

Tethered to Tradition: Toward an Innovative Model for Legal Education

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INTRODUCTION

There is a widely expressed aphorism that asserts that any publicity is good publicity, and although this may be true for celebrities, law schools in the U.S. are not so fortunate. As a case in point, a series of articles published in the *New York Times* has brought the many challenges of preparing twenty-first century lawyers from the back rooms of the academy to the broadly visible pages of the popular press. These articles have been a public airing of issues and grievances against the outdated curriculum and instructional approaches common to many schools of law—and it has not been pretty. Included among other data that have come to light is that at the national level applications to law school are sharply down over the past decade, while concurrently, debt for law school graduates has skyrocketed. However, beyond mere metrics of law school students and admissions, there is also a moral imperative for reform. Law schools prepare professionals who serve a fundamental role in our democratic society, and thus have an obligation to meet the needs of a vast array of stakeholders, especially those who cannot access much needed legal services.

In 2011, a *Times* article titled *What They Don't Teach Law Students: Lawyering*¹ urged schools of law to produce practice-ready lawyers. Asserting that deteriorating employment opportunities for law school graduates coupled with clients' ebbing financial fortitude to support the post-graduate training of law firm associates through an extended apprenticeship necessitates that immediate reforms are needed throughout the system of legal education.² This *Times* article came following a series of high-profile academically minded publications regarding

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¹ David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

² *Id.*

the reform of legal education,³ and although this critique in the popular press, now several years old, could have served as a national wake up call for a systemic review of law school education, apparently the urgency of the message was not received—or yet believed.

More recently, the *Times* published an article titled, *A Call for Drastic Changes in Educating New Lawyers*.⁴ This article posits that in 2013 we may have finally reached the tipping point, and the resolve for implementing enduring changes in the way lawyers are prepared may have finally arrived. As the stimulus for such a transformation, the article cites “a sharp drop in law school applications, the outsourcing of research over the Internet, a glut of underemployed and indebted law school graduates and a high percentage of the legal needs of Americans going unmet.”⁵

The legal landscape has evolved, and so must schools of law.

My concern is for a missed opportunity for schools of law to *lead* this change process as opposed to adopting a merely reactionary stance to mounting pressures from beyond the halls of the academy. Law faculty must recognize profound structural changes in the legal landscape of the United States, and respond with bold, innovative, and rigorous blueprints for reform. Areas for action-oriented discussion and deliberation should include curriculum scope and sequence across the law school experience, law school admission criteria and funding models, public and private partnerships for professional practice placements of law students as a required and formal element of legal training, and roles and responsibilities of the various classifications of law faculty. The *Times* article suggests that “the vested interests of tenured professors tied to an antiquated system” serves as a significant obstacle for schools of law to consider their own reforms.⁶ I disagree with such an assertion—at least partly. Although many programs are indeed tethered to traditions that may no longer serve the needs of today’s students, and the legal profession writ large, law faculty must be seen as the most potent

³ See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007), available at http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf; see also REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS (David M. Moss & Debra Moss Curtis eds., 2012) (discussing case studies of legal education reform).

⁴ Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11.

⁵ *Id.*

⁶ *Id.*

catalyst for reform, not an impediment to work around. Most certainly, the greatest asset of any law school is its faculty, and as such, in partnership with stakeholders from across the legal profession, faculty must embrace leadership roles in what may be the most significant reforms to shape legal education in a century.

Central to any reform agenda must be a change process driven by evidence. Thus, a *culture of assessment*, and the resulting data required for informed decision-making, is a key element of the next generation law school. Second is the fundamental reconceptualization of the nature of *professional practice placements* within schools of law. As such, this transformed model for legal education will involve stakeholders and foster partnerships that are yet unrealized in today's system of legal education. Finally is the consideration of the notion of *globalization* and its impact on all aspects of both legal education and the practice of law.

In the following section, I will address the key elements of an assessment driven academic culture by drawing upon examples of successful models from my own work in the preparation of teachers.

I. A CULTURE OF ASSESSMENT

The putting into practice of a data driven decision-making model as the key tenet of a culture of assessment within higher education is a relatively recent development. Historically, assessments have largely been thought of at the classroom level to gauge student learning, and have been mostly relegated to a summative role with students tested at the end of a prescribed unit of teaching. This traditional assessment model, often lacking any feedback beyond a grade, score, and/or ranking, is all too familiar to the countless numbers of students who have endured this ritual of formal schooling over the years. The idea that assessment is more than a test designed to offer proof that specified knowledge and skills were learned, and serves to *inform the learning process* itself, helped pave the way to considering the possibilities of collecting ongoing evidence and making informed decisions at the program and/or institutional level. In that sense, both formative and summative measures have been re-conceptualized and scaled up beyond classroom walls and applied in institutional and programmatic contexts to help bring about a culture of assessment.⁷

⁷ In a classroom, formative assessments are typically of a range of procedures

Assessment in legal education is complex and layered. The Law School Admission Test (LSAT) remains an integral element of admissions while the bar exam looms for graduates as a summative measure used to determine if one can practice law within a particular jurisdiction. The impact of these landmark pre- and post-measures on the culture of legal education cannot be overstated. For one, they perpetuate a tone of individual high-stakes competition that often carries over to assessments in individual courses across the three years of law school. Although this article will not directly address the implications of course assessments tethered to traditions (such as the curve) on student motivation and learning, it is important to recognize schools of law as a challenging context for assessment reform.

In terms of programmatic and institutional level assessment, the American Bar Association (ABA) accreditation processes and standards are a primary driving force for self-evaluation by law schools. An important question to consider in this regard is whether the ABA dominance over accreditation has actively promoted strategic reforms or has served to essentially maintain the status quo. Rigor and excellence are not mutually exclusive with innovation and reform. Perhaps the legal education enterprise could have averted many of the current calls for reform if schools of law had been routinely collecting, analyzing, and acting upon comprehensive datasets that brought to light the many issues facing them today.⁸ That is, a culture of assessment could serve to inform key stakeholders in legal education to proactively deal with significant issues as they arise.

So what does a culture of assessment look like? My own experiences as a faculty member in the Neag School of Education at the University of Connecticut has afforded me the opportunity to work in a rich assessment driven culture in higher education, and the core principles of our assessment program may shed some light on this critical question. As noted in the *Neag School of Education Assessment Plan*:

The philosophy embraced by the [Assessment Office] . . . is that each person has ownership in assessment as the Neag School strives for a model of excellence, embracing and promoting a culture characterized by evidence-based decisions. . . . [Assessment is] a

employed by teachers during the learning process in order to inform and modify teaching and learning activities to improve student attainment. At the institutional level, they are often ongoing measures designed to gather feedback used for program planning.

⁸ Commonly cited issues facing legal education include preparing practice-ready graduates, falling admissions numbers, and the increasingly large debt burden of law students.

collaborative process. . . . [It is facilitated] by the Neag Assessment Committee (NAC) and our various subcommittees. The NAC team has representation across all levels (students, faculty, staff, administrators) and units ⁹

The assessment plan, developed by the assessment committee, has incorporated many best practices by embracing the following:

- A focus on facilitating an assessment culture.
- A system of participatory engagement in assessment development and reporting by the Neag Assessment Committee and others.
- Formative and summative assessments at both the candidate and program level facilitating ongoing feedback on a continual basis.
- Internal data with efforts made to ensure that assessments are credible, fair, consistent, accurate, and unbiased.
- Information available from external sources such as state licensing exams, evaluation through clinic experiences, employer reports, and alumni studies.
- Alignment to *all* accreditation processes from the university to program levels.
- Assessment research opportunities.
- A system for reviewing and approving the assessment plan.¹⁰

As such, assessment is integrated into the day-to-day roles and responsibilities of the members of our learning community, but our culture did not materialize overnight. Purposeful and strategic investments in developing a culture of assessment is a years-long process, but one that is necessary for legal education as they engage in reform-minded work in coming years.

As a first step, an assessment committee must be convened and charged with the purposeful establishment and/or advancement of an assessment driven culture. Ideally, a full-time Director of Assessment should oversee such a committee. However, perhaps novel and mutually beneficial arrangements

⁹ THE NEAG SCHOOL OF EDUCATION ASSESSMENT PLAN 15–16 (3rd ed. 2012), available at <http://assessment.education.uconn.edu/assessment/assets/File/Assessment%20Plan%203rd%20Edition-%20FINAL.pdf>. For associated assessment reports, visit <http://assessment.education.uconn.edu/>.

¹⁰ THE NEAG SCHOOL OF EDUCATION ASSESSMENT PLAN, *supra* note 9, at 33.

can be made with other schools or colleges at the university to engage faculty members who have particular expertise in assessment if a full-time position with an appointment at the law school is not feasible.¹¹ Regardless, resources will be required to both initiate and maintain a data-driven culture and should include incentives for faculty, professional staff, and students who will serve on the assessment committee and lead such an effort. As a starting point, such incentives for faculty must include serious recognition of work in this area for promotion and/or tenure.

As a key outcome for this shift to a culture of assessment to truly be considered successful at the institutional level, data-driven decisions should ultimately be proactive in reforming the work of the law school and not merely be responsive to crises or challenges after they have arisen. That is, a functional culture of assessment can serve as a catalyst for reform.

In the following section, beyond a culture of assessment, I will address specific recommendations for reform in terms of law school curriculum and practice.

II. PROFESSIONAL PRACTICE

Professional schools within higher education must balance the responsibility for academic rigor and excellence with practical training. Although these notions are not mutually exclusive, they require a comprehensive curricular approach along with extensive resources to facilitate both elements of this dual mission. This is true for schools of law, business schools, medical schools, and schools of education—among others.

A key to the success of promoting a rich knowledge base and skill development within the context of professional practice is providing opportunities for students to work directly with mentors *in situ* as a formal element of their education. For doctors, this means compulsory work in hospitals and/or clinics and for teachers it involves student teaching and other internship opportunities embedded within K–12 schools. Medical schools and teacher preparation programs both *require* that their students balance academic classes with more applied learning in the context of professional practice.¹² Interestingly, although law

¹¹ Faculty members with expertise in testing and measurement, psychometric development, qualitative methodologies, curricular and instructional design, and curriculum theory often have appointments in schools/colleges of education along with other units across campus.

¹² See COUNCIL FOR THE ACCREDITATION OF EDUCATOR PREPARATION, DRAFT

schools may encourage such experiential learning via clinics, externships, and summer associate positions, mandating applied learning within an actual professional context is rarely required as a formal element of law school. Historically, such so-called practical or real-world learning was put off until the early years of employment following law school, but as noted earlier, firms and their clients are unable and/or unwilling to underwrite what boils down to post-graduate training. Additionally, law faculty may view such practice-oriented learning as less rigorous than traditional doctrinal classes and seemingly have been reluctant to embrace such experiences as mandatory within the context of the three years of formal law school. Breaking the tethers of tradition, a key recommendation of this article is that schools of law should move to implement formal professional practice experiences as a core requirement of legal education.¹³

But what are the programmatic implications for requiring such professional practice placements? Initially, schools of law must consider three key elements, including the scope and sequence of their curriculum, the capacity and nature of

RECOMMENDATIONS FOR THE CAEP BOARD 13 (2012), *available at* http://caepnet.files.wordpress.com/2013/02/draft_standards3.pdf for standards for the preparation of K–12 teachers, and see ASSOC. OF AM. MED. COLLEGES, <https://www.aamc.org/about> (last visited Jun. 10, 2013) for information on medical school accreditation.

¹³ It is important for readers of this article to note the perspective I bring to such a recommendation. I am currently a faculty member and the Director of Teacher Education at the University of Connecticut. Our core teacher preparation program is nationally ranked. In its annual review of the best graduate schools in the country, *U.S. News and World Report* ranks the Neag School twenty-eighth among the nearly 300 private and public education schools surveyed. *Best Education Schools*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-education-schools/edu-rankings/page+2> (last visited June 28, 2013). Also significant are the rankings of the Neag School's core programs that are individually assessed by *U.S. News*. Three rank among the nation's top twenty-five, including: Elementary Education (eighteenth), Special Education (twelfth), and Secondary Education (eighteenth). *Elementary Teacher Education*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-education-schools/teacher-education-rankings?int=38fa2c> (last visited July 7, 2013); *Special Education*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-education-schools/special-needs-education-rankings?int=38fa2c> (last visited July 7, 2013); *Secondary Teacher Education*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-education-schools/secondary-teacher-education-rankings?int=38fa2c> (last visited July 7, 2013). Our program requires three years of full-time study, has competitive admissions, and awards a graduate degree. Although this may not be the norm for teacher preparation in the United States, it does allow for a reasonable comparison between the Neag School of Education Integrated Bachelors/Masters Program and many schools of law. See Wendy J. Glenn, David M. Moss, Douglas Kaufman, Kay Norlander-Case, Charles W. Case, & Robert A. Lonning, *Teachers as Leaders, Teachers as Researchers, Teachers Who Care: The University of Connecticut's Journey*, in *PORTRAIT OF A PROFESSION: TEACHING AND TEACHERS IN THE 21ST CENTURY* 63–84 (David M. Moss, Wendy J. Glenn, & Richard L. Schwab eds., 2005) for a detailed description of this program.

stakeholder partnerships, and the role and responsibilities of law faculty. As law faculty discuss and debate the merits of requiring professional practice placements, they need not re-invent the wheel. Schools of education have been dealing with such issues for decades, and exploring models of teacher preparation and/or other professional school exemplars may offer some initial insight into the challenges facing schools of law as they ponder this new reality.

In terms of curriculum, there are three essential and distinct elements common to many teacher education programs, including core courses, school placements, and seminars. The core courses will perhaps be the most familiar to law professors in that they are content-focused, university classroom-based courses that convey a rich tradition of knowledge within the discipline. They may be most analogous to doctrinal courses. In fact, in schools of education they encompass a body of knowledge that may even include case studies of educational law and policies relevant for teachers in training. Core courses are often taught early in a program and serve to lay a foundation of essential knowledge to becoming a professional educator.

However, these core courses differ from many law school programs of study in that they purposefully establish foundational knowledge for a subsequent classroom teaching practicum as a required and formal element of a program. These core courses may also be grouped around disciplinary areas, including the various subject areas in secondary education, elementary education, music education, special education, and the like. In schools of education, teacher preparation candidates have self-selected into tracks of specialty for the duration of their program. In many programs, however, students are able to study in areas outside of their specialty by pursuing endorsements in related areas.¹⁴ This notion of specialty tracks within legal education may also offer schools of law an opportunity to better connect foundational coursework with subsequent professional placements within a program.¹⁵ Such specialties would also have the added benefit of encouraging law students to not merely shop

¹⁴ Endorsements typically require as many as four to five classes in an area beyond the primary area of specialty. Such endorsements to a teaching license are often governed by the state in which a candidate is seeking professional certification.

¹⁵ Such specialty should reflect the strengths and interests of the law faculty. For a discussion on specialty areas in legal education, see Peter V. Letsou, *The Future of Legal Education: Some Reflections on Law School Specialty Tracks*, 50 CASE W. RES. L. REV. 457 (1999).

around for electives based upon questionable criteria, but offer a strategic focus for study across the years of law school.

The professional placements themselves are considered the second curricular element in teacher education. Although a full semester (fifteen-week) student teaching experience has been the traditional norm for schools of education, many educational programs have instituted pre-student teaching placements as well as those that may follow a student teaching semester. In that way, required professional practice placements may serve as a capstone requirement and/or occur at several strategic points throughout the duration of a program.

The key to success in all placements is in the nature of the placement and associated partnership between a school of education and the K–12 school that hosts the student. Keep in mind the placement of candidates in schools is more than an opportunity to afford students work experience, and is regarded as a formal and intense experiential learning opportunity. Thus, the nature of the experience differs from a sink-or-swim model, nor does it relegate the teacher education candidate to low-level administrative support tasks. It is a professional practice experience that requires a collaborative mentor and a supportive school community that have a vested interest in the preparation of teachers. Although typically mentor teachers receive a small stipend for their effort, mentors often work far beyond what their remuneration might imply in terms of commitment. Additionally, mentor teachers are often trained and certified to work with student teachers.¹⁶ As such, the very nature of the partnership between schools and teacher education programs are designed around the purposeful training of new teachers. All parties understand such a commitment is essential for schooling, and many individuals view this collaborative endeavor as an honorable obligation to both the profession and society.

Understanding this partnership as a principled undertaking for the preparation of lawyers is key to transforming the dominant model for legal education, where such collaborative work between schools of law and stakeholders has yet to realize its potential. The various stakeholders in the legal professions, including those in the private and public sectors, must be

¹⁶ Such training can be quite variable from state to state, and need not be extensive. In many cases, it may be as little as a full-day workshop designed to help mentor teachers learn to offer critical feedback to student teachers and to familiarize them with standards for teacher preparation. For an example of a Connecticut mentor program, see *Training, TEACHER EDUC. AND MENTORING PROGRAM*, http://www.ctteam.org/?page_id=799 (last visited June 9, 2013).

encouraged and incentivized to plan and work collaboratively with law schools in the preparation of lawyers. Moving beyond the potentially exploitive model of “free labor” or other unsupported work prospects, there is real potential to offer law students structured professional placement opportunities for learning many of the skills, habits of mind, and knowledge of what real lawyers need to know and be able to do in a given area of practice.

The third and final element of course work fundamental to a teacher preparation curriculum, often called *seminars*, supports both the professional practice placements and core foundational course work by providing a safe intellectual space to reflect upon what transpires in each context. Seminars, taught by full-time professors and/or practicing professionals in an adjunct capacity, are often a dynamic, discussion-based learning environment where students consider their emerging understandings from core courses and weigh that knowledge against what they actually experienced during their professional practice placement. In that sense, seminars serve as a bridge from theory to practice. Typically, each professional practice placement is accompanied by a seminar course; however, the grouping of students in seminars can vary depending on the nature of the associated placements. In teacher education, whether the school placement is a short-duration early program experience or perhaps a post-student teaching internship to offer a broader perspective on schooling¹⁷ will determine the focus and grouping of students in a seminar. Likewise, in legal education it may be beneficial to group candidates who have similar placement experiences, such as those interning as in-house counsel, and at other times it might be beneficial to group students who are having differing experiences such that they can be exposed to a wider range of perspectives (perhaps in a first-year short-duration placement designed to help law students choose an area of specialty).

Thus, taken together, the three areas of a curriculum (core courses, professional practice placements, and seminars) can be designed to create a rigorous, coherent, and balanced approach to

¹⁷ An example of a post-practice teaching internship is one that involves work analyzing school-wide assessment data and developing new curriculum to meet an identified learning gap in a school. Note that such an internship demands that a candidate has completed their student-teaching and has gained base-line professional practice experience and is now ready to contribute to a school in a value-added capacity as a professional educator beyond day-to-day teaching. That is, it extends the experience for the student in ways that are essential to both the candidate and partner school.

the preparation of lawyers. Beyond the aforementioned curricular implications required for a transformed model of legal education, the roles and responsibilities of law faculty must also be considered. In a recent publication that directly addressed this notion, I noted:

For far too long there has been an unnecessary compartmentalization between tenure stream and non-tenure stream faculty. Certainly there must be a distinction between such lines, but different professional identities and roles do not necessitate a partition of such severe consequence that the law school mission is in peril.¹⁸

My co-author and I went on to note:

First and foremost, law schools should seek to clarify (and perhaps standardize) such designations of all permutations of faculty. Such a forthright conversation encompassing the responsibilities and designations of tenure, short- and long-term contract positions, clinical faculty, instructors and adjuncts, and such can yield much needed clarifications that will help all faculty achieve their potential, consistent with their professional endeavors and identities. We acknowledge that a hierarchy will persist even with careful consideration of faculty roles, but it is not the hierarchy alone across faculty ranks that is holding back the potential for faculty to work collegially toward common goals as much as a lack of clarity of roles and responsibilities within the legal education academy.¹⁹

Given the potential magnitude of pending reforms, the clarity of roles and responsibilities for faculty teaching in a model that supports a full range of core courses, seminar courses, and associated professional practice placements (not to mention elective courses, skill courses, and the like) is desperately needed. It is here that law faculty must not get mired in tradition, but address fundamental questions underpinning the balance of scholarship and teaching.

Law schools, like other areas in higher education, offer a unique and necessary intellectual space to explore and debate scholarly issues. Publications are often the result of such research activity. Such is central to the mission of higher education, and the pursuit of scholarship is a fundamental element necessary for a free and open society. The challenge for law schools is to create a workable professional staffing model that effectively balances this critical research endeavor with the equally important mission of preparing practice-ready lawyers

¹⁸ David M. Moss & Debra Moss Curtis, *Essential Elements for the Reform of Legal Education*, in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS 217, 220 (David M. Moss & Debra Moss Curtis eds., 2012).

¹⁹ *Id.* at 221.

who are immediately ready to make important contributions to their chosen area upon graduation.

Balancing a dual mission is challenging, and there is no one replicable model that will meet the needs of every law school. Such should be positively regarded in that law schools with differing missions and resources can explore solutions to meeting this challenge in ways that make programmatic sense for their particular circumstances. However, common to all models of reform is the acknowledgement that law schools are resource-intensive organizations and require careful consideration of the roles of faculty. As discussed, professional school exemplars across the academy may inform possibilities for serving the multi-faceted mission of schools of law and the deliberate consideration of business, education, and medical models of professional preparation should serve as a starting point as reform-minded programs plan for the future.

III. GLOBALIZATION AND LEGAL EDUCATION

As law schools look to the future, one key area that will likely have a significant impact on both their teaching and scholarship is the notion of globalization. Across many facets of higher education, this notion has served as a catalyst for reform.²⁰ However, a considerable challenge in this area is that many faculty and administrators leading such efforts may not have had considerable experiences in this context. In a recent book designed to promote education and policy reforms in response to globalization and a changing world, the authors note: "With some exceptions, educators and policymakers concerned with education, however well meaning, have not themselves had the opportunity to think much about education or a truly global era; and even if they have, their own education has rarely prepared them to undertake such education seriously and effectively."²¹

²⁰ See Melanie Agnew, *A False Dichotomy of Serving Either the Local or the Global Community and its Impact on Internationalization of the University*, 34 J. HIGHER EDUC. POL'Y & MGMT. 473 (2012). The author argues that strategic planning is necessary for addressing issues of internationalization.

²¹ Howard Gardner, *Preface* to VERONICA BOIX MANSILLA & ANTHONY JACKSON, EDUCATING FOR GLOBAL COMPETENCE: PREPARING OUR YOUTH TO ENGAGE THE WORLD, at x (2011), available at <http://asiasociety.org/files/book-globalcompetence.pdf>. For a discussion on promoting global competence through education and policy, see VERONICA BOIX MANSILLA & ANTHONY JACKSON, EDUCATING FOR GLOBAL COMPETENCE: PREPARING OUR YOUTH TO ENGAGE THE WORLD (2011), available at asiasociety.org/files/book-globalcompetence.pdf.

Thus, at the outset, those leading reform efforts in legal education must purposefully consider the implications of a globalized world and the evolving roles of lawyers in such largely uncharted territory.

The very construct of globalization is multi-faceted and complex, and incorporates such ideas as global development, intercultural communication, government and society, economic development, conflicts, humanitarian efforts, and human rights.²² Globalization has been defined as both the processes and consequence of shrinking distances between cultures and people around the world.²³ Considering the implications of such, Yong Zhao²⁴ notes: “When global distances shrink, human activities are no longer confined by geographical locations or bounded by political entities. . . . Events in one part of the world could be experienced in real time in other parts of the world. . . .”²⁵

As such, twenty-first century lawyers working in virtually any area of practice are likely to face issues underpinned by such connectedness of globalization, and their professional training must address this evolving reality.

Perhaps one mechanism to address the many challenges associated with globalization would be to consider specialty areas within law schools along with international experiences as a formal element of legal training. Leveraging an earlier

²² For a discussion of issues underpinning global development, see *Edexcel GCE Advanced Subsidiary in Global Development (8GL01)*, EDEXCEL (2013), www.edexcel.com/migrationdocuments/GCE%20New%20GCE/AS_Global_Development_specification.pdf. Edexcel is the United Kingdom's largest awarding body, offering academic and vocational qualifications and testing to more than 25,000 schools, colleges, employers, and other places of learning in the United Kingdom and in over 100 countries worldwide. This qualification is designed to develop students' knowledge and understanding of global development. Students develop understanding of the contested nature of global development, the key concepts and the areas of action within which development occur. For a discussion on intercultural communication, see Kenneth Cushner, *Intercultural Competence for Teaching and Learning*, in *INTERNATIONALIZING TEACHER EDUCATION IN THE UNITED STATES* 41 (Beverly D. Shaklee & Supriya Baily eds., 2012).

²³ See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 236, 375 (3d ed. 2007).

²⁴ Dr. Yong Zhao is an internationally known scholar, author, and speaker. His works focus on the implications of globalization on education. He has designed schools that cultivate global competence and founded research and development institutions to explore innovative education models. He has published over 100 articles and 20 books, including *Catching Up or Leading the Way: American Education in the Age of Globalization*. He is currently the Associate Dean for Global Education in the College of Education and a Professor, Department of Educational Methodology, Policy, and Leadership at the University of Oregon. See YONG ZHAO, *CATCHING UP OR LEADING THE WAY: AMERICAN EDUCATION IN THE AGE OF GLOBALIZATION* (2009).

²⁵ Yong Zhao, *Preparing Globally Competent Teachers: A New Imperative for Teacher Education*, 61 J. TEACHER. EDUC., 422 (2010).

recommendation in this article that schools of law require professional practice placements as a routine element of their program, perhaps law schools should consider international professional practice placements as one option for meeting such a requirement.²⁶ Affording law students the opportunity to not only specifically address issues of globalization through course work and the like at their home institutions, international professional placements take this to the next level by folding in cross-cultural experiences in the study of global issues. In essence, this would meet several pressing needs simultaneously as students received real world learning in international contexts.

Such recommendations are already in place at several law schools. New York University (NYU) School of Law has made strides toward addressing issues of globalization as described in a 2012 *New York Times* article:

N.Y.U. Law's new curriculum plan is highlighted by experience outside of the school's Greenwich Village campus. While the school has dabbled in foreign study, it is now redoubling its focus on international and cross-border legal practice. N.Y.U. Law is preparing to send as many as 75 students to partner law schools in Buenos Aires, Shanghai and Paris, where the students will study the legal systems and the languages of those regions. . . .

Another key initiative gives students the chance to build a specialty. Called "professional pathways," the program will offer eight focused areas of instruction ²⁷

The *Times* article reminds us the motivation behind such reforms: "The move comes as law schools are being criticized for failing to keep up with transformations in the legal profession, and their graduates face dimming employment prospects and mounting student loans."²⁸

Even more recently, other law schools have made moves which take into account professional practice placements in a global context as well: "All schools of law, including the elites, are increasing skills training by adding clinics and externships. Starting this fall, the University of Virginia will allow students

²⁶ "The [ABA] has adopted three sets of Criteria applicable to study abroad: Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools (revised August 2010); Criteria for Approval of Semester and Year-Long Study Abroad Programs (revised August 2010); and Criteria for Student Study at a Foreign Institution." *Foreign Study*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/foreign_study.html# (last visited June 9, 2013).

²⁷ Peter Lattman, *N.Y.U. Law Plans Overhaul of Students' Third Year*, N.Y. TIMES, Oct. 16, 2012, at B1.

²⁸ *Id.*

to earn a semester of credit while working fulltime for nonprofit or government employers anywhere in the world.”²⁹

Such moves by these law schools, and others, not only address several present-day challenges facing legal education, but they appear proactive reforms designed to anticipate challenges yet to come.

CONCLUSION

Schools of law in the United States are faced with significant challenges ranging from bleak employment prospects for their graduates to fundamental questions regarding notions of whether those graduates are even practice ready—and yet remain tethered to tradition. Regardless of the position or status of any given law school, such criticisms are not to be readily dismissed as they may be symptomatic of more fundamental issues facing all of legal education.

Schools of law are an essential element within higher education, and thus society. Although law schools face many of the same challenges of other professional schools across the academy,³⁰ they also share the reality that their graduates, along with teachers and others, play an indispensable role in a free and open society. But law schools are mired in tradition, and tethered to outdated modes of curriculum and assessment, thus falling short of their potential to serve humanity.

If schools of law are to routinely produce graduates who meet and exceed the needs of individuals and society, reforms should not merely be driven by responding to the challenges of today, but by anticipating the needs of tomorrow. Reforms discussed in this article—establishing a culture of assessment, implementing required professional practice placements, and considering globalization and its impact on curriculum reform—can all respond to today’s challenges while positioning law schools for the twenty-first century.

Moving ahead with such reforms does not demand that law schools abandon all of their rich traditions, but at the same time they must not be held hostage to a business-as-usual model for the mere sake of them.

²⁹ Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES, Mar. 1, 2013, at A14.

³⁰ Such challenges are summed up as balancing the need for academic rigor and legal scholarship with more pragmatic skill development necessary for practice-ready graduates.

The overarching law school model will likely be quite different a generation from now than it is today. Such a transformation should be informed by both real-world considerations of law students, law schools, and their graduates as well as guided by the moral imperative of service to society. Breaking many of the tethers to tradition is a necessary first step. A key question for law school faculty to consider is: Do they want to merely react to mounting pressures for reform in a piecemeal fashion while clinging to outdated practices, or shape their own future in strategic, purposeful, and exciting ways?

The Fully Formed Lawyer: Why Law Schools Should Require Public Service to Better Prepare Students for Private Practice

*Sara K. Rankin**

INTRODUCTION

By now, it is commonly accepted that law schools are graduating students who are under-prepared for practice in the real world.¹ In other words, students that perform adequately in the classroom seem to struggle or suffer—to an unnecessary² degree—when they enter practice. It is as though law schools are graduating inchoate or “partially formed” lawyers, who demonstrate classroom fluency but lack meaningful ability to grapple with the wrinkles and complexity of real-world practice. And law schools, institutions that are extremely resistant to change, often defend the status quo because to do otherwise would be an admission that change is necessary.

Some law faculty and administrators protest that it is not fair to require law schools to graduate fully formed lawyers. This is a reasonable point, but it ignores the plain reality that law schools can and must do more to prepare our students for

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¹ See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES], available at http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]; SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

² By “unnecessary,” I mean to acknowledge that students necessarily experience some discomfort as they transition from a student into a full-time practicing lawyer. However, this degree of discomfort is unnecessarily amplified when law schools deliver students into practice with inadequate hands-on training. Discomfort is to be expected; suffering is unnecessary. Students who receive hands-on experience in law school should be better equipped to handle the messiness and complexity of practice with less stress and confusion.

practice. Of course, it is not reasonable to expect law schools to produce graduates with the same capabilities as a seasoned partner because the latter has multiple years of real-world experience and law school is only a three-year program. But what about an incoming second-year associate? Should there be such a tremendous gap in abilities and aptitudes between a new law school graduate and a lawyer with only one year of practice? What if the new graduate had attended a law school that placed a premium on training and real-world experience, but the second-year associate had not? Shouldn't the intervention of actual practice experience translate into greater skills and abilities? Of course it does.³ Millions of years of human evolution tell us so; decades of clinical training repeat the refrain.⁴

Law schools can no longer resist reform. A magic storm is finally brewing: economic pressure,⁵ curricular needs,⁶ and

³ Some scholars compare the dilemma of a law student's practice-readiness to that of medical students: We don't allow medical students to graduate and practice without extensive hands-on training, so why do we allow law students to practice on human beings for the first time after graduation? Isn't the production of under-developed lawyers particularly problematic when current economic times make lawyering competence terribly important, not only for our graduates who compete in the job markets, but also for the increasing number of unrepresented clients? For examples of scholarship comparing medical school to law school, see Beverly I. Moran, *Disappearing Act: The Lack Of Values Training In Legal Education—A Case For Cultural Competency*, 38 S.U. L. REV. 1 (2010) (making the comparison with respect to values training and listing a variety of similar articles that contrast medical and law school); Jennifer S. Bard, *What We in Law Can Learn from Our Colleagues in Medicine About Teaching Students How to Practice Their Chosen Profession*, 36 J.L. MED. & ETHICS 841 (2008) (comparing pedagogical goals and practices between medical and legal education).

⁴ See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 916 (1933) (considered by many to be the first published argument for clinical legal education); John S. Bradway, *The Legal Aid Clinic as an Educational Device*, 7 AM. L. SCH. REV. 1153, 1155–58 (1934) (describing the goals and methods of clinical education); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 325–34 (1982) (applying principles of adult education to clinical teaching); Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (outlining the justifications and promise of clinical education). More recent assessments of the benefits of clinical and experiential education affirm its value. See, e.g., CARNEGIE REPORT, *supra* note 1, at 58, 121, 125; cf. Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 370, 396 (2008) (reporting “both benefits and limitations of clinical education” from a small empirical study).

⁵ See BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 107–85 (2012); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 608–10 (2010).

⁶ The current call for curricular reform is frequently linked to the need to improve student readiness for practice:

Both the Carnegie Report and *Best Practices* voice considerable concern with the chasm perceived to lie between legal education and the legal profession. Each considers the current state of legal education and makes generalized recommendations about how to bridge the chasm. Currently, these reports observe, the bridge is too underdeveloped to safely carry across the tens of thousands of law graduates who enter the profession each year. But through the support each project provides for modifying the traditional curriculum in

professional insistence⁷ are generating a refreshed demand for reform that law schools ignore at their own peril. Law schools that continue to graduate inchoate or partially formed lawyers may finally become obsolete. Legal education reform must focus on training our students to be skilled lawyers, ready to enter the profession.

This symposium asks how legal education can better prepare students to enter private practice, presumably with a special focus on the necessary skills for the corporate or private sector. But the core lawyering skills every student needs do not change depending on whether they practice in the public or private sector. The bottom line is that to create practice-ready or “fully formed” lawyers, law schools should reform to prioritize hands-on training in public service.

“Public service training” in law school can take many forms, but I am specifically referring to programs that engage students (1) in real work, (2) on a real legal problem, (3) with a real client (4) that is of limited means or would otherwise be underrepresented or unrepresented.⁸ This sort of definition is familiar to clinical legal education, but these hallmarks are also increasingly surfacing in legal writing courses, externships, and other integrated skills projects, even as early as the first year of law school.⁹

the direction of contextual legal education, each offers hope that curriculum innovation can strengthen and widen the passageway.

Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 524–25 (2011–12). I have also examined this link. See generally Sara K. Rankin, *Tired of Talking: A Call for Clear Strategies for Legal Education Reform: Moving Beyond the Discussion of Good Ideas to the Real Transformation of Law Schools*, 10 SEATTLE J. SOC. JUST. 11 (2011).

⁷ See generally Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499 (2011).

⁸ There is significant debate in the academy over the definition of public interest, the appropriate contours of pro bono work, and the relationship between clinical education and social justice. See, e.g., David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 328–29 (1996) (examining definitions of public interest law); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 4 (2004); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23 (2006) (discussing the balance between clinic social justice missions and teaching practical skills to law students); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2107 (2004) (discussing the challenges of integrating social justice into clinical education).

⁹ See, e.g., Mary Nicol Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC. 586 (2012); Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. PUB. INT. L.J. 429 (1999); Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441 (2006); Sara K. Rankin et al., *We Have a Dream: Integrating Skills Courses and Public Interest Work in the First Year of Law School*, 17 CHAP. L. REV. 89 (2013); Nantiya Ruan, *Experiential Learning in the First-Year*

It may seem counterintuitive to suggest that the key to *private* practice skills is to emphasize *public* interest experience during law school, but there are several reasons why the private sector should support it: through public service, law students can (1) help to address the current access to counsel crisis; (2) learn their moral and professional obligations to provide pro bono service; (3) receive incomparable training in core lawyering skills; and (4) sustain their emotional and psychological health by connecting with relevant, meaningful work.

I. LAW STUDENTS CAN HELP TO ADDRESS THE ACCESS TO COUNSEL CRISIS

A first and fundamental point is that requiring public service throughout law school helps to address the access to counsel crisis. The crippling lack of representation for non-profits and indigent populations—people and entities that typically cannot afford legal services—is well documented.¹⁰ The current economic crisis and withering funds for legal aid only exacerbates this lack of access to counsel. Law students and faculty are capable resources that can help to fill this gap.¹¹

Although clinics are common conduits to facilitate the provision of student service to those in need,¹² law schools can use legal writing faculty,¹³ externships,¹⁴ and other skills programs¹⁵ to engage students in real-world lawyering experiences. To maximize positive impacts on the access to counsel crisis and to extend the pedagogical benefits to students, these public service experiences can and should be offered as early as the first year of law school.¹⁶

Curriculum: The Public-Interest Partnership, 8 LEGAL COMM. & RHETORIC: JALWD 191 (2011).

¹⁰ See generally Douglas L. Colbert, *Clinical Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono*, 18 GEO. J. ON POVERTY L. & POL'Y 309 (2011).

¹¹ *Id.* at 325 (discussing how “law students and faculty are natural resources for devoting their skills to address injustice” and to redress the lack of access to counsel).

¹² See generally Colbert, *supra* note 10.

¹³ See *supra* note 9.

¹⁴ See generally Liz Ryan Cole, *Externships: A Special Focus to Help Understand and Advance Social Justice*, in THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE 326 (Frank S. Bloch ed., 2011); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240 (2009).

¹⁵ Maranville et al., *supra* note 6, at 518 (acknowledging the “hybrids and varieties [of experiential courses] that defy easy categorization.”).

¹⁶ See *supra* note 9.

