

# The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity

*Susan Sturm\* and Lani Guinier\*\**

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## INTRODUCTION

Law school reform is in the air. Many reformers agree that the prevailing law school model developed in the nineteenth century does not adequately prepare students to become effective twenty-first century lawyers.<sup>1</sup> Langdell's case method, designed around private

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\* George M. Jaffin Professor of Law and Social Responsibility, Columbia University.

\*\* Bennett Boskey Professor of Law, Harvard University.

1. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Carrie Menkel-Meadow, *Taking Law and \_\_Really Seriously: Before, During and After "The Law"*, 60 VAND. L. REV. 555, 579 (2007); Todd Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 607 (2007); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007); William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, [http://carnegiefoundation.org/files/elibrary/EducatingLawyers\\_summary.pdf](http://carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf); Legal Education

domestic law, appellate cases, and the Socratic method, increasingly fails to teach students "how to think like a lawyer" <sup>2</sup> in the world students will occupy. The curriculum over-emphasizes adjudication and discounts many of the important global, transactional, and facilitative dimensions of legal practice. Law school has too little to do with what lawyers actually do and develops too little of the institutional, interpersonal, and investigative capacities that good lawyering requires. The Socratic method in the large classroom, though valuable as a way to teach sharp analytic skills, is ill-suited to fostering "legal imagination,"<sup>3</sup> which is what lawyers need most to become effective advocates, institutional designers, transaction engineers, and leaders. It also contributes to law student disengagement, particularly for women and people of color.<sup>4</sup>

Forward-looking deans and faculty members have responded with a host of reforms focused on updating how law schools prepare students to "think like a lawyer." Law schools are experimenting with curriculum, course materials, legal writing programs, clinical education, faculty governance, class size, and even architecture. There is palpable energy for change among various constituencies concerned about legal education's future.

Many of the key reformers are participating in this Symposium. Scholars and policy analysts like Ed Rubin at Vanderbilt, Martha Minow at Harvard, Beth Mertz at Wisconsin, and Carrie Menkel-Meadow at Georgetown occupy strategic positions across different institutional affiliations, enabling them to act as "organizational catalysts" for change, both within their own

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and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (July 1992), <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

2. Rakoff & Minow, *supra* note 1, at 600.

3. *Id.* at 602.

4. LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE 13-15 (1997); Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM (2006); Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 510-12 (2007); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 531-39, 562 (2005). A recent study conducted by Bonita London, Geraldine Downey, and Vanessa Anderson documented students' experiences during their first three weeks of law school, and then assessed their self-reported levels of engagement at the end of the first semester. This research revealed that students who were equally matched in their credentials and level of undergraduate engagement going into law school showed differential levels of engagement after the first semester of law school. Students of color and women reported, at statistically significant higher rates, feeling invisible, isolated and alienated, and reported lower frequencies of volunteering in class and three times the experiences of social exclusion. Bonita London, Geraldine Downey & Vanessa Anderson, *Daily Life During the Transition to Law School: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. J.L. & GENDER (forthcoming 2007) (on file with authors).

institutions and across a set of law schools.<sup>5</sup> Professional associations such as the AALS and the New Legal Realism Project have put law school reform on their agendas and offered their communication and networking resources.<sup>6</sup> Outside constituencies, including alumni and leading lights of the profession, have also begun to exert pressure on law schools.

This convergence of internal and external constituencies and circumstances creating pressure for change is unusual for a tradition-bound institution. Law schools, whose culture has been passed down through generations of lawyers, generally do not ask fundamental questions about long-established practices and their relationship to institutional mission. But we see the seeds of a constitutional moment for law schools—a time for systemic reflection and for reconstituting the framework and relationships shaping law schools.

Much of the recent energy focuses on curricular reform initiatives that seek to expand students' understanding of what law is to move beyond adjudication and the courtroom, to introduce broader forms of knowledge, and to develop a wider range of skills. Many initiatives add new courses focusing on public law, transactional world, international law, and interdisciplinary understandings of law and legal problems.<sup>7</sup> Some schools have even decided to experiment by introducing students to these ideas in the sacred first year.<sup>8</sup> Most

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5. For a discussion of the role of organizational catalysts in pursuing institutional change see Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Education*, 30 HARV. J.L. & GENDER 247, 287-99 (2006).

6. Two examples of these professional networks include the New Legal Realism Project described in Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 335-38, and the AALS teaching and curriculum reform network, which offers committees and programs concerning teaching and curriculum, described at 2006 AALS Workshop for New Law Teachers & Workshop for New Clinical Teachers, [http://www.aals.org/events\\_2006nltprogram.php](http://www.aals.org/events_2006nltprogram.php).

7. See, e.g., Elia Powers, *Beyond the First Year*, Nov. 8, 2006, <http://www.insidehighered.com/news/2006/11/08/stanford> (describing Stanford Law School's proposed reforms as experiments with its upper school curriculum); David M. Schizer, Focus On: Innovative Teaching: A Message from the Dean, <http://www.law.columbia.edu/curriculum/innovative> (describing several of Columbia's innovative courses).

8. For a period of time, Harvard had an experimental section in the first year, and Columbia had two courses in the second semester designed to expand students' understanding of law's meaning and method—the Regulatory State and Perspectives on the Law. Georgetown continues to have an opt-in first-year section, Curriculum B, which is problem-based, experientially grounded, transnational, and multi-disciplinary. Menkel-Meadow, *supra* note 1, 589-91. Research shows that the first semester of law school is crucial in shaping students' level of engagement in their academic work. See London et al., *supra* note 4, at 17. This research underscores the need to identify the environmental cues beginning early in the first semester of law school that operate as barriers to law student engagement. *But see* Powers, *supra* note 7, (describing Dean Larry D. Kramer's conclusion, following conversations with alumni and other attorneys, that the first year was definitional of legal education but "[i]t's the one that already works").

recently, Harvard has decided to add new courses on policy ("Legislation and Regulation"), international law ("Public International Law," "International Economic Law," or "Comparative Law"), and problem-solving strategies ("Problems and Theories") to the century-old first-year curriculum.<sup>9</sup> To expose students to more of what lawyering involves, other schools offer expanded clinical courses and externships and develop transactional, theory-practice opportunities.<sup>10</sup> We are ourselves experimenting with courses like this.<sup>11</sup> Law schools are also making efforts to improve the quality of the classroom experience by reducing class size and encouraging faculty to experiment with more interactive, problem-oriented pedagogy.<sup>12</sup>

Curricular reformers seek to realign the study of law with its twenty-first century practice. They strive to expose students to a broader range of knowledge, tools, and methods for doing lawyers' work.<sup>13</sup> They seek to create a pedagogical space for the development of

9. Memorandum from the Curricular Innovations Committee to the Faculty of Harvard Law School (Sept. 26, 2006) (on file with authors); Jonathan Glater, *Harvard Law Decides to Sleep Students in 21st-Century Issues*, N.Y. TIMES, Oct. 7, 2006, at A10, available at [http://www.nytimes.com/2006/10/07/education/07harvard.html?\\_r=1&ref=education&oref=slogin](http://www.nytimes.com/2006/10/07/education/07harvard.html?_r=1&ref=education&oref=slogin) (stating that Harvard Law School faculty unanimously voted to overhaul first-year curriculum to add courses on international law, regulation, and problem solving). This is a significant development. As Dean Elena Kagan told the New York Times, "The world of law has changed." Glater, *supra*. The changes in requirements reflect "changes in what our students will do and what they need to know." *Id.* The first-semester, first-year curriculum, however, is still dominated by 19th century common law courses such as torts, contracts, and property. In addition, the crucial, formative first semester retains the large classroom pedagogical style with fixed sections moving in lockstep from one class to another. For a discussion of the impact of this pedagogical approach on students and faculty, see *infra* notes 28-34, 43-47 and accompanying text.

10. A "deals" course at Columbia, for example, provides students with an opportunity to work with documents from actual business transactions. Schizer, *supra* note 7.

11. For a description of our experimentation with pedagogy, see Racetalks, <http://www.racetalks.org/examples/lawintro.html> (last visited Jan. 15, 2007); see also Susan Sturm and Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 63 J. LEGAL EDUC. 515, 522-39 (2003).

12. Columbia distributes a pamphlet on Innovative Teaching Methods and has recently established a rotating chair to encourage innovative teaching. Both Harvard and Columbia have recently undertaken efforts to reduce their class size, which has led to first year classes of eighty rather than 120.

13. The prevailing curriculum, particularly in the first year, presents law as the mastery of rules and principles elaborated and enforced by the judiciary, so that students can apply these habits of thought to, in Langdell's words, "the ever-tangled skein of human affairs." Rakoff & Minow, *supra* note 1, at 599. Curricular reformers criticize this view as overly narrow; law also involves designing institutions, facilitating transactions, and solving problems. Students must be exposed to the many other locations for law's operation, including the legislature, administrative agencies, bureaucracies, nongovernmental organizations, international organizations, board rooms, and the community. They must also understand lawyers' roles as problem solvers, legislative drafters, institutional designers, transaction cost engineers, facilitators, and mediators, in addition to their more familiar roles in adjudication. To achieve the "intellectual

legal imagination, a form of "thinking like a lawyer" that enables its practitioners to produce a more robust definition of the problem at hand, and a more plural version of possible solutions. Legal imagination involves "the ability to generate the multiple characterizations, multiple versions, multiple pathways, multiple solutions" to which students then apply "very well honed analytic skills."<sup>14</sup>

As Robert Gordon has demonstrated, however,<sup>15</sup> history is littered with failed reform efforts of this type. Many brilliant reforms do not take root because they overlook the crucial role of law school culture in determining their meaning and impact. The worldview reflected in many curricular innovations does not square easily with the shared cultural assumptions that are embedded in the law schools' routines and values. Where there is a cultural mismatch between reform proposals and the institutions they seek to change, well-intentioned and carefully analyzed programmatic initiatives may nevertheless founder.<sup>16</sup>

In this essay we argue that law schools breed a culture of competition and conformity. By culture we mean the incentive structures and peer pressure, dominant rituals and unspoken habits of thought that construct and then define the interpersonal, institutional and cognitive behaviors and beliefs of members of the educational community. Because culture operates at multiple levels, both formal and below the radar of our conscious imagination, it creates a powerful yet subconscious mindset that maps the physical and psychic terrain for a majority of both students and faculty. In law schools, that cultural mix exerts a constant pressure to make comparisons along a uniform axis. As a result, the requirement to conform will often trump the invitation to explore.

Law school culture emerges from the adversarial idea of law that is inscribed in the dominant pedagogy. It is reinforced by the

versatility" required by legal practice, students must learn "top-down and bottom-up analysis, logical and relational reasoning, and collaborative and self-interested strategies." Yet, "law schools tend to encourage top-down, emotionally detached reasoning and antagonistic interactive strategies and to discourage contextual and relational reasoning and collaborative interactive strategies." Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795, 798-99 (2005).

