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## A Judges's Perspective on Perspectives Courses: Three Suggested Rubrics ... with Examples

Stephen J. Fortunato Jr.

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## Articles

# A Judge's Perspective on Perspectives Courses: Three Suggested Rubrics . . . with Examples

The Honorable Stephen J. Fortunato, Jr.<sup>1</sup>

*"[I]t is not enough for a man to be good; he must be good for something."*

—John Dewey<sup>2</sup>

*"The great human societies are the creation not of profiteers, but of dreamers."*

—Rabindranath Tagore<sup>3</sup>

### I. INTRODUCTION

The objective of the legal system is to do justice, a succinct

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1. Associate Justice, Rhode Island Superior Court (ret.); Adjunct Professor, Roger Williams University School of Law. provjust@cox.net. I am grateful for the comments and encouragement of David Logan and Carl Bogus, Dean and Professor respectively, at the Roger Williams University School of Law. The research and observations of Maura Clancy, School of Law '14, were invaluable. Naturally, any mistakes are mine alone.

2. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 417 (Paul Monroe, Macmillian 1922) (1916).

3. RABINDRANATH TAGORE, THE ENGLISH WRITINGS OF RABINDRANATH TAGORE VOLUME FOUR: ESSAYS 697 (Atlantic Publishers and Distributors 2007).

## 2 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 19:1

precept easy to recall but problematic to define as a course of behavior. If the animating principle of the rule of law were lodged in the quip by the early twentieth century legal scholar Zechariah Chafee as the desire “to settle a dispute between two persons without physical conflict,”<sup>4</sup> then statistics about cases filed and disposed would supply the key to measuring success and failure. This is far from the full story, however, and the imperative charging the profession to do justice insistently both provokes and challenges.

Indeed, one part of the nation’s legal apparatus is denominated as the criminal justice system and in popular discussions, references to “our system of justice” and the cries to “bring whoever did this heinous crime to justice” by prosecutors, editorialists, and lay persons are common. Oaths administered to the principal custodians of the judicial system, the lawyers and the judges, require solemn promises to support and faithfully interpret the venerable and venerated documents that define, albeit with some mischievous imprecision, the fundamental principles of our system of ordered liberty and “to administer justice without respect to persons.”<sup>5</sup> Moreover, judges on some courts are called “Justices,” as if their very beings are infused with traits associated with a dispassionate search for the goals of sagacity, probity, and fairness.

Other declarations within the law, less esteemed than constitutions but nevertheless crucially important to lawyers and litigants, also mandate that judges and lawyers in the midst of a trial recognize that justice is their ultimate quest. For example, the preamble to the Federal Rules of Civil Procedure commands that the Rules shall be “construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>6</sup> Similar directives are found in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence as well as their counterpart rules in every state. Indeed, the most quoted jurist in American history,<sup>7</sup> Benjamin Cardozo, wrote in his classic *The*

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4. Zechariah Chafee, Jr., *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 37 HARV. L. REV. 513, 519 (1924) (book review).

5. See 28 U.S.C. § 453 (2006).

6. FED. R. CIV. P. 1.

7. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (Univ. of

*Nature of the Judicial Process* of the judicial responsibility to be alert to persistent demands to maximize “social welfare,” under which are subsumed considerations of justice: “[I]ts demands are those of religion or of ethics or of the social sense of justice, whether formulated in creed or system, or immanent in the common mind.”<sup>8</sup>

The centrality of doing justice as the driving force within the legal profession, whether honored more in its breach than otherwise, was a prime motivating force behind the drafting of the *Carnegie Report, Educating Lawyers: Preparation for the Profession of Law*<sup>9</sup> (hereinafter “the Carnegie Report”) which today shapes the focus of the proponents of law school reform. “Doing justice” is a recurring theme throughout the two hundred pages of text as its authors seek to demonstrate how law schools may better prepare persons entering the profession to answer a question the authors believe attorneys should regularly ask themselves: “Does the responsibility to pursue substantive justice in individual cases and to consider the broader impact of one’s actions conflict with the advocacy on behalf of one’s client?”<sup>10</sup>

Of course, the prevalence of the term “justice” within and without the legal profession is no guarantee that students entering law school will have more than a superficial awareness of its multiple meanings and provenances. The parameters of justice, both reparative and distributive, have stimulated tomes over the centuries, written by luminaries from Plato and Aristotle, to Thomas Aquinas and Leibnitz, to John Locke and John Stuart Mill, down to John Rawls, Richard Posner, and Ronald Dworkin, and this is only the short list. However, most students entering law school have little or no familiarity with these thinkers and their analyses; and under the traditional law school curriculum, they will not become any more familiar with these thinkers unless some professor randomly interjects them. Though the Carnegie Report repeatedly lobbies for the primacy of professional

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Chicago Press 1993) (1990).

8. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (Yale Univ. Press 1991) (1921).

9. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *Carnegie Report*].

10. *Id.* at 131.

4 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

responsibility and ethical behavior, it does not note this substantive intellectual deficit or its causes.

Law students are bright, earnest, and enthusiastic, but the paucity of their pre-law school preparation in the humanities can be proved both anecdotally and empirically. Consequently, law schools have more of a task than simply to teach basic legal doctrine and technique supplemented with some clinical experience: they must remedy a deficit in the humanities as they simultaneously seek to restore the more noble values to what some identified as a troubled profession long before the Carnegie Report was published.<sup>11</sup>

Law school deans and professors are aware of this challenge – call it an obligation if you will—and have been addressing it in various permutations for several decades, even longer at some institutions. Innovative programs in the 1960s and ‘70s sent second- and third-year students into the field to work at everything from poverty law clinics to anti-smoking foundations to Selective Service reform organizations and into seminars that offered elective credits in courses ranging from Chinese Law to Law and Literature; these programs developed on an ad hoc basis depending on the interest and motivation of individual professors and deans at various law schools,<sup>12</sup> as well as pressure from socially engaged students in some instances.

Seminars were part of the curriculum at many schools long before the Carnegie Institute decided to scrutinize legal professional education. For decades, the seminar has allowed

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11. See, e.g., Carl T. Bogus, *The Death of An Honorable Profession*, 71 IND. L.J. 911 (1996); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (Harvard Univ. Press 2001) (1993).

12. This approach by these deans and professors is consonant with the *American Bar Association Standards and Rules of Procedure for Approval of Law Schools and Admissions to the Bar Standard 3-302*, which provide that law schools shall offer “substantial opportunities” for “instruction in . . . the history, goals, structure, values, rules and responsibilities of the legal profession and its members,” for “seminars, directed, research, small classes, and collaborative work” and for “live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession.” *American Bar Association Standards and Rules of Procedure for Approval of Law Sch.*, available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf)

students, usually in their second and third years, to study a traditional subject in greater depth or to explore a topic, sometimes an esoteric one, outside the core curriculum. Indeed, the seminar—and a related teaching modality, the apprenticeship—have been part of the training of lawyers and advocates at least since the age of Pericles. Socrates and Aristotle gathered small groups around them to teach—by the Socratic Method, of course—rhetoric, logic and other skills associated with the art of persuasion. Their substantive curriculum covered a host of topics, not the least of which was the practice of civic virtue.<sup>13</sup> So by 2007, when the Carnegie Endowment published its much-discussed tractate urging the reform of legal education through increasing the number of clinical courses and the exposure of students to mentoring by practicing professionals, all to be carried out with constant reference to ethical responsibilities, it was yet another vindication of the famous pronouncement by the author of the Book of Ecclesiastes that there is nothing new under the sun.<sup>14</sup>

A random search of law school course lists available on the Internet shows that at least a dozen schools refer to those usually one- or two-credit, limited-enrollment classes as “Perspectives” courses. This is an apt appellation as the purpose of these courses is to afford the student an opportunity to approach a topic from non-conventional viewpoints and with materials that do not place the decisions of appellate courts at center stage. Among the schools choosing this designation are Cornell, Notre Dame, and William and Mary; some schools add a word or two to their seminar offerings, so, for example, at the University of Minnesota, these courses are referenced as “Perspectives on the Law.” But however they are denoted, they exist at all schools as supplements to the core doctrinal courses and the other courses, such as Bankruptcy Law, which are taught by lecture to large groups of students. Advocating that some of these “Perspectives” seminars be required as either compliments to, or prerequisites for, enrollment in some of the clinical offerings, this essay suggests

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13. See CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* (Harvard Univ. Press 1995) (1994).