II. ALL LAWYERS HAVE A MORAL AND PROFESSIONAL OBLIGATION TO PROVIDE PRO BONO SERVICE

Even if the lack of counsel crisis was not compelling as it plainly is, every lawyer has a moral and professional obligation to perform pro bono work. It is never too early for students to embrace these obligations; it is never too early for faculty to model them. Service in the public interest is a core part of a lawyer's purpose and identity. For example, the ABA's Model Rules of Professional Conduct consistently and explicitly promote pro bono service and require lawyers to enhance "the quality of justice."¹⁷ The New York Bar recently implemented a mandatory pro bono requirement for new attorneys, and the California and New Jersey Bars are likely to follow suit.¹⁸ New York Chief Justice Jonathan Lippman, who was instrumental in passing the New York pro bono requirement, predicts that a pro bono mandate will be "the norm in the United States" in the "next five or [ten] years."¹⁹ Similarly, "leaders of bar associations around the country" are embracing these professional and ethical

¹⁷ MODEL RULES OF PROF'L CONDUCT pmbl. (2012); *see also* Colbert, *supra* note 10, at 313 (discussing the Model Rules). These values are consistently embraced in ABA reports, including the MacCrate Report, which recommended that law schools educate students to "striv[e] to promote justice, fairness, and morality" and to "improve the profession." Ruan, *supra* note 9, at 195 (discussing these themes in the MacCrate Report).

¹⁸ *See* Karen Sloan, *Pro Bono Mandate Picks Up Steam*, NAT'L L.J. (April 22, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202596770850&Pro_Bono_Mandate_Gains_Steam. In fact, the California Bar's Task Force on Admissions Regulation Reform reported that its interest in the pro bono mandate is related to the need for greater practical skills training in law school; accordingly, California plans to allow law students the flexibility to start satisfying their pro bono requirements during law school:

In our view, a new set of practical-skills requirements focusing on competency and professionalism should be adopted in California in order to better prepare new lawyers for successful transition into law practice, and many of these new requirements ought to take effect pre-admission, prior to the granting of a law license.

Id. At the time of this writing, the California Task Force on Admissions Regulation Reform issued a June 2013 report calling for fifteen credits of experiential learning in law school or an apprenticeship and for fifty hours of pro or low bono service as prerequisites to admission in California. STATE BAR OF CALIFORNIA, TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 1 (2013), *available at* http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/STATE_BAR_TASK_FORCE_REPORT_FINAL_AS_APPROVED_6_11_13_062413.pdf. On July 1, 2013 the Clinical Legal Education Association (CLEA), the nation's largest association of law professors, made a similar petition to the Council of the American Bar Association's Section for Legal Education and Admissions to the Bar to require law schools to offer fifteen hours of experiential education in the second and third years. CLINICAL LEGAL EDUC. ASS'N, COMMENT ON DRAFT STANDARD 303(a)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(a)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES 1 (2013), *available at* <http://www.cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf>. Such pre-admission practical skills training requirements can and should be directed to public service.

¹⁹ *Id.*

responsibilities by stressing the role of lawyers in increasing access to justice.²⁰ To this end, the Society of American Law Teachers recently announced that a key objective of any law school reform effort should be

to facilitate a paradigmatic shift in legal pedagogy based on the guiding principle that access to justice is a core component of lawyers' professional responsibility and ethical obligations as set forth in our Model Rules of Professional conduct and should, therefore, be a core component of law school courses – regardless of subject matter.²¹

Students must learn this connection between public interest, pro bono work, access to justice, and a lawyer's professional and ethical obligations. As with many law school subjects, the best way to teach students about this connection is to give them real lawyering experience and to do so early on. In other words:

[L]aw schools must provide opportunities for students to develop an understanding of their status as members of a profession that has ethical norms and moral dimensions at the very start of their law school careers, instead of relegating this vital aspect of students' education to clinical and externship opportunities and a single stand-alone course on professional responsibility.²²

Public service opportunities directly engage students in emotional and ethical experiences that are impossible to replicate in a standard doctrinal or casebook course. The personal investment and motivation a student feels from working for a real client on a real problem simply cannot be matched by simulations or hypotheticals.²³ If we want students to understand and embrace their professional and ethical obligations, there is no substitute for actual public service.

Cynics may believe I've already lost my audience: Why should corporations and businesses care about the access to counsel crisis or a lawyer's ethical or moral obligations? What's in it for the private sector? The optimist in me believes the private sector can be motivated by societal and professional good.

²⁰ Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 666 (2008).

²¹ For the objectives of the SALT Access to Justice Committee's Law School Curriculum Development Project, see SALT ATJ COMMITTEE'S LAW SCHOOL CURRICULUM DEVELOPMENT PROJECT (2012), *available at* http://www.law.umaryland.edu/faculty/conferences/conf128/salt_cdp.pdf.

²² See Ruan, *supra* note 9, at 197.

²³ See, e.g., Rankin, *supra* note 9 (attributing improved student performance to increased motivation from actual work in the public interest); Millemann, *supra* note 9, at 444–45 (noting “[t]he closer the student comes to being responsible for some aspect of the client's matter, the greater the motivational and therefore educational value of the work”); Michael A. Millemann, *Using Actual Legal Work to Teach Legal Research and Writing*, 4 J. ASS'N LEGAL WRITING DIRECTORS 9, 14 (2007) (noting the “motivational force of the actual legal work” results in “more thorough and creative” student research and improved written analysis).

But for the cynics, I would suggest there is a relationship between the access to counsel crisis and societal economic health.²⁴ I would also remind them of some compelling instances where corporate counsel could have benefited from a deep and personal understanding of how to navigate ethical quandaries.²⁵ I'd point them to articles that explain how pro bono service is actually good for business.²⁶ Finally, I'd explain that requiring our students to perform public service can amount to remarkable training in core lawyering skills—the same skills that matter in the private sector.

III. PUBLIC SERVICE CAN PROVIDE INCOMPARABLE TRAINING IN CORE LAWYERING SKILLS

It is hardly surprising that hands-on experience provides the best training in core practical skills.²⁷ This observation is the premise and beauty of clinical education, but increasingly, law schools are experimenting with hybrid courses and other integrated skills courses that engage students in real work as

²⁴ See, e.g., Douglas G. Morris, *Can Constitutional Law Be Sequestered?*, N.Y. L.J., (2013) (discussing the negative impacts of the sequester on the entire legal system and noting, "U.S. Supreme Court Justice Stephen Breyer recently said that slashing Federal Defender budgets would ultimately be more expensive than providing a defendant with 'a decent lawyer in the first place'"), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202595357757&Can_Constitutional_Rights_Be_Sequestered&slreturn=20130512161246; see also Ian Urbina & Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES, (Mar. 30, 2013) (discussing links between the economy and the right to counsel for immigrants), http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html?pagewanted=all&_r=0.

²⁵ See, e.g., Eli Wald, *Lawyers and Corporate Scandals*, 7 LEGAL ETHICS 54 (2004) (discussing lawyer ethics in the Enron scandal), available at <http://ssrn.com/abstract=595564>; Mark Curriden, *The Lawyers of Watergate, How a Third Rate Burglary Provoked New Standards for Lawyer Ethics*, A.B.A. J. MAGAZINE, (June 1, 2012) (discussing how the role of lawyers in the Watergate scandal provoked revisions to lawyer ethics), http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards; see also Zach Lowe, *Stanford Financial Scandal and Whistleblowing Rules for Lawyers*, THE AM. LAWYER, (Feb. 19, 2009) (discussing the role of lawyers in the Stanford companies litigation), http://www.law.com/jsp/article.jsp?id=1202428390098&Stanford_Financial_Scandal_and_Whistleblowing_Rules_for_Lawyers&slreturn=20130310162323.

²⁶ See, e.g., Esther F. Lardent, MAKING THE BUSINESS CASE FOR PRO BONO 2 (2000), available at http://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf; Mike Sheehan, *Pro Bono Work is Good for Your Employees*, BUSINESS WEEK, (June 29, 2012), <http://www.businessweek.com/articles/2012-06-29/pro-bono-work-is-good-for-your-employees>; see also Roy S. Ginsburg, *Pro Bono: It Pays to Be Good*, ATT'Y AT WORK (Oct. 12, 2012), <http://www.attorneyatwork.com/pro-bono-it-pays-to-be-good/>.

²⁷ See BEST PRACTICES, *supra* note 1, at 144 (contending that contextualized learning, such as that from clinical training, is the best way to teach students to be competent lawyers); CARNEGIE REPORT, *supra* note 1, at 58 (describing clinical education as a "primary means of teaching [law] students how to connect the abstract thinking formed by legal categories and procedures with fuller human contexts"); see also Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58–59 (2009) (concluding that relatively new lawyers in private practice considered clinical training their best preparation for practicing law).

early as the first year.²⁸ Public interest work is particularly fertile training ground for core lawyering skills.²⁹

What do I mean by core lawyering skills? Others have articulated detailed menus of such skills that are beyond the scope of this essay,³⁰ but common themes emerge and necessarily echo the skills needed for practice. First, by engaging with a real client who has a real public interest problem, students are motivated to master basic lawyering skills. These basic skills include the ability to (1) find, read, and comprehend applicable law; (2) prepare a complete and organized legal analysis; (3) effectively communicate this legal analysis, both orally and in writing; and (4) perform all of these tasks in an ethical and efficient manner. But public interest experience also targets more advanced lawyering skills, including the ability to (1) interview clients and witnesses; (2) develop case theories; (3) differentiate important information from less important or unimportant information; (4) strategize, use judgment, and perform in unstructured situations; (5) problem-solve and reason; (6) cultivate a professional identity; (7) provide culturally-sensitive and ethical representation; and (8) work both independently and collaboratively. In short, public interest experience “encourages [students] to think like lawyers in a real-world, client-centered problem.”³¹

Of course, real-world lawyering requires concrete or technical skills, as well as judgment and problem-solving skills.³² Public interest work is multi-dimensional and motivational, challenging students to develop higher-order thinking abilities, intellectual and emotional resilience, as well as self-awareness and reflection.³³

Public interest work results in higher student motivation

²⁸ See, e.g., Rankin, *supra* note 9.

²⁹ See, e.g., Cochran, *supra* note 9, at 435.

³⁰ See, e.g., Maranville et al., *supra* note 6, at 522–25 (discussing the range of skills and learning objectives among clinical educators); Krieger, *supra* note 4, at 360–62 (surveying assessments of core lawyering skills that are supported by clinical or experiential education); see also *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 511, 512–17 (1992) (discussing the nine purposes of clinical legal education).

³¹ See Ruan, *supra* note 9, at 193.

³² See, e.g., Amsterdam, *supra* note 4, at 614–15.

³³ See, e.g., Rankin, *supra* note 6, at 22–28 (discussing the pedagogical benefits of experiential learning, active learning, situated learning, service learning, transformative education, collaborative learning). All of these benefits are hallmarks of the public interest experiences that are the focus of this essay. See also Millemann, *supra* note 23, at 16 (comparing the pedagogical benefit of “actual legal work” to “canned problems[, which] discourage students from developing alternative factual theories, legal arguments, and theories of the case, and ill-equip them to work with uncertainty and indeterminacy, as they must in practice.”).

and engagement, which in turn, often translates into higher performance. The work “gives students a sense of personal responsibility for the legal problems of another, substantially enhancing and diversifying the educational experience by strongly motivating students to do their best work.”³⁴ I consistently observe this link between motivation and performance in my own students; my students demonstrate tremendous growth in their skills and abilities when they engage in public service because they know their work will actually matter to a real client.³⁵

IV. PUBLIC SERVICE ENCOURAGES STUDENTS TO INVEST IN THEMSELVES, THEIR COMMUNITIES, AND THEIR PROFESSION

By prioritizing the engagement of students in public service, law schools not only encourage higher student motivation and performance, but they also support the moral, emotional, and psychological health of law students and the legal profession. Law students have a need—often overlooked or minimized—for moral, emotional, and psychological sustenance during law school. Public interest experience is one way law schools can legitimize and support this need.

Deep in the darkest hours of my work as a mid-level associate in private practice, I had the good fortune to read Jean Stefancic and Richard Delgado’s book, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds*.³⁶ It was the first publication I had ever read that openly criticized the soul-sucking potential of law school and the legal profession. Reading this book was profoundly therapeutic; up until that point, I assumed I was not “cut out” for private practice because I felt my greatest sense of purpose and meaning when I engaged in pro bono work.³⁷

³⁴ Millemann, *supra* note 23, at 16; *see also* Millemann & Schwinn, *supra* note 9, at 459 (noting that, by comparison, traditional or “canned” curricula tend to encourage student passivity and disengagement).

³⁵ *See generally* Rankin et al., *We Have a Dream*, *supra* note 9 (attributing improved student performance to increased motivation from actual work in the public interest); *see also* Millemann, *supra* note 23, at 14 (noting the “motivational force of the actual legal work” results in “more thorough and creative” student research and improved written analysis); Steven D. Schwinn, *Developmental Learning Theory and the American Law School Curriculum*, 3 J. MARSHALL L.J. 33, 44–49 (2009) (concluding that “actual legal work” in the first year helps improve student learning).

³⁶ *See* JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005) (exploring how legal formalism is “[h]armful for society and deadening to the soul.”).

³⁷ When I first opened this book, I had no way of knowing that I would not only join legal academia, but that I would eventually join Seattle University as a colleague of Professors Stefancic and Delgado. I am deeply grateful to them for so many of their scholarly contributions, not the least of which was the publication of this book—a

A few years later, I read the Carnegie Report, which similarly chastised law schools for creating an environment that is actually “harmful to the emotional and psychological well-being of many law students.”³⁸ As I reflected on the phenomenon of legal education, I came to understand how law school can encourage students to ignore their own self-interests; students learn this lesson so well that they carry it into the legal profession. Students are coaxed to disengage as early as the first day of law school: they are not only buried in books and the Socratic method, but they are denied the connection that brings so many of them to law school in the first place: the client who needs their help. This deprivation gradually extinguishes the “passion for justice and . . . enthusiasm for helping other people that were their strongest initial motivations for wanting to become lawyers.”³⁹

For years, countless articles have documented how the common law school experience—especially in the first year—familiarizes students with isolation, withdrawal, depression, dissatisfaction, and distress.⁴⁰ The distress students experience often “has important academic and institutional repercussions as well.”⁴¹ Empirical and anecdotal data shows that this hostile environment ultimately results in learned resignation.⁴² By persuading students to neglect their own interests, legal education begins the poisoning process that often continues in practice:

General surveys reveal a grim picture of an unhappy profession, with a high rate of burnout, job dissatisfaction, divorce, depression, suicide, and drug and alcohol addiction. Job stress runs high, with unrealistic demands for billable hours, narrow specialization, inadequate opportunities for creativity, and intense competition for jobs, clients, and partnerships Many lawyers regret having entered law at all and contemplate leaving for another field. Every year, about forty thousand actually do. An entire new industry

life-altering read for me.

³⁸ BEST PRACTICES, *supra* note 1, at 21–22.

³⁹ Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001).

⁴⁰ See, e.g., Cassandra M.S. Florio & Steven J. Hoffman, *Student Perspectives on Legal Education: A Longitudinal Empirical Evaluation*, 62 J. LEGAL EDUC. 162, 167 (2012); Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 248 (2008); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 113 (2002); Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 668 (1994).

⁴¹ Roach, *supra* note 40, at 667.

⁴² See, e.g., Florio & Hoffman, *supra* note 40, at 176; Krieger, *supra* note 40, at 113; Roach, *supra* note 40, at 668.

counsels lawyers who are unhappy with their work. Counselors report that miserable lawyers come to them in droves with almost identical complaints: I feel like a hamster in a cage. I am dejected and depressed. Life is not worth living.⁴³

Law schools can help to reverse this trend by engaging students in meaningful work, starting in the critical first year. By prioritizing public interest experience, law schools send students a powerful message that the work they do is important: it matters to a *real* client and can make a *real* difference. By prioritizing public interest experience, law schools encourage the “passion for justice”⁴⁴ that motivates so many students to come to law school in the first place. By prioritizing public interest experience, law schools teach students that it is appropriate for them to seek moral, psychological, and emotional sustenance.

Public interest work not only helps to humanize the student experience, but it might help to improve the emotional and psychological health of the legal profession. In other words, if law schools prioritize public interest opportunities for students, it encourages students to take care of their communities and themselves. If these messages are consistent and genuine, it may increase the likelihood our students will continue to make such investments—in the public good and in themselves—when they enter the profession.⁴⁵

CONCLUSION

This symposium asks what law schools can do to improve student readiness to practice in the private sector. But the answer does not depend on whether students practice in the private or the public sector: law schools should prioritize hands-on training in public interest work. The public good is the *raison d'être* of the legal profession. Every lawyer is obligated to

⁴³ STEFANCIC & DELGADO, *supra* note 36, at 51 (internal citations omitted). The movement to “humanize” law schools observes that happier, healthier students mean a healthier, happier, and more competent profession. For more on the effort to humanize legal education, see generally Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 248, 262 (2008); Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEGAL WRITING INST. 229 (2002); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

⁴⁴ Maranville, *supra* note 39, at 51.

⁴⁵ See Ruan, *supra* note 9, at 198 (discussing evidence that, although students often enroll in law school to serve the public interest, the “ambition to serve the public good wanes significantly during the average three years of law school.”).

use our profession to enhance the public good. But this solemn obligation is also a profound benefit: public interest work offers exceptional skills training and encourages us to invest in our emotional and psychological well-being. By prioritizing public interest experiences for our students, law schools just might start to graduate “fully formed” lawyers.

What Can We Do on Monday to Improve Our Teaching?

David S. Levine*

INTRODUCTION

I have taught Internet Law and Intellectual Property Survey for six years, after having practiced law in New York for an even longer time. Influenced by Eric Goldman¹ and Larry Lessig,² two mentors, I encourage my students, from day one, to embrace the challenge of learning how to make smart decisions in a dynamically changing environment. As law professors in 2013, we need to embrace the same challenge. I ask my students: When representing a client, what would you do differently for these parties? Not just based upon law, but based (as relevant) upon business objectives, market forces, social norms, unexpressed assumptions, and (last but not least) rules of professional responsibility?

With this essay, I seek to modestly address the challenge

* Associate Professor, Elon University School of Law; Affiliate Scholar, Center for Internet and Society at Stanford Law School ("CIS"); and founder and host of *Hearsay Culture* (KZSU-FM Stanford—more information at <http://hearsayculture.com>). This essay is based upon a talk that I gave at *Chapman Law Review's* 2013 Law Review Symposium. I am fortunate to have had (and continue to have) mentors that have enriched my life and my experience as a law professor. My colleagues at Elon—as well as the students themselves—inspire (require?) me to put considerable effort into my classroom (and outside classroom) teaching. Thanks to two colleagues in particular, Steve Friedland and Howard Katz, for their comments on this essay, as well as their friendship, mentorship, and inspiration. Additionally, much thanks to Carl Oeschner, my extraordinary middle school teacher; my late Uncle Rabbi Alan Kay, uncle, friend, Rabbi, and colleague; as well as Professors George Boyer, Kevin McMunigal, Eric Goldman, Jacqui Lipton, and other wonderful teachers and mentors that I've been fortunate to know and from whom I've learned. Thanks to Windels Marx Lane & Mittendorf, LLP's Bob Mercurio, who is the exemplar of civil practice of law to which I regularly refer in my classroom and whose influence from my first day as a summer associate remains. Finally, thanks to my wonderful wife Heidi, an elementary school teacher and my daily guidepost for how to do my job in and outside the classroom.

¹ Eric Goldman is a professor at Santa Clara University School of Law where he teaches Cyberlaw and Internet Law. *Cyberlaw/Internet Law*, ERIC GOLDMAN, <http://www.ericgoldman.org/cyberlaw.html> (last visited June 11, 2013).

² Lawrence Lessig is the Roy L. Furman Professor of Law at Harvard Law School and Director of the Edmond J. Safra Center for Ethics at Harvard University. *Lawrence Lessig*, HARV. L. SCHOOL, <http://www.law.harvard.edu/faculty/directory/10519/Lessig/> (last visited July 7, 2013). For examples of Lessig's publications, see LAWRENCE LESSIG, *FREE CULTURE* (2004); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

that we, as law professors, face in making smart decisions in the dynamically changing environment of legal education. How can I meet the goals that I set for my students in our current academic and professional environment? Structural changes take time and money. But what can we do, on the cheap, right now?

I am here to make three relatively simple suggestions to law professors in tandem with the three general standards for promotion and tenure: listen (teaching), bring your scholarship to your classroom (scholarship), and be attentive to your students' career objectives beyond the classroom (service). I am proposing conceiving the law professor as a learning guide, and, in that way, the traditional three pillars of promotion and tenure as pedagogical markers for what scholars have called "generative learning."³

My suggestions are keyed to keeping students current in intellectual property (IP) and technology, but applicable broadly to any law class that can be implemented relatively easily and on Monday when you return to the classroom. To that end, I am crafting my suggestions for the professor who is not engaged in the current debate over legal reform directly. I should also note that I am not the inventor of these ideas; rather, my goal is to gently remind law professors that we can all do something to address today's academic challenges on Monday, regardless of outside forces.

As we all know, these are challenging and perhaps unprecedented times in legal education. The lag time from the economic collapse of 2008–2009 has, literally in the last year, finally visited its wrath on law schools' most insulated actors—professors. This is not climate change's lag time—what Jamais Cascio has observed as the problem in environmental regulation: what we (as humans) did twenty or thirty years ago to the environment is felt now, and what we do now will be felt twenty years hence.⁴ Pedagogical change can, and I say thankfully does, move more quickly. The economy, and the social norms that develop as a result, move *far* more quickly. Current technology, market forces, desire for immediate gratification, and needs to pay bills, have vested in a matter of a few years, and law schools must now pay out in the form of tenure's three pillars: teaching, scholarship, and service.

³ Manuel London & M.J. Hall, *Unlocking the Value of Web 2.0 Technologies for Training and Development: The Shift From Instructor-Controlled, Adaptive Learning to Learner-Driven, Generative Learning*, 50 HUM. RESOURCES MGMT. 757, 758 (2011). Thanks to David Moss for pointing me to this scholarship.

⁴ JAMAIS CASCIO, *HACKING THE EARTH* 12 (2009).

Sure, we professors knew that the legal job market was bad. Of course, we witnessed (and many, to be clear, experienced) that our paychecks—particularly for those of us who came from private practice, as I did—were not always covering what we expected—mortgages, after school activities, a night out with the family. Perhaps, we thought, a personal *reprioritization* has to occur in order for those activities (luxuries?) to continue.

But these were still, in many ways, abstract problems. And while few were oblivious, and even fewer unsympathetic, there was a sense that “toughing it out” and “staying the course” might be sufficient.

Fewer professors feel that way now. Crocodile tears for law professors notwithstanding, the economic realities facing today’s students have forced most law schools to confront what other disciplines have confronted for several years.

Law schools, legal educators, and by extension, the legal profession, have to act, have to *reprioritize*, now. Not because a failure to act now will cause a school to soon fold (although there may be some institutions that do not weather this ordeal). But rather, failure to act now will cause law schools to exacerbate the extravagances and errors of the past in ways not sustainable for our May 2014 graduates. And by 2015 or 2020, the schools that do not act may find themselves marginalized, or worse.

That said, this essay does not discuss a grand vision for the law school of 2020 or even 2015. While I have opinions as to what the 2015 law school model should be (recognizing that no model will be adequate for all audiences and communities), I want to offer observations as to what full-time, tenured and tenure-track professors can do *right now* to address the changes of which we are increasingly unable to ignore.

How can we, using our charges of teaching, scholarship, and service, concretely address these concerns *on Monday*? I want to make one simple but perhaps overlooked suggestion in each area (which some professors may be doing already), with the built-in assumption that each promotion and tenure pillar adds value to our performance as educators.

I. TEACH: PAUSE AND LISTEN

In 2005–2007, while a resident fellow at CIS, I experimented with virtual world teaching at the invitation of my colleague Lauren Gelman. I “lectured” in There.com about trade secrecy in public infrastructure. Attending: six or so graphical representations of the humans listening in, known as “avatars.” Playfully, I got a jetpack and landed on the platform to give my

talk. The six known attendees were then joined by a few avatars wandering the landscape. They walked in, listened, and left. They paused, reflected, and made a decision. They left, and it was instructive. What did they do in that limited time? They presumably listened. Is there a role for serious downtime—for listening—in the classroom?

In our zeal to react, we talk (and increasingly act) through concepts like engaged and experiential learning. These are laudable and complex endeavors that take time, effort, and much planning, and I encourage it. But, on Monday, a relatively easy thing to do is to (surprisingly) pause and listen.

I am suggesting that we consciously and structurally pause and listen, especially given how fast-paced legal education has become. For example, I do this regularly in Internet Law through requiring my students to blawg.⁵ We discuss theory and caselaw, but (also) in each class one student posts and one student replies to a post on a class blawg. In that way, students can pause and reflect on a current topic of their choice, and digest. It keeps them current in a dynamic field where, in every of the six years that I have taught it, a case that I have taught has been reversed or amended during the semester. It also allows them to practice (a little) what it is like to write for a busy, perhaps uninterested, client. And we have a ten-minute class discussion around it. My role during the discussion? I listen, and in the process I reflect on how my students are thinking about the law, and they seem to do the same.

On day two of my Contracts I class, I pause and listen again. I assign an excerpt from *Wolters Kluwer Financial Services, Inc. v. Scivantage*,⁶ a 129-page sanctions opinion written by Judge Baer of the Southern District of New York (yes excerpt, the students read six pages). We discuss NY DR 7-101,⁷ involving treating your colleagues with respect, dignity, and civility. And I show on a slide a sentence from the opinion: “while our system is by its very nature adversarial, it goes without saying that such a system expects—indeed, requires—a measure of civility.”⁸

In the process of discussing civility, I confront, head-on and candidly, the challenging legal landscape that the students face. I

⁵ *Blawg*, WEBOPEDIA, <http://www.webopedia.com/TERM/B/blawg.html> (last visited Aug. 28, 2013) (defining blawg as a “[s]lang term used to describe an online blog that is written by lawyers, or one that is focused on providing legal-oriented content”).

⁶ 525 F. Supp. 2d 448, 451 (S.D.N.Y. 2007), *aff’d in part, rev’d in part*, 564 F.3d 110 (2d Cir. 2009).

⁷ N.Y. CODE OF PROF’L RESPONSIBILITY DR 7-101 (2007).

⁸ *Wolters Kluwer Fin. Servs.*, 525 F. Supp. 2d at 451.

mention, and seek feedback, on their prospects for employment, the practical benefits (aside from ethical rules) of civility, and how I see my role as an educator teaching (influencing) fifty 1Ls. I listen to their responses and reflect on how contract law might influence their experience in law school and in practice. I share my own personal experience making my way into the legal education profession from the unusual perch of Case Western Law School (a great school and education, to be clear, but not a traditional “feeder” to legal academia)—and doing it effectively and civilly.

Always, a discussion that would not normally occur this early in their legal career begins. And almost always, a student approaches me immediately after class with a question regarding ethics that (I suspect) would not have been raised otherwise.

By pausing and listening, up front, lines of communication are established that pay dividends throughout the course, and throughout law school. Although much of my day-to-day classroom conduct is the more traditional quasi-Socratic dialogue and open discussion that (in my experience) serves well to teach the skills of lawyering and the theoretical underpinnings of law, pausing and listening, deployed deliberately, vests me with the ability to react more rapidly to the dynamism of law practice and education today. By not pretending that things are going along as planned, and infusing my classroom with that non-abstract, non-hypothetical urgent reality, I begin to establish lines of communication between my students not built upon friendship *per se*, but rather professionalism and seriousness of the shared purpose to address our shared unprecedented challenge. Interested students working with professors can address these problems internally, beginning in their own classrooms. This can be done on Monday.

II. SCHOLARSHIP: BRING IT TO THE CLASSROOM

What happens to those blawg posts? No, I do not plagiarize them. Rather, they open a discussion about my work, which focuses largely on policy matters like whether the public should have access to source code in voting machines over the objections of the authors of that code who claim proprietary trade secret rights, the role and theory of secrecy in the innovation process, and how international IP law should be created. Indeed, I was very proud that two of my students in my fall 2012 Trade Secrets seminar presented their draft final papers as works-in-progress to the conferees at the first Trade Secrets Law Works-in-Progress Workshop that I hosted because of the generosity of Elon University School of Law.

Through their blawg posts and discussion of my scholarship, students begin to see not just what I do, but where they too can make contributions—*now*—to their profession. The changing economic landscape has not altered one of the great blessings of being a law professor: the opportunity to think and write about how the law can be re-conceptualized, re-theorized, and improved. I consider this work not only exciting and fun, but a privilege and a duty, as we have been given the extraordinary luxury to have the time to do this work as salaried employees rather than having to find modern-day de Medicis to fund it.

Students, albeit for a limited time unless they are fortunate enough to be able to pursue it beyond law school, have the same opportunity for influence enjoyed by professors. And we all have access to the Internet, the greatest leveler (albeit imperfect) of the influence playing field ever created. Creating an *esprit de corps* around making such contributions can create the bonds that build an institution. Because influencing the legal and policy world around you can actually happen.

Aside from the pedagogical benefits of keeping your teaching current by bringing recent scholarship into the classroom, bringing scholarship into the classroom can help create the institutional fortitude to not only survive the current turmoil but thrive. Moreover, the students can carry those skills of communication, thought, and ambition to the marketplace. No time more than now (in the last several decades at least) has called for students to engage such unconventional and aggressive thinking.

On Monday, ask your students to write a 500-word blawg post (which you can host on TWEN, Blackboard, etc.) on a legal topic *of their choosing* in your given field. So long as they make a decent effort, these blawg posts will motivate and inform more thoughtful discussion and inquiry inside your classroom.

III. SERVICE: SERVE YOUR INSTITUTION BY SERVING YOUR STUDENTS AFTER THEY PASS THE BAR

Perhaps the hardest concept to assess, as it is often the third wheel of tenure, is service. But now, more than ever, it is time for professors to embrace the notion that our responsibilities to students lie not just within the classroom, or within the school, but into their careers. The notion that what you do with your JD is not the concern of doctrinal faculty is, in my view, somewhat archaic and increasingly a luxury (if viewed as a burden, which I do not) that we cannot afford. Indeed, my pitch for taking Internet Law and Intellectual Property has gone from primarily “it is a fascinating and dynamic area of law” in 2006 to primarily

“people are hiring in these areas of law” in 2013.

I call my students Mr. and Ms. not because I worship formalities, but because I believe that our social media-infused “friend” culture blurs the line between professor as expert, guiding discussion and learning, and professor as mentor. I remind students—subtly—that while I care for their success as a student and lawyer, and will help them get there, and I wish them all personal happiness, I am not their “friend.” That can wait until they graduate, and if they (and I) so desire. Modeling such professional behavior serves your institution as much as it serves the students themselves.

Perhaps counter-intuitively, my experience is that this seeming disparity gives me more credibility to have a candid discussion about the state of the profession, the job market, and their role in the law. There is respect and support, but not necessarily friendship. Friendship, conceived through the prism of social media, has contorted professional relationships in ways that we (or I) have yet to adequately incorporate into the role of professor.

Fortunately, students do not need to be my friend for this effort to be successful. Thus, I offer my advice, but more importantly, my concrete support, to my students. No, professors should not decide what students should do with their JDs, nor should professors be looking for jobs for them. But at the same time, now more than ever, students need the guidance of not just career and student services staff, but professional mentors, both during and after law school.

That mentorship, beyond what you teach in class and model in terms of analysis and legal reasoning, can start on Monday. Even if you have had it relatively easy professionally—and let us be clear, many law professors have—your time spent analyzing concrete ways that students can seek and acquire employment can do wonders. Have no sympathy for those who are capable but refuse to help themselves, but offer that time to your students on Monday. And through social media and other forms of connection and communication yet to be invented, when you are friends after they graduate, you can use new technology to be an old mentor.

Admittedly, IP and Internet Law are one of the few areas where there is job growth and significant hiring. But they are not the only areas, and all students can benefit from this engagement. So watch, as I have, as more and more students take up the mantle, and inspiration, and forge their uncharted path in this challenging legal environment. Internships (paid and

unpaid) in technology transfer, start-up in-house counsel, and government small businesses incubators can await—as they have been found by several of my students in the last eighteen months.

CONCLUSION

I do not profess that anything that I am saying here has not been done before, or done well. And I do not think that anything that I am doing is heroic.

But that is the point. Law schools do not need to throw up their hands and conclude that we must conform to the current market by being less ambitious or more conservative in our goals—at least not yet. Before we (or any individual schools) declare the end of an era or our options as to how to structure our institutions, we should at least try the above (and other ideas too numerous to discuss now).

I have been fortunate, and indeed this was a huge motivating factor in my choice of foci, to teach IP and Internet Law from 2005 onward (and practice in the areas since 2000). Dynamic, fast-moving, theoretical, exciting, reversal-prone, geeky—I love it. And I like to (attempt) to pass that excitement to my students. I like dynamism. But it is not for everyone. I relish the challenge that we face, even as I wish that we could face it hypothetically as we do when we teach.

Nonetheless, from day one of teaching law, I wanted suggestions on what I could do right now to improve my teaching. With the demands on time that are ever-increasing, my goal with this essay is to offer three relatively easy courses of action that can be implemented almost unilaterally and quickly. I hope that I have achieved that modest, but important goal, and offered thoughts and advice useful to the neophyte as well as the mentor.

Specialization in Law and Business: A Proposal for a JD /“MBL” Curriculum

*Robert J. Rhee**

The curricula of most law schools are not well-suited to train lawyers for advising corporate clients in a sophisticated practice from the get-go, much less pursuing a career in business. This has always been true of a generalist legal education, but this weakness was not seen as a problem until recently. In more bountiful times, law firms trained new lawyers and corporate clients subsidized this training by paying the bill for the services of young associates. True, the typical law school may have a big menu of business law courses, and law students can take as many of these courses as a fourteen- to sixteen-credit semester may fit in during their meander through the largely unstructured 2L and 3L years. The breadth of curricular offerings and student choice are not enough to provide the basic foundation of a sophisticated training in business law and business geared toward meeting the needs of corporate clients. The outcome—starting preparedness for corporate careers—is not as good as it could be. In today’s climate, corporate clients are refusing to over-hire and overpay for this output.¹ The changing practice of clients is a market judgment on the value of legal education’s finished products. This assessment cannot be dismissed by law schools and legal educators. The economic effects of reduced demand are felt by lawyers, law firms, students, and ultimately law schools.² While macroeconomic and

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¹ See Ashby Jones & Joseph Palazzolo, *What’s A First-Year Lawyer Worth? Not Much, Say a Growing Number of Corporate Clients Who Refuse to Pay*, WALL ST. J. (Oct. 17, 2011), <http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html> (noting that corporate clients are increasingly refusing to pay for first and second year associates).

² By now, most informed readers know the facts concerning the economic woes of the legal profession: student job prospects, the historic rise in the cost of legal education,

industry developments determining the demand for lawyer services are outside the control of law schools, the market value of a young lawyer is still largely ours.

In a previous article, I argued that law schools should “teach a little more business and a little less law,”³ and suggested the possibility of “a prepackaged curriculum to obtain in essence a ‘lite’ version of an M.B.A. in a traditional three-year J.D. program.”⁴ In another paper, I said that “even outside of joint degree programs, formal relationships with other graduate schools makes sense in some areas, such as business (corporate law).”⁵ This paper completes these thought fragments by providing the specific details of how one form of a very substantial interdisciplinary program can be structured in a three-year JD program.

The program envisioned is a JD/“MBL,” which is distinguished from the better-known JD/MBA. The acronym “MBL” stands for “masters of business law,” which is simply an idea tag. The moniker can represent a program conferring a supplemental degree in law and business, or more likely a specialized course of study to complete a JD. Either way, the substance of the program is an interdisciplinary program of concentrated study in core transaction-oriented law courses and core business courses. This idea is grounded in personal experience. I have a JD/MBA, and in my prior professions I worked as a lawyer and investment banker for a number of years. This collective experience informs my belief that the most effective education for lawyers serving corporate needs (the specific topic of this symposium) should be interdisciplinary, and that a good education in law and business should prepare a lawyer for alternative careers in business or law.⁶ Career flexibility and the ability to think adaptively are more important than ever as lawyers enter a dynamic and uncertain marketplace.⁷ The following passage in Richard Susskind’s *The End of Lawyers?* is informative:

and student debt. I forego the customary citations and documentations of these phenomena.

³ Robert J. Rhee, *The Madoff Scandal, Market Regulatory Failure and the Business Education of Lawyers*, 35 J. CORP. L. 363, 363 (2009).

⁴ *Id.* at 390.

⁵ Robert J. Rhee, *On Legal Education and Reform: One View Formed from Diverse Perspectives*, 70 MD. L. REV. 310, 337 (2011).

⁶ See generally RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 99–146 (2008) (discussing disruptive legal technologies and alternative legal service businesses that may arise from them).

⁷ I have previously noted:

Lawyers should be equipped for the 21st century world, one where traditional boundaries in the labor market are eroding, where the contractual nexuses of

This will lead, I claim, to the emergence of what I call 'legal hybrids', individuals of multi-disciplinary background, whose training in law will have evolved and will dovetail with a formal education in one or more other disciplines. . . . If lawyers want to reinvent themselves and carve out new multi-disciplinary roles that allow them to deliver new value, then their commitment to these neighbouring areas of expertise must be deep and our law schools should be gearing up accordingly. In this way, we will also formally be equipping lawyers of the future with the tools and knowledge to solve business and social problems and not just legal problems.⁸

My proposal of a JD/"MBL" is based on the idea that legal and business educations can be unbundled to the maximum degree permitted within institutional constraints to form a coherent interdisciplinary program of study. These core elements of legal and business educations are: (1) essential training in legal analysis ("thinking like a lawyer"), (2) concentrated study in foundational business law, and (3) basic training in business. This program of study requires all three years of law school, and thus fully justifies the existence of a three-year JD program with respect to an education in business law.⁹

firms and their relationships to employees have become less sticky, where workers should consider themselves entrepreneurial factors of valued-added skills, and where the expectations of society, clients, employers, and workers are ever more demanding and dynamic.

