages, and Restitution, most often taught as three separate courses. As Mueller emphasizes, Wright "aims to demonstrate to students how, when and where the complete arsenal of today's remedies work."¹²⁰

Yet as teaching materials, Mueller condemns Wright as much as Crane for producing books ill-suited to what legal education should be. Wright and Crane, doubtless with the encouragement of West, offer teachers the identical "slimjim format," reports Mueller: short books traceable to the demands of overworked teachers who need books that can be taught on an automatic "'for tomorrow take the next twenty pages' basis."¹²¹ Even more to the point, the authors severely edit the opinions to serve particular and limited pedantic aims. The edited opinions prove to be mere stick figures of the originals, much as the people in casebooks almost always amount to stick figures compared to ordinary humans.¹²² In what would become for Wright a standard maneuver, he anticipated such objections and cleverly insists, as Mueller quotes: "Reviewers object to casebooks in which the cases have been severely edited, and call for a return to the magnificent casebooks of the 19th century, where the cases were presented in all their pristine garrulousness, undefiled by the editor's scissors."

In response, Mueller digs right down to basic premises. His re-

¹¹⁹ See Addison Mueller, *Reviews*, 65 *YALE L.J.* 744 (1955-56)

¹²⁰ *Id.* at 746.

¹²¹ *Id.* at 744.

¹²² See López, *Anti-Generic Legal Education*, *supra* note 47, at 337.

sponse to Wright's preemptive technique summarizes so tellingly what had already become true of casebooks in the 1950s (and likely earlier) and remains true in 2018. It deserves to be quoted in full, indeed treated as the final word on this topic:

Again [Wright] has neatly anticipated this reviewer's criticism. For though I hardly call for "a return to the magnificent casebooks of the 19th century," I do object to the sort of scissoring that Professor Wright indulges in. Occasionally a case, like a man, needs an operation. But Professor Wright has not run a hospital, he has run a slaughterhouse. The only value he can see in including cases not thus butchered is that it may be "good for the student's soul to demand that he wade through page after irrelevant page, searching out those facts, issues, and holdings which are related to the course." I submit that it is also good for his development of legal skill. The fact that it is is one reason why the introduction of the case method marked such a significant advance in legal education. That we may well have gone too far in the use of that case method is another matter. I personally have no doubt that it is wasteful of a student's time and wearing on a student's interest to feed him an almost exclusive diet of such case reading and analysis for three years. But the solution does not seem to me to be the substitution of twice as much half-case reading. There is a growing need in legal education for illuminatingly written text which can be used to convey information economically and thus free a student's time for independent research and project work and the training of other skills. But a parade of fact summaries and excerpts from opinions does not constitute such illuminating text. And I trust that we have not yet become such slaves to the "case system" that we can see no way to supply it other than thus to smuggle it in behind a mask of case headings.¹²³

b. Obscuring Rather Than Systematically Revealing Patterns In Judicial Opinions

Even if more opinions survived less butchered, the Socratic case method has proven an awful way to teach students how to read, interpret, and use cases as first-rate lawyers. Rather than reveal the identifiable patterns in judicial opinions, teachers most often obscure them. Especially if they cling tightly to old-school or semi-Socratic questioning, they prefer to reveal some "truth"—some insightful reading—as mystifyingly within the special domain of the professorial caste rather than predictably a part of readily identifiable rhetorical arrangements. They're doing what, in their estimation, they believe rigorous Socratic case method teachers have done forever. Yet if they're the product of

¹²³ Mueller, *supra* note 119, at 747.

an unexamined tradition, they choose each day to give it new life.

Instead of aiming to equip students to map configurations and even improvisational variations, faculty remain convinced they're doing their job best when students find themselves confused, now and then awed, and sometimes shamed. Confused students signal the beginning of an appreciation of "it depends" in law. Awed students signal an appreciation that some have the natural ability to "see and make arguments" central to case law (that's why they're part of the faculty and on law review). Public humiliation can create awe too—instead of putting one person up a pedestal, a teacher can equally take down a few students, as a reminder that most students (all but the tiny elite) can work very hard to get competent but will still remain permanently outside the "gifted class."

Students today still regard a devout follower of the Socratic case method as a teacher who takes some pride, if not enjoyment, in making students feel small. No, this is not hyperbole: not about the classroom, not about the comments many and perhaps most faculty make to one another about students,¹²⁴ and not about students' perceptions. That sums up the prevailing state of affairs. Except that some have broken rank with this still-sturdy tradition.

Among those who lecture, the Bainbridge and Leiter generation and those who pre-dated and followed them, and certainly among those who offer students synthesized notes and outlines, the aim is to make available both mainstream law and the deeper empirical and normative choices at work. In this sense, faculty do not exploit judicial opinions as a means to confuse but as another source for the professor to describe and explain in lucid terms. To varying degrees, these professors may even offer some charting, some diagramming, of opinions, of arguments, of policies supporting arguments. To the extent synthesized notes and outlines deliver on how to read cases (illustrate, describe, explain—repeat), this lecture approach can amount to an advance over traditional or quasi-traditional Socratic exchanges. Yet what these professors rarely if ever do is to convert this knowledge into the point of departure for students preparing to do something in role with judicial opinions, to demonstrate their early literacy, their reading, interpreting, and using cases as lawyers in diverse roles do. That failure proves unfortunate, a huge opportunity missed, and ut-

¹²⁴ My sketch draws on decades of my own experiences, on the experiences of many others, and on a large literature illustrated by this sample. *See, e.g.*, LANI GUINIER, ET AL, *BECOMING GENTLEMAN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK" LIKE A LAWYER* (2007); Susan Sturm, *The Architecture of Inclusion*, 29 *HARV. J. L. & GENDER* 247 (2006); López, *Anti-Generic Legal Education*, *supra* note 47.

terly changeable.

Other faculty who have broken rank within the Socratic case method courses do so by explicitly mapping the patterns in judicial opinions. And by doing so, they aim to equip students to “do things” with cases in the ways lawyers do. Duncan Kennedy created and shared an ideologically and pedagogically transparent method where faculty shared with students visible and invisible patterns—“vying argument bites, ever-present polarities”—perceivable in all judicial opinions in any and in every doctrinal realm.¹²⁵ Kennedy’s students, some of whom themselves became prominent professors and practitioners, carried on this tradition, with a full appreciation of how Kennedy’s ideas and methods inspired their own particularized approaches to teaching and to using cases in practice.¹²⁶

At the same time as Kennedy was implementing and refining his approach, another cluster of teachers has taught, as best as casebooks will permit, how first-rate lawyers in various roles actually read the edited judicial opinions in casebooks they use. In the immediate footsteps of Mueller and Countryman and Chayes and Sander and Michelman, Janet Cooper Alexander, Alison Anderson, Daniel J. Bussel, Devon Carbado, Clare Dalton, Peggy Cooper Davis, Steven Derian, Ingrid Eagly, Paul Goldstein, Cheryl Harris, Sheri Lynn Johnson, Jerry Kang, Sung Hui Kim, Charles Ogletree, Richard Parker, Joanna Schwartz, Steven Shiffrin, David Sklansky, Kathleen M. Sullivan, Dan Tarullo, Kim Taylor-Thompson, Sherod Thaxton, Laurence Tribe, Jon Varat, Alex Wang, C. Keith Wingate, Steve Yeazell, and Noah Zatz offer powerful examples of the modern incarnation of intellectually radical realists.

Why? They get right into the belly of the beast, not through mystery, much less awe-inspiring surprises. Rather they coach, each in her or his own way, by describing, explaining, modeling how top-notch lawyers actually read cases in everyday problem-solving circumstances. And they nurture students who then “try on for size” in the classroom the same approach to and techniques for reading, interpreting, and using cases. Some consciously and others not-quite-so-consciously borrow from the best of clinicians, both those they have read and those they may know. Like Kennedy and his robust network, these teachers do not hide from the entanglement of politics and law—and of teaching as coaching.¹²⁷

¹²⁵ For one description of Kennedy’s aims in his Torts teaching, see Gerard Clark, *A Conversation with Duncan Kennedy*, 24 *THE ADVOCATE*, *THE SUFFOLK U. LAW SCH. J.* 56 (1994).

¹²⁶ See Boyle, *supra* note 19; Balkin, *supra* note 19; Paul, *supra* note 19.

¹²⁷ For what I regard as illuminating portrayals of the ideas and sensibilities and skills at

Finally, and at least as importantly, the very best academic support teachers and first-year lawyering teachers transform the Socratic case method into something approaching a direct and explicit training of how to read, interpret, and use cases. Rejecting the widespread (if often unspoken) conviction that to be direct is somehow to be less than intellectually formidable, they offer their own versions of guides to the patterns judicial opinions represent. Some methods may look like Taylor-Thompson's, others like Anderson's, others still like a variation of Kennedy's. Others may reflect still a different combination of influences, perhaps from practice as much as law school, yet suited to this particular aim of the Socratic case method.

Whatever may well be the differences, all these teachers expect ambitious learning by students and offer ambitious teaching. If as part of the academic support system, a faculty member of this quality teaches Socratic case method courses (Con Law or Remedies, say), they'll make the most of probing lawyer-like readings and exchanges with students—in the phenomenal fashion of Patrick Goodman, Kristin Holmquist, Pavel Wonsowicz—and, earlier still, Kristine S. Knaplund. If they're assigned to teach first-year Lawyering, they'll make the most of grounding the students in what lawyers actually do in the middle of messy and difficult disputes, where reading and interpreting and using cases may be central to a client's well-being. Faculty like the late Skye Donald, Aderson François, Kris Franklin, Tom Holmes, K. Babe Howell, Andrea Matsuoka, and Ezra Ross transform Lawyering into the explicit and ambitious training about reading and using cases that is far more typically and inaccurately attributed to the traditional Socratic case method.

Yet far too few, even of these superb exceptions (principally the Lawyering faculty), require students routinely to read, interpret, and use cases through written products responding to life-like problems. And yet that's how students routinely get tested, certainly in Socratic case method courses, certainly on the bar exam, and often in practice itself. To be sure, some of the remarkable teachers include practice and even graded writing assignments. And the Academic Support faculty double down compared to other great teachers, even when class size would appear prohibitively large. And the Lawyering faculty require far more writing precisely because the course builds its training—and most often, its class size—around applied efforts.

Yet even many teachers I greatly admire would be the first to acknowledge wildly more writing and feedback and rewriting (repeat,

the heart of this cluster of teachers' approach to lawyering and training, see, e.g., Michelman, *supra* note 19; Taylor-Thompson, *The Politics of Common Ground*, *supra* note 8; STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

repeat) would be fundamental to learning how to read, interpret, and use cases in ways required typically in the writing of a lawyer. They only wish they had the resources to require routine writing in the Socratic case method courses they teach. Only through writing—absolutely featuring preparation and explanation and examples of quality products—can students aim to achieve what they’re being asked to produce about how to read, interpret, and use cases. Only through feedback on and rewriting written products can students come to appreciate and consolidate strengths and come to recognize and work to address weaknesses. All the old adages about writing (no writing but rewriting) apply every bit as much within legal education as elsewhere.

As important as it is to highlight those who break with tradition (the Andersons, the Davises, the Kennedys, the Taylor-Thompsons, the Derians, the Wonsowiczs, the Howells), this emphasis risks skewing our perceptions. The great majority of Socratic case method courses I have observed and read about still muddle what they might make lucid; they still complicate what they might simplify; they still render as simplistic what they might make deservedly complex about learning to read, interpret, and use cases. These consequences may result only from the inadvertent failure of many teachers either to abandon or to transform the question and answer exchanges and either to abandon or transform the casebook as materials.

But inadvertent failures can define a teaching and learning practice. To some degree, these effects may be produced purposefully because that odd mix has come again to signify—to the teachers, to the authors and fans of the Carnegie Report, to the 2018 born-again celebrants of Langdell’s creation—intellectual depth and breadth. The praise proves as difficult to explain as the annual choice of this method to teach how to read, interpret, and use case law.

c. Substituting a Sterilized Brand of Weak Formalism For The Radically Honest Appraisal Of What Goes Into, Can Be Discerned In, And Can Be Produced Through The Use Of Cases

If you have sat in on as many classrooms as I have (and now watch multiple times on video), if you have reviewed as many casebooks and teacher’s manuals as I have, it’s impossible not to come away convinced that most faculty teach a sterilized brand of weak formalism. I’m hardly the first to make this observation, in private and in print.¹²⁸ Yet most faculty deny even what they see in the mirror. (Re-

¹²⁸ For a very recent illustration, see POSNER, *supra* note 7, at 297-304.

member, videos preserve performances—permitting teachers, like coaches, to “watch film.”)

How can anyone who in no sense believes in formalism, you may ask, teach students to believe it is or might be true?¹²⁹ The motivations may be many, but the bottom line turns out to be the same. Faculty using the Socratic case method offer students a weakly convincing and thoroughly attackable brand of Langdellian thought. It’s as if they first need students to believe this in order to have exchanges they regard as offering doubts, posing questions, culminating almost always with the democratic problem of judges who actually decided on bases “outside the law.” They perceive they need a target, so with the help of casebooks and students they create one. No more than many judges themselves, these faculty do not want to teach an outed version of how judges decide.¹³⁰

What’s so weird and dysfunctional about this pronounced tendency is that it utterly violates what any top-notch lawyer does, what social scientists (especially political scientists) prove over and over and now treat as obvious, and what ostensible believers in the total autonomy of law violate every time they apply an ideological check to the appointment of judges.¹³¹ Every able lawyer, every social scientist, and every honest elected official utterly understands that ideology and law intermingle, each playing its role, yet entangled inevitably and importantly. Everybody knows political views explain data about both case results and reasoned elaborations. It’s not at all that ideology is any more determinative than law. That’s naïve and wrong-headed—theoretically, empirically, experientially. But every judge holds views—conscious, half-conscious, tacit—that explain cases at least as much and often more than “judicial method.” Of course judges can experience constraint and freedom depending upon the question

¹²⁹ While a huge literature variously defines and assesses formalism, for a small sample of the best treatments, see Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3 (1980); MORTON J. HORWITZ THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Ernest J. Weinrib *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Fred Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Duncan Kennedy, *Legal Formalism*, in THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634 (2001); DUNCAN KENNEDY, *The Rise and Fall of Classical Legal Thought* (2006).

¹³⁰ See Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183 (2008).

¹³¹ For only an illustration of a large and probing social science literature, see, Benjamin E. Lauderdale & Tom S. Clark, *The Supreme Court’s Many Median Justices*, 106 AM. POL. SCI. REV. 847 (2012); Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. OF POL. SCI. 14: 131 (2011); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Byron J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999).

posed and the field of cases they must deal with. Both apparent boundlessness and limits are real, often proving only that some judges are better than others at making law appear to control the outcome. If we must inevitably first determine “the law” to be true to it, then fidelity turns out to be a far more circular phenomenon in judicial opinions than conventional legal accounts routinely offer.¹³²

In place of the Socratic case method, it is not only easy to imagine how we might alternatively teach reading, interpreting, and using cases. It’s easy to borrow from decades of courses outside the Socratic case method where, for example, large numbers of clinics have taught the reality of how cases in practice can be described, illustrated, and explained. Already in legal education, the stocks of categories, stories, and arguments and the always available polar meanings can be mapped. And teachers can help students envision choices judges (and their law clerks) made in framing questions and rationalizing results—and choices they might well have made had they been otherwise inclined. That does not mean law is pretext and answer-yielding ideology lurks behind every decision. That means they share a world of complex social, cultural, legal, and political forces. And laudable reading, interpreting, and using of cases acknowledges and works fully aware of the presence of these desires.

In such training, judicial opinions would be read in their entirety. But that’s only a start. Opinions would be read often against the backdrop of briefing submitted to trial and appellate courts to decipher the help counsel (including any amica) provided the court in determining what to decide and why. And those briefs and memoranda can be and often should be read against the background of the record. And opinions and briefs would be read against *everything* lawyers could and would learn about the judge or the panel of judges or the state or federal Supremes—from statistical analyses of hard data to details about their law clerks to insider scoops about what judges reveal about their desires and concerns.¹³³ In this approach, the judge is just another worker. Not a sacrosanct figure, not a necessarily wise figure, not a person who on the job can totally shut out (even if she desires

¹³² The modern literature exploring at length this brute fact, if in different terms, ranges from Posner to Kennedy to Amsterdam and Bruner. *See, e.g.*, POSNER, *supra* note 7, at 297-304; KENNEDY, *supra* note 7; AMSTERDAM & BRUNER, *supra* note 7.

¹³³ Though the literature about the influence of law clerks on judges should be older and richer, recent interdisciplinary scholarly efforts prove valuably illuminating. *See, e.g.*, ADAM BONICA, ADAM CHILTON, JACOB GOLDIN, KYLE ROZEMA & MAYA SEN, A LEGAL RASPUTIN? LAW CLERK INFLUENCE OVER VOTING BY SUPREME COURT JUSTICES (2016); IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (Todd C. Peppers & Artemus Ward eds., 2012); TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

to) everything she brings to her role.

That's anything but a putdown—at least coming from me. Three of the people who helped shape me as a lawyer and as a person served for decades as judges. One I clerked for (Edward J. Schwartz) and the other two (Roy B. Cazares and Napoleon Jones) were two of my three law partners (the great Tom Adler, the third) in our storefront radical firm. I knew the inside of their courtrooms, the inside of their chambers, and the inside of their feelings and thinking. They were as fair as can be and as human as can be. Of course ideology intermingled with law in everything they did. Of course cultural and social and economic realms inflected their cognitive processing and their self-conscious “judging.” How could I have ever thought otherwise about these people, these laborers, I knew so intimately for decades?

Every judge I have ever appeared before and every judge I have known (now huge numbers, including brilliant former practitioners like Louise DeCarl Adler, Jesus G. Bernal, Peter W. Bowie, Laura W. Halgren, Virginia Keeney, the late Harry Pregerson, Hector E. Ramon) has been every bit as human as my mentors and friends.¹³⁴ Not as gifted, mind you, not as wise, but every bit as human. Absolutely none were or are the ridiculously robotic figures the traditional Socratic case method makes them appear to be. Judges are other humans with a job. They're other workers—yes, other workers, deserving of respect only if they earn it, just as are others (presidents, janitors, musicians, coaches, you name it). That judges are just other workers makes lawyering and law more and not less intriguing, makes reading, interpreting, and using cases more and not less demanding. It's a serious expertise, where growth never ends, at least if a lawyer never stops being willing to get better.

The training already provided for decades by the best of clinical programs advances from fundamental through greater and greater sophistication—in reading, in interpreting, in using cases as lawyers variously must. And the radical honesty about the process heightens the intellectual and practical rigor in ways both exciting and unnerving. In the best clinical programs, we already train students to grasp, from the beginning, the contradictory nature of our tendencies and the range of meaning-making instruments always available to take us in whatever direction we choose. The best clinicians and non-clinicians train through problems about the problem solving lawyers actually face in a

¹³⁴ That long ago Holmes famously agreed, and that, far more recently, Posner prominently endorsed this same view, makes a much wider range of audiences take notice. See OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881); Richard Posner, *Book Review: Reasoning by Analogy*, 91 *CORNELL L. REV.* 761 (2006).

world wildly less sterile and pre-determined than the faux formalism at least implied and so often drawn out by traditional practitioners of the Socratic case method.

At least since 1970, and through some earlier practitioners of the problem method (Cavers) and some of the earliest live-client clinicians (Bradway), we can discover various schools of thought about how best to teach how to read, interpret, and use cases. We could emulate any and deliver first-rate training about how to read, interpret, and use cases. And we could combine virtues into new packages. Just consider the rich diversity of sources:

Some schools of thought are linked to particular people at particular law schools. To name just some, the NYU School (Amsterdam/Hertz/Guggenheim/Davis/Bruner/Francois), the Harvard School (Bellow/Charn/Ogletree), the American University School (Millstein/ Shalleck), the CUNY School (Bryant/Lesnick/Burns/Copelan), the Chicago School (Stone/Futterman), the Northwestern School (Elson), the UC Hastings School (Marshall/Piomelli/Aaronson), the Columbia School (Rabb/Schatz/Liebman), the UCLA School (Bergman/ Binder/Boland/Patterson/Moore), the Georgetown School (Aiken/Epstein/Mlyniec).

And at the very same law schools and at other schools still, you can discover clinicians and non-clinicians who chart their own spectacular approaches, perhaps borrowing from many different sources, always melded into their own original compositions. Think only of other such masters as Alicia Alvarez, Iman Anabtawi, Sally Burns, Daniel Bussel, Angela J. Davis, Steve Derian, Paula Galowitz, Patrick Goodman, Bill Ong Hing, Albert Moore, Nancy Morawetz, Charles Ogletree, Michael Pinard, William Quigley, Dean Rivkin, Bryan Stevenson, Kim Taylor-Thompson, Tony Thompson, Lucie White, Leah Wortham, and fresh waves of extraordinary teachers like E. Tendayi Achiume, Sameer Ashar, Alina Ball, Priva Baskaran, Amber Baylor, Ingrid Eagly, K. Babe Howell, Cady Kaiman, Elizabeth Keyes, Irene Oritseweyinmi Joe, Daria Fisher Page, Meg Satterthwaite, Joanna Schwartz, Pavel Wonsowicz, Noah Zatz.

What these teachers all know—and what they have put into action since at least 1970—is that you need not and should not secrete or sugarcoat the realities of how judicial opinions come into being, and you need not and should not avoid the contradictory and indeterminate many-sidedness of what it means to read, interpret, and use cases in the ways lawyers in diverse roles do. While today's Socratic case method itself may produce formalist graduates, others within law

schools have done all they could to counteract and rectify this demonstrably limiting and limited vision.¹³⁵ Students as much as teachers can handle the truth. And everyone—not least clients and the legal profession—will be far better off for it.

3. *Learning How To Recognize, Understand, And Produce Quality Legal Analysis*

At least since 1870, legal analysis has been deeply entangled with legal education. Many regard this relationship as healthy and even estimable—mutually defining and mutually admiring. For all the many criticisms of the training law schools provide, especially the failure to turn out “practice-ready” graduates, many and perhaps most praise legal education’s brand of “case method” as *the* way of inculcating a deep and supple understanding of “how to think like a lawyer.” Indeed, nearly all proposed reform agendas explicitly defend, or at least confidently presuppose, the wisdom of building proposed changes in the curricula around a first year devoted to teaching legal analysis through the case method, and a second year and almost always a third year with ample case method course offerings.

I am among a relatively small cluster who openly regard teaching legal analysis through the Socratic case method as intellectually lazy, pedagogically haphazard, and practically ineffective. Students do not at a deep level grasp the nature of legal analysis, cannot describe it lucidly, and cannot with confidence produce solid-to-high-quality legal analysis, as required by law school essay exams, essay and performance test segments of the bar exam, and assignments in many lawyering roles.

Here’s the kicker, though. Student grasp of legal analysis resembles faculty and practitioner comprehension. To be sure, most law professors I know and have read can produce solid legal analysis, some excellent, others even magnificent. And many practitioners whose work I have read can generate serviceable legal analysis, some excellent, some even brilliant. But if forced to describe the “it” lucidly, both at the deepest and the most practicable levels, practitioners’ and even faculties’ explicit depictions more often than not betray a revealingly garbled quality. They cannot coherently describe the nature of the legal analysis they aim to produce or how they manage to produce it. When seasoned faculty members and lawyers offer fractured, cagey, enigmatic accounts of legal analysis, is it any wonder law

¹³⁵ Perhaps more than any other experienced observer, Richard Posner routinely castigates and argues against the formalism embodied by the teaching of far too many Socratic case method teachers and reflected in the law school graduates he encounters. POSNER, *supra* note 7, at 300-03.

students and young practitioners reveal kindred qualities?

Instead of the explicitly coherent accounts, both deep and practicable, what we most often get in 2018 is very familiar but not frequently enough spelled out. Explicit depictions of legal analysis and how to produce it most often employ idioms bouncing between two identifiable poles. At one pole, we find what I'll call an "academically high pedigree" account. At the other pole, we find what I'll call a "practically useful, typically IRAC-driven" account. My use of "academically high-pedigree" does not mean to convey my conviction that it really is high pedigree. A "practically useful IRAC-drive" does not mean to convey my conviction that views at this other pole prove, in fact, practically valuable. Still, the labels capture an important sociological truth about this polarity, at each end and at all points in between—and of legal education and the legal profession.

Ardent true-believers in either polar account nearly despise the other. High pedigree proponents regard IRAC proponents as anti-intellectual, vulgar, and perfunctory. IRAC proponents regard high-pedigree types as intellectually pretentious, confused and confusing, and even mystified and mystifying. Those who genuinely see merit at both poles—and certainly those who feel they must pay homage to each before divergent audiences—not surprisingly offer various admixtures somewhere along the continuum between the two poles. Some employ their own worked-out fusions that, at least in my judgment, do help others comprehend and generate legal analysis. But most others offer admixtures that leave their audiences feeling more flummoxed and annoyed than ever, perhaps to some degree mirroring the aching doubts of those offering the concoctions. In any event, this state of affairs—habitually bouncing between these poles, offering various admixtures of the "high pedigree" and "practically useful, typically IRAC-drive" polar views—can be witnessed on any day in a law school classroom, in one-on-one meetings between more senior and more neophyte practitioners, in commercial bar training courses, and in advanced CLE writing courses for lawyers.