14. Rakoff & Minow, *supra* note 1, at 602.

15. See Robert W. Gordon, *The Geologic Strata of Law School Curriculum*, 60 VAND. L. REV. 339, 349-64 (2007).

16. See EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 5-7 (3d ed. 2004) (providing examples of organizational interventions that were unsuccessful because they did not take account of the assumptions about how things should work within each organization); Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. OF SOC. 271, 276 (1999) (discussing how culture mediates behavior and interferes with implementation of stated values).

prevailing metrics of success, which rank students through relentless public competitions (for grades, jobs, law journals, moot court, and clerkships) and provide very little opportunity for feedback that encourages students to develop more contextually defined or internally generated measures of accomplishment. It is locked in by its resonance with the currency of success in the private bar—money. It is preserved by the detachment of faculty from students' professional self-definition and reinforced by the primary way students learn—in class through questioning by professors in the presence of peers, when students perceive they have either won or lost the interaction. The culture of competition and conformity becomes an invisible but ubiquitous gravitational force affecting how students perceive the law and their place in it.<sup>17</sup>

This culture is remarkably static, non-adaptive, and resistant to change, even in the face of strong pressure from significant constituents of legal education and evidence that law schools are not fulfilling core aspects of their mission. Indeed, for the last 130 years, law schools have been tethered to their traditions.<sup>18</sup> Though the justifications for Langdell's vision of the law, the legal profession, and legal education have outlived their origin story, the pedagogical structure put in place to implement that vision has endured. That resilience, we argue, can be explained in large part by the feedback loop between the structure implementing Langdell's vision and its host culture of competition and conformity.

We address our comments about law school culture to those who seek to reform legal education. We worry that those who seek to change law school underestimate the power of this culture of competition and conformity, which permeates every reform initiative, whether it involves curricular reform, pedagogical innovation, clinical education, career development, or student life. This culture mediates the impact of these reforms on students' learning and decisionmaking. It also discourages faculty from investing the time and intellectual resources necessary to make these reforms work. It saps the collective

17. It is certainly true that law school culture funnels individual motivation and self-esteem through the filter of pedagogy, course content, career counseling, extra-curricular activities and interpersonal relationships, generating many different opportunities for substantive learning, self-reflection, and a sense of belonging among students. At the same time as legal education promotes a range of experiences, however, law school culture operates in the opposite direction to narrow students' focus on a precise form of interaction whose mastery is judged competitively and publicly along a common axis. See *infra* Section I.

18. For the most part, law school pedagogy, especially within the all important first-semester/first-year curriculum, was invented "not just before the internet, but before the telephone; not just before man got to the moon, but before he got to the North Pole; not just before Foucault, but before Freud; not just before Brown v. Board of Education but before Plessy v. Ferguson." Rakoff & Minow, *supra* note 1, at 597.

energy of sympathetic members of both constituencies. Exposure to the culture of law schools has habituated both groups into thinking of themselves as individual competitors. For these reasons, it is crucial to identify the aspects of the law school environment sustaining that culture, so that those dynamics can be addressed as part of any successful reform initiative.

This essay proceeds as follows: Part I describes the culture of competition and conformity. Part II identifies the crucial elements of that culture as they interact within an institutional web or matrix. Part III draws out the implications and challenges of that culture for reform efforts.

### I. THE LAW SCHOOL CULTURE OF COMPETITION AND CONFORMITY

Law students embark on a journey of collective learning, through faculty interrogation, practice, repetition, and public performance. That process is intentionally destabilizing: it invites students to suspend judgment, to question their intuitions, to read structurally, to learn a new language, and to ask different questions. In the first year, many students bring to this process all the drive and purpose that got them into law school. All of this is important to their educational mastery and ultimate success, what we call the process of "getting it." "Getting it" has several meanings, but the most familiar is a cognitive process through which students begin to understand and internalize the distinctive way lawyers analyze problems: distinguishing what is significant from what is not, "working from the particular to the general and back again," and applying these habits of thought to actual human affairs.<sup>19</sup> Legal education is organized around classroom interactions channeling students' learning so they master how to "think like a lawyer."

In law school, the process of "getting it" tends to be both collective and public.<sup>20</sup> Everyone has the same classes and exam schedule in the first year. Students are evaluated in most of their classes in relation to each other on a uniform metric. They find themselves going to the same meetings, applying through the same on-campus interview process for jobs, and competing for the same law reviews and clerkships. The most visible and easily accessible measures of "getting it" come from the results of these public competitions.

All this collective and formalized activity is part of what constitutes a culture. Law students, like big firm associates, absorb

19. *Id.*

20. Rubin, *supra* note 1, at 654-55.

"knowledge, techniques, norms, rules, and behavioral patterns" through "a process of 'osmosis.'"<sup>21</sup> Culture is inscribed in the rhythms and rituals of shared or common activity, such as when and where students and faculty regularly meet, when they engage in collective rites of passage, such as first-year exams, how value is assessed and communicated, and how status is negotiated within the law school community. It is also constructed by the shared norms and the implicit rules of the game, the habits of thinking, and the mental models that frame how people interpret their experience.<sup>22</sup> Legal culture shapes lawyers' modes of thought, their language, their self-image as professionals, their particular professional and organizational history—these and other features are important components of what makes lawyers more or less receptive to innovation and to particular styles of reasoning.<sup>23</sup>

By culture, we mean the norms and understandings of acceptable and desirable practice, inscribed and reinforced by rules, routines, incentives, rewards, and patterns of behavior. Cultural markers are less like billboards and more like directional signals in invisible ink: Stop, Yield Right of Way, No Passing. These signals are communicated through the subtle repetition and reconfiguration of values, experiences and behaviors that are welded into a larger—though often barely discernible—paradigm that binds group members with a set of shared, implicit commitments. These signals function to 1) move traffic (in terms of professional careers, faculty scholarship, or commitments to public service) in the same direction through the 2) accumulation of shared learning that leads to assumptions that are deep and enduring.<sup>24</sup> They create an institutional culture, meaning "those elements of a group or organization that are the most stable and least malleable."<sup>25</sup>

This culture makes law school feel like a world unto itself, a world with its own rules, rhythms, and rituals. For many students, law school is a potentially exciting but, in many respects, foreign culture. For some, it is a game, an exhilarating experience of competition and the attendant rewards of winning. They love the

discipline, the intellectual rigor, and the prospect of security, status, and possibly even glory that comes with using the skills they learn not only to think like a lawyer, but to be one. For others, they arrive hoping to learn how to solve the world's problems or at least find a home for their passions and convictions. As they learn the language and customs of a strange new way of thinking, both sets of students are in search of the moment when the light bulb goes off and they finally "get it."

Law school culture directs students through the process of "getting it" in multiple, yet interconnected ways. We have already described its meaning as a process by which students learn to "think like a lawyer." This means learning the grammar of analytic reasoning. It means decoding the empirics and internalizing the rules of evidence-based argument. It means identifying the location and locution of adversarial advocacy. It is this litigation-centric aspect of "getting it" that many people associate with the Socratic classroom and the standard first-year curriculum.

There is, however, a crucial second meaning to "getting it." In the law school culture, "getting it" is also about reaping the rewards of being successful. In this second sense, "getting it" means getting good grades (on exams), good reviews (on classroom performance), and the good opinions ("she's smart") of one's peers and professors. There is a disciplinary aspect to this sense of "getting it." Success is achieved through a highly public set of common rituals.<sup>26</sup> Students collectively take exams, receive grades, go through the job search process, and compete for law reviews and clerkships. The law school environment encourages students to form their sense of selves and their success in terms of how well they do in all of these rituals of performance and competition. The pressure to keep up and to do well, as measured by these common metrics of success, comes to define the law school atmosphere. Students come to measure their worth by comparing their performance to that of their classmates. The prevalence of these public competitions influences student motivation. Externally derived comparisons become more important than internally generated commitments. "Getting it," in the sense of external rewards, recalls the status hierarchies of high school where adolescents compete to conform.

Students' substantive learning is profoundly shaped by how they collectively define what it means to succeed in law school.

21. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 62 VAND. L. REV. 871, 913 n.257 (1999) (quoting Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 759 (1998)).

22. SCHEIN, *supra* note 16, at 5-6.

23. LAWRENCE MEIR FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15 (1976); Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 166-67 (1998).

24. SCHEIN, *supra* note 16, at 16-17.

25. *Id.* at 11.

26. Edward Rubin, W. H. Knight & Katherine Bartlett, *A Conversation Among Deans from "Results: Legal Education, Institutional Change, and a Decade of Gender Studies,"* 29 HARV. J.L. & GENDER 465, 467-68 (2006) (Remarks of Edward Rubin) (describing the highly ritualized character of law school).

Whether their goals upon entry are conventional or idiosyncratic, their success is measured similarly. "Getting it," in other words, means not only "thinking like a lawyer," but also thinking in terms of one-size-fits all metrics of success. "Getting it" is the currency of a culture that prizes competition and cultivates conformity.

Although "getting it" has these dual meanings, law school reform work typically concentrates on only the first. Reformers seek to broaden students' conception of what it means to "get it" in law school, as if "getting it" has a purely substantive meaning. Curricular reform initiatives seek to expand students' understanding of what law is, to move beyond adjudication and the courtroom, to introduce broader forms of knowledge, and develop a wider range of skills. Reform initiatives focus on students' desire to "get it" in the sense of mastering the content of law and lawyering.

Because curricular reformers only address the first aspect of "getting it," they do not engage those features of law school that reinforce the culture of competition and conformity. Their substantive focus fails to change the institutional cues about what really matters so that students have the necessary incentives and tools to absorb the substantive messages intended by these reforms. Indeed, most of the reformers do not deal with the incentive and evaluation structures that maintain this culture. They focus on the substance of the curriculum, but leave the underlying culture intact. As a result, the culture of competition and conformity is in tension with the goals and operation of many of the reform efforts. The unwillingness of reformers to rock the boat is understandable. Law schools are extremely conservative institutions that are quite resistant to fundamental change. And the culture of competition and conformity dramatically affects law professors' incentives and priorities in ways that make the reform of legal education daunting. But as we discuss below, reform cannot escape the impact of law school culture. It will either deal with it or be done in by it.