14. *Ecclesiastes* 1:9.

6 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

that the failure to use these courses to their maximum effectiveness is one vice of the legal curricula at many schools.

The Carnegie Report was received by law schools as a summons to act self-consciously and collaboratively<sup>15</sup> to address the problems besetting the legal profession by improving the training of new lawyers. Whatever its shortcomings, whether it is a repetitive bureaucratese, few specific suggestions, or a dearth of cogent commentary by judges and seasoned attorneys as to what they see in practice, the Carnegie Report is considered an influential critique of the current problems within legal education, and its observations have resonated throughout the law school community.

Law schools are now reexamining the role of clinical programs, how they monitor and provide constructive feedback other than a final exam grade to their students, and how the more elevated values of the profession may be transmitted by integrating them into the entire academic experience. In fairness, it must be noted that the authors of the Carnegie Report did not claim to reach their conclusions at a conclave on some Parnassian height but acknowledged earlier efforts to move in the directions they recommend by law schools at the City University of New York, New York University and Yale.<sup>16</sup>

As every law school dean is aware, the thesis of the Carnegie Report is simple and direct: law schools are turning out graduates who know doctrines of the law's major topics and branches as enunciated in appellate decisions, but they know little about how to draft elementary pleadings or find the way to the courthouse, and once there, they do not have a clue as to what to do by way of filing the papers or arguing the simplest of motions to a judge.

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15. In fact, a consortium of ten law schools was assembled in 2009, two years after the publication of the *Carnegie Report*, to “promote thoughtful innovation in law school curricul[a]” and to implement the legal education reform called for in the *Carnegie Report*; the consortium named themselves the Legal Education Analysis and Reform Network, or LEARN. See Legal Education Analysis and Reform Network (LEARN), *General Description of Planned Projects 2009–2010*, at 10, available at <http://www.albanylaw.edu/media/user/celt/learnprojects.pdf> [hereinafter *LEARN Proposal*]. Although one of LEARN's stated project proposals was to create a website—not only for the purposes of identifying their organization and mission, but also to offer a “rich collection of teaching resources” to legal educators—no such website has yet come to fruition. See *id.* at 16–17.

16. *Carnegie Report*, *supra* note 9, at 43–44, 119–20.

Worse, the Carnegie Report maintains that the newly minted lawyers are ignorant of ethical and professional responsibilities and consider that their only moral mandate is to wage a zealous crusade on behalf of their client. Considerations of justice are few or nonexistent, and in any event are suspended while the student devotes herself to learning legal doctrine and “how to think like a lawyer.”<sup>17</sup>

To rectify this sorry state, the Carnegie Report recommends increased clinical education that will expose the student to a variety of real-life clients with controversies placed before real-life courts and administrative tribunals. The Carnegie Report’s authors opt for “an integrative strategy for legal education”<sup>18</sup> in which the “more effective way to teach is to keep the analytical and the moral, the procedural and the substantive in dialogue throughout the process of learning the law.”<sup>19</sup>

This bland and benign generalization characterizes the Carnegie Report’s critique, as does a paucity of concrete recommendations, so the profession was delivered a call to arms but furnished little in the way of ammunition. But a platitudinous (even if they are well-meaning and occasionally helpful platitudes) bureaucratese is not the only shortcoming of the Carnegie Report.

Of the Carnegie Report’s five co-authors, only one, Judith Welch Wegner, has any background in the law, and hers has been primarily as an academic and a law school dean,<sup>20</sup> with little or no

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17. *Id.* at 51–54, 187.

18. *Id.* at 191.

19. *Id.* at 142.

20. *Id.* at ix–x. William Sullivan is a former philosophy professor and serves as the co-director of the Carnegie Foundation’s Preparations for the Professions Program, with research experience in identifying distinct practices in professional education. *Int’l Conference on the Future of Legal Educ.: Conference Participants*, GEORGIA STATE U. COLLEGE OF LAW, <http://law.gsu.edu/events/index/FoLE/speakers?name=sullivan> (last visited Nov. 14, 2013). Anne Colby is a developmental psychologist, a professor at Stanford University, and formerly the director of Harvard’s Murray Research Center and a Senior Scholar at the Carnegie Foundation. *Stanford Ctr. on Adolescence*, STANFORD GRADUATE SCH. OF EDUC., <http://coa.stanford.edu/people/anne-colby> (last visited Sept. 13, 2012). Judith Welch Wegner is former dean of the University of North Carolina at Chapel Hill Law School, with professional experience as law clerk, attorney-advisor, appellate attorney for the United States Department of Justice, and special assistant to United States Secretary of Education Shirley M. Hufstedler. *Faculty and Research: Judith Welch Wegner*, U. NORTH CAROLINA SCH. OF LAW, <http://>

8 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

background in the court room, where lawyering skills, or a lack thereof, are always on display. Her fellow authors have backgrounds in sociology, psychology, and educational theory but none has a biography that includes any examination of the cultural, political, or practical dimensions of the judicial system. Though the authors spent time visiting a number of law schools, where they observed classes and spoke to students and professors, there is no indication that they watched any trials or learned about the current caliber of advocacy from those most appropriately positioned to observe it, trial and appellate judges. Moreover, clients could also provide rich insights about how lawyers had represented their interests, but this cohort was also overlooked.<sup>21</sup>

In any event, the Carnegie Report's integrative model requires that at different points during their law school careers, small groups of students should be supervised and mentored by professors and instructors with appropriate doctrinal and experiential credentials. It is difficult to disagree with the

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[www.law.unc.edu/faculty/directory/wegnerjudithwelch/](http://www.law.unc.edu/faculty/directory/wegnerjudithwelch/) (last visited Nov. 14, 2013). Lloyd Bond is a professor at the University of North Carolina-Greensboro, with research interests that include psychological and educational measurement and the measurement of teaching ability, and has served as a Fellow of the American Psychological Association, a Carnegie Foundation Senior Scholar, and various other scientific committees. Lloyd Bond Named as Carnegie Senior Scholar, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, <http://www.carnegiefoundation.org/press-releases/lloyd-bond-named-carnegie-senior-scholar> (last modified Sept. 2002). Lee Shulman served as the eighth President Emeritus of the Carnegie Foundation, with professional experience as a professor of educational psychology and a researcher of teacher and teaching education, cognitive processes of medical problem solving, and studies of medical reasoning. *Academic Symposium Keynote Speaker: Lee S. Shulman*, UNIV. OF VIRGINIA, <http://www.virginia.edu/inauguration/shulman.html> (last visited Sept. 13, 2012).