The state of affairs has produced both a relatively new body of specialized guidance literature and relatively recent pre-law-school orientation programs. The literature comes in all forms—books, articles, blogs, and more. The quality and tone varies widely, perhaps befitting the emotional and intellectual confusion the literature means to address. The best of these publications accept legal education as it is and aim to help law students, incoming first-years in particular, to make sense of training through the Socratic case method that leaves

most baffled, exasperated, sometimes even dejected.¹³⁶ The books, some written by gifted and skilled teachers, can perhaps be best summarized by the title of one: *Cracking the Case Method: Legal Analysis for Law School Success*.¹³⁷

Authors of these books aim to help incoming students grasp how law professors use the case method, trying to make plain the unarticulated assumptions and aspirations, aiming to define the boundaries within which teachers and students operate, and the standards by which student classroom performance shall be judged. The literature surfaces the unspoken scripts about legal analysis (mini-theories of the classroom version of oral legal analysis), how to “try it on for size” in the classroom (what sorts of things to say in response to conventional classroom questions), and, sadly, to a far lesser degree, how to produce it as required on final essay exams (“what goes into an A answer to an essay exam”).¹³⁸

Relatedly, this state of affairs has produced, too, pre-law school orientation programs run both by commercial outfits and by some law schools. Much like the “Cracking the Case Method” literature, these programs offer guides, even blueprints, for knowing how the case method works. Without pretending they’re uniformly structured and equally successful, it is true the questions these programs address for the incoming student considerably overlap: What is the Case Method, including what are casebooks and what is the Socratic Method? What does it mean to prepare for class? To participate well in class? To understand the aims and methods of the law school case method as *the* most celebrated and still most dominant way to expose the nature of legal analysis valued so by law professors? And how best can students handle the social and professional and cultural dimensions of the law school and legal profession’s environments?¹³⁹

“What a strange world, right?” That’s what a few authors of this guidance literature and creators of these orientation programs have said to me—themselves acknowledging the oddity of their books’ existence and popularity. In some cases, authorial ambivalence goes fur-

¹³⁶ The contemporary guides certainly have their predecessors, some valuably conceived and lucidly presented, though mainly unknown and uncredited. *See, e.g.*, DELANEY, *LEARNING LEGAL REASONING*, *supra* note 7.

¹³⁷ PAUL BERGMAN, PATRICK GOODMAN & THOMAS HOLM, *CRACKING THE CASE METHOD: LEGAL ANALYSIS FOR LAW SCHOOL SUCCESS* (2d ed. 2018).

¹³⁸ Predictably a separate body of literature aims to target students hoping to understand how to do well on law school essay exams, some produced by very able and caring teachers. *See, e.g.*, RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS* (1999).

¹³⁹ For a brief description of the week-long UCLA orientation program, see UCLA Law, Curriculum, <https://www.law.ucla.edu/academics/curriculum> (last visited Jan. 27, 2018).

ther. Patrick Goodman, one of the three authors of *Cracking the Case Method* and an instructor of UCLA Law's first-year orientation program, is an outspoken critic of the case method itself, and questions the utility of books like his:

I intended the book to be an outsider book, but there wasn't an accord on that point among the authors, with the result that the book is deeply and strangely agnostic about its central subject. In a perfect world, the book could inoculate students against bad pedagogy by encouraging them to assume outsider status from the start, to question law school's methods and make better choices. But frankly I am afraid that I am doing harm with the book. I fear I am contributing to the status quo with a book like this, rather than being a change agent, i.e., being a fomenter of Marcusean "false consciousness." Those who are best at "beating the system" might be most loath to change it or be dissatisfied with alternatives. Or worse, administrators and students might feel like the orientation and book is itself sufficiently innovative that activities like these are what it means to reform legal education.¹⁴⁰

The Socratic case method's approach to teaching and learning legal analysis has proven so obtuse that students and faculty and commercial investors correctly perceive a huge market clamoring for direction. Students must learn how to learn before they arrive at school because the teaching is so poor. What explains the nature of this way of teaching and learning? How can new students adapt as quickly as possible to the regimen? How can they adapt when individual teachers can hardly be described as sharing an agreed-upon set of ways to employ the method? Hard, Semi-Soft, Soft Socratic? Lectures as Socratic? And what is it teachers mean students to learn? And if "legal analysis" transcends classrooms and the law school and the lawyering worlds, then why do teachers appear far from in agreement about what it is and when someone is "doing it," much less "doing it well"?

And if in the Socratic case method virtually all the practice of "thinking like a lawyer" is performed orally in the classroom, how come the final exam revolves around written problems students do not routinely see, requiring the production of written legal analysis they seldom practice under their teacher's guidance? And if cases dominate the classes, why does something like memorized black letter law (largely omitting any case names, put aside any explicit analogies from one case to another) prove the critical way to shape the answers faculty want? And why do so many faculty members behave as if stu-

¹⁴⁰ Email from Patrick Goodman, Lecturer in Law, UCLA School of Law, to author (Nov. 29, 2017, 21:56 PST) (on file with author).

dents trying to figure out how to get an A are somehow grubby, when final grades appear to be for most teachers a measure not just of a student's performance on an exam but of her or his ultimate intellectual capacity?

Of course those who recognize the strangeness of the world we're entangled with typically appreciate legal education already offers a counter-regimen for how to teach and learn how to recognize, understand, and produce quality legal analysis. Going back to 1970 and further still, some slice of teachers, students, and practitioners have always developed and refined aims and methods that diverge strikingly from the Socratic case method, equipping students to perform well in law school, on the bar exam, and as lawyers. Some have written worthy intellectual accounts, and others more practically-oriented products.

To be sure, these authors differ in their terminology, how they reconcile available evidence and opposing views, and to what degree they respect the rival accounts offered by other authors. Yet it astonishes me how much the contributions of these authors go largely ignored. Not that many students and practitioners are even aware of this literature. And I have come to conclude not as many faculty as I might have once thought know this literature at all well. In any event, only a very small number of teachers employ this immensely valuable scholarship and how-to manuals when training students in how to recognize, understand, and produce quality legal analysis. Students can grasp what too few faculty and practitioners read, and they can see how the "fancy scholarship" relates to their everyday learning.

At the same time, many who never publish a word about legal analysis do ambitiously and effectively train students in how to recognize, understand, and produce it. Again, you can find them in Lawyering courses, in Academic Support Programs, in simulated and live-client clinics, and in non-clinical problem solving courses. Yes, too, you can find a small number in Socratic case method classrooms, though even the most extraordinary of these faculty members would teach legal analysis far better still in an entirely different format. They produce materials, problems, and feedback deserving and rewarding careful study.

Yet here's a blunt fact. If most do not read what even the best authors have produced about legal analysis, far, far, fewer still carefully examine the materials and the methods great teachers use in teaching legal analysis outside the Socratic case method. (What, study what Academic Support folks do? Lawyering folks? "Skill-teaching" clinicians? Excellent professors who have flipped their doctrinal classrooms and won teaching awards as a result?) In carefully examining

the clinical methodology of Gary Bellow and the “case method” systems of business and medical schools, Frank Sanders stood with only a tiny number of curious faculty and practitioners. And in borrowing from many bodies of literature and many varied teaching methods, a very long line-up of clinicians and non-clinicians (mainly problem method devotees) treated the teaching and learning of legal analysis as important enough to do ambitiously and effectively. And that meant, they realized, as Kris Franklin rightly insists we all should, that we should shake loose from the grip of the Socratic case method and of all those who insist, apparently as a matter of faith, “it is *the way*.”¹⁴¹

For all the differences among these teachers and writers, this counter-regimen circles around certain shared insights. At least in my version, these insights proceed from the appreciation that legal analysis is a stylized variation of all analysis. And analysis expresses one dimension of problem solving, all problem solving, not just what lawyers do. We’re always making meaning—offering ourselves one or another depiction of what we sense is happening—just to take the next step. And inevitably we employ our standard stock of meaning-making instruments. We invariably use stock categories, stories, and arguments. And what stocks we use and how we use them depend upon the role we’re in, the culture and setting in which we find ourselves, and what effective meaning-making means there and then.

Answers to bar and law school essay exams illustrate this dynamic. If as a test-taker you want to be perceived in your written analysis as knowing how to make meaning as competent lawyers do through contract doctrine, then you must formulate and resolve questions the way lawyers do through contract law. How do lawyers give meaning to life’s endless situations through contract doctrine? Your answers must read like—feel like—answers competent lawyers would provide. Your answers must leave lawyer-graders convinced you belong to—should be considered a member of—the legal community.

Test-takers often ask, “What should I know?” What perhaps they should ask is, “What should I know how to do?” Or even, “What should I know how to perform in writing answers to bar and law school essay questions?” Sample answers provide terrific data—perhaps the best—for learning what lawyer-graders demand and reward. They represent test-takers formulating and resolving questions in ways the legal community regards as worthy. Sample answers should be studied and emulated by test-takers:

- Sample answers should be studied to identify significant pat-

¹⁴¹ See Franklin, *supra* note 97.

terns—significant because lawyer-graders have rewarded answers that reveal those patterns and have said explicitly, “Test-takers should produce answers that include these patterns to get from us what they want from us” (good grades, bar membership).

- Sample answers should be emulated by test-takers to build critical “muscle-memory” (yes, it’s actually stored in the brain)—critical because lawyer-graders reward a particular (even peculiar) sort of performance in answers to essay exams and, far more than most acknowledge, that performance can be made something a test-taker learns how to do, time and again, under exam conditions.
- Sample answers exploited by test-takers in training—trainees—guide “knowing and doing.” And knowing and doing is both the aim and the method of all ambitious and effective training.
- If we look at thousands of sample answers, here’s what we all know for sure: At least by implication, sample answers tell us what lawyer-graders regard as unworthy of lawyers—as indicating test-takers do not at all grasp the meaning-making required on essay exams.
- And here’s the kicker: Learning patterns, through organized systems, frees us to be artists. We can teach the production of legal analysis precisely to free law students and lawyers to approach this (and all kinds of) writing as writers—as writers with artistic aspirations for the exquisite manuscripts they’ll now and then generate. Yes, writers potentially the equal of those we call “writers.”

C. The Socratic Case Method As Work Slowdown

The stubborn refusal to recognize these superior and already available alternatives has led me to see that both faculty and students have come to appreciate that the Socratic case method serves as a modestly well-disguised work slowdown. I do not use the term “work slowdown” allegorically, much less glibly. I mean a faculty-student work slowdown in the full sense of workers stalling out more productive and efficient ways of doing what they’re doing because they’re not willing to change their work lives.

Some might argue that my use of the term is misguided, mistaken—that the battle against threatening changes in legal education (if ever there truly was one) has already been won, and that absent a fight to win or a foe to overcome, continued adherence to the Socratic case method should be cast as indolence or inertia rather than as a

work slowdown. And yet I insist on and persist in so labeling it. “Work slowdown” bespeaks resolve, actions taken with a purpose in mind, and here the purpose is not merely indolence for its own sake, but entrenchment. The longer the status quo remains the status quo, the more difficult it will be to upend, and the less likely it becomes that faculty and students will be asked to put forth the effort that would be required of them in a system devoted to truly robust legal education.

In the 1970s, faculty and students together took two semesters (a full year) for each doctrinal course. They took that year to accomplish very murkily, very indirectly, very slowly what they might well have accomplished ambitiously and efficiently in far less time. Yes, teachers chose this approach, and they collectively and individually imposed it on all students. But far too many students, probably the majority, acquiesced in the regimen. The “mystery” of “learning to think like a lawyer” probably had something to do with student loyalty (if not loyalty, then certainly the failure to raise hell): They wanted to become priests too or at least knew the jobs they wanted, the future they imagined.¹⁴² They treated (after proper inculcation) Socratic case method as *the* means of measuring talent or at least as not squandering time and energy and talent.

Transforming legal education, certainly banning the Socratic method, will kill this particular work slowdown. Will kill it for faculty, which is a big reason (not the only one, but a big reason) why voting majorities refuse this most central of changes. And will kill it for students, which may be one reason why they haven’t refused *en masse* to register for doctrinal classes as currently constituted. To be sure, plenty of students have perceived, at least half-consciously, that the entire process is not just indirect and shallow and all over the place. They have understood, especially at exam time, that it all could have been done in wildly less time. And the “saved time” could have been put to far more productive use.

But if the Alternative Vision ever fully implanted, with the Socratic case method banned, students would soon learn how much they had been involved with a work slowdown. And their entire work experience in law school would change. They would have to be deeply committed to prepare for and to practice problem solving, its capacities, alone and together, through a progression that would lead them to get better and better, advancing far more rapidly from novice to

¹⁴² See, e.g., López, *Changing Systems*, *supra* note 7. Invocations of priesthood were relatively common in the 1970s, and earlier references in influential scholarship can be found in ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS – DIARY OF A LAW PROFESSOR* (1992).

problem-solver to coach-in-training. But students, like teachers, would experience a startling change in their daily work life.

In both quarters, this would look like a heavier workload and a decreased comfort level. No longer able to simply perform their competences, both teachers and students would affirmatively have to perform. Rather than leaning on the crutches of casebooks, the Socratic case method, and their well-worn scripts, teachers would have to do real legwork—assembling appropriate materials for distribution to the students up front, crafting problems to be used in class. Even after new methods ceased to be new, they would demand far more of teachers than does the Socratic case method in the form of deep engagement with the material and with students from a place of true consciousness and conscientiousness rather than formulaic pedagogy.

As it currently stands, seasoned teachers of doctrinal courses may be overheard to boast to their colleagues about how little time they spend teaching each week. “You’ll be proud of me: I got it down to seven hours total, including prep, time in the classroom, and office hours.” “Talk to me when you match my five.” These are real conversations that take place at “elite” and “non-elite” schools alike—but, under the Alternative Vision, they’d wither away. These jaded faculty members would rapidly discover just how much work it takes to live up to new expectations, to truly teach. And some might exit. So much the better.

Meanwhile, students would quickly realize how very much they depended on the game-playing and formulae of the Socratic case method. Indeed, student course evaluations from flipped law school classrooms reveal a decidedly mixed picture. While excited by the change of pace and obvious potential, students have been dismayed at the sheer amount of work and level of engagement expected of them. Some who were used to thriving in classes governed by the Socratic case method found themselves out of their depth and struggling.

Like any good campaign, this work slowdown is being waged on many fronts. Most students receive little or no training in, say, client interviewing—and if they were, the wisdom of the Socratic case method, from which the client is an ever-notable absence, might be called into question. Clinics (and clinicians) have been relegated to the bottom of the prestige totem pole—for if they weren’t, the utility of the best clinical programs relative to doctrinal classes might call into question the value of the Socratic case method. Discussions of the need for practical training are almost inevitably one-offs—because if real efforts were undertaken, real change might result. And on and on.

But the negative consequences of sticking to what we do are both

real and formidable. Students get taught a version of lawyering through the Socratic case method that results (in the words of a colleague) in “amateurish and arrogant” problem solving. As such, students have presented clinicians and clients with what some public health leaders call “downward pathology.”¹⁴³ Like Langdell himself, students have often regarded categorizing all of life into doctrinal categories as the sum and substance of legal analysis, thinking like a lawyer, lawyering. They typically show precious little curiosity about what else they might learn about a situation, about how others might perceive what was going on, about how to categorize in the political, social, cultural, and economic realms with the same vigor they presumably employed in their doctrinal filtering.

Some students successfully have fought off these messages. They’re a varied crowd, and it’s hard to know what leads to their collective choices. In any event, most students accept the method on its own terms, perhaps especially the most earnest and dutiful, at least for a time. And after being so trained, they face the challenge of unlearning what law school had trained them (if often only subliminally) to think “quality analysis” entails—a brightly colored set of highlighters. They had internalized default settings that could have proven stubborn indeed. Many clinicians and practitioners and judges, perhaps most, have understood that these students would have been far better off had they never been initiated through the standard first-year curriculum. But downward the dysfunction flows. They all have gotten stuck with “health problems” in the student’s approach to lawyering that had already been created before they even met.

And the sad truth is that some students may *never* receive the necessary training. Having been inculcated in the pathology that pervades law schools, these students may go on to underperform throughout their careers. Big firms, long venerated for the quality of training they provide associates, often pick “winners” early on and relegate the others to tedious work with little or no training provided (or needed). Nonprofits routinely describe themselves as having too few resources to train their incoming lawyers, though this explanation has been openly challenged, with some whistle-blowers describing certain non-profit cultures as choosing not to provide first rate training, just as they choose to promote the organization’s brand over the well-being

¹⁴³ For just one vivid example, see the interview with world-class doctor and epidemiologist, Sandro Galea, on his transition from emergency room and world crisis doctor to public health specialist, Lisa Chedekel, *New Dean Sandro Galea: Pushing to ‘Elevate’ Public Health* (Jan. 4, 2015), <http://www.bu.edu/sph/2015/01/04/new-dean-sandro-galea-pushing-to-elevate-public-health>.

of client communities.¹⁴⁴

Especially in the early 1970s, though, few Socratic case method teachers paid a moment's notice to this phenomenon. They just did what they did. They may well have been committed fans of the Socratic case method; they may have been agnostic but experienced; they may have been deeply skeptical but not about to undertake a challenge to colleagues and a rich tradition. Some regarded a faculty member's job as having little to nothing to do with the education of great lawyers. "Law professors are not paid to train lawyers," proudly proclaimed Yale's Owen Fiss, "but to study the law and to teach their students what they happen to discover."¹⁴⁵ Others may not have been so cavalier, so self-absorbed, so much the independent contractor responsible only to himself. But views like Fiss's did not meet with any notable resistance, at Yale or anywhere else across the country.

In 1970 and in 2018, what always has seemed diagnostically critical to ask is what exactly law professors aimed to produce at all, let alone through the Socratic case method. Fiss may not have cared, figuring everything could be remedied by a talented graduate and experience. But what of those who feel differently about the obligation of teaching? What do they make of this work slowdown? Of the failure to teach legal analysis, case reading, and black letter law well? Of the related effects of training students to be dysfunctional as problem solvers, presenting obstacles to quality work, across the various roles lawyers fill?

Answers to such questions may illuminate what we have been through during the long reign of the Socratic case method. Yet they should not deter us from what we must and should do. Much as we should respect work slowdown as a labor strategy, we need not agree with its every deployment. We cannot and should not put up with efforts—by faculty, students, or anybody else—to interfere with more ambitious and productive ways of learning and teaching in legal schools. We should and must and can insist we bear the burdens a radically better legal education would impose upon us all. We must ban the Socratic Method. Full stop.

D. To Find Further Resistance, Follow The Money

In addition to the collective work slowdown, adherence to plain

¹⁴⁴ See Gómez, *supra* note 8.

¹⁴⁵ See Letter from Owen M. Fiss to Paul D. Carrington, in correspondence collected in Peter W. Martin, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 26 (1985). For a contrasting view, one I regard as contributing to the Alternative Vision, see John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation for Curricular Reform*, 1 CLIN. L. REV. 363 (1994).

old tradition, and the misconception that the Socratic case method is an effective way to teach law, financial incentives are an important source of resistance to change. These incentives come in many forms, but two are immediately obvious.

The Socratic casebook method is financially efficient for law schools, which benefit from packing lecture halls with as many students as possible—students who pay tuition and go on to become financially comfortable (and hopefully generous) alumni. Supposedly, every one of the fifty or eighty or one hundred students in a class benefits from every Socratic exchange between the instructor and any other student. Whatever else the Socratic case method is, it is tested, formulated, and usable in its common, mediocre form right out of the box. These factors combined—ease of mass administration and near-zero transaction costs—mean that continued adherence to the Socratic method makes financial sense for law schools.

Some professors profit from the Socratic case method system, and the influence of those professors who financially benefit may keep many others in line. Professors who author prestige casebooks, of course, have a vested interest in the method's continued vitality. Were the method to die its deserved death, these authors would lose their captive audiences of students who now pay hundreds of dollars per book (in the latest edition, tinkered with slightly and re-released to evade the used-book market) and purchase multiple books per semester. Those professors who do not author casebooks and whose colleagues include those who do are likely to be subject to pressure from these power-broker authors, who frequently wield intra-school political clout, not to upset the status quo by abandoning the method.

And how about the authors of study aids? Guides through law school? Bar review outlines and lectures? Orientation courses? And all those who teach basic CLE problem solving to students who graduate without any training whatsoever? We could go on and on. But the obvious aim of this litany is that we should remember that some of the method's most ardent champions have motivations far beyond the pedagogical, the philosophical, the forgivable, the defensible.

E. Scrutinizing Everything Else (Seminars, Colloquia, Practicums, Externships, and Clinics)

As the Mission Impossible Teams of the Alternative Vision descend on law schools, rooting out what's destructive and ineffective, nothing must escape scrutiny. Just as the best clinical programs have for years, and just as doctrinal classes would in the Alternative Vision, everything in legal education should reflect an educational approach at one with the problem solving at the heart of all law practice. This

would entail a series of probing questions and hard answers. Many aspects of legal education that are now standard (or even billed as cutting edge) would fall casualty to the rooting out of the useless, the unambitious, the harmful.

Of each clinic, we would ask, “Does this clinic use live or life-like experiences to coach students up in the various capacities lawyers use to solve problems? Is each component geared to that specific end? Are students expected (and given the means) to come prepared to practice practice? Have they been provided diverse materials that make the social and ideological and economic realms accessible and the law explicit, that lay out lucidly the methods to be used? Or is it instead a ‘clinic’ in name only? Shallow, mechanical, vapid? A so-called clinical course, for which in advance of any meeting no interdisciplinary reading is assigned and in which class time is consumed with slideshows or banal lectures on foundational law or the basics of cross?” All these “clinics” have no place in the Alternative Vision. Either remake them from the ground up or eliminate them.

Seminars and colloquia that purport to provide deep dives into specific areas of law must likewise be scrutinized for their utility to the ultimate aim of preparing students to be lawyers. “Do students enrolled in this colloquium come away knowing more not just about the subject matter, but about the various, standardized ways of responding to academic writings? Are those standard responses made plain, explained, explicitly tried out in the colloquium space? Or is it instead the shallowest of one-offs, after which students have no better grasp of the systematic ways in which writings can be dissected than they did beforehand?”

Of seminars, we ask, “Are students receiving valuable instruction on, say, how to read and write and speak? On how to recognize standard structures? Understand, dissect, and respond to authors’ claims? With wise supervision, write substantive pieces of their own, from research and question formulation to structured argumentation? Or is this seminar instead an excuse for teachers and students alike to coast—the students barely skimming readings but virtually assured of receiving A’s, the teachers ‘teaching’ only through some strange mix of podium formality and small classroom sloppiness?”

Some might argue that externships should receive lighter or no scrutiny—that, because participating students are engaging in work that approximates that undertaken by lawyers, no further inquiry is required. Nonsense. Just as clinics may be vapid, just as seminars and colloquia may underperform, so too may externships fail to live up to their charge (as did many apprenticeships in the past). We must inquire, along now-familiar lines:

“Are wonderfully constructed foundational materials made explicit and available up front, and are excellent performances modeled and explained, so that the student is prepared to perform from day one? Are students coached up as they perform? Are they learning by doing the things they are supposed to be learning to do? Are they taught explicitly how to become their own coaches? Or is this externship instead a two-sided (but hardly victimless) exploitation, where the host receives free labor and the student avoids the earnest effort that is at the heart of the Alternative Vision?”

We could go on and on and on. The bottom line, however, is that nothing in legal education will go unexamined, and little programming will go untouched. The casualties will include those practices whose main effect is to waste time and resources, to permit participants barely to engage, to fly the flag of eminence without delivering. There shall remain and there shall be freshly introduced much excitement, joy, and creativity. And in the mingling of the serious and the playful, everyone will experience the thrill of great learning and teaching of the problem solving that is the practice of law.

V. PIECING TOGETHER GREAT TEACHING AND LEARNING TEAMS

A. *A Brief Case Study Of Dysfunction*

Law school can and should be a place that is worthy of the full engagement of excited, motivated students. And indeed, in small and discrete pockets, it is. Remarkable clinicians and non-clinicians do exist in even the most pathological of institutions, and for the students with whom they cross paths, the promise extended by so much promotional material is kept, if typically in too-small ways.

But the rest of the school lives of these students, and virtually the whole of the experience of others, is characterized by decided dysfunction. This is as true at elite schools as at non-elite schools. Students voice concerns to one another, to trusted professors and mentors, and perhaps even to law school administrators in moments of boldness or of being simply fed up. But their concerns are not addressed, and the machine grinds on. For example:

A renowned scholar is a terrible teacher, though he’s been teaching for many years. He assigns eighty to a hundred pages of reading for each class session, but the reading proves shallow, and the class itself moves at a snail’s pace as the teacher labors the obvious through ancient lectures, often reading statutes word-for-word to the class. The students shift in their seats, shoot each other sidelong looks, gripe outside of class about their disappointment and frustration. “We’re not learning *anything*.”