## II. THE ELEMENTS CONSTITUTING A CULTURE OF COMPETITION AND CONFORMITY: THE LAW SCHOOL MATRIX

In this Part, we tease out the elements of conflict, expertise, professional identities, and the incentives that structure and reinforce the culture of competition and conformity within the classroom, the institution, and the larger environment of legal practice. Law school culture is constituted by the ways conflict is understood and practiced within the classroom and the larger institutional environment. It is reinforced by the prevailing notions of expertise that are modeled in the classroom and in the institutional roles of students, faculty, and

the legal profession. It is preserved by assumptions about students', professors', and legal professionals' relationship to the learning process. It is reflected in the way law school structures the relationship of the social and personal to the professional. All of these dimensions are mediated by the cultural understandings of success and the formal and informal metrics that communicate those values.

We see these elements as combining to form a cultural matrix—the complex web of rituals, habits, and shared assumptions that create a culture of legal education resistant to change. We use the term matrix because of its many meanings, from the mathematical idea of a table of isolated yet interactive elements, to the biological matrix in which specialized structures are embedded between cells, the geological term which refers to the fine-grained, often microscopic crystals in which larger crystals are embedded, and the technological idea of a matrix in printing as a mold for shaping letters. All of these meanings fit under the larger idea of looking at parts of a whole, of examining the spaces between things and not just the things themselves; of seeing things as they are arrayed in more than one dimension; of looking at the larger environment through smaller samples.

We have identified several features that we think sustain this cultural matrix even when the substance of reform is directly intended to change or avoid it. These features include: (1) the form of conflict built into the classroom structure and the law school environment; (2) the idea of expertise reflected in the dominant discourse; (3) the segmentation of the intellectual, professional, and personal dimensions of learning; and (4) the incentive structure and evaluation system driving decisions, for both students and faculty. For those who would benefit from a visual presentation, we include, as an appendix, a schematic of how this matrix operates at different points of institutional reform.

### A. *The Role of Conflict in Structuring Learning*

The traditional association between law and adjudication is reflected in more than the substance of what is taught. It is hardwired into the process used to convey knowledge, validate learning, evaluate performance, and reward achievement. Law is presented as the resolution of conflict in formal settings through application of rules backed by sanctions. Conflict thus lies at the core of legal inquiry and intervention: it is what brings issues to the courtroom and the classroom; it is what brings lawyers to the table and creates the occasion for the exercise of state power. As Beth Mertz documented through careful classroom observation, "legal pedagogy deconstructs

and analyzes the underlying 'conflict stories' (the factual accounts of the underlying conflicts that led to legal intervention) of each case.<sup>27</sup> Students' understanding of the meaning of law and of themselves as lawyers is connected to their experience with conflict in the classroom and in law school more generally. The first year in particular is a profound socialization experience, defining what students come to understand as real law. The adversarial framework, which so dominates the learning process in the first year classroom, plays a huge, often unacknowledged, role in shaping how students define law and their place in the legal world they are entering.

In the conventional law school classroom, adversarial conflict provides the underlying framework of interaction, knowledge generation, and problem solving. As presented in most law school classes, law addresses conflict in highly formal settings aimed at determining winners and losers. Conflict is regulated by being categorized and framed by formal legal authority.<sup>28</sup> Problems are converted into binary options, and they are "resolved" by using authority and rigorous analysis to test the strength of those options. Competition functions to establish truth. The adversary process and rank ordering defines success as winning that competition—in class, in an argument, in the courtroom, or elsewhere.

The conventional law-school classroom mirrors adjudication's adversarial, formal idea of conflict. The professor structures interactions with students by invoking the style of an appellate judge who questions lawyers to ferret out the weaknesses in their positions and validate winning arguments.<sup>29</sup> Through her interrogation of

27. Elizabeth Mertz, *Teaching Lawyers the Language of Law Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 99 (2000).

28. Beth Mertz's important research documents the role of authority in students' understanding of conflict and their worldview as lawyers:

Instead of putting priority on the content of the factual "conflict stories" told in legal texts, law professors urge their students to analyze how the texts point to (or "index") authority. This focus shifts the students' orientation towards several major sources of authority: (1) the relationship between this text and the language of other texts that provides precedent and authoritative guidance (and correlative issues concerning the authority of the courts, legislatures, or framers who authored those texts); (2) the procedural history of the case, which determines the questions a court can address, the types of standards that are applicable to those questions, and the court's jurisdiction or power to consider the case at all; and (3) the related strategic questions involving framing legal arguments within this authoritative backdrop.

*Id.* at 101.

29. Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 38-40 (1998); James R. P. Ogloff, David R. Lyon, Kevin S. Douglas, & V. Gordon Rose, *More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 77 (2000). See also *infra* note 43.

lawyers, the judge demonstrates her formidable power and superior expertise in the law, motivates lawyers to prepare their cases carefully and exposes flaws in the reasoning or the assumptions being made by the advocates who come before her.<sup>30</sup> By adopting the stance of the Socratic judge, professors convey several important and related messages. First, students internalize the substance of what they have to master, what they think of as "real law." Real law emerges from the careful reasoning of appellate judges. Second, Socratic dialogue privileges a particular style of interaction. The professor constructs a contest or an argument between different sides and serves as the arbiter of excellence and truth. Class contributions are judged by their cleverness and responsiveness to the professor's chosen line of inquiry. Strong students are rewarded for being able to differentiate between a winning and losing argument, particularly in areas close to the line or unresolved by legal authority. Third, the court-centered focus encourages law students to identify good lawyering primarily with skillful and quick-witted verbal combat. On-your-feet verbal agility is a key skillset for trial advocacy. Although most lawyers never go to court, the culture of the law school classroom reinforces the iconic status enjoyed by litigators in the legal imagination.<sup>31</sup>

As Michael Dorf has noted, the typical law school teacher "deftly leads his students where he wants to take them, much in the style of a skilled attorney conducting cross-examination entirely through leading questions."<sup>32</sup> Students often experience their participation in class as a performance, and one that regularly defines their status among their peers. Students tend to perceive forms of knowledge and argumentation that fall outside this methodology as superfluous, supplementary, or even marginal to what really matters for lawyers.<sup>33</sup>

In the law school classroom, this highly stylized, court-centered and win-lose view of conflict resolution, which we call the adversarial

30. *But cf.* Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 10 n.29 (1998) (distinguishing own experience as a litigator in which the judge's actual role is not entirely consonant with some of the assumptions of the Socratic classroom).

31. Trial work gives lawyers "the experience of having to think fast and come up with objections and come up with better crafted questions and those are crucial life skills and crucial lawyering skills." Sacha Pfeiffer, *Few Chances for Lawyers to Develop Trial Skills*, BOSTON GLOBE, Nov. 29, 2006, at A1, available at [http://www.boston.com/business/articles/2006/11/29/few\\_chances\\_for\\_lawyers\\_to\\_develop\\_trial\\_skills/](http://www.boston.com/business/articles/2006/11/29/few_chances_for_lawyers_to_develop_trial_skills/) (quoting Kathleen McGrath). Yet, most lawyers never go to court. *Id.* (describing the "vanishing trial").

32. Dorf, *supra* note 29, at 39.

33. See Mertz, *supra* note 27, at 101-02 (describing how law professors train their students to limit their arguments to those based on authority and to discount arguments based on what's fair, just, or desirable).



frame, filters the analysis of non-adjudicative forms of knowledge or conflict resolution as well. Often, students are introduced to administrative, legislative, or transactional activity by reading appellate decisions assessing the adequacy of decisions by non-adjudicative institutions, and by applying an adversarial mode of inquiry to analyzing the work of these institutions. Classroom inquiry operates within the Socratic style although the object of that inquiry involves the processes of negotiation, experimentation, facilitation, collaboration, and problem solving. Thus, the structure of the conventional law school classroom reinforces the dominance of traditional ideas of law even when it is exploring new legal forms.

The adversary frame is also embedded in the evaluation system. One aspect of evaluation, which we discuss in Section D, relates to performance incentives. Here we are focusing on how adversarialism structures the evaluation process. Most law school exams focus on what courts, or lawyers appearing before courts, do. Law school exams often ask students to assume the position of an adversary or the judge, and to analyze a fact pattern from that point of view. Students are evaluated based on their mastery of that process of reasoning; they are then rank-ordered based on their performance. This focus on issue spotting in the exam generates selective attentiveness to different types of material in the classroom. Students pay careful attention to what will be on the exam and assess the importance of in-class discussion based on the likelihood that it will show up on a final. Because "policy," problem solving, and normative judgments often do not feature prominently in the evaluation process, students tend to discount their significance in class. The adjudicative setting tends to dominate exams; it therefore structures students' attention and motivation in class.<sup>34</sup>

The most significant public rituals in law school for rewarding achievement and signaling the meaning of law also reinforce the preeminence of the adversary frame.<sup>35</sup> Many law reviews select editors through a competition relying heavily on grades or other time-sensitive forms of evaluation, and thus reinforce the salience of successful competition in issue-spotting exams or other adversarial tournaments. Other public rituals that reward excellence, such as moot court, tend also to be organized around the judiciary. It is difficult to think of many occasions or venues that publicly reward

34. Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 153 (2002).

35. A study based on interviews with law students reported that "peers are viewed as competitors in the race for top grades, prestigious jobs, judicial clerkships, and Law Review positions." Brooke Andrich, "Overwhelmed": The Experience of Law Students at One Elite Law School 5 (Jan. 25, 2007) (unpublished manuscript, on file with authors).

performance and achievement outside the adjudicative setting. Legal writing and legal methods courses can also reinforce this emphasis by focusing primarily on brief writing and adjudication, and by overlooking transactional work, drafting, and other more facilitative or problem-oriented writing.

Students' preoccupation with adjudication is also a function of the frameworks that they bring into law school. Popular culture has a strong influence on how many law students view the law, and depictions of the practice of law on television and in film emphasize the adversarial proceedings of the courtroom. Law's more facilitative or policy-oriented roles are less public, less well understood, and more complex. Students are thus predisposed to think about law in terms of rules developed, interpreted, or applied by courts. Unless this assumption is actively disrupted, newcomers are likely to assimilate their understanding of law into their pre-existing conception.<sup>36</sup> It would take actively engaging and challenging students' preconceptions about law for them to assimilate a richer, more pluralistic notion of law's roles. That would require making the non-judicial sites where law operates palpable, visible, and equally valued as part of the canon of legal education.

This adversary frame for conflict overly determines a formalistic idea of law and a litigation model of lawyering. It squeezes more deliberative, legislative, transactional, and collaborative approaches to problem solving into the dominant frame, thereby distorting their elaboration and marginalizing their value. It deflects attention from the multiple ways in which conflict actually occurs in the world, and the different forms of knowledge and skill that lawyers will need to address conflict in its different locations. Adversarialism is valuable for "sharpening the mind in order to narrow it" but it pushes aside other potentially important legal approaches including efforts to problem solve in light of the relevant social, political or economic context. It also discourages students from grappling with the moral values implicated by a problem. The emphasis on court-centered resolution of conflict encourages law students to devalue other forms of inquiry, and to adopt adversarial approaches even when they are counterproductive to learning and to performing effectively as a lawyer. Changing the content of classes alone, however, will not alter this preoccupation with adversary conflict as the universal mode of interaction. The approach to learning in the classroom, the reward structure, and the methods of inquiry would have to change in order to

36. See KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 26-30 (2004) (discussing how the best teachers "stimulate students to build new models" to incorporate newly-learned information).



involve students in the kind of learning and interaction required by these other forms and locations of conflict resolution.