Rhee, *supra* note 4, at 381.

⁸ SUSSKIND, *supra* note 6, at 6–7.

⁹ I say "justified" because many commentators have argued that the 3L year is unnecessary, for some students at least. See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 605 (2012) (citing RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 280–95 (1999)); see also Peter Lattman, *N.Y.U. Plans Overhaul of Students' Third Year*, N.Y. TIMES (Oct. 16, 2012), available at http://dealbook.nytimes.com/2012/10/16/n-y-u-law-plans-overhaul-of-students-third-year/?_r=0 (quoting Larry Kramer, former dean of Stanford Law School, "One of the well-known facts about law school is it never took three years to do what we are doing; it took maybe two years at most, maybe a year-and-a-half"); Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES (Jan. 18, 2013), available at <http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html> ("As legal scholars, jurists and experienced attorneys have attested for decades, many law students can, with the appropriate course work, learn in the first two years of law school what they need to get started in their legal careers.") (Rodriguez is the dean of Northwestern University School of Law and Estreicher is a professor of law at NYU School of Law). Certainly, more of the "same old, same old" in terms of randomly selected courses and seminars calls into question whether the direct and indirect costs of an additional year of law school are worth it. There have been some signs that state courts may consider circumventing the ABA imposed three-year requirement. See Karen Sloan, *FDR did fine without a 3L year: New York may let law students once again take the bar exam after two years*, NAT'L L.J. (Jan. 14, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202584156317&FDR_did_fine_without_a_3L_year_&slreturn=20130601000247; see generally Estreicher, *supra*; cf. Debra Cassens Weiss, *Arizona Supreme Court OKs Proposal to Allow 3Ls to Take Bar Exam*, A.B.A. J. (Dec. 12, 2012, 9:28 AM), http://www.abajournal.com/news/article/arizona_supreme_court_oks_proposal_to_allow_3ls_to_take_bar_exam/ (noting that the Arizona Supreme Court has approved 3L students

At the outset, I caveat the scope of the idea. The issue of training in legal education is larger than just the needs of corporate clients. The recent economic woes of the legal profession and their trickle-down effect on law schools have shined a spotlight on the issue of training. Since the career paths of lawyers are so diverse, including lawyers who transition to business and other non-law careers, training and curriculum are not conducive to a one-size-fits-all approach. Different aspirations and career paths may require different curricular pathways, i.e., highly specialized course of study for students whose career goals are clearly set at a relatively early stage. The ideal legal education should be sufficiently flexible to provide training for these different pathways. This paper is not a broad comment about legal education and it must be construed narrowly. This paper only proposes a pathway toward the education and training of corporate lawyers and lawyers who might one day transition to businesspersons, which is the specific subject of this symposium. As I explain below, the number of students who would opt for this program would in the end be small.

I. JUSTIFYING REFORM OF THE BUSINESS LAW CURRICULUM

What is the purpose of a business law curriculum? The obvious answer—to teach business law and to help students achieve their career aspirations—is somewhat hollow due to the reality of the job market and conservatism of the legal academy. When the topic comes up in faculty colloquia and informal discussions, I hear from thoughtful colleagues that one reason why curricular changes are not worth making is because they provide no tangible benefit in hiring. A fair question from the legal professoriate to the professional bar, which has been critical of legal education, would be: “If we change our curriculum, will *you* hire more of our students?” Ask this question the next time a high ranking professional launches into a critique of law schools, and the honest response might be noncommittal foot shuffling. In the dialogue between the academy and the profession, there is some merit to the academic pushback to curricular reform.

Let’s agree that the quality of a business law curriculum probably does not change the competitive dynamics between schools of different statures in terms of hiring practices. Law schools and the legal profession are a part of a rigid hierarchical

to take the bar exam, a proposal that was supported by all three law schools in Arizona). The JD/“MBL” program cannot be accomplished in two years, and it requires a three-year program. Thus, the program fully justifies a three-year law curriculum for a student aspiring to be a corporate lawyer or lawyer businessperson.

ordering system based on rankings, reputation, and prestige. The student's employment prospects are subject to three major variables: (1) the stature of the school (prestige enhancement to the firm), (2) the student's grades (quality of human capital in the firm), and (3) the overall market demand for corporate lawyers (quantum of human capital needed in the firm). These three factors determine a law student's prospects of obtaining a job in the highly competitive field of corporate practice.

Let's be more concrete about this: If there is only one slot for a law firm job in the corporate field, the student graduating from the #1 school with minimal coursework in business law will most likely get the job over the student from the #41 school¹⁰ with a substantive, rigorous business law curriculum, all other factors being equal. The weight given to the quality of a business law curriculum is not *pari passu* with a law school's stature. Harvard and Yale could provide a concentration in Law & Poetry if they wished, and their graduates would still be hired because pedigree is coveted and because their legal poets would still be smart. The legal profession and law schools are heavily invested in "the pecking order" as validation of the institutional system and as a heuristic for quality.¹¹ It is doubtful that an alternative system of differentiating student candidates by curricula will displace the pecking order relative to schools occupying different rungs of the pecking order.

Given that ninety percent of all law schools are not elite, if a particular law school changes its curriculum to meet the demand of the profession, will the profession reward the school by hiring more of its students who are said to be better trained in business law than higher ranked schools? Doubtful, the academic status-quoist and the legal profession would correctly answer. Although this relevance challenge is not unfair, it ultimately does

¹⁰ This was the 2013 *U.S. News* ranking of the University of Maryland Francis King Carey School of Law. *Best Law Schools*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2> (last visited Jun. 30, 2013).

¹¹ Data on BigLaw's hiring practices, available from the *National Law Journal*, make this point clear. I compiled the number of 2012 hires by NLJ 250 firms. The top one through ten law schools placed 1,677 students with BigLaw, which is 48.3% of the graduating class of 3,470 students. The top eleven through twenty law schools placed 985 students, which is 30.8% of the graduating class of 3,200 students. The rest of the schools placed 1,795 students, which is 5.4% of the graduating class of 33,131 students. Another way to look at these data is that of the 4,457 total positions, the top twenty schools took 2,662 jobs (59.7% of jobs available), and the rest took 1,795 jobs (40.3%). The total graduating class figure is slightly lower than the actual 2012 class because some schools did not place a single student with NLJ 250 firms. The essential quality of these ratios do not change much at the margins of which schools belong in the top ten and top twenty, and so I will forego the listing of these schools, which merely serves status-oriented curiosity.

not stand up to scrutiny even accepting the quite reasonable underlying premise that the business law curriculum does not enhance hiring results between schools of markedly different statures.

First of all, hiring is not always a competition between elite and non-elite schools. The quality of business law curricula between schools of relatively equal stature may make a difference at the margin in terms of hiring. As between, say, the #41 and #30 schools, all else being equal, the candidate's training in business law may be a relevant factor in hiring. Since there is always a strong local bias in hiring (e.g., the University of Chicago and Northwestern place many students in the Chicago market even though they are elite national schools), the quality of the curriculum among a few schools in the local market may be a strong factor in local hiring. Outside of the handful of mega-metropolitan markets and DC, the employment market is highly localized. Curricular differences matter in these fields of competition.

Secondly, the curriculum that best serves the needs of the student's career aspirations and the legal profession is worthwhile. This assertion is not based on the ideal of "education for education sake," but is based on the pragmatic concern for professional development and training. While corporate law firms hire from elite schools, they in fact also reach down to other non-elite schools to the extent that their hiring needs are not fully met by elite schools.¹² Even in challenging economic times, the demand has never been so depressed that BigLaw firms only hire the good students of elite schools. Once students are in the door, pedigree matters far less than talent and job performance.

Let's be more concrete about this: if a smart lawyer from the #41 school outperforms the smart lawyer from the #1 school due to better training she had in law school, she will advance further than the weaker performing lawyer with the prettier diploma. Ultimately clients don't pay for pedigree; they pay for results.¹³

¹² See *supra* note 11.

¹³ There is some evidence that pedigree is not a strong indicator of who becomes a partner at BigLaw. See Bill Henderson, "Too Good for BigLaw: The Statistician Edition," THE LEGAL WHITEBOARD (Mar. 9, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/03/too-good-for-biglaw-the-statistician-edition.html#comments>; Vivian Chen, *Too Good for BigLaw*, THE CAREERIST (Mar. 8, 2012), <http://thecareerist.typepad.com/thecareerist/2012/03/best-second-tier-law-schools-for-big-law.html>. Assuming that the data is valid, there may be a number of reasons why pedigree is not a strong indicator of who becomes a partner. As Professor Henderson hypothesizes in his blog post, one reason (of several) may be that everyone hired at BigLaw is already smart irrespective of pedigree, and the factors that matter in the long-run are work ethics, focus, and natural talent outside of raw smarts (e.g., problem-solving skills, professional empathy, and ability to succeed in business

Pedigree does not ease the supervising lawyer's work; a better-trained junior attorney does. Clients want value for their money; supervisors want the best, hassle-free junior professional to handle their assignments. The drivers of performance at the junior level are natural talent, work ethic, and educational training.¹⁴ Assuming we have the same talent and work ethics among junior lawyers of different pedigrees, the difference at the outset is training. These performance measures affect the career trajectory of a junior lawyer in a competitive environment such as the practice of corporate law. Since a proper business law curriculum and training can reduce the on-the-job learning curve and produce better business lawyers, training is an important factor that determines the success and longevity of a career. The quality of a business law curriculum matters for a junior lawyer.

By improving the business law curriculum, law schools will not change the macroeconomic dynamics of the law market and the tectonic forces adversely affecting the legal profession and law schools. But the quality of a business law curriculum will affect the competition among law schools of similar levels in placing students in jobs. This is particularly true in highly localized hiring markets where curricular differentiation should matter to hiring firms, and it will affect the preparedness of students to compete better with their junior peers once at the job irrespective of their educational credentialing. This competitiveness may affect the trajectory of a career and in the long-term affect the reputation of the law school in the local legal market. A strong, interdisciplinary business law curriculum better serves students. These goals are sufficiently worthwhile to rethink the curriculum and how law schools teach business law irrespective of larger forces that are outside the control of law schools.

II. ILLUSTRATION OF THE CURRICULUM PROBLEM

Legal curriculum should matter more than ever in light of the current environment confronting law firms and lawyers. Training must be funded by someone. The typical legal curriculum is inadequate to train corporate lawyers and lawyer businesspersons (such as entrepreneurs, bankers, or corporate executives). I illustrate the point with a hypothetical course load

development a.k.a. "rainmaking"), such that pedigree becomes far less of a predictive factor. See Henderson, *supra*.

¹⁴ Commentators have suggested that as between law degree pedigree and student grades, the latter was a far better predictor of a lawyer's success. Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness, and School Performance Shape Legal Careers*, 9 J. EMPIRICAL LEG. STUD. 893, 893 (2012).

of a responsible student (call her “Jane”) who desires to concentrate in business law with the aspiration of working as a corporate lawyer or perhaps one day transitioning to a career as a businessperson.

The 1L curriculum is fairly similar in most schools, and it emphasizes core common law subjects: constitutional law, civil procedure, and legal writing. Differences among schools are at the margins. Jane’s 1L program might look something like this.

Fall 1L		Spring 1L	
Torts	4 cr.	Property	4 cr.
Criminal Law	3 cr.	Contracts	4 cr.
Civil Procedure I	3 cr.	Civil Procedure II	3 cr.
Constitutional Law I	3 cr.	Constitutional Law II	3 cr.
Legal Writing	2 cr.	Legal Research	1 cr.

Although there has been lively discussion of legal curriculum, for the most part the 1L program has escaped criticism, for good reason because there is not that much wrong with it. Students need to learn core common law subjects and the fundamental skill of “thinking like a lawyer.” Improvements can only be gained at the margins, e.g., adding courses in legislation, international law, or administrative law on the grounds that these are now core subject areas perhaps.

On the other hand, the upper level curriculum is left mostly to the student’s discretion, and this is a problem. In my hypothetical, Jane is a serious student. She avoids taking too many “perspectives” courses, esoteric seminars,¹⁵ and less rigorous or easy grading courses. She takes substantive business law courses, and designs a curriculum that is rigorous, intellectually stimulating, and pedagogically diverse. Jane’s curriculum might look something like this (business law courses are noted in ***bold italics***).

¹⁵ See Lattman, *supra* note 9 (“While classes like ‘Nietzsche and the Law’ and ‘Voting, Game Theory and the Law’ might be intellectually broadening, law schools and their students are beginning to question whether, at \$51,150 a year, a hodgepodge of electives provides sufficient value.”); Susannah Moran & Joe Palazzolo, *Are Odd Electives a Waste? Third-Year Law-School Classes Often Delve Into Quirky Territory, Draw Criticism*, WALL ST. J. (Dec. 16, 2012, 7:53 PM), <http://online.wsj.com/article/SB10001424127887324296604578179393345730734.html> (quoting Robert Carangelo, hiring partner at Weil, Gotshal & Manges LLP, “If law schools want to employ the vast majority of graduating students then they should be offering mostly mainstream classes”).

2013]

Specialization in Law and Business

45

Fall 2L		Spring 2L	
<i>Business Associations</i>	4 cr.	<i>Securities Regulation</i>	3 cr.
<i>Commercial Law</i>	3 cr.	<i>Mergers & Acquisitions</i>	3 cr.
Evidence	3 cr.	Criminal Procedure	3 cr.
Health Care Policy Seminar	2 cr.	Trial Advocacy	3 cr.
Judicial Externship	2 cr.	Clinic	3 cr.
Fall 3L		Spring 3L	
<i>Income Tax</i>	3 cr.	<i>Business Planning</i>	3 cr.
<i>Financial Institute Regulation</i>	3 cr.	<i>Topics in Corporate Governance</i>	2 cr.
Administrative Law	3 cr.	Immigration Law	3 cr.
Professional Responsibility	2 cr.	Law & Philosophy Seminar	2 cr.
International Law	3 cr.	Clinic	3 cr.

This curriculum totals eighty-six credits, and has been thoughtfully designed. There is diversity of courses even as Jane concentrates in business law, and pedagogical diversity with a mix of stand-up, simulation, and clinic courses. However, from the perspective of training corporate lawyers and lawyer businesspersons, this curriculum is less than ideal for the following reasons.

A. Young, Unknowledgeable, and Inexperienced Students

Law schools, law firms, and corporate clients must contend with the problematic fact that the typical student is young and inexperienced. Most do not come to law school with a basic knowledge of business. Their undergraduate majors may have been political science, government, history, philosophy, and English¹⁶—none of which is in any meaningful way related to business. The typical matriculating student is probably twenty-two- to twenty-four-years-old with no work history or life experience beyond college studies.¹⁷ Most students are empty

¹⁶ See Rhee, *supra* note 4, at 389 n.110 (citing RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 205 (2004); Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 680 n.66 (2005)). Only about 12% of entering law students majored in STEM (science, technology, engineering, and mathematics) fields. Another 18% majored in business. Arts, humanities, and social sciences constitute 64% of law students. In the academic year 2002–2003, political science was the most popular undergraduate major by law school applicants (over 15,000), followed by English (6,300), psychology (5,200), and history (4,800). See POSNER, *supra*, at 205; Lloyd, *supra*, at 680 n.66.

¹⁷ In a significant way, law schools have a problem created by the admissions policy. The reason they receive so many young, inexperienced students is fairly obvious. If many of our students had attempted to enter the job force, they would have learned that there are not many well-worn professional career tracks for political science or philosophy majors from well-respected but non-elite colleges. There are formalized professional track positions, such as entry-level management trainee positions at Fortune 500 companies and analyst positions at investment banks, management consulting firms, and Big Four accounting firms. The favored recruiting grounds for these positions are graduates of elite schools, STEM majors, and graduates of well-regarded college business programs. For

vessels. Much knowledge must be poured into them in the three years of law school, and I question whether random assortments of knowledge is best for highly focused students with clear career goals (admittedly, this is a small set of law students with programmatic implications that I explain later).

B. Bias in Favor of Generalist Education and a Big Menu of Courses

Even with a concerted effort to structure a business law focus, the typical law school curriculum lacks a critical mass of required substantive courses. Student choice and faculty academic freedom have led to a bias in favor of generalist training. Frequently, students graduate with a hodgepodge of courses in the largely unstructured 2L and 3L years. There is always an opportunity cost of curriculum. With limited credit hours, a generalist training conflicts with the goal of specialist training.

C. Lack of Contextualization and Connection

Most law school courses and curricula are structured as discrete silos. Knowledge is acquired in discrete doctrines without the student obtaining a sense of how they fit together and how they can be used to solve problems. In the real world, client problems do not necessarily present themselves in discrete

instance, most major investment banks do not recruit undergraduates for analyst positions beyond the Ivy League and a few other elite schools. Companies in the Mid-Atlantic region would probably recruit undergraduates from the University of Maryland business school, among other schools, because it produces graduates with employable skills. Technology companies would recruit from the University of Illinois, among other schools, because it graduates outstanding engineering students.

This employment landscape means that smart, good students who majored in political science or philosophy from respected but non-elite universities, who want professional white collar careers, must: (1) be entrepreneurial in chartering their professional careers (scrambling to find the small businesses or other institutions with good growth and professional development prospects); (2) accept the fact that climbing the professional ladder may literally mean starting in the company mail room or the sales floor (as many CEOs and corporate executives have); or (3) go to graduate professional schools. Medical schools require significant personal commitment to medicine and an aptitude for science. Arguably, many students who majored in political science or philosophy lack the qualities necessary for entry into medical school, which may explain why they selected political science and philosophy majors in the first place. Business schools require substantial work experience prior to admission. Substantial prior work experience is a barrier for the unemployed, uncommitted, unimaginative, or un-venturesome college graduate, or the student who is just caught in a really bad economy. Law school simply requires a good GPA and LSAT score, though most students do not have a really good idea about what most lawyers do or the nature of the profession they seek to enter. For many generations, law school represented the easy default choice for students in these kinds of situations, but the cost-benefit of the default choice have changed significantly resulting in a new set of considerations in light of unattractive economic outcomes and greater informational transparency in the Age of Information.

issues from discrete doctrines. Not only should each individual course be a coherent body of knowledge, but the curriculum as a whole should be held together by a criterion of core competency in layered sequence of interrelated subjects and skills.

D. No Business Training

Without doubt, *legal* curricula in no way provides *business* training. Students do not learn basic concepts in accounting, corporate finance, economics, management, or strategy. These are core subjects in the curriculum of business schools, but this does not mean that they are irrelevant to lawyers. Probably due to custom, history, and incapability, law schools have assumed that these subjects do not merit a place in the curriculum. However, business law is the area of law practice that *most* requires an interdisciplinary education.

E. Little Diversity of Pedagogy

The typical law school curriculum is not pedagogically diverse in a way that most benefits a corporate lawyer. Classroom courses are taught with casebooks and statute books, and typically in lecture or Socratic method format. The skill of “thinking like a lawyer” is the constant focus, and at a certain point it becomes monochromatic upon reaching the point of pedagogical diminishing returns.¹⁸ Some pedagogical diversity is provided by clinical education and other forms of experiential learning. However, the larger problem of pedagogy is that substantive business and business law concepts are not sufficiently contextualized in complex settings. We should improve the teaching of problem-solving and deal skills.

In light of these issues, let’s consider again Jane’s curricular choices. Her curriculum could have been a part of a typical law school’s business law program. She sought a “balanced” curriculum that includes bar exam subjects and a smattering of diverse subject matters that may have less direct benefits for a business lawyer. The number of business law courses probably exceeds the minimum requirements of many business law programs, but the choices seem a bit random. Also, how would she contextualize the connections among the courses—the connections among Business Associations, Securities Regulation, Commercial Law, Income Tax, Financial Institutions Regulation, Mergers & Acquisitions, and Business Planning? At graduation,

¹⁸ See Lattman, *supra* note 9 (quoting Evan R. Chesler, presiding partner at Cravath, Swain & Moore and trustee of NYU School of Law, “Training lawyers to think like lawyers was once law schools’ entire mission. That doesn’t work anymore.”).

it is likely that these subjects are retained as discrete chunks of knowledge in Jane's memory bank without ever having been put to use in problem solving.

For many law schools, the business law program serves several functions. It is a marketing tool to attract prospective students in the ever-increasing competition for quality students. Hopefully, it is more than a glossy brochure and wall posts on the school's Facebook page. Independent of quality, students benefit because participation in a business law program signals to potential recruiters that the student has a genuine interest in business. But the most important function of a business law program ought to be steering students toward courses that teach the necessary knowledge and skills. In this regard, the curricula of most law schools can better train students for careers in business law and business.

III. CORPORATE NEEDS AND BUSINESS CAREERS

The business law curricula of the typical law school can be improved by embracing an interdisciplinary approach. Much of the training must be done on the job. This is inevitable since there are limits to what schools can do to provide the practical training done in the workplace. There is simply no substitute for immersion in practice, e.g., the learning that comes from doing a deal from engagement to closing under real conditions cannot be replicated. These immersion experiences provide the steepest part of the learning curve. Clinic is no answer because its most natural functional home is litigation and not business transactions (on this latter point, most law school clinics also tend to provide public service as a core mission and so they are largely unsuitable for training in private business transactions).

While "training" in the educational context is sometimes associated with experiential learning such as clinics and externships, the mantra of "learning by doing" is not particularly relevant to training in schools of corporate lawyers and lawyer businesspersons. Training is not just about developing particular aspects of "doing," e.g., negotiating, drafting, conducting meetings, organizing work flow, making presentations, etc. Nor is the activity of client interaction, meeting clients in flesh and blood, particularly important to *school* learning.¹⁹ These skills

¹⁹ I assume that junior lawyers are well-mannered, have some degree of confidence and humility, and have judgment on subtle social awareness that determines when and to what extent they should be participating in discussion with clients and various other professional settings. This assumption may not hold for some law students who have no work or professional experience. Even in these cases, however, I doubt that education or clinic can provide appropriate training, and the young lawyer must learn through

are quite important in the workplace (obviously), but many of them are better developed through actual experience. The primary focus of training in the classroom should be to teach different fields of knowledge that a professional must know. Knowledge and skills are not distinct tools in the professional's toolbox. At the core of any particular skill—for example, the ability to read and use financial statements—is a body of complex knowledge. A skilled lawyer should have many fields of knowledge to solve complex business problems.

Let's put the matter to a simple empirical test. Below is a simple quiz of randomly selected concepts that graduating law students should know because these concepts frequently come up on any given corporate or business project. These questions are posed at the most basic level, and some questions are even open-ended with many possible correct answers. There are no highly technical, arcane, or "gotcha" questions, the type of questions that only senior, experienced lawyers with deep expertise in a specific field would be able to answer. The standard of grading this quiz is whether a student can answer most of these questions with *specificity and authority at the most basic level of understanding beyond mere definitional recitals*.

- What are the differences among revenue, operating profit, and net income? What is the book value of equity? What part of the cash flow statement does capital raising affect? Explain how net income directly connects to the balance sheet.
- What is the difference between market-based valuation measures and a theoretical cash flow valuation? What is the concept of cost of capital?
- What are the essential features and rights of preferred stock? How does preferred stock differ from common stock? What might be some uses of preferred stock?
- What is a bond indenture? How are the rights of bondholders enforced?
- What are some specific methods to determine a buyout in an entity's governing document? For each method mentioned, explain some of its advantages and disadvantages.
- Why does financing a long-term asset like a factory with short-term financing like commercial paper not

experience or plain conversation with supervisors. With respect to the clientele of many clinics, institutional presentation and organizational awareness are less important.

make sense? How should a long-lived asset be financed?

- What is the difference between a call option, a put option, and a swap? What are the underlying bets? Give a specific example of how derivatives could be used in the market to hedge risk.
- What are some specific factors that a corporation would consider in deciding whether to invest its capital in a project? What is the primary criterion by which the corporate manager makes this decision?
- What might be some specific contract terms in executive compensation that could mitigate agency costs? What are the drawbacks and limitations of such methods?
- What are some of the fundamental differences among a limited liability company, a limited partnership, and a general partnership? Sketch out profiles of business activities that might be most suitable for these entities and explain how the legal features of these entities would support the activities.
- What are some of the principal factors determining whether an issuer chooses debt or equity when raising capital?
- What are some of the principal factors to consider and issues to resolve in entity formation when two corporations are seeking to engage in a “strategic partnership”?
- What information might you expect to see in a business plan for a young company seeking venture capital funding? What information might you expect to see in a registration statement filed with the SEC and a merger proxy?
- What are representations and warranties in a deal document?
- In a merger or acquisition transaction, what are the respective roles of a lawyer, accountant, and investment banker?
- What are the purposes of a fairness opinion and a solvency opinion? How would lawyers representing the corporation incorporate these opinions in the advice they provide in a transaction?

How would the typical business law student score at the end of three years? In the course of working on different transactions and projects, a business lawyer will acquire by direct learning and osmosis foundational knowledge to answer the above questions (and of course go far beyond this basic level). Clients would expect their business lawyers to have this knowledge, and if a junior lawyer does not even have basic knowledge to understand the situational context, we cannot begrudge the client who refuses to pay. I have little doubt that most of the above concepts might have been mentioned in the classroom at some point in any given business law curriculum. But the standard is whether the student has some basic level of understanding to inform his work. A student with a JD/MBA will pass this test. So too will a student who takes a heavy load of core business law courses, though she may miss some of the business questions. Beyond this small group of students, it is questionable whether a student who professes an interest in practicing business law, but takes a big menu approach toward designing her curriculum, will be able to pass the above quiz. When she gets to the firm, she will have much to learn to catch up to others who may have had better training in school.

The skills gap in young business lawyers arises primarily from inadequate coursework and knowledge acquisition during law school. Consider the career paths of corporate lawyers, in-house lawyers, and lawyers who transition to the business side, such as business executives, bankers, consultants, or entrepreneurs. The job functions of this spectrum of professional careers are many and complex. The general JD degree is often touted as providing flexible career options, and this narrative reinforces the default choice of law school by college graduates.²⁰ Career flexibility provided through education may be true for lawyers who go into government or public service, but it is really not true for corporate lawyers and lawyers who transition to business careers.

In fact, I will go further and suggest that, aside from critical thinking skills that can also be obtained from top university undergraduates, there is *nothing* in a general *legal education* (vis-à-vis legal professional experience achieved by an experienced lawyer) that prepares a young law graduate for a

²⁰ See Christopher Edley, Jr., *Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School*, 100 CAL. L. REV. 313, 321 (2012) (suggesting that legal education can train future businesspersons and investment bankers); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 492 (2004) ("Many [students] choose law school over business school, reasoning that although law school might cost 1/3 more (three years versus two years), the law degree would be more flexible—in the worst case, they might be able to practice law on their own.").

career as a corporate executive, an investment banker, a management consultant, or an entrepreneur. The typical law graduate, even at elite law schools, has no skills that would be applicable to investment banking, corporate management, management consulting, or a startup venture. Smart, hardworking junior professionals can be readily hired from top undergraduate campuses, and there would be no uncomfortable issue of whether a twenty-six-year-old junior lawyer with a graduate professional degree can cope with the fact that he would occupy the same status as the bright twenty-two-year-old Princeton undergraduate at the entry rung of a business career. Just because the law graduate is a lawyer would not entitle her to occupy a higher rung from the start in light of the fact that she has no business skills at all. Can she put a spreadsheet together on financial projections? Can she quickly learn a complex body of foreign (business) knowledge as autodidacts? Can she analyze an industry and distill the essence in an information memorandum? Can she think strategically? Can she process and coordinate complex workflow? Can she work in teams and manage a cadre of junior professionals? Can she figure “it” out and take the initiative? If not, the junior lawyer must start at the bottom of the rung, and if so, it is more advantageous to hire the smart, hardworking Princeton undergraduate with critical thinking skills because the young lawyer provides no value-added skills, and she presents a real human resources problem concerning status and compensation. If one doubts my assertions about the myth of the flexible business career options provided by a general JD *education*, answer this question: How many corporations, investment banks, management consulting firms, Big Four accounting firms, and institutionally funded startups actively recruit at law schools even as law schools produce annual pools of over 40,000 professionally trained recruits?

To properly structure a business law curriculum for careers as corporate lawyers and lawyer businesspersons, we must determine what knowledge and skills should be taught in school.

A. Knowledge of Transaction-Oriented Business Law

Careers in corporate law and business are diverse, but at the more sophisticated and demanding end of the spectrum, lawyers are expected to have deep substantive knowledge in complex, difficult-to-master areas of law, such as corporate law, securities regulation, corporate finance, tax, and business planning. They need not be experts in all of these areas, but they should have deep knowledge acquired through formal coursework. Do most business law programs require a broad grounding in corporate

law, securities regulation, taxation, corporate finance, and business planning? Some do, but some do not.

B. Knowledge of General Business Concepts

A career in business law most requires an interdisciplinary training, and ideally some formal education in business. A lawyer does not need an MBA, but coursework in management, strategy, entrepreneurship, management of legal services, accounting, and finance would be *very* helpful. A lawyer with business knowledge and skills would better understand the client's perspective and problem. This makes for better lawyering as well as better business development, which is ultimately the most coveted skill. Also, the lawyer can better transition to an alternative business career. Indeed, I have no doubt that a basic understanding of accounting and finance should be required knowledge for most lawyers,²¹ and it is interesting that the Trustees of NYU School of Law have recently recommended that accounting and finance be taught to all 1L students.²²

C. Basic Quantitative Skills

Law students and lawyers are famously averse to math and quantitative concepts. That a student was a history or philosophy major is no excuse for being incompetent in basic math and quantitative skills necessary to function as a business lawyer. How is a mathematically incompetent lawyer supposed to draft anti-dilution provisions in security instruments, draft financial covenants or regulatory filings such as merger proxies and registration statements containing complex financial data, or understand value and consideration in a merger or acquisition, business plans, strategic decisions, information memoranda, the risks and returns of a large-scale lawsuit, and the economics and structure of financial deals? The mathematically incompetent

²¹ That business education has broad applicability is increasingly recognized in the legal academy. See Frank H. Wu, *In Praise of Practical Legal Education*, HUFFINGTON POST (Dec. 19, 2012), http://www.huffingtonpost.com/frank-h-wu/praise-of-legal-education_b_2324035.html (noting that "the lawyer who succeeds as a solo practitioner is a lawyer who understands business. In addition to being able to cross-examine a witness and draft a will, a new graduate of law school should be able to, at a minimum, read a balance sheet. Even if their aspiration is to be a civil rights trial lawyer, they will not advance their cause if they cannot determine whether a venture is making money or losing it. After all, they themselves are in business—whether in their own firm or as a member of a larger enterprise").

²² NEW YORK UNIVERSITY SCHOOL OF LAW BOARD OF TRUSTEES STRATEGY COMMITTEE: REPORT AND RECOMMENDATIONS 10 (Oct. 5, 2012), *available at* http://www.law.nyu.edu/sites/default/files/ECM_PRO_073917.pdf. If one reviews the list of members of the Board of Trustees Strategy Committee, one will see that these people are highly accomplished in the profession and are the type of people who can provide expert advice on market needs.

lawyer has a handicap, and when it is discovered he will be diminished in the eyes of other professionals and clients.

D. Leadership, Ethical, and Teamwork Training

A corporate lawyer or lawyer businessperson must be taught legal ethics, including ethical aspects of advising corporations and working as in-house counsel. Coverage should include not only rules of professional responsibility, but also important statutes that routinely implicate their work, e.g., Sarbanes-Oxley Act and Foreign Corrupt Practices Act. Lawyers should also have leadership skills. I do not mean the romantic notion of the inspirational, charismatic leader of people and organizations (like Barack Obama). My definition of “leadership” is minimal and instrumental: the ability to function in a team environment, to manage workflow and team production, and to communicate necessary information and instructions in furtherance of efficient project management.²³ While “leadership” as just described seems rather easy to grasp in the abstract, mastering “leadership” actually requires substantial skill as well as good judgment on how to make people and processes work. Leadership is developed from experience and training. That is why all quality business schools emphasize “teamwork” to varying degrees. On the other hand, the mere mention of this in a law school faculty meeting would be brushed off as “soft” and “non-academic,” thus meriting no serious consideration of how these skills should be incorporated into the curriculum. However, there is no doubt that students should be exposed to the reality that the business world does not revolve around the work of solitary professionals, but instead organizations are networks of people working together to execute deals in a team environment.

E. Exposure to Contextualization and Problem-Solving

In an unstructured curriculum, there is the risk that in the course of taking many disparate subjects, students see them as discrete doctrines and clusters of knowledge. What is the connection between accounting and finance, corporate finance and securities regulation, business planning and tax, strategy and entrepreneurship, and entrepreneurship and business associations? There should be a way in which the necessary packaging of courses around doctrines does not create false walls in perspective. Courses should be offered where business problems are properly contextualized in complex factual milieu

²³ See generally Robert J. Rhee, *Reflections on Team Production in Professional Schools and the Workplace*, in LAW AND LEADERSHIP: INTEGRATING LEADERSHIP STUDIES INTO THE LAW SCHOOL CURRICULUM 213 (Paula Monopoli & Susan McCarty eds., 2013).

and not in discrete legal issues and doctrines as provided in appellate opinions that are then edited further by casebook authors. Students should have opportunities to engage in complex problem solving.

IV. PROBLEM WITH THE JOINT JD/MBA PROGRAM

Some may contend that if a studious law student wants a business education, there is always the option of a joint JD/MBA. Although I am a JD/MBA myself and strongly believe that business lawyers should have some business education, I do not readily recommend this path to most of my law students who seek my advice. The compelling logic of a joint JD/MBA completed together as an educational package escapes me. At the most basic level, a joint JD/MBA is very costly. It requires more time, money, and personal commitment, and there is no credentialing necessity to have both degrees in careers in either law or business.²⁴

For a student with the ambition of becoming a business lawyer, the MBA is certainly a useful credential. But knowledge learned in the program can be acquired without the degree and at a fraction of the cost. In terms of employment prospects, it is questionable whether this added credential would offset poor grades (probably not). For a student with the ambition of becoming a businessperson, the JD is simply unnecessary. The vast majority of MBAs enter the workforce in corporations, investment banks, consulting firms, startup firms, and accounting firms without a law degree, and they do perfectly fine. The one distinct advantage of a joint-degree program is that it delays a commitment of career choice for another four years. Upon graduation, a joint-degree student must make a career decision—practice law or do business (it is the rare career in which one can practice law and do business in an institutional setting at the same time).²⁵ But this option comes with a significant price tag. Factoring in costs, a joint degree is not ideal for the vast majority of law students.

The JD/MBA makes much more sense as a way to make a career change. There is no career path for an MBA businessperson to become a lawyer but through a JD program.

²⁴ See Jeri Zeder, *Jointly Held: A Harvard Program Immerses Students in Legal and Business Training*, HARV. L. BULLETIN (Fall 2012) (“Graduates [of the joint JD/MBA program] report that there is no job that requires a JD/MBA.”).

²⁵ The career that comes closest is a general counsel of a corporation, who is “as much a general manager of legal services as an actual counselor to management.” JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 224 (2006). But even a general counsel does not need an MBA, and I would guess that the vast majority of them in Fortune 500 companies do not have one.

Likewise, although a JD is often touted as a flexible degree that opens up careers in business, the education is actually not that flexible, as I have suggested above. Seasoned lawyers who made this transition from the law to business side have done so because they were opportunistic or at the right place at the right time, and were sufficiently nimble in professional skills developed over the years of professional practice to make the jump. There are many lawyers who have become CEOs, investment bankers, and entrepreneurs, but for the vast majority of lawyers, the opportunities are really not there. For example, there is no career path for an ordinary government lawyer to become an investment banker but through an MBA program (this was my career path from a lawyer to an investment banker). Even for corporate lawyers working at BigLaw firms, there are very few opportunities to transition to an investment banker, a management consultant, a venture capitalist, or a corporate manager; otherwise, we would have seen mass migrations of lawyers from BigLaw to the business side. Getting the other degree is an entrée into the other profession (even for the typical lawyer educated at the likes of Harvard and Yale law schools), and educational retooling and re-credentialing are the compelling rationale for acquiring a dual JD/MBA.

For the university, the joint JD/MBA is an opportunity to confer more degrees and generate more revenue. The joint degree is also an opportunity for the truly undecided student to delay an important career choice until graduation. However, for the serious student who wants to be a *lawyer*, the joint JD/MBA is a suboptimal expenditure in most cases. Career options are discrete, and one or the other degree is unnecessary when the student must finally choose between a law or business career. Surely the basic elements of business knowledge can be acquired at a far cheaper price than the sticker price tuition of a two-year MBA program, which is a suboptimal commitment of time, effort, and money for the business lawyer.

V. PROPOSAL FOR JD/“MBL”

Students ideally need a concentrated program of study in business law *and* business. I propose a JD/“MBL” program to serve this function. This proposal is based on the Goldilocks principle. A generalist JD program does not teach enough business law and business. A joint JD/MBA teaches too much business at too high a price. A JD/“MBL” is in between. The idea takes the core, relevant component of an MBA program and staples it to a JD.

There is evidence in the marketplace that this type of a program is needed. Some law firms are beginning to partner with business schools to provide “mini-MBA” training programs.²⁶ Among other partnerships, Skadden Arps has teamed with the Harvard Business School²⁷ and Reed Smith has partnered with the Wharton School²⁸ to provide business training for young associates. Senior lawyers and partners are also getting formal management training, which makes much sense since they manage large business enterprises and their legal education would not have prepared them for complex managerial duties. It would be helpful for a lawyer to think from the perspective of a manager (a sort of professional empathy).²⁹ Of course, not all firms do this or have the resources to provide this training, and my guess is that most BigLaw firms do not have formal relationships with business schools. Furthermore, the benefit of learning in a school environment, instead of workplace training, is significant.