Some days, they'll engage each other *sua sponte* in spirited, in-class debates about big questions and fine details, the sort the professor has never mentioned. Turns out, they care deeply about the subject and are desperate to find some way to stay engaged. Past years' outlines are as incoherent as the class itself, revealing that their student-authors had much the same experience. No past exams are available to students who want to practice. And yet this professor is venerated by the school, his scholarship (most of which is in fact mediocre) held up as evidence that he belongs in front of a classroom. What are students to do besides shift as best they can, write tepid or even scathing course evaluations, knowing no one who reads will ever even try to change a thing, and then move on?

A second-year clinician is moved to a doctrinal teaching position because the school can't otherwise staff it up. As it turns out, she's terrible—an unprepared and capricious teacher who can't assemble demanding reading materials, put together an engaging class session, or even pose a coherent question. Each student is divided between compassion and anger: The teacher is clearly struggling, and they empathize. But they enrolled in the class in hopes of learning something (even a great deal), and it's now obvious they'll have to learn whatever the course description promised outside of this experience. To make matters worse, students in the young clinician's clinic confidentially acknowledge their experience had been every bit as disconcertingly gloomy.

One or two students go to the student-facing members of the administration, people they know and trust. The administrators listen open-mindedly. But they state facts: They can't do anything about it. And those who could make changes, who could intervene and see that the young and inexperienced teacher was coached up, are higher-ups who presume that they have nothing to learn from students. Besides, the higher-ups know the law school has no robust system in place for training teachers. Going to the higher-ups would accomplish nothing and might even lead to a backlash against the students.

A Socratic teacher popular among some students initially presents as charming in front of a classroom. In the lingo of students, he is likeable and, now and then, "brilliant" in offering unexpected insights about excerpted judicial opinions included in the famous casebook. But in short time, students experience him as the full-on bully he can be. He's thin-skinned and vengeful. It's hard to figure what sets him off. Certainly one pattern emerges: He seems to target certain students. Because they come off as accomplished? Because they question the (largely tacit) political assumptions driving his interpretations? Because they cannot take seriously his utterly legalistic

sense that all that matters lies within the case itself (doctrine as both the entire world and walled off from all other realms)?

In the largely scripted classroom exchanges, the Socratic teacher aims to take these targeted students down a peg or two. He most often employs abrasive questioning and his own Greek-chorus-like commentary on the exchanges. Routinely, he crosses the line from the pedagogical into the personally abusive (“ad hominen attacks,” as lawyers sometimes say). Of course the targeted students feel bewildered. They stand up for themselves, but students behaving like adults only drives him to extend his bullying. Other students notice.

Unconvincingly, they attribute his behavior to “tough-mindedness”—even as they openly doubt he can ever become anything but an unapologetic, vainglorious bully. All the students know there’s nowhere to turn. He’s an up-and-coming teaching star, at least as the law school markets him. The students variously wonder: Should I just check out? Attend or not but devote all serious attention to the student-generated outlines he condemns and the high quality scholarship he never mentions (much less assigns)? No matter the choice, they will learn whatever they will learn despite a teacher no one should experience.

These stories are completely fictional—but based on “real events.” Over the decades, I have heard many such tales about instructors at diverse schools. And often I have studied the materials the teachers assigned and watched videos of the classroom work the teachers do with students. Students, faculty, and staffers all have their own stories to add, which they’ll share in confidence and off the record—stories about shockingly bad teaching and institutional complicity. They have stories, too, about going to really nice and good people—the student-facing administrators, for example—only to be told, again and again, there’s nothing we can do. Anyway, say these nice and good folks, she or he or they *are* terrible teachers or *are* incorrigible bullies but she or he or they are “hardly the worst.” Soothing, right?

The clinician I’ve just depicted, and other unacceptably poor teachers like her, may well be trainable and retainable in the Alternative Vision. The renowned scholar provides us fewer reasons to hope. Selected and venerated for his scholarship, he’s a teacher in name only. That for years he has been allowed to rest on his questionable laurels—that he will be allowed to do so until he is feted upon retirement—reflects and contributes to the creepy solidarity routinely present within law school cultures. Ostensibly because of respect for the terrible teacher’s scholarship, more likely because of misplaced loyalty, even many first-rate teachers routinely prove unable to face their

colleague's horrible teaching or at least unwilling to delineate the problems in any way that might lead to redress. Together with many others, they enable terrible teachers, and every bit as frequently they enable the law school's inattention to serious and sustained training.

As for the bully, he has no place in any institution of learning—at least not without a fundamental change in his practices and habits. To earn a place in the Alternative Vision, he would have to demonstrate openness, at a deep level, to a pedagogy that doesn't center around his position of power or around the Socratic exchanges he uses to assert it. And he would have to abandon mean-spiritedness. As it stands, though, he's in no danger. His colleagues do not experience his bullying, so they feel no cause to defend him—though they likely would if called upon. “It's just some students.” “They're being too precious or too demanding or too political or too something other than reliably accurate.” “Learning is sometimes uncomfortable—get used to it!” Any administrators made aware will simply tell students to soldier on. “What can we do? The semester's only a few months long. You'll be fine.”

The laissez-faire attitude toward the struggling young clinician, the blind eye turned to the up-and-coming bully, and the institutional complicity that established the scholar in his role and keeps him there are as condemnable as they are common. The Alternative Vision makes room for none of this. In a school in which joyous engagement and perpetual openness to improvement is the baseline, communication will remain open, and all opinions (especially of those in the know, which often includes students) heard and respected. Bad teaching will not be tolerated from anyone, be she a new clinician or he a senior doctrinal scholar with decades of classroom experience. And, of course, those who abuse their power (yes, unapologetic, vainglorious bullies) and those who protect bullies (various enablers) will be jettisoned.

We will hire with both eyes (not just one) on teaching ability. We will insist that teachers, like students, train themselves and each other up—not just initially, not just at occasional, voluntary sessions, but never-endingly, through well-conceived programs themselves staffed only by the best teachers of teachers. Every institutional move—including and especially hiring and training and “counseling out”—will reflect the expectation and aspiration that teaching and learning should and shall be utterly engaging and exciting.

B. Utilitarian Evaluation and Compensation of Teachers

The unspoken premise that underlies much discussion of teaching and learning is that a teacher ought to be evaluated on the basis of the

quality of her performance in the time she spends with students in the classroom. This is the premise around which many course evaluations are based. The questions center around the classroom time, asking about the organization of the presentation, the professor's receptivity to student ideas in class, and the like.

But this basic premise is wrong. Teachers should be evaluated based on all they do—most of which, in the Alternative Vision, happens outside of meetings between students and teachers. The focus ought be, how much might an engaged student have learned from all the teacher has done? Why shouldn't a teacher who develops and promulgates excellent materials, who crafts valuable problems, who gives insightful feedback be elevated as a great teacher, though his classroom presence be less dynamic than others'?

And I'll go a step further: If students are able to learn and achieve mastery through the use of excellent material developed and promulgated by such teachers, why shouldn't we give these teachers credit for units on that basis alone? Classroom time is certainly valuable. In fact, it's so valuable we ought meet only when we know exactly what we're doing together, so that the students practice what they're learning and the teacher coaches the practicing student. How well a teacher coaches in these meetings matters. But it does not necessarily matter most, and it most often will matter less than how well the entire course (the training program) affords engaged students a wonderful learning experience. Evaluations and compensation ought reflect this truth.

C. Drafting and Training for Success

Being on an excellent team—a team full of focused, mutually supportive individuals striving together toward a common goal—is a magical experience. We see this experience depicted in movies and on television shows, in fiction and in sports writing. But we need look no further than everyday experience to find this magic in action. Students in study groups urge each other on to better performance, encouraging one another before exams and checking in afterward. Members of high school sports teams gather for group cheers before games or meets and cheer each other on as they compete. A company whose door-to-door salespeople work on a commission-only basis mandates daily meetings, and workers at those meetings share tips on how to close, make bets on who will sell the most the next day, and are inducted into the “comma club” for four-figure commission checks.

When people unite to reach a shared goal, the whole really is greater than the sum of its parts. In volleyball, every member of a team has her mind on a goal: Don't let the ball drop. Each has her role

in helping the team to meet this goal, and will do whatever is required, laying out her body if necessary to keep the ball from hitting the floor. If she sees she's in over her head, a player will yell, "Help!" and other players will come to her assistance, laying out their bodies if necessary to keep the ball from hitting the floor. The team is not just six players on a court; it's a twelve-handed, twelve-footed, twelve-eyed entity determined not to let the ball drop.

And if a team is truly successful, the drive toward the ultimate goal shares space in the spotlight with individual achievement and mutual support, ends unto themselves. A good swim coach has her swimmers stationed poolside during meets, cheering their teammates whenever they're not themselves competing, and pretty soon scoring the most points or upholding the team's reputation is no longer the singular focus. Swimmers know one another so well that they can pick each other out in a heat by stroke mechanics. They've all memorized each other's best times for every event, and when an old best time falls to a new one, everyone celebrates as if it were partially theirs. Because it *is*. And, wouldn't you know it, best times fall more often, and more meets are won, in such environments.

Modern law schools are not nearly often enough populated by teams devoted to teaching and learning. Faculty are frequently more focused on writing and self-promotion than on teaching—and what passes for teaching is worn and ineffective and in fact requires very little of faculty. Students by and large know that the real value they will extract from their law school experience will come in the form of resume lines and grade point averages, so they pursue those ends, leaving full engagement (in a pedagogy they know is feeble) to those few who've not yet sussed it out.

The hard truth is that teaching the law, and doing so effectively, is not for everyone. If we are to build great teaching and learning teams, we must be willing to cut the dead weight. For one thing, teachers who are unwilling to put in the hard work that will come with reorienting themselves to the Alternative Vision and truly pursuing the end of preparing law students for the practice of law must be let go—just as a volleyball player who won't lay out must be cut. I realize this implicates issues of tenure, and that shedding ineffective teachers is not now as simple as deciding to do so, but I persist in saying that, in the Alternative Vision, teachers must shape up or be made to ship out, either by being fired or being "counseled out."

This will mean either the radical conversion or the departure of faculty who now brag to one another about how little time they spend on their teaching, who protest against requirements that they seriously undertake to write up aims and methods, who remain utterly con-

vinced, under the auspices of academic freedom, that teaching is not a responsibility to be shared with others. The message must be proclaimed loud and clear: If you can't get on board and pull your weight, swim back to shore and we'll leave without you.

And not everyone who undertakes to teach lawyering has the necessary ideas, skills, and sensibilities. The beginning of wisdom is to realize that teaching ability draws on particular capacities, separate and apart from either ability as a performer (here, as an attorney) or as a scholar. In the Alternative Vision, law schools will stop pretending otherwise. To piece together great teaching teams requires the hiring of great teachers—not great practitioners, not renowned scholars who we're "confident" will teach well, but great teachers.

Law schools' cultural hostility to the ambitious training of lawyers is perhaps especially visible in this quarter. The great majority of law schools appoint new faculty almost exclusively on the basis of their scholarship. In the materials submitted to prospective employer law schools, a candidate's "teaching interests" frequently receive only passing mention—and teaching methods are rarely mentioned at all. Meanwhile, past and future scholarship take and hold center stage, the candidate elaborately portraying her work, enthusiastically marketing at least as much as accurately describing. Indeed, extensive scholarship has become so entrenched as a hiring prerequisite that faculty search committees frequently privilege J.D.-Ph.D.s (who often have more published scholarship) above those whose work is exclusively legal.

It's not that I believe a single-minded focus on lawyering or law is desirable or at all correlated with teaching ability. And it's not that we cannot name J.D.-Ph.D.s among those from whom the Alternative Vision has learned from and should learn still more from in the future. (Abel, Gómez, Hale, Jolls, Thaxton, Whitman . . .) Rather, selecting teachers principally on the basis of their scholarship is plainly wrong-headed. And I'm far from the only one to think so. In a recent empirical study of the hiring of J.D.-Ph.D.s and its effects on legal education, Lynn LoPucki concludes that the notable shift in favor of such hiring, as well as that which results from such hiring, goes largely undebated within law schools.¹⁴⁶ Worse still, he finds the shift will "reduce the

¹⁴⁶ See Lynn M. LoPucki, *Dawn of the Discipline-Based Law Faculty*, 65 J. LEGAL EDUC. 506 (2016). A small literature has noticed, praised, worried. See, e.g., Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 5 AM. BAR FOUND. RES. J. 501, 531 (1980); Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139 (2008); Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLIN. L. REV. 35 (2009); Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL. L. REV. 901 (2011); Tracey E. George & Albert H.

schools' capacity to prepare students to practice law."¹⁴⁷

If legal education regards past and immediate scholarly production as far more important than creative and effective training of future lawyers, then faculties will disproportionately lack the abilities and the willingness to do what I insist they must. That collision has already arrived.¹⁴⁸ And, if this were a hallway conversation, LoPucki would tell me, with a twinkle in his eye, "You're already getting crushed and the future looks bleak." More and more attenuated from the work of lawyers, more and more encouraged to ignore ambitious teaching and learning about lawyering, many and perhaps most tenure-track faculty already have cut themselves off from the practice of law, the vitality of great teaching and writing. This obsessive focus on scholarly production will have no place in the Alternative Vision. The time has come for all of us to stop behaving as if teaching ability were either a secondary qualification for a job as a teacher or "follows naturally" from other sorts of excellence.

Just as not everyone has the drive or ability to teach effectively, not everyone who now enrolls in law school is equipped to learn in the way they would have to in the Alternative Vision. I certainly do not propose a return to the days of "look to your left, look to your right." The fraction of students who are unwilling to train when push comes to shove or who truly lack the chops required to become practicing attorneys is tiny. But it does exist. In building great teaching and learning teams, a school operating under the Alternative Vision will recognize this, and will "fire" or counsel out students who won't put in the necessary sweat labor. Those who aren't ready to be turned loose on clients and communities after completing their studies must likewise be counseled out or held for more training.

I know all these points may come across as harsh, especially against the background of legal education as we know it. There's a sort of magical thinking animating what we do now: "This scholar has never taught a day in her life, but she knows so much about the topic that I'm sure she'll teach well." "This student is lazy and a terrible listener and writer, but he's survived three years of law school and passed all his classes, and I'm sure he'll catch on once he starts practicing." I'll be the first to champion magic, but magic, like excellent improvisation, doesn't happen on its own. The magic that results when teams form is like any other kind of magic—it's planned, practiced,

Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1 (2014); Justin McCrary, Joy Milligan, & James Phillips, *The Ph.D. Rises in American Law Schools, 1960-2011: What Does it Mean for Legal Education?*, 65 J. LEGAL EDUC. 543 (2016).

¹⁴⁷ See LoPucki, *supra* note 146, at 511.

¹⁴⁸ See Lynn M. LoPucki, *Disciplinary Legal Empiricism*, 76 MD. L. REV. 447 (2017).

executed, reviewed, improved, put into action yet again. That process never ends, at least among the greats.

To more fully flesh out what the law school would look like if this brand of magic were realized, we can look to the excellent teachers who currently make up their own tiny counterculture and extrapolate out. Even as their colleagues boast about getting their weekly teaching hours down to single digits, these teachers pay out all the sweat and time involved in flipping their classrooms and imparting knowledge and know-how rather than just rehearsing tired scripts. These teachers spend serious time and thought writing up their aims and methods, recognizing it as an exercise not just in transparency, but in self-reflection and continued improvement. These teachers are willing to share the responsibility of teaching with similarly motivated others, and are frequently themselves resources to which others could come for information and guidance. But, wouldn't you know it, no one ever asks.

What if these teachers were no longer lone warriors? What if all legal educators took that title seriously and bent their collective shoulders to the wheel? Make no mistake—those few who take their charge seriously must now expend a great deal of effort protecting themselves and their sweat labor from the wear of the cultural tide, even if they've stopped trying to push it back by converting their colleagues and sparking real change. What if we set these excellent educators free, allowed them to devote all their energy to their work? And what if we built around them teams of likeminded teachers in a community where collaboration, shared methods, and constant improvement were the norm? Members of these teaching teams would lead classrooms full, to the last woman and man, of students committed to learning how to be lawyers—and if that goal were affirmatively in reach, the transparently natural result of the prescribed course of study, the number of students unwilling to put in the work required (and therefore in need of counseling out) would be vanishingly small.

In order to reach the heights sought, we need folks at all levels to be fueled by love of teaching people and not things. The work involved, and the demonstrated excellence upon which we insist, demand nothing less. Students and faculty, deans and staffers should get at least as turned on by teaching and learning as they do by whatever else they count as part of their work (writing, practicing, administering). As a point of departure and as a goal, everyone on the teams must be able, ready, and willing to treat teaching and learning—teaching and learning superbly—as an intellectual, practical, and emotional high they aim to enjoy and help others to experience.

Along with a love for teaching people and not things, team members must bring to the table an openness—an ability to observe and a

willingness to change. On an interpersonal level, this means they must be ready to be completely honest in their work; to reveal themselves and their weaknesses; to put in the effort it takes to improve; to partner and work with people of all “skill levels”; to learn from everyone (because absolutely everyone has something to teach); to engage deeply with the work of others and incorporate others’ strengths into their game; and to commit to each other’s improvement as well as their own. They must, in other words, be coaches on the floor—propelling one another and themselves up the learning curve, to ever-greater performance.

On a pedagogical level, and among other changes, this openness would likely lead to the long-overdue incorporation of advanced technology into legal education. The near-total absence of advanced technology from the modern law school (save for that used for legal research and that put to administrative uses) is at once flabbergasting and all too predictable. At a time when football and basketball players are using virtual reality to improve their games,¹⁴⁹ when software can teach us languages and can translate spoken language in real time, why are we not actively seeking out ways to make technology a full-fledged member of our teaching and learning teams?

The answer is the same as it was over thirty years ago, when Donald Trautman, Tim Hallahan, and John DeGolyer’s remarkable computer and video course of evidence tutelage stood alone and unreplicated: Welcoming technology into the pedagogical space would involve admitting there’s room for improvement—that the Socratic case method is not the panacea it’s long been claimed to be. In the Alternative Vision, teaching and learning teams would energetically seek out technological “members” and enthusiastically incorporate anything and everything of utility into legal education. Following the example set by Trautman, Hallahan, and DeGolyer, we’d bring powerful and available technological tools to bear inside and outside the law school classroom.

It should not have to be stressed, and yet it cannot in 2018 be emphasized emphatically enough: The teams must be aggressively desegregated. As unfortunately still needs to be stated, underscored, and bolded, diversity of all sorts is an integral part of a robust education. By ensuring that all aspects of the team reflect diversity in race, ethnicity, gender, religion, political leanings, sexual orientation, and

¹⁴⁹ See Tom Haberstroh, *John Wall: “I Really Thought I Was Gonna Die”*, ESPN (Feb. 8, 2017), http://www.espn.com/nba/story/_/page/presents5/washington-wizards-virtual-reality; Kit Ramgopal, *Virtual Reality Companies Are Changing How Athletes See Practice*, N.Y. TIMES, Nov. 27, 2017, <https://www.nytimes.com/2017/11/24/sports/virtual-reality-athletes.html>.

socioeconomic status—obviously, a less than exhaustive list—we will ensure that students (and indeed all involved) incorporate into their worldview the truth that wisdom comes from all quarters. Team members' experiences will all be enriched by the inclusion of divergent points of view.¹⁵⁰ This is especially important in the legal field, in which White men have long been dominant and their voices disproportionately amplified.

Those attempting to piece together great teaching and learning teams must be watchful of pitfalls and challenges. It will not do, for example, for law school deans to merely pay lip service to the assembly and support of such teams while continuing to nurture an underbelly of current practices. Remember that law school administrators address calls for fundamental changes in legal education with one-off dinners. Know that students who seek to involve themselves in administrative matters are often carefully chosen (with passivity in mind) and carefully instructed (to be smart, behave, and legitimate predetermined decisions by signing off). We must guard against this mindset so infected by inertia, against the sort of lip service that gives the impression that we're moving when in fact we're standing still.

A continuing challenge will be to discover (while never accepting as set) the limits of the willingness and ability of all involved to adapt to new demands. How smart and hard are we all willing to work? How far outside our comfort zone are we willing to venture? How long until our new space becomes comfortable, and does that comfort bring with it a complacency that itself is cause for change? And how are we to keep one another motivated to always, always strive to improve—to better not just our results, but our very methods?

The fact is that the excellent teams that would result from careful assembly should be the floor and not the ceiling. Admittedly, this is a high standard, but it is certainly no loftier than our professed aim: to prepare students to ably represent clients upon graduation. Nor is it loftier than anything that's been going on for many years in the best of clinical programs. That teams of such high caliber would represent a floor reveals two things: that the Alternative Vision is incredibly different from the legal education with which most of us are familiar, and that this is eminently doable. Yes, everyone should come in ready to work. Yes, students should be ready to practice upon graduating law

¹⁵⁰ See Marybeth Gasman, *An Ivy League Professor on Why Colleges Don't Hire More Faculty of Color: "We Don't Want Them"*, WASH. POST, Sept. 26, 2016, <https://www.washingtonpost.com/news/grade-point/wp/2016/09/26/an-ivy-league-professor-on-why-colleges-dont-hire-more-faculty-of-color-we-dont-want-them> (explicating some of advantages that come with a diverse faculty and exploring ways in which institutions might make their faculty populations more diverse).

school. And yes—we can do this.

We cannot know at the outset every wrinkle or variable that the Alternative Vision will bring our way, nor the final form and ultimate abilities of the whole that will take life from the parts we seek to assemble. But piecing together great teaching and learning teams is a doable and absolutely vital step. Excellent, motivated teachers and able, hungry students do exist. Let's be uncompromising in our prioritization of excellence. Let's privilege teaching ability in teachers, learning ability in students, and proper motivation in both. Let's stop thinking magically and start acting to make magic happen.

VI. BE AWARE—AND BEWARE

Even as the vast majority engage in a work slowdown, some students and faculty audibly voice the need for change—for legal education that fulfills its compact with students to prepare them to practice law. They may sometimes speak softly, or avoid speaking directly to those in power, but still they speak. Aware of the need to at least make motions around the issue, administrators may tick the box of attending to these concerns through various one-offs, like lunchtime symposia or faculty–student dinners. The conclusion that these one-offs are inadequate to the task of transforming legal education, and are in fact nothing more than motions made around the issue, is inescapable. They say, “Pay no attention to the man behind the curtain.” I say, don't be bought off by such transparent overtures.

The announcement of such a lunchtime symposium or dinner might look like this:

As you know, the school regularly hosts events at which students, staff, and faculty discuss issues of importance to our community. We hope you will join us for dinner this coming Thursday, when the topic will be the school's legal pedagogy. Specifically, we will discuss ways in which faculty members can and do incorporate legal skills development into doctrinal instruction. We look forward to your presence and input.

Pretty standard, right? And to the casual eye it might even look promising: “Finally, they're going to talk about it!” But even assuming that such a dinner could be a means to the end of improving legal education (which I'm quite unwilling to concede), we have a problem right out of the gate. Included in my stylized example, because I've encountered it so routinely, is a hedge: “[W]e will discuss ways in which faculty members can *and do* incorporate legal skills development into doctrinal instruction.” In other words, it's a non-problem. “This is already being done. Nothing to see here. Move along.”

To imply that the ambitious development of problem-solving ca-

pacities is taking place in any significant portion of doctrinal and theoretical courses is to tell a bald-faced lie, full stop. But the fact that such hedges are used so frequently by law school administrators in the context of addressing concerns lays bare another hard truth about many school administrators: They're not listening. Here, they ignore the students who profess a desire to be prepared for practice upon graduation, as well as the faculty who see a systemic problem and want a systemic solution. Likewise, those who raise the need for more high-quality teachers are told that occasional, voluntary trainings are already available. And students who ask for explicit, in-school bar preparation are told that more is being done to prepare them than they realize. And on and on and on.

In many cases, it's not a bare assertion of power—"I'm the dean, and this is how it's going to be." Rather, such claims are rooted in an assumption, which is sometimes made explicit, that those at the top know best what's going on at their law schools—better than faculty, and certainly better than students.

For far too many deans and top administrators, this position is more than a default; it's unshakeable. But the fact is that both faculty and students know what goes on in doctrinal classes far better than do deans, and that students also know (by virtue of their summer work experience) precisely how little "legal skills development" they're deriving from the Socratic case method. Just as students know more about teacher quality, and faculty know more about their colleagues' teaching abilities, than do deans. Just as students who've begun bar preparation know, far better than do deans, how little their schooling has prepared them. When faculty and/or students underline a problem and ask for change, shouldn't their understanding be respected, their queries considered open-mindedly and answered with candor?