21. Naturally, locating a sampling of clients and then getting them to comment may prove difficult, but those in high-profile cases might be forthcoming as would those who were acquitted after a criminal trial; and perhaps their less fortunate colleagues sitting in jail after sentencing might have something to contribute. Needless to say, results would undoubtedly create bias one way or the other, but even clients with adverse outcomes could provide insight on their attorneys' zeal for the case and concern for them as people. As Oliver Wendell Holmes, Jr. said, "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Stuart E. Thiel & David Widger eds., trans., 2013) (1881).

Carnegie Report's theme that doctrinal courses should be complimented with practical clinical experiences and that law and lawyering should be placed within the context of moral responsibilities to clients with concrete legal problems and undergirded with an abiding awareness of the integrity required of each participant in the legal system.

Clinics, standing alone as vocational training workshops, will not fit the bill. As Professor Carl Bogus observed a decade before the publication of the Carnegie Report, clinics, or skills courses, unaccompanied by substantive explorations, do not equip the student for responsible conduct. "It is all too easy for the law to slide into formalism or place too great an emphasis on technique," he warned.<sup>22</sup>

Skeptics, of course, would say that because the clinical experience will necessarily be confined to, for example, a law student representing an individual with a minor problem in front of a low-level administrative tribunal or court, no skills will be gained that could not be picked up after graduation during the first four months of actual practice with a law firm or at a government agency. The rejoinder to this criticism is that the close supervision and the dialectic with the professor and other students and the value gained from that interaction, will not be found at the average firm or agency.

## II. THE STUDENTS' HUMANITIES DEFICIT

Any generalization about a group as large and diverse as the law school student population is subject to criticism by demonstrating the existence of plentiful exceptions to the general assertion. Law schools admit academic stars, some with advanced degrees in everything from philosophy to comparative literature to engineering, as well as mature students a number of years out of college who have experience in such fields as journalism, teaching, law enforcement and community organizing. But if my encounters – and those of fellow law professors – with law students constitute a barometer, the students lack an awareness of their own culture, both high and popular, as well the ethical dimensions of legal, social, and political issues, and the philosophical and historical ideas that must be referenced in attempts to solve them. Thus,

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22. See Bogus, *supra* note 11, at 944.

10 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

remediation may be in order.

During my twenty-four years in trial and appellate practice and my thirteen years as a trial judge in a court of general jurisdiction, I regularly used the service of law clerks that were enrolled in law schools. Their research services were invariably helpful, but through discussions with them, it became clear to me that, through no fault of their own, high schools and colleges had failed to give them a broad grounding in the humanities and therefore the development of the critical, analytical and forensic skills generally associated with such study had been stunted.

A couple of examples stand out. A young woman who had graduated from one of the original Seven Sister colleges with a major in American literature did not know of the existence of Allen Ginsberg or any of the Beats. Whatever one's opinion of the output of this group of renegade poets and novelists, surely a student of American literature should have been exposed to them? Another student, who I employed to assist on research for a book review about an anti-war activist, had graduated from one of the United States service academies and then spent more than a decade in the military before entering law school and yet, he had never taken a course on the Vietnam War,<sup>23</sup> nor had he studied it in any depth in a survey course in military history.

In short, the majority of people entering law school, like the majority of their fellow college graduates, have an inadequate foundation in the humanities. This is a fact that professors and administrators at the nation's colleges and universities have bemoaned for at least the past ten years, and some prescient Cassandras sounded the alarm about this unfolding phenomenon

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23. He reported that one was not offered at the academy he attended, and to this day there is no such course listed in the curriculum. To date, the United States Naval Academy and the United States Air Force Academy offer limited courses (perhaps one or two) that cover topics related to the Viet Nam War, and the United States Military Academy does not offer any history courses (whether military history or American history) which focus on issues raised by the Viet Nam War. See *United States Naval Academy, Course Information*, US NAVAL ACADAMY COURSES, [http://www.usna.edu/acdean/courses/all\\_courses.html](http://www.usna.edu/acdean/courses/all_courses.html); United States Air Force Academy, *Curriculum Handbook* (2009), <http://www.usafa.af.mil/shared/media/document/AFD-090508-044.pdf>; *United States Military Academy, Curriculum and Course Descriptions*, ACADEMIC PROGRAM, [http://www.usma.edu/curriculum/RedBook/AY13\\_RedBook.pdf](http://www.usma.edu/curriculum/RedBook/AY13_RedBook.pdf).

even earlier.<sup>24</sup> These critiques range from memoirs to screeds to dispassionate analyses scrutinizing the economic disparities among university departments engendered by government grant policies, which favor the applied sciences and marginalize the humanities. But the conclusions are all the same: humanities departments get short shrift with funding and students get short-changed when it comes to acquiring a familiarity with the canon of world literature, or to use Matthew Arnold's oft-quoted phrase, "the best which has been thought and said in the world. . ."<sup>25</sup> Of course, the students also rarely see out humanities courses as the pressures on them from their schools, their families, and their own looming debt is to take "practical" courses and pursue a vocational program.

The consensus of the critics is that the greatest problems are at second- and third-tier institutions, not at the handful of elite, well-endowed colleges and universities, though at these more esteemed venues the humanities are placed before the student as a smorgasbord with little structure or coherence. Hacker and Dreifus collate the available data in their narrative and also illustrate their conclusions with charts: "English now attracts only half the majors it did in the mid-1960s, while history and foreign languages and literature have even fewer survivors."<sup>26</sup> An accompanying chart shows that for every one thousand bachelor's degrees awarded between 1968 and 2008, the number of vocational majors has jumped from 498 to 642, with a concomitant decline in liberal arts concentrations, e.g., degrees awarded in the social sciences declined from 191 to 108 and those in the

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24. See, e.g., ANDREW DELBANCO, *COLLEGE: WHAT IT WAS, IS, AND SHOULD BE* (2012); ANDREW HACKER & CLAUDIA DREIFUS, *HIGHER EDUCATION?: HOW COLLEGES ARE WASTING OUR MONEY AND FAILING OUR KIDS—AND WHAT WE CAN DO ABOUT IT* (Times Books 2010); MARTHA C. NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* (Princeton Univ. Press 2010); ELLEN SCHRECKER, *THE LOST SOUL OF HIGHER EDUCATION: CORPORATIZATION, THE ASSAULT ON ACADEMIC FREEDOM, AND THE END OF THE AMERICAN UNIVERSITY* (2010); ANTHONY T. KRONMAN, *EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE* (Caravan Books 2007); STANLEY ARONOWITZ, *THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING* (2000); ALVIN B. KERNAN, *IN PLATO'S CAVE* (Yale University Press 1999).

25. MATTHEW ARNOLD, *CULTURE AND ANARCHY* 5 (Yale University Press 1964) (1869).

26. HACKER & DREIFUS, *supra* note 24, at 99.

humanities from 115 to 86.<sup>27</sup>

For Arnold as well as current champions of the humanities in today's culture wars, the great ideas embodied in classic works of literature are worthy of study because of their intrinsic value and the pleasure and enlightenment they bring to the student. Beyond this, there are also important ancillary reasons for becoming conversant with the canon.