Law schools can embrace business training as a core part of the business law curriculum. The essential idea of a JD/“MBL” is to provide law students in a three-year JD program with a concentrated course of study in transaction- and corporate-oriented business law courses coupled with about a semester’s worth of basic business courses taught at a cooperating business school.³⁰ This program requires three full years of study at law school, an assertion that some contend cannot be said for a generalist education.³¹ Obviously, the big

²⁶ See Alina Dizik, *Law Firms Embrace Business School 101: As Recession Bites, More Attorneys Attend Management Training and Take Mini-MBA Courses*, WALL ST. J., May 20, 2009, at B5.

²⁷ Jeremy D. London & Charles F. Smith, *New Training Program Accelerates Associates’ Development*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (June 20, 2011), <http://www.skadden.com/insights/new-training-program-accelerates-associates-development>.

²⁸ Terry Carter, *Learning the Business Basics: Pittsburgh Firm Teams with Wharton School to Boost Profile in World Market*, A.B.A. J. (May 28, 2005, 5:58 AM), http://www.abajournal.com/magazine/article/learning_the_business_basics/.

²⁹ Obviously, this is a general statement. I do not suggest that empathy with a client intent on doing bad things, such as the case of Enron, is a good thing. My comment is a generality on the adage that lawyers should know their clients.

³⁰ My proposal calls for approximately sixteen credits to be taken at the business school, which is about one semester of work. This complies with ABA accreditation standards. According to the ABA, the minimum number of credits for a JD program is eighty-three. Of the 58,000 minutes of instructions, 45,000 must be at the law school. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 304(b) & Interpretations 304-3 and 304-4 (2012). This translates into eighteen credits that can be taken outside of the law school. See Email of Stephanie Giggetts, Assistant Consultant, ABA Section of Legal Education and Admission to the Bar, to Crystal Edwards (Dec. 4, 2012) (on file with the author).

³¹ See *supra* note 6.

tradeoff is that students must give up most electives to fit in the required courses.

I sketch out the three-year program. In the 1L year, students take a standard regiment of core first-year courses, supplemented by a few business courses. (Courses in gray are taught at the law school, and courses in boxes are taught in business schools.)

Fall 1L		Spring 1L	
Torts	4 cr.	Property	4 cr.
Contracts	4 cr.	Civil Procedure I	3 cr.
Criminal Law	3 cr.	Legal Writing	2 cr.
Legislation	2 cr.	Management	2 cr.
Math & Excel Camp	1 cr.	Financial Accounting	3 cr.

The law courses are familiar, and the student is introduced to legal analysis of cases and statutes, thinking like a lawyer, and legal writing. Math and Excel Camp is needed so that law students are prepared to undertake studies in accounting, finance, and economics. Most students who were not STEM majors would need refreshers in arithmetic, algebra, and probabilities, and basic training in Excel spreadsheets. Financial Accounting is introduced in the spring semester. Although the concepts in accounting can be abstract, the math required is basic arithmetic, so the course is a soft quantitative introduction to business. Also, management is introduced to get students to think about business and running a business.

In the 2L year, the student takes a rigorous regiment of core business law subjects, supplemented by business courses in finance, economics, and management.

Fall 2L		Spring 2L	
Corporations	3 cr.	Securities Regulation	3 cr.
Partnerships and LLCs	3 cr.	Corporate Finance Law	3 cr.
Income Tax	3 cr.	Partnership or Corporate Tax	3 cr.
Evidence	3 cr.	Business Communication	1 cr.
Corporate Finance	3 cr.	Litigation & Management	3 cr.
		Managerial Economics	2 cr.

The package of business law courses focuses on corporate advisory and transactional work. The student is introduced to the major business entities (the division between corporations and other limited liability entities), coursework in legal aspects of financing, and taxation of business enterprises. Evidence is a

foundational course, a bar subject, and useful knowledge even to corporate lawyers and in-house counsels.

Business courses constitute these courses: (1) Corporate Finance, which is the basic finance course at business schools; (2) Managerial Economics, which teaches principles of micro and macroeconomics at the most basic level; (3) Business Communications, which teaches students that the written forms of the legal memorandum and the appellate brief are not suitable in many situations and that professionals communicate ideas in executive summaries, press releases, marketing documents, data summaries, and PowerPoint presentations. I also propose a course in Litigation & Management, which would be a hybrid course that incorporates information on complex litigation (e.g., class and aggregate actions) with management issues (e.g., litigation cost managements methods, litigation financing, litigation business strategy, use of technology, and legal service outsourcing).³² Corporate lawyers, in-house counsels, and legal services managers should all benefit from this course.

By the end of fall 2L (halfway through the JD program), previously unknowledgeable and inexperienced students will have a good idea of whether the study of business law and business, and a career as a corporate lawyer or lawyer businessperson, is for them. To successfully complete Math Camp, Financial Accounting, Corporate Finance, Corporations, Partnerships and LLCs, and Income Tax, a student must like the field; otherwise, this gauntlet of courses will be worse than pulling teeth without anesthesia. The program requirements provide sufficient information for students to form reasonable conceptions of the practice of business law and business by the end of their 1L year or fall semester 2L. By this point, many students who may have harbored vague notions that they want to do mergers and acquisitions, corporate law, venture capital, or business transactions work will drop out upon realizing that they like business less than the idea of a business career, and that the academic training required for this professional career is not for them.

In the 3L year, the curriculum broadens to include courses that are important to have as background, such as Administrative Law and Intellectual Property, and several electives.

³² See generally SUSSKIND, *supra* note 6.

Fall 3L		Spring 3L	
Administrative Law	3 cr.	Intellectual Property	3 cr.
Professional Responsibility	2 cr.	Corporate Counsel	2 cr.
Electives	2-3 cr.	Electives	4-5 cr.
Business Advising: Early Stage	3 cr.	Business Advising: Mature Stage	3 cr.
Entrepreneurship	2 cr.	Strategy	2 cr.
Leadership & Teamwork	2 cr.		

There are two pedagogical goals. First, leadership, teamwork, and professional ethics are taught in several courses, including a first-year business school course on the subject. Deals are always done in teams and groups. The corporate structure requires work in groups, teams, units, and departments. The business lawyer is no exception. These are considered “soft” skills, but they are important.³³ Corporate Counsel is a course designed to teach the legal aspects of being a general counsel, which may be a career aspiration of many business lawyers.

Second, students take Business Advising over the course of the year, first focusing on early stage businesses and later switching to mature businesses. In these two courses, students learn not a particular doctrine, but instead focus on problem solving. For early stage businesses, students can do problems in entity choice and formation, financing options and securities regulation including aspects of venture capital funding, and business evaluation. They would work with actual documents such as governance agreements, information memoranda related to financing, and financing agreements. For later stage businesses, students can work on problems in mergers and acquisitions, taxation, and corporate financing. Again, case studies would be a vehicle to deliver problems, and the problem would entail working with actual documents and simulated facets of transactions such as negotiations and drafting. There would be no doctrinal boundaries to these problems. Teaching would be done through a mix of simulations, business school case studies, lectures, and traditional legal analysis. Supplementing this focus on the lifecycle of businesses would be standard business school courses in Entrepreneurship and Strategy.

The work of a corporate lawyer is complex because there are many skills and knowledge required to be effective: (1) “thinking

³³ See Debra Cassens Weiss, *Law Firms Embrace Leadership Training, Even If Leadership Isn't the Goal*, A.B.A. J. (Mar. 4, 2008, 11:29 AM), http://www.abajournal.com/news/article/law_firms_embrace_leadership_training_even_if_leadership_isnt_the_goal/ (noting that top law firms have spent significant amounts of money on leadership programs at the Harvard Business School and the Wharton School).

like a lawyer”; (2) expertise in core business law; (3) quantitative competence in accounting and finance; (4) general business knowledge; (5) ethics, leadership, and teamwork; and (6) business problem solving. The JD/“MBL” program provides different layers of skills and knowledge in a three-year curriculum. The following table summarizes how this is done.

Capstone and Problem Solving
▪ Business Advising (Early Stage) ▪ Business Advising (Mature Stage)
Ethics, Leadership and Teamwork
▪ Legal Ethics ▪ Corporate Counsel ▪ Leadership & Teamwork
General Business Skills
▪ Management ▪ Entrepreneurship ▪ Strategy ▪ Business Communication ▪ Litigation & Management
Quantitative Skills
▪ Math Camp ▪ Financial Accounting ▪ Corporate Finance ▪ Microeconomics
Business Law
▪ Securities Regulation ▪ Corporate Finance Law ▪ Corporation ▪ Partnerships and LLCs ▪ Income Tax ▪ Entity Tax
"Thinking Like a Lawyer"
▪ Contracts ▪ Torts ▪ Criminal Law ▪ Property ▪ Civil Procedure ▪ Evidence ▪ Administrative Law ▪ Intellectual Property ▪ Legal Writing

This program is rigorous and focused. It requires students to take very difficult substantive courses that should be a part of the corporate lawyer’s toolbox. There is little room in the curriculum for “fluff,” intellectual digressions, and easy paths toward graduation. The program is also intellectually substantial and pedagogically diverse. It focuses on training for sophisticated professional tasks, and it layers different skills and knowledge in a coherent sequence. At the end of the program, a law student is sufficiently prepared to add value as a junior member of the team and to quickly learn the job with as little start-up cost as possible. Perhaps the young associate may still not be worth \$250 per hour, but she would not be worth \$0 per hour either. In the real world, the start-up cost is always funded by someone—

clients, law firms, lawyers, or law schools—and increasingly clients are refusing to fund it. Who will ultimately pay for training?

VI. IMPLEMENTING THE PROGRAM

Since the JD/“MBL” program requires a heavy load of *required* courses, and the law school curriculum is constrained by a certain number of credits, sacrifices must be made to implement the program. Several dear concepts of legal education must be relinquished.³⁴ The biggest sacrifice is student choice. Students no longer would have substantial discretion to design their own curriculum, which is a hallmark of most 2L and 3L curricula. They would have a limited number of credits for electives, approximately six to eight credits. The bulk of electives would be substituted for requirements. But is this so bad? If the student does not like the heavy requirements, he has the option to not participate. Many students would not have the wherewithal and discipline to focus on the appropriate courses. Student course selection is too often a function of subject need, intellectual interest, scheduling feasibility, perceived teacher quality, ease or difficulty of course, faculty and peer recommendations, and a host of other factors. Frequently, the end result is a mishmash of courses that as a whole may not make much sense—it is neither a deep training in a specialized field nor a serious liberal arts education.

Since there are over 1.5 years of required upper level coursework (approximately sixteen credits of business courses and forty-one credits of upper level law courses), there must be cuts in the traditional law courses. These cuts would come from the electives that students would mostly take in their 2L and 3L years. Electives and student choice impose significant opportunity cost. Students interested in business law careers can do without many electives, some of which are “perspectives” courses, seminars with academic writing projects, clinics, and externships.

If there are not enough credits to squeeze out, six credits of Constitutional Law can be sacrificed. I identify Constitutional Law for instrumental and broader reasons. In most law school curricula, this course is a sacred cow, but it is also true that constitutional law has little relevance to the work of corporate

³⁴ I again remind the reader that the scope of the concept here is limited, and the ideas here are not generally applicable to the “standard” legal curriculum. I emphasize this caveat because what follows is bound to ruffle some feathers if it is understood as a general comment on curricular reform. Even with this caveat, feathers may be ruffled, but that is the risk of the academic enterprise.

lawyers and businesspersons. In the realm of courses dealing with how government works, Administrative Law is more relevant to the business lawyer since corporations and their lawyers routinely work with agencies. Let me press my point further: if there are only three credits remaining and the choice is between learning constitutional law or accounting, I would prefer to see the business law student learn and understand accounting. To instill important values of citizenry and public responsibility, I would prefer to see the future corporate lawyer take a course on international human rights, environmental law, corporate social responsibility, or climate change.

The point of this discussion is this: Why does legal education require so many sacred cows such that curricular reform driven internally (faculty initiated) is such a difficult process? The world changes, but legal curriculum does not. At the end of the day, the fabric of civil society and government would not unwind if a few lawyers, seeking to be corporate lawyers or businesspersons, opted out of Constitutional Law and a few other “perspectives” on law in light of the opportunity cost.³⁵ When thinking about curricular sacred cows, we must acknowledge these unassailable facts as sure as death and taxes: curricular choice is zero-sum; one cannot squeeze two credits from one credit; every choice, including the current legal curriculum, comes with opportunity costs.

I do not propose mass slaughter of sacred curricular cows.³⁶ The scope of the proposal is a comment on business law and business education, and is limited to the specific symposium topic. I only propose that selective sacrifices be made to clear a pathway for a limited number of students seeking high specialization needed for clearly defined career objectives.

³⁵An important data point is from perhaps the market leader in terms of legal education. Harvard Law School does not require Constitutional Law in its curriculum, but it does require in its 1L curriculum “a problem solving workshop in which they grapple with real-world challenges involving complex fact patterns and encompassing diverse bodies of law.” See *J.D. Program*, HARV. L. SCHOOL, <http://www.law.harvard.edu/academics/degrees/jd/index.html> (last visited July 15, 2013). If any school needs to require Constitutional Law, it is Harvard. The school graduated eighteen U.S. Supreme Court justices, of which six are currently sitting on the Court. See *Harvard Law School Alumnae/i Who Became Justices of the Supreme Court of the United States*, HARV. L. SCHOOL, <http://www.law.harvard.edu/library/special/research/hls-scotus.html> (last visited July 15, 2013). Yet the school does not seem to take a one-size-fits-all approach. After the 1L curriculum, students have the option to pursue a number of clearly defined curricular pathways toward specialization, which are: Law and Government; Law and Business; International and Comparative Law; Law, Science and Technology; Law and Social Change; and Criminal Justice. See *J.D. Program*, *supra*. Clearly, it would be a good idea to include Constitutional Law in the upper level curriculum for some of these tracks, but maybe not for the Law and Business track.

³⁶At the end of the day, if constitutional law is deemed too sacred in collegial deliberation, perhaps a condensed three-credit version may be a compromise.

Nevertheless, even these limited sacrifices illustrate why curricular reform is so hard to accomplish in the legal academy. There are strong vested interests and preferences in all of these aspects of today's legal curriculum including constitutional law, clinics, seminars, student research papers, student choice, big curricular menus, and generalist bias. Law professors tend to have strong opinions on these matters, and some beliefs may be less subject to nuance or caveat than others. Curricular change is always a political exercise in the faculty meeting, and it often touches core beliefs. Imagine the angst-ridden, hand-wringing conversation if one were to propose that Administrative Law or International Law should be a part of the 1L curriculum ("what would be sacrificed?" being the elephant in the room); and now imagine more radical changes put on the agenda in the faculty meeting. Suggesting curricular sacrifices will surely be an uncomfortable conversation at many schools, but these are also surely uncomfortable times for law students, faculties, and administrators. My guess is also that in the medium- to long-term, as law schools continue to feel the effects of new market realities and as more outcome-based measures creep into the evaluation of law graduates and law schools, those schools that had the foresight and the strategic thinking to make the necessary adjustments will be standing on firmer foundation.

I also address the question of intellectual mission of law school, which is a big elephant in the room. Some may think that my proposal is too technocratic and diminishes the intellectual development of a lawyer. Without explicitly stating so, intellectual development is sometimes conflated with an education in public law and citizenry, which of course is the nobler side of the legal profession. But some students may choose not to pursue that nobler side, and we cannot begrudge their aspiration and choice, and instead we should serve their legitimate interest in pursuing a career in business law and business.³⁷ Some students may choose to facilitate economic transactions, which serve important societal function on the whole even if the transaction participants are merely seeking gain.

I would disagree with the general tenor of the criticism suggesting that a concentrated study in business law and

³⁷ See WORKING PAPER, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, AM. B. ASS'N 4 (Aug. 1, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paperdraft_august_2013.authcheckdam.pdf ("But the training of lawyers is not only a public good. *The training of lawyers is also a private good.* Legal education provides those who pursue it with skills, knowledge, and credentials that will enable them to earn a livelihood.").

business does not advance intellectual development, which I think is a red herring and a false argument. A sound business education allows a lawyer to make sense of important aspects of our society, economy and markets, and thus develops a lawyer's intellect.³⁸ This education takes time and many credit hours. Some aspects of business education, such as finance and strategy, are distilled from important, Nobel Prize-winning academic works. A basic course in corporate finance, for example, would cover at least four Nobel ideas: portfolio theory, capital asset pricing model, theories of capital structure, and option pricing. Some basic training in economics is also a useful thing for a lawyer to know. In light of the twin institutions of government and corporations that figure so prominently in our lives, understanding how corporations work on the business side is important. One should not underestimate the intellectual aspect of understanding how complex institutions actually work. The world of business presents deep, difficult social problems. Certainly, the lens of business is just one perspective on the world, but three years is simply not enough time to delve into all things that are the world (nor is four years in a good liberal arts college). The fundamental tradeoff is not intellectual development for technocratic training; it is one of specialization in a field and a generalist education composed of a hodgepodge of courses selected largely by students who know very little about what they need to know. Like all intellectual pursuits, specialization comes with focused study within the constraint of limited time and credits.

I am not a Pollyanna with respect to the difficulties of implementing the proposal here. I do not know whether any law school would adopt the proposal here in light of these major difficulties. Perhaps this paper can be seen as a thought piece for how each institution can structure a specialized program for corporate and business careers, perhaps taking pieces here and there and emphasizing core, difficult, and technical areas of law and business that has application to the needs of corporate clients. Perhaps also this paper can serve as a discussion starter for thinking about how we should design specific career paths for students who have clearly defined career goals.³⁹ Despite the

³⁸Rhee, *supra* note 4, at 381.

³⁹For example, if a student clearly wants to pursue a career in litigation, shouldn't she be required or be strongly encouraged to take courses in Trial Advocacy, Criminal Procedure, Negotiations, Evidence, Insurance Law, Arbitration and Mediation, Complex Litigation, Appellate Practice, Basic Accounting and Finance, Judicial Externship, and Litigation Clinic (plus preferably some package of courses on common causes of action such as Commercial Law, Advanced Torts, White Collar Crime, Employment Law, Intellectual Property, Securities Regulation, and Business

hurdles to implementing the JD/“MBL,” the program as proposed here makes much sense as the goldilocks middle between a generalist legal education and an expensive joint JD/MBA degree in an era of problematic student debt levels.

Another major issue of implementation is that the program would be large in the beginning and would winnow to a small group in the end. Many law students come to law school with vague ideas of what type of law they want to practice, and many explore business law as a potential default choice.⁴⁰ Many would also want to hedge their career bets. However, students who are not personally committed to the field and the career would quickly drop out of the program after Math Camp (fall 1L), Financial Accounting (spring 1L), or Corporate Finance (fall 2L) at the latest, which would leave them plenty of time to pursue the more traditional generalist program and keep all options open. The program is for focused students with clear career goals, the type of students typically populating competitive MBA programs. For all the difficulties in putting together the program, student demand at the end would be a major issue. If you build it, they may not come—or to be more accurate, they may come in droves and leave in droves.

This phenomenon poses a challenge to implementing the program.⁴¹ This suggests that an early screening mechanism is needed. Perhaps law students should separately apply to the “MBL” during the summer prior to 1L. What would that application process look like? Here, the business school application process might be adapted to identifying clearly directed students. There are several key differences in the application processes. First, business schools require some work experience. There is nothing that can be done about this since

Associations)? This package of courses would take up most of 2L and 3L, leaving little room for “fluff,” various “perspectives” on law, and intellectual digressions. Why wouldn’t schools require most of these courses for a student who declares a specialization? The answer cannot be that students know better.

⁴⁰ Other professors have observed similarly. Consider this assessment: “But the more common narrative is for law students to arrive at law school with a vague notion of doing international or environmental law, then meander aimlessly around the curriculum. Eventually, realizing that gainful employment is probably a good idea, they find themselves in a job interview wondering what in the world a bond covenant is. At that point, offering an elective course in accounting and finance is too little, too late.” Victor Fleischer, *The Shift Toward Law School Specialization*, N.Y. TIMES (Oct. 25, 2012, 12:22 PM), <http://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/>.

⁴¹ For example, suppose 100 students in an entering class of 200 skip taking Constitutional Law on the thought that they would complete the “MBL,” but by the end of fall 2L, only fifteen students remain interested in pursuing the program and by the end of the program less than ten students complete it. This may play havoc with the curriculum if these students must now take Constitutional Law in the upper level years. I do not think that these numbers are out of the range of plausibility.

law schools do not require experience at all. Except, a relevant work experience by some law students might count favorably in the application. Second, business schools require a battery of personal essays that explore many issues: What are your specific career goals? How would education further one's career goal? Where do you see yourself in ten years and how do you plan to get there? What was your most challenging work experience so far? What ethical dilemma have you confronted and how did you resolve it? I can attest that writing these essays is no easy matter, and they require a great deal of personal reflection (one cannot crank these things out over a weekend). The application to the "MBL" should require a series of personal essays that would be difficult to meander through or puff absent a certain degree of focus and direction. The prospect of completing this task may be enough to discourage some students from even applying. Third, upon screening the applications, business schools typically interview the group of finalists. This can be done as well in the fall 1L semester. When an application process is in place and the student must go through Math & Excel Camp in fall 1L, these measures should sufficiently screen law students to a small number so that curricular havoc and resource misallocation created by the comings and goings of droves of students would be avoided. In the end, only a small group of 1L students would want to pursue the program, which is ideal from the perspective of the program as well.

If the number of JD students enrolled in the program is too small, a way to increase enrollment to justify the program would be to open up the "MBL" portion of the program to non-JD students. I digress a bit here and discuss my general impression of the economics of law schools and the legal profession. I am not an expert in this field and have not devoted as much scholarly effort as other thoughtful commentators have. However, it seems apparent to me as an informed observer that there is a fundamental change underway in the legal profession initiated by clients demanding efficiencies in the delivery of legal services.⁴² Once new sources of efficiency are found, we do not go back to the old way (for example, we have dispensed with the telegraph, the typewriter, the cassette, and the film loading camera). At the same time, there is greater information flow in our society in the Age of Information, and this information flow delivered at the speed of light has been exceedingly negative on the state of the legal profession, employment prospects, raising tuition, and student debt levels. In light of the confluence of these

⁴² See Rhee, *supra* note 5, at 320–24.

events, the current downward trend of law applicants and enrollment⁴³ may be a process of moving to a new equilibrium for legal education reflecting the adverse macroeconomic trends in the legal profession. Perhaps we are in the midst of a market correction. If these plausible observations and speculation on my part are in fact true, law schools should think about being more entrepreneurial in terms of finding new sources of revenue and new opportunities to add value in the delivery of legal education. I realize that my comments here seem so “business like,” but there can be no delusion that law schools are large economic enterprises with cash flows in and out, and are subject to the effects of larger economic forces.

The “MBL” program is an opportunity to expand legal education and to create additional sources of revenue. For example, many schools have LLM programs, and a two-year “MBL” program (instead of the traditional one-year LLM) for foreign lawyers makes sense as an educational value to foreign lawyers and revenue generation to the schools. This type of credentialing in law and business may be particularly appealing to business-oriented law students from East Asian and emerging economies, and some formal training at a business school, perhaps recognized through some non-degree certificate or perhaps even a degree, may have additional cache when these lawyers return to their home countries. Also, the program can be expanded to allow MBA students seeking substantial background in business or regulatory law, and lawyers and businesspersons seeking continued education or “retooling” opportunities to enroll in the “MBL” program. Wouldn’t a non-lawyer regulator or manager of an NGO benefit from some formal training in law and business? The “MBL” program must pay for itself, but it has the potential for revenue generation for law schools that currently face declining enrollment of JD students and perhaps de facto tuition decreases.⁴⁴

Lastly, the proposal for a JD/“MBL” requires institutional commitment and cooperation with a business school. Even if a student had the gumption to take the above coursework, it would not be possible as an individually tailored curriculum. As I have

⁴³ See *Three-Year ABA Volume Comparison*, L. SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lisacresources/data/three-year-volume.asp> (last visited July 15, 2013) (showing the continuing decline in applicants from 2011 to year-to-date 2013).

⁴⁴ See Karen Sloan, *Non-J.D. Candidates Easing the Strain on Law Schools*, NAT’L L.J. (Dec. 21, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202582328993&NonJD_candidates_easing_the_strain_on_law_schools_&slreturn=20130626033440 (noting that since 2005, the number of JD students fell by eight percent and the number of non-JD students increased by thirty-nine percent, which has eased the financial strain on law schools due to declining enrollment of JD students).

learned, business schools may be reluctant to open up their core first-year program to non-MBA students. This makes the administrative challenge that much more difficult. I have direct experience negotiating with the dean of a business school to allow law students access to core business school courses, and this difficulty should not be underestimated. Naturally, the business school will cooperate only if it is to its advantage. There must be quid pro quo for the program to work. Finances and the economics of the program are major issues, and let me address them.

A. Does the program require additional tuition?

Perhaps, and this tuition increase may be necessary to fund the business education. As a business proposition, and especially in a declining and uncertain market in legal education, one would not expect law schools to sacrifice their bottom line in erecting a program. I am not suggesting that tuition increase be made because the law schools can justify it through the promotion of a new glitzy program (those days seem to be drawing to an end fairly quickly with declining student application numbers and data suggesting a long-term decline in the interest in law schools). The tuition increase may be needed because there must be a business school partner that will want consideration for the partnership. It is a question of whether the law school or the student takes the hit on this cost.

B. How would a participating business school be compensated for opening up access to their program?

Money is the first answer. Seats in the classroom cost money. A more creative answer might be payment in kind. Many business schools do not have a deep program in legal aspects of business. Business students would benefit greatly from law school courses in business organizations, business planning, taxation, corporate governance, corporate finance, securities regulation, financial institution regulation, and the like. In addition to the pedagogical and training benefits of an interdisciplinary education, the exchange and socialization of law and business students make much sense. A worthy goal is to figure out an arrangement in which law school tuition is not increased.

C. Wouldn't it be simpler and cheaper to just hire business school professors to teach the courses at the law school on a contract basis?

Possibly, but it would be the cheaper, lower-quality option and not recommended. There is something to be said for law students to take the same courses with business students and be graded with the same standard. The classroom dynamics will be different with just all law students, and there is the real risk of increased agency cost, i.e., a business school professor hired on a contract basis with an unaffiliated institution would dumb down or otherwise cheapen the course for law students if she taught the course at the law school exclusively for law students. The benefits of a law student becoming a partial business student in the business school are significant.

D. Is the "MBL" seen as a threat to the business school?

At first glance, this seems like a possibility. An argument might be that it would cannibalize the JD/MBA program. But from a purely business perspective, the "MBL" is an independent product and a revenue generator. The student market for a JD/MBA is very small,⁴⁵ and the demand may be inelastic to the features of the law school's program due to some strong personal commitment that resulted in the pursuit of dual degrees. Usually, the commitment to pursue a JD/MBA is done before matriculation and students are generally focused on the joint degree program. On the other hand, the decision to sign up for the "MBL" would be done upon matriculation. In any given law or business school class, only a small handful of students are joint degree students. There is no threat to the business school's MBA program. The real concern for a business school, as I have learned from some of my discussions with the dean of a business school, would be opportunity cost since a seat in core courses such as Accounting, Corporate Finance, and Management may potentially take away a seat in the MBA program. These issues must be worked out.

⁴⁵ Since the JD/MBA program was created at Harvard, the school has graduated 450 people in forty-three years. Zeder, *supra* note 24. This is a little more than ten graduates per year. Both the Harvard Law School and the Harvard Business School are the largest schools in their respective fields. Most other schools would have a few students per year.

E. Can law schools and business schools create a strategic partnership to expand the educational market? In other words, is there a “win-win” financial scenario?

Quite possibly, and this possibility should be explored. The potential market for an “MBL” would be much bigger than the current partnership represented in the joint JD/MBA. The “MBL” would open up the law market for business schools in a way that the MBA degree to law students would not. Business schools may have opportunities to train foreign lawyers or law students seeking LL.M.s, and make further inroads in the professional training of lawyers and law firms. I would think that the deans of business schools would be very interested in these types of proposals (many business schools have highly profitable executive training and executive MBA programs). The business school would not lose revenue, and the “MBL” could be a natural entry to deliver business education to new markets. In terms of the delivery of education, only a partnership between law and business schools can deliver the “MBL” to the legal profession. If there is a possibility to expand the market, the discussion should be had and further analysis be done. This analysis would also require feedback from the profession on whether the product makes sense and how best to implement it. These discussions may lead to further thoughts on how law schools and the profession can partner in a mutually beneficial way to provide training to law students and young professionals.

In summary, that something makes sense does not mean it must always exist per some natural law of markets. A concentrated JD/“MBL” program makes sense, but there are significant barriers to implementation, some of which may not be within the control of law schools and their faculties. The specific issues are unique to each set of institutions within the larger university.

CONCLUSION

Careers as corporate lawyers or lawyer businesspersons require a specialized, interdisciplinary education—a heavy dose of core business law subjects and, ideally, a significant education in business. Based on the goldilocks principle, a JD/“MBL” is just about right in terms of the optimal mix of law and business at the cost of legal education. The program rationale is compelling, but it too is not without cost. Specialized training cannot coexist with generalist education. The cost-benefit works in favor of specialization for students seeking a career path as corporate lawyers or lawyer businesspersons. A crucial part of rational discussion is the plain fact that, quite obviously, all curricular

choices, including the current configuration of legal curriculum and its sacred cows, have opportunity costs. These costs are most directly felt by graduating law students and indirectly by the profession as a whole.

A Way Forward for an Ailing Legal Education Model

*James E. Moliterno**

I. A CRISIS FOR LEGAL EDUCATION

There is a crisis in legal education right now; there is a crisis in the practice of law right now. Law practice has changed as a result of technology, globalization, and economic pressures. The market for legal education's product, law graduates, has diminished. And now, for the first time in decades, the market for legal education has diminished.¹ Law schools cannot remain the same in this environment.

There has been an economic transfer that has taken place in moving away from a system in which mostly corporate clients willingly paid for training of beginners at major law firms. Law firms could pick up those costs if partners were willing to see their incomes shrink, but so far they are not doing so. The old but wildly-successful-in-its-day pyramid structure is breaking down.² Billing for newly minted associates' time is substantially decreasing.³ Far fewer law graduates find jobs in major firms, and the few who do are not being trained as they once were.⁴ Everyone interested in this issue wants to turn to the law schools and say "it's your turn folks, you have to do this for us." Law firms and their clients, prospective law students, and even the *New York Times* have turned to law schools to be more effective at preparing students for the practice of law.⁵ So there is an economic transfer that is taking place in moving from a system of corporate clients paying for the training of beginners to an effort

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¹ Ethan Bonner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1.

² See generally David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

³ *Id.*

⁴ See David Segal, *For 2nd Year, a Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 20, 2012, at B1; Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 78.

⁵ See generally Segal, *supra* note 2; Segal, *supra* note 4.

by law schools to do it.⁶ And if that were not a big enough problem, it is happening as the cost of legal education is already too high and our application numbers are too low for the current supply of legal education.⁷ It is an enormous problem that we are going to cope with. I think the only way we can cope with the enormous problem is by forging partnerships with the practicing branch.

A. Not as Recent as One Might Think

Most of the focus on legal education's current trouble is on current events. It sounds as if these troubles are purely a result of the economic crisis of the past decade. But that is obviously not the case. This has been coming for a long time, both in economic terms and the way legal education has tried to cope with changing conditions in law practice over the last thirty years. In fact, the root of the problem is to be found in the late nineteenth-century reforms of legal education and medical education not long after.⁸ Both reformed as part of the general "scientification" of higher education and the professions.⁹ But one crucial turn on the road told the tale. When medical education reformed, it decided that its mission was to produce doctors.¹⁰ When legal education reformed, it decided that its mission was to produce law professors.¹¹ Legal education's reform sought (for a complex set of reasons) to replicate graduate programs in philosophy and history, for example, where the main product of education is philosophy and history professors. We are still trying to figure out how we get to the place where legal education really is about producing lawyers, and it has been a difficult road. It has taken over a hundred years now. But we are getting closer to a better fit between legal education and the lawyer's work and career trajectory.

One bit of good news, but only a bit: for all the reasons why it is a bad time for legal education, lawyers, and law students, it is a great time to be a legal education reformer. Everybody is mad at law schools and wants us to do better. You know, everyone from the *New York Times* to prospective students to alums to the

⁶ See James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423, 434–36 (2013).

⁷ See generally Bonner, *supra* note 1, at A1.

⁸ See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277, 277–78 (2004).

⁹ See Moliterno, *supra* note 6, at 426.

¹⁰ *Id.*

¹¹ See M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 102 (1986).

practicing branch to corporate interests. Everybody wants us to do better right now, and we must.

We are also hearing about lowering the cost of legal education. I am all for it. The interest of lowering costs resonates very much with me. I think we are going to see a reduction in the discount rate—what students actually end up paying—for legal education this year, next year, and the year after that. The sticker price might not go down, but the discount rate is going to adjust to the drop in applications we are seeing this year and that projects out to future years.

I do not absolutely oppose what some people advocate as the major cost reduction technique, which is to cut law school to two years instead of three.¹² Our approach at Washington and Lee has been: “As long as we have three years, let’s do something far more productive with that third year. Let’s not just continue to have it be the wasteland where they bore you to death. Let’s do something better for the students we have right now.” Reduction to two years, to the extent it happens, is unlikely to result in a two-year JD. More likely, as is being considered in New York right now, would be states granting students permission to take their bar exam after two years, without a law degree.¹³ Students will choose (and to a great extent, employers will choose) whether a law license after three years with a JD is preferable to a law license after two years without a JD.

II. A BETTER THIRD YEAR

What do I mean by a better use of the third year? For me, it is about better designed, better implemented, wider-ranging experiential education. Education in the role of lawyer. Let us put the students in the role of lawyer in the third year after they spend two years being a pure student. Let us prepare them to do a lot of the things that are needed in practice.

¹² See, e.g., Kristina Dell, *Fast-Tracking Law School*, TIME (July 23, 2008), <http://www.time.com/time/nation/article/0,8599,1825863,00.html>; Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599, 605 (2012); Brian Leiter, *Four Changes to the Status Quo in Legal Education That Might Be Worth Something*, BRIAN LEITER’S L. SCH. REP. (Mar. 15, 2012, 4:00 AM), <http://leiterlawschool.typepad.com/leiter/2012/03/four-changes-to-the-status-quo-in-legal-education-that-might-be-worth-something.html>. Judge Posner is also among those who have suggested abolishing the third year. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 280–95 (1999).

¹³ See Estreicher, *supra* note 12, at 610; Karen Sloan, *Experts Debate Two-Year Law School Option*, NAT’L L.J. (Jan. 22, 2013), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202585158075&Experts_Debate_Two_Year_Law_School_Option.

A. What Legal Education Has Taught

So, think about the path that we have been on for over one hundred years. Legal education only taught one skill from about 1880 until 1980.¹⁴ It taught the critical thinking skills necessary to analyze appellate opinions. And it did it brilliantly. It still does it brilliantly, and it is not something we should stop doing. But we do not need to do it for three years. Two is enough.

Beginning in the 1970s and 1980s, we started getting more clinical courses and we, my generation of law students, got courses on writing, interviewing, negotiating, mediation, advocacy, and trial practice.¹⁵ That is a basket of skills we started to teach in the seventies, eighties, and nineties in addition to the one skill that we taught brilliantly for over a hundred years. And we have to keep teaching that seventies-era basket of skills as we go forward. But they are not enough.¹⁶ Not even close.

B. The Adjusted List of Goals

What beginning lawyers really need these days are problem-solving skills. They need business sense and savvy. They need to know how to work as a member of a team. They need to know how projects are managed, how they fit in the role of a person on that project-team, and eventually how to be the managers of those projects. There is a wide range of what students need to know to be a successful lawyer. Many of these tools that are needed by today's and tomorrow's lawyers are better taught to them by seasoned lawyers who have succeeded in today's practice environment. More on that later.

What we are trying to do at Washington and Lee is give our students a head start. We do not expect our students to be "practice-ready" upon graduation, a popular term today. The "practice-ready" term has been thrown around a lot and I think it is too high a hurdle for any law school to expect to leap. It is unrealistic to think that a three-year JD can produce law graduates who are like third-, fourth-, or fifth-year attorneys. That is not going to happen in the time we have and with the resources we have. But we *can* give students a head start on their development. At Washington and Lee, we are giving our

¹⁴ See Moliterno, *supra* note 6, at 429–30.

¹⁵ *Id.* at 430.

¹⁶ See Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 518 (2007) ("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.").

students a head start on the process of becoming valued in practice. And if it used to take them three years to develop, maybe they can now get there in a year or a year and a half after they graduate and move on in practice. We want to give them a launch.

III. WASHINGTON AND LEE'S WAY FORWARD

At bottom, all we have really done in our new curriculum is allocated a year to experiential education, and required it for graduation.¹⁷ It is really simple and pretty straightforward. The first and second years are largely unchanged (although the subjects required in our first year curriculum already include some forward-thinking: the administrative state, transnational law, and professional responsibility stand alongside the traditional offerings). But teaching in the first and second year looks a lot like it has for a very long time. There are some people who have come to the mistaken conclusion that we provide experiential education from start to finish, first year through third, that we do not do traditional first year teaching. That is not the case. We are still doing the things that have been really brilliant about legal education in the first and second year.

But the reformed third year involves students being engaged in a full credit load of experiential education all in the role of lawyers. It is clinics, it is elaborate semester-long simulations. More on the new courses and on engagement in a moment.

A. Learning Law as Lawyers Do

At the middle of what happens to students in this third-year curriculum is that they learn law the way lawyers do. For example, one of the many semester-long elaborate simulation courses is called "The Lawyer for Failed Businesses." In that course, the students learn bankruptcy law. But they learn it the way lawyers do to solve a client's problem. That is how lawyers interact with the law. Lawyers do not learn law in order to pass a three-hour closed-book exam. They learn law in context and with a purpose.