But deans are on average far too wrapped up in the top-down, expert(-as-traditionally-defined)-deifying mythology of the legal field and of law school pedagogy to break with this model. "As lawyers, we don't listen to our clients to discover anything more than what fits in our pre-fabricated boxes of legal problems and legal solutions; why would we listen more openly here? As lawyers, we know more than our clients because we have legal knowledge; why shouldn't our administrative knowledge put us in the same privileged position?"

The typical dean doesn't ask herself such questions, much less undertake the candid self-evaluation that would result. Just as clients are boiled down to fact patterns in the mind of a traditionally educated lawyer, who gleans legal problems with legal solutions and leaves the rest, the typical dean gleans from the complaints of those who question traditional legal pedagogy that this is a particular type of problem

in need of a particular type of solution. More specifically, it is a non-problem—as communicated via the wording of the announcement—and those troubled by it can be appeased via a one-off.

And what a one-off it is. Even if we were to excise the common “can *and do*” hedge or to consider the dinner or the lunchtime symposium on its own terms, its by-design impotence is starkly evident. Wouldn’t any such effort require extensive preparation by the participants? The body of relevant literatures—on human psychology, on adult learning, on theories of legal pedagogy, to name only some—is wide and deep, and good-faith participants in any honest effort to reform legal education would need to undertake serious readings in order to be prepared to do the work required.

Consider the very one-off nature of a dinner or a lunchtime symposium. If law school administrators were really committed to incorporating the development of useful capacities into doctrinal classes, wouldn’t they undertake a distinctly more serious effort? Wouldn’t such an effort have to span far more than a single evening and involve the ongoing participation and training of many more than could sit comfortably at any dinner table? The reading undertaken beforehand would be just the start. Those seeking to transform legal education would need to tackle a series of challenging problems and be involved in discussing how any existing or imagined course (or any experience) might meld theoretical and conceptual training into experiential learning and how experiential learning can be at the heart of conceptual and theoretical training.

The feigned value, the worse-than-uselessness, of the proffered “problem-solving method” becomes all the more inescapable when thinking about other areas of life. Suppose instead that the issue were the quality of instruction at an elementary school, with some parents and teachers asserting that students weren’t proficient in reading upon graduating the fifth grade. Would a dinner party be an appropriate solution? Would the agitators’ concerns then be assuaged?

And when such a law school dinner takes place, the tenor of the conversation is as predictable as its failure to lead to any change. Despite having been billed as already doing work to imbue students with the ideas, skills, and sensibilities they’ll need, many of the faculty in attendance will wonder at the wisdom of the central question and seek to reframe it. “Should we really be doing that? Isn’t law school about learning to ‘think like a lawyer’? Isn’t everything we’re doing with the Socratic case method wonderfully intellectually pure, and wouldn’t the introduction of those baser ‘skills’ dirty the whole thing? And is it even possible to teach the needed ‘practice skills’ in a doctrinal

classroom?”¹⁵¹

If no one but law students suffered—if they were the only ones who felt the injury that results from this particular wrong, by exiting law school utterly unprepared to perform in the profession for which they’ll soon be licensed—that would be bad enough. But the injury doesn’t stop there, or even with their future supervisors, who will have on their hands new lawyers who are at best unprepared and at worst prepared affirmatively badly, having to unlearn all they’ve absorbed and relearn something useful.

Rather, it’s clients who will suffer. Some will be well-heeled, able to weather the inevitable losses that come with poor representation and to find new representation when they wise up. Others won’t be so lucky. The low-income and middle-income and otherwise vulnerable clients served by very poorly educated students will feel real injury and suffer real harm at the hands of new lawyers far from practice-ready. Students are told obliquely and in passing in law school that this is all about the client, and once they start working this becomes true; aren’t law schools working directly in opposition to clients’ interests in preparing future lawyers so poorly?

The plain truth is that law schools, like all major institutions, are supremely capable when they care to embrace self-improvement. To take only one example, one need look no further than university landing pages to see that this is so—those carefully curated areas that present the university’s face to the world at large. University leaders, alumni development and communications departments, faculty, and consultants undertake expensive and extensive research on the effectiveness of their landing pages: The images, layout, and messages are all the subject of continual and intensive scrutiny. Virtually no effort is spared in the drive to present the university in the best possible light—to attract students, parents, scholars, and dollars. Where a school is vigorously invested in the success of a particular effort, it can and will go all-out.

Don’t be bought off by such transparent overtures as one-off gatherings to discuss what should be done (and what’s already being done) to address this serious problem. And don’t be pacified by the mere absence of such maneuvers; recognize that this account, far from being fully descriptive, is instead merely illustrative. The maneuvering that has taken place over the last decade has taken many forms—and in some cases, even those who participated in calls for reformation

¹⁵¹ See Fisher Page, *supra* note 8, at 817 (noting that some question meaning of “practice-readiness” in legal field, given premium placed on specialization and difficulty of preparing students for “widely disparate types of work”).

acted as enablers to the old regime.¹⁵²

Law schools are not preparing law students to practice law. Far from being a nonproblem, this is an outrage. Until law school administrators undertake serious measures involving deep thought, wide participation, and serious training, don't be placated by bones thrown. Remain outraged. Become outraged. Act daily to express that outrage.

VII. THE DYSFUNCTION RUNS DEEP

It may be tempting to think we've covered the territory—that indolence and entrenchment, denials and rationalizations, one-offs and no-gos are the sum total of what's stopping real change from taking hold. But in fact the forest of problems we must solve has roots even deeper, stretches even farther, looms even larger than most may realize or want to see.

The enormity and shape of the forest could be described from innumerable perspectives. How would Damon Agnos describe it? How would Regina Austin? Marissa Dagdagan? Sally Dickson? Michelle Fei? Paula Galowitz? Marlene Garza? Colin Cloud Hampson? Stacey Hawver? James (Sákéj) Youngblood Henderson? Bill Ong Hing? Katie Hurley? Duncan Kennedy? Shauna Marshall? Yumari Martinez? Dale Minami? Gary Peck? Dian Sohn? Kim Taylor-Thompson? Francisco Valdes? Eva Wood? Accounts of each of these and many more would almost certainly focus on different aspects of the issues we face. Although a clear picture would only emerge from an amalgam, each individual account would be illuminating.

And indeed we do have some descriptions in hand. What follows are two related perspectives, both authored with uncommon honesty. The first and more lengthy is by Brian Mikulak, in the form a letter shared with his colleagues upon his retirement from teaching at USF. Following Brian's letter is a reflection from another gifted, accomplished, and experienced legal educator, a friend, who has chosen to write without attaching his name. Together, they throw into sharp relief *just some—just some*—of the pathologies we must root out and overcome as we strive to reform legal education.

A. *A Swan Song*

Dear [Dean],

As you know, I'm retiring at the end of this semester after nearly

¹⁵² See López, *supra* note 5.

twenty-seven years of teaching as skills faculty in the law school. Trent has practiced environmental public interest law for nearly forty years, and particularly in this climate, he really needs to pass the torch to younger people with more stamina. We've sold our preposterously appreciated flat in the Mission and we're expatriating. We'll spend our first year in Latin America, our second in Italy, and figure out the rest on the road. We're not sure whether we'll come back.

I know it sounds cliché, but it has absolutely been a privilege and a terrific pleasure to have taught for the bulk of my legal career. The kids have been a fantastic and incredibly fulfilling part of my life. But as much as I'll miss them—and as lucky as Trent and I have both been professionally—we want to launch our long-contemplated adventure while we're still young enough to adventure.

I've collected my thoughts about my experience in the law school and the challenges it faces, and I want to share them with you and the rest of the law school community. I know what I've written is long, but after nearly twenty-seven years I think it's time this subaltern spoke, and I ask you to hear me out.

Let me say at the outset that I respect scholarship and the people who produce it. I published one law review article many years ago. It wasn't very long and it wasn't published in a prestigious journal, but it took a great deal of energy and effort. I've now written a book I'm trying to get published. It's not a scholarly work, but it is a serious book, and it, too, took a great deal of energy and effort. I very much appreciate our doctrinal faculty members' role as scholars as well as teachers in the law school.

But I think your identity as scholars and your elite school formation have left most of you with an emotional need to believe that you're vastly smarter than everyone else. So you tart up law in an attempt to make of it something more intellectual than it is. The result is that many of you teach in a needlessly opaque way that harms the students and the school.

Yes, law is often verbally and conceptually complex—maybe complicated would be a better word—but it's always in a mechanical way. The language isn't ornate and specialized because the concepts are too deep to convey more simply. The language and exaggerated formulations often veil political decision-making, and even when they don't, they're almost invariably more complicated than they need to be. Do you need a certain facility with words and a certain minimum capacity for abstract thought to do law? Of

course. Are many of our current students borderline in these respects? Obviously. Are their shortcomings matters of innate limitation or undeveloped skill? That's a far murkier question.

Some of our kids are privileged kids who don't belong in law school if they couldn't do better than us after enjoying all the advantages of parents with money and education. But in the last few years we've gotten increasing numbers of first generation college kids, immigrants' kids and immigrant kids, the products of a dramatically more socio-economically diverse UC in the wake of the admissions changes wrought by Prop 209. I've welcomed these kids with open arms and view them as a renewal of the best of this school's traditions and its original mission. This school was founded to serve kids too poor for Stanford and too ethnic for Berkeley. I couldn't have been luckier in enjoying the recapture of that mission and purpose as the capstone of my teaching career.

I view this student cohort as all the more reason for the law school to finally tackle the antiquated beast of traditional legal pedagogy because that pedagogy needlessly imperils these kids. I distinctly remember feeling appalled by traditional law school pedagogy as a 1L, and I've never stopped feeling appalled. Demonstration and modeling are accepted, respected, and even required modes of pedagogy in every school of the university but the law school, where they continue to be marginalized if not maligned.

*Legal think is a very particular—and very peculiar—kind of thinking, and it's not very intellectual. It's mechanical to the point of knee-jerk, it's utilitarian but not very efficiently so, and it's eminently small-minded. There's a reason why they call it bean-counting. To paraphrase Mrs. Henry Adams on Henry James, legal think chews more than it bites off. When an undergraduate humanities professor assigns Homer's *Odyssey* and then asks the class what entrancing sirens' song keeps them from their respective journeys, the professor is teaching the students how to think. The law professor's claim to teaching people how to think, on the other hand, isn't just tenuous, it's destructive.*

A case disembodied into a law school casebook doesn't work for timeless contemplation like a work of art because it's not a work of art. It's a utilitarian document in a cumbersome administrative system written not just for those who speak the language, not even just for those who speak the dialect, but for the lawyers directly involved in the matter. Handing a group of newbies a stack of appellate opinions and quizzing them on the in-speak in those opinions

is a stupid way to teach people how to be lawyers, and it's no less stupid for being time-honored. But it certainly does set up a power dynamic that keeps the kids in thrall of the professor.

*Old hands don't speak in-speak because they're smart; they speak in-speak because they're old hands. Newbies aren't confounded by in-speak because they're stupid; they're confounded by in-speak because they're newbies. Traditional law school pedagogy willfully conflates experience with intelligence. Professor Kingsfield wasn't just a nasty old man, he was an intellectual fraud. An updated, kinder, gentler version of Professor Kingsfield is no less fraudulent for being less unpleasant. When a law professor assigns *Pennoyer v. Neff* in a void of abstraction and then expects the class to discern what from the tangle of technical in-speak subsequently emerged as doctrine and what fell into obscurity, the professor is demanding divination in the guise of demanding thought. The answer doesn't come from a process of careful reasoning; it comes from acquired knowledge of the evolution of the doctrine that might just as reasonably have evolved differently.*

It would be far more efficient and effective to sum up and explain what the rules have evolved to, and then to assign a problem and the cases that would control to show how courts go about adjudication. Tell them what the rule is, explain it, and walk them through the courts' application of it in the first few cases assigned for the day, then ask them how the rule was applied in the remaining cases and move to the day's factual problem. When it's their turn—after you've turned the lights on—it's totally appropriate to push, to demand, to cold-call. I certainly have. But when you demand divination in the guise of demanding thought, you pretend to a room full of newbies that you got the answer by sheer application of reason to the text.

Feigning knowledge of the answer by sheer application of reason to the text gratifies the teacher by leaving the students with the impression that the teacher is brilliant. But when teachers do that, they leave students feeling stupid, confused, and utterly adrift. The teacher's ego gratification comes at the expense of panic and tail-spin on the students' part, and it's especially destructive panic and tail-spin. It causes them to believe what they need to do here is immeasurably deep when in fact it's shallow: They need to recognize what rules are triggered by the fact pattern, then quickly and superficially bat the most obvious facts back and forth and proceed to the next issue to do the same before time is called.

When a professor masquerades acquired knowledge as innate capacity, there's no kid the professor is more likely to derail than the first-generation college kid from a lower-class background. These kids' lives are freighted with reasons to doubt their capacity, and professional school is already an alien and intimidating environment for them.

I had a superfund lawyer's kid in class a few years ago, and she wasn't very smart. She wound up on academic probation after the first semester, and came to see me about it that January. When we discussed her status, the first thing out of her mouth was, "I know I can do this." I get lower class kids on academic probation in my office every January. I can't count the number of times the first thing I've heard these kids say was, "I don't know if I can do this."

One of my recent students is the child of immigrant farmworkers who was first exposed to English in grade school. She writes it with greater fluency and style than most of my lawyers' kids, but she was on academic probation in her first year. I could've predicted the classes she'd do well in—and those she'd do poorly in—based on the pedagogy of the professors who taught her first semester.

A couple of years ago Carol and I tag-teamed a student we particularly wanted to see succeed. He was a Latino floor refinisher's kid who went to Berkeley. A kid like that doesn't get to a school like that because of who his parents are. He definitely had the intellectual capacity to do law. And he absolutely was not a jerk-off; he worked very hard, and consistently so. His work was always in the clouds, and the task was to reel him down to earth. We would talk him down, and give him examples of what he needed to do. At one particularly telling moment, frustrated and still resistant, he blurted out, "It can't be that simple!" So in addition to doing our own jobs, skills faculty have to, if you'll pardon my French, un-fuck the kids' heads after doctrinal teachers' pedagogy convinces them legal analysis has to be inscrutably intellectual.

In the past, our students, like most law students at most law schools, muddled through. They taught themselves the rules and taught themselves how to write an issue-spotting exam. But it's hardly a paean to the pedagogy that students made it through in spite of it rather than because of it.

Our doctrinal faculty need to think critically about the institutions where they believe they learned to think critically and I believe they learned to think alike. Elite education is first and foremost about assuring privileged kids that they're better than everyone else and

thus entitled to lead. If you're smart and progressive, didn't you notice that?

If you think I'm exaggerating about the composition of elite campuses, you probably missed the NYT Upshot piece about a recent study by Berkeley, Stanford, and Brown economists showing that dozens of top-ranked schools, including half the Ivy League, enroll more kids from the top one percent of the income spectrum than the bottom sixty. It includes a spiffy interactive feature that allows you to type in a school to get its top one to bottom sixty ratio.¹⁵³ The study showed that kids from the top one percent have one in four odds of elite school admission, with those odds steadily, correspondingly, and stunningly declining as you descend the class hierarchy. The odds drop below one in a hundred at the sixtieth percentile, still significantly above median, and get worse from there down.

That study confirmed what I've known experientially ever since I set foot on an elite campus over forty years ago. I grew up in a Catholic-ethnic factory town in New England that has long since become an eastern Rust Belt town. I was one of four from a class of over four hundred at my factory town public high school to get to an elite college, and I was the only one of the four who was First Generation College. I naively expected to find there a campus full of top students from ordinary schools in ordinary working towns across the country, but found instead a world of kids whose elite degrees might as well have been printed along with their birth certificates.

I certainly did not grow up poor. But before you object that your background is just middle class, let's acknowledge that the untenable elasticity in American use of that label isn't an accident; it's propaganda. Here's what the real middle looks like: a median wage a bit above thirty grand and a median household income below sixty. As to education, two-thirds of American adults lack a bachelor's degree and only the top five percent have a Ph.D. or a professional degree. If you were a kid forty years ago, for perspective consider that median family income in the mid-70s was about twelve grand. My family's was nine. And we shared the company of about 85 percent of Americans as a household not headed by a college graduate. My sources are readily available census data on

¹⁵³ See *The Upshot: Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours*, N.Y. TIMES, Jan. 18, 2017, <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>.

the web.

Yes, you worked hard to get your degrees. You dutifully, at times arduously stepped to the choreography your parents laid out for you to get where you are.¹⁵⁴ But the vast majority of the population can't get to Harvard by stepping to parental choreography because their parents don't know the way, much less what steps to take on it, and because elite education, maybe college education at all, is culturally foreign if not out-rightly alien to them. What role does our doctrinal faculty play in that kind of alienation?

I'm genuinely flummoxed by what seems to be the unique severity of the doctrinal faculty's snobbery. You guys even sneer at John because he's not an academic, and he's obviously vastly more accomplished than the rest of you put together. He was an Undersecretary in Obama's cabinet, for Christ's sake! In my twenty-seven years of teaching in the law school, very few doctrinal faculty members have ever treated me with the respect John does in a completely natural, matter-of-course way. And no, I'm not saying that to suck up to John. Talk to Brand about how much I suck up to Deans. Talk to Peter about how much I suck up to bosses generally.

While your education is certainly a big part of it, that alone doesn't explain the phenomenon. My husband went to Harvard Law School, and while he and his Harvard friends absolutely have egos, none of them behave with the imperiousness that seems unique to academics. Over the years, when I've found myself in the elevator with a thirty-something I didn't recognize with an officious, rushed, self-important air who avoided eye contact with me and grudgingly and uncomfortably acknowledged me when I introduced myself, I've generally assumed I had just met the latest doctrinal faculty hire. I'm sorry to say I can't remember having been wrong about that.

It certainly was harder to make my way alone and uphill, but I'm glad I wasn't born to the upper middle class. It must be like having been born in a 19th century novel. Your way was paved, but that meant someone else charted your course. Your way was paid, but that meant someone else held the purse strings. If you've never really known freedom and self-determination, I can understand that you would flog status as consolation.

¹⁵⁴ I know there are septuagenarian meritocrats on the faculty—Jews who broke the glass ceiling. But their progeny aren't meritocrats; they're aristocrats. That's generally how it works.

Increasingly I've come to the conclusion that insecurity compounds the imperiousness of high birth and elite education. I can't imagine a more charitable explanation for our doctrinal faculty's disrespect of the skills faculty. For people as obsessed with status as most of you guys are, it must be a source of considerable anxiety that you teach at my alma mater and not yours. And for people who never tire of presenting themselves as progressive, you guys aren't very good at letting subalterns speak.

The law school recently got the highest ranking it's ever gotten: The Princeton Review ranked us number five in the country for academic support for minority students. The reason for that ranking has a name: Carol Wilson. For nearly thirty years she's specialized in academic support for those students with the lowest admissions indicators in the in-coming class, and for those who fall into academic probation after the first semester. She's engineered the stunning success of low-income and minority students with dauntingly low test scores and undergraduate grades, enabling them to emerge as some of our most illustrious alums. Those alums include the incomparable Cupcake Brown, a former junkie who became a big firm lawyer, Alameda County Chief Public Defender Brendon Woods, Federal Magistrate Candace Westmore, and my personal hero, Judge Advocate General Jophiel Phillips, a young man I'll always feel honored to have taught.

It's not hyperbole to say that it was institutional dysfunction to exclude from academic policy-making the teacher in the law school who enabled this kind of success for students who arrived with the lowest scores and grades in their classes. Her expertise is precisely what the law school most needs in navigating through its current peril. And yet you guys are so jealous of power and so into school snobbery that you exclude Carol, and Richard Sakai, and the rest of the skills faculty from policy-making.

Carol is the child of an auto-body man and a homemaker from a logging town in rural Oregon. Richard is a gardener's kid. Do you guys seriously believe that you would have wound up at Harvard, Boalt, or NYU had you started out as children of auto-body men or gardeners?

I'm sure you'll want to attribute the recent encouraging news about the Bar to doctrinal faculty answering questions for a couple of hours per week in the library pending the bar in the summer, while ignoring the fact that Richard Sakai and Rod Fong spent the rest of those weeks working one-on-one with kids who sought their help

in substantially increased numbers, probably because last year's pass rate put the fear of God in them. Time will tell whose efforts made the difference.

What I've consistently found with every post-crisis class is that while their written work is generally inferior, considerably inferior, to my students' written work several years ago, their spring term moot court oral argument is just as strikingly and just as consistently superior. Might that be because our students in the past came more consistently from households and schools where serious attention to written work was part of a regime rigidly and relentlessly imposed, but debate skill typically was not? Might more of our current students conversely come from households and schools where rote academic preparation for higher education was relatively rare, but fluid and far less parentally scripted interpersonal exchange was more common? Might these differences be more about culture and class than intelligence?

I'm not sure of the answers to these questions, but I frankly feel troubled and offended by the presumption many on our faculty bring both to the questions how and why they came to be elite educated, and whether those not bred to a polished level of reading and writing are or are not capable of it. Of course it's easier to teach kids who've been bred to assimilate abstract thought and to dutifully manipulate it according to the conventions of one or another discipline. But if doctrinal faculty want critical thinking and nuanced analysis on every question except who's smart and who isn't, we have a moral as well as an empirical problem.

I know that more than a few of you will want to dismiss what I'm saying about elite education as sour grapes, so I'll share with you that after going on a four-year outside merit scholarship to Wesleyan undergrad, I got into a Ph.D. program at Duke, and scored in the 98th percentile on the LSAT. I didn't come here to get my J.D. because this was the highest ranked school I could get into. I came here to work my way through night school because my employer offered tuition reimbursement and I wanted to continue to avoid educational debt.

I don't, however, think that high test scores and the schooling high test scores facilitate mean what most of you want to believe they mean. I don't dismiss the significance of those scores; the correlation between a school's LSAT median and its pass rate is undeniable. But what they measure is not the limit of innate capacity; they measure academic skills learned to date. And even that they often

enough mistake. Had your LSAT cut-off been in place when Cupcake applied, we would've rejected her.

I know precisely how and why I made my unlikely journey, and it's not the tale of an ubermensch. I was the little fag who was afraid of the ball, but most of all I was afraid of the violent menace of the bully boys at school, not to mention my father and big brother—and that triggered the serendipity that landed me at Wesleyan. I certainly wasn't averse to books, but I hid out in the public library to be physically safe and so wound up inadvertently spending the bulk of my childhood reading. As the physical menace faded in high school, the overwhelming pressure to conform in heterosexual dating and lusting sent me fleeing back to the library, which remained my escape and my refuge. Without the hostility that sequestered me in the library, I would never have wound up at an elite school—maybe not even in college at all.

While I was always regarded as the strongest student in the class, school, like the library, was my refuge and safe space. Teachers were rational, sometimes even kind, and the system of rewards and punishments was actually something I could control with my behavior, and so I eagerly did. I engaged at school.

I can fairly say I out-performed the few other kids who also engaged, but what about the defiant kids who completely rejected school and refused to cooperate? And what about the bulk of the kids in between, who submitted and went through the motions, but half-heartedly and half disengaged? I can't say I'm smarter because I outperformed kids who weren't trying, or trying very hard. So what do I really know about how smart they were and how smart I am?

How about you? If you're the child of moneyed and educated parents, your native language lab was a dining table attended by parents with graduate degrees, you went to schools full of comparably situated kids that left the schools of the other ninety if not ninety-five percent in the dust, and your sophisticated and financially enabled parents moved heaven and earth the moment you seemed to falter on the path to elite education, are you really so special for having arrived as delivered?

And are you really so special for having attained fluency in a rarified language that you've gotten paid to read, write, and speak for decades? How could you believe that knowing how to do what you've done for a job for years makes you smarter than someone who's never done it before? Accretion of knowledge is supposed to

produce wisdom, not snobbery. And the terrible irony is that when you rank what you do high and what other people do low, when you believe yourself superior for having mastered a job you've long done, and when you sneer at people who don't know what you know, you're buying into a social ideology that ultimately degrades what you do.

Upper class people have always appropriated anything culturally defined as high whether or not they have any autonomous inclination toward it or any natural facility at it. They sully reflective undertaking as a prestige totem. Professional class and rich parents shove books and art down the throats of even their most ill-suited and resistant children so their children can wear cultivation as a badge of social superiority in adulthood. Caste isn't just about dis-possession and disrespect for those born low; it's also about distortion of culture and perversion of psychology for those born high.

The children of Tiger Moms aren't born, they're bred. And if Mom's a tiger, Junior is likely a sheep, though an excellent one. I highly recommend to our faculty Bill Derieseewicz's best-selling book, Excellent Sheep. And I'm attaching the chapter from my manuscript entitled The Social Distribution of Intelligence. If you can't hear it from me, maybe you can hear it from Bill since he's an Ivy League faculty brat who got his Ph.D. at Columbia and taught at Yale. He's someone you'd claim as one of your own, so you can't dismiss him as readily as you can dismiss me.