Matthew Arnold himself believed such study would help the individual move toward spiritual perfection. One of the twentieth century's most important proponents of the necessity of studying the classics, or Great Books, gave a more utilitarian cast regarding purpose. Robert M. Hutchins, who just before the middle of the past century served as Professor and Dean of the Yale Law School and later as President of the University of Chicago, noted that occupations were not simply about performing specific tasks but existed within "moral, social, scientific, and intellectual contexts."<sup>28</sup> Thus, the purpose of education was to prepare the student to work for societal reform rather than to simply learn guidelines for social adjustment and conformity.<sup>29</sup>

Which works of literature should constitute the canon is but one of the questions for educators seeking a relevant curriculum. Then there is the related question of the existence of sub-canons; not long ago the Journal of Legal Education made its pages available to a forum that posed the question as to whether there was a legal canon.<sup>30</sup> The offerings provided a display of intellectual firepower and wit by such luminaries as Stanley Fish, Derrick Bell and Cass Sunstein but little of substance was

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27. *Id.* at 100. See also U.S. Department of Education, *Fast Facts*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=37> (last visited Sept. 27, 2013) (figures collated from U.S. Department of Education research by the National Center for Education Statistics, which show that of the 1,650,000 bachelor's degrees conferred in 2009–10, 358,000 were for majors in business, more than twice as many as the 173,000 awarded to social science and history majors).

28. ROBERT M. HUTCHINS, *THE GREAT CONVERSATION: THE SUBSTANCE OF A LIBERAL EDUCATION* 11–12 (Britannica Great Books 1952).

29. *Id.*

30. See Derrick A. Bell, *Multiple Cultures and the Law: Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993); Stanley Fish, *Not of an Age, But for All Time: Canons and Postmodernism*, 43 J. LEGAL EDUC. 11 (1993) [hereinafter Fish, *Not of an Age*]; Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22 (1993).

suggested about any cases or treatises that should be included in such a canon. And for some there are the wider questions of whether the study of the great works of Western—or world—culture should be offered to all or to just to the gifted, and whether such a pursuit has any value to either the individual or the larger community.<sup>31</sup>

For Stanley Fish, the lawyer and literary critic, “[t]he humanities are their own good,” but “[t]o the question ‘of what use are the humanities? the only honest answer is none whatsoever.’”<sup>32</sup> As for canons of any type, Fish, who describes himself as “characteristically perverse,”<sup>33</sup> proclaims, “they function not to encourage thought, but to stop it. Canonical materials, when they are exerting their full force, draw a line in the sand, but with an air suggesting that the sand is a monument of steel.”<sup>34</sup> Katha Pollitt, the columnist and social critic, endorses the study of what most literate people would agree are the classics, but joins with Fish in her skepticism that any benefit from them outside of personal pleasure is dubious: “But is there any list of a few dozen books that can have . . . a magical effect, for good or for ill? Of course not.”<sup>35</sup>

Surely Thomas Jefferson, John Dewey, and a host of others who have linked the survival of democracy to an educated citizenry would disagree with the crabbed notions of Fish and Pollitt about the value of the humanities, even though the advocates of such study might disagree as to what works merit inclusion in the canon. One interested in the law would have to be comatose not to be stimulated by Aristotle or H. L. A. Hart, or a

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31. See *The Heart of the Matter*, AMERICAN ACADEMY OF ARTS & SCIENCES: COMMISSION ON THE HUMANITIES AND SOCIAL SCIENCES (June 19, 2013), available at [http://www.humanitiescommission.org/\\_pdf/hss\\_report.pdf](http://www.humanitiescommission.org/_pdf/hss_report.pdf) (the most recent governmental and establishmentarian endorsement of humanities studies—for kindergarten through college). The Carnegie Report’s subtitle, “The Humanities and Social Sciences: for a vibrant competitive, and secure nation,” reveals the authors’ utilitarian objectives for such pursuits. See *id.*

32. Stanley Fish, *Will the Humanities Save Us?*, N.Y. TIMES: THE OPINION PAGES (Jan. 6, 2008, 5:31 PM), <http://opinionator.blogs.nytimes.com/2008/01/06/will-the-humanities-save-us/>.

33. Fish, *Not of an Age*, *supra* note 30, at 12.

34. *Id.*

35. Katha Pollitt, *Why We Read: Canon to the Right of Me*, REASONABLE CREATURES 16, 24 (Vintage Paperback 1995) (1994).

reading of *West Virginia State Board of Education v. Barnett*<sup>36</sup> or *Miranda v. Arizona*.<sup>37</sup>

The authors of canonical texts have never required a slavish agreement by students or other readers, nor would any responsible teacher do so. Contrary to Fish's assertion that the canon stifles inquiry, it stimulates it. Robert Hutchins had it right when he said of the canon: "What makes them great is, among other things, that they teach you something every time you read them. Every time, you see something you had not seen before[.]"<sup>38</sup> Of course, revering the humanities is not enough; as the educational reformer Jonathan Kozol points out: humanists, to make their studies serve the community, must leave their libraries and ". . . participate in unfamiliar, openly political, and therefore highly dangerous assaults upon societal injustice . . ." <sup>39</sup>

As if the notion that exposing students to great histories, poems, or philosophical disquisitions serves no purpose other than the pleasure of reading them were not enough to give pause when considering curriculum reform, one of the authors of the Carnegie Report has questioned whether the clinical training, which it so strenuously promotes, has any correlation with successful performance as a lawyer. Two years after the Carnegie Report was released, Judith Welch Wegner, the only co-author with legal training, wrote: "[I]t is unclear whether effectiveness in practice correlates with course work (including skills related courses and clinical participation)."<sup>40</sup>

So with a tentativeness about outcomes on the part of some reputable scholars regarding the efficacy of programs of study they themselves endorse to improve society generally and the legal profession in particular, deans and professors seeking to design a relevant and reformative curriculum have little choice but to rely heavily upon their own observations and experiences as well as their encounters with lawyers and judges active in the profession. This would naturally include reflections about the lawyer as not only a counselor and advocate but as a proponent

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36. 319 U.S. 624 (1943).

37. 384 U.S. 436 (1966).

38. HUTCHINS, *supra* note 28, at 75.

39. JONATHAN KOZOL, *ILLITERATE AMERICA* 170 (Doubleday 1985).

40. Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 636 (2010) (emphasis added).

and champion of democratic values in the community.

From my experience as a lawyer and judge, I can say anecdotally that I encountered stellar performances (in court and at the negotiation or deposition table) ten percent of the time, competent lawyering eighty percent of the time, and blundering bordering on malpractice in the remaining ten percent. The most capable attorneys came from every tier of law school and from diverse backgrounds. I had no way of knowing who went home at night, put on Bach's cello concertos, and curled up with Montaigne, Swift, or *The Federalist*. I do know, however, as anyone interested can verify, that those universally considered titans of the American legal profession – Thomas Jefferson and James Madison, John Marshall, Abraham Lincoln, Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, Earl Warren, and Thurgood Marshall – read widely and voraciously.

It is beyond the scope of this essay to recite the numerous complaints about higher education found in the books I have adverted to any more than it is my purpose to design a comprehensive model law school curriculum. But for those of us entrusted with the training of aspirants to the legal profession, it is incumbent to know what intellectual foundation most of our students are bringing to law school and how familiar they are with the humanities tradition of which the legal system has been a part for centuries. Sadly, the answer for the latter question is, "Not very." Additionally, it is important for us to reflect on what subjects and values we wish to inculcate beyond technical skills, even though many students themselves would state their goal is no loftier than to obtain admission into a profession that provides prestige and an opportunity for financial reward.