Our students still do the "student thing" for two years. But the third year places them into a sort of transition time for their mental pathways. They are moving from being the student to being a lawyer and thinking like it.

¹⁷ See generally WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, <http://law.wlu.edu/thirdyear/> (last visited July 16, 2013).

In the new courses, they are not only learning the 1970s basket of skills. They learn law. They learn theory. They learn business sense. They learn to be members of teams. They experience what experienced lawyers face managing projects. They solve problems. Almost every day, they solve problems, generate plans for client action, and implement those plans.

B. Our Progress to Date

In 2012–13, we were in our second year of required participation. We had two years of phase in (2009–10 and 2010–11). It was optional in those first two years, but very popular, and we have watched carefully to learn how it has gone. We examined bar exam results and determined that there was no statistically significant difference between the students in the new curriculum and those who remained in the traditional curriculum. We studied the costs of the new curriculum and found that it is no more expensive to run than our first or second years. We reviewed every new course. We both taught and learned from the new instructors. We did a very early extensive review with lots of student evaluations and focus groups. We held hours of faculty discussion that ended with a vote of confidence.

C. What Is in the Reformed 3L Curriculum?

So, “what is it?” It is two-week immersions, clinics, externships, practicum courses (elaborate simulations), law-related service, and exposure to the profession’s culture, economics, and cutting-edge issues.¹⁸

Each semester starts with a two-week skills immersion. In both immersions, there are large group meetings to deliver theory. There are small group meetings for drills, practice, and strategy meetings. And then the students do the work for their simulated client.

In the fall, every student in the third-year class is in a litigation immersion. They represent a person in a simple piece of litigation from start to finish. We have them interview the client, draft the pleadings, do a little bit of discovery, do a bit of motion practice, negotiate, counsel with their client, and eventually take that simple case to a truncated trial at the end of the two weeks.

In the spring, they do a transactional immersion and, again, all of our third-year students participate. Every student represents either the buyer or the seller in a transaction for the sale of a five- or six-million dollar furniture manufacturing

¹⁸ *Id.*

business that we have made up from whole cloth. Basically, we created all the documents and everything about the company. Every student represents someone who is role-playing the client. They deal with employment issues, executive compensation, decisions about the deal's structure, representations and warranties, indemnity clauses, and more. They learn law, negotiate, counsel their client, draft documents, and work with peers, lawyers who represent the opposite party and supervising lawyers. It is a lot of fun but it is a lot of work.

"Intense" is the word most often used by students to describe the immersions. "Like a job." Exactly. From the beginning of the fall immersion until the end of the third year, students are on a transition path, moving from student to professional.

Following the immersion in each semester, each student enrolls in at least two twelve-week experiential courses. Four of them total for their third year. Most students have taken five, actually. One of those four or five has to be a clinic or externship. It has to be a live client experience in which they represent real clients. The simulation courses we are calling "practicums." Courses like the "The Lawyer for Failing Businesses," "The Litigation Department Lawyer," "Poverty Law Litigation," and "Corporate Counsel."¹⁹ You notice that each of these is built around a practice setting. Some of our regular faculty teach these courses, and many courses are taught by wonderful lawyers who come in and essentially teach what they do. They put the student in the role of the litigation department lawyer, if that is their practice group. They design the simulations, come in and run their course, putting the student in the role of the lawyer in the course's practice setting.

In addition to the immersions, clinics, externships, and practicum courses, every third-year student is enrolled in a course called "The Legal Profession." It is not the course on professional responsibility law, which we teach in the first year. Instead, this course is a one-unit course that exposes them to critical cutting edge issues facing the legal profession. So, there are sessions on the law firm economic system and alternative business structures. There are sessions on legal culture, relationships between prosecutors and defense lawyers, and gender issues. There are sessions on special skills that are rarely addressed in the curriculum, like empirical skills or financial

¹⁹ For a list and description of the "practicums" offered at Washington and Lee School of Law, see WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, PREPARED FOR THE PROFESSION, available at [http://law.wlu.edu/deptimages/career%20planning/3L%20\(2\).pdf](http://law.wlu.edu/deptimages/career%20planning/3L%20(2).pdf).

statement reading skills for lawyers. The idea is to move the students closer to being “of the profession.”

Students must also do at least forty hours of law-related service during their third year. There is room for one traditional course per semester, if the student wants to take it, and most students do take one of the traditional courses they feel they need for the bar or for a job offer they have received.

D. Replicating the Reform

This reform is really quite doable. It is not a top-to-bottom redesign of the curriculum. There is room for a lot of faculty to do as they have always done, and because of partnerships with the practicing branch, it is not more expensive. More than half of my colleagues think that this curriculum is a great idea, but they do not want to teach in it. They still teach the courses they have always taught in the first and second year.

Adoption of this curriculum reform is really just a statement that experiential education is as important as the first-year thinking skills. Every law school has clinics, every law school has at least some courses that we would describe as practicum courses, maybe not quite enough to make them a requirement, but everyone has the resources in place to do this. It is really just a matter of saying, “the way we require students to do the first year the way it is, we require students to do experiential education in the third year: it’s just as important.”

E. A Partnership with the Practicing Branch

Excellent lawyers and law firms teach their courses for very little monetary compensation. They teach for the love of doing it, and they are teaching students who are not only students at their law firm, they are teaching whoever signs up for the course at Washington and Lee. So, some of the resource that the practicing branch is not able to give to their beginning lawyers anymore, they are giving to any law student who signs up for the courses. We could not afford to do it without them.

Not only are costs lowered by the generous teaching contributions of our practicing colleagues, they also happen to be more effective at teaching these courses. In general, there is not a precise skill-set overlap between law professors and the role to which the vast majority of our students aspire. There are some things law professors do exceedingly well and perhaps so well we are irreplaceable. Teaching the critical thinking involved in the first-year courses, for example: there may be nothing like being taught the first-year courses by an accomplished scholar of the

specific topic. But by contrast, law professors are not all excellent problem solvers, managers of teams, and business people. Not all law professors have and can convey the techniques and traits involved in high levels of interpersonal skills. Experienced, excellent lawyers know how to practice in their areas better than most law professors. (There are exceptions, to be sure, but I am speaking of the majority.) With some guidance regarding teaching issues, management of classrooms, and design and management of simulations, experienced lawyers have the capacity to be better teachers of their practice area than law professors could ever hope to be. In the law school of the future, we must take advantage of the relative strengths of all our possible teaching resources. We cannot afford to do anything less.

F. Early Empirical Data

There is a survey called the law school survey of student engagement (LSSSE).²⁰ It is managed by a staff at the University of Indiana. For schools that participate, it asks questions of law students about how wrapped up they are in their studies, how much time they put into their studies, how often they show up for class without preparing (some students do that, I am told), how many papers they write of different lengths, how often they work with colleagues or other students on projects, and how much of the time is spent applying what they learned to real world problems.²¹ In the end, the survey is trying to capture the measure of student engagement in activities that will enhance their preparedness for practice.

On the charts printed here, the prompt is at the top and the answer or answers illustrated by the graph are in parenthesis after the prompt. The two bars on the left illustrate the percentage of students at Washington and Lee giving the answer indicated in the parenthetical (light blue for 2008, before the start of the new curriculum, dark blue for 2012, the first class to be required to take the curriculum in full). The two bars on the right are the composite percentage giving the same answers by our peer schools (again, light blue for 2008, dark blue for 2012). The survey organizers do not release any particular school's

²⁰ LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LSSSE REPORTS, *available at* <http://lssse.iub.edu/reports.cfm>.

²¹ For all the questions and responses in the 2012 report, see LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT: LSSSE 2012 MEAN COMPARISONS REPORT, *available at* [http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20\(Lssseville%20Law\).pdf](http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20(Lssseville%20Law).pdf). For the 2008 data, see LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT: LSSSE 2008 ANNUAL SURVEY RESULTS STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS, *available at* http://lssse.iub.edu/2008_Annual_Report/pdf/LSSSE_Annual_Report_2008.pdf.

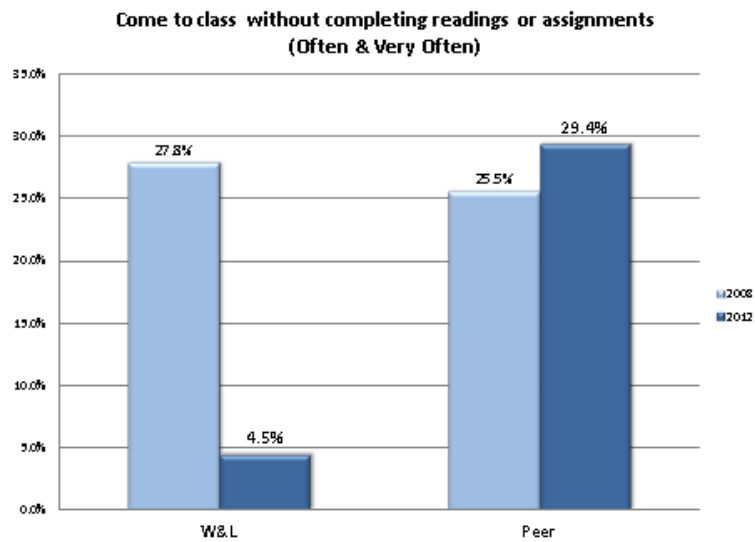
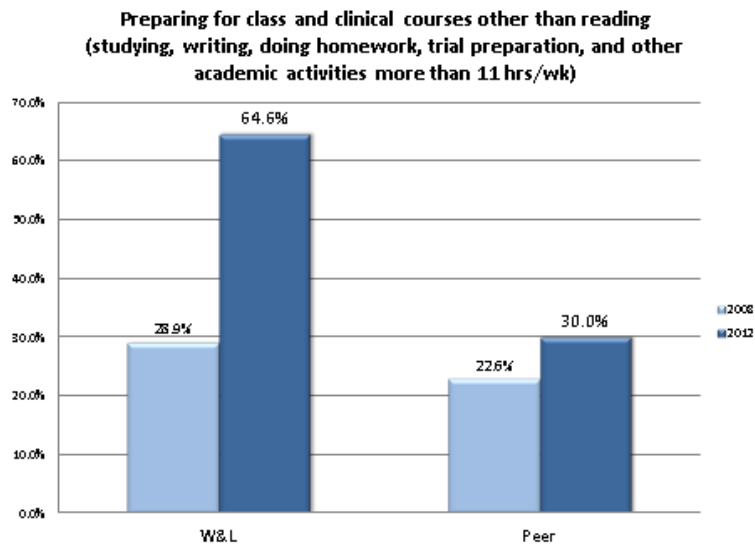
numbers and scores. They solicit a list of peers from each school and provide a composite set of answers and scores for the group of peers. Our peer schools are those with whom Washington and Lee competes most closely in various markets.

1. Overall, how hard are students working in their third year in the reformed curriculum?

In 2008, 28% of our students said “often or very often” they come to class without completing reading assignments (for third-year students). Our peer schools showed almost exactly the same number in 2008 (25.5%) and a few more “often or very often” unprepared students in 2012 (29.5%). Now, however, very few of our third-year students come to class unprepared (only 4.5%). The third-year students can not afford to come to class unprepared anymore, and they do not do it!

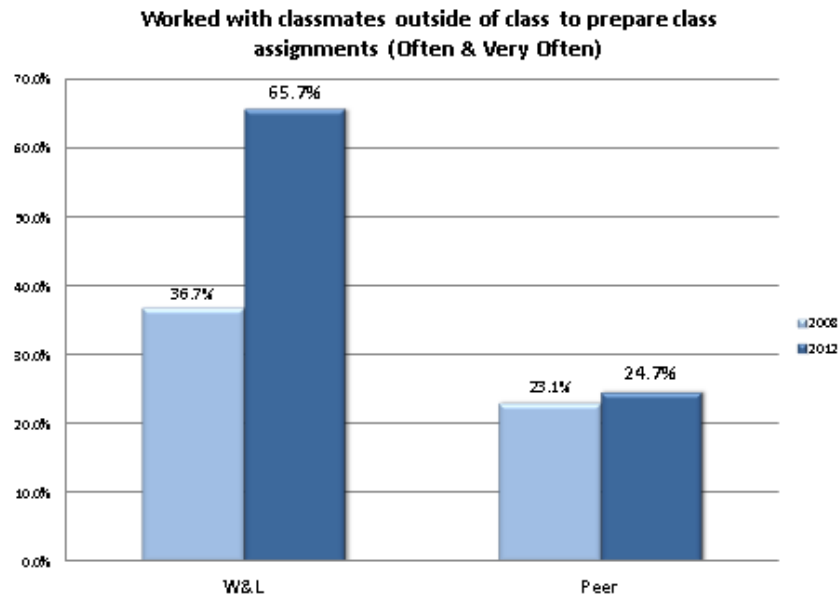
How many hours do they work outside of class other than reading? Again, the change at Washington and Lee between 2008 and 2012 is striking. In 2008, only 28.9% of our third-years reported working eleven hours or more, while, in 2012, 64.6% said they work eleven hours per week. At our peers, the number reporting eleven or more hours of work outside of class has moved only a modest amount from 2008 to 2012 (22.6% in 2008 and 30.0% in 2012).

Students are working harder in the reformed curriculum.



2. What are they doing in this additional work-time?

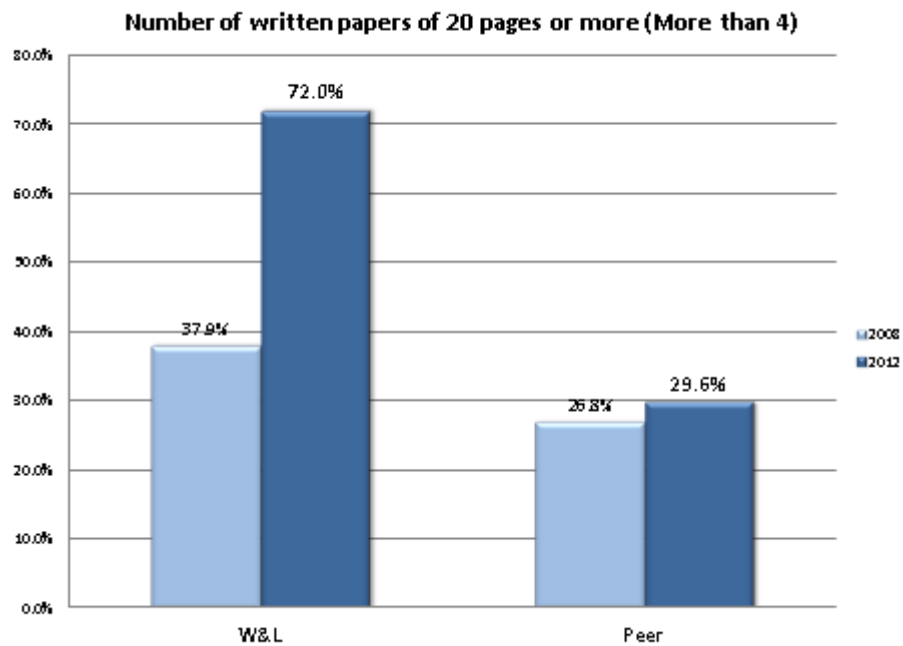
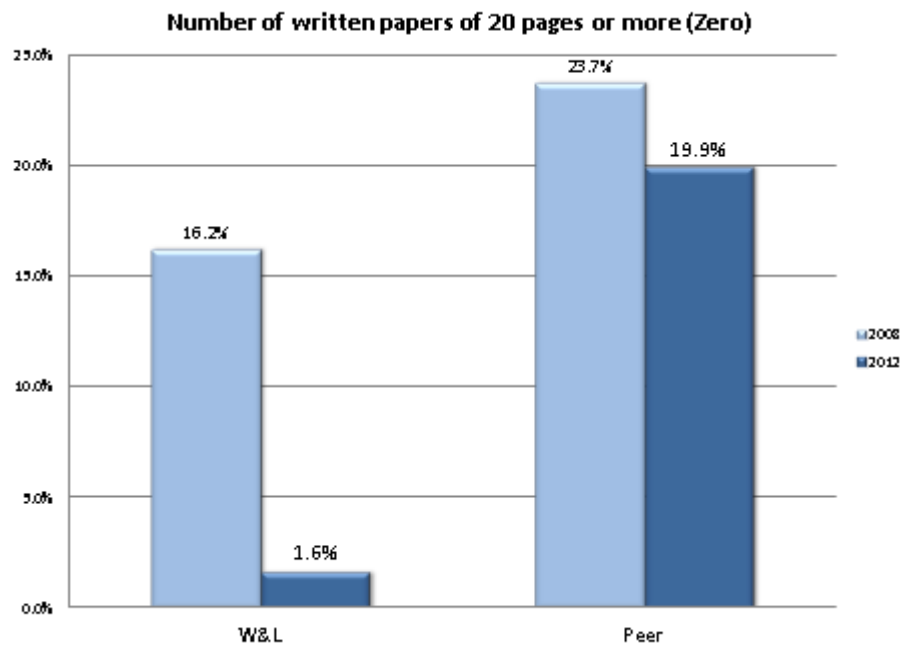
For one thing, they are collaborating with one another more. The survey asked, “How often do you work with other students on projects in and outside of class?” Washington and Lee students in 2012 were doing those collaborative activities two or three times as much as in 2008. Peer schools had almost no change in their numbers on these questions from 2008 to 2012.

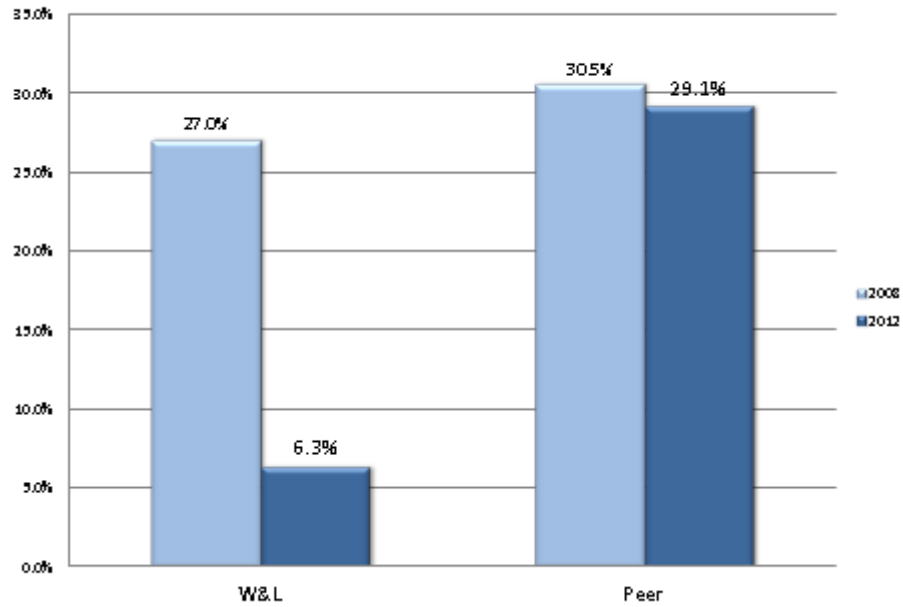
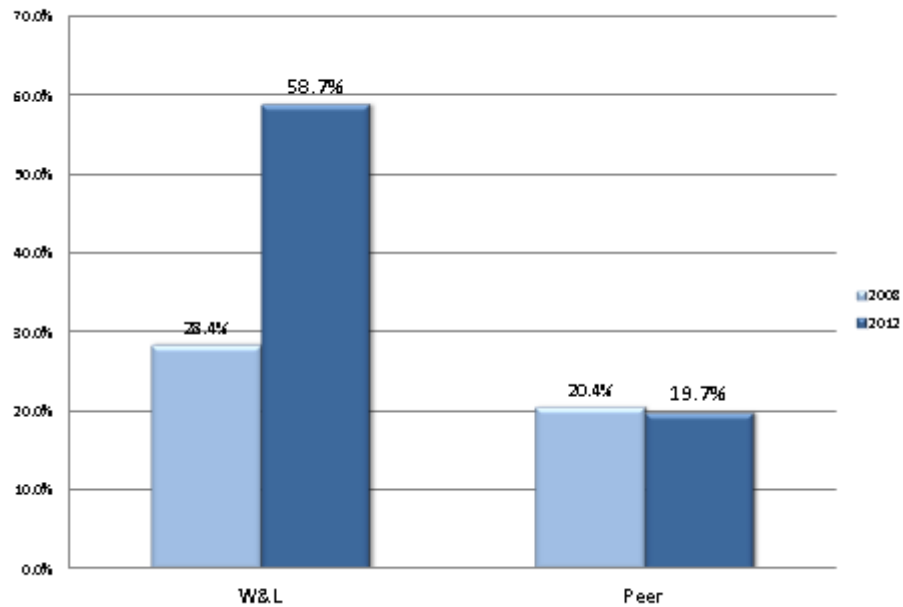


3. What else are they doing?

They are writing a lot. “How many written papers of twenty pages or more?”—it used to be that 16% said, “I did zero.” Now, virtually no one (1.6%) says that. The number of students doing four or more twenty-page papers has nearly doubled from 2008 to 2012, from 38% to 72%. All the while, students at our peer schools continue to report close to 2008 numbers.

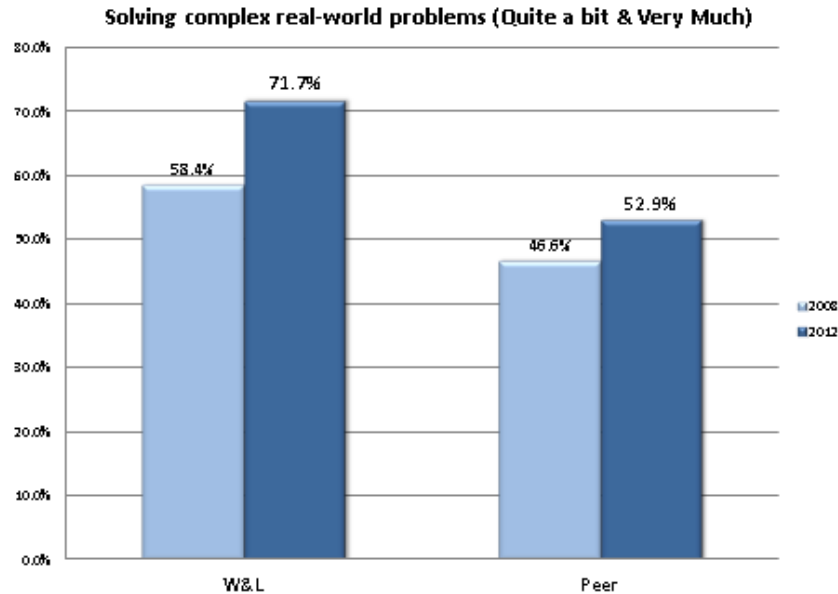
Perhaps even more significant is the frequency of writing papers of five pages or less, a very common occurrence in law practice. Again, in 2008, 27% said, “I haven’t done that at all this year.” Now, nearly all of them have done five-page papers (94%), and most of them (58.7%) have done more than seven such papers. But our peers have not improved from their similarly poor 2008 numbers.



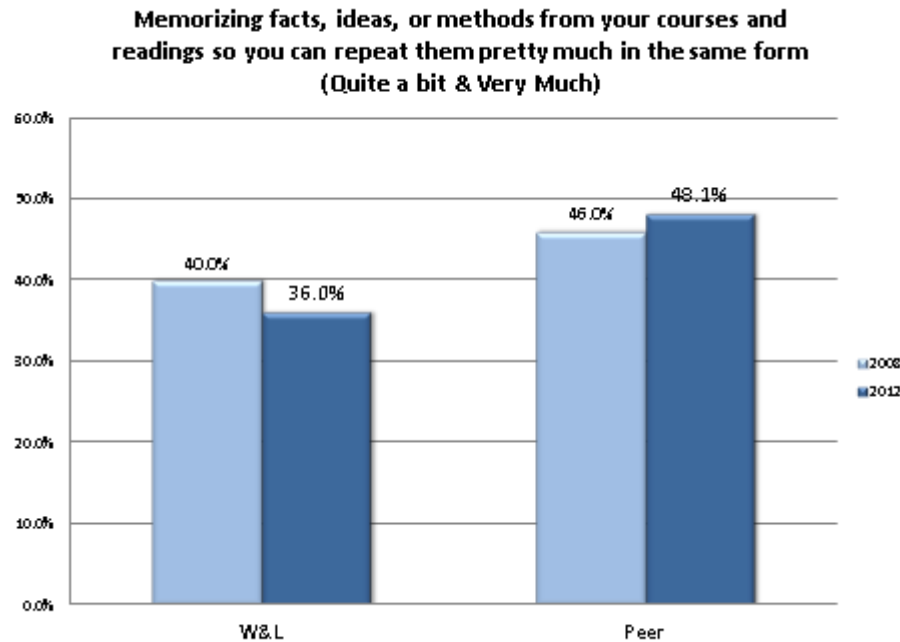
Number of written papers of fewer than 5 pages (Zero)**Number of written papers of fewer than 5 pages (More than 7)**

4. What else are they doing more of?

They are solving real-world problems with their legal knowledge. They are problem solving, a critical lawyer skill, and they are solving realistic problems, more than they did prior to the reformed curriculum.



One thing they do not do more of, which I am quite happy about, is that they do not *memorize things* any more than they used to. This is one number that did not go up between 2008 and 2012. It is not what the new curriculum is about. We are not teaching them to memorize anymore than they ever did. We are teaching them how to use information, not just pack it into their brains.



What has really happened is that students are spending more time being more productive on things that will matter for them as lawyers. That is what our new curriculum has meant to us and our students.

CONCLUSION

Legal education cannot stand apart from its markets, the markets for its graduates and the markets for its legal education product. Dramatic changes in law practice cannot be ignored until they pass. And practice will not adjust to synch up with legal education's status quo.

Costs should be contained. But whether costs are contained or not, students need an education that is more effective, more active, and more tailored to reality. Without abandoning what is successful about legal education, including at least some version of what has traditionally happened in the first year, law schools can produce this more effective legal education with increased emphasis on experiential education.

We Have a Dream: Integrating Skills Courses and Public Interest Work in the First Year of Law School (and Beyond)

Sara K. Rankin, Lisa Brodoff,** Mary Nicol Bowman****

Real-world learning experiences are widely understood to result in higher student motivation, satisfaction, and performance.¹ However, first-year students rarely receive clinical learning opportunities.² Meanwhile, legal writing courses tend to focus students on carefully constructed legal problems rather than “real time, real life” legal problems.³ As a result, first-year law students are starved of valuable skills training opportunities. They are also denied the motivational sustenance of working on a project that has real meaning to a real client. By the end of the first year, many law students cannot recall the very passion for justice and change that brought them to law school.⁴

The clinical and legal writing faculty at Seattle University School of Law are trying to address these issues by experimenting with collaborative teaching projects that use real legal problems faced by clients of the clinical program. These

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¹ See generally Sara K. Rankin, *Tired of Talking: A Call for Clear Strategies for Legal Education Reform: Moving Beyond the Discussion of Good Ideas to the Real Transformation of Law Schools*, 10 SEATTLE J. SOC. JUST. 11, 22 (2011); JOHN DEWEY, DEMOCRACY AND EDUCATION (1916); JOHN DEWEY, DEWEY ON EDUCATION (Martin S. Dworkin ed. 1959); JOHN DEWEY, EXPERIENCE AND EDUCATION (1938); Alfie Kohn, *Progressive Education: Why It's Hard to Beat, But Also Hard to Find*, INDEP. SCH. (Spring 2008), <http://www.alfiekohn.org/teaching/progressive.htm>.

² Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 J. A'SSN LEGAL WRITING DIRECTORS 191, 203 (2011).

³ *Id.* at 201.

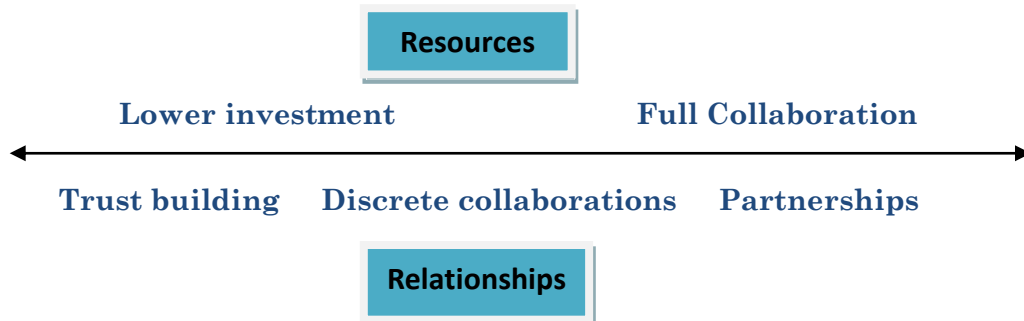
⁴ See, e.g., Sara K. Rankin, *The Fully Formed Lawyer: Why Law Schools Should Require Public Service to Better Prepare Students for Private Practice*, 17 CHAP. L. REV. 17, 26–27 (2013); Mary Nicol Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC. 586 (2013); Deborah A. Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001).

“integrated skills projects” engage first-year students with legal writing faculty, clinical faculty, and public interest work. We have found that these projects provide our first-year students with exceptional training in practical skills, generate remarkable student satisfaction, and reignite student passion for the practice of law.⁵

These rewarding experiences motivated us to inspire other legal writing and clinical faculty to try such integrated skills projects or to advance their current collaborative efforts.⁶ To this end, this essay (1) introduces a “continuum” of integrated legal skills projects, featuring applied examples of activities that range from discrete to more ambitious; (2) surveys the benefits that we have seen at Seattle University School of Law from the various collaborative projects we have engaged in; and (3) offers some practical tips for getting started with collaborative projects.

I. CONTINUUM OF POTENTIAL COLLABORATIONS

Integrated legal skills projects can range from very discrete to more ambitious. The feasibility of any particular project will depend on a number of factors, including but not limited to the time and resources of interested faculty and their respective institutions, as well as how developed the relationships are among the various participants.



⁵ See *infra* Part II.A–B.

⁶ The benefits and challenges of various “integrated skills projects” are discussed in many sources, including Rankin, *supra* note 4; Bowman, *supra* note 4; Ruan, *supra* note 2; Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517 (2011–12), available at <http://ssrn.com/abstract=1626568>; Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLINICAL L. REV. 285 (2010); Sarah E. Ricks & Susan C. Wawrose, *Survey of Cooperation Among Clinical, Pro Bono, Externship, and Legal Writing Faculty*, 4 J. A’SSN LEGAL WRITING DIRECTORS 56 (2007); Michael A. Millemann, *Using Actual Legal Work to Teach Legal Research and Writing*, 4 J. A’SSN LEGAL WRITING DIRECTORS 9 (2007); Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441 (2006).

2013] *Integrating Skills Courses and Public Interest in Law School* 91

This continuum offers a conceptual framework for surveying some examples of discrete and simple projects that require a lower relative investment of resources at one end, compared to more involved and detailed projects at the other end of the scale. Our successes have been the rewards of a gradual process, starting with some fairly low resource investment efforts and culminating in much higher-investment partnerships. But we have also discovered that there is a direct correlation between increasing investment of time and resources and increasing levels of trust and effective partnership.

The next few sections elaborate and provide some applied examples of efforts at the low-, mid-, and high-end points on the continuum of potential collaboration. These explanations will help interested faculty in assessing viable projects based on their own unique needs and limitations, using the sliding scale as a visual framework.

A. Lower Resource Investment & Trust Building Efforts

The steps discussed in this section would not directly impact students, but they lay the groundwork for the more intensive collaborations discussed below that do provide benefits to first-year students. They are ideal for schools or faculty that are less accustomed to legal writing and clinical faculty working together on curricular projects.

- Reach out to a clinician/legal writing faculty member (at your own or another school) to start a conversation about the possibility of a collaborative project.
- Schedule a joint clinic/legal writing faculty meeting or retreat to discuss common issues (e.g., creating common writing terminology, discussing student writing and solutions, preparing students for clinic writing tasks, discussing common workplace/status issues, etc.).
- Hold a preliminary meeting of legal writing and clinical faculty to discuss potential joint projects (e.g., explore interest on both sides, whether there are recurring issues in the clinic that could use additional legal research, etc.).
- Create clinician/legal writing faculty coordinators to foster collaborations and create efficiencies.

B. Mid-Level Investment & Discrete Collaborations

The collaborations discussed in this section involve both students and faculty; they can also lay the groundwork for more

intensive collaborations. Seattle University's collaborative projects currently fall into this part of the continuum and have generated the benefits that are discussed in Part II of this article.

1. Co-supervise an independent study for a student writing an amicus brief

At Seattle University, clinical faculty are frequently asked to author amicus briefs for client groups or on behalf of the clinic itself in support of important and pressing public policy arguments. When one of the legal writing faculty's students wanted to further expand her brief writing skills, the legal writing faculty member and a clinician came together to jointly supervise her in researching and drafting an amicus brief to the state supreme court. Later, the two faculty members and the student co-authored a law review article on the same policy issue.⁷

2. Create an "idea bank" of research to support recurring legal problems the clinics encounter

If the clinic has recurring issues that require legal research, the legal writing classes can design useful projects that are "inspired by" clinical cases. For example, during the spring of 2012, a Seattle University legal writing faculty member worked on an issue that was identified by the clinician who teaches in Seattle University's Domestic Violence Clinic; the issue has been affecting pro se litigants rather than clinic clients. The legal writing students worked with a composite fact pattern that was inspired by the real cases, and the legal writing and clinic students will likely work together to figure out the best way to disseminate the results of the research.

3. Guest lecturing

For example, clinicians can teach discrete legal writing classes (e.g., a class on client interviewing). Legal writing faculty can teach discrete clinic classes (e.g., a class on research skills or amicus brief drafting in the clinic or a class on judicial opinion writing in a judicial externship seminar).

⁷ Lisa Brodoff, Susan McClellan & Elizabeth Anderson, *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. SOC. JUST. 609 (2004).

2013] *Integrating Skills Courses and Public Interest in Law School* 93

4. Legal writing students can work on a research project based on a current clinic client and case; students from the clinic and legal writing class can work together on the client issue

For example, students in Seattle University's Immigration Clinic served as client contacts to legal writing students, who provided factual and legal research in support of an asylum application for two women who were victims of human trafficking and female genital mutilation. Clinic students used that research in writing briefs, and the clients were granted asylum. As another example, legal writing students provided a short memo and brief to Domestic Violence Clinic students regarding whether a Washington court has the power to issue a protection order for more than one year. The materials were used in support of clinic cases. More recently, legal writing students provided research and an objective memo on the legality of a Medicaid regulation barring coverage of Gender Reassignment Surgery for a transgendered client of the Administrative Law Clinic. The research memos were used by the clinic students in briefing their client's case through the administrative hearing process and then in the state court appeal.

C. Full Partnerships

These more advanced forms of collaboration may involve structural or institutional changes.

1. Co-Teaching

A co-teaching model involves a full-time legal writing faculty and clinician co-teaching a clinical class with a writing overlay or a legal writing class with a clinical overlay.

2. Rotating Teaching Responsibilities

Under a rotating model, a legal writing faculty member teaches a clinical course and/or a clinician teaches a legal writing course.

3. Rotating Resident

By contrast to the former rotating teacher model, a rotating resident is a more sustained and integrated concept. A legal writing faculty member joins the clinic firm and serves as a writing consultant for students/faculty in all of the clinic courses. Similarly, a clinician could rotate into the legal writing program to help make "live client" issues more pervasively integrated throughout the legal writing curriculum. The faculty would partner in terms of teaching, supervision, etc.

4. Integration

Clinical and legal writing faculty become “skills faculty.” Such faculty work as a single department to address legal skills education throughout all three years of legal education, at the appropriate level for each student.

II. BENEFITS

We have found that the benefits that flow from these projects make them well worth the additional work involved as compared to traditional teaching methods. When we began these projects, we expected that they would generate a number of benefits, but our experience has been even more positive than we expected. We expect that the benefits we highlight below could also be achieved at other schools through similar collaborations that involve both first-year and clinical students.

A. Benefits to Legal Writing Students⁸

1. Anticipated Benefits

- Increased student motivation, engagement, and satisfaction;⁹
- Improved work product;
- Provided students with experience of “real world messiness” and complexity;
- Provided students with training in how to integrate and apply skills to “real world” experiences;
- Increased team-building and collaborative skills;
- Developed a sense of community within and outside of class, extending to larger community;

⁸ Professors Lisa Brodoff and Sara Rankin conducted surveys of 3Ls who participated in a legal writing/clinic collaborative project during their 1L year. The student surveys supported our observations that these projects result in many benefits to legal writing and clinical students, including improved skills acquisition, law school course planning, job marketability, and satisfaction with choice of a legal education and career. Clinic Collaborative Project Survey, Mar. 2013 (on file with the authors). *See also* Videotape: Legal Writing & Clinic Collaborative: Real Clients in the First Year (Seattle University School of Law), available at <http://law.seattleu.edu/x12101.xml> (last visited Aug. 25, 2013).

⁹ Just six months into the first year of law school, students' level of depression and anxiety are significantly elevated. *See* G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 240; Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357 (2009) (finding that law students who exercised their strengths and skills in their law school courses were less likely to report depression and more likely to report satisfaction).

2013] *Integrating Skills Courses and Public Interest in Law School* 95

- Engaged students in thinking about their roles in social justice and public service; and
- Encouraged students to reflect on moral and ethical aspects of lawyering.

2. Surprise Benefits

- Increased student confidence in their lawyering skills and choice of entering law school and the legal profession;
- Generated student interest in clinical programs;
- Generated student interest in particular areas for continued study or specialization;
- Improved student marketability for externships, summer jobs, and post-graduation legal positions; and
- Increased student readiness for participation in clinics.