Working class and underclass people, in turn, typically respond to social and psychological ownership of higher education by the high born with defensive rejection. They get the message that university education isn't their cultural property and, without the benefit of a casebook, they understand that property is held to the exclusion of others. They often view higher education as a set-up for humiliation and failure because, for them, it often is.

While most on the faculty got where they got because of their breeding, the farmworkers' kid and the floor refinisher's kid who sit before you got here despite their breeding. You can't get from where they started to here without the intellectual capacity to do law. But faculty certainly could be too arrogant, too insular, and too socially incompetent to teach them. Take a break from laureling one another for the lines you've crossed and consider how short a distance you've travelled before you dismiss our current students as stupid.

Being in your classroom at all is emotionally and culturally

freighted for a kid like this. And when the going gets rough he can't fall back on the people back home. The people back home don't know the terrain and they can't help. Some of the people back home even view him as a traitor and would take satisfaction in his failure. For him it would also be horrific loss of face to turn to them because he was always the child who could, and suddenly he feels like he can't. In fact, as the child who could he's likely being called on to rescue them in one way or another on the assumption that school is something he's got down because he always did.

Subjecting this kid to traditional law school pedagogy is Dickensian. I'm not remotely suggesting he should be spared rigor; he's entitled to rigor. But anyone who can't do rigor with respect shouldn't be teaching here, if anywhere. If you make people who don't know what you know feel stupid, you're not a teacher.

I've begun each academic year telling my students the difference between them and me in this context has way more to do with experience than it has to do with intelligence. "If I couldn't run circles around a room full of newbies after years of teaching," I say, "I'd have to be pretty fucking stupid."

It's really important that you understand that I'm not making a case for disadvantage. I'm not asking you to turn on the missionary shtick, which is one of the uglier expressions of educated liberal upper-middle class culture. These kids don't need your condescension any more than they need your arrogance. I'm asking you to climb out of your insularity and conceit and drop both the arrogance and the condescension. I'm asking you do to something far more difficult and far more radical than being a liberal missionary: I'm asking you to renounce your belief in your innate personal superiority. That belief is the social class equivalent of white supremacy, and it's morally vile.

But it's the belief that motivates and animates your social class. When you pressed me for my views after a curricular reform meeting last spring, [Dean], I started to explain my view of the fundamental problem: that you and most of your colleagues are culturally and emotionally invested in believing that you're vastly smarter than everyone else.

You physically recoiled when I said that. That's how deep your belief that you're some sort of intellectual ubermensch goes, and that's why I'm writing with a jackhammer: I'm trying to reach you, and to reach your colleagues. I've used the word stupid liberally in

what I'm writing because I've noted how easily that word flows from your lips. One thing I've always liked about you, [Dean], is that you actually say what most of your colleagues tacitly think.

There's a lot about the culture I came from that's ugly. There's tribalism and xenophobia, there's subordination of women and violence and substance abuse. And some of what's ugly about it is even formally institutionalized: I lapsed as a practicing Catholic decades ago not just because I refused to abjure my sexuality but also because of the Church's institutional misogyny and its historical role as colonizer of the heart in the grand sweep of Western imperialism—a historical role the last two papacies shockingly seemed to affirm.

I suppose it's easier for me to be frank about the evil in my culture of origin because I left it as a matter of self-preservation. Having been born, educated, and employed all on the same rung of the ladder, on the other hand, it's hard for you to muster critical perspective on your own cultural assumptions and to distinguish between them and something closer to objectivity in the way someone with multiple cultural perspectives can. But that's all the more reason for me to ask again: How about you? What about your culture is ugly? What were you bred to believe that's morally and empirically wrong?

People who owe high educational and social status to social and economic heredity have a long and ugly history of biologizing their status, of believing and socially asserting that their social and economic patrimony is instead some sort of innate superiority unique to them or to their families. They essentialize human intelligence because they inherited its trappings and the conventional modes of its social expression. And they drive their children mercilessly to validate their pretension to innate superiority. If you think I'm exaggerating or being unfair, consider that New York City now has advanced placement kindergarten—and advanced placement kindergarten test prepping. If you aren't repulsed by that, your moral sensibility and mine are irreconcilable.

Protest your liberal politics all you want; what you and most of your colleagues believe about yourselves and about other people puts you in bed with Charles Murray. When people back home tell me that at least Republicans are up front about who they are, I can't argue with them.

In the social world I grew up in, you could be better than other people at something. But the minute you crossed the line into belief

that what you excelled at somehow meant that you were better than other people, you got smacked down, smacked down hard and smacked down fast. In that way, at least, the social morality of the culture I came from is better, vastly better, than your culture's. I came from a culture of solidarity while you and most of your colleagues come from a culture of virtuosity. You've almost completely excluded from the faculty anyone from a culture of solidarity in the name of your superiority and our inferiority, and in so doing you've fundamentally subverted the traditional educational enterprise of this school.

For most of its history this school's teachers were their students' social if not situational equals. The professor of course wielded the power in the classroom, but he came from the same social and ethnic group as his students so he didn't view himself as a superior species. He could be a taskmaster without compromising his camaraderie and solidarity with his students. Over the course of the past few decades, the law school devolved into a school for the also-ran children of Mill Valley, Piedmont, and Hillsborough. During those same decades, its doctrinal faculty became populated by people from elite schools, schools that have always been socially and economically exclusive.

And during those same past few decades this country has suffered a harrowing reversion to pre-New-Deal class structure. We're as economically stratified today as we were in the first Gilded Age. The tier of schools whose degrees have become a de facto prerequisite for a doctrinal faculty position in our law school have also reverted to their Gilded Age socio-economic composition—not that they ever varied from it in any significant way.

Since the crisis, I've been thrilled to see the law school begin to return to its roots in enrolling working-class, underclass, and immigrant kids in much greater numbers. These kids required recalibration of my teaching and much more work, but I was never happier and more satisfied in my job than I've been for these past few years. I've savored my work with the kids who could, the kids from unlikely circumstances who got to Cal and from there to my classroom. If you can't find intelligence in these kids it's because you can't find intelligence beyond the social and economic mirror. Unreflective presumption about who's smart and who isn't is certainly flattering to the egos of those with the conventional social trappings of intellectual superiority, but it's not honest. Anyone morally and socially fit to teach at this school has to start from that premise.

I've walked into the classroom presuming that I knew how to do something my students didn't. And I've understood, morally, that that knowledge and experience didn't and doesn't make me superior to them, but just more knowledgeable and experienced. I didn't throw out that baby from my native cultural formation with the bathwater of tribalism and sex-phobia, despite your culture's profound influence on my life and my otherwise substantial assimilation to it. I think that's why I've been able to learn from my students and they've been able to learn from me. They know when you genuinely respect them and want to engage with them, and if you do they'll let you in. Then you get the fun and satisfaction of a wonderful and productive intimacy with them. If you're lucky, the bond grows into something not entirely unlike a love affair. But you'll never be able to effectively teach them until and unless you recognize how much you have to learn from them. Without that mutual respect—and that humility—you'll never connect with them in a meaningful way.

I don't remotely know how it feels to be non-white in American society. I do know intimately how it feels suddenly to be in a foreign and intimidating educational environment, abruptly to feel stupid and incompetent there, and to spin into panic and confusion. And of course I know the profound and harrowing otherness of growing up gay in a clannish, provincial, Catholic ethnic factory town many decades ago.

My life experience has left me emotionally attuned to otherness and vulnerability in my students, even when I'm quite literally ignorant of their experience. This is why and how I've learned so much from them. I've always known there's so much they know and understand that I don't. We've coached each other. I could never have been their teacher without also having been their student.

You can't either. If you can't learn in a way you didn't on an elite campus and in your childhood preparation for an elite campus—if you have a hard time learning in a way that's not culturally familiar to you—welcome to their world with you as their teachers. How would you like it if they dismissed you as stupid because you don't understand them?

If you teach in a way that, as a practical matter, is socially exclusionary, you're not teaching other people how to think; you're practicing the bigotry that's at the core of your social class' self-replication. And if you won't deconstruct your own breeding, you're the ones whose thinking needs some work. If the modern

scholarship of social relations teaches us anything, it teaches that much of what were believed to be biological verities are instead social constructs. So how does that insight apply to your purportedly innate intellectual superiority, [Dean], and the purportedly innate intellectual superiority of your colleagues? Is that the rare instance of biological verity, or is it social construct?

But deconstructing your breeding is subversive for excellent sheep. It's scary to take off the blinders that have always kept you trained on the next rung up, the blinders firmly affixed to your head by your parents and maybe firmly affixed to their heads by theirs. Looking around instead of always and only up risks the single-mindedness that got you where you are.

I think this, more than greed or self-aggrandizement, is behind the professional class mania for remaining always busy. If you allowed yourself a free moment you might actually think outside the mill of professionalized thought. And that, of course, is fraught with risk that you'll become distracted from the climb. Looking around instead of always and only up risks reflection about what you're doing and imperils the climb with the menace of ambivalence. But this is the stuff of moral deliberation, and if you won't do it you shouldn't be teaching anybody anything. If you won't do it you should use your fancy degree to get lots of money and power at a law firm where moral deliberation is derided as sophomoric.

I'm not saying I think there's no natural variation in human intelligence. But could it be more obvious that its social measurement and assignment are profoundly political? When have the socially dominant ever failed to pronounce themselves innately intellectually superior, and innately superior in virtually all ways? Hitler's hissy fit when Jesse Owens won was nothing new when it happened and it's nothing old now. The sex-based math performance gap has steadily shrunk with the educational advancement of women. The race-based gap in standardized test scores has steadily shrunk with social policy enhancing the status of a self-perpetuating black upper middle class to something more closely approximating the status of a longstanding, self-perpetuating white upper middle class. And the class-based gap in standardized test scores has steadily widened with the reversion to pre-New Deal class stratification this country has suffered in the past forty years. So much for biological verity. My money's on social construction—and it was long before I knew that was what academics called it.

In this context, the only morally safe and empirically sound way to

proceed is with the objective acknowledgement that you know how to do stuff your students don't. Whether they don't or don't yet depends rather dramatically on you. If you pollute the classroom with the conceit of innate personal superiority, the kids will very likely validate it for you. And because that conceit is the animating belief of your social class, your class' dominance of the doctrinal faculty is a moral and practical disaster for this school and for others like it.

In my teaching career I've tried to renew and modernize this school's tradition of camaraderie and shared sense of identity between teacher and student built on the social if not the situational equality of teachers and students. I've tried to do this in a twenty-first century context where the teacher isn't an Irish Jesuit but an openly gay man and the students aren't all Irish and Italian SI boys but the majority minority kids of a post Prop. 209 UC system enrolling vastly more first generation college students from ordinary working families than it did in your day and vastly more than Eastern schools ever have or ever will.

The sociological composition of the doctrinal faculty is the biggest impediment to the renewal of the law school I believe in and have attempted to live in my teaching. My moral sensibility shouldn't be under siege and my cultural perspective shouldn't be extirpated on the law faculty of a Jesuit school because you can't seem to find anyone you think is as smart as you in the social realm I came from. Have your culture of conceit at Harvard; a school like USF should be a haven for the culture of solidarity that built it.

The university should set a goal of proportionality by class background in the composition of the law faculty. In service of this policy the university administration should institute a rebuttable presumption that elite-schooled faculty candidates are morally and socially unqualified to teach here.

The university should also end the doctrinal faculty's exclusion of skills faculty, librarians, and program administrators from voting rights. The skills faculty, the librarians, and program administrators are a far more genuinely diverse group with a much more respectful and productive connection to the students than the doctrinal faculty.

There's an urgent practical reason for ending the doctrinal faculty's monopoly on institutional power in the law school as well: The school's current peril is about student outcomes, not SSRN rankings. Morality aside, exclusively empowering the faction of the law

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school with an overwhelming stake in the latter and disdain for what they view as the yeoman's labor necessary to improve the former is just plain bad institutional policy.

When I said at the outset of this message that it's been a privilege and a great pleasure to teach our students, I wasn't mouthing a retirement platitude. Of course not my every interaction with my kids has been great, but the joy I've experienced from knowing my students and from the intimacy of teaching beginners left me in tears when I broke my news in my last classes. I'm looking forward to getting drunk with my kids before Trent and I launch.

I think getting to do something that engages and satisfies you and that bonds you to the people you do it with is lucking out—and I did in my teaching career. But for too many on the doctrinal faculty, it's all about the next rung up. I'm sure many of you would ditch this school in a heartbeat for a higher-ranked school—if you could. I distinctly remember being taunted by a tenured faculty member, many years ago, for my lack of ambition because I just wanted to teach what I've taught.

So if you were really smart and you had ambition, you'd want to teach in an amphitheater of eighty kids where you can't create and enjoy and profit from the intimacy of a small seminar. And you wouldn't want to experience the wonderful and engaging intimacy of coaching bewildered and insecure newbies because there's more prestige and status to be had in teaching upper division doctrinal law.

That's the way most on the doctrinal faculty were bred to think, and the way you guys unreflectively continue to think. And that's why I think you're the ones who need to be taught how to think. It's also why you don't deserve these kids if this school isn't your first choice.

I guess ambition is relative. I like my native culture's understanding of it better than yours.

Sincerely,

Brian

B. One Educator's Reaction to Brian Mikulak's Letter

Brian's letter is brilliant and often led me to shout out "Exactly!" His linking the idea that professors often make the law more complicated than they need to (I absolutely love the line that "legal think chews more than it bites off") with the emotional needs of ladder

faculty (who define their identity as scholars) is right on the money. A case is a utilitarian document, and too many faculty lose sight of that.

The last half, in particular, was thoughtful and, at times, moving. When he contrasts himself to ladder faculty by stating that he was “emotionally attuned to otherness and vulnerability,” I absolutely believe him and have often felt the same way. But I wonder if he left some money on the table. He doesn’t put it this way, but I perceive him as pushing two theses. One of the big problems I have with legal education is that faculty who rarely practiced law are teaching students how to be law professors rather than lawyers. Their focus is on the law rather than lawyering. Brian’s letter tackles many of the reasons (identity formation as a bigshot critical thinker leaves no oxygen for thinking of oneself as the transmitter of a legal method to the next generation of practitioners—there’s more glory in the former than in the latter). But there are other reasons—it’s hard to think of oneself as a practitioner when you’ve never practiced (so let’s talk “theory”); it’s hard to discuss the professional development of a lawyer’s career arc when you never experienced it (so let’s talk “theory”); it’s hard to find something wrong with law school pedagogy when you thrived on that pedagogy (so let’s not change a single damn thing about the system, because I’m the cream and I rose to the top in this system); it’s hard to teach students how to respond to conditions of uncertainty (should I object or not?) when you’ve never faced that uncertainty (so let’s talk “theory”).

I guess what I’m saying is that I thought Brian’s crescendo would be about imposter theory behind the podium. Heaven knows our students feel the “I really don’t belong here, so how do I make it by faking it?” conundrum. But there are people who feel like imposters behind the podium, and it’s in their interests to strive for opaque theory (things that feed their ego, things that they feel some mastery of) over teaching the next generation of great practitioners (too small a role for their great minds, too scary to discover that maybe, just maybe, the Emperor has no clothes). I read Brian as thinking the problem is smug elitism, but, maybe, it’s just abject fear. Or far more likely, an intermingling of both.

VIII. SKETCHES OF WHAT COULD BE

A few readers of Part I and a draft of this Part II have exhorted me to offer a concrete proposal. They feel stuck, maybe a bit paralyzed, in the face of inertia and of the necessity of so much change. Much as they agree with the Alternative Vision, they feel bewildered and even intimidated. “Yes,” they’ve said, “I’m on board—legal education can and must be better. But what precisely would you suggest

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we do?”

Most others who have read both Parts, however, strongly disagree. These agitators insist that everyone who still aims to transform legal education should feel the need to shoulder their fair share of the burden. Face the blank screen and write something, they insist. After all, those who believe in the Alternative Vision and feel like putting in sweat labor would, presumably, be seeking to transform their own law schools, where they know the students, the staff, the faculty, the communities. They have much of what it takes—and quick access to lots more needed—to begin designing one or three iterations of the Alternative Vision adapted to their circumstance.

Besides, they're almost never alone. If they can recruit (or already have working with them) other folks, they can do this all the more readily. At this point, the agitators say, we should be searching for our own variations on a theme, not trying to harmonize up. Perhaps in time, when many wise iterations have been tried out and improved, we'll have many ways to make better music. But let's learn by doing. Besides, the doing we all would most have to do is scouting out and borrowing already-made learning opportunities going on around the country and maybe even in our own schools.

I agree with the agitators. No surprise there, I suppose. But I did take one small step to help get us “unstuck,” at least if that's how any of us may feel. I asked some people who had read Parts I and II to very swiftly sketch their initial ideas for transforming “their law school.” I told them to take flight, an email brainstorm, not intended to be anything like complete, anything like fully “rationalized.” These five folks were generous enough to spend time they don't really have offering sketches they authorized me to share. I'm keeping these anonymous, though much of what you shall read feels at least as personal as institutional.

So here are some ideas—not answers, not proposals, but ideas from people who know and care lots. You should know they do not know the names of the other authors, and they did not initially read one another's initial drafts. You can like what they have worked hard to produce, hate them, or feel ambivalent about them. But by all means engage them, and treat them with respect. After all, not many are willing to put themselves out there. And when it comes to transforming legal education, many and perhaps most who care deeply feel a bit at sea offering their own feelings and thoughts, at least at first.

Sketch No. 1

Despite the conventional thinking, we almost never train to be

the best at something by *only* doing that thing. For example, as a child I trained (or was trained) for 15 years by the American School of Ballet to be a professional ballet dancer, but I did much more than ballet. I was required to take classes in jazz, modern, flamenco, ballroom, and character and folk dance; I trained in pointe shoes, but also barefoot, in soft jazz shoes, and in heels. I had to learn to read music, to play piano, and to play character instruments like the castanets (for *Sevillanas*). I had brief immersions in kinesiology and Labanotation. Looking back, I realize that even what I learned about different techniques to sew ribbons and elastic on pointe shoes (I went through 2-3 pairs a week) was a small but important part of my educational experience “learning” ballet.

I also just watched. I watched as much dance as I could, of all types. I read voraciously and omnivorously. I intuited that if I was going to communicate a story and emotions without words, I needed to know how good stories were told. I diligently listened and tried to appreciate opera. Despite my mother listening to *Aida* every day in the car, I can’t say it set in. Thanks to Theater Development Fund tickets, and Christmas family splurges, I saw much of what New York theater had to offer in the 1980s and 90s, from *Oleanna* and *Six Degrees of Separation* to *42nd Street* and *Les Miserables*. (Yes, and *Cats*. Twice.) I performed at the New York State Theater and the Metropolitan Opera House, but I also performed with smaller, lesser- to barely-known companies, where, in addition to learning my roles, I learned about sets, fixing my own costumes, and applying my own stage make-up.

Much of this learning, perhaps most, didn’t come to me through a single curriculum. My training was a patchwork inspired by different programs, coaches, and self-direction, driven by occasionally unhealthy doses of “healthy” competition. Today, many training programs have evolved something closer to a single, coherent yet diverse curriculum that includes ballet, other dance, physical training, and music.¹⁵⁵ At the North Carolina School for the Arts, high school students training to be professional dancers are required to take intensive ballet classes, partnering or adagio, dance composition, improvisation, and character dance, as well as traditional high school courses.¹⁵⁶ Undergraduate students also take contemporary dance, costuming, history of dance and dance music, a dance pedagogy course, a choreography workshop, traditional liberal arts classes, and,

¹⁵⁵ See, e.g., *Summer Course in NYC*, SCHOOL OF AMERICAN BALLET, https://sab.org/summer_programs/summer_course_in_nyc/curriculum.php (last visited Jan. 28, 2018).

¹⁵⁶ See *High School Ballet*, UNIVERSITY OF NORTH CAROLINA SCHOOL OF THE ARTS, <https://www.unca.edu/dance/high-school/classical-ballet.aspx> (last visited Jan. 28, 2018).

perhaps most surprisingly, a business class.¹⁵⁷

When I think about what a new law curriculum could offer, I think about these experiences. I also think about the professional training to become an architect (a profession I also considered). We so easily accept that architects inhabit a grey area between art and science, sculpture and engineering, humanity and industry. And their training reflects this acceptance. Architects take both drawing classes and physics classes. They often must actually build a building they have designed—not just supervise the construction, but “physically participate.”¹⁵⁸ They take classes that contextualize their work, like urban design and introductory planning, and they often must take at least one history class.¹⁵⁹ They are encouraged to learn the nuts and bolts of everyday practice in courses ranging from digital media to firm and project management.¹⁶⁰ At many schools, students spend their last year of training in extended problem solving exercises, designing structures that address the problems and needs of actual or potential clients and communities, and getting regular, often weekly feedback, from peers and instructors, through “crits.”¹⁶¹

While law has historically struggled with similar dualities—is it a trade or a profession? is it an art or a science?—we have failed to understand how a “both/and” understanding of the duality could enrich our practice, much less integrated those different facets in the curriculum. In my experience, most schools overemphasize the “science” of law (assuming there is such a thing) and downplay the art, or minimize it by calling it “soft skills.” If an architect were taught only physics and structures, and was essentially left to her own devices to master artistic skills, the world would likely be an ugly and dysfunctional place. Yet, this is how we have designed, cobbled together, somehow arrived at, modern legal education: Learn the “science” and get the art on your own time. Maybe you already have the skills, maybe you’ll seek them on your own, or maybe you’ll get them through some seminars or a clinic, if you have that opportunity. And while educators in other disciplines appear to have accepted the obli-

¹⁵⁷ See *Undergraduate Classical Ballet*, UNIVERSITY OF NORTH CAROLINA SCHOOL OF THE ARTS, <https://www.unca.edu/dance/undergraduate/classical-ballet.aspx> (last visited Jan. 28, 2018).

¹⁵⁸ *Building Project*, YALE SCHOOL OF ARCHITECTURE, <http://architecture.yale.edu/courses/building-project-1> (last visited Jan. 28, 2018). The Building Project is required of all Masters of Architecture students at Yale.

¹⁵⁹ See *M. Arch. I: First Professional Degree*, YALE SCHOOL OF ARCHITECTURE, <http://architecture.yale.edu/school/academic-programs/march-i> (last visited Jan. 28, 2018).

¹⁶⁰ See *id.*

¹⁶¹ See *Architecture [and] *: Core I Syllabus*, COLUMBIA GRADUATE SCHOOL OF ARCHITECTURE, PLANNING AND PRESERVATION, <https://cdn.filepicker.io/api/file/qBE525wT5uVWH3sHnwC?> (last visited Jan. 28, 2018).

gation to teach the requisite skills for the business side of everything from ballet to architecture, law schools, particularly elite law schools, generally reject the proposition that a lawyer should know something about managing a business. This notwithstanding the fact that many of our students at all our schools have never had a job and go on to manage and practice in solo or small firms.¹⁶²

To my mind, a good lawyer is a good problem solver (this will surprise no one who read the prior 100+ pages). A good problem solver can assess a problem from all different angles, can sense both the harmony and discord permeating a problem, can stand (or try to stand) in the shoes of every person and every group involved, can help co-participants in the problem-solving, whether lay or expert, surface latent benefits, opportunities, risks, and anxieties. A good problem solver, like a skilled photographer, operates with attention both to the smallest details and to the broadest dynamics of context, relationship, and perspective available in the situation. And she can move comfortably between both perspectives. It is cliché that lawyers must excel at persuasion. We understand that persuasion asks broadly how we speak to, and write for, different audiences to convince them of our reasoning or make them feel a specific feeling. But our teaching, as it stands, doesn't answer that question. We teach persuasion as if it were a science problem (e.g., IRAC), rather than an art that requires a student to read and understand an audience, and that might well require them to pivot unexpectedly and courageously, the same way that a dancer will follow the conductor in the orchestra pit who changes the pace of the music (or that same conductor herself might wait for the violinist who holds a pause for an extra beat).

Many 1L students are scared and overwhelmed, yet simultaneously bored and disconnected. Once you've briefed a handful of cases, it becomes mechanical. Once you know the math of IRAC, you can apply it to anything—and pretend you are getting the “right” results. The reality is that much of lawyering can indeed be reduced to formula, and although these formulas (and rituals and vocabulary) must be learned, it doesn't take three years. Lawyering in its highest form is much, much more than formula. It is the art of choosing how, when, and why to deploy (or not) these formulas, rituals, and vocabulary. In the new legal curriculum I dream of, we'd embrace the art of lawyering, even if becoming more like musicians and less like surgeons results in diminished status or salaries.

My dream curriculum would also incorporate the notion that *everything* in our respective worlds is a legitimate input to our lawyering,

¹⁶² See Meredith R. Miller, *Designing a Solo and Small Practice Curriculum*, 83 UMKC L. REV. 949 (2015).

in the same way we acknowledge that environment, experience, and interactions are important fodder for an artist. We would give students more freedom to explore and expand their worlds as part of their professional education. We would not only encourage, but mandate that they read fiction, listen to music, learn to see the world differently by learning to draw. We would *push* students to take classes in other schools, with other types of students. Just as training to be a ballet dancer involved the study of obviously related and seemingly unrelated subjects, so, too, should legal education.