### III. LAW SCHOOLS AND THE LAWYERS THEY WISH TO MOLD

It is of course easier to determine the background an entering student presents upon arrival at law school than it is to design courses that will enhance the law school experience and create competent and ethical, if not superlative, lawyers by supplementing the core doctrinal courses and others oriented toward preparation for the bar exam and the inculcation of basic skills. Thus, to answer the question of what the preferred and most beneficial non-core studies, or perspectives courses, should be, it is preliminarily necessary for the law school to have a vision

of who, or what, the aspiring lawyers should be upon graduation.

We know that for stand-up comedians and cocktail party cynics, lawyers are sharks and bottom-feeders, but this is clearly not the composite any responsible dean or law professor wishes to create. For Anthony Kronman, a former dean of the Yale Law School, regardless of what some lawyers have done to warrant the pejorative appellations bestowed on them by comedians, lawyers should be groomed to wear the mantel of statesmen.<sup>41</sup> Or, if a gender-neutral term is preferred, their calling must be that of diplomats with a high-minded and socially-conscious portfolio. Fifty years before Dean Kronman's call for the profession to save its collective soul, two other distinguished Yale law professors, Harold Laswell and Meyers McDougal urged another elevated role for the lawyer, that of policy-maker.<sup>42</sup>

Laswell and McDougal were not envisioning this role for every car accident case or every misdemeanor prosecution, though it is not difficult to imagine cases in these categories that require resolutions demanding more than technical skills. The two authors were also not confining the term policy-maker to cabinet-level positions in federal, state or local government. Rather, for them, lawyers who make policy, or counsel policy-makers, are everywhere, on stages grand and small, public and private.

It should need no emphasis that the lawyer is today, even when not himself a "maker" of policy, the indispensable adviser of every responsible policy-maker of our society—whether we speak of the head of a government department or agency, of the executive of a corporation or labor union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser, when advising his policy-maker of what he can or cannot legally do is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy.<sup>43</sup>

The ubiquity of lawyers that Laswell and McDougal noted in 1943 obtains even more so today, and contemporary social and political conditions invite the same question the professors raised

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41. KRONMAN, *supra* note 11.

42. Harold D. Laswell & Meyers S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 208 (1943).

43. *Id.* at 208–09.

when they wondered “. . .whether the lawyer can be held responsible for the plight in which we find ourselves.”<sup>44</sup> And the answer we give today is unfortunately no different from the one they supplied: “most assuredly, yes.”<sup>45</sup>

Lawyers are everywhere. They regularly occupy elective and appointive offices from the White House to zoning boards and school committees or are available to provide counsel to these same officials. Lawyers advise corporations and banks, including ones that pollute air and rivers and drive individuals and communities over financial cliffs. And lawyers supplied the legal and moral underpinning, such as it was, for the embrace by the United States government of torture as a weapon in its foreign policy.<sup>46</sup> For many of us in the profession, it was anything but uplifting to read of a United States Supreme Court Justice, one Antonin Scalia, musing on the political necessity and constitutional propriety of sometimes forcibly removing finger nails from a defenseless prisoner.<sup>47</sup>

All is not unremittingly grim, however. Intrepid and courageous lawyers, including some serving in the military, have exposed the depredations of two presidential administrations waging the so-called War on Terror and continually fight for the principles of due process to be applied on behalf of those scorned (or ignored) by the majority. Whenever challenges are mounted to improve the plight of the homeless, the racially marginalized, the addicted, the undocumented and the generally neglected, lawyers can be found collecting facts, writing briefs, and pounding on the courthouse door for redress.

Lawyers involved in these matters, and in many others involving liberty interests, must undertake these types of cases if the profession is to discharge its mandate to protect and preserve democratic values. At least, that is the way Laswell and

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44. *Id.* at 208.

45. *Id.*

46. See, e.g., John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 793–95 (2004); see also ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (Yale University Press 2002).

47. Raphael G. Satter, *U.S. Supreme Court Justice Scalia Says “So-Called Torture” Cannot Be Ruled Out*, ASSOCIATED PRESS (Feb. 12, 2008), available at [http://www.msnbc.msn.com/id/23153116/ns/world\\_news-terrorism/t/scalia-so-called-torture-cannot-be-ruled-out/#.UDYmGOe5dM](http://www.msnbc.msn.com/id/23153116/ns/world_news-terrorism/t/scalia-so-called-torture-cannot-be-ruled-out/#.UDYmGOe5dM).

McDougal saw it as they assigned a special responsibility to law schools: “The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.”<sup>48</sup>

Implicit in this call for the instilling of “democratic values” are the larger questions of what the outer reaches of those values are, and what the “ends” of the American polity are, or should be. The strident and intractable temper of current political debate is but one barometer measuring the divergence of opinion on issues that twenty years ago were considered resolved, at least in theory. Among these issues are abortion, birth control, gender pay parity, separation of church and state, racial profiling, etc. Most law schools will undoubtedly draw their students from across the political and ideological spectrum just as they attract a fair grouping of those who simply want a license to enter what they understand to be a trade, albeit a sophisticated one. This will not be an easy task. Crafting a mission and a curriculum that represents “democratic values” designed to address and reform contemporary societal problems through the agency of Kronman’s statesmen or Laswell and McDougal’s policy-makers will require a law school to first clarify its own mission and then to marshal some backbone and self-confidence to push it. Complicating this task is the central tenet of the adversarial system which holds that everyone is entitled to legal representation; and thus lawyers are obliged to represent snakes as well as saints and every grade of goodness and evil in between. So the persistent question remains: what type of legal education fits all (or most)?

Laswell and McDougal ventured an answer that attempts to mesh the law school’s desire to inculcate into its students a commitment to ethical conduct in the pursuit of democratic values with a respect for the sensibilities of the individual student:

In a democratic society it should not, of course, be an aim of legal education to impose a single standard of morals upon every student. But a legitimate aim of education is to seek to promote the major values of a democratic society and to reduce the number of moral mavericks who do not share democratic preferences. The student may be allowed to reject the morals of democracy and

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48. Laswell & McDougal, *supra* note 42, at 206.

embrace those of despotism; but his education should be such that, if he does so, he does it by deliberate choice, with awareness of the consequences for himself and others, and not by sluggish self-deception.<sup>49</sup>

Law schools are clearly under no obligation to design a curriculum that provides instructions on how to conceal police brutality, send blacks to the back of the bus, and deny full participation in civic life to all but those who can prove their heterosexuality. Noxious ideas that may be freely espoused in the town park have no place in law school. That people who engage in racist or homophobic behavior are entitled to a defense if they are charged with a violation of the law does not translate into an affirmative duty to teach their odious doctrines in law school, or any other school for that matter.

I reference these extreme situations not because a significant population of law school administrators wishes to promote anti-democratic values but because law students reflect the larger polity from which they are drawn; and thus, there is no assurance that they are universally or unwaveringly committed to democratic values and social justice. How could they all be if some spring from the same soil that has given us the racist, homophobic, and xenophobic blather mouthed daily by countless elected officials and talk show hosts in every section of the country? Yet Laswell and McDougal sensibly argue that while the curriculum need not adjust to the undemocratic sentiments of any student or group of students, such students should neither be expelled nor penalized for chafing at the law school's promotion of democratic values.