The adversary frame reinforces the culture of competition. Modes of inquiry and evaluation that depend on unitary and formal authority to resolve conflict along a binary axis of winners and losers fit easily with the culture of competition and give it epistemological legitimacy. Ironically, the adversary frame for conflict also fosters a culture of conformity along with the culture of competition. The emphasis on mastering adversary dialogue discourages students from deviating from this structured format, or from speaking when they are uncertain about whether they are "right." This discourages students from risk taking or trying on new ideas. In particular, students don't want to take chances either by stepping out of a highly stylized way of interacting or by introducing novel ideas about which they are curious but unsure. The focus on a specific and narrow view of adversarial conflict inhibits dissent that might challenge the validity of the questions being asked, the adequacy of goals being pursued, or the neutrality of values implicitly conveyed. Many students feel constrained from initiating difficult yet important discussions that will not advance the discrete goals of conveying verbal mastery to win the argument. When people cannot change the way in which the problem itself is being addressed, they often opt for silence to avoid signaling acquiescence in a framework they find troubling. That silence then reinforces the sense that everyone must conform to a set pattern of interaction.<sup>37</sup>

### B. Modeling Expertise

Law school culture also manifests itself in the model of expertise that is built into the structure of relationships among faculty, students, and practitioners. This culture also defines the format of the first semester of law school.<sup>38</sup> Take first the relationship between faculty and students. The prevailing assumption is that the most important learning and interaction takes place in the classroom, through professor-run instruction often in the form of questions posed by the professor and answered by the students. The teacher models

what it means to think like a lawyer. This means constructing logical and analytical distinctions. What matters most is the teacher's capacity to use her knowledge and experience to show which arguments are logical and persuasive and to do so with respect to all normative positions on an issue.<sup>39</sup> The teacher creates a professional environment in which aspiring lawyers "acquire methods, skills, expert knowledge, and responsibilities" that differentiate them from the "ordinary."<sup>40</sup> One of the ways legal professionals have been trained to differentiate themselves from the ordinary is through the development of a detached mastery of rigorous analysis. Being smart becomes a value in itself, detached from what people want to accomplish with their mastery.

Based upon this premise of mastery and legitimacy, the value structure and the architecture of the classroom appropriately allocate power to those who deserve it.<sup>41</sup> This includes both the professor and the most successful students. The professor is assumed to have the power to dictate all in-class interaction. The architecture of the traditional classroom funnels attention and control to the front of the room. It does not allow much mobility or flexibility for either the teacher or the students. The assumptions as to who has power—and what it means to have power—are also reinforced by the symbols of success reflected in the portraits on the wall. Detached mastery becomes synonymous with representations of prestige and control.

This idea of detached mastery also influences the relationship of legal practice to students' learning experience. Law school pedagogy distills inquiry to focus on logical and analytical reasoning. Professors do not generally focus classroom attention on the interactive, interpersonal, and organizational aspects of their practice field.<sup>42</sup> The implicit (and sometimes explicit) message conveyed to students is that these non-doctrinal forms of knowledge and interaction can be developed on their own, easily picked up in practice, or are simply not as demanding or significant in the development of foundational expertise for lawyers. Thus, the issues and challenges students will actually face in practice, unless they emerge in appellate case law, may never be addressed in the classroom. Legal practitioners operate

37. We thank Martha Minow for pushing us to deepen our analysis of the relationship between the adversary frame for conflict and the culture of conformity.

38. Research shows that transitions into new environments, particularly those that involve substantial amounts of high-stakes assessment, activate concerns about competence and belonging, and that these concerns correlate with disengagement from law school work inside the classroom. This kind of withdrawal has also been shown to affect performance. For this reason, the first semester of law school is a crucial transition period. See London et al., *supra* note 4, at 17.

39. "Learning how to make arguments on different sides of a question is learning that there are arguments on both sides, and learning how to hear them." Anne-Marie Slaughter, *On Thinking Like a Lawyer*, HARV. L. TODAY, May 2002, at 4 (excerpting remarks to her 1L classes).

40. ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 74 (1992).

41. The language of power, for example, may be observed by the dominance of valuable "airtime" by those with status or institutionally sanctioned credentials (grades) or by the pictures on the walls and the architectural structure of the classroom.

42. Davis & Francois, *supra* note 13, at 2-3; Menkel-Meadow, *supra* note 1, at 560-63.

in a separate world. Students are exposed to the work of practitioners during summer jobs and internships, but these experiences are not integrated with the academic content of law school. Students may take classes with professors who are brought in from practice to teach as adjuncts, but it is left to students to integrate those experiences with the rest of their legal education.

This approach to expertise, exemplified by the role of the Socratic professor, dramatically influences how law schools organize and allocate teaching responsibility.<sup>43</sup> For example, professors get teaching credit only for in-class instruction and typically receive credit based exclusively on the number of formal, whole-class meetings. Assumptions about expertise lock professors into their place at the podium, conveying knowledge by modeling mastery. It places students in a passive and reactive position, focused on at least not making mistakes and at best giving the professor what she is looking for. Students then internalize what the professor "wants to hear" (from the professor's modeling and from responses to peer answers). Thus, the case method as practiced is often a fishing expedition—with professors fishing for the "right" answers, and students trying to catch the hook.

In the law school learning hierarchy, students treat learning interactions primarily as those mediated by the professor, both inside and outside the classroom. In a traditional law school classroom, students tend to turn off when other students speak, to look to the professor to validate insights articulated by a peer, and to devalue interactive experiences that depart from the structure of professors conveying information or evaluating student responses. Moreover, professors are not generally involved in out-of-class learning. They do not spend much time providing feedback on students' work or helping them figure out how to use the law to advance their intellectual and professional aspirations.

Students do not generally see faculty as taking an interest in their development as learners or lawyers outside the classroom. Interactions that take place outside of class, such as in study groups, extracurricular activities, career services events, or summer jobs, are viewed as secondary and beyond the responsibility of the professor. Many students who are confused about material or at sea about their

relationship to the profession do not come to office hours.<sup>44</sup> Those who do seek out faculty often treat their interactions as opportunities to perform, to develop relationships with faculty in order to secure positive reference letters, or to prepare for the exam, rather than to learn. Faculty who devote time and energy to students' learning outside the classroom do so at their own "expense." They receive little credit or reward, and colleagues view this work as a distraction from the core functions of scholarship and in-class teaching. Yet, these are crucial locations of learning.

David Garvin's contrast with other professional schools is instructive. While the law school case method teaches "expertise" through individual interpretation and analysis, medical school education emphasizes "deep understanding" and students taking responsibility over their education, while business school emphasizes "decision-making" and "action."<sup>45</sup> Garvin notes that the differences in how the three schools utilize the case method represents the fact that the "three schools differ sharply in the professional skills that they have chosen to emphasize."<sup>46</sup> It is interesting that both medical schools and business schools focus on group learning and preparing students to work collaboratively, assuming those are vital skills to the respective professions, while law schools make no such assumption. As a result, law schools communicate a relatively narrow idea of professionalism and law, one focused on individual mastery and manipulation of doctrine in the context of formal adjudication or its shadow.

44. An interview study on law school engagement provides some insight into why at least some students who developed faculty relationships as undergraduates do not attend office hours in law school:

They [undergraduate professors] were certainly very smart, but I didn't think that they expected us to interact with them on the level of a peer . . . . With them, it was such a more learning relationship—and maybe I just have the wrong approach to the professors here, but I feel like there's a little more judgment here about how much you know and how much you've done and how much background work and homework you've done and everything else. I do all my reading, so I don't know why I should feel like I can't go talk to these professors about stuff, but I feel like I'll be judged on what I know and don't know and not helped.

Andrich, *supra* note 35 (manuscript at 8). Some students find professors inaccessible or aloof even where the faculty are not overtly judgmental. This is disproportionately true for those students, often but not exclusively women, who look for friendliness cues before approaching faculty. Guinier et al., *Becoming Gentlemen*, 143 U. PA. L. REV. 1, 34-35 nn.87-94 & 72 nn.185-81 (1994); see also Neufeld, *supra* note 4, at 538-39.

45. David A. Garvin, *Making the Case: Professional Education for the World of Practice* HARV. MAG., Sept.-Oct. 2003, at 58, 60-62.

46. David A. Garvin, *How Professional Schools Teach Professional Skills: The Case Method in Action* (Harvard Business School, Working Paper No. 03-202, 2003).

43. The "Socratic professor" is a term suggestive of the "sage on the stage," whose command of the substantive material, displays of verbal agility, and performance style define the classroom and the learning environment. The term envisions a range of techniques, from rapid fire question-and-answer to a more free-style interrogation. What these techniques share is the message that information and learning must be sanctioned by the voice of authority at the podium. See *infra* notes 45-47 and accompanying text.

Expertise, constructed as detached mastery, signals to students that learning priorities emanate almost exclusively from the professor's podium inside the classroom. Professorial distance also buttresses norms of competition as students vie with each other for snippets of attention. And it reinforces other cultural cues that discourage students from playing with ideas, experimenting with novel forms of engagement, and actively participating in class (for fear they will be tagged as a "gunner").<sup>47</sup>

Many of the curricular innovations reformers have developed rest on broader ideas of expertise that require interaction, collaboration, brain-storming, risk-taking, and synthetic knowledge, in addition to the analytical skills now structuring students' learning. This kind of learning takes time, informal interaction, and shared responsibility for learning. It demands a willingness to try on new roles and imagine creative solutions to old problems. It runs up against deeply held assumptions about what expertise is—assumptions that are built into the current physical and organizational structure of many law schools. Going forward, these aspects of law schools must be put on the table if we want law students to engage fully with the content of the twenty-first century curriculum. This is especially true if reformers want to encourage students to enlist the exercise of legal imagination as a form of expertise. Such an exercise would require a level of intellectual and professional curiosity that is not cultivated by the current default (and often conformist) cultural stance of detached mastery, a stance that both distances students from the object of their learning and leads them to keep their options forever open.