The fear may be that such a curriculum would “give credit” for “whimsical” activities. The legal academy may not understand or trust—let alone embrace—activities outside the traditional curriculum. But that doesn’t make them all cotton candy, And if we even suspect the most whimsical activities might improve the quality of lawyering, and the experiences of attorneys and clients, why wouldn’t we try to use these activities in our curriculum? And, honestly, would it be so bad for law students to have some fun and find some new joys in their education (beyond or even instead of school-sponsored, alcohol-focused events)?

* * *

My dream curriculum would dedicate the first year slowing down. Rather than drowning students in new vocabulary and rituals, and rather than minimizing, even disparaging, the skills that students already possess when they arrive at law school, my first year curriculum would shore up the skills of listening, observing, documenting, and interpreting that they already have. Students need to understand how they see the world and hear the people around them. They need to understand deeply that when others are looking at the same object, they may see it differently, or that when they hear the same words, they may extract a different meaning. Students in my curriculum would take intensive classes that focus on developing these observing, listening, documenting, and reading skills not just in the classroom but out in their communities.

In the classroom, students would practice listening and observing by studying art, music, movies, theater. Yes, they may resist (though arguably no more than they resist traditional Socratic teaching). And, yes, they can learn even if they are not afraid. In the community, students would begin by exploring and describing the community outside of the law school (aka the real world), and getting a sense of the context in which they will live and lawyer for three years. What does the place look like? How does it work? Who lives and works there? How do they interact with others in the community? What do daily lives look like? This process of exploring, describing, and documenting,

which should lead to further and deeper exploration, would attune students to the value of their own curiosity and intuition. At the same time, first year students would take a class on the history of legal education and the legal profession. Just as they need to understand the broader context in which they live and lawyer, they should understand and question the professional enterprise they have joined (its history, context, and future). They would also take a class on collaboration, to identify their own approaches to work and relationships, develop a common vocabulary, and begin to learn collaboration models and strategies.

In their second semester, students, working in teams, would continue to investigate and document their communities, but would add an intensive research class. Students would learn how to research cases and statutes, as they do in a traditional Legal Research and Writing class, but they would also learn how to navigate and use legislative histories, transactional databases, court dockets, property records, IRS records, and many others. They would do this in the library, but also out in the world—in courts, city halls, and musty archives. Students would hone their reading skills, critical to lawyering. As in the first semester, they would learn to be close, attentive readers by studying both legal and non-legal texts, fiction and non-fiction.

Instead of doing a full-time internship or clerkship the first summer, experiences which, at least anecdotally, often have limited value and no remuneration, students would take two classes: either Civil or Criminal Procedure and Constitutional Law. That is, they would be immersed in relatively traditional legal work only after sharpening core skills their first two semesters. A procedure class would give students practice manipulating rules of procedure and understanding their interdependence, which they could, in turn, apply to other arenas. Constitutional law would teach them about key cases and U.S. history, and would provide an introduction to reading and analyzing court records and opinions. All classes would have no more than twenty students. They would be interactive, explicitly drawing on the observing, listening, and reading skills from the first year. Students would also be encouraged to teach each other, and would be rewarded for doing it well. Both classes would draw on broader materials than a casebook and would engage the human context of cases and legal change.

In their second year of law school, students would spend the first semester working in teams to identify and define a problem that they uncovered during their time in the community the previous year. This iterative process of problem identification would rely on students' re-

corded observations and interviews, but would also require them to return to the community to vet and refine their hypotheses. Students would take two classes of their choosing, one a litigation class and the other a transactional law class. These classes would provide an introduction to different areas of law and different types of lawyers, just as I studied both Balanchine and Ashton ballet (even though I *knew* with certainty which type of dancer I wanted to be). Like their first year classes, these classes would be very different than a traditional Socratic method class.

In their second semester, the student teams would generate and evaluate strategies for the problem they identified, continually engaging the community in their process. They would again take two classes of their choosing: a policy or legislative class and a class on international or comparative law. The policy or legislative class would complement the litigation and transactional classes and an international or comparative class would enable students to see legal issues from the community or their other classes through the lens of a different legal regime and to connect local with global, domestic with foreign. Students would work on their writing skills throughout the first two years: They would write weekly reflections, descriptions of the community and conversations with people, and summaries of potential problems and solutions.

In their third and final year, students would take a clinic their first semester and participate in an externship their second semester. The clinic would require students to undertake a litigation matter and a non-litigation matter. Instead of committing students to litigation, transactional, or legislative practice, students would represent clients in different types of matters, experiencing diverse clients, using an array of problem-solving tools, building on their broad classroom experience, and articulating the similarities and differences across matters. Once they had represented clients under close supervision and with the support available in a clinic, students would move to an externship placement.

In their final semester, students could choose the substance of their externship placement (criminal law, family law, etc.). However, it would have to be in a location or culture that would challenge them in new ways beyond the set experiences of their first two and half years, and provide a new opportunity for observation, immersion, and reflection. A law student in NYC could do an externship in rural Oklahoma; a law student in Minneapolis could do an externship in Nairobi. The externship experience would oblige students to transfer their law school skills to a fresh work situation and to adapt to an unfamiliar place and culture, while still having the support and super-

vision provided by the law school. The personal experience of being the “new” person, potentially an outsider, is itself a rich learning experience, and would provide students a new perspective on legal problems. During both third-year semesters, students could elect to participate in bar preparation classes: as long as bar passage is required to be a practicing attorney (and that seems unlikely to change), law schools should ensure that *all* students pass the bar as part of the “core curriculum.”

My dream law curriculum would help students transfer and refine the skills they had before law school; engage them in their community at the beginning and throughout their education; and would reward collaboration, not just competition. It would emphasize problem identification and definition, not just problem resolution, presenting lawyers as the askers, not just the answerers, of questions. Rather than forcing students into pigeon holes, the curriculum would give students a broad foundation and the self-reflection and awareness necessary to adapt what they learn to new contexts, new clients, and new areas of law. It would give them the skills and the practice of making informed choices about their careers.

We rarely train to be the best at something by only doing that thing. Today, basketball players learn history and human rights from their coaches;¹⁶³ football players are practicing yoga;¹⁶⁴ doctors are studying art;¹⁶⁵ and actors are learning cobblery.¹⁶⁶ It is time for legal

¹⁶³ See Kevin Arnovitz, *Why President Trump Ignites Gregg Popovich*, ESPN (Sept. 25, 2017), http://www.espn.com/nba/story/_/id/20809321/nba-about-president-trump-triggers-gregg-popovich. Arnovitz recounts:

But rather than dive into the session with a strategic imperative or even a parable on the virtues of resiliency, [San Antonio Spurs Coach Greg] Popovich began by posing a question to the room. He asks, “Does anyone know what today is?” . . . In Australia, June 3 is Mabo Day, a commemoration of the nation’s most notable activist for indigenous rights A few minutes into the seminar, a picture of Mabo appeared on the video screen. . . . As the team’s head coach and senior executive, Popovich preaches that curiosity about people—especially those unlike yourself—provides not only a foundation for cultural literacy, but the building blocks of a better team. . . . His players are routinely recommended reading. In *SpursWorld*, unfamiliar ideas are to be explored, then discussed with those who will challenge your assumptions honestly.

Id.

¹⁶⁴ See *Players Turning to Yoga as a Way to Stay in Shape*, N.Y. TIMES, Aug. 29, 2015, <https://www.nytimes.com/2015/08/30/sports/football/players-turning-to-yoga-as-a-way-to-stay-in-shape.html>. Football players are unlikely practitioners of yoga, “given that one of the tenets of football is to be aggressive and not back down.” A teacher who regularly trains NFL players explains, “I stress breathing with the guys—it helps them on the field and to remain calm in a stressful situation.” She “emphasized the mental aspect of yoga for her clients—and its ability to heal emotionally and psychologically.” *Id.*

¹⁶⁵ See Dhruv Khullar, *What Doctors Can Learn from Looking at Art*, N.Y. TIMES, Dec. 22, 2016. Khullar describes that, in his mandatory art class at medical school, “[f]or the first time, [he] didn’t just look – [he] saw. . . a skill, perhaps more than any other, that lays the

education to embrace its full humanity—including its artistic side—and help our students see the wisdom and insight already inside them and beyond the law school.

Sketch No. 2

A Law School Curriculum Utopia

Law school should be a training ground for attorneys, activists, leaders, etc. of diverse fields (private sector, government sector, non-profit, non-legal fields, etc.) to master legal skills through problem-solving techniques. Under this utopian law school curriculum, a comprehensive understanding of justice and improvement of societal welfare would be prioritized. Main objectives of this curriculum would be:

- Each year (1L, 2L, 3L) students will be required to take a sequence of courses or workshops that dismantles the regnant vision of lawyering by emphasizing the role of attorneys as preserving and advancing justice, as problem-solvers (encouraging the uses of legal/non-legal strategies and community building/networking), to explore multifaceted career opportunities a Juris Doctorate degree can bring.
- This framework would do away with curve-grading. Alternative forms of grading would be encouraged, or a combination thereof, such as pass/fail (this is especially true during the 1L year, where students need to expend their energies learning core skills).
- The three-year curriculum would encourage interdisciplinary and multidisciplinary forms of teaching. It would abandon casebook-dependent/Socratic method forms of teaching and replace it with an interdisciplinary approach of black letter law/problem-set models/legal skills-clinical exercises.
- A law school graduate should feel comfortable with the litigation process in at least five court settings and/or areas of law (e.g., civil courts, criminal courts, administrative law venues,

foundation for good medicine.” Dr. Joel Katz, at Harvard, who teaches an art class for medical students explained, “We’re trying to teach them to trust their vision, to look carefully before making judgments.” Students also learn to grapple with the ambiguity in both art and medicine: “In both, we have to avoid prematurely narrowing our thinking.” *Id.*

¹⁶⁶ See Julie Miller, *Daniel Day-Lewis Quits Acting: A History of Fascinating Retirement Attempts*, VANITY FAIR, June 20, 2017 6:03 p.m., <https://www.vanityfair.com/hollywood/2017/06/daniel-day-lewis-acting-hollywood>. After shooting “The Boxer” in 1997, and before shooting his next film, “Gangs of New York,” Oscar-winning actor Daniel Day-Lewis devoted five years to learning shoemaking, apprenticing in Florence with the Italian shoemaker Stefano Bemer. Day-Lewis said, “I simply need the time I spend not working in films, the time away, to do the work that I love to do in the way that I love to do it.” *Id.*

immigration law, family law, civil rights).

- Students would be prepared for the bar exam without the necessity of having to purchase a complete third-party bar exam study program. By the third year students will have enough practice rule-proofing, issue-spotting, concise writing in the form of practice, as opposed to a skewed doctrinal teaching. If supplemental bar study exam programs are required these should be integrated into the law school curriculum.

Emphasizing Concepts of Justice/Dismantling Regnant Vision of Lawyering

Introduce various theories/philosophies of justice throughout various sequential courses so as to have a diversified/well-rounded understanding of justice. The objective would be for students to see and understand political philosophies and strategies from various lenses. This is opposed to Duncan Kennedy's suggestion that law school students should be taught the left/right perspective. Although Kennedy's suggestion may have been limited to a left/right framework due to the political atmosphere at the time, today's current political climate shows the dangers of reducing world visions to a "left/right" dichotomy. Also introduce materials from anthropology, archeology, sociology, neurology, ancient histories, etc., to expand and polemicize the students' conceptions of justice, culture building, and law making.

Emphasizing Interdisciplinary Skills Throughout 1L, 2L, 3L

Current law schools disproportionately depend on doctrinal teaching and the use of the Socratic method which yields very limited legal skills for law school students. In combination with curve grading, this educational structure only encourages petty competition, elitism for the sake of elitism, and only further obscures the reality of attorney practice. In a time where law school tuition is at its peak, nearing \$200,000, these antiquated forms of teaching provide an embarrassingly limited set of legal skills.

The Problem-Set Model: First year, and some second year and third year courses, would be organized around problem sets that mimic real life, as opposed to dividing it by subject matter (property, contracts, civil procedure, etc.). Such problem-sets can still prioritize "core" subject matters during the first-year (criminal law, wills and trust, contracts, civil procedure, etc.), but in the form of real-world case scenarios. The objective would be to have students encounter real-life case scenarios and be forced to approach the issues holistically (e.g., being forced to apply relevant elements of civil procedure, evidence, client interaction, writing).

For example, a course could require students to provide wrap-around services to a family that has many needs:

Dad wants to incorporate a business and has various goals/problems that require knowledge of business associations, tax law, etc. Grandma and Grandpa want to ensure to protect themselves and their assets as they age, while at the same time trying to plan for their deaths and asset reallocation with minimal tax loss, they want to draft reciprocal wills, pour-over trusts, and have end-of-life instructions, etc. Junior is getting a divorce and wants to maintain custody of his kids, and is already engaged to someone else and wants to get a prenuptial agreement to marry the new person, but also wants to adopt kids. Sister might get into legal troubles while at a protest, maybe she experiences excessive force and now has civil and criminal needs. The list goes on for each family member.

Each problem set will be accompanied with black letter law lectures, through the use of lectures (could use carefully prepared videos) and concise outlines (given to students out front; the black letter law is no secret and its dissemination should not be discouraged). The doctrinal material will be taught in sequence with the problem set that the student will have to resolve. The substantive law should be accompanied with the procedural tools necessary to get the job done. The problem set can be structured so that the student has to produce (1) a legal writing exercise where the student addresses the family members' concerns. This will likely be in the form of a letter to the client, or maybe a letter to the ex-wife/husband, etc., explaining the law and why the result is warranted or recommended; and (2) the actual products (e.g., will, trust, incorporation, prenuptial agreement, adoption papers, civil complaints, etc.). Students must learn to be practitioners, not just theoreticians.

Upper-division courses can be tailored as desired to encourage mastery of certain legal skills or subjects by presenting more complex scenarios, focus on specific subject areas, and/or focus on certain set of legal skills (direct/cross examination, appeal brief writing, depositions, etc.).

Writing as a Skill Set: Since this utopian law school curriculum would aim to develop targeted legal skills, it is likely that a quarter system would help maximize problem-set scenarios.

At least during the first and second year, students will be exposed to various writing exercises, as opposed to perfecting only two memoranda throughout the entire first year of law school. The goal is to demystify writing exercises used throughout various aspects of the legal profession by exposing their commonality, each having a common denominator that is extensive, and easily adaptable to any legal assignment. These would include, but absolutely not be limited to, writ-

ing a succinct research letter to a partner, letter to a client regarding a legal question and other aspects of representations (retention letter [professional responsibility], explaining various stages of representation, closing letter, etc.), practicing outlining, legal memorandum in support of motions, bar-exam-style essays and performance exams.

The objective of these various exercises is not to give students “mastery” over each specific type of exercise, but to demonstrate they can learn the overall mechanics of legal writing, which is fairly routinized with discernable patterns they can easily target to any writing task. This will give students the confidence of knowing they can tackle any legal writing exercise, regardless of whether it is a “new” type of writing assignment they had not done before. As many practitioners know, this confidence and set of skills is vital to succeeding in the legal profession.

Upper-division courses can and should focus on advanced court briefs, appeal briefs, including but not limited to circuit court appeal briefs. These should be done in conjunction with internal memos to a partner and letters to clients. Again, this will emphasize the commonality that the tasks entail, and thus expose the building blocks of legal writing, regardless of how it is packaged or tailored for the specific reader.

Courses in Career Development

Law schools currently lack courses that assist future practitioners in their professional career development, management skills, and specialized area of law. While current clinical courses may focus on trial advocacy, or take on a real-life case (asylum, post-conviction relief, etc.), these courses are treated as “electives” and barely touch the surface in terms of topic and skill sets.

Clinicals: In clinicals, students will work with real life problem sets, with the assistance of top professionals in the field. This is both useful for their own formation and central to what it means to be in the legal profession, which in our school will focus on being a man or woman for others; justice component; providing quality legal service to people regardless of ability to pay. Clinical courses will be an extension of the problem-set courses that students are already familiar with; this will provide students with client interactions, access to practitioners who are supervising their work, and possibly to a tribunal (e.g., immigration, or administrative law judge).

Advanced Training on Reading and Application of Governing Law (cases, statutes, regulations): In other courses, students will gain advanced expertise in a field through the use of the problem-set model. Students will get problem sets that require them to prepare

and file a brief in the area of law they hope to master. The problem set will be very similar to a performance exam on the bar, in that the professors will provide the students with a package of cases, statutes, and regulations related to the substantive and procedural tools needed to write the brief. The students will read the cases and discuss them openly with the group. The goal is for students to be able to read through long cases that discuss a plethora of topics to isolate the relevant parts, to be able to analogize and distinguish where necessary, and to use cases to give life to a statute. Students will use their own judgment to write their product.

Case Management/Task Management: Different fields require varying time management skills depending on the area of law and nature of the work/office structure. Such a skill set is far too ignored by law schools despite its everyday importance for practitioners. Such a skill-set is not uniform, rather, a variation on knowledge to be mastered depending on the area of practice, whether the office focuses on impact litigation, direct legal services, etc. Courses would be developed to assist in time management, case management, task management, and delegation and supervision of assignments. While nothing can replace real-life practice, graduating students should know how case management systems function, how to manage a high volume caseload, how to manage staff, and when and how to delegate tasks, either internally to staff or to third-party contractors.

Professional Development: A course or set of courses would be developed to demystify career paths and assist in developing skills for such path. For example, if a student wishes to be a sole practitioner, or open a firm with attorneys in other areas of law, students should graduate with basic skill sets to know where to start. This would mean more than simply learning different types of law firm formations; it would include learning business skills, risk of creating such agreements, incorporating pro-bono services, marketing, etc. Students hoping to be Executive Directors of non-profits, who wish to become judges, or who want to become partners of a mid-size or top-20 law firm should have a more concrete understanding of how to arrive on such path within a desired timeframe.

Emphasis on specialization, practice and professional development is not only necessary to slowly dismantle deep-entrenched nepotism in the legal field, but would also create strong, loyal alumni that know the value of such curriculum and continue to invest in the school.

Diversity Outreach Summer Programs

Outreach diversity summer programs before law school should

continue to exist. It is the hope that this new curriculum would eliminate the need for such outreach programs, however, it will likely take years, if not decades, of retraining law schools (administration, faculty, law school culture) to eliminate the regnant way of lawyering.

Bar Study Courses

Given the exorbitant amount of law school tuition, it is absurd that law school students have to pay thousands for a bar exam course. Students would already be fully trained in issue-spotting, bar exam essay writing, etc., after a three-year curriculum emphasizing the problem-set model. However, until students and instructors adapt to such a curriculum, the law school would be responsible for offering a quarter course for the bar exam. The concept is that law schools should be responsible for training their students on passing the bar.

Demystifying Abusive Practices in Legal Positions Throughout Summer Internships, Externships, and Post-Graduate Legal Positions

Unfortunately, law school students and recent graduates are unprepared to tackle overt and implicit forms of discrimination and abusive behavior in the workforce, including exploitation. These patterns start from the hiring stage to everyday office practices, however they are rarely ever discussed in a classroom setting, much less introduced as a topic for learning.

For example, non-profits may take advantage of first generation bilingual speakers to conduct intakes in their direct legal services program—recent graduates take these positions with the romanticized vision that they are directly helping their community, and while they are, they are also blinded to the limited set of legal skills they will obtain, to the limitation for career mobility, unfair workload/caseload and impossible salary. This contributes to a dual system in which white law students are given the legal writing and research, and essentially groomed to get competitive legal jobs upon graduation. Monolingual English speakers should do intakes, even if it means they need to work with translators, and bilingual students should be given the same substantive assignments that monolingual white students get. Other examples of abusive tactics include mission-driven nonprofits that attract young lawyers who are true believers, but who are exploited precisely because their belief in the mission makes it almost certain they will accept being overworked, underpaid, inadequately supervised, and otherwise exploited.

These issues can be demystified through a series of either well-organized panels and/or shared experiences within the classroom by

honest professionals who can expose and testify to such abusive patterns. Instructors and legal professionals can work together to provide suggested solutions for students, whether it be skills speaking to a manager, partner, etc. Furthermore, this is not to discourage job opportunities in direct legal services, but rather to be wary of being “boxed” in positions that may affect legal experience, financial opportunities, and wellbeing.

Tutoring

In hopes that moving away from the doctrinal/Socratic method of teaching will make “tutoring” obsolete, tutoring programs should play an active role in the meantime. Inspired in part by Duncan Kennedy’s dissent, teaching staff will be trained and required to assist students who may face challenges with course material/practices.

Concerns that students known as “gunners” would take advantage of such services by “hogging” resources could be prevented by having tutoring counselors that tailor a remedial program based on the student’s need. For example, a student may need 3 hours of tutoring in writing during the lapse of 2 weeks, a student would be given such attention with a specified professor. Students would be screened based on need, as opposed to first-come first serve. The abolition of curved grading should de-incentivize the “gunners” from seeking tutoring they do not need.

Integrating Self-Care Practice and Concepts

Knowing the prevalence of depression and alcohol/drug abuse among attorneys, self-care courses would be required by law school students. These courses would address various aspects of attorney pressure, such as dealing with abusive relationships in the office space, the psychological impact of working in direct legal services, coping with high-stress situations, etc. The aim would be to practice integrating concepts such as mindfulness into an attorney lifestyle.

Sketch No. 3

By anyone’s standards, I have excelled in law school; barring some sort of catastrophe, I will graduate in the top of my class, and the opportunities I will have after graduation would make most law students salivate. But it’s no secret that I hate it. I tell everyone, and those close to me hear little else come exam time. When asked why, I talk about how much effort I put in and how very disjointed it all is—how little the semester’s work has to do with the exams, and how little any of it has to do with the practice of law.

Anyone who knows me will tell you that I don't mind hard work. I throw myself into everything I do with a level of devotion that borders on obsession, and I've certainly done so in law school. The effort I've expended has not been costless: I lost thirty pounds my first semester, my second year came with my very first migraine, and every single relationship I have has suffered. I'm usually willing to exert myself and pay the piper without complaint. But here, I mind, and I do complain, because the amount of work I've put in far outpaces the returns I've seen. Yes, my GPA is high. But why, when I prepare for exams, do I feel like I'm starting from scratch? Why haven't I learned yet how to be a lawyer? And why the hell are my professors and my school not working to prepare me for these challenges?

I began this last semester, the first of my third year, by obtaining outlines for all of my doctrinal classes. As dutiful as I've been, it can't be said that I haven't learned a thing or two about how to cut corners, and I was so weary and fed up that I allowed myself this deviation from lockstep with the Socratic case method (although I still read every case I was assigned and briefed every case I read). Having those outlines was an incredible experience: All of a sudden, I was psychic. I finally knew what was going on—where we were headed, how it all fit together. What's more, I almost always knew exactly what the professor was going to say next. At one point, in response to a professor's question about a case, I gave an answer directly from my outline, and immediately realized that this was the (relatively straightforward) point to which she had planned to build over the course of the class session. You should have seen her face—the picture of flustered, of caught off-guard. After recovering herself, she proceeded to do just what she'd planned—to spend the class session building to the point I'd just made. It was astounding. As I sat through the next plodding hour, I felt like I'd won the lottery and instantly lost it all. “Wait, we still have to do this? Isn't there something more?”

I shouldn't have been surprised. With my outlines in hand, I saw that all of my doctrinal classes were scripted, the professors using the same phrases in the same order as they had in years past, pathologically unable or unwilling to deviate. I was irritated by my professors' clear lack of effort, but I thought, “Well, I've been more prepared for class than ever this semester, so at least I'll be extra-prepared for exams.” I still couldn't unlearn what I'd been told in conversations as scripted as doctrinal classes: “The Socratic case method will teach you the law, and deep engagement with Socratic case method will prepare you for exams.”

Nonsense. I carried my bravado into my exam preparation, only for my misplaced confidence to crumble. It was heartbreaking, to fi-

nally see what I'd have realized much earlier had I not been so very dutiful: The relationship between the work that's required during the semester and the performance that's rewarded on exams is passing at best.

I made up for lost time with a flurry of practice exams, and did about as well as I always do, though my crisis of faith made the whole experience even more miserable than usual. I've spent some time trying to understand why I always do well, and though it may not be a complete answer, I ascribe my success to the fact that I'm a hardworking good writer who knows how to figure out what people want and give it to them. What I know for certain is that the quality of my performances has next to nothing to do with the "preparation" I've received in doctrinal classes. Similarly, my summer work experiences were as successful as grit, intuition, and writing ability could make them, but again I found myself substantively unprepared for the work that was expected of me. As I asked for (and thankfully received) tutelage on the basics of the practice of law, I wondered, "Why is this all utterly unfamiliar? What has all this schooling been for?"