B. Benefits to Clinic Students

- Empowered clinic students to become teachers/mentors/clients;
- Helped them realize how much they had learned since their first year;
- Exposed them to elements of supervisory and case management roles;
- Challenged them to identify, select, and integrate research from “parts” of a case into a “whole”;
- Built confidence as they entered difficult legal market; and
- Helped with transference of skills and knowledge from legal writing courses to client representation in the clinic.

C. Benefits to Faculty

- Broke down institutional siloes;
- Shared (and increased) ideas, creativity, and energy;
- Built professorial capacity (substantive and pedagogical);
- Enhanced faculty motivation, engagement, and satisfaction;
- Built an idea bank/resources for potential scholarship;

- Provided a group of trained research assistants; and
- Facilitated clinicians' interaction with 1Ls.

D. Benefits to the Institution

- The Institution experienced derivatives of student and faculty benefits, including the following:
- Increased student skills and student employment prospects;
- Energized and facilitated productivity of skills faculty.

III. PRACTICAL TIPS FOR GETTING STARTED

Collaborative projects are somewhat challenging to develop and teach, but the tips below may help to make the process smooth and effective.

A. Generating Good Projects

It takes a lot of "startup" legwork to generate good projects. Here are some tips to consider:

- Consider starting the conversation about potential collaborations with an ally, and then reach out to others who might be interested. Ultimately, try to involve multiple faculty members from both legal writing and the clinic—the more faculty members who are interested and the more potential projects that you generate, the more likely it will be for you to come up with good, workable projects.
- Designate a coordinator in each faculty group (legal writing and clinic) to help make the process more efficient.
- Hold regular in-person meetings between legal writing and clinical faculty to ensure everyone's needs are met. For example, the legal writing faculty can clarify their pedagogical goals and timing issues, and the clinicians can talk about how they might use the work or what their timing needs are likely to be. It is also helpful to discuss whether students will be able to come out on both sides of the issue and any concerns related to use of their work product as a writing sample. You can also use this meeting to brainstorm potential projects. It is often helpful to have this meeting as early in the school year as

possible, so that the clinicians can be on the lookout for potential projects all year.¹⁰

- Plan ahead so that you have time to evaluate potential projects and slot them into the curriculum. For example, at Seattle University, we generally assign the projects in February, and we try to get the list of potential projects in early November. But with advanced planning, you can slot a project into any appropriate part of your curriculum (e.g., a research exercise, a full memo, a brief, etc.). You can also see how the project relates to the rest of your curriculum and adjust accordingly (e.g., covering research topics in other places in the curriculum).
- Carve off a manageable “slice” for the legal writing students to work on if a project seems too large or difficult for the legal writing students to accomplish. For example, if a claim involves multiple elements, have the legal writing students focus on a single element, while having the clinic students look at the other elements. Or have different professors work on different aspects of the issue presented.

B. Teaching (and Managing) the Projects

These projects often involve more factual and legal complexity than “canned” problems, so it is important for students and legal writing faculty to be prepared to manage that complexity.

- Consider assigning non-legal background reading, particularly if the legal issue is novel or complex. For example, this approach was necessary in a recent project concerning Medicaid coverage for Gender Reassignment Surgery.
- Involve as many students as possible in the collaboration by inviting the clinical students to introduce the project to the legal writing class, or by scheduling opportunities for the legal writing students to present their research to the clinical students.
- Be prepared for students to make more “wrong turns” or otherwise struggle more than might be expected

¹⁰ It can also be helpful to create a document summarizing the discussion about what makes a good project. For a sample document that can be adapted, see Bowman, *supra* note 4, at 597.

from a canned problem. Let the students know that this struggle is part of the pedagogical benefit of the problem because live legal issues are often complex, and use the opportunity to model for the students how a lawyer works through a new issue. That takes confidence to carry off, but it can be a powerful opportunity for modeling professionalism. And be flexible!

- Stay in touch throughout the project, so legal writing faculty and clinicians can work through any unexpected challenges that arise.
- Use creative methods to help the students work through the complex information to produce reader-based rather than writer-based work product. For example, we often use “revising classes” to help the students deepen and clarify their thinking. We also encourage our students to work in groups and to practice presenting the results of their analysis to each other before presenting the final analysis to the client.
- Discuss preferences for delivery of work product. For example, it is unlikely that the clinician will want to review all of the legal writing student memos; instead, we generally select one or two of the top memos to deliver to the clinician as the final work product, although we provide more if warranted by the different approaches taken by various students.
- Always emphasize the utility and purposefulness of each student’s work product, even if only a few memos are ultimately delivered to the client. In addition to each student’s participation in the collaborative learning dynamic, each student can also participate on a team (broken up by issue or topic) that presents to the client.

Integrated skills projects like those we have undertaken at Seattle University may be challenging, but they can offer tremendous benefits to students, faculty, the institution, the broader community, and ultimately, the legal profession. We have witnessed how these projects—especially when they are implemented as early as the first year of law school—can increase student motivation, engagement, practice-readiness, and employment prospects. We have experienced first-hand how these projects can enhance faculty motivation and engagement, as well as challenge and improve our teaching skills. Our clients

2013] *Integrating Skills Courses and Public Interest in Law School* 99

and community partners desperately need such inspired public service from our students.

These days, there are not many win-win-wins to report in the legal academy. But with courage, passion, and vision, faculty can work together to make integrated skills projects a reality in the first year of law school. The challenges can be overcome, and the benefits can be extraordinary. We dare to dream.

Using the Client-File Method to Teach Transactional Law

*Bradley T. Borden**

INTRODUCTION

For several decades, law, business, and other schools have used different versions of the case method as the basis for teaching and facilitating classroom discussion.¹ In law school, the case method consists of students reading cases and professors asking students questions regarding the cases. This Socratic method, which Christopher Columbus Langdell introduced almost 150 years ago, helps students develop critical reading and analytical skills.² In graduate business schools, the case-study method consists of students reading facts about a particular business or business situation (i.e., a case study or problem) and discussing and analyzing the case study with other students and the professor. The case-study method provides students the opportunity to apply business skills and knowledge to the real-world facts presented in the case study. With the call for law schools to help bridge the gap between legal education and practice, law schools and commentators have begun adapting the business school case-study method to the law school classroom to more closely resemble aspects of the practice of law.³

The client-file method combines the law school case method with the business school case-study method, and provides students an opportunity to study and apply legal doctrine to a real-world problem and analyze those problems as part of an

* Professor of Law, Brooklyn Law School. I thank Steven Dean, Ali Khan, and the participants at *Chapman Law Review's The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs* for comments on earlier drafts of this Article.

¹ David A. Garvin, *Making the Case: Professional Education for the World of Practice*, HARVARD MAGAZINE, Sept.–Oct. 2003, available at <http://harvardmagazine.com/2003/09/making-the-case.html> (reviewing the history and use of the Langdellian teaching method and the business school case-study method, in addition to the development and use of a case method in medical school).

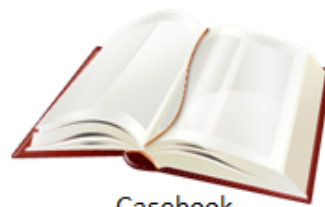
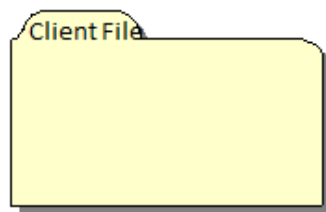
² See *id.* at 58–60.

³ See Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 TENN. J. BUS. L. 9, 10–11 (2009).

engaging classroom environment. The term “client-file method” avoids the confusion that the term “case-study” presents in the law school setting. Too often law professors think of the Langdellian teaching method when they hear “case-study method,” even though business professors use it to refer to the business-school model of teaching. The term “client-file method” helps dispel such confusion, and it further distinguishes the analytical methods business managers use from those lawyers must use when they represent clients in the transactional setting.

The client-file method presents students with transactional information that exposes them to real-world legal problems. Students must be familiar with the transactional setting, understand client objectives, and know the relevant law to properly address the problems that materials in the client file raise. The casebook (and related statutes and regulations) that accompanies the client file provides students the resources they need to obtain the legal knowledge required to solve those problems.

Resources for the Client-File Method



The client-file method of study requires two main resources: a client file and legal resources, which can be compiled in a casebook. The client file presents a factual scenario that

requires the content of the casebook to address the questions presented in the client file. A fundamental aspect of the client-file method is that it provides students the opportunity to work with a single baseline fact scenario throughout a semester. As the semester progresses, the set of facts grows in complexity with changes or additions to the original facts as clients face various business transactions. This method therefore helps students begin to understand the scope of complexity that client matters present. For many students this will be the first time they get exposure to such complexity. That exposure will help them anticipate the amount of work that a client engagement will often require and recognize that work they receive in a law firm will often be a small part of a much larger transaction. That understanding should help them better serve clients.

The client-file method provides unique opportunities for delivering materials to students. A single author may prepare the client file and the accompanying casebook. An author may, however, create an independent client file that others may use with existing casebooks or treatises. Authors may write casebooks that would be useful generally and nicely complement independent client files and hope for adoptions by professors who have adopted a particular client file. As the supply of client files grows, professors could use a particular casebook but adopt new client files from time to time. They also may develop their own sets of materials and forego assigning casebooks. The client-file method therefore will offer law professors great flexibility as they mix and match client files with other materials.

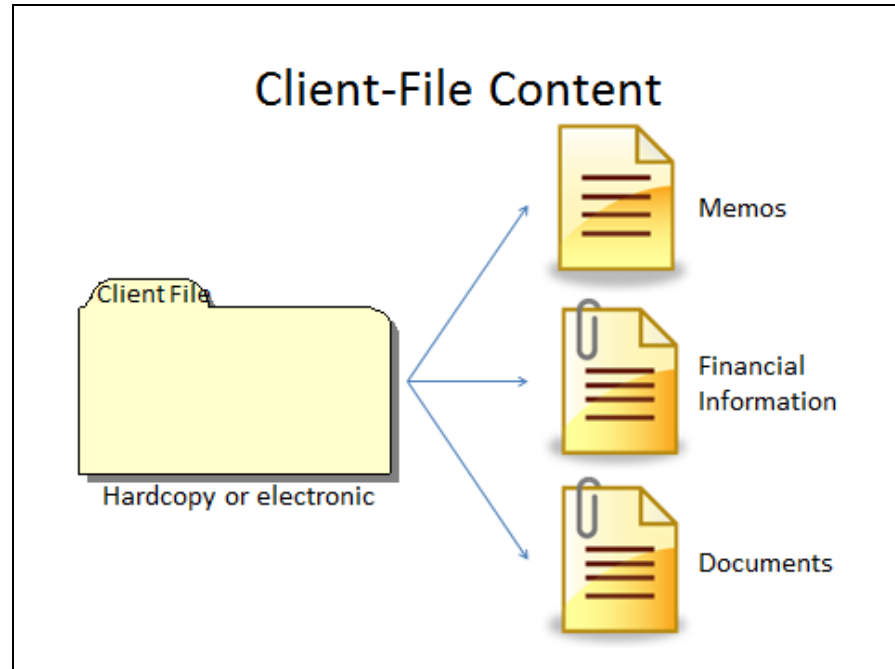
The client-file method is an integral part of several existing and forthcoming books.⁴ Other law professors in the real estate area use a version of the client-file method in their courses.⁵ As more professors experiment with and develop materials, surely the library of client files and supporting materials will grow.

Consider how the client-file method works by first considering the contents of the client file, then considering a progressive casebook format that should work well with the client file, and finally considering how professors can adopt the client-file method for transactional courses.

⁴ See, e.g., BRADLEY T. BORDEN, *TAXATION AND BUSINESS PLANNING FOR REAL ESTATE TRANSACTIONS* (2011); BRADLEY T. BORDEN, *TAXATION OF PARTNERSHIPS AND LLCs* (forthcoming 2014).

⁵ Professors in the real estate area have developed materials that adopt aspects of the case-study method. See Hammond, *supra* note 3, at 37–46 (discussing the use of case-study materials in various courses).

I. THE CLIENT FILE



The client file should include memos that provide factual background and give students legal assignments. The client file will also include financial information and documents that are relevant to the transaction. Professors may choose between presenting the client file in hardcopy or electronically. The client file could be published as a separate book that contains the relevant information and accompanies a casebook,⁶ or it could be incorporated into the book.⁷ The client file could also be a stand-alone product (this appears to be the method that several real estate law professors have adopted).⁸ Experience is revealing that incorporating the client file in a casebook inhibits the ability to return to client materials presented in prior chapters but relevant throughout the course.

⁶ This is the method used in the forthcoming book, BRADLEY T. BORDEN, TAXATION OF PARTNERSHIPS AND LLCs (forthcomintg 2014).

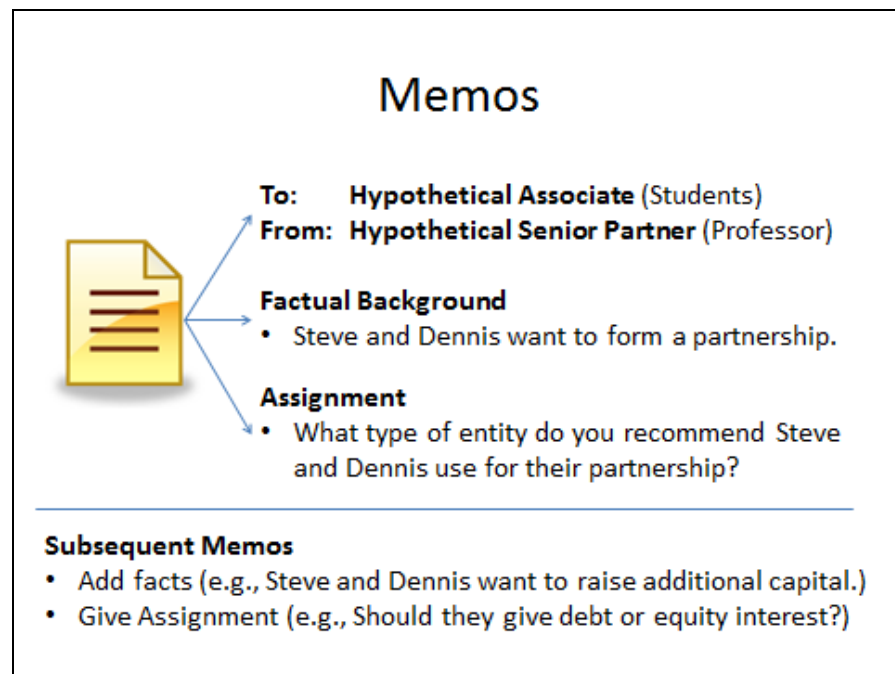
⁷ This is the method used in the first edition of BRADLEY T. BORDEN, TAXATION AND BUSINESS PLANNING FOR REAL ESTATE TRANSACTIONS (2011), but subsequent editions will most likely spin off the client file as a result of the evolving process of developing the method.

⁸ See *supra* note 5.

The client file could either be web-based or distributed by email or through a class website. The electronic format would permit the professor to control the distribution of memos and other information. A controlled distribution would keep students from seeing the entire file at the beginning of the semester. That may help dispel anxiety to some extent, but has the disadvantage of preventing students from anticipating the extent of the work they will do throughout the semester and appreciating the magnitude of the transaction at the beginning of the semester.

A single client file may be appropriate for more than one course, with slight tweaking. For example, a client file that works for a partnership tax course might also work for a course on limited liability entities (i.e., unincorporated entities such as limited liability companies, limited partnerships, and limited liability partnerships).

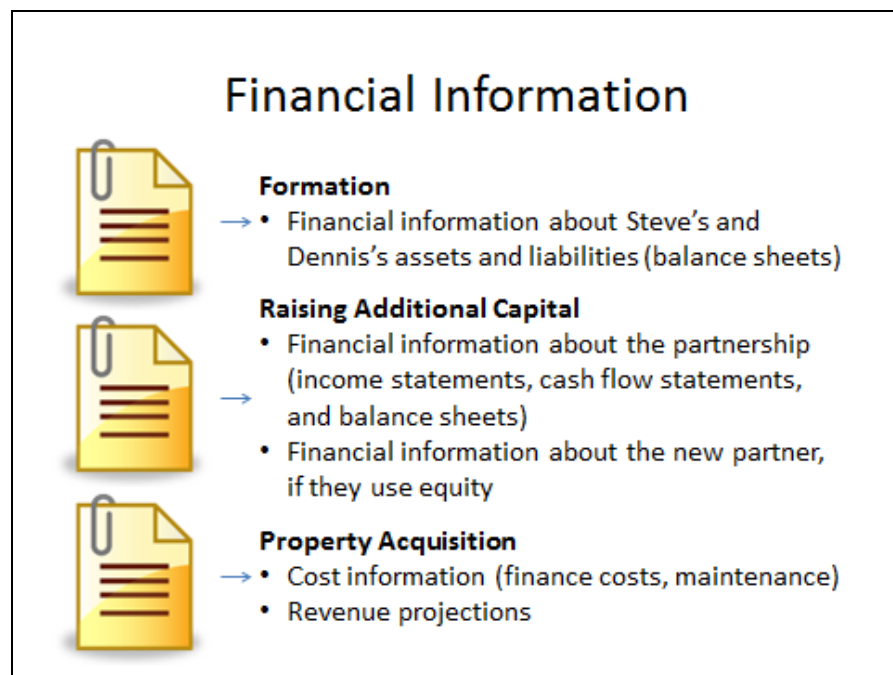
Because the client file-method will be new to many people, each component of the client file deserves specific attention.



The client file will generally include several assignment memos addressed to students. The memos will replicate types of memos that senior partners write to associates regarding project assignments. Each memo will present facts and give the students

an assignment. For example, in a partnership tax course, the first memo may introduce the parties that have approached a law firm seeking legal help in forming a tax partnership. The memo could assign students the task of considering what type of legal and tax entities would be most appropriate for the arrangement.

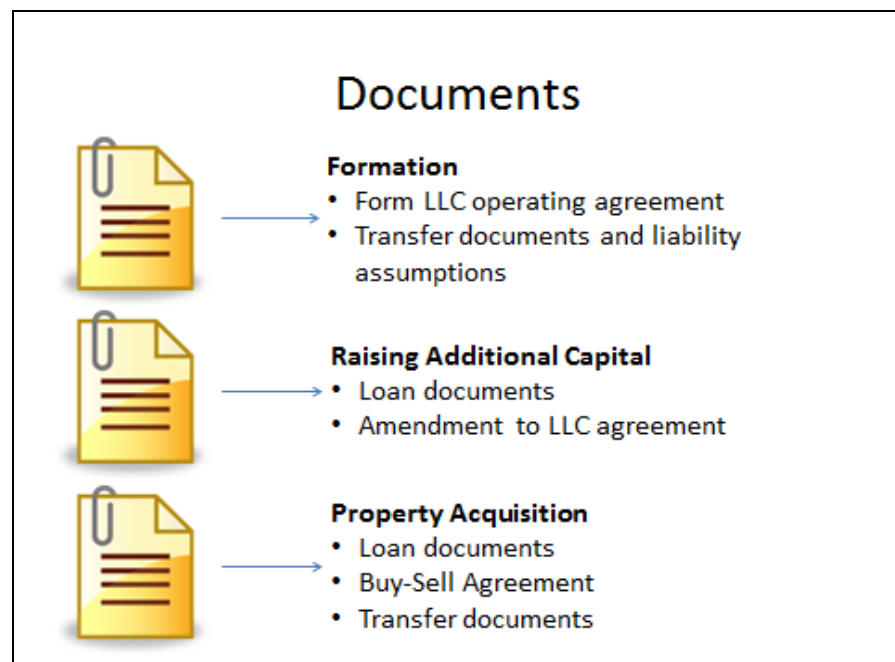
Subsequent memos could build upon the facts of the first memo. For example, subsequent memos could reveal that some time after forming the arrangement, the original members are considering raising additional capital. The subsequent memo could present relevant facts and assign students to recommend whether the clients should raise capital through borrowing or admitting additional partners. Memos could also anticipate problems that may arise, such as the death of a partner, which would require students to reexamine decisions that they made earlier in the course. For instance, if an earlier memo asked students to consider an LLC operating agreement that contained buy-sell provisions, students could test those provisions with real-life events, such as the death of a partner, which the memos reveal later in the semester.



The client file could also include financial information that supports the facts and the assignment in the memo. For example, if the first memo covers the formation of a partnership, the file

should include financial information about the assets that each partner will contribute and the liabilities of the partners that the partnership will assume. If a subsequent memo considers raising capital, the client file should include financial information that students may need to consider to answer questions asked in the memo. For example, a lender may require certain financial information from the partnership and partners before it provides a loan. Attorneys should be familiar with that information and be able to help a client obtain information or provide appropriate information as the case may be. Furthermore, a partnership's liabilities can affect the tax situation of the partners, so an attorney must be prepared to give advice with respect to such effects.

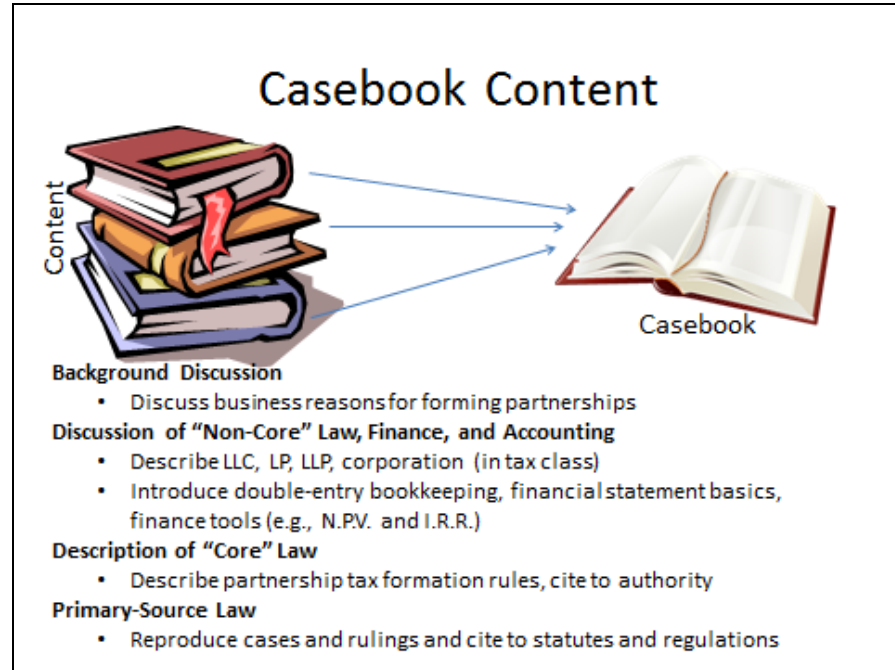
If the partners wish to admit a new partner, they may require the partner to provide some financial information to avoid the headaches of having a bankrupt partner and to ensure the partner can provide the required capital. If a memo presents facts about a property acquisition, the file may include financial information about the property. Even if the information is not critical to the legal analysis, exposure to such information will help students appreciate the type of information that clients consider when making business decisions, which will help the students begin to think about how business people make decisions.



The client file should also include transaction documents. A significant part of the law governing transactions exists in documents. For example, an operating agreement generally governs many aspects of the relationships that members of a limited liability company have with each other, with the limited liability company, and with third parties. Similarly, loan documents contain the law that determines many of the rights and obligations of borrowers and lenders. Not only do provisions in documents affect the rights and obligations of parties to the agreement, they may also determine tax consequences. By gaining exposure to documents in a transactional law course, students begin to appreciate the importance of good drafting and how documents affect the analysis of other areas of law. Documents contained in a client file may be models of good drafting, but they may also contain flaws. Either way, they provide students an opportunity to consider the documents, discuss strengths and weaknesses of provisions in the documents, consider how those provisions affect the application of other laws (e.g., tax consequences of the parties), and recommend changes or improvements as needed.

To illustrate, the core of partnership tax is the allocation rules, and a significant portion of most limited liability company operating agreements is allocation provisions. Tax law often influences the allocation of economic items (such as cash flow and gains and losses) of an LLC, and the application of tax law often depends upon the structure of the allocation provisions. Examples of allocation provisions can help students understand how tax rules affect the allocation provisions in an operating agreement and how those rules affect members' rights and obligations. In the corporate context, the terms of an acquisition—including the type of consideration used—can determine whether the transaction qualifies for “tax-free” treatment. By providing students with an example of a stock purchase agreement describing the type of consideration used, the client file can help them to see how important the details of transaction structures can be.

II. AN ACCOMPANYING, PROGRESSIVE CASEBOOK



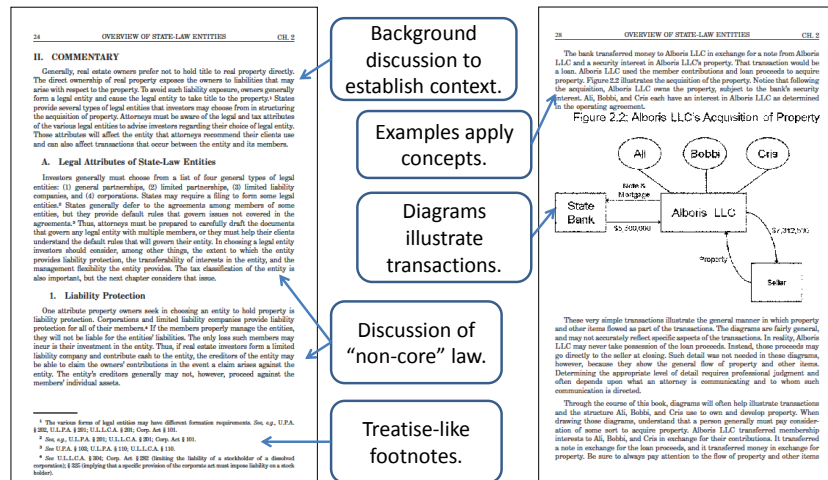
The legal and other instructional materials that accompany the client file are a critical part of the client-file method. An innovative, progressive casebook could be the most effective form of materials that could accompany a client file. One function of the casebook that becomes a part of the client-file method is to provide information that students should obtain outside of class. That information will provide them with background knowledge that they will need to solve problems that the client file presents. Students and the professor can then use class time to discuss issues, analyze problems, and find solutions to those problems. The classroom thus becomes a discussion and problem-solving forum, instead of a place where one person disseminates information to a passive audience.

Background material in such a casebook may include discussions of why parties form a partnership, factors that contribute to a decision to buy or sell property, and the need to raise additional capital. Often, students must have some knowledge of other areas of the law to tackle problems that arise in a course's particular niche. For example, the partnership tax rules distinguish between recourse and nonrecourse liabilities.

To know whether a liability is recourse to a partnership and to the partners, students must understand concepts such as subrogation, indemnification, limited liability, and guarantee. Instead of imposing numerous prerequisites on students or requiring them to study the source of such laws, a partnership tax casebook could simply discuss those concepts to provide students the framework they need to analyze the tax consequences of borrowing at the partner or partnership level. The discussion of such “non-core” law in a tax course facilitates the learning of tax law and the discussion and analysis of tax problems that the fact scenario raises.

Practitioners often look to secondary sources to know which primary sources to consider. A casebook can provide similar guidance by striking a balance between describing the law and citing to relevant primary sources. Its discussion of the “core” law will provide background and lead students to the primary source of the law, which students will have to master to deal with the problems that client files present.

Casebook Format: Discussion of “Non-Core” Law



Page extracts are from BRADLEY T. BORDEN, *TAXATION AND BUSINESS PLANNING FOR REAL ESTATE TRANSACTIONS* (2011).

The casebook should include a discussion of “non-core” law. “Non-core” law is not the core law of the course. For example, the law governing limited liability companies is not core to a course on partnership taxation. It is, however, relevant to the application and analysis of partnership taxation. The casebook

that accompanies the client-file should include relevant discussions of non-core law. Those discussions should include a background discussion to establish context. For example, a discussion about legal entities might explain types of legal entities and why business owners might consider using a particular type of business entity. The discussion should then include a brief discussion of the legal aspects of business entities. Such a discussion might cover the legal attributes of business entities, issues an attorney should consider when drafting an entity's governing documents, and laws governing transfers to and from entities. More specific topics could include liability protection, transferability of interests, and management flexibility. The casebook will use treatise-like footnotes, which practitioners encounter in practice.

The discussion of non-core law should also include examples that apply concepts and diagrams that illustrate transactions. Discussion of basic concepts, such as contributions to a limited liability company, helps students appreciate the difference between a sale and a contribution and that such transactions require proper documentation. The discussion of non-core law in the casebook enables students to focus on learning the core law from primary sources and doing the relevant analysis, instead of devoting class time to extensive discussion of such law or requiring additional research.

Discussions of non-core law in a transactional text must also include ethical issues. The transactional lawyer provides advice in a setting that implicates ethical rules. Because the client-file method requires students to apply the law in a transactional setting, it provides an excellent opportunity to discuss ethical issues that arise in transactional law.

Casebook Format: Description of Finance Concepts

COMMENTARY 121

estimated that the property would sell after four years for \$1,200,000, the investor could estimate that the property's internal rate of return would be 6%.¹⁴ If that amount is less than the investor would earn purchasing bonds or other investments, the investor may decide to not purchase the property but instead to invest in bonds.

2. Net Present Value

Another useful financial tool is the net present value of an investment. The net present value of an investment allows an investor to compare present outlays to the present value of an investment's future cash flows. To compare present outlays with future cash flows, the investor must discount the future cash flows to account for the time value of money. Recall that when computing the internal rate of return, the investor used outlays and future returns to determine the rate of return. The internal rate of return reflects the annual return that an investor would have to realize to obtain the future dollar returns. To compute net present value, the investor must assume some rate of return (referred to as a discount rate) and be able to estimate the amount and timing of outlays and receipts. Using the discount rate, the investor can compare the amount of present outlays to the value of future cash flows in present-value terms. If the present value of the future cash flows does not exceed the amount of current outlays, the investor may decide not to proceed with an investment. These concepts generally only make sense when applied to examples.

To begin the examination of net present value, consider an investment of \$100,000 that has a 5% return, compounded annually. For example, an individual could purchase a five-year certificate of deposit (CD) that provides for 5% annual compound interest. At the end of the first year, the CD would have a \$105,000 balance (the original \$100,000 deposit plus \$5,000 of interest). The CD would earn 5% interest on the \$105,000 balance during the second year (\$5,250), so the balance at the end of the second year would be \$110,250. Thus, a \$100,000 investment with a 5% compounded annual return would be worth \$110,250 after two years.

Effect of Compound Interest	
Original investment	\$100,000
Year 1 interest (5% of \$100,000)	\$5,000
Balance at the end of Year 1	\$105,000
Year 2 interest (5% of \$105,000)	\$5,250
Balance at the end of Year 2	\$110,250

Net present value reverses that process. In computing net present value, one asks what a future dollar amount would be worth in present value terms. For example, one could ask what \$110,250 received two years from now would be worth in today's dollars assuming a 5% discount rate. The example above illustrates that if a person invests \$100,000 today compounded annually at 5%, the \$100,000 would be worth \$110,250 in two years. Thus, the net present value of \$110,250 to be received two years from now must be worth \$100,000 today. The net present value

¹⁴ See the Practice Materials at the end of this chapter.

Page extract is from BRADLEY T. BORDEN, *TAXATION AND BUSINESS PLANNING FOR REAL ESTATE TRANSACTIONS* (2011).

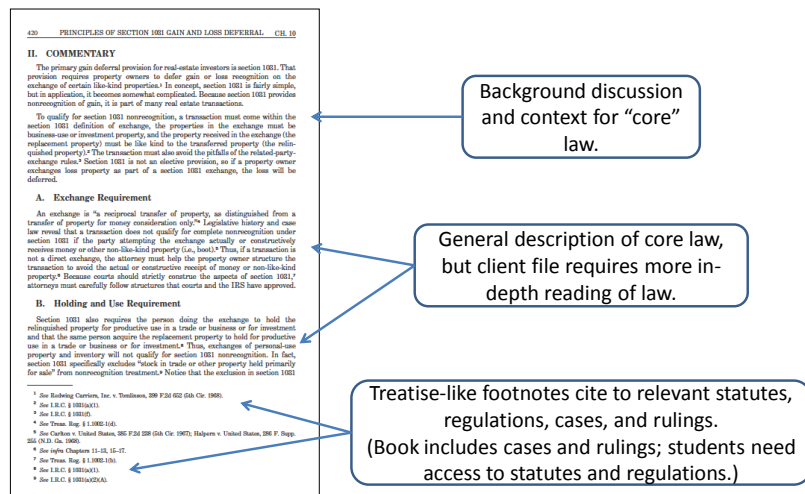
The casebook should also explain basic finance and accounting concepts. The transactional attorney invariably encounters financial and accounting concepts. Attorneys generally do not provide financial or accounting advice, so they do not need expert skill in these disciplines. Nonetheless, the clients of transactional lawyers use financial and accounting information to understand and communicate business concepts and make business decisions. Furthermore, legal concepts and contractual terms often include financial and accounting concepts. For example, a partnership agreement could use internal rate of return to determine partners' rights to distributions. Consequently, the transactional attorney must be familiar with such concepts to understand transactions and provide competent advice. The casebook should include discussions that provide general background and understanding.

The casebook should also include specific topics that are relevant to the course material. For example, partnership tax requires some understanding of basic accounting and time-value-of-money concepts. The casebook should therefore provide enough discussion of such topics to enable students to better understand the tax concepts. The discussions in the casebook push the learning of finance and accounting concepts out of the classroom, freeing up classroom time for analysis of the

specific legal issues that the transaction, as described in the client-file memos, creates. Armed with tools and background knowledge included in the casebook, students can approach the core legal problem with requisite finance and accounting knowledge.

The casebook could use visual tools, such as example boxes or other techniques, to offset examples, discussions of non-core law, and financial and accounting topics.

Casebook Format: Description of “Core” Law

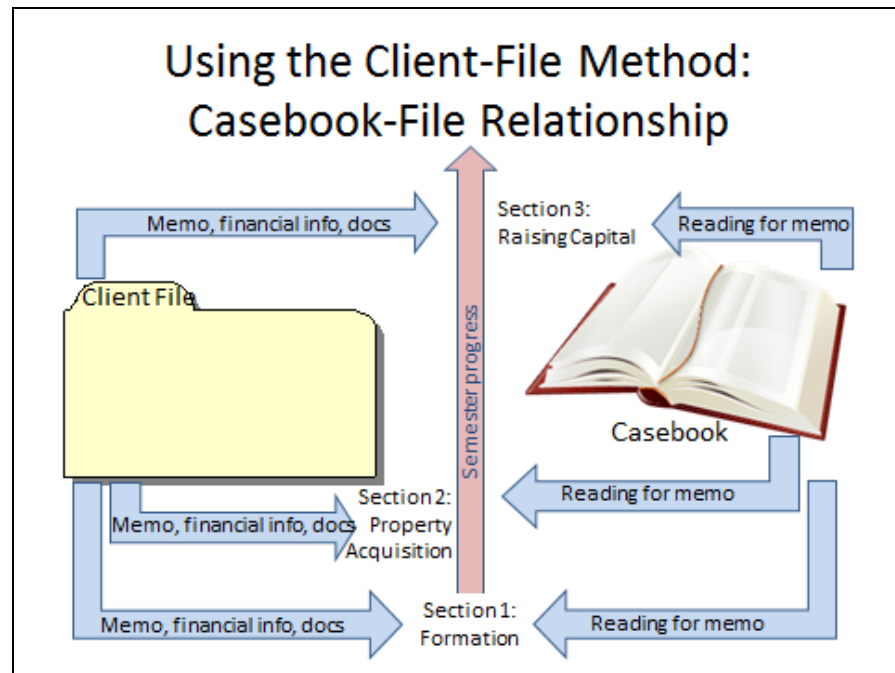


Page extract is from BRADLEY T. BORDEN, *TAXATION AND BUSINESS PLANNING FOR REAL ESTATE TRANSACTIONS* (2011).

The casebook should focus primarily on helping students learn and apply the law that is at the heart of the course—the core law. The casebook must strike a balance between spoon-feeding descriptions of the core law and requiring students to develop the skills they need to read and understand the law from primary sources. The casebook will provide background discussion of the core law and describe parts of it. It will cite to primary authority to support the discussions. The memos will require students to have a better understanding of the law and its nuances than appear in the discussions. Consequently, students will have to resort to the primary authority to fully analyze the problems. The casebook will reproduce cases and rulings at the end of chapters that first cite such material. It will not, however, reproduce the relevant statutes or regulations. Instead, it will cite to specific provisions, and students will need

access to the primary-source material either through a supplement or on the Internet.

One potential hazard of using the client-file method is the temptation to focus exclusively on practice skills that may appear to maximize a client's position. Even though that is often what attorneys do (as mandated by rules of professional ethics), the law school classroom provides an opportunity to explore the effects of a law and whether outcomes reflect sound policy. Consequently, the casebook and classroom discussion should include broader policy issues that examine the effects of attorney actions and the effects of laws as applied to particular facts. Facts raised by the client file provide such opportunities, but professors must be disciplined enough to include broader discussions throughout the course of the semester.