### *C. The Segmentation of Intellectual, Professional, and Personal Development*

Typically, law students develop their professional identities and career directions outside the context of their academic work and

without direct faculty involvement. With the exception of students aspiring to become legal academics, many professors do not communicate with students about the relationship of their academic work to their professional aspirations and goals. Nor, as we pointed out above, are faculty generally rewarded for playing this integrative, mentoring role in students' lives. Instead, law schools assign the role of professional mentoring and advising primarily to administrators, particularly deans of student services, placement, and public interest. These individuals bring considerable knowledge and experience to the advising function, but are often themselves quite detached from the academic faculty and only partially integrated into the academic life of the law school.

The formation of students' professional identities, as well as their personal values and goals, is thus disaggregated from the academic process. Students detach their personal and professional commitments from their academic learning, encouraged by classroom inquiry that deemphasizes the importance of context and the relevance of personal reactions and goals. The environment does not regularly provide students with significant out-of-class opportunities for connecting their academic learning with the process of forming a professional direction.

This disaggregation of academic, professional, and personal questions means that students are rarely invited, much less required, to make sense of what they are learning in relation to their values, histories, and personal qualities. There is little opportunity to subject the values underlying classroom work to the exigencies of practice, or to question the implicit values driving the law school placement process in relation to academic goals or personal values. Administrators wishing to help students integrate their classroom learning with their career planning often find it difficult to involve faculty in any ongoing way. Faculty who are troubled by the implicit and stated messages of the placement process come up against administrators' understandable preoccupation with the practicalities of responding to students' current demands. Many career counselors see their role as getting everyone hired. They focus on short-run placement statistics, tracked by *U.S. News and World Report*, rather than on long-run career development, professional satisfaction, and public responsibility. Moreover, the professional placement staff have limited opportunities to learn about students' particular skills, passions, and intellectual interests.

Disengagement from formal learning creates an asymmetry between the classroom and the job search process. Students become easily seduced or influenced by the conventions of recruitment. Some experience validation mainly through job offers and law firm wining

47. A recent study of student participation at Harvard Law School found that forty-three percent of the airtime in first year classes was occupied by ten percent of the students, eighty percent of whom were men. See Neufeld, *supra* note 4, at 537. Based on the students' responses, there were two reasons why some students, notably women, were silent. One is that the classroom debate felt scripted, generating a certain anti-intellectualism. Two is that those who eagerly participated in this scripted dialogue tended to monopolize the conversation in ways that invited peer derision. The eager participants were the "gunners" and many students chose not to speak in order to avoid being put in that camp. *Id.* at 538; Guinier et al., *supra* note 44, at 43; Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027, 2029-32 (1998) (describing classroom socialization as cultivating detachment from prior commitments and ideals, resignation about the future, and increased impatience with students who still strive to distinguish themselves).

and dining.<sup>48</sup> They receive disproportionate psychic reinforcement from law firm outreach, and they are disproportionately vulnerable to advice from career counselors to change their identities to fit the corporate ideal. For example, one student working on her Ph.D. was advised by a career counselor to take any reference to her years of graduate schooling or her experience working abroad off her resume.<sup>49</sup> Other students report being told to downplay their public service experiences or their interest in work and family during their interviews. This upsets some students; it also produces a deadening of their moral sensibilities. Students who seek work that does not fit into the predefined tracks may become discouraged about the possibility of realizing the goals that initially drew them to law school.<sup>50</sup>

The job placement process conveys that there is a norm, and that students are taking unnecessary risks if they deviate from it. That norm is still very much like David Wilkins's "bleached out

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48. Many students describe the lure of fancy recruiting receptions offering "chocolate covered strawberries" and other forms of law firm flattery as essential to recovering the self-esteem they lost when they got their first year grades. In the thrall of such seductions, some students drift toward a career path that has little to do with why they came to law school in the first place and everything to do with the need for external validation. Prestige and money replace passion and deep moral commitments.

49. A former student wrote in an email that when she met with the law school career counselor,

[The counselor] took a pen and began marking items that needed to come off my resume—these included my Ph.D. candidacy and all work experience except my two law school summer positions and my paralegal job before I started grad. school. Everything else, she said, was both irrelevant and "out of the norm." I told her that it upset me to have so many of my accomplishments wiped off the page, especially when I was under the impression that employers are looking for uniqueness in their recruits. She said that any employer who had my resume side-by-side with a more "normal" one would choose the normal because it was less risky.

Another student reports a similar experience in the public interest arena:

The "track" is you do things like be on journal boards, participate and do as well as you can on grades, try to get a good writing sample, get a clerkship, then work for a prestigious organization—that's the public interest track. It comes from talking to the public interest counselors who say, "You shouldn't do Legal Aid two summers in a row because that's not prestigious. You should definitely, definitely clerk." Everybody definitely clerks.... You definitely get the impression that there are certain things that people have done to get fellowships.

Andrich, *supra* note 35 (manuscript at 14).

50. The Andrich study reports students' fear at having realized that their interests do not conform to the career "tracks" made available to them. *Id.* at 15. One interviewee said, "I'm kind of confused about what I thought I would be doing [after law school]. I wanted to be working with clients and doing problem-solving, but now the more I learn about the legal profession, the farther it gets from what I probably came in thinking I was going to be doing.... If I don't want to argue motions and I don't really think I'm going to be good at financials, does that mean that I can't be a lawyer? Does that mean that this is all just a bad idea?" *Id.*

professional".<sup>51</sup> The faculty does little to push students to question this professional norm. Further, the law school culture provides little push-back or occasion for students to re-center themselves in terms of a set of affirmative, morally responsible social goals. Professional responsibility courses, which focus for the most part on the ethics of lawyers as governed by the Model Rules, neither encourage students to address the conflicts between their personal and their professional identities, nor provide sustained opportunity for self reflection.

This brings us back full circle to the impact of the culture of competition and conformity on students. Students' career demands are currently shaped by a culture that encourages them to pursue law firm positions, not because they are passionate about those jobs, but because that is what everyone else is doing.<sup>52</sup> And the most desirable jobs are not necessarily those that offer an opportunity to do intellectually compelling or publicly spirited work. Instead, students compete for jobs at firms that pay the most money because that is they way they have learned to keep score.

#### D. Faculty and Student Incentives

The current incentive and reward structure, for both faculty and students, is the linchpin holding together the culture of competition and conformity. The law school evaluation structure, whose metric is one of out-ranking or out-competing peers, allocates value based on one's place in the performance hierarchy: we are excellent because we are highly ranked; we are successful because we have high LSAT scores or grades or make the most money or have the greatest number of publications or citations. Performance is embedded in a success narrative that constrains and structures every aspect of law school activity including admissions, faculty appointments and tenure, student assessment, resource allocation, and career counseling.

Yet, this self-referential idea of excellence for its own sake remains isolated from the world within which law schools operate. It is inconsistent with law schools' stated mission of developing leaders and advancing social justice and acts as a barrier to meaningful change. The most successful contestants in the law school competitions are not necessarily the best lawyers. More importantly,

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51. A "bleached out professional" is both "generic and interchangeable," with no race, class or gender identity. David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L J. LEGAL PROF. 141, 142 (1998).

52. It is also true that the escalating cost of law school is "subsidized" by post-graduation opportunities for lucrative law firm salaries.

many people who do not perform well according to traditional success metrics go on to have successful and meaningful careers.

These measures of success have unintended consequences for the learning enterprise. Success is defined as a comparative value; evaluation performs a ranking function rather than a feedback function. Exams are not designed to give students meaningful guidance on how to improve, but instead to rank-order large numbers of students on a single performance metric. The preferred mode of evaluation becomes issue-spotting exams or other assessment tools that are easy to grade and that enable faculty to make fine distinctions at the margins. Many professors do not know what else to do to evaluate large numbers of students fairly. They give feedback by providing final grades, model answers and collective commentary on the correct way to respond, but only at the end of the term. Students may go through the entire semester with little sense of whether they are on the right track in their approach to learning the material.

In fact, the reward structure for tenure-track faculty discourages them from taking the time to provide the ongoing, prompt, qualitative and individualized feedback that enables students to learn from their errors and to advance intrinsic learning goals. Professors receive limited rewards for excellent teaching, particularly for working closely with students outside of class, efforts that will not even show up in course evaluations. Faculty do not want to spend any more time than necessary evaluating and providing comments on students' exams, a task they find tedious and often meaningless given the large number they must grade. They do not view grading as an integral part of teaching, which makes sense since most grading takes place after the class is over. Moreover, professors measure their worth in publications, and it is widely recognized that this incentive structure places serious constraints on any innovation that will require faculty to devote time and energy to teaching at the expense of scholarship. As a result, many professors devote their considerable intellectual life to producing scholarship for an academic audience of specialists, and not to mentorship for a broad constituency of students, or to intellectual leadership for a public and a profession thirsty for new ideas.

Professors' role in rank ordering students also structures the law school's relationship to the legal profession. Law schools function primarily as a hiring hall for the profession. The placement office facilitates the process of matching students to firms. The grading system provides a signal to employers as to where students belong in the professional hierarchy. Professors' letters of reference and students' grades on exams become the primary interface between the law school and the profession. Professors who have never practiced

law, however, are not well positioned to help guide student career choices, particularly if they do not respect the intellectual content of practice.<sup>53</sup> Neither practitioners nor judges, neither activists nor policy makers play an active role in shaping the priorities of law schools, much less in informing the judgment of the professoriate as to who should be hired or tenured.

At the institutional level, law schools are engaged in a similar ranking competition, with each school pursuing the goal of moving up in *U.S. News and World Report* rankings. The fear of falling behind discourages institutional creativity and risk taking, especially on metrics like students' LSAT scores and law firm placement statistics that weigh heavily in the rankings. Competition and conformity are reinforced by these uniform and narrow metrics of success for students, faculty, and law schools in which the emphasis is on rank ordering through collective competition.

### III. THE IMPLICATIONS OF CULTURE FOR LAW SCHOOL REFORM

The culture of competition and conformity profoundly shapes not only how students interpret and experience the classroom, but also how students see the law and themselves as lawyers. Those frameworks then filter students' perceptions of and reactions to curricular change. They reinforce the narrow conceptions of law and lawyering that these changes are intended to expand. They predispose students to marginalize the programs that depart from, or cannot be evaluated easily within, the rank-ordering system of the dominant culture. The student who comes in with an information and support network can use curricular innovations as a springboard for expanding her overall ideas of law and skills as a lawyer. However, many students turn themselves over to the law school environment to define their professional and personal path.<sup>54</sup> Indeed, the law school culture encourages the suspension of personal judgments, substituting an external reward system for students' internal moral or professional goals. The system of evaluation based on "being the best" substitutes for a substantive vision of professional and public responsibility. As a

53. Fifty years ago, a Supreme Court clerkship and a few years of practice were considered sufficient academic preparation for law school teaching. By contrast, there is a trend among many elite law schools to hire entry-level candidates for faculty positions who have never practiced law, have earned a Ph.D. as well as a J.D., and have already published scholarly articles. It is not surprising, therefore, that many faculty now focus on students who wish to pursue an academic career rather than on those who are interested in the practice of law.