A law school's promotion of values as advocated by Laswell and McDougal, Kronman, and the authors of the Carnegie Report, may appear counterintuitive to the vaunted principle of academic neutrality, that is, the professor in a given course supplies the scholarly information with a survey of responsible critiques and then lets the student come to her own conclusions. Here is what Dickens wrote, here are the times he lived in, here is what reputable critics have said, now you decide. This approach may suffice when discussing the Romantic poets or even the black letter laws of offer and acceptance or libel and slander, but a

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49. Laswell & McDougal, *supra* note 42, at 212.

20 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

different dynamic operates if the questions are, for example, whether legal services should be available for those facing deportation, whether detainees should be held indefinitely without trial, or whether gays should be permitted to marry. Could a law school seeking to produce graduates ready and eager to serve the public interest in a purportedly democratic society fairly answer these questions in the negative or positive?

Such tensions as those that exist between academic neutrality and the advocacy of democratic values are surely intensified by the adversarial system and its premise that all sides to a dispute are entitled to be heard. However, this still begs the question of a lawyer's responsibility regarding the kind and quality of representation he or she is obliged to provide. There is, after all, a qualitative difference between vigorously defending a person accused of war crimes and affirmatively assisting a client, even a president, in circumventing, if not obliterating, the strictures of the Geneva Conventions and other laws, domestic and international, which proscribe torture.<sup>50</sup>

Similarly, while it is perfectly acceptable for an attorney to represent management's interests in a labor dispute, is it ethically acceptable for the attorney to design a strategy for an employer to undermine workers' rights and intentionally consign employees to unsafe conditions at the minimum wage, albeit a lawful one? And was it morally proper for one of the most prominent former constitutional law professor in the country to direct his advocates to argue to the United States Supreme Court that the Fourth Amendment does not prohibit strip searches of misdemeanor arrestees without any probable cause or reasonable suspicion whatsoever indicating they might be in possession of contraband or weapons?<sup>51</sup>

The consensus at any bar association meeting or judicial conference respecting a lawyer's responsibilities regarding representation of either side in any of these scenarios would undoubtedly be that the lawyer may do virtually anything to

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50. See 42 U.S.C. § 2000dd (2006) (codifying the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment, which became effective December 10, 1984).

51. *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510 (2012).

further the client's objectives so long as no fraud or lying is involved and legal justifications are in the realm of the plausible. So long as the adversarial system remains governed by such guidelines as those found in Rule 11,<sup>52</sup> no change in this dominant viewpoint is likely. However, this does not obligate the law schools to follow suit.

As the gatekeepers for those who wish to enter the profession, the schools are ideally positioned to shape the character and professionalism of lawyers so they will not shirk from redirecting their clients away from a socially destructive path, even if the law could be used to justify it. Just as the ethical divorce lawyer will not help a hurt and furious spouse avoid child support payments or frustrate visitation rights, even if the marriage partner was a scoundrel and cheater but a decent parent nonetheless, shouldn't lawyers put the brakes on polluters and usurers even if responsible conduct diminishes the profit margin?

That problems of morale, competency, and ethics, not to mention angst about income potential on the part of recent law school graduates, permeate the legal profession is beyond cavil. The New York Times has regularly chronicled these phenomena and the malaise they engender for the past several years.<sup>53</sup> It is small consolation that every other political and social institution in the United States is failing or faltering when measured against some past ideal, real or fanciful. Some of these failing political institutions include: political gridlock in Washington and elsewhere; a costly and cumbersome health care system; shooting wars on many fronts; chronic poverty for millions and a persistent societal inability to more equitably distribute the boons of record-

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52. Rule 11 provides, in pertinent part: ". . . By presenting to the court a pleading, written motion, or other paper . . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11.

53. See James B. Stewart, *Dewey's Fall Underscores Law Firms' New Reality*, N.Y. TIMES, May 5, 2012, at B1; Peter Lattman, *Dewey & LeBoeuf Crisis Mirrors the Legal Industry's Woes*, N.Y. TIMES, Apr. 26, 2012, at B7; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1; David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at BU1.

22 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 19:1]

high corporate profits; decayed and decaying infrastructure; and elementary and secondary schools, and colleges and universities, providing educations that many responsible critics say are inadequate.

Given the intelligent, problem-solving, and even aggressive, personality imbedded in many of those attracted to the law as a career, it should come as no surprise that some of these people have resolved to fix the problems besetting the profession; and some within this hardy group have resolved to do this by reforming law schools. Although the profession's difficulties are complex, ill-defined, and generally difficult to study and quantify in the field, i.e., places such as the courtroom and the lawyer's office, this is not viewed as an obstacle by these intrepid reformers. Some of these critics and reformers, it must be said, find no worth in any current law school curriculum, as if the overwhelming majority of graduates cannot distinguish the hearsay rule from *res ipsa loquitur*.<sup>54</sup>

Though the Carnegie Report has its shortcomings and often replows the field, it should not be ignored or dismissed. On the contrary, the discussions it stimulates and actions it provokes will continue to help law schools evaluate and improve their services. And these discussions have taken place not only within individual law schools but across the spectrum of legal education.

A consortium of ten law schools called the Legal Education Analysis and Reform Network (LEARN)<sup>55</sup> was formed in 2009 with the express goal of working together to solidify, for their students, some of the reforms the Carnegie Report recommended. Their self-appointed mission,<sup>56</sup> in sum, is to "promote thoughtful innovation" in law schools' curricula by teaching a variety of

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54. See, e.g., Ethan Bonner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11.

55. The LEARN consortium consists of the following participating schools: CUNY Law School, Georgetown University Law Center, Harvard Law School, Indiana University School of Law (Bloomington), New York University School of Law, Southwestern Law School, Stanford Law School, University of Dayton School of Law, University of New Mexico Law School, and Vanderbilt University Law School. See LEARN Proposal, *supra* note 15, at 5.

56. LEARN has not to date published or announced a definitive mission statement that could be referenced here, however, their primary objectives are set forth in contents of the LEARN Proposal. See LEARN Proposal, *supra* note 15.

subjects in an array of practical learning environments, exploring the best ways to transmit the recommendations of the Carnegie Report to law school faculty members, and to examine the role that assessment plays in legal education. Thus far, individual schools with and without LEARN have engaged in these and related undertakings, but how much of this activity is attributable to impetus from the consortium remains to be seen.<sup>57</sup>

#### IV. DEVELOPING RELEVANT—AND REMEDIAL— PERSPECTIVES COURSES

If there is a solitary law school somewhere that does not offer one or two credit courses that deviate in mode of presentation and subject matter from the core doctrinal and bar preparatory courses taught by the lecture and case method, I have not located it. On the contrary, a random examination of law school curricula shows a plethora of topics covered by seminars, sometimes aptly named Perspectives Courses, which have as their goal the introduction of legal issues and viewpoints not usually addressed in the principal courses. Every law school is offering these courses, mostly to second and third year students. As would be expected, the larger (and more prosperous) the law school, the greater the variety of courses offered. Many of the titles suggest that seminars are often presented not only to educate, but to entertain and divert—not, to borrow from Jerry Seinfeld, that there is anything wrong with that.