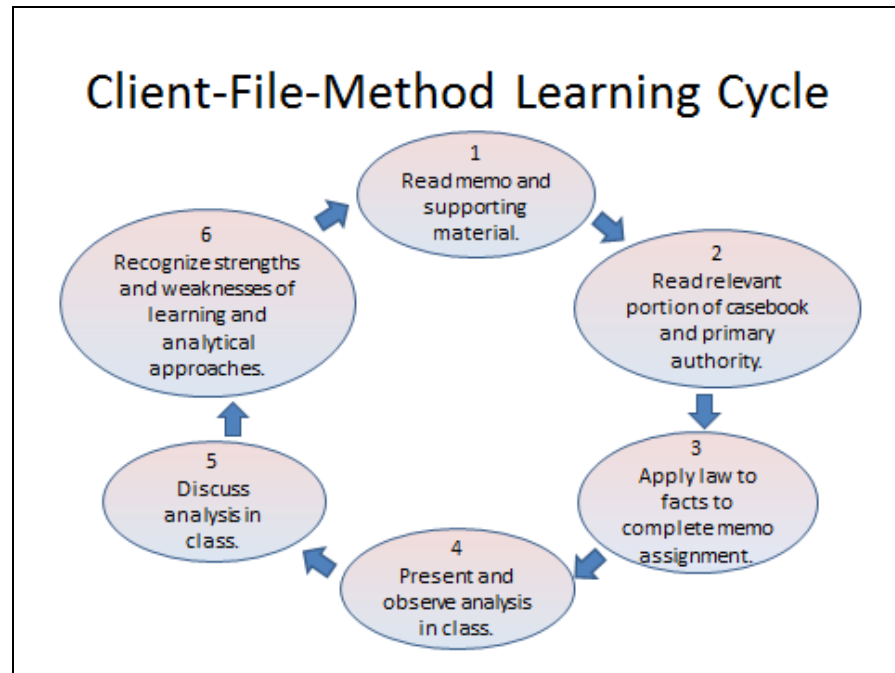


The client file and the appropriate materials, such as a progressive casebook, empower professors to use the client-file method to teach transactional law courses. The client-file method will be new to many law school professors, but the idea is fairly straightforward and intuitive for transactional attorneys. A common practice in law firms is for senior attorneys to give junior attorneys research assignments. Often those assignments require the associate to examine a discrete area of law. In firms

that focus on associate training, the assigning partner will review the associate's work product and provide feedback. The feedback helps the associate know how to improve work on subsequent assignments. The feedback can focus on the thoroughness of research, strength of analysis, and presentation of material. The client-file method provides an opportunity to replicate that process in the classroom.

At the start of a semester, the professor gives or assigns students the first memo and relevant information. Students use the relevant portion of the casebook to obtain the information needed to do the analysis that the memo requires. As students present their analyses in the classroom, the professor can join the discussion and provide feedback. The feedback can address the students' knowledge of the facts, relevant law, and other concepts; their analytical approaches; and their conclusions. After completing the assignment in the first memo, the professor assigns another memo, which leads students to any supporting material in the client file and the relevant portion of the casebook. Some memos could present issues that require multiple chapters of study and several class periods to complete. A memo could break such projects down into more discrete segments to narrow the focus of the reading.

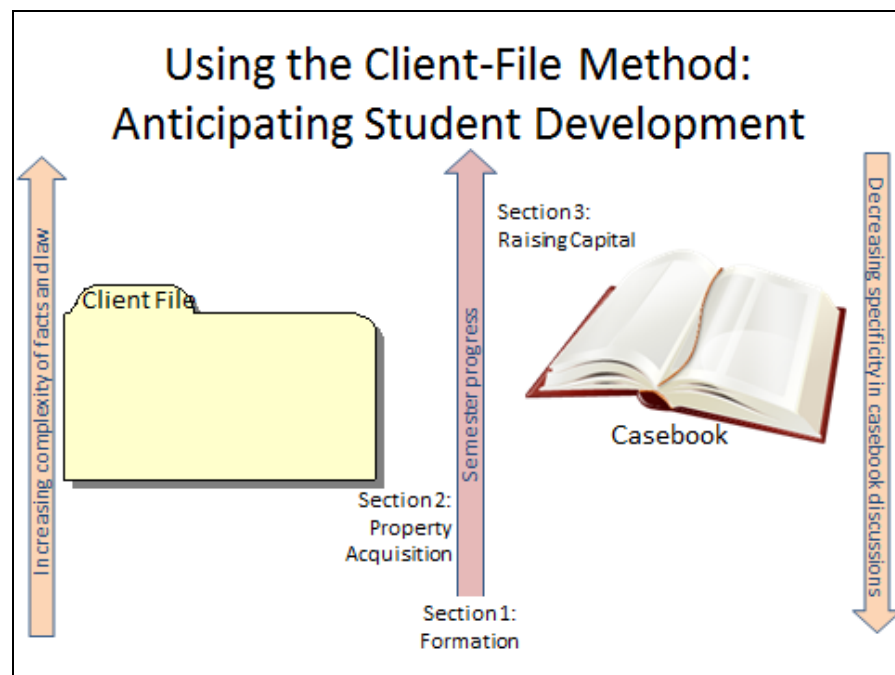
By working with a file throughout the semester, students can begin to appreciate that client work is often complex and requires a significant amount of time to complete. They can also witness the types of issues that generate transactional law work.



In addition to presenting students with a practice setting for learning, the client-file method facilitates a rigorous learning cycle.⁹ The cycle generally works most effectively in classes of no more than twenty-five students, so the client-file method may not be appropriate for large classes. Using the client-file method empowers students to learn by doing the analysis and receiving feedback. The cycle begins with a memo (similar to the transactional practice setting where learning often begins with a set of facts and a question). Students read the memo to learn the facts and receive an assignment. They then read the relevant portion of the casebook and primary authority. Then they apply the law to the facts to complete the memo assignment. The cycle then requires students to present their analyses to the class. A method that has proven successful generally for the author is to have students (in classes of more than ten students) divide into groups of two to prepare analyses and present them to the class. Specific assignments to students afford them the opportunity to thoroughly prepare the material.

⁹ This simple learning cycle is not too far removed from the learning cycle identified by the accounting academy. See generally MARLENE C. FRANCIS, TIMOTHY C. MULDER & JOAN S. STARK, *INTENTIONAL LEARNING: A PROCESS FOR LEARNING TO LEARN IN THE ACCOUNTING CURRICULUM* ch. 2 (1995), available at <http://aaahq.org/AECC/intent/index.htm>.

All students and the professor should join in the discussion of an analysis in class. The discussion allows the professor, in particular, and students, more generally, the opportunity to probe the analysis by questioning the conclusions that students reach. Such questions should help students realize that an appropriate analysis requires a thorough understanding of the law and facts. Students must learn to question their conclusions, recognize weak spots in analyses, and strengthen them prior to presenting in class. Questions can occur in a respectful and encouraging manner with the end result being improvement throughout the semester. Expecting thorough preparation helps students realize that subsequent assignments require greater effort in particular areas. The presentations and discussions of analyses provide students the opportunity to recognize strengths and weaknesses in their approaches and make the necessary changes in subsequent assignments.



The client-file method anticipates that students will develop knowledge and skills throughout the semester. Consequently, the method allows for increasing complexity of facts and law as the semester continues. The projects that students work on may become more complex, or the complexity of a transaction may increase as the semester continues. Students' skills reading the

law should also increase, so the background discussion and explanations of the law in the casebook could decrease as the semester progresses and as students gain confidence reading and applying primary source material. The client-file method thus helps law students gain independence and prepare to be transactional lawyers.

CONCLUSION

The client-file method combines the Langdellian case method and the business school case-study method to reflect the practice of a transactional attorney and helps students gain experience in the classroom that resembles real-world practice. It allows students to learn and apply knowledge and skills that they will use on a daily basis as transactional lawyers. The legal profession demands that law school graduates be ever closer to practice-ready upon graduation. The client-file method will fill an important role in the changing landscape of legal education by creating practice-like settings in doctrinal transactional courses and offering more students skills-based opportunities.

Strategic Austerity: How Some Law School Affordability Initiatives Could Actually Improve Learning Outcomes

*R. Michael Cassidy**

INTRODUCTION

The legal profession is facing profound and perhaps irreversible changes. Whether you view these striking demographics as a “crisis” likely depends on the location of your perch. If you are a tenured professor at a T14 law school or a senior partner at an NLJ 250 firm, you may view the trends we have been discussing today as cyclical corrections. If you are an unemployed graduate looking for work or an untenured professor at a lower-tier school that is struggling to stay afloat, you may be more likely to view these trends as permanent and paradigm shifting.

While applications to American law schools have been dropping markedly since 2005, the last three years have seen the most dramatic changes. Between 2010 and 2012, the total number of applicants to U.S. law schools decreased by twenty-four percent.¹ This year alone—2012–2013—the number of applicants dropped another thirteen percent.² By 2014, the legal academy may for the first time face an open enrollment situation where the total number of available seats exceeds the number of applicants.

Most law schools have responded to this sharp application decline in one of two ways. Many schools have dramatically reduced their class sizes, which entails foregoing tuition revenue. Lower gross revenue means schools must seek out opportunities to cut costs. Other schools have kept their class sizes relatively stable by offering more scholarship assistance to attract students (essentially increasing their discount rates). This approach too requires expenditure cuts, because absent additional non-tuition

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¹ *LSAC Volume Summary*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lsacresources/data/lsac-volume-summary.asp> (last visited July 10, 2013).

² *Three-Year ABA Volume Comparison*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lsacresources/data/three-year-volume.asp> (last visited July 10, 2013) (reflecting data as of June 28, 2013).

sources of funding (such as gifts or endowments) spending more money on scholarships means spending less money on something else.

Law schools cannot make up for this lost revenue by continuing to raise their tuition at rates that far outpace inflation. A continued upward spiral in tuition threatens to further exacerbate the downward spiral in applications. On average, law school tuition in the United States increased 375% at private law schools and 820% at public law schools between 1985 and 2009.³ During this twenty-five-year period, law schools on average increased their tuition between 6–15% each year, while inflation averaged only 3%.⁴ By way of comparison, tuition for MBA students at our nation's top management schools increased only 70% in the past decade, an average increase of 4–6% per year.⁵ Reining in the law school tuition spiral is critical to restoring consumer confidence in the value of the product we are selling—especially in a climate where the job prospects for the graduates of some law schools are increasingly bleak.⁶

Legal educators are now engaged in some very difficult and painful conversations about the financial model of legal education. Schools that take an ostrich-like approach to this challenge risk becoming obsolete or irrelevant. What follows are seven proposed changes to the structure of legal education that could simultaneously reduce overall costs to law students,⁷ and improve the quality of their education. Quality is not always synonymous with price. With vision and lots of hard work, it may be possible to do more with less.

Three of my proposals will require amendments to ABA accreditation standards. The political and institutional climate

³ BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 108 (2012).

⁴ *Id.*

⁵ *Overpriced or Priceless?*, THE ECONOMIST (Aug. 26, 2009), <http://www.economist.com/node/14297397> [hereinafter *Overpriced or Priceless?*].

⁶ Law schools in the United States are now graduating approximately 44,000 students per year—roughly two graduates for every available job opening. Katherine Mangan, *Law Deans Confront a 'New Normal' as Schools Adjust to Job-Market Changes*, CHRON. HIGHER EDUC., Jan. 18, 2013, at A3; see also Karen Sloan, *Summer associate hiring declines amid anemic job market*, NAT'L L.J., (Feb. 11, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202587755601&Summer_associate_hiring_declines_amid_anemic_legal_market_&slreturn=20130611131009 (citing four-year decline in number of students obtaining summer associate positions); Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A1 (finding 55% of 2011 graduates secured full-time jobs requiring a JD nine months after graduation).

⁷ I purposefully label my proposals “affordability” initiatives rather than “cost containment” initiatives. Some of my ideas are directed at controlling expenditures, and thereby keeping the price of tuition down. Other ideas are directed at improving a law student's ability to afford his or her tuition, by increasing his or her earning capacity while in law school. Both forms of initiative reduce a student's overall cost of attendance.

2013] *Law School Affordability Could Improve Learning Outcomes* 121

now seems ripe to make these reforms. Many ABA accreditation standards are perceived to impede experimentation and innovation in legal education, and to primarily benefit academics (who largely have captured the accreditation process) over students and the practicing bar. The president of the American Bar Association has recently appointed a “Task Force on the Future of Legal Education” that is looking at the structural and economic models of legal education, and the impact of rising tuition and falling employment rates on crushing student debt.⁸ The Task Force is soliciting comments and testimony from all sectors of the profession, and some of its members have predicted “bold” and perhaps even “radical” reform.⁹ My hope is that several of the proposals presented at today’s symposium will be submitted for consideration by the Task Force in the critical months ahead.

SEVEN AFFORDABILITY INITIATIVES

A. Varying the Three-Year Model

In *Failing Law Schools*, Brian Tamanaha has argued for increased differentiation among law schools as to mission and focus. Some law schools should retain their focus on research and scholarship, while others should see themselves primarily as trade schools engaged in the professional preparation of lawyers.¹⁰ I would encourage differentiation of another sort. More law schools should differentiate *internally*, and establish several paths available to their students for a JD degree. Rather than offering students a one-size-fits-all, three-year, full-time JD model, law schools should allow students to complete the JD degree in two years, three years, or four years (as described below) with alternate routes selected by students at the end of their first year primarily based on considerations of career interests and available finances.

A two-year JD would be designed primarily for students who intend to practice government or public interest law after graduation, and therefore are the most acutely sensitive to taking on substantial debt. The degree would be completed in

⁸ For 2010, the average combined undergraduate and law school debt for those new lawyers graduating with educational debt was \$124,000. TAMANAHA, *supra* note 3, at 110.

⁹ Ethan Bronner, *A Call for Drastic Change in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11. Another committee of the ABA—The Standards Review Committee of the Section of Legal Education and Admission to the Bar—is debating revisions to accreditation standards. Mark Hansen, *A Slightly Faster Track: Legal Section Takes Steps to Speed Up Review of Accreditation Standards*, A.B.A. J., Feb. 2013, at 60, 60. Exactly how the work of these two committees will be integrated and coordinated remains unclear. *See id.* at 61.

¹⁰ TAMANAHA, *supra* note 3, at 172–74.

five semesters (two full academic years plus the summer in between).¹¹ The summer after the first year, the students in this program would take online courses that have been created by videotaping prior in-person class sessions, coupled by carefully crafted faculty review questions and online discussion threads. Prime courses that should be considered for such summer online instruction would be traditional second-year core courses such as Corporations, Evidence, Administrative Law, and Federal Taxation. The students would be charged on a per-credit basis for these online courses at a substantially reduced rate compared to taking the same course live during the regular academic year due to the lower cost to the law school in terms of delivery. Such an “online” summer program could save participating students twenty-five percent of their overall cost of JD tuition, by eliminating one semester and reducing the cost of a second semester by up to one-half.¹²

ABA accreditation standards could accommodate this “2 1/2-year” plan with two minor amendments.¹³ First, the number of overall credit hours required for completion of the JD degree would have to be reduced from eighty-three to eighty.¹⁴ Second, the maximum number of “distance education” credits the student could take toward a JD degree would need to be increased from twelve to fourteen credits.¹⁵ Both changes are eminently reasonable, and indeed quite modest. A student would be able to complete the “2 1/2-year” program by taking sixteen credits each semester of his or her first year, fourteen online credits during the summer, and seventeen credits each semester during his or her second year. This model would provide a lower-cost gateway to the profession for students intending to

¹¹ I take no position on whether the ABA should allow for completion of a JD degree in four semesters (roughly fifty-six credit hours). My gut instinct is that law schools in the United States are not sufficiently preparing our current students for practice in a global environment; compressing a JD program from six to four semesters would leave little room for addressing the present deficiency in international and comparative focus that exists at many law schools today.

¹² NYU is piloting a three-year medical school model not dissimilar to my proposal, eliminating some redundant science requirements and taking advantage of summer courses. See Anemona Hartocollis, *N.Y.U. and Other Medical Schools Offer Shorter Course in Training, for Less Tuition*, N.Y. TIMES, Dec. 24, 2012, at A16. My “2 1/2-year” model might not only save students twenty-five percent in tuition, but it would also reduce the amount of money they need to borrow for living expenses and reduce their opportunity costs of foregoing employment for an additional six months.

¹³ See Larry E. Ribstein, *Practicing Theory: Legal Education for the 21st Century*, 96 IOWA L. REV. 1649, 1675 (2011) (advocating for more flexible accreditation standards).

¹⁴ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 304(b) (2012–13) (Interpretation 304-4).

¹⁵ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 306(d) (2012–13). The standard, which prohibits taking more than four distance education credits in a single semester, would also need to be eliminated.

2013] *Law School Affordability Could Improve Learning Outcomes* 123

serve low-income clients, at a time when the availability of legal services for the poor and middle class in the United States is being seriously threatened by rapidly declining law school enrollments. Law schools might consider limiting admission to this program to students committed to public interest or government service.

My “four-year” model would essentially take the traditional three-year JD program and add a paid apprenticeship between the second and third year, during which participating students would spend a year away from the law school in gainful law-related employment. One way to think of this is an optional “gap year” for law students. The economic advantage of this model would be that students would be able to earn money to help pay for the third year of law school.¹⁶ They should also be allowed to lock in their third year tuition at the rate applicable upon their departure. The pedagogical advantages are twofold: (1) it would provide them with hands-on experience applying the concepts and skills they learned in their first two years of law school, and (2) it would help them better assess their strengths and interests, so that they could come back to law school with a renewed sense of purpose and a greater focus on what final courses might be essential for their intended career path. This “four-year” model might be particularly attractive for students who finish the second year of law school without any firm direction about their vocation, and are uncertain about the advisability of undertaking an expensive third year of study until they gain more focus.

Of course, one prerequisite to the viability of such a “four-year” model is the availability of apprenticeships to fill the “gap year.” By “apprenticeship,” I envision a salaried position at a small to mid-size law firm or a corporate general counsel’s office, performing functions somewhere between the level of paralegal and entry-level associate at a salary of roughly \$45,000 per year.¹⁷ In an economy where close to forty-five percent of law

¹⁶ Apprentices would need to apply for a deferment of their student loans during this gap year, because typically federal loans enter repayment after a six-month grace period upon disenrollment. See *When You Graduate or Leave School*, DIRECT.ED.GOV, <http://www.direct.ed.gov/leaving.html> (last visited July 2, 2013). Forbearance is common for students who take a leave of absence from law school for personal or medical reasons, and there is no reason to suspect that loan servicers under the federal direct student-lending program would react to a shift away from a standard three-year JD model by not routinely granting forbearance or deferment requests. See *Deferment and Forbearance*, DIRECT.ED.GOV, <http://www.direct.ed.gov/postpone.html> (last visited July 2, 2013).

¹⁷ My apprenticeship model bears many similarities to the “articling” system in Canada, but students would complete the apprenticeship during rather than following law school. See John Law, *Articling in Canada*, 43 S. TEX. L. REV. 449, 456–70 (2002).

school graduates nationwide are presently unable to find full-time legal work nine months after graduation,¹⁸ one might reasonably question why employers would hire a current student at \$45,000 per year when they could hire an unemployed but already licensed attorney for \$60,000¹⁹ to do similar work? In addition to the possible \$15,000 cost savings, I think there are two other incentives for law firms to hire apprentices. The first is flexibility. Small to mid-size firms with fewer resources and no formal hiring or training programs may be willing to take on an apprentice to help with a complex litigation matter or a large but short-term transactional project, when they would be reluctant to commit to hiring a full-time employee due to uncertainty about future business. The second reason is loyalty to the law school. Prominent alumni in small to mid-size law firms may be willing to mentor apprentices as a way to give back to the law school, and to help their alma mater experiment with a new and exciting model of legal education. If career services and externship directors cultivated relationships with appropriate alumni, it is possible that each year they could identify ten to twenty employers willing to participate. If the initial experiment is successful, that number may grow over time.

Notwithstanding the availability of these new “2 1/2-year” and “four-year” paths to a JD, perhaps the majority of law students will continue to select a traditional three-year course of study. Students in this category might include those students who are elected to law review, those who are successful in securing remunerative summer employment after their second year that leads to a full-time job offer, and students who are receiving substantial assistance from others in financing their legal education. The availability and perhaps continued prominence of the three-year model would not diminish our responsibility to curtail tuition costs even for traditional students, in some of the manners I will describe below in proposals two through seven. Moreover, law schools must redouble their efforts to make the third-year experience pedagogically *valuable* for traditional JD candidates, by offering a “competency-based” curriculum with carefully crafted simulation, practical skills, and capstone courses.²⁰

¹⁸ See Palazzolo, *supra* note 6, at A1.

¹⁹ According to the National Association of Law Placement, the median salary for Class of 2011 graduates employed in a legal job full-time was \$60,000. See *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NAT'L ASS'N L. PLACEMENT (Aug. 2012), <http://www.nalp.org/august2012research>.

²⁰ For a description of the innovative new third-year curriculum at Washington and Lee School of Law, see *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW,

B. Allow for Paid Externships

The ABA prohibits a law student from receiving both pay and credit for the same externship.²¹ This “no pay” rule, implemented in 1979 and retained after further study in 1983, is unique in professional education. Among professional schools, only law, pharmacy, and nutrition schools enforce such a limitation.²² Allowing law students—like business, accounting, and engineering students—to “earn while they learn” would help them keep down the net costs of their legal education and thereby reduce debt.

The concerns that prompted the ABA to retain the “no pay” rule in 1983 no longer seem very persuasive. Professor James Backman at Brigham Young University has summarized these concerns as follows: fear of drawing student interest and financial resources away from in-house clinics serving the poor; worries about faculty being able to control the learning objectives in a paid externship, where there may be a stronger conflict of allegiance between the employer and the educator; and a concern that employers will not allow students to participate in important formational experiences that cannot be billed to a client (shadowing meetings, court appearances, depositions, etc.).²³ Professor Backman makes a powerful case that the concerns that prompted the ABA to retain the “no pay” rule in 1983 no longer exist: in-house clinics are on surer financial footing at most law schools, and their faculty have greater job security; standards for awarding credit for study outside the classroom are far more detailed and comprehensive in terms of quality assurance;²⁴ and faculty can still control the learning objectives in paid externships by setting up a detailed commitment letter with the supervisor, specifying the types of work and opportunities the students will be provided.²⁵

Moreover, the “no pay” rule disadvantages students from lower socioeconomic backgrounds. If law students are forced to

<http://law.wlu.edu/thirdyear/> (last visited July 1, 2013). For a description of what a “competency-based” law school curriculum might entail, see William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 495–501 (2013).

²¹ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 305 (2012–13) (Interpretation 305-3).

²² James H. Backman, *Where Do Externships Fit? A New Paradigm is Needed: Marshaling Law School Resources to Provide an Externship for Every Student*, 56 J. LEGAL EDUC. 615, 640 (2006).

²³ James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 26, 40–41, 48 (2010).

²⁴ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 305(e) (2012–13) (detailing explicit prerequisites for awarding credit for field placement programs).

²⁵ Backman, *supra* note 23, at 53.

choose between a part-time paying job outside the legal profession (such as working as a barista at a coffee shop) or a legal externship, some will be forced to choose the former in order to pay their living expenses. This may lead students from more modest means to forego valuable externship opportunities that will give them the necessary experience, credentials, and contacts to obtain a full-time legal job following graduation.

If employers have a choice to pay externs or not to pay externs, one might argue that they will reflexively choose the “no pay” option, and therefore little benefit will inure to law students by making a change to Standard 305. But many legal employers have been reluctant to take on unpaid externs due to fear of violating the minimum wage provisions of the Fair Labor Standards Act. The Wage and Hour Division of the Department of Labor has issued detailed guidelines setting forth six criteria for determining when educational internships may be hosted by for-profit organizations without providing compensation. The fourth criterion specifies that the activities of the intern must provide “no immediate advantage” to the employer.²⁶ Some law firms are reluctant to take on unpaid externs for fear of violating this provision.²⁷ Allowing for paid legal externships—say, up to 200% of the prevailing minimum wage—might thus end up *increasing* the pool of available opportunities for law students. Moreover, a 2009 survey by the organization Intern Bridge found that both employers and students derived greater satisfaction from paid internships than unpaid internships; the students found the assignments more meaningful, and the employers found performance on the assignments to be of higher quality.²⁸

C. Vary Teaching Loads

Some commentators have predicted that many law schools will be forced to contain costs by increasing the teaching loads of full-time faculty members.²⁹ For example, professors at many top-tier law schools presently teach three courses per year (roughly ten credits). If those same professors were required to teach four courses per year (roughly twelve credits), certain faculty slots could go unfilled upon retirement over the next decade, and some stipends currently paid to adjunct professors could be eliminated.

²⁶ U.S. DEPT OF LABOR WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

²⁷ Backman, *supra* note 23, at 55.

²⁸ *Id.* at 44.

²⁹ TAMANAHA, *supra* note 3, at 182.

2013] *Law School Affordability Could Improve Learning Outcomes* 127

Rather than increase teaching loads across the board, my proposal would be to differentiate among faculty in their annual course assignments depending on their productivity in other academic endeavors (most notably scholarship). Course loads have been reduced at many law schools over the past two decades in order to give faculty more time for research and writing.³⁰ Yet, even after this across-the-board course relief, not all faculty members at all law schools have become productive scholars. Faculty play many roles, and not all of them equally well. At many law schools there are highly effective teachers who do not engage in substantial research. Those faculty members should be utilized more effectively by being assigned an additional course per year. It makes little sense, from either a cost-efficiency or utility perspective, to treat all faculty members equally, regardless of their strengths, interests, and contributions.

Unfortunately, many schools have preferred a facially egalitarian approach to teaching assignments as a way to avoid the political difficulties (and wounded egos) that would result from differentiation. But this only results in inequalities being forced underground—they still exist. Some faculty members are both productive scholars *and* productive teachers; under a facially egalitarian teaching assignment model, they end up doing a disproportionate share of the work in terms of combined student contact hours and scholarly contribution. If law schools react to the current affordability crisis by increasing the teaching loads of *all* full-time faculty members across the board, they run two risks: (1) jeopardizing the scholarly output of their most productive researchers, and (2) burning out their most effective classroom instructors who already teach heavy student loads.

A more sensible approach to teaching assignments is to raise the presumptive teaching load for all full-time faculty, but then to allow individual faculty members to petition for a reduced course load in a particular year, depending on (1) their scholarly agenda and the likely success of their projects (as demonstrated by prior significant scholarly contributions), or (2) unusually high student contact hours. By thus making faculty members “earn” a reduced teaching load, law schools could begin the difficult but critical task of varying teaching assignments to suit individual faculty productivity.³¹ Allocation of teaching responsibilities

³⁰ *Id.* at 42–44.

³¹ If implemented, my proposal might also serve as a retirement incentive for senior faculty members reaching the end of their careers, who do not anticipate that they would be eligible for a reduced teaching load under a new course assignment model. All retirement incentives (broadly conceived) are important for schools to consider as part of an overall cost containment strategy.

would then begin to more optimally reflect the different interests, talents, and capabilities of faculty members at various points in their careers.³²

D. Short-Term Contracts: Creating a “Third Track” for Full-Time Faculty

The traditional model of legal education is to hire, recruit, and promote two categories of full-time faculty: (1) clinical/legal research and writing faculty (so-called “skills” or “experiential learning” faculty), and (2) tenured/tenure-track faculty (so-called “podium” faculty). While many schools have eliminated the contractual distinction between these two types of faculty members by offering tenure to clinicians, at most schools the primary teaching responsibilities and research expectations for these two groups of professors continue to be different.³³ What each group has in common, however, is longevity; both skills and podium faculty typically view law teaching as a career that will span the remainder of their working lives. In other words, these faculty members are wedded to us for as long as they want to be here.

This two-track model of faculty hiring ignores an important and far more flexible source of legal talent. Lawyers are living longer and retiring earlier. Many partners at major law firms work under partnership agreements that require them to retire at or around sixty-two years of age. Similarly, many government attorneys and judges are eligible for a public pension, depending on their years of service, in their early sixties. Lots of these accomplished, talented, and still energetic lawyers would relish the opportunity to continue working in a law school environment as visiting faculty. These retiring lawyers and judges still have lots left to offer our students, and it is a missed opportunity not to utilize them.

I am not urging law schools to hire seasoned old trial lawyers to come in and tell war stories to our students. Some of the accomplished attorneys I am envisioning have taught at our law schools with distinction as adjunct faculty while they were practicing law or serving on the bench (with exemplary course

³² Deans who increase teaching loads in response to the present financial crisis might also consider allowing faculty members to “bank” credits from year to year. This would allow faculty who wish to devote substantial energies to research to teach an extra course in one year in order to obtain a course reduction in the next.

³³ While the ABA does not require law schools to afford clinical faculty the right to earn tenure, it does require at a minimum that they be afforded “a form of security of position reasonably similar to tenure” following a probationary period, such as a presumptively renewable five-year contract. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 405(c) (2012–13) (Interpretation 405-6).

2013] *Law School Affordability Could Improve Learning Outcomes* 129

evaluations to prove it). With careful screening and vetting, some of these former adjuncts could bring extraordinary skill sets to our communities as “full-time but short-term” visitors, at exceptionally low cost.

Tenure might not be as “dead” as many pundits like to proclaim,³⁴ but in an era of heightened attention to costs, it naturally will be limited to a smaller and smaller percentage of faculty. Law schools should thus expand their pool of potential teaching resources to create a third category of full-time faculty member—the distinguished visitor from practice. Especially in an era where fewer and fewer tenure track faculty are being hired with significant practice experience, ignoring this highly talented sector of the labor market makes little sense—either in terms of cost or in terms of maximizing the professional preparation of our students. Without the need for sabbaticals, summer research support, or research assistants, these professors could teach a course load of three to four courses per year for one-fourth to one-half the cost of tenure-track faculty, and no long-term commitment. Visitors could be awarded a series of short-term contracts (e.g., two years) and be retained only so long as the relationship continues to meet institutional needs.

Many law schools have shied away from such a layered faculty hiring strategy due to concern about its impact on *U.S. News & World Report* rankings. Full-time tenured or tenure-track faculty improve the school’s student-faculty ratio, and arguably have the greatest capacity to influence the academic reputation of the school.³⁵ But schools need to take a bold step in reducing faculty costs for the benefit of their students, irrespective of its incidental effect on the rankings. In other words, they should have the courage to lead the rankings indicators, rather than simply follow them. And even if one views rankings as a legitimate concern, the ABA could certainly help here by changing the way it calculates student-faculty ratio.³⁶ The ABA currently treats “visitors” (even those teaching a full course load) as 0.7 faculty resources rather than one full faculty resource, unless the visitor is covering for a regular full-time

³⁴ Robin Wilson, *Tenure, RIP: What the Vanishing Status Means for the Future of Education*, CHRON. HIGHER EDUC. (July 4, 2010), <http://chronicle.com/article/Tenure-RIP/66114/>.

³⁵ TAMANAHA, *supra* note 3, at 62.

³⁶ In their rankings instrument, *U.S. News & World Report* uses the student-faculty ratio reported annually by law schools to the ABA. See Sam Flanigan & Robert Morse, *Methodology: Best Law School Rankings*, U.S. NEWS & WORLD REP. (Mar. 11, 2013), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings>.

faculty member on leave.³⁷ More significantly, visitors are included in the ABA's category of "additional teaching resources" (along with administrators who teach and adjuncts), which is capped at 20% of the school's full-time skills and podium faculty.³⁸ Because many schools are already at their 20% cap in additional teaching resources, hiring more distinguished visitors from practice will do nothing to improve their student-faculty ratio, and may actually hurt that figure if visitor hiring is done in lieu of regular full-time appointments.³⁹ The ABA should consider raising the "cap" on additional teaching resources in Standard 402 to 30% or 40% in order to encourage schools to take more creative and less costly approaches to faculty recruitment.

E. Maximize Course Enrollments

Another trend that drives up the cost of legal education is running low-enrollment courses. I am not referring to clinics or certain simulation courses such as Trial Practice or Negotiation, which may need to be small in order to achieve valid pedagogical objectives. I am referring to very narrow seminars that primarily advance the research interests of the instructor, or doctrinal "podium" courses that are being taught primarily in a lecture style to an unusually small audience. It is very uncommon for deans or associate deans to cancel scheduled courses due to limited enrollments, for fear of embarrassing the professor or upsetting the expectations of enrolled students. But here, law schools need to learn a lesson from the airline industry. Just as it is not cost-efficient to run planes with half-empty seats, it is not cost-efficient to run classes with half-empty desks. Airlines have closely scrutinized consumer travel patterns over time and reorganized their routes and schedules to optimize efficiency; law schools must do the same sort of rigorous analysis with regard to course preferences and enrollments.

³⁷ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 402 (2012–13) (Interpretation 402-1(1)(a)(ii)).

³⁸ See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 402 (2012–13) (Interpretation 402-1(1)).

³⁹ Adjuncts and administrators without faculty rank who teach count as 0.2 faculty resources; administrators with faculty rank who teach count as 0.5 faculty resources; and visitors on short-term contract count for 0.7 faculty resources, all subject to the 20% cap. By way of illustration, a school with fifty full-time faculty members on tenure track, or its equivalent, is capped at ten additional teaching resources to be computed toward its student-faculty ratio. If the school already employs forty adjunct faculty members per year and employs four deans/associate deans who have teaching responsibilities, they have reached their cap of ten additional teaching resources. Hiring a visitor might be beneficial for the students and the curriculum, but it would have absolutely zero effect on the student-faculty ratio at my hypothetical school as presently computed by the ABA.

2013] *Law School Affordability Could Improve Learning Outcomes* 131

My proposal here is threefold. First, law schools must have the courage to cancel seminars and doctrinal courses that are undersubscribed (e.g., under eight students), forcing the professor to offer an alternative course either in that semester or in the following semester. Second, law schools should offer certain doctrinal courses that typically enroll between nine to fifteen students (for example, a Conflicts of Law or Admiralty course) on an every-other-year schedule. If this matrix were planned in advance and adequately published to students, they would know that if they wished to take a certain course they must do so in their second year, or it would not be offered again before they graduate. Finally, law schools in urban environments with other law schools nearby should develop “target” enrollments for each class, and work out a consortium agreement with partner law schools whereby students outside the host law school would be allowed to register for open classes after the internal registration period had closed if the target enrollment had not been reached. Such a consortium agreement could operate on a balance of payments model, where the outside students would not pay any additional tuition, but the consortium members would work out a per-credit exchange at the end of each year depending on how many outside students took courses at each school. Such an exchange, over time, would encourage law schools to play to their subject matter strengths in making curricular decisions, rather than trying to satisfy the full panoply of student interests.

F. Expand Seats in Clinical Programs through Use of Teaching Fellowships

Law schools face pressure to cut costs at the same time that they face pressure to expand their practical skills offerings. Yet one of the prime drivers of the tuition spiral (in addition to reduced teaching loads and higher administrative costs) has been the increase in both number and diversity of clinical offerings at many law schools. Clinical programs are extremely expensive to operate on a cost-per-credit basis, due to the extremely low student-faculty ratio necessary to accomplish clinical pedagogical objectives (typically around 8:1).⁴⁰ Many law schools that would like to “require” all students to participate in a clinic, or at a minimum guarantee a clinic seat to every student who desires one, might find it prohibitively expensive to do so.

⁴⁰ Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 309 n.1 (2012).

One low-cost method of expanding the number of available seats in clinics is to hire recent law school graduates (preferably graduates who have excelled in that particular clinic) as “teaching fellows” for six to twelve months after their graduation. This fellowship would serve as a form of apprenticeship for the recent graduate as he or she searches for full-time employment. But because the fellow is also a licensed attorney, he or she would be available to help the faculty member supervise students on assigned cases. Such assistance would allow the faculty member to increase enrollments in the clinic by perhaps two to four additional students per semester. Clearly fellows are not substitutes for experienced clinicians, because they do not have the legal practice experience, the judgment, or the teaching skills to serve as a student’s primary case supervisor. But they could assist the faculty member in managing and directing a student’s caseload, including providing research direction and document review. Viewing some recent graduates as perhaps an additional teaching resource in the clinics might be a low-cost way to increase the student-faculty ratio from 8:1 to 11:1. In return for their services, law schools might offer such fellows a modest housing stipend, or free courses in the school’s LLM program. This is another example of how law schools can be more creative in expanding their pie of available teaching resources in a way that does not add substantially to the tuition burden of students.

G. Cut Back on Law Reviews

There are presently 201 accredited law schools in the United States and over 650 student edited law journals—on average, over three journals per school. Many schools host specialty journals in such areas as environmental law, cyber law, maritime law, etc. At many law schools, students are paying tuition to serve on a specialty law journal, where they receive up to three credits per year for writing a note and engaging in editorial work such as source and cite checking. While students undoubtedly receive some educational benefit from journal experience, the primary beneficiaries are the well-paid faculty members at *other* law schools who are finding a home for their scholarship. This clearly represents a cross-subsidy.⁴¹ Flagship journals at many lower-ranked law schools, and even specialty journals at mid- to top-tier law schools, are reaching to fill their books, and sometimes publishing “scholarship” of dubious value that does not significantly benefit the student editors, the host school, or the profession. One study has suggested that up to forty-three

⁴¹ TAMANAHA, *supra* note 3, at 61.

2013] *Law School Affordability Could Improve Learning Outcomes* 133

percent of law review articles published in the United States are never cited after publication by a *single court or other scholar*.⁴²

It is time for law schools to seriously reconsider whether all of their currently sponsored law journals are wise investments of valuable tuition dollars. Are the students receiving a rigorous academic experience that will better prepare them for the practice of law? Are the journals publishing articles that are likely to have any influence in the legal profession? Even if the answer to both of these questions is *yes*, might the same benefits flow from online rather than print publication?⁴³ Might many law schools—particularly lower ranked law schools that are struggling with enrollments—be better off publishing only one flagship journal?

It may cost a law school up to \$25,000 annually to publish a specialty journal, including printing costs of multiple volumes per year and the apportioned salary and benefits of a professional staff member hired to manage business affairs. For less than half that figure, law schools could open thirty seats in two new practical skills courses taught by experienced adjunct professors (such as advanced legal research or advanced legal writing) that might serve similar pedagogical objectives. The students in such courses might receive an equal or even more formative educational experience, and the law school would save money.