I'd propose scrapping law school exams altogether in favor of a wholly practical education, but bar exam essays share many or most qualities with law school exams, so I don't think the latter should be done away with entirely. What I do think—what I know, and what I assert with as much force as my fatigue with it all will allow me—is that what we do in law school should directly and affirmatively prepare us for the performances that will be expected of us: on law school exams, on the bar exam, and in practice. We know so much more about learning than we did in the 1800s, when the modern law school was born, and yet legal education has stagnated, an antiquated machine grinding law students in its gears. In my darkest hours, I chalk this up to professional hazing—the notion that we suffered, so the newbies must too—and to the indolence of those who have the power to make change and whose lives would be affected by it. At my most optimistic, I think it's just inertia mixed with ignorance, and I have hope for change—that maybe someday, even someday soon, law school will serve its ideal purpose.

My vision of a new law school curriculum centers around a basic premise: Tell us what we need to know, and teach us how to do what we need to know how to do. Put another way, every law student who puts in the effort should graduate prepared to take the bar and prepared to practice law.

Doctrinal classes should be interactive and writing-based. Ball-hiding and the Socratic case method should be banned in favor of practical, hands-on experience that leaves the student with a working

understanding of the law as well as of legal research, the writing that is required on bar exams, the various written products attorneys are required to produce, and the benefits of collaboration.

- Teach the law up front, explicitly, in the form of materials distributed prior to the first class. These could be video or audio lectures, outlines, books, interactive technology-based materials, or all of the above—anything to get the playbook of the law in the hands and minds of the students so that they are, to quote Professor López, “conversant” by the first day of class.
- Distribute a fact pattern to the class, an issue-spotter one might find on a typical law school exam. Discuss the doctrinal implications, and, in the case of early 1L classes, lecture, take questions, and distribute materials on the structure of law school exam answers.
- Assign each student to write an exam answer in response to the fact pattern (relying on the distributed materials for doctrine), then assign them, in pairs, to review one another’s answers and provide comments.
- Select several pairs of students to present their work (both answers and comments thereto) to the class, and engage the class in guided discussion regarding what went well and what needs improvement, both in the principal piece of writing and in the commentary. (How well did the player play, and how well did the coach coach?)
- Assign students to rewrite their exam answers based on what they learned from their partners and from class discussion. The rewritten answers should go through another round of peer comments and should also be read and commented upon by the professor.
- Once a baseline of student fluency with the distributed materials is achieved through repetition of this process as necessary with various fact patterns, distribute yet another fact pattern, one with nuances that take the situation slightly beyond what was covered in the distributed materials, and assign students to conduct legal research on electronic databases to find responsive case law. Some of this research should be conducted in class so that the professor can assist the students in building their research skills.
- Require students to bring the results of their research to class and to discuss in small groups what cases they believe are most responsive to the fact pattern.
- Assign students to write briefs, motions, complaints, client letters, bench memos, drafts of judicial opinions—the products

they will likely be required to produce as practicing attorneys. Distribute materials on the structure of each of these written products before they're assigned and take questions in class.

- Again, students should work in pairs to review and critique each other's work, present their work to the class, and rewrite their work based on what they have learned, with feedback from professor and partner on the rewritten product. Again, repeat as necessary, with each fact pattern going a bit further than the last into the doctrinal arena at hand.

Broad reading should be required as a means of improving students' writing and making them more critical readers. This instruction might take the form of a mandatory class in the first two semesters of law school.

- Assign students to read (and write reflections in response to) works that explore the effective use of language and rhetoric. Some of these should focus on the legal realm, while others should more broadly address the topic of effective writing and interrogate the efficacy of various uses of language. Students should read one another's responses prior to class and come prepared for robust discussion.
- Assign students to read fiction, non-fiction, poetry, and legal writing displaying what various faculty members consider to be excellent use of language, both traditionally and in a novel sense. Students should write reflections that focus specifically on the authors' use of language—what the student finds compelling, effective, or lacking about it, and why. Students should, in all their reflections, try out the techniques they find in these written works, and should be encouraged to do so in their doctrinal writings as well. Again, students ought to read one another's reflections, and class time should be devoted to discussion.

Oral advocacy in its various forms should be taught to every student through an experiential process. Students should be required to engage in mock negotiations and moot court proceedings, with guidance and critique from both peers and professors, to develop their oral advocacy skills. In these settings, they should represent one another's interests, gaining practice and facility in the art of listening to clients and advocating for them.

Professional options should be laid out in a course offered during the first semester of the first year. Students should receive early instruction that will enable them to make informed, conscious choices about their educational and career paths. Topics covered could include the nature of transactional work versus litigation, private prac-

tice versus public interest, academia, clerkships and judgeships, life and work in firms of various sizes, the demands of solo practice, a brief introduction to the demands of various practice areas, and the possibility of using a law degree outside the traditional practice of law. Rather than having to gather this data on an ad-hoc, patchwork basis over the course of their law school careers, students should have access to information about the cornucopia of possibilities as early as possible so that they may move through law school with greater intention and focus.

Explicit Bar preparation should be conducted during at least the final two semesters of law school. This instruction should take as prominent and as early a role as necessary to ensure that every student who puts in the necessary effort graduates ready to take, and able to pass, the bar exam.

- Using methods that mirror the first portion of the doctrinal class framework laid out above—distribution of necessary doctrinal materials and fact patterns; take-home essays, followed by peer critique—instruct students in every topic that appears on the essay portion of the Bar exam.
- Similarly, instruct and drill students on the skills necessary to succeed on the Performance Test portion and on the knowledge necessary to succeed on the multiple choice Multistate Bar Examination portion.

Summer work should be more heavily supervised to ensure that students are receiving adequate instruction. To this end, schools should screen summer opportunities and provide employer organizations and firms with a form of accreditation provided they meet standards regarding the level of instruction and education that will be provided to the student over the course of the summer. Students could receive school credit or a transcript annotation for summer work completed with an accredited organization or firm.

Grading/evaluation should be structured to reward hard work and objective mastery and to incentivize rather than discourage student collaboration. Professors should meet with each student at least once over the course of the semester to provide a progress report and, in lieu of assigning letter grades, should write an evaluation of every student in their classes at the end of the semester. Included in each evaluation should be an explicit discussion of how well the student collaborates with others—how generous she is with her knowledge and how open she is to learning what her peers have to teach her.

Mental health should be addressed from a place of realism. Law schools' current rhetoric around mental health issues seems to assume that students enter law school in a pristine state, when in fact many

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have past or present experience with various sorts of mental disorders. Rather than maintaining a singular focus on remaining healthy as a law student, or simply farming out all work around mental health to outside providers, law schools should devote some resources to helping students function and succeed even as they live with ongoing mental health problems.

* * *

I can't decide whether my law school is commonsense or radical; given how poorly the currently prevalent system works and how ardently legal educators have clung to it, I think it might be a little of both.

I will not graduate with a comprehensive, practical legal education; I will struggle in my bar exam preparation, and in my first few years of practice as I attempt to cobble together the knowledge and skills I need to be a good attorney. Simply put, it's too late for me. But it's not too late for future generations of law students. My alternative vision is but one iteration of a legal education that would fulfill a school's compact with incoming students: to arm them with the skills and knowledge they will need in order to meet successfully the challenges they will encounter outside the law school's doors.

Sketch No. 4

Based on my own educational experiences—primarily benefiting from the Lawyering for Social Change curriculum at Stanford Law School in the early 90s; five years of teaching Legal Research and Writing at George Washington Law School shortly after graduating from law school; and nearly 20 years as a domestic violence trial lawyer and attorney supervisor in Washington, D.C.—I am happy to share my vision of a what an effective, challenging, and engaging law school curriculum would look like to me. The first year would transform the traditional black letter law classes so that students would learn the material by doing some of the things that lawyers actually do—taking facts and law and building cases. They would also have a co-equal class offering the broad range of career options and skills they can choose from to focus on for the remaining two years. During second semester they would also start the process of learning about the communities, challenges, and gifts of their future clients.

Second and third years would involve a single hub of intensive, interrelated subject matter, skills, policy, and simulated or live practice experiences each year.

My Educational Experiences

Growing up in a military family, we moved every few years, but lived a fairly typical white, middle-class, suburban life. We moved to Spokane, Washington, in 1979, the summer I turned 10 and was starting 5th grade. As a late arrival, I got stuck in the new teacher's class because most of the other engaged parents had already ensured their children a spot in the "good" teacher's class. Mr. Frost, my teacher, was a cruel, sadistic man who used my academic success to ridicule other children. Thank goodness for Mr. Frost.

At the beginning of the year, some fifth graders—I don't know how many—were tested for Tessera, a gifted program that students attended once a week at another school. I did not receive the top score on the test, and so was not selected to attend until my mother made clear to the administration that if I was going to be subjected to Mr. Frost all year, I was going to be included in Tessera. Thank goodness for my mother.

Tessera was my lifeline. Every Wednesday for the year, my (who-would-become-a-lifelong) friend John and I went to Longfellow Elementary, a multi-story, turn-of-the-century, brick school building with high ceilings, hissing radiators, and Mr. Wescott. Thank goodness for Mr. Wescott.

The 10-12 lucky students in that class received our first education in problem-solving in myriad ways that resonated with each to different degrees. We played games like Mastermind and Othello (John's favorite; I had no interest); solved wooden cube puzzles and Tangrams (more to my liking); tackled Logic Problems (which became a lifelong hobby of mine and directly contributed to my success on the LSAT); and tried to successfully feed the people of ancient Sumeria in the video game Hamurabi on one of the original IBM personal computers with nothing more than a dark screen and illuminated green text characters.

At some point each week, we would gather in a circle. Mr. Wescott would present a fact pattern, a problem, the rules, a goal, and our resources, and leave us to work together to solve it. We traveled to the moon and uninhabited islands. We decided who would be saved in a lifeboat and solved haunted mysteries with only yes or no questions. By the end of the year, we were such a cohesive group we astounded him with how quickly we could solve the puzzles he presented. He treated us as adults, let us mostly direct our own learning, offered various activities that appealed to our various interests, and we thrived.

At the end of the year, the old brick building was torn down and I imagine Mr. Wescott moved on to teach elsewhere, but I have never forgotten the joy of learning that year.

When it came time to choose a law school in 1991, I chose Stanford over Harvard for three primary reasons: the opportunity to begin working at the East Palo Alto Community Law Project¹⁶⁷ as a first year; the diversity of graduate student housing options; and the public interest scholarships the school offered at the time to 2Ls and 3Ls.¹⁶⁸ The first two worked out wonderfully for me and, although I did not win one of the scholarships, the law school's generous loan repayment program ultimately served me just as well.

I was right that living outside the law school "bubble" proved positive on a personal level. My randomly selected roommate for graduate housing was a medical student with whom I got along so well we continued to live together all three years and disproved the old adage about lawyers and doctors disliking each other. From a distant acquaintance, I befriended a group of AeroAstro¹⁶⁹ Ph.D students who helped remind me there was a whole universe beyond the law school. And, by a fortuitous set of circumstances, my friend John (from 5th grade) was a constant companion during my first year while he obtained his masters in Stanford's STEP¹⁷⁰ program and remained close during my second and third years while he taught at a local high school.

I knew nothing about lawyering when I arrived at Stanford. I came from parents who were a scientist and an engineer. From kindergarten through college graduation, though, I had loved school and

¹⁶⁷ According to Stanford's "Public Interest Law at Stanford Law School" brochure at the time:

The Project, which first opened in March of 1984, serves the nearby community of East Palo Alto. The Project was begun by students and community members and has the dual purpose of providing legal services to an otherwise severely underrepresented community and providing students with practical experience working with residents of that community. A student steering committee works with the staff to determine the policy direction of the Project. The Project emphasizes projects that promote community development and individual and community self-sufficiency. Under the supervision of attorneys, the students may volunteer their time to assist in the domestic violence TRO Clinic, the Small Claims Clinic or the Guardianship Clinic. In addition . . . students can also fulfill clinical coursework obligations by working at the Project.

Id.

¹⁶⁸ The same brochure included:

Public Service Fellowships. Recently established by the Law School, these provide full tuition for several second and third year Stanford law students planning careers as lawyers in government, public interest work, or public service more generally. Fellowships are awarded on the basis of students' demonstrated commitment to public service, their intention to seek permanent employment in public service, and academic achievement in their first year of law studies.

Id.

¹⁶⁹ Department of Aeronautics and Astronautics.

¹⁷⁰ Graduate School of Education, Stanford Teacher Education Program (STEP).

dreamed of being a lawyer since second grade. I started keeping a journal when I arrived at law school because I thought it would be worthwhile to capture and reflect on the experience. Little did I know I would be documenting abject misery throughout the entire first year of traditional coursework: Torts, Contracts, Civil Procedure, Criminal Law and (basically ignored) Legal Research and Writing first semester; and Constitutional Law, Property, Law and Sociology, Lawyering Process for Social Change, and (basically ignored) Legal Research and Writing second semester.

Representative of my first year experience, but only several weeks into classes on September 24 I wrote:

The Law is quickly becoming almost a menacing thing to me. It is emerging as an arbitrary set of rules that will determine who wins with no regard for fairness or justice. The Law should not take on a life of its own. We should control It. I fear an indoctrination process which makes us slowly begin to see these procedures as perfectly rational and apply them w/o question. I hope to resist that force and remember the issues that really matter. . . . These are things I will constantly have to remind myself of. I value clarity & keeping in mind that π & Δ are people, not just symbols.

Only two academic experiences that year received positive reflections in my journal: (1) training for and working in the student run Domestic Violence Clinic at the then East Palo Alto Community Law Project and (2) beginning the Lawyering for Social Change (LSC) Curriculum¹⁷¹ second semester with the Lawyering Process for Social Change class.¹⁷²

After first year, I only took two other traditional law school classes: Criminal Procedure and Evidence. Otherwise, I took only “skills” classes (Negotiation; Trial Advocacy; Advocacy Skills Workshop; What Lawyers Should Know About Business and its accounting sub-

¹⁷¹ There are a number of descriptions of the curriculum, but I will start with the one from the front page of the same brochure cited above, *supra* note 167:

This coordinated [Lawyering for Social Change] curriculum draws on interdisciplinary ideas and every day experience to prepare lawyers to work with subordinated or disadvantaged populations. Students choosing this sequence enroll in courses which, among other things emphasize the relationships between doctrine, strategy, ethics, skills and the social context of lawyering. The sequence is designed to provide students with specialized training, while providing a broad understanding of the social and psychological dynamics of poverty and the needs of underrepresented groups.

Id.

¹⁷² “This section introduces students to what it is like to work with subordinated people, what it is like to work with allies, and what it is like to work with in a particular neighborhood (East Palo Alto), designing and executing strategies aimed specifically at solving particular problems and more generally at fighting social and political subordination.” Stanford University Bulletin, School of Law 1990-92, p. 22.

section; and an undergraduate Advanced Spanish Conversation class), in-depth seminars (Gender Law and Public Policy; Domestic Violence: Social and Legal Analysis of Woman Battering / Models of Attorney Intervention) and most of the courses offered in the LSC curriculum (Subordination: Traditions of Thought and Experience; Community Law Practice; Advanced Issues in Criminal Defense and Prosecution; and Teaching Self-Help and Lay Lawyering). Many of these classes had limited enrollments and were very hard to get, ensuring I had an experience substantially different than most of my classmates.¹⁷³

As expected, the East Palo Alto Community Law Project was as central to my education as my courses. In addition to serving as the clinical placement for my LSC courses both semesters third year, the Law Project housed the student-run Domestic Violence Clinic where I worked as a volunteer my first year and student co-coordinator my second two years. I also received course credit for a directed research project there my second year working on housing matters.

As a result, my third year journal entries are radically different from my first. There are three main takeaways. (1) I worked extraordinarily hard. I came home many days at 11:30 p.m. and occasionally called my roommate just to say hello because we never saw one another. (2) I was blessed with a phenomenal community of peers and mentors that supported and challenged me. (3) I had rediscovered the joy of learning.

As early as September 11 of my third year, recognizing how unique my third-year learning opportunity was compared to most of my classmates. I wrote in my journal:

I also must say that the amazing experience I am going to have this year is not the typical 3d year or law school experience (lucky me). I have chosen to stay far away from Secured Transactions, Capital Markets, and Trusts and Estates which are the basic courses of most of my classmates. I think I am very fortunate to get to do all that I am doing and feel sorry for all of the students trapped by traditional notions of what they should be doing. I plan to stay very humble, very attuned, and learn my tail off this year.

And it did not fade. On November 8, I wrote:

For the millionth time I'll reiterate how much I love this year – it puts the other two to shame. Every day I am concerned about real people with real problems and working hard to do what I can to address

¹⁷³ I was the only second year in my trial advocacy class taught by a federal judge in San Francisco because even though I was on the wait list, I attended the class from the first day and the judge let me enroll. Needless to say that did not make me popular with my third year classmates whose friends had not been able to enroll in the class.

them.

Sadly, most of the amazing educational experience I had in my final two years at Stanford got axed by the new administration after my graduation.

After graduation I spent four years as an assistant general counsel for the Department of the Army at the Pentagon. For five years between 1995 and 2001, I taught Legal Research and Writing to first years at George Washington University Law School in a program far more robust than what I had first year at Stanford. I learned a lot I wished I had learned then. Since 1998, I have been a domestic violence trial attorney practicing a unique hybrid of family and criminal law in Washington, D.C. As a practitioner, I can see the training deficits in the students coming out of school—legal writing, trial skills, and understanding of the broad human dimensions in all of our work. The first two at least have created a strong market for continuing education programs that focus on those skills.

Though I often work with my colleagues who teach at the many law school domestic violence clinics in Washington, D.C., I have not stayed abreast of or attuned to developments in law school curricula in many years. For the most part, the approach seems to be a “one and done” philosophy, with students typically getting one semester of a clinical experience that focuses on the nuts and bolts of the practice but not the extended opportunity to evaluate lawyers and their roles in the particular community and practice they are supposed to be serving.

As a result, I offer the following sketch outline of a law school curriculum based on what worked and what did not work for me and on what I see in recent law graduates.

First Year / First Semester

Students would take three “black letter law” classes representing bar topics—Contracts and Torts (to teach common law concepts), and Criminal Law (to teach statutory law concepts)—and one lawyering class. Legal research and writing and civil procedure would be integrated into the three black letter law classes.

Contracts and Torts. Drawing on the highest quality outlines, hornbooks, and computer-based learning, videos and other training materials, students would spend the first seven weeks learning the black letter law

For the second seven weeks, students would do what many lawyers actually do—take a fact pattern and draft a variety of legal documents. Writing assignments would be created through civil procedure lenses so that in completing each assignment the stu-

dents would also be learning civil procedure as applied to real life. Each course would focus its assignments on different aspects of civil procedure. In creating the fact patterns, professors would seek out current real world, cutting-edge problems and give students a choice from two or three problems. Fact patterns would require students to learn who the involved parties are, what brought them to this place, and what the legal system can and can't do to address their problem. During class time, professors would work as coaches for the students, breaking down the problems into manageable pieces, teaching students the requisite parts of each document and guiding them through conducting the research needed to address each issue.

Grading: Students would test their mastery of the material through on-line, multiple-choice tests modeled on the bar exam. They could re-take tests on any section of material as many times as they need to to reach the level of mastery (and grade) they want.

During the second seven weeks, teachers will assign letter or number grades to writing assignments simply as a way to help students gauge their mastery. Using feedback from coaching, students may rewrite a document as many times as they want to improve their mastery and their grade.

There will be no mean. It will be entirely up to the students how much effort they want to expend to improve their work.

Criminal Law. Criminal Law follows the same format and grading policy as Contracts and Torts, but instead of writing projects centered on civil procedure tasks, the writing problems focus on statutory interpretation and persuasive writing skills either to a trial or appellate court.

Mosaic. A full year class exposing students to the skills needed for myriad career paths. First seven weeks: creative problem-solving, brain exercises, logic and reasoning (à la Mr. Wescott—our 1Ls need some joy of learning!), plus basic legal research to understand how to find and cite cases, how to determine if they are still good law, and how to find policy research. Second seven weeks: The world of lawyers, including the history of the profession and legal education. Readings, videos, panels, etc., to expose students to the wide range of career paths available with an emphasis on the specific training and skills students should acquire for each path:

- General counsels for both government and private business
- Trial lawyers (those people who are actually in court most

days)

- Impact litigators who take on large impact or class action cases
- Rebellious lawyers
- Appellate lawyers
- Judicial officers—from administrative law judges to appellate judges
- Academics
- Policy advisors, think tank workers, community organizers
- Law firms in all their permutations from solo practitioners, to “boutique” small firms with specialized practices, to massive corporate law firms, with special attention to the many emerging alternatives to the traditional law firm and billing models including “low bono” models.

Grading: show up and participate = pass; don't show up or don't participate = don't pass. Same number of credits as the other three classes.

First Year / Second Semester

Students choose two courses from Constitutional Law, Property, Business Associations, and Evidence. The first three would be taught in the same format as Torts, Contracts, and Criminal Law, though the writing assignments would not be limited to civil procedure. For the second half, instead of writing assignments, Evidence students would have simulated exercises to practice evidentiary concepts. Like Civil Procedure, Professional Responsibility would be incorporated into the fact patterns and simulations the students face, especially in Evidence.

For their third class, students would have the option to take any upper-level course offered by the wider university or to take a law school course. Either choice should be specifically designed to help them understand the clients they will ultimately be serving and can serve as a pre-requisite to an upper level “hub.” The courses would be a deep and wide reading theory class drawing on multiple disciplines and sources of understanding.

Some examples of college courses that would meet this requirement (from the Cornell University course catalog):

- America, Business and International Political Economy
- American Conservative Thought
- Economics and Environmental Policy
- History of Consumption: From Wedgwood to Wal-Mart
- Information, Technology, and Society
- Immigrant America: Race and Citizenship in Modern Working-Class History

- Representing Racial Encounters/Encountering Racial Representations
- Social Studies of Space, Technologies and Borders
- Theories of Industrial Relations Systems

Courses at the law school could include:

- Subordination: Traditions of Thought and Experience¹⁷⁴
- The Architects of Silicon Valley¹⁷⁵
- CEOs from Robber Barons to Philanthropists
- Celebrity Agents Then and Now
- Asian Culture and Traditions

Mosaic: An Exploration of Advocacy. Through readings and simulated practice this class will introduce students to the wide range of advocacy skills that attorneys employ. Drawing on the lessons of first semester, the course will explore the theory and practice of how lawyers in each of those practice areas influence others: organizing, lobbying, legislative advocacy, appellate legal arguments, media campaigns. Based on their interests, students would be able to choose from two or three fact patterns that would serve as the basis for all of these exercises. Again, it would be a co-equal class for credits with the other classes this semester. Recognizing that all forms of influence may be too much to cover in one semester, a school could break them down into two or three smaller groups giving students a choice in registration, but each course must still at least contain at least three different forms of influence.

Second and Third Year

Second and third year students must be able to take classes that interact, build upon each other, and offer ample simulated and live practice. I imagine a hub and spoke model, where schools create a hub of related courses in a field which all of the students in that hub take and from which students choose one of a number of specialized spokes to offer them more opportunity for specialized training and practice.

In their work in the spokes, besides learning an area of law more in depth, students would also be trained and expected to come to know the lives and experiences of the individual or community they are serving and evaluate the positive and negative effects of an attorney's role in their situations.

Through their course materials, assignments, and placements,

¹⁷⁴ See description above.

¹⁷⁵ The rest of these are all from my imagination.

each hub with all of its spokes would be designed to accomplish six goals:¹⁷⁶

- Teach students to be creative problem solvers.
- Expose students to interdisciplinary literature relevant to the area of law.
- Train students in the skills relevant to the type of lawyering.
- Equip students to understand and participate effectively in policy debates relevant to the area of law.
- Create a literature analyzing the nuts and bolts of effective practice in the area.
- Analyze past reform efforts and encourage students to develop tools to evaluate the impact of their own work.

Hubs could form around subject matter areas, practice types, or both in a given school. Schools could also become known for their particular programs so not every school would have to be everything to every student.

Live practice opportunities could range from live client law school clinics, to moot court or actual appellate practice opportunities, to legislative drafting, to business negotiations, to a media campaign.

Students would be able to do a different hub each year.

Some hub and spoke examples drawing from my own experience:

- *A Community Law Practice hub.* In course formats designed to meet the six goals above, students would all take a course or courses that included trial advocacy, non-profit business management and fund-raising, an overview of the types of law included in all of the spokes, and the political and economic forces underlying poverty. The spokes could include specialized coursework and live practice opportunities in housing, economic development, public benefits, family law, or immigration.
- *A Criminal Justice hub.* In course formats designed to meet the six goals above, students would all take a course or courses that included trial advocacy, criminal procedure, the legislative process, the role of each of the spokes in the system, and bias in the system. The spokes could include specialized coursework and live practice opportunities in criminal defense, prosecution, habeas corpus work, re-entry programs, death penalty appeals, or victims' rights work.
- *A Civil Rights hub.* In course formats designed to meet the six goals above, students would all take a course or courses that included Constitutional Law, federal civil rights legislation, fed-

¹⁷⁶ Adapted from Lawyering for Social Change Program.

eral procedure and practice, and a study of successful movement organizing and peaceful protest. The spokes could include specialized coursework and live practice opportunities in police abuse cases, Title IX enforcement, disability access, or transgender issues.