The randomness of the topics coupled with an absolute discretion allowing the student to select any seminar she wants from the buffet put in front of her does not necessarily serve the student well when the goal is to increase professional competence. A law school could hardly be considered tyrannical, or even overbearing, if it mandated some Perspectives Courses to be taken in conjunction with, or as prerequisites to, certain clinical courses. Some law schools now already provide counseling for a student to follow a particular track in the second or third year if the student has discovered a field of possible specialization. The law school would be meeting its obligation to the student and the legal profession if it paired a seminar with the student's practical

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57. *See id.* at 10–11 (describing the three working groups that have been established to effectuate LEARN's planned projects).

interests as revealed by her choice of a clinical course.

To facilitate this I suggest that some of the perspectives courses be grouped under three rubrics: History,<sup>58</sup> Legal Profession and Social Issues, and Doctrinal. Not every seminar will fit neatly into these categories, and any seminar could surely be taken by a student without any connection to a clinical course.

Some subjects would necessarily be placed under two, perhaps all three, of the rubrics; this should be no surprise as unearthing the law is at bottom a historical investigation into precedent, past legislative intent, and the evolution of public policy. For instance, one possible complement to a clinic in criminal defense would be a seminar in the History of the Fourth Amendment, beginning perhaps with the trials and travail of John Wilkes in eighteenth century England,<sup>59</sup> the fulminations of James Otis,<sup>60</sup> and/or Stephen Hopkins<sup>61</sup> against the predations of King George III and his colonial officers on the eve of the American Revolution; but when these matters are measured against contemporary United States Supreme Court decisions in, say, *Whren v. United States*<sup>62</sup> and *Florence v. Board of Chosen Freeholders*,<sup>63</sup> the domain of the Doctrinal will have been entered.

The rubric of Legal Profession and Social Issues presents a litany of topics, almost all with some historical or doctrinal content, or both; and some of these could easily be matched with a relevant clinic. In addition to the wider philosophical questions of to whom and to what the attorney and the profession are responsible, the daily ethical quandaries a lawyer experiences—i.e., cross-examining to discredit a witness the lawyer knows is telling the truth; assisting the client to conform his recollection to what forensic evidence shows to the contrary; deciding how much

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58. For a vigorous argument urging the teaching of history to law students, see Harold P. Southerland, *The Case for American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661 (2007).

59. See ARTHUR H. CASH, *JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY* (Yale University Press 2006).

60. James Otis famously decried the general warrant as “[T]he worst instrument of arbitrary power . . . that ever was found in an English law book,” a declaration admirably cited by the United States Supreme Court in *Boyd v. United States*, 116 U.S. 616, 625 (1886).

61. Stephen Hopkins, *The Rights of Colonies Examined* (1764) (reprinted by The Rhode Island Bicentennial Foundation: Providence 1974).

62. 517 U.S. 806 (1996).

63. 132 S.Ct. 1510 (2012).

adverse legal research to provide against one's own thesis; counseling the criminal defendant about taking the witness stand, etc.—would all be apt explorations in any seminar complementing clinics that expose the student to trial preparation and practice.

The same could be said for a seminar focusing on the use of the media by lawyers to advance the cause of their client(s). In today's technological age, it is not unusual for a lawyer to be thrust by an aggressive media and the public declarations of one's adversary into a controversy in which a grasp of both public relations and ethical considerations are crucial. There are also circumstances that warrant the attorney initiating contact with the media, as when an activist organization is about to commence litigation addressing what they believe to be official transgressions. And there are numerous related topics as well, with which the attorney, as a leader in the community, should be conversant.

These issues invariably surface if the attorney is speaking about the profession to a student group or civic organization. Is it good and healthy that Justices Scalia and Breyer are regulars on talk shows, often discussing books they have written? Are the "judges" on daytime reality shows real judges, and should some of them have their tickets pulled for routinely bringing discredit on the profession by unnecessarily upbraiding, insulting and demeaning the benighted souls who appear before them in ways that would make the nineteenth century judges in the somber and stern portraits lining courthouse walls seem like therapists on an Oprah show? A seminar that explores these topics could also address the issue of judicial free speech as well.<sup>64</sup> Clearly, the aspiring lawyers will not be functioning as judges in any clinics, but the subject of judicial speech is one with which a member of the profession should be familiar.

Some perspectives courses will have aspects of all three rubrics. This is certainly the case, for example, with an academic excursion into the social and legal history of gay rights designed to

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64. See, e.g., *Republican Party v. White*, 536 U.S. 765 (2002); See also *The Code of Conduct for United States Judges*, available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>; Stephen J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 *GEO. J. LEGAL ETHICS* 679 (1999).

better prepare students who work in clinics focusing on the rights of individuals in the LGBT community. As is the case with many topics, the professor, full-time or adjunct, chosen to lead such a seminar will benefit from considerable historical spadework already done in this field; a stroll through the stacks of law reviews in an accredited law library or a visit to the law section in a decent bookstore—brick and mortar or Internet—will attest to this.

More than ten years ago, journalists Joyce Murdoch and Deb Price chronicled the legal struggles waged during the twentieth century to strike down laws discriminating against, even criminalizing, gay and lesbian individuals in *Courting Justice: Gay Men and Lesbians v. the Supreme Court*.<sup>65</sup> More recently, Professor Dale Carpenter of the University of Minnesota Law School has written in a popular style, *Flagrant Conduct: The Story of Lawrence v. Texas*,<sup>66</sup> which shows a legal and cultural history complete with the strategizing and tactical maneuvering of the lawyers and activists involved.

While the focal point of *Flagrant Conduct* is the constitutional challenge to a Texas sodomy statute, the book, like any seminar that uses it, can serve as an instructional device that goes well beyond the issue of gay rights. The same can be said for the words Justice Anthony Kennedy used to identify the animating principle of his decision, reversing what the Court had said was dogma only seventeen years before in *Bowers v. Hardwick*.<sup>67</sup> Recasting Chief Justice John Marshall's immortal declaration from *McCullough v. Maryland*,<sup>68</sup> Justice Kennedy wrote: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>69</sup>

Thus, a perspectives course created primarily to provide a substantive historical and doctrinal background for students who have elected to work in a clinic providing legal assistance to the LGBT community also may create opportunities to acquaint them

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65. JOYCE MURDOCK & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (Basic Books 2001).

66. DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

67. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

68. *McCullough v. Maryland*, 17 U.S. 316, 407, 415 (1819) ("[I]t is a constitution we are expounding . . . intended for ages to come . . .").

69. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

with the dynamic view of constitutional interpretation that will serve them well when they need to explore strategy and tactics in legal disputes beyond the topic of the seminar.

The diversity of Perspectives courses will be as wide and adventurous as the imagination of the law school's faculty and the governing entity that approves the curriculum; and this is true not just for seminars addressing controversial social issues but traditional doctrinal concerns as well. The latter will most naturally arise to address a peeve of a professor regarding a confusion some point of doctrine may present to students, either because it is inherently complex or because the course in which the student initially meets it gives it short shrift because of the volume of other topics obliged to be covered.