54. This is especially true of students who come to law school straight from college or who see law school as the all-purpose post-graduate education best suited to keeping their options open.

result, students find themselves profoundly shaped by the routines and incentives that reverberate through the law school culture, which can take them far afield from either their own professional ambitions or many of the sites where lawyers tackle important social issues and problems.<sup>55</sup>

The cost of this aspect of cultural conformity can be great. Internalizing the culture of competition and conformity desensitizes students to their internal compass. A story told after a civil rights dinner at one of our law schools helps illustrate the point. A student leader in the public interest community was offered the opportunity to go to Africa in the summer after her second year of law school to work for an innovative program in economic development. This student came to law school to build on her extensive background and interest in human rights. This was the job she had dreamed of, the one she went to law school to pursue. But she didn't go. Why not? She was afraid to take the risk of deviating from the conventional route of working for a large firm in her second summer.

These are the kinds of choices students don't let themselves make because these unconventional experiences would place them out of step with their peers and potentially cause them to fall behind the competition. This student described herself as giving up her dream job for one that she has never really wanted. She explained her decision

55. See, e.g., Jenée Desmond-Harris, *Public Interest Drift Revisited: Tracing the Sources of Social Change Commitment among Black Harvard Law Students*, 4 HASTINGS RACE & POVERTY J. 101 (Spring 2007) (manuscript on file with authors) (detailing the conclusions drawn from interviews and an anonymous survey of fifty black Harvard Law School students and fifteen newly admitted students). Desmond-Harris describes three groups of students: 1) a small group of black law students who are consistently dedicated to social change work 2) a much larger contingent who consistently pursue conventional success and 3) a significant though amorphous number who arrive at law school open to, but not yet committed to, pursuing a social justice agenda through their legal careers. Desmond-Harris's study focuses on the third group of black law students. She finds that their early curiosity about law as a tool to engage pressing social issues fades as they become both disillusioned and passive over the course of their law school experience. Desmond-Harris writes: They "expect law school to stimulate their social change commitment and direct them to a career that reflects it" yet find themselves instead "unenthusiastically accepting positions with law firms." *Id.* at 44. Despite their initial interest in using law as a tool for public problem-solving, their career plans solidify instead around the more conventional commitments of the majority of their peers to high salaries and financial stability. Although 73.3% of newly admitted students reported that they had expressed an interest in public interest work in their personal statements, only fifteen percent of black graduating students surveyed actually planned to pursue public interest work, with seventy-eight percent planning to work for law firms. *Id.* at 41. Desmond-Harris finds that the career choices of this third group of black students were a result of their own passivity as well as the law school's failure to expose them, in the classroom, to "what is possible through the law." *Id.* at 66; see also Guinier et al. *supra* note 44, at 39-41 (finding that many women, in particular, turn away from their first-year interest in public service over the course of their three years in law school). Of first-year women, twenty-five percent to thirty-three percent indicated that they expected a job in public interest law, compared to seven percent of first-year men. *Id.* However, the third-year women's level of interest in public interest work was nearly as low as that of first year men. *Id.*

as an effort to keep her options open for a large firm position (which, if she is like most lawyers, she will leave within two to three years, never to return to large firm practice).<sup>56</sup> As she reflected on her past summer, she expressed profound regret about foregoing this unusual opportunity to explore how she could use her legal knowledge to build a meaningful professional career that could make a difference in the world. She gave up the chance to connect theory and practice, to work in and then step back from and critically analyze a field she hopes to enter, to develop her capacity to construct a fulfilling life-time career that would also make a significant public contribution.<sup>57</sup> Many law

56. See NALP FOUNDATION AND THE AMERICAN BAR FOUNDATION, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 54 (2004), available at [http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After\\_JD\\_2004\\_web.pdf](http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf) [hereinafter NALP STUDY] (detailing the results of a national survey of lawyers two to three years into their careers).

57. By no means do we suggest that the culture of competition and conformity affects only students who take jobs with law firms. Students likewise compete for status and prestige in their pursuit of public interest fellowships and jobs, rather than considering legal service jobs or employment as a prosecutor, public defender, or counsel to a member of a state legislature. A 2006 law school graduate, for example, who had always wanted to be a public defender, was invited to consider two of the most prestigious impact litigation organizations in NYC that were still looking for fellowship candidates to sponsor. As described by a law school friend:

This was a very tempting opportunity, and very desirable in our world, and my first reaction was to be excited and assume that she would be too. Instead, she was shaken up and miserable for several days. She knows exactly what she's called to do, and can't wait to do it, and then along comes the devil, sort of, offering her the biggest temptation he can come up with. She really struggled, and then one afternoon went for a walk and came back standing up straighter and said 'Screw them for making me think something has changed when it hasn't.' And she called up and told them no thanks. It was a small struggle, but its the kind that makes the difference between following a path that takes you further and further from your values and one in which you are an agent. On one path you WILL fall into the traps of habit and tactics for tactics sake, because you've fallen out of touch with what guides you.

At the same time, those who focus on public interest organizations that do impact litigation or Supreme Court advocacy often become indistinguishable from their corporate law firm counterparts. As a former student wrote in a recent email:

Last Monday I went to my interview for a public interest fellowship; the interview was at the offices of a large law firm . . . I was waiting in the waiting room in my suit, and there were a few other white guys around my age in similar suits, similar haircuts. A woman came downstairs and said Matt? I said yes, smiled, we exchanged pleasantries, she took me upstairs, brought me into someone's office and said Gloria, this is Matt Haas (name changed here). Only then did I realize she was looking for another Matt, one interviewing for an associates' position. We had a laugh, I went back downstairs, had my interview, left. The point being how little qualitative difference between the fellowship interview and the associate interview. Same people, same suit, same smile, same pleasantries, same interview. Same career, different departments. This is not a coincidence; it's the express goal of the people at [elite law schools] and at the foundations building public interest organizations to make public interest work



students feel similarly pressured by the culture to succeed by outperforming others in narrow, prescribed terms, and as a result, they do not use law school as a time to develop the broad-based knowledge needed for them to identify their interests over time, craft rewarding careers, and develop the capacities needed to succeed in those positions.<sup>58</sup>

The culture of competition and conformity also leads students to disparage or under-value those classes that do not fit the norm or advance their position in the competition. Too often, students resist curricular innovation because they worry about how those innovations will affect their competitive position. They also find it difficult to appreciate the value of nontraditional courses in an environment that is set up to evaluate and reward proficiency in the traditionally performative, appellate court-centered classroom. If these experimental courses are simply added on top of the traditional curriculum, and are not accompanied by rethinking the pedagogical structure in which they are taught, the system of evaluation, and their relationship to the mainstream curriculum, they face a strong risk of marginalization.<sup>59</sup>

This dynamic also spills over into students' course selection. Many students shy away from the innovative courses that reformers develop because they believe that they must take the classes on the prescribed route—prescribed not by anyone in particular or out of any sense of what these students really need to know, but rather by what is commonly understood as required. The structure of courses in the first semester of the first year of law school, combined with the law firm culture conveyed by upper-class students, constructs for students a definition of what is real law, as opposed to what is "mere" policy. This structure conveys the impression that appellate litigation and corporate practice constitute law's core, and that law emerges when judicial actors interpret the arguments of lawyers, the policies of legislators, or the decision of administrators.<sup>60</sup> So, many students follow what they perceive to be the prescribed path, signing up for the

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indistinguishable from any other [high profile] law job, so that students won't be scared of it.

58. See sources cited *supra* note 47 and accompanying text; see also Desmond-Harris, *supra* note 55.

59. For example, Columbia recently discontinued two first year required courses - "The Regulatory State" and "Perspectives on the Law" - which were strikingly similar to the ones Harvard has just decided to add. Many students saw these classes as add-ons, and did not appreciate their value. Student dissatisfaction was a primary impetus for this change.

60. Indeed, one of our colleagues relayed a story about an associate at a law firm in which he once practiced who wrote a 40-page memorandum on the law surrounding a particular case. When asked why she failed to cite or discuss any statutes in her lengthy memo, she replied, "You asked me to research the law."

exact same courses as their (very different) peers. Large classes with long lists abound, while smaller, innovative courses with committed faculty in the precise area of a student's particular interest go undersubscribed. Some students choose never to take a small class where they can work closely with a professor. As *Slate* editor Dahlia Lithwick observed, "If there is one law of law-school thinking it's this: 'If everyone else wants something, I must want it, too.'"<sup>61</sup>

The consequence of making choices in this way means that many law students never actually focus on what they came to law school to learn, nor do they pay close attention to their development in their chosen fields. They squander the opportunity law school can provide to find ways of making life in the law meaningful. And they lose the most important aspect of law school—a renewed sense of purpose generated by passionate engagement with real problems, with the issues that brought them to law school in the first place, and with the act of intellectual discovery. They miss out on the chance to interact closely with their peers and teachers, to get to know people from whom they can learn for the rest of their lives, to develop mentoring relationships which will serve them well when they hit the two-year firm limit and want to strike out on a path more closely connected to the reasons they came to law school in the first place.<sup>62</sup> These tendencies are actively encouraged by the law school culture and incentive structure.

This process of detachment from students' sense of purpose is captured eloquently by a quote from a second-year student who was taking stock of himself as part of writing a political autobiography. This student was extremely successful, by conventional measures. Yet, he found himself buffeted by the dominant law school culture. As he put it,

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So I find myself here in law school with fragmented, unstable goals and sense of self. It is amazing to me the extent to which I gently yet firmly placed aside feelings of what's important last year as a 1L. I had never tried to fit in and match a type to such an extent since high school. Law school seemed to require such singular focus on a particular path that appears already carved and laden with promises of success. It was a focus wholly external to self. This path, which I feel I almost inevitably will follow out of fear, laziness, or perhaps great interest, reminds me of a quote from Joseph Campbell in the *Power of Myth*: "If you can see your path laid out in front of you step by step, you know it's not your path. Your own path you make with every step you take. That's why

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61. Dahlia Lithwick, *Letter to a Young Law Student*, SLATE, Aug. 15, 2002, <http://slate.msn.com/?id=2069512>.

62. A study done by the National Association of Law Placement shows that many new lawyers intend to change jobs after two years, and that of those surveyed, fifty-five percent of new associates in large law firm offices, defined as exceeding 250 lawyers, plan to leave within two years. See NALP STUDY, *supra* note 56, at 53-54, cf. *supra* note 55.



it's your path." If I am to become a great lawyer or scholar, I want to make sure I am doing it for my own reasons and on terms with which I'm comfortable.<sup>63</sup>

This student is not the first to notice the similarities between high school and law school culture. In both settings, inhabitants are in a process of transition—to personal or professional adulthood in a setting marked by collective rituals, fascination with authority, competition for prestige, and strong peer and faculty pressure to conform.