Some other examples outside of my experience but that I could imagine:

- *A Corporate Clients hub.* In course formats designed to meet the six goals above, students would all take a course or courses that included corporations, taxation, negotiation, and business development—how to attract and retain clients. The spokes could include specialized coursework and live practice opportunities in a transactional law clinic, securities regulation, corporate tax policy, or setting up an initial public offering.
- *A Science and Technology hub.* In course formats designed to meet the six goals above, students would all take a course or courses that included administrative and regulatory law, an overview of all the types of law included in the spokes, a seminar on influencing policy makers, and how to translate scientific data into law. The spokes could include specialized coursework and live practice opportunities in cyberlaw, patent law, environmental law, or health care law.
- *A Solo Practitioner Hub* (to give a practice type rather than a subject matter example). In course formats designed to meet the six goals above, students would all take a course or courses that included trial advocacy, small business management and accounting, initiating and defending lawsuits, and an overview of areas of practice including wills, family law, and criminal defense. The spokes could include specialized coursework and live practice opportunities in a small general practice.

* * *

I am certain that experts in these and other fields could come up with cohesive programs that would make law school meaningful and productive for students pursuing all areas of the law and offer them the joy of learning and passion I found in the Lawyering for Social Change curriculum.

As my favorite, fictional, accidental rebellious law student Elle Woods said in *Legally Blonde*:¹⁷⁷ “I have come to find that passion is a

¹⁷⁷ In this farcical fish-out-of-water story, bubbly, rich, sorority girl Elle Woods reveals herself to be a natural, if accidental, rebellious lawyer. Elle first demonstrates a natural instinct for lay lawyering through her friendship and advocacy with a local hairdresser. She later breaks out of the grinding format of Harvard’s first year law curriculum by landing a prestigious internship defending a woman accused of murder. As the only member of the

key ingredient to the study and practice of law and life.”

Sketch No. 5

A J.D. is a fetish. It is a credential in a society that relies on credentialing to determine access to high-status occupations—and to ensure that those occupations will not decline in status.¹⁷⁸ Components of the J.D.—law school ranking, 1L grades, law review—act as “signals” of student quality to employers, enabling access to valued rewards within the high-status occupation in the form of high-paying or well-regarded positions.¹⁷⁹ But what qualities do these components actually signify? And what occupational expertise does the credential certify? Under the current law school system, it is not the content of the J.D. that matters but the symbol itself.

The vision of lawyering and of legal education outlined in Professor López’s article would give content to the symbol. This vision demands that law schools develop students’ knowledge, skills, and capacities as problem-solvers. Most contemporary law schools fail to achieve this development *not* because they are deeply committed to a regnant view of lawyering; rather, they lack any sort of vision at all. Contemporary law schools replicate the regnant model simply by falling in line with institutional pressure toward correspondence. To maintain external legitimacy, law schools mirror the practices of other law schools and conform to the mandates of outside organizations—not just the American Bar Association but also U.S. News & World Report and large law firms that want easy heuristics to use in hiring decisions.¹⁸⁰

Law schools can only resist the pressure toward conformity by articulating a clear mission. When the purpose of an organization is simply to go on existing, it is beholden to its patrons. Its only source of legitimacy is external. But an organization that articulates a mission has an internal mechanism for legitimacy. An organization with a mission can continually ask whether its activities promote or harm its central purpose.

defense team that bothers to truly hear and protect the client’s story, and through the dumb luck of her familiarity with the culture and practices of all the various witnesses, Elle is singularly able to get her client acquitted while preserving the client’s right to her own story.

¹⁷⁸ See RANDALL COLLINS, *THE CREDENTIAL SOCIETY: A HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* (1979).

¹⁷⁹ See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998). Professor Korobkin sees sorting itself as economically positive, whereas I view arbitrary sorting as socially problematic.

¹⁸⁰ See Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63 (2009).

A mission statement in itself does not guarantee progress toward an alternative vision for legal education. A mission statement can be regnant or rebellious. A mission statement may require conformity with existing institutions or may demand institutional change. Mission statements can be written in vague terms or using empty platitudes, providing little substance for accountability. And mission statements can simply be ignored, as organizations say one thing and do another. Yet despite all these pitfalls and workarounds, a mission remains important to any organization that is truly committed to intentional decision-making over reflexive reliance on tradition.

For my sketch, I decided to imagine a law school with a mission. This is not my dream law school—my dream law school would have a radically leftist orientation toward social and economic justice. This law school is more conventional in its approach—it intends to prepare students for the full range of existing legal careers, for-profit and public interest, and to enable them to choose a career they consider a good personal fit. My dream law school would also be radically egalitarian. This law school retains a strong meritocratic orientation, even as it shifts away from arbitrary ranking and toward genuine education and evaluation. This school is also not fully rebellious—it privileges legal expertise over other ways of knowing and approaching solutions. Still, I like this law school—it captures many of the principles described above by treating problem-solving as a community activity and preparing students to work on real-world problems. By tying its activities to its mission, this school establishes a mechanism for accountability, giving students the potential to strengthen or change the school with their feedback.

* * *

Gemein Law School—Student Handbook Excerpts

Mission

Gemein Law School trains students to work productively with others to solve practical problems by drawing from a strong set of competencies in the law. Gemein Law School approaches the law as both a set of existing rules and systems to be apprehended and a living institution to be shaped and transformed through practice. The Gemein Law curriculum is designed to train law students first as generalists, establishing the broad base of knowledge needed for bar passage and practice as well as legal careers. After establishing their competency in the law, students at Gemein Law receive specialized training in specific areas of the law that speak to their personal interests and career goals. Gemein Law graduates are prepared for a wide range of

21st-Century careers as highly collaborative, creative thinkers who are strengthened—not limited—by their expertise.

[. . .]

Student Supports

Faculty Advisors. Each student is assigned a faculty advisor. The faculty advisor provides the student with support in considering careers in various areas of the law, reaching out to potential mentors and collaborators in the field, and gauging the student's development in the program. Advisors and students meet during orientation and at least once per term. At Gemein Law, advisors consider students as future colleagues in the law and seek to treat students with respect while also offering guidance.

Advising Groups. Each advisor is matched with more than one student in a cohort, as well as across cohorts. Together, the students matched with a faculty advisor form an “advising group.” Advising groups meet together with their advisor for a meal or off-campus activity at least once every fall and every spring. Advising group members are encouraged to check in with one another at other times as well, to reflect on their own progress and on their satisfaction with Gemein Law. Advising groups are also asked to collaborate on a response to an annual evaluation from the Dean of Students. The annual evaluation asks students to rank the school's performance on a number of items related to the school mission and to provide constructive suggestions for improvement.

Orientation. The 1L year begins in early September, with one week of orientation before classes start. Orientation week is designed to introduce students to peers and faculty and to acclimate students to the collaborative environment of Gemein Law. Orientation week includes a ropes course with advising groups, community volunteering activities, an interactive workshop on confronting discrimination in the law school setting, and a barbecue with games. Orientation week concludes with convocation and a reception.

[. . .]

1L & 2L Curriculum and Evaluation

Overview. The first two years at Gemein Law are designed to develop students' general knowledge of the law. These years will prepare students to pass the state bar exam and will establish a toolkit of practical competencies. The 1L and 2L years involve ten six-week terms. Each term is structured around two paired courses—one covering legal doctrine and the other covering legal skills. Each of the paired courses meets daily for two hours per day, four days a week. In

addition to these courses, students meet weekly with an instructor for a critical thinking seminar. The seminar provides critical legal analysis of the doctrine covered during the term and introduces materials covering related social problems. The 2L year concludes in Comprehensive Exams. Passage of all Comprehensive Exam components is required for students to advance to their 3L Practicums.

First Term. The first of the six-week terms is structured somewhat differently from the remaining terms. Term 1 is designed to orient students toward law school and to prepare students for subsequent coursework with a shared knowledge base. The two courses in Term 1 are Introduction to U.S. Legal Systems and Lawyering as Problem-Solving.

Introduction to U.S. Legal Systems provides a historical and sociological understanding of the interlocking systems that comprise the legal institution. The course also provides a basis of legal terminology for students to use during their law school career. To take advantage of our faculty expertise and to orient students toward the range of possible careers available to students who earn a J.D. from Gemein Law, the course is led by an instructor of record but involves guest lectures on different topics from various faculty and practitioners. Topics covered include:

- Court systems: Federal and state, civil and criminal.
- Carceral systems: Policing; jails, prisons, and detention centers; bail and pre-trial monitoring; post-incarceration monitoring; collateral consequences of incarceration.
- Legislative systems: State and federal legislative processes.
- Administrative law and regulatory systems.
- Common law systems: Origin of U.S. common law in British history, modern permutations.
- Constitutional systems: Overview of U.S. Constitution; comparison to other constitutional democracies.
- 21st century, global systems: International law and regulations, global economics, contemporary immigration regimes, human rights.

Lawyering as Problem-Solving introduces students to the work of the law. The course begins with a theoretical orientation toward lawyering as a stylized variation of human problem solving. This section of the course utilizes writings on problem-solving in the rebellious lawyering tradition alongside writings on problem-solving from various professionals, activists, academics, and creative writers. After considering the place of lawyering among varied forms of problem solving, the course provides strategies and skills to approach the practical problems that will appear as part of the regular coursework in the

remaining 1L and 2L terms. These strategies include brainstorming options, community-based research, legal research, and legal writing. Practitioners such as community organizers, law librarians, and lawyers visit the course to provide guest lectures related to these topics.

Coordinated Coursework in 1L & 2L. Each of the subsequent terms of the 1L and 2L years covers one of the doctrinal areas tested by the California Bar Exam. Each term also covers an area of practical knowledge and skill needed for law practice. Courses are always paired as follows, though the order of paired courses by term will depend on each students' section in the class.

1L Courses:

- Torts & Civil Procedure
- Criminal Law & Criminal Procedure
- Contracts & Evidence
- Property I (Real Property, Community Property) & Remedies

2L Courses:

- Constitutional Law & Legal Analysis
- First Amendment & Trial Advocacy
- Business Associations & Negotiation
- Property II (Trusts, Wills & Succession) & Professional Responsibility

In the 1L year, all courses are structured in the same manner. The first three weeks of each term cover black-letter law as preparation for the Bar Exam and to provide a knowledge base for practice. No casebooks are used. Instead, professors provide students with a set of outlines and case law summaries at the beginning of each term. Students immediately set to work applying these outlines and summaries to hypothetical issue spotters and to explain or question court decisions. Students work together in small teams on these issue spotters and court decisions, but they are encouraged to ask questions of anyone in the class. The professor provides coaching and clarification as they work. At the end of the third week, students complete an individual issue-spotter assignment designed to evaluate their knowledge. The third-week assignment is performed individually outside of class and returned to the professor at the beginning of Week 4.

In the second three weeks of each term, students tackle real problems. Each session begins with a problem drawn from practice—not a hypothetical situation concocted to fit the rules or to diverge slightly from previous cases, but a real client problem drawn from a practitioners' experience. Students are provided all materials needed to develop the factual basis for their problem-solving. In some cases, this means that actors attend class to play clients or witnesses. Students address the problems by brainstorming holistic options for the

client, including legal options. In developing their approach to the problem, students may be required to engage in additional research on resources local to the client or on cases or legislation. Most problems also result in written work product, usually in the form of a legal document such as a motion or a contract rather than the standard law school memorandum. Students are to utilize the bank of model legal documents in Gemein Law library as a key resource to write their assignments. Problems typically bridge multiple class days.

A single final problem is given for each term. The professors for both courses in a term work together to design the final problem, drawing from real practitioner experience. The problem bridges both course areas. For example, the final problem for the term covering torts and civil procedure might require students to advise a client of her options after experiencing harm from a consumer product she purchased in a local store and to draft a complaint. Students work in small teams on the final problem during the last week of the term.

In the 2L year, most courses (First Amendment, Business Associations, Property II, and Professional Responsibility) are structured similar to 1L courses, with three weeks spent on issue spotters and cases designed to develop facility with the black letter law and three weeks spent on problem-solving modeled after real legal practice. Trial Advocacy and Negotiation are structured to allow for the integration of principles and practice throughout the term. As in the 1L year, the Week 6 problem is coordinated across both courses in each term. In addition, in the term covering Constitutional Law and Legal Analysis, students read full Supreme Court cases in addition to outlines of major Supreme Court doctrine. These cases are analyzed as part of the Legal Analysis course; the final project for that term requires students to write a Supreme Court decision from the perspective of a sitting justice.

CLS/Social Problems. Each term, students enroll in a seminar designed to critically analyze the development of the black letter law, to investigate social problems, and to reflect on practice issues related to the term's two doctrinal and practical courses. The same instructor runs the seminar for the same set of students over the course of an entire school year. This enables instructors to introduce and build tools of analysis, investigation, and reflection over the course of the year. Instructors coordinate their curriculum with the other two instructors for each term so that discussions are immediately relevant. Seminars are capped at 20 students to allow for productive discussion.

Schedule & Credit Hours. The school calendar is designed such that students undertake 12 weeks (two terms) of classes before the winter break and 18 weeks of classes before the summer break. Stu-

dents earn 3 credit hours for each doctrinal course and for each practical course, as well as for each of the two 1L Term 1 courses. Students earn an additional 0.5 credit hours for each CLS/Social Problems course. Students therefore earn a total of 32 credit hours in the 1L year and 26 credit hours in the 2L year. Three-credit-hour courses meet four times a week, an hour and fifty minutes per meeting. CLS/Social Problems courses meet once a week, an hour and a half per meeting. Students are expected to spend an equivalent amount of time in out-of-class preparation for each course.

Sample Student Schedule

	1L	2L
September (1 week)	Orientation	N/A
Term 1: Sept. - Oct. (6 weeks)	US Legal Systems Problem-Solving*	Constitutional Law Legal Analysis CLS/Social Problems
Term 2: Oct. - Dec. (6 weeks)	Torts Civil Procedure CLS/Social Problems	First Amendment Trial Advocacy CLS/Social Problems
December (3 weeks)	Winter Break	Winter Break
Term 3: Jan. - Feb. (6 weeks)	Criminal Law Criminal Procedure CLS/Social Problems	Business Associations Negotiation CLS/Social Problems
Term 4: Feb. - Apr. (6 weeks)	Contracts Evidence CLS/Social Problems	Property II Professional Responsibility CLS/Social Problems
April (1 week)	Spring Break	Spring Break
Term 5: Apr. - May (6 weeks)	Property I Remedies CLS/Social Problems	Exam Study Period & Comprehensive Exams*

* All students have the same coursework/activities during this term

Grades & Evaluations. 1L and 2L courses are ungraded. Students are graded only on their Comprehensive Examinations, which are administered at the end of the second year of study (see below). Students receive feedback on the week three assignments and problems given throughout each term in the form of rubrics rating

students as Rudimentary Learner (RL), Needs Improvement (NI), Meets Expectations (ME), or Exceeds Expectations (EE) on specified competencies. Students also receive written feedback on their overall performance—as a classmate and colleague, as well as on their work product—at the end of the term. This feedback is delivered privately, through the Gemein Law internal online system. Term feedback does not post to transcripts and is not shared with potential employers or others.

To comply with ABA guidelines regarding credit hours, transcripts note a grade of P for students who attended class and turned in all assignments and a U for students who did not satisfy the course requirements.

Students should expect to receive RL or NI on most competencies at the beginning of each term and to work toward achieving ME by the end of the term; EE is given only in rare exceptional cases. Ratings of RL or NI are often initially uncomfortable for students who earned primarily A's and B's in their previous education; however, at Gemein Law, we believe that it is important for students to learn to recognize areas of their own nescience as part of their approach to problem-solving.

Peer Support. Students are expected to work collaboratively with their classmates throughout each term. Students are encouraged to work together on problems and to peer-edit written work product, except on assignments specifically designated as individual assignments. Students are also encouraged to share materials and form study groups outside of class time to work together toward the goal of achieving a full pass rate on Comprehensive Exams. Students are advised to carefully consider their own learning process as they work with others and to consult with their advisor when they feel that they are struggling.

Honor System. Though many assignments involve collaborative work, some assignments—including the Week 3 assignments—are performed on an individual basis. Professors do not monitor students as they work on these assignments; rather, students follow the honor system in attesting that their work is their own. Students who work with others on these assignments miss a critical opportunity to receive feedback on their competency development as part of their preparation for the Comprehensive Exams.

Students are asked not to share work from previously taken courses across sections or years. By denying others the opportunity to approach problems with fresh eyes, sharing harms other students' development as well as their chances of passing the Comprehensive Exams.

Comprehensive Exams. Comprehensive Exams are administered in the last four days of the final term of the 2L year, after a five-week study period. Comprehensive Exams cover all of the course topics previously studied.

Comprehensive Exams involve three components:

1. Bar essays and multiple choice (Day 1 & 2, 12 hours): Similar in design, format, and difficulty to the state bar exam.
2. Written work product (Day 3, 8 hours): In response to a problem, students are asked to produce a holistic plan to assist the client and a written legal document.
3. Oral argument (Day 4, 15 minutes): Students are given a prompt at the beginning of the study period and must deliver a 15-minute oral argument in response on the final exam day.

Comprehensive Exams are graded as Fail/Pass/Pass with Distinction. Students must receive a score of Pass or Pass with Distinction on all components of the Comprehensive Exams to move on to the 3L Practicums. Students who do not pass their first Comprehensive Exams enroll in a study seminar and are able to retake the exam. Students can earn 5 credit hours for a summer study seminar and 10 credit hours for a fall study seminar. Students can re-take the exam on two additional administrations. Students only need to re-take the component that they failed on previous administrations. Additional administrations occur at the end of summer, before Winter Break, and before Summer Break the following year.

3L Curriculum and Evaluation

The 3L year at Gemein Law consists of Practicums paired with Training Courses. The purpose of the Practicums and Training Courses is to allow students to specialize in two areas of law before finishing law school. Students are to enroll in two fourteen-week Practicums—one in the Fall and one in the Spring. Practicums involve a placement within a legal organization under the supervision of a practicing attorney. Students must enroll in a different Practicum in each of the two terms.

During each Practicum, students also enroll in a Training Course covering the area of law they are working in—for example, Immigration Law Training, Criminal Defense Training, or Entertainment Law Training. Training Courses cover both black letter law and additional skills students may need. Training Courses also provide structured opportunities for reflection, goal-setting, and ethics-in-practice. Students earn 10 credit hours for each Practicum and 5 credit hours for each Training Course. Practicums are conducted on-site at each legal organization during the day; Training Courses are conducted in the eve-

nings at Gemein Law and online. Students should expect to see practicing attorneys enrolled in their Training Courses as well because all Training Courses at Gemein Law satisfy continuing education requirements.

Students who enroll in a Study Seminar in Fall of their 3L year may not enroll in a Practicum but may enroll in a Training Course.

Students will be compensated for their participation in Practicums at a rate above local minimum wage. Students will all receive the same wage for their work, regardless of type of legal organization. All compensation for student work in Practicums at private firms is paid directly to the law school and redistributed to help subsidize public interest work and judicial clerkships. This pay structure enables students to pursue their interests through work in various types of organizations.

Students are to receive written evaluations from both their Practicum supervisors and their Training Course professors. Written evaluations are intended to be comprehensive and to assess areas of proficiency and areas of nescience for all students. Written evaluations will not rank students. Written evaluations form a part of each student's hiring portfolio.

[. . .]

Career Services

Hiring. On-campus interviews for both private firms and public interest organizations occur at the end of the 3L year. At this time, organizations are assured of hiring attorneys with proven competencies and the ability to pass the bar exam. Some organizations may choose to hire students they previously supervised for Practicums. Students utilize hiring portfolios during on-campus interviews, which include samples of written work product, Comprehensive Exam results, and 3L evaluations. Traditional "letters of recommendation" or class rankings are not allowed as part of the hiring portfolio, which is intended to stimulate fruitful conversation about the students' interests, abilities, and experiences during the interviews.

[. . .]

Degree Requirements

J.D. Requirements. In order to graduate, students must pass all Comprehensive Exam components, complete at least 88 credit hours of coursework, and complete at least one Practicum. Students who complete these requirements receive the degree of *Juris Doctor* (J.D.).

M.Law Requirements. Students who earn a "P" in all 1L and 2L

courses but who are unable to pass Comprehensive Exams after a third attempt will graduate Gemein Law with a Master's in Law. Their transcript will note any passing scores on components of the Comprehensive Exams. Students with a Master's in Law are not eligible to take the bar exam unless they later fulfill requirements to join the bar, such as earning a J.D. from another institution or completing apprenticeship requirements. Students with a Master's in Law may be eligible for other law-related career paths. Students may also choose to forego Comprehensive Exams and to graduate at the end of the 2L year with a Master's in Law.

[. . .]

S.J.D. Academic Training

An additional year of academic training is intended to prepare Gemein Law students to become professors of law or legal researchers. The "4L" year can be taken immediately after receiving the J.D. or later, after the attorney has practiced law. The fourth year of coursework culminates in the Doctor of Juridical Science (S.J.D.) degree. The S.J.D. distinguishes an attorney who is prepared for academic research and teaching, in addition to practice.

The S.J.D. program has four requirements:

1. Coursework: Each S.J.D. candidate must take one research methods survey (covering legal analysis, quantitative empirical methods, and qualitative empirical methods) and one theory survey (covering legal realism, Critical Legal Studies, and Critical Race Studies) in the fall and one pedagogy seminar in the spring.
2. Research Project: Each S.J.D. candidate must engage in original research culminating in a publishable law review article under the supervision of two law faculty.
3. Law Review: Each S.J.D. candidate must participate on the editorial board of a law review. At Gemein Law School, law reviews are managed jointly by members of the faculty and by S.J.D. candidates only.
4. Colloquium: To prepare for teaching and research presentations, each S.J.D. candidate must prepare a practice lecture on a topic of interest to be given to J.D. students at the law school in a colloquium. Students in attendance are invited to give the S.J.D. candidate constructive feedback on lecture style.

* * *

This sketch imagined a law school that departs radically from the norms of current teaching by relying on some of the insights and practices outlined in the foregoing article. Yet this sketch does not fully

realize the promise of those insights and practices. Part of this was intentional on my part. I wanted to think through how a law school might do a much better job of teaching conventional knowledge and skills that conform to conventional standards and prepare students for conventional career paths. In sketching Gemein Law, I tried to imagine a school that prepares students for both bar passage and career practice, where problem-solving is central to lawyering, where professors treat students with respect rather than contempt, where faculty design their teaching in community, and where students do not compete with one another. I sketched a school that intentionally chose its activities to serve its mission. Even where the reader may find that the activities fall short, this accountability demonstrates the importance of an intentional, mission-based approach to organizational design.

My sketch is also limited because I designed it alone. I chose to make collaboration central to Gemein Law because I wholeheartedly believe that collaboration is needed to solve the practical problem of regnant lawyering. My “dream” law school would not spring, fully formed, from my own mind. Instead, it would grow from discussion, argument, and debate with others with different ideas but similar commitments. Because of this, I am very grateful to be included in this epilogue as a space to play with ideas and try out changes—not just as an intellectual exercise but also as a practical step toward realizing a transformative vision for legal education.

EPILOGUE

It may well be that nothing in Part II—and, for that matter, nothing in Part I—will provoke an epiphany. Not what I’ve written, not what collaborators have contributed, nothing about the whole being greater than the sum of the parts.

That’s okay, though. Epiphanies by themselves don’t transform a thing. It’s almost natural to feel inspired at an ardent protest or a mammoth march, just as it’s effortless to feel transported by the performance of a Yuja Wang, a Gil Scott Heron, a Chavela Vargas. And it’s the easiest thing in the world to awaken the next morning virtually unchanged, to go about our lives just as we have before.

We make our choices. And we make them every day, even minute by minute. And we stick with them or not. And, after falling off the wagon, return to them or not. We translate any epiphanies and any more subtle realizations into action. Or not.

If we’re to put into action an alternative vision of anything—of a life well led, of a worthy legal education, you name it—we must approach the job with the fervor of a recovering addict, the sustained

resolve of a mountain climber, the radical bravery of the women and girls who brought down Larry Nassar and aim fundamentally to alter Michigan State University, U.S.A. Gymnastics, and who knows what else.

No march, no protest, no artistic performance, and certainly no lengthy articles will do all this for us. If we're to change our institutions, we must change ourselves. We make our choices—every bit as much through inaction as action. If we're to build legal education around the Alternative Vision, we must, at once, take a leap of faith and grind it out. Over and over again. For those of you who think the daily commitment worth your heartfelt best, others who have gone before us and many today shall be with you. For what's it's worth, so shall I.