My recommendation for close scrutiny of expenditures is not confined to law reviews. It is always difficult to raise questions about the value of existing programs. Sacred cows are scattered across the legal academy. Many programs have well-entrenched advocates and their own unique institutional histories. Yet these are exactly the sorts of difficult conversations that a wise steward of financial resources must undertake. Law school deans who are serious about curtailing the rising cost of tuition must scrutinize all aspects of their programs—from library subscriptions to administrative personnel to travel and catering—in order to identify those expenditures that have the least significant impact on our two primary educational

⁴² Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 118 (2010).

⁴³ In 2009, a group of twelve law library directors at some of the nation's leading law schools issued the "Durham Statement on Open Access to Legal Scholarship." Call to Action from Richard Danner et al. (Feb. 11, 2009), *available at* <http://cyber.law.harvard.edu/publications/durhamstatement>. The Durham Statement encourages law schools to make their print law journals available in electronic format via open access on the web. In addition, the Durham Statement encourages the end of print publications and the move to an exclusively electronic platform for law reviews. While many law schools in the United States have accomplished the first objective, very few have accomplished the second.

missions: the advancement of legal knowledge and the professional preparation of our students. All operational and salary expenditures must be evaluated against these two critical benchmarks.

CONCLUSION

The economic fuel that has sustained law schools for the past several decades has been the willingness of students to finance the high cost of their legal education through student loans, on the hope that they will obtain a six-figure legal job upon graduation. This bubble—much like the subprime mortgage bubble—is beginning to burst.⁴⁴ As the percentage of graduates nationwide who obtained full-time legal jobs requiring a JD shrunk last year to fifty-five percent,⁴⁵ the application pool has plummeted. College graduates increasingly see law school as a very risky proposition.

We are now facing a perfect storm of overcapacity of seats, shrinking demand for legal services in several sectors of the legal profession,⁴⁶ and a flawed economic model of the professoriate. Some have likened this crisis to the automotive industry in Detroit in the 1970s and to the steel industry in Pittsburgh in the 1980s.⁴⁷ We ignore these challenges at our peril, and risk walking backwards over a precipice while pointing blindly to the responsibility of others in the system. The law schools that are able to react nimbly and decisively to these changing demographics might state the most convincing case for attracting the precious tuition dollars of aspiring lawyers.

I hope that nothing I have said in this essay will deter recent college graduates from pursuing a law degree. Being a lawyer is an intellectually challenging and professionally satisfying career. And the diverse legal needs of this nation's citizens are certainly very compelling. But the trends I have identified are real, and cannot be ignored. If we are attentive to market indicators and the needs of our students, we may emerge from this economic downturn leaner, stronger, and more focused on what matters

⁴⁴ Henderson, *supra* note 20, at 494; *see also* Robert J. Rhee, A Market Correction in Legal Education: What's Happening? What Now?, Address at the Chapman University School of Law Symposium: The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs (Jan. 31, 2012).

⁴⁵ *See Overpriced or Priceless?*, *supra* note 5.

⁴⁶ *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 757–63 (2010); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 1–3 (2010).

⁴⁷ Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at 10(L) (quoting Hastings College of Law Dean Frank Wu); Michael Madison, *Legal Education and the End of the Beginning*, THE FACULTY LOUNGE (Oct. 25, 2012, 10:10 PM), <http://www.thefacultylounge.org/2012/10/legal-education-and-the-end-of-the-beginning.html>.

2013] *Law School Affordability Could Improve Learning Outcomes* 135

most—providing a quality, affordable, professional education to the next generation of America’s lawyers.

**Transcription of 2013 *Chapman Law Review*
Symposium: “The Future of Law, Business,
and Legal Education: How to Prepare
Students to Meet Corporate Needs”**

**Keynote Dialogue: “Old School” Law School’s
Continuing Relevance for Business Lawyers
in the New Global Economy: How a Renewed
Commitment to Old School Rigor and the
Law as a Professional and Academic
Discipline Can Produce Better Business
Lawyers**

Friday, February 1, 2013

Keynote Address:

*Chancellor Leo E. Strine, Jr.**

I am pleased to be with you to discuss a topic important to us all, which is whether a rigorous three-year “old school” law school education is valuable to a lawyer practicing business law in the emerging global economy.

I have three different windows on this subject. As a judge, I employ two recent law school graduates as my law clerks each year. We are fortunate in Chancery to get hundreds of applications from top-ranking students at top law schools. Each year, I have the privilege (and some of the frustrations) of employing two of these students in their first real legal job.

As a judge, I of course have another wider window on the products of American law schools, through which I view the lawyers who practice in our court. I look at lawyers within

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Delaware who practice civil law at all levels, because our Court does not just handle big corporate and commercial cases, but also adjudicates all general equity matters, including guardianships and trusts and estates. And, precisely because of our sophisticated business law caseload, I see lawyers from the top business firms from all regions of our nation.

The final window I have is a bit like many of yours. For over a decade, I have taught year round, with my primary posts being at Penn and Harvard, as well as a regular short-course gig at Vanderbilt, and stints at UCLA and Cal Berkeley. That has given me a sense of the current state of affairs at some of our nation's finest law schools, in terms of key issues like curriculum, grading policies, faculty incentives, and academic focus.

In preparing my remarks, I have drawn on each of these perspectives. I don't pretend that my thoughts reflect an empirical sample of law school curricula, grading systems, the substantive legal knowledge expected of the current generation of business lawyers, or the like. This is just one person's own sense of things, based on his own subjective experiences. Because I have been charged with interrupting your dining experience with my remarks, I intend to be blunt and provocative. There won't be much varnish. Rather, I will give an emphatic *yes* to the question of whether a rigorous three-year legal education remains valuable to someone wishing to practice business law at the highest level in a rapidly globalizing economy, and then explain the ways in which I perceive the current legal education system to be falling short of the mark.

In addressing these questions, I focus on three primary types of business lawyers. The first category consists of those business lawyers who serve as in-house counsel to businesses operating in an increasingly international economy. The second category are sophisticated transactional lawyers who work in law firms and are engaged by businesses to put together major M & A transactions, licensing agreements, and joint ventures. The final category are the advocates who represent businesses in litigation, administrative proceedings, and arbitrations when businesses have disputes about their contracts, face claims by affected constituencies that their conduct violated legal or equitable duties owed to them, or must seek regulatory approval before taking action.

It is my view that the globalization of the economy makes a rigorous three-year legal education more, not less, necessary for these categories of lawyers. I begin with the admission that I think that a lawyer practicing at the highest level of any of these categories and exclusively having to address U.S. law also needs

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 139

three solid years of law school. The primary reason for that is that business lawyers at the highest level are required to spot diverse legal issues, recognize the glimmer of a legal problem from another body of law, size it up initially, and determine whether more specialized legal advice is required to address it. The best GCs, the best big picture M & A lawyers, and even the best litigators are great generalists with a sense of the broad legal context within which their clients must operate and a keen radar for the emerging presence of a potential legal issue not seemingly central to the business issue the client is addressing.

The GC of any public company that makes products in this nation is likely to have addressed more bodies of law than I have the time to identify. The obvious ones are: (1) state and federal securities laws; (2) state and federal tax laws; (3) state and federal employment, worker safety, ERISA, and worker's compensation laws; (4) state and federal regulatory and consumer protection standards relevant to the particular products and services the business provides; (5) state and federal environmental laws; (6) state corporate laws; (7) federal and state laws regarding contributions to political candidates and political involvement more generally; (8) state contract and fraud principles that will hover over every contract the business enters into; and (9) business licensure and U.C.C. filing requirements pertinent to the business's conduct in its various markets. Because disputes on all these fronts are a possibility, the GC must have a basic understanding of how litigation works, including the respective roles of federal and state courts and concepts regarding class actions and derivative suits, administrative law, and alternative dispute resolution. As I speak, some GCs in the room may be shouting that I've missed some key things. I doubt any of them is saying, "Geez, we never come across that stuff."

The list I've identified applies with full force to transactional lawyers. Any merger agreement between two public companies will involve representations and warranties regarding subjects like environmental compliance, employment contracts with key employees, ERISA plans, antitrust approval, tax, and ongoing litigation. Transactional lawyers are frequently required to identify legal issues that arise in due diligence, because of industry context or other reasons, and to bring in more specific legal experts to help address it. The generalist transactional lawyer must then work with the GC and others at the client business to translate the advice of the specialists and to address the specialized issue in a way that's consistent with the client's transactional objective.

The smart generalist transactional lawyer will have already engaged her favorite litigator, who will help the generalist flag issues that might give rise to claims by stockholder plaintiffs, interloping bidders, industry rivals, or, perhaps most concerning, regulatory agencies.

When a young or even experienced lawyer is thrown into the head-tilting whirl of practice, there is precious little time to take an evening, pull out a nutshell, and read up on the various general law subjects she now wishes she had studied in law school. And as a matter of logic, one must have some general sense of the applicable legal principles before the fact, if one is to spot their possible application. A good generalist lawyer with a broad sense of legal context can spot issues that require the attention of a specialist. But without any understanding of the broader context, and the interplay and overlap of different bodies of law, that important duty to protect the client by grasping the full range of legal risk presented and addressing it prudently can't be fulfilled.

Now, these factors are ones that apply even if a business operates only in the United States. With fifty states, keeping track of different state law approaches is a big task. If a business is entering into contracts in multiple states with other businesses and consumers, its lawyers will have to address important variations in contract, regulatory, tort, tax, and other laws.

But these are nothing compared to the challenges of operating a business that engages in international commerce. Crossing borders exposes the business to regulation by the laws of other nations, many of which come from a civil, not common, law tradition, as well as to additional domestic regulation, such as requirements under the Foreign Corrupt Practices Act. Other nations have very different approaches to litigation, administrative law, taxation, labor law, securities law, and other critical areas of legal regulation important to business. As in the domestic context, the duty of the high-level GC, transactional lawyer, and advocate is to help the client comply with the law and prudently assess the full range of legal risks its operations entail.

In a cross-border acquisition, myriad legal issues can arise: Which securities regulator governs the EU corporation that is a party to the transaction? How do you treat U.S. or non-EU stockholders of the EU corporation? And vice versa. What is the form of the Takeover Directive that the relevant EU nation has adopted? How will the EU competition authorities feel about the proposed acquisition? Are there national champion or other unique nation-specific considerations that could affect regulatory

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 141

approval? What are the rights of the EU corporation's employees, works councils, etc., in the context of an acquisition? If there are disputes about these issues, or issues such as the fairness of the consideration offered to the EU stockholders, the forums and methods for their resolution can be far different from what would be the case in the U.S.

Likewise, in a cross-border licensing agreement, important issues involving national and regional IP standards (heard of ETSI, anyone?) can be implicated, which are very tricky to resolve. What are the FRAND principles that apply? What is essential to the relevant standard? Where do we go to resolve disputes? If we chose a court, will all affected jurisdictions respect the judgment of a court or do we need to go to arbitration? Are some issues solely within the province of particular government regulators or forums to resolve, irrespective of the parties' choice?

It's my strong sense that the lawyers best equipped to address the various bodies of law and, as important, distinct approaches to law and dispute resolution, are those with a broad exposure to the important traditions of not only domestic law, but with some general sense of the civil law tradition and how it differs from the common law approach, how conflicts of laws between nations are resolved, and of the emerging importance of international bodies like the standards-setting organization I referred to and organs like the International Trade Commission in regulating cross-border commerce. Law school is the place to get that grounding, not the maelstrom of practice as a junior lawyer in a specific legal field that might be a gateway to being a full-range business lawyer of the highest caliber. Second-year students may be impatient, but they need the learning provided by the third year of law school to be educated in both a broad and deep way. That doesn't happen during practice, certainly not the broad part—which is essential.

There's another reason why a legal education remains critical: the law is a profession with a distinct set of professional values and duties that are vital to the well-functioning of a society that is based on adherence to law, rather than the momentary whim of those in power. Of all lawyers, those lawyers who represent organizations with the mission of making profits most need to understand why the distinct role of the lawyer is important. Often lost by those who pursue profit is that the first obligation of a corporation chartered under most American law is not to make profits. What comes before profit is compliance with the law. Delaware, for example, doesn't charter lawbreakers. We only allow corporations to pursue "any lawful business" by any

“lawful” means.

In any aspect of life, there’s a great temptation to break the rules if you can reap the benefits of doing so for yourself, and shift a lot of the costs of your rule-breaking behavior. That temptation is near its highest in the business setting. Our polity has put in place laws that are designed to deal with the externality risks caused by profit seeking. Worker safety and environmental laws are only the most obvious examples of society’s recognition that for-profit businesses will not, of their own accord, responsibly address the effects of their conduct on others. To ensure that businesses do not externalize the costs of their activities by harming others in order to make a profit, society requires businesses to comply with regulations ensuring safe workplaces and responsible environmental practices.

Within complex business organizations, it’s corporate counsel who plays a leading role in ensuring that the organizations instill cultures that foster respect for and compliance with the law. Like it or not, a good corporate counsel must be a kind of school marm, focusing the client on its legal duties and making sure that the client makes a good faith effort to operate within the bounds of the law. A good corporate counsel can’t tolerate intentional legal misconduct in the name of profit, because no corporate manager is authorized to put his own ardor for profits (even profits for the stockholder) over the corporation’s fundamental duty to comply with the law. The kind of moral and ethical strength required by corporate counsel when a business is under pressure to take legal shortcuts in order to make a gain isn’t easy. A law school education that grounds the lawyer in the traditions of the profession and the critical role that lawyers play in enforcing the rule of law is at the heart of a republican democracy, and it remains more vital than ever, in a world where global competition puts businesses under tremendous pressure to generate short-term profits.

With these thoughts in mind, I’ll turn to a few thoughts on how law schools could do better than they are currently in educating future business lawyers—remembering again that being a lawyer is a profession and that law school is, therefore, a professional school.

I begin with the curriculum. My perception is that in the guise of being more relevant and interesting, law schools have actually made their curriculums less challenging and less relevant. I say that as someone who gets paid in large part because of the move in law schools toward “junkie” courses, in the sense of highly specific courses for junkies in particular subjects. In corporate law, for example, I know it’s possible for

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 143

students to spend a good deal of their second and third years at some institutions taking so-called “upper level” classes dealing with overlapping corporate law issues, such as mergers and acquisitions, corporate governance, shareholder activism, and corporate finance. At most of these institutions, it’s also possible to do so without the student actually taking an advanced class in a subject that every corporate transactional and corporate litigator must know cold: contract law. The fact that you know that ISS is again ISS after for a time being something else will not help you when you haven’t the faintest idea what the difference between a representation and warranty, a covenant, or a condition is, and when the only thing you understand about a bring-down condition is that if it’s triggered, the merger might fall to pieces.

These junkie classes come at the expense of the introductory survey classes that play a critical role in exposing law students to the diverse, but fundamental, bodies of substantive law that exist. Let me indicate just how fundamental the law can be that a student need not take at law school. I’ve been privileged to teach at excellent law schools, and there’s no school that has more talented corporate law faculty in one place than Harvard. I’m not saying that the HLS corporate faculty are, as individuals, better than many of my excellent colleagues elsewhere, it’s just a reality that there are more excellent corporate people at one place in Cambridge than anywhere else in the world. My friend, former Dean Clark, started that tradition and Dean Minow honors it today. But it’s also true that HLS has an amazing stable of constitutional law professors.

Well, one day several years ago, I was talking to one of my best students, who was a very bright guy. Somehow we got on to the subject of constitutional law, and I asked whom he had as a professor. He confessed that he hadn’t taken constitutional law. I said, “But wasn’t it required?” No, was the answer.

I didn’t and don’t understand that on any level. On a moral and ethical plane, I think it’s absolutely essential that law students be taught a course in the fundamental constitutional law of our republic. I think that is true of anyone who comes here to get an LLM, much less a degree that allows you, upon bar exam passage, to practice law.

But let’s take a more applied approach. In what way, shape, or form should a corporate law or advisor (even an investment banker doing transactional or advisory work) not be materially aided in her effectiveness by having a basic understanding of constitutional law and the governance of politics? Does anyone think it coincidental that boards of directors are elected

annually? Does anyone think it coincidental that there are some decisions that the board can only make if the electorate actually approves them? Does anyone think it is coincidental that there are rights given to stockholders to allow them to hold the managers of corporations to their duties? Although treating corporations or other business entities as if they are actual polities is a mistake, not understanding the basics of constitutional law and the working of republican polities is a tremendous disadvantage to any sophisticated corporate lawyer or advisor. Corporate law drafters drew on and continue to draw on the Lockean traditions that are the basis for American republican democracy.

Here's a quiz. Can anyone who practices corporate law identify how the now iconic corporate law standard of review called the *Unocal* standard has progenitors in constitutional standards of review? What does *Unocal* resemble? How about the means and ends fit tests used in First Amendment and Fourteenth Amendment cases, as well as in employment discrimination cases? These tests smoke out pretext and overreaching using a required identification of ends by the party whose actions are under review, and the requirement that the chosen means bear the required tightness of relation to that end.

And back to the issue of advanced contracts. Why isn't it a required subject anywhere, or even taught in many places? The cow case is not enough for any lawyer. And, I can't even be confident that students still receive the fundamental common law tradition even in their first-year contracts course. One of my former students at a top-rated law school told me that his first-year contracts course was taught as the "Philosophy of Contracts" and they spent so much time reading Hart and Dworkin that they never reached the recognized excuses for breaching a contract. Nor did he ever see an actual commercial contract in that course. Virtually any functioning lawyer must be able to negotiate, understand, and enforce complex agreements, and understand the interaction of complex agreements to risk-creating bodies of law, such as the law of fraud. No subject could be more professionally useful, especially to a business lawyer.

Why Complex Contracts is not a required course is easy. There is no faculty incentive for teaching Contracts in a traditional rule-bound way, much less Contracts II. It's much more fun to teach a junkie course in one's own subject, and there's no curriculum mandate that requires students to take such a mundane subject. Ditto for advanced civil procedure, and many other subjects that are in fact vital.

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 145

Things would be better if deans were empowered and required to actually set real curricular standards. Even within junkie courses, there should be improvement. To be candid, if you want to really teach students M & A law, the course should be a full-year class covering at least these components: (1) state corporate law, including fiduciary duties; (2) relevant securities law principles; (3) other regulatory factors common to transactions, including tax, antitrust, national defense (CFIUS, anyone?); (4) international considerations, such as the EU Takeover Directive; and (5) the contract and tort law principles relevant to the enforceability of M & A contracts. I'm not aware of any full-year approach that addresses this reality. Most such classes slight the contract law aspects the most, despite the reality that these are the most important in most transactions.

This isn't to say that students should not have the chance to do deeper dives in particular subjects; that's important. Seminars are useful, and so are advanced classes. But in the long run, what is most vital is that the students all complete a rigorous set of introductory courses covering the most important areas of law. If something has to give, it shouldn't be the fundamental subjects; it should be the optional.

Another problem is that too many students are taught introductory classes by professors from the "law & blank" [insert your oxymoronic social science of choice] movement. This often results in a student not getting any real exposure to the traditions of the law, certainly not a first-rate exposure, and instead being subject to third or fourth rate "& blank." I repeat: law school is a professional school. In practice, lawyers are expected to deal with the law as it is, not as a professor might wish it to be. Students deserve to have the legal tradition taught with fidelity and respect. An appropriately scholarly attitude would remember that the law's current state reflects the grappling of generations of humans over centuries to figure out a rational way to resolve disputes and to channel human behavior toward the mutually tolerable, if not optimal. Indulging the notion that understanding these traditions from the perspective of the legal tradition itself is an important starting point for lawyers and even legal scholars is critical. If one wishes to go off on to the "&" one can do so, but one first has to have the law part down and understand that.

I fear that too many deans and institutions allow professors self-indulgently to subject law students to idiosyncratic introductory courses. Too many of my upper corporate law students have had particular professors who seemed to feel that the truly iconic doctrines of corporate law were simply not

important enough to be part of the basic corporations course for me to have confidence that this is not true in other areas. Even more regrettably, one can tell from the scholarship of too many law professors that their actual understanding of the law itself is thin, and that their tolerance of reading statutes, cases, and legal history is just that—a tolerance for doing the minimum to do their regressions or advance their ideological positions regarding the “& blank” passion they harbor.

Sadly, too many students are taught courses by professors with no genuine experience as a lawyer. And when students are taught by professors without experience, who often haven’t ever bothered to read the full judicial decision, the excerpt of which they have assigned their students, students come into practice without a real grounding in core subjects—a deficiency that hurts their performance. Some professors not only lack legal experience, they lack a law degree and any apparent effort to understand the law itself. The primary goal of law schools should be first-rate law teaching and first-rate legal scholarship. Until the law teaching and scholarship is done right, the ampersand stuff will just be junk, rather than adding a valuable perspective on the legal tradition and the future direction of policy.

Most important, law students who are entering the profession need to understand the law as it is applied in reality, not in theory. Because law school is a professional school, the students are also being disserved by the indulgence that law schools give to complaints about the rigors of the legal education process. Any employer can tell you that law school grading policies would be laughable, if they didn’t have a real world consequence. Law schools with the traditional A, B, C, etc., grades have so compressed their grading systems that students who get B pluses need to be put on suicide watch. Other schools have adopted silly systems involving Hs, Ps, and variations on the same, including a grade aptly called the PC!

Most of the students at top law schools have gotten there because they are good at exams and writing papers. But when they get to the top law schools, all the other students are good at them, too. The competition that always worked for them now scares the heck out of them. Hence, it becomes easy for them to argue that everyone should get the same grade. But that’s not the way the world works. There are meaningful differences between a subpar, adequate, good, and great business lawyer. There are meaningful differences between student achievement on exams at top law schools. In the real professional world, these gradations will matter. It’s unfair to all students for law schools to keep dumbing down their grading policies. Get over it,

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 147

achievement matters, and the ability of a lawyer to understand a legal problem under time pressure and come up with an articulate, well considered initial response is a real professional requirement.

When students take eight blind-graded exams in their first year from different professors, the distributional outcomes are telling. At one of my favorite schools, one of its comparative strengths was that it gave real grades, not old school real grades, but at least grades with some real rigor and an old school feel. Getting an A was different from getting an A minus, and many students would get Bs and even B minuses. Now, a professor basically gets to give students an H (with a high percentage), deem some eligible for an H plus, and the rest a P, with anything lower than a P being an optional grade that's essentially highly discouraged. The incentives for untenured faculty to give out the most generous grades are obvious, as is the incentive for tenured faculty to do so to be popular, get good enrollments, and avoid being trashed online. The "paper chase" is not the scary part now, it's the "tenure chase" for the young professor aspiring to be Professor Kingsfield.

Students whose P work is demonstrably superior than the great mass of Ps don't get the recognition they deserve. Students who barely P their way through—without realizing that most of the reading professors think their work is really poor, but who won't give them the real signal of how below the mark they are—don't get the sort of wake-up call they should. And none of the students are getting a real world experience in terms of performance evaluation. It's of course true that in any particular course, a student could get a B plus rather than an A minus that would be given by a different professor. But the beauty of blind grading and having multiple professors is that the overall system provides a fair assessment, if the assessments have to be done with rigor.

If ever a group of people needs the strictures of a rule, it is law professors in the context of grading. There should be non-negotiable curves for every law school course, regular or seminar, and it should have at least four required tiers of grades, with no less than twenty percent in each of the lowest two tiers. If by some random chance, one seminar has only the descendants of Cardozo and Holmes, some of those descendants might have to get a poor grade for once. Deal with it; it's a good learning experience.

Likewise, law schools seem increasingly dangerous places for professors to require that students respond to questions without being told in advance that they'll be expected to answer questions

that session, and that students be expected to speak audibly so that everyone in the room can hear. There's virtually no legal job that doesn't require a lawyer to advocate the position of her client orally. It's not just the trial lawyer who must speak up for her client and be able to explain her client's position clearly, logically, and convincingly. Any business lawyer must do that as a negotiator of contracts.

As important, lawyers need good oral presentation skills in communicating with their own clients. Some of the toughest tangles lawyers get into are with clients keenly interested in pursuing a legally problematic course of action. If a lawyer can't speak in a persuasive, logical manner in response to the client's questions and concerns, the lawyer won't be effective. Part of the lawyer's skill also involves how to handle a situation provisionally, when an unexpected question or issue arises. There is an element of "faking it" about a lot of things in life, and that's true in the law, too. The lawyer must get through the moment with an intelligent reaction that reflects a general understanding of the situation, and then explain why she needs more time to give a firmer answer. You can't say pass or tell the client that the question is unfair because you weren't on the panel for that subject today.

The reluctance to cold call students because of the grief it can entail if students complain seems also to extend to refusing to instill in students a recognition of the professional standards they must meet in terms of thorough research and thinking. Too few professors make students read entire judicial or administrative decisions. Although I understand that in a survey course, it is difficult to assign too many entire decisions, the reality is that in practice, you must read and understand entire decisions. That is helpful not only genuinely to grasp the meaning of a decision, but for another critical reason: indulging the notion that judges and regulators may think that the things they write to explain their reasoning are important might be useful as a member of a profession whose clients will wish to prevail before these decision makers. What judges and regulators write provides an insight into how and why they make decisions—insights that are vital to effective practice and real understanding of the law. The same reasons counsel requiring students to touch and feel actual complex contracts, and understand how they work, and why they have common recurring parts.

On a related topic, judges (and their law clerks) find typos, poor grammar, and unorganized writing dismaying. But law school professors seem reluctant to emphasize to students that if

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 149

their writing fails on the most basic level of spelling accuracy and grammar, they're likely to lose their readers and ultimately their job. With spell check, a typo should at least be a word. If I read a brief with the word "teh" in it several times, I find it annoying and wonder why I should believe that the arguments being made were important if the writer couldn't take the time to fix "teh" and make it "the."

Law school should be a time when professors emphasize to students the rigorous writing discipline required of high-level lawyers. In classes where student essays and papers are required, there should be consequences for poor editing, improper citation form, and the like. Graduates shouldn't reach their first job and suddenly realize that it's not okay to send a letter to a client with multiple spelling and grammar errors, much less to a court or administrative agency. As I tell my law clerks, you can always decide to become sloppy later in life. It's much harder to learn how to become a disciplined writer and, as important, editor of one's own work. Aspiring professionals should be exposed to and expected to meet real world legal writing standards in the comparatively low stakes setting of professional school, and not learn the much harder way when they can't cut it in practice.

Finally, I think there's another problem that law schools and all professional schools will have to help the current generation of students to address. With the poor man's version of Westlaw being ubiquitous—I refer to Google and other search engines—the current generation of law students come at things with a decided preference to look for the highly specific answer straight away rather than to reason to that answer after obtaining a more general understanding of the relevant law and context. As a judge, I've often seen situations where even judges fall prey to this. An initial decision is quoted out of context by a second decision for a proposition that is reflected in the decontextualized quote. The third decision builds on the second, and so on, and the law gets distorted because none of the busy judges and law clerks have gone back to the roots and recognized that the first decision was not in fact authority that spoke to the question, and that the answer being given required an actual justification in logic, rather than an out-of-context repetitive citation.

As very bright law clerks come to me from good schools, one common trend I have to address is their propensity toward the immediate answer guided by case-specific search terms. They often generate materials that lack appropriate context and emphasis precisely because they're viewing the problem from a very narrow perspective that's uninformed by an understanding

of the key general applicable principles. To approach a legal problem effectively requires reversing the order of how these students approach things. If there is an issue about, let's say, what the effect of a majority of the minority vote is on the standard of review of a merger, the best way to start is to go to the excellent treatises that exist about corporate law, and to read the relevant chapters. Ninety minutes spent that way will ground the young lawyer in the subject. The compilation of citations will also be useful to the next step. With that general context in mind, the young lawyer can then formulate the basis for, and examine the more specific results of searches, with much greater accuracy and insight. This approach also builds brain muscle because the reading that the young lawyer does of the best treatises and summary materials will have lasting value in terms of the lawyer's understanding of the larger principles of the relevant subject matter.

Regrettably, I don't think law schools do much teaching about the *how* of effective legal research and thinking. Too many very bright students seem to either be unaware of materials like *Collier on Bankruptcy*, *Weinstein's Evidence*, *Wright & Miller's Federal Practice and Procedure*, and *Moore's Federal Practice*, or deem them too old fashioned to be worth consulting. That is wrong-headed. For many subjects, old school sources—which are usually updated by excellent professors—remain very relevant. When dealing with general topics of civil law in states without developed case law, sources like *American Jurisprudence* and the *American Law Reports* remain very helpful starting points about national trends, and they are useful to help experienced lawyers brush up on topics that they don't address every day. Mundane sources exist that law students don't think of. For example, anything called a “uniform law” is called that for a reason, and there are publications that track cases citing specific sections and versions of those important acts, and discussing the background on why the uniform law in question takes the form it does. These publications can be critical in dealing with a question about a uniform law in a state without decisional law of its own on point, or where the state took a divergent approach to a particular point from the uniform law.

Similarly, law students seem to struggle to realize that not all authority or precedent is of the same force. Recognizing that there is a hierarchy of both actual authority, in terms of the power of its source, and persuasive authority, in terms of the quality of the source, is critical to effective advocacy. The best authority isn't necessarily the material that will come up first on a Westlaw search, must less on a Google search.

2013] *Commitment to Old School Rigor Can Produce Better Lawyers* 151

Obviously, law schools should not be required to teach students how to approach each field of law. But they can and should do more to make sure that, throughout all three years of legal education, students are taught how to approach a legal research problem, and how to translate that research into an effective written answer. Overcoming the understandable tendency of a generation weaned on the Internet to look for the quick, immediate answer without taking the time to recognize that formulating the right question to ask is often more important to effectively representing a client is a formidable challenge. But until this problem in thinking is actually identified as a serious trend, law schools can't even start.

Thank you for indulging me today. I believe law schools have a critical societal mission. We can't give in to the temptations to turn law schools into degree mills where, if you pay the huge bill, you get a quick diploma. Recommitting to old school rigor is the best way to meet the demands of the global economy we now confront.

**Transcription of 2013 *Chapman Law Review*
Symposium: “The Future of Law, Business,
and Legal Education: How to Prepare
Students to Meet Corporate Needs”**

**Panel 1: Can Law Schools Prepare Students
to be Practice Ready?***

Friday, February 1, 2013

Moderator:

*Professor Susanna K. Ripken***

Panelists:

*James E. Moliterno****

*Sara K. Rankin*****

* This transcript has been edited and excerpted. For the full video presentation, visit www.chapmanlawreview.com.

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*R. Michael Cassidy******

*Susan B. Myers******

RIPKEN: The first panel addresses the question: “Can law schools prepare students to be practice ready?”

MYERS: In my years of practice I have worked on a broad range of matters. Currently at Hyundai Capital I am the head of our company’s legal team. So, in addition to a transactional practice, which involves reviewing contracts, reviewing shareholder subscription agreements, and advising my clients on new products and new business areas, I also manage our team of lawyers. And one thing that law school doesn’t teach is how to manage employees. That’s a very important skill.

But, what’s very important for in-house attorneys, probably more so than private practice lawyers, is knowing how to *do* the law. The legal department in a corporation is not a revenue producer, and we are part of the overhead expenses. So, the company looks at us as a necessary expense (or they wish it was an unnecessary expense), but we have to prove ourselves and prove our value to the company everyday.

The skills that I need to do my job today are not tools that I learned in law school. Earlier in January, Judge Francisco

analysis, legal research and writing, and general principles of trial and appellate procedure and advocacy, at Seattle University School of Law. Prior to her teaching career, Professor Rankin worked for the major law firms of Kirkland & Ellis LLP and Sidley Austin LLP, where she specialized in complex litigation. She also served as in-house counsel for a national accounting firm. Professor Rankin received her JD from New York University School of Law and her MEd from Harvard Graduate School of Education. She continues to support the advancement of legal education as an active member of the Legal Writing Institute and the American Legislative and Issue Campaign Exchange, and is on the board of governors for the Society of American Law Teachers. Professor Rankin’s research interests include legal education reform and legal skills education.

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Briseno of the Orange County Superior Court stated, “Law schools do not prepare students to be lawyers.” As you may know the *New York Times* has done a series of articles on laments of the business community about the fact that law schools are overly academic and do not train students how to practice law. And while this is not true of every law school, and I am sure it is not true of my esteemed panel members, many law professors have not practiced a single day of law, but have worked their entire careers in the halls of academia.

Today many corporations will tell their outside counsel firms that they will not pay for first- or second-year associates to bill on their matters; rather, they expect the law firms to absorb the costs of doing the necessary training for junior lawyers. The legal profession in the United States is the only profession that does not mandate an apprenticeship to teach tools of the trade. In all other professions (medicine, nursing, accounting, etc.), students intern or apprentice as a mandatory part of their training so that when they start working, they have foundational, practical, basic skills.

In all other countries, lawyers are trained by studying legal courses on a much shorter academic path than in the United States. In most other countries around the world, lawyers are trained in the law in their college, their four years of college. And then they apprentice to a lawyer, or a judge, or a prosecutor to learn on-the-job training as part of their education. The lawyers in other countries are typically younger than the lawyers in the United States because we have to go through seven years of training and then begin practicing.

The history of law education in the United States shows that law schools were not even set up to train law students how to be lawyers. Of course, law schools teach students to be able to spot obscure legal issues, but those are primarily directed at teaching students how to learn the curriculum well enough to graduate from law school and how to pass the bar exam. I think I went to a pretty decent law school, but thinking back to the courses I took in law school, I’ve never had occasion once in my legal career to apply most of the legal principles I learned at Harvard. I’ve never had an issue that called me to know what was the ruling in *Hadley v. Baxendale*. In all the real estate transactions I have worked on I have never needed to know the Rule Against Perpetuities. And for all the contracts I have reviewed I have never had to know the ruling in *Hudson v. McGee*, which you all know as the “hairy hand case.” In fairness, I have to remember that I do look at certain issues I learned. I look at the *International Shoe* case for jurisdictional issues, and I frequently

reach back to the tenants I learned in my U.C.C. secured transactions course.

On my first day of my first law firm job, I thought I was very well prepared with my Harvard law degree to start practice. One of my first assignments was to review a package of loan documents for a bank client, and I was told to review and mark-up the document. I started reading the document and realized that I didn't know what the borrower's business was, I had no idea what the assets described involved, I didn't know what a financial condition was, or what EBITDA ratios were. I also didn't know how to do things like run the photocopier or the fax machine. At the end of my first week of working at my law firm, on a late Friday night, I was trying to send a fax to a client in eastern Canada at midnight California time. No one was at the law firm except for me and I couldn't get the fax machine to work. I tried everything I could think of, but it would not send the documents. Now, you guys probably don't even know what fax machines are, we don't use them anymore, but back when I was starting we didn't have email and so we had to send faxes to get documents sent quickly. We were set to have a conference call at nine o'clock the next morning, Saturday morning, to look over the changes that I was trying to send in the fax. I did not want to call the partner that I reported to and wake him since it was midnight, but I was very nervous that by nine o'clock the next morning we were not going to have our documents. I ended up going home, slept for about three hours, went back to the office early Saturday morning, and when it was about nine o'clock in the morning in eastern Canada I was able to contact somebody by telephone and found out that their fax machine had run out of paper. Law school did not prepare me for that.

Most recently, when I was working at Kia in 2011, right before the All-Star NBA game, I had to call upon my post-law school skills of patience and diplomacy when my marketing clients came to me and asked whether Kia could drive a Kia Optima out on the floor of the Staples Center and have Blake Griffin do a dunk-stunt jump over the vehicle while his teammate Baron Davis threw the ball through the moon roof as Blake ran up to catch the ball. Remembering in law school the "eggshell skull" case in Torts class, my first reaction was, "No! We can't do that!" Of course, my marketing department started then to tell me about all the revenues we would earn from this spot, and that we were not going to have to pay very much for it because Blake Griffin's agent had come to us. So, I had to quickly go through the issue spotting and figure out that we needed to make sure that our contracts had proper indemnifications and

protections, and that our insurance premiums were all paid up.

Practicing lawyers, especially those working in-house, need practical skills and key “soft skills,” such as emotional intelligence or “EQ.” Successful lawyers are good listeners, are open and flexible, and they have patience and are sympathetic. Law schools can teach their students that it is important to learn and be knowledgeable about your client’s business and the industry, almost more so than knowing the law. Students becoming lawyers need to know that clients do not want to know how smart you are or how right you are. They don’t want to be told the “whyfors,” “wherefore art thou,” and “henceforths.” They just want to know, and they want to know right now, whether they can do something. What corporate lawyers need to have is a strong business sense. They need to know how to provide legal advice in the business context, and how to speak law to their non-lawyer clients. What I need to know is what keeps my clients up at night and what they’re worrying about, not what I am worrying about.

I know that the law schools represented here today are becoming more entrepreneurial and working to add practical course work to give their students the training that will help them hit the ground running when they graduate and pass the bar. I’m hopeful that the legal academic community will keep these foundational movements growing and give their students the tools and skills that I look for when hiring new counsel.

RIPKEN: Ms. Myers, thank you very much for those valuable insights into what clients and corporate general counsels are looking for in new lawyers. Next, we are going to be hearing from Professor James Moliterno, who is the Vincent Bradford Professor of Law at Washington and Lee University School of Law.

MOLITERNO: Thanks very much. I think the thing about teaching at six different law schools just sort of means I can’t hold a job. I’m going to try really hard to do in fifteen minutes what I would like to do in forty-five minutes. We’ll see how it goes. If you want to learn more about our current reform, there are a couple of places to go. One is the Washington and Lee website, and another good place is a blog called *The Legal Whiteboard* that Bill Henderson does. He actually posted a blog earlier this week that goes into detail about what we have been able to accomplish so far.

I suspect that as the day goes on we are going to hear more from a number of speakers about the crisis that legal education is in right now, the crisis that the practice of law