The risk aversion that this student describes is antithetical to what one really needs to succeed as a lawyer in today's world. As Todd Rakoff and Martha Minow argue persuasively,<sup>64</sup> what students most crucially lack is "legal imagination." Legal imagination involves creativity and indeterminacy. It requires risk taking and being willing to make mistakes, which are so often the source of innovation. Legal imagination is hard to develop when you are worrying constantly about keeping up, mastering the rules, and out-performing your competition. Indeed, learning theory underscores the importance of intrinsic motivation and trust in facilitating creativity and long-term learning.<sup>65</sup>

Law firm culture reinforces law students' tendency to eschew risk and rely on extrinsic measures as a substitute for intrinsic goals. Patrick Schiltz's important article, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, explains the way in which money assumes the place of grades in providing extrinsic rewards for winning the competition:

Big firm lawyers are, on the whole, a remarkably insecure and competitive group of people. Many of them have spent almost their entire lives competing to win games that other people have set up for them. First they competed to get into a prestigious college. Then they competed for college grades. Then they competed for LSAT scores. Then they competed to get into a prestigious law school. Then they competed for law school grades. Then they competed to make the law review. Then they competed for clerkships. Then they competed to get hired by a big law firm. . . . They're playing a game. And money is how the score is kept in that game. . . . Money is what tells them if they're more successful than the lawyer in the next office—or in the next office building—or in the next town. If a lawyer's life is dominated by the game—and if his success in the game is

measured by money—then his life is dominated by money. For many, many lawyers, it's that simple.<sup>66</sup>

These purely extrinsic rewards do not generally yield happy or ethical lawyers. Again, Patrick Schiltz constructs a powerful picture of professional malaise. Among young associates at big firms, only about one percent was strongly committed to remaining at their firms for at least two more years, while almost forty percent had a strong interest in working elsewhere. Another study found that only five percent of lawyers who left large Chicago firms went to other large Chicago firms; most went to small firms or in-house. For example, according to the Michigan Law School survey, only thirty-two percent of the members of the classes of 1990 and 1991 who were in private practice were "quite satisfied" with their careers five years after graduation, as compared to forty-eight percent of corporate counsel, sixty-seven percent of government attorneys, and seventy-eight percent of public interest lawyers.<sup>67</sup>

This professional demoralization is accompanied by dissatisfaction with the product of this money-driven culture. A recent American Bar Association study documents plunging levels of client satisfaction with large firm representation. Their dissatisfaction was based on firms' failures to keep up with clients' changing needs, to articulate the value they deliver, and to communicate well with clients.<sup>68</sup> Moreover, "absorbing the values of big firm culture will also push a lawyer away from practicing law ethically in the narrower sense of being honest and fair and compassionate." In the highly competitive, money-obsessed world of big firm practice, "most of the new incentives for lawyers, such as attracting and retaining clients, push toward stretching ethical concerns to the limit." Polls show growing public dissatisfaction with the legal profession for its materialism, ethical lapses, and failure to provide leadership in addressing pressing public problems.<sup>69</sup> Thus, changing this culture of

66. Schiltz, *supra* note 21, at 905-06.

67. *Id.* at 883-888. "Lawyers seem to be among the most depressed people in America." *Id.* at 874. Schiltz noted the results of a Johns Hopkins University study, which found that "[w]hen the results were adjusted for age, gender, education, and race/ethnic background to determine to what extent those in each occupation were more depressed than others who shared their most important sociodemographic traits, only three occupations were discovered to have statistically significant elevations of MDD (Major Depressive Disorder): lawyers, pre-kindergarten and special education teachers, and secretaries. Lawyers topped the list, suffering from MDD at a rate 3.6 times higher than non-lawyers who shared their key sociodemographic traits. *Id.*

68. Sandra Prufer, *In-House Counsel Axing*, 5 A.B.A. J. REPORT 36 (2006) (describing the results of an annual survey in which seventy percent of corporate counsel responded that they were dissatisfied with their primary law firms).

69. See Schiltz, *supra* note 21. A recent NALP/American Bar Foundation Study also documents disaffection among young associates at large law firms, where high rates of turnover are attributed, in part, to pressure to bill, long hours, and lack of control over work environment.

63. Political Autobiography of Student A, *Interdisciplinary Perspectives on Law: Race and Gender* (Spring 2005). A political autobiography is a writing exercise in which students integrate their intellectual, professional, and personal identities and aspirations. For a fuller description of political autobiographies, see Race Talks, <http://www.racetalks.org/examples/lawactive.html> (last visited Feb. 14, 2007).

64. Rakoff & Minow, *supra* note 1.

65. Learning theorists such as Charles Silverman, Thomas Good, Jere Brophy, and Theresa Amabile, have found a strong connection between internal motivation, which comes from greater interest in material, and successful active learning. See THERESA M. AMABILE, CREATIVITY IN CONTEXT 107, 131, 133 (Westview Press 1996); THOMAS L. GOOD & JERE E. BROPHY, EDUCATIONAL PSYCHOLOGY 470-475 (3d ed. 1986); CHARLES SILBERMAN, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION 209 (Random House 1970).

competition and conformity is not only important for students' education, it is also important for the future of the profession.<sup>70</sup>

In addition, even those students who reject the values reflected in the dominant culture are affected by their dominance. Many students, disproportionately but not exclusively people of color and women, experience a disconnect between the culture and their own values. They respond by withdrawing, by refusing to participate—even as they continue to care deeply about succeeding.<sup>71</sup> However, this strategy often does not work. As Claude Steele, Geraldine Downey, Bonita London and others have shown, disengagement often negatively affects performance, and it removes the pressure and opportunity to develop affirmative goals.<sup>72</sup> Those law students who have withdrawn intellectually and emotionally are often quite unhappy with their legal education.<sup>73</sup>

The danger facing all students, even those who accept the dominant values of law school culture, is that law school's culturally prescribed metrics of success take over and define what "getting it" means, both in the classroom and in their professional self-definition. Without students even realizing it is happening, their efforts to compete in and win these collective competitions stand in for the essential process of defining what success means, why it matters, what future lawyers need to know to achieve it, and how they define their route in law school and beyond. This is perhaps what Harry Lewis is referring to in the title of his book *Excellence Without a Soul*.<sup>74</sup> When students are disconnected intellectually and emotionally, their learning process is impoverished. Especially when extrinsic

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See NALP STUDY, *supra* note 56, at 48, 53. One of our students recently said that she knows she sold out—that she is doing work disconnected from the reasons she came to law school in the first place—when she went to a firm. Still, she noted, she was able to buy a house, which she never could have done otherwise. And, she could even imagine staying at the firm, because she is working with a partner who was part of the firm when it was small and collegial and who still retains that attitude. What she cannot tolerate is the billable hours mentality—the idea that efficiency is punished. It is not simply that she never knows when she can go home, but that she often receives work at 4pm, due the next morning, which, had she gotten it at 9am, she could have finished in daylight hours.

70. Susan Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 125-26 (1997).

71. See sources cited *supra* notes 4, 44, 47 and 55.

72. *Id.*; see also Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. OF PERSONALITY AND SOC. PSYCH. 896, 898 (2002) (citing various studies that indicate a correlation between expectations of status-based rejection and poorer academic test performance among African Americans); Claude Steele, *Thin Ice: Stereotype Threat and Black College Students*, 284 ATLANTIC MONTHLY 44, 50 (1999) ("[B]lack students internalize negative stereotypes as performance anxiety and low expectations for achievement, which they then fulfill").

73. See Note, *supra* note 47.

74. HARRY LEWIS, *EXCELLENCE WITHOUT A SOUL* 12 (2006).

rather than intrinsic rewards motivate learning, that learning is more likely to be superficial and short term.<sup>75</sup> Moreover, when those extrinsic rewards themselves no longer matter, students simply distance themselves from their environment. For this reason, many third-year law students who no longer require grades to obtain their firm jobs simply check out, doing the minimum necessary to graduate. In addition, even second-year students often stop thinking of themselves as learners when the extrinsic rewards of law school no longer seem accessible. Instead, they begin to substitute material rewards for the rewards that they perceive as unattainable and start to look for other forms of external validation rather than digging for personally meaningful moments of discovery and recognition.<sup>76</sup>

Thus, the internal institutional culture operationalizes the theories of law, concepts of professionalism, and ideas about education that students absorb in law school. It does so in ways that limit the capacity of law school reform to address three increasingly visible mismatches that underlie much current reform: 1) between student idealism (why they came to law school) and what they still mostly study in the identity forming first year (the pedagogical mismatch); 2) between what students are taught and what young lawyers say was most useful about their legal education (the training mismatch); and 3) between the scope of legal need, the range of advocacy work and the career path of law school graduates, especially at elite institutions (the professionalism mismatch). The perceptions about a lack of fit between pedagogical assumptions and professional practice are not new and have been well documented in the scholarly literature.<sup>77</sup> Nonetheless, dramatic changes in the world of practice may be contributing to a more widespread sense of cognitive dissonance.<sup>78</sup>

Many curricular reformers acknowledge these disconnects between the dominant law school curriculum and students' personal, professional, and intellectual needs. Yet, curricular innovators often propose changes that do not take account of the dynamics producing student disengagement, alienation, and intellectual passivity. They properly credit what the first year teaching method does well, without facing up to the impact of the culture of conflict and conformity on students' level of engagement, motivation, and orientation to the legal profession. Many innovations attempt to address these disconnects by

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75. See sources cited *supra* note 65.

76. See *supra* note 48 and accompanying text.

77. See sources cited *supra* note 1.

78. The demands of the global economy coupled with changing twenty-first century technology have created new challenges for law firms as they attempt to respond to changes in internal governance of corporations and to increased associate dissatisfaction. Sturm, *supra* note 70, at 133; Tim Wells, *A Conversation with David Wilkins*, WASH. LAW, Dec. 2001, at 22.

updating the content of the curriculum to meet the demands of a changing world, without addressing the cultural roots of students' withdrawal from the intellectual life of legal education.<sup>79</sup> Many reformers acknowledge the multiple sources of such disengagement, stemming from a loss of idealism and a sense of disconnectedness from real world issues. Yet, curricular reform alone leaves intact the incentive structures and routines that contribute to students' conformity.