During my time as attorney, judge, and professor, I have observed gaps, if not chasms, in the understanding by lawyers, both young and seasoned, of some fundamental doctrines; and I attribute much of this to the cursory approach to these topics in law school. Leading my list of peeves is the dearth of understanding by lawyers, and hence many judges, of the concepts of burden of proof and the burden of producing evidence. While a course in criminal law will reference proof "beyond a reasonable doubt" and torts will invariably touch upon proof by "a fair preponderance of the evidence," the invocation of catch phrases without an in depth exploration<sup>70</sup> will hardly prepare the student for recognizing what evidentiary hurdles must be surmounted at trial or how to craft a jury instruction most favorable to one's client. Add to these two prevalent standards, the standards of "scintilla of evidence," "prima facie case," "substantial evidence" (especially as used in administrative settings), and "clear and convincing evidence" and one has more than ample fodder for a doctrinal Perspectives seminar just on Burdens of Proof.

Fortunately, the United States Supreme Court over the years has provided considerable instruction on this topic, though, sadly, it has been ignored more than followed. In the criminal law we have been instructed that proof beyond a reasonable doubt is that

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70. An epigram of Oliver Wendell Holmes neatly summarizes the problem: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

credible and persuasive evidence which induces in the fact finder a “subjective state of near certitude.”<sup>71</sup> Similar guidance has been provided for civil litigation.<sup>72</sup> Seminars addressing burdens of proof and other evidentiary issues, such as Rule 404(b) of the Rules of Evidence, in a thorough manner are more than academic exercises because any misunderstanding leading to their misapplication can have dire consequences for litigants.

The former Chief Judge of the United States Court of Appeals for the Second Circuit, Jon Newman, has argued that the pervasive misunderstanding of the criminal burden of proof by federal judges has led to the conviction of many people on a standard less than that constitutionally mandated.<sup>73</sup> His thesis was straightforward: “I believe that the constitutional jurisprudence of this Nation has accepted the ‘reasonable doubt’ standard as a verbal formulation to be conveyed to juries in jury charges but has failed to take the standard as a rule of law against which the validity of convictions is to be judged.”<sup>74</sup>

A last example involving History and Social Issues, with cases scattered over decades available for illustration, is the much-discussed political question of judicial activism. It is one of many topics that students should be familiar with if they are to protect not just the rights and interests of their own clients but also the integrity of the profession.

Though the topic surfaces in presidential campaigns and senate confirmation hearings, the public remains without a sound understanding of what courts do and how judges decide cases involving matters of policy and public interest. Judges and attorneys must take responsibility for this failure to educate the average voter as they have either ignored the debate altogether or have been timorous when venturing into it.

The law is replete with pronouncements by eminent legal thinkers that judges, in fact, make law. However, Chief Justice

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71. Jackson v. Virginia, 443 U.S. 307, 315 (1979); *See also* In re Winship, 397 U.S. 358, 368 (1970); Holt v. United States, 218 U.S. 245, 254 (1910); Coffin v. United States, 156 U.S. 432, 456 (1895).

72. *See, e.g.*, Office of Workers’ Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994); Concrete Pipe and Products of Cal. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).

73. Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 980 (1993).

74. *Id.*

John Roberts's analogy at his confirmation hearing of a judge's role to that of a baseball umpire calling strikes and balls has carried the day in the public imagination. While the turning of the words "judicial activism" into a badge of infamy was a Republican stratagem, the Democrats conceded the debate to their opponents, and today all judges flee from the epithet. This fosters a popular view of the courts that is not supported by history. A few references will illustrate my point.

Justice Benjamin Cardozo in his classic *The Nature of the Judicial Process* titled a section covering easily a fourth of his tract 'The Judge as Legislator' to explain his assertion that a judge "fills the open spaces in the law."<sup>75</sup> Oliver Wendell Holmes favored us with this concise observation: "I recognize without hesitation that judges must and do legislate."<sup>76</sup> And to these we can add the words of Judge Jerome Frank who maintained that those who wished for a just and humane legal system must face the unavoidable uncertainties in law.<sup>77</sup> More recently, the late esteemed federal judge, Gerhard A. Gesell, who presided over the trial of Oliver North, told a gathering of lawyers and law students: "There is. . .not much precedent out there, and, frankly, precedent is frequently confused and goes both ways."<sup>78</sup>

These jurists undoubtedly respected the Constitution and the Founders. However, it is not difficult to locate in their careers a repeated endorsement of the need to make the law relevant to contemporary circumstances that our eighteenth century predecessors, some of them slave owners and all of them champions of a limited franchise, could not have imagined. I offer the judicial activism controversy as an example of an undermining of the rule of law that is as insidious as the attacks that criticize personal injury lawyers, and not errant hospitals or physicians, or the manufacturers of defective products, for driving consumer prices up. If the law schools are to heed the call of the Carnegie Report and others to inculcate a commitment to professional

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75. CARDOZO, *supra* note 8, at 118.

76. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

77. See JEROME FRANK, *LAW AND THE MODERN MIND* 7 (1930) ("Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.").

78. Edward N. Beiser, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 511 (1990) (Gerhard A. Gesell interview).

responsibility in their students, part of which is to explain the role of the legal system to the public, then such topics must be addressed and the background and history of the controversies and the biases of the contending disputants must be exposed and scrutinized.

## V. CONCLUSION

Law schools as a group, albeit not a cohesive one, have for some years been offering students clinical programs and seminars as a supplement to the core doctrinal curriculum. An examination of the efficacy of these endeavors and soul-searching as to how to improve them has been underway at least since the publication of the Carnegie Report in 2007. A random survey of law school catalogues, now available almost exclusively on the Internet, shows that clinical programs and seminars of every imaginable variety are offered in one quantity or another at all of the nation's law schools. How well this cornucopia is preparing the next generation of attorneys to function in a competent, ethical, and socially useful manner remains to be seen.

To maximize the possibility that some benefit of these supplemental programs will inure to both the individual lawyer and the larger society, it is incumbent upon the law schools to recognize the unfortunate deficit in the humanities the students are bringing to the schools; and it is also crucial that the schools determine what it is in addition to basic legal knowledge they should to impart to their students. The answer to this question supplied by the Carnegie Report (in its broadest terms) and other commentators is a sense of ethical responsibility by lawyers to their clients, the judicial system, and the wider community.

The Carnegie Report and its criticisms about the legal profession and legal education had distinguished precursors in Dean Anthony Kronman with his call for lawyers to be statesmen and Professors Meyers McDougal and Harold Laswell insisting that law schools be mindful that lawyers are policy-makers with a responsibility to maintain and expand democratic values.

While esoteric and entertaining Perspectives courses have their place, the suggestion of this essay is that schools design some of their seminars to relate directly to the practical clinics being offered. I propose three rubrics toward this end: History, Legal Profession and Social Issues, and Doctrinal. This is hardly

2014] *PERSPECTIVE ON PERSPECTIVE COURSES* 31

an exhaustive list, but within the ones I suggest, ample opportunities will be available for the student to encounter an in-depth exposure to the history and literature in the topic being addressed by a complimentary clinic or core course. This will give the student a more comprehensive grasp of the subject at hand while providing the ancillary benefit of remedying the humanities deficit so prevalent among most college graduates.

I have advocated that some of these seminars be required as supplements to, or prerequisites for, certain core courses or clinics. If such a mandate for second and third year students runs counter to the culture at a given school, then the student can be strongly urged to enroll in the complimentary perspectives course.

Though to assess any causal nexus between law school performance and superlative and ethically responsible lawyering is difficult, it is not a stretch to say that providing students a background in the history and philosophy of a legal issue, be it the Fourth Amendment or eminent domain or anything else, will measurably increase their efficacy as advocates and community leaders, whether the audience is an appellate court, the readers of an editorial, or a political or civic group.