It is certainly true that innovations in course content and teaching methods have reinvigorated many students in their enthusiasm for alternative career paths or for reconnecting with the original reasons they came to law school. Our own commitment to experimentation within the law school classroom has been a source of energy for teachers and students alike. Such classroom experiments often produce vibrant intellectual communities with enthusiastic participants. When students are actively engaged in deciding what questions to ask, in helping real clients satisfy legal needs, in creating new frameworks for local, national, and global conflicts, they often find professional as well as deep personal satisfaction.

But such experimentation, focused only on the classroom level, has a limited shelf life. It requires enormous amounts of faculty (and student) time in an institutional culture that views time as a scarce and valuable resource. It must persuade students to take risks when the environment fails to reward them for their creativity and social impact. It must generate ideas about alternative professional choices when students are bombarded with the impression that large law firms are the only viable option, or at least the only career they can get effective help in pursuing. Our experimentation within the law school classroom has had limited effects, due in part to the operation of the larger culture that is at odds with the space we are trying to create within the classroom.<sup>80</sup>

As a result of our own experience as collaborative and untraditional classroom teachers, we are skeptical about the institutional efficacy of reform efforts that fail to engage the incentive

79. Dean Kramer concludes that the problem is primarily one of holding students' attention, a problem that first surfaces, in his mind, in the second and third years of law school.

It's peculiar to me that schools are still spending all this effort on the first year, he said. It's the one that already works. The thinking is you have to put all your focus into the year where you have the students' attention. But for some reason, we can't hold their attention during the second and third year—most likely because it's more of the same.

Powers, *supra* note 7.

80. Of course, curricular reform that is vigorously embraced by law school deans and other administrators has a greater chance of redefining the larger culture, especially where it is accompanied by incentives for faculty/student collaboration in theory/practice formats.

system of legal education. In particular, the DNA of law schools generates a system of evaluation that emphasizes the creation of hierarchies of excellence, hierarchies which reward analytic rigor as demonstrated by winning or scoring points. The internal operating system of legal education integrates a theory of law (cognitive and objective); a concept of professionalism (adversarial and neutral); and a view of education (competitive and uniform). When students and faculty share an institutional culture that is organized around formalized and homogeneous measures of success, departures from that system of evaluation are necessarily marginalized. Such experiments, as important as they may be for the immediate participants, nevertheless fail to generate traction outside the boundaries of the laboratory in which they are formulated.

When reformers fail to address these cultural prerogatives, the new world of law school, even as envisioned by curricular reformers, is likely to reproduce its old world origins. Students will still compete for the good notice of their professors using the metrics of success they are given in the first-year-first-semester large impersonal classroom. They will become more risk-averse the more time they spend in law school. Because of the debt-tuition ratio, they will still flock to high paying, billable hours obsessed law firm jobs. Their twenty-first century legal education may do a better job offering its visitors a passport to explore, but it will do little to unsettle the requirement to conform.

## CONCLUSION

Since Langdell, there has been no systematic effort to realize the theory of law and the concept of the profession with the basic design of the law school as an institution. The points at which institutional culture interacts with the outside world are currently marginal to the creation and transformation of that culture. The changes in society and the legal profession do not influence the dominant routines, incentives, and norms of legal education that shape how people value themselves, assess their success, and establish their priorities. When they can do so, law schools tend to adapt with minor adjustments that can be easily integrated into the existing arrangements and routines.

So, what is to be done? We hope that this essay will highlight a critical first step: making law school culture an integral part of the conversation about law school reform. Culture is not a concept that lawyers necessarily understand, but it is increasingly recognized in both the corporate and public-interest world as a vital dimension of successful change. Law school culture is largely taken for granted; indeed, it is invisible unless explicitly confronted and

contested. Yet, it mediates and shapes the meaning of every programmatic innovation. Even if law schools are not ready to take on problems of culture, it is critical to sustainable reform to acknowledge the importance of background norms, values, and incentive structures.<sup>81</sup>

We understand that many reforms may not take place if they must address up front the incentive structure or the cultural barriers to change. It may be that reform must proceed incrementally to occur at all. Reforms that enhance the capacity of interested faculty to reshape the value structure or the structure of expertise within their classroom may themselves create openings for institutional change. But it is important for modest reforms that do not take account of culture to resist overstating their impact and scope. If the culture is left intact, that fact should be acknowledged so people understand the limits of what has been done and the need for future initiatives.

Over the long run, we think it is essential to open up the discussion to encourage genuine innovation. Our own experience suggests that law school reform will only be sustainable to the extent the reformers do three things. *First*, they need to interrogate structures of evaluation and incentives so broader conceptions of law, the legal profession, and learning can be integrated into the project of reform and help produce more socially and publicly responsible law schools. Evaluation, and the incentives attached to it, cannot be left intact to function primarily as a form of ranking and sorting. Evaluation is the driver of the learning process. The evaluation process is also crucial to integrating intellectual, personal, and professional development. If there is an effort to transform legal education in a way that prods people to use their legal imagination, then methods of evaluation must be tailored to the learning goals and multiple forms of practice comprising the world of law.

*Second*, reformers need to invite into the legal educational reform project, from the very beginning and throughout the process, the various constituencies for legal education. This includes the students whose tuition pays for faculty and administrative salaries, the faculty who dominate most institutional decision-making, and the alumni whose institutional support is critical to the enterprise. It also includes the lawyers, legislators, and judges who interpret and

81. We acknowledge that law schools are not in a world of their own in their emphasis on competition and conformity. They are part of a larger culture that is substituting a preoccupation with status for meaningful connections to other people and to work. Law schools are both leading and following the larger culture, and may be more vulnerable to these larger forces because of the emphasis on adversarialism—winning and losing. For this reason, the reform process is an ambitious project that may require understanding the larger cultural processes that affect and define the meaning of law and of lawyers' work.

narrate the meaning of law as well as the policy makers, administrators, and activists who are guided by its changing meaning. The public mission of legal education will only be addressed when constituencies outside of legal education are actively engaged in the institutional change process at a deeply structural, not just informal, level.

*Finally*, law school reformers need to expand their focus to reach the variety of locations and incentives affecting students' development as lawyers. Most reformers tend to situate the project of legal education inside the realm of the classroom and the curriculum. This is not surprising since the classroom remains one of the few sites where professors and students still dependably interact. Yet the larger institutional incentive structures make classroom-specific changes and curricular reform, alone, inadequate. These incentive structures cast the teaching of law as technical mastery apart from normative commitments. They emphasize the efficiency of a high student/faculty ratio with its unitary view of evaluation. They heighten the preference for styles of teaching based on the way professors learned—and thrived—in law school, a preference that perpetuates a disconnect from students' clinical and experiential learning.

To make meaningful progress, legal educational reform must deal with the culture built into the formative first year, which socializes students to their understanding of law and dramatically affects how students view their place in law school. The period of transition and initiation into the legal profession has to be addressed directly. Research shows that many law students internalize this culture and begin the process of disengagement within the first three weeks of law school.<sup>82</sup> The legal culture students experience during this transitional time period orients them to their place in the law and law's place in the world. The first semester of the first year, therefore, must be broadened pedagogically, experientially, as well as substantively to reflect the multiple meanings, locations, and purposes served by law. And, law's public and normative responsibilities will not be taken seriously unless they figure prominently into this acculturation process.

This process of change does not have to be about changing the identities of the winners in a system that continues to emphasize the distinction between winning and losing. An interim approach is to add on new forms of expertise, such as interdisciplinary knowledge and more integrative forms of conflict resolution and problem solving. In the long run, though, we need to revisit the question of legal education's purpose. This process would require not only rethinking

82. See London et al., *supra* note 4.

## APPENDIX A: The Law School Matrix

the knowledge and skills needed to meet the demands of a complex legal environment, but it would also demand the recalibration of law school's rituals and rewards, for both students and faculty, to advance these multiple learning goals. Such a process would not reject the value of expertise needed to prevail in an adversarial system. Instead, it would de-center adversarialism and place it in a broader array of approaches needed to meet the challenges facing law and lawyers.<sup>83</sup>

In the appendix that follows, we offer a schematic approximation of the relationship between the Langdellian law school and law school reform approaches. We present three different stances toward legal education and its reform. We lay out one way of re-imagining legal education to expand and pluralize concepts of law, expertise, pedagogy and success. Our thoughts are heuristic, not prescriptive. They are intended to invite a larger conversation about ways to unsettle the deeply resonant conventions of competition and conformity. Such a conversation would actively contemplate the need to transform the entire enterprise of legal education to become a more vibrant source of legal imagination inside and outside the institutional walls. Reformers need not adopt our matrix to proceed. Unless reformers find some way to engage with the culture of law school, however, the changes they initiate are unlikely to propel the organic experimentation that will ultimately redefine legal education in its twenty-first century context.

	Langdell's Law School	The Experimental Law School	The Re-imagined Law School*
<b>Role of Law</b>	Formal authority, symbolic legitimacy, court-centered hierarchy as part of unitary system of conflict resolution	Pluralizing formal authority, perpetuating existing metrics of symbolic legitimacy; Layering on of Institutional and transactional lawmaking (includes legislature, ADR, administrative agencies as sources and forms of lawmaking)	Law as a Plural and Contested Concept that involves reconciling multiple forms of authority, rethinking metrics of symbolic legitimacy, and expanding public problem-solving to foster continuous inquiry about law's meaning and role, including the relationship between the "is," the "ought" and the "what might be"
<b>Pedagogical Goal</b>	Thinking like a lawyer	Thinking like a lawyer in context	Building analytic, strategic, institutional, and problem solving capacity; Developing legal imagination
<b>Role of Conflict</b>	Socializing lawyers within adversary system	Including non-adversarial processes filtered through adversarial frame	Multiple forms and formats of conflict explored
<b>Modeling Expertise</b>	Detached and individual mastery; Teacher owns the classroom, signals priorities and creates a status hierarchy	Adding on clinical, interdisciplinary, collaborative learning, framed through adversary structures and values	Contextually and collectively constructed, includes ability to exercise leadership in addressing important social problems
<b>Integration of Personal, Professional, and Academic Goals</b>	Irrelevant	Done by administrative professionals	Integrated and interrogated through collaboration among faculty, administrators, practitioners, and students
<b>Evaluating Success</b>	Rank ordering through collective competitions applying uniform metrics; Scoring points to receive validation, establish pre-eminence, authority and control	Adding on opportunities for more interactive and socially meaningful forms of success	Integrating evaluation into the learning process; Connecting success to personal aspirations and social goals.

\* Law schools in the re-imagined position continuously ask how to create an educational infrastructure consistent with the institution's culture and mission. The willingness to ask and re-ask questions about the role of law school in a democracy is what distinguishes the re-imagined position. See Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1986) ("To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'").

83. In Appendix A, we offer a heuristic approximation of the relationship between the Langdellian law school and law school reform approaches. We present three different stances toward legal education and its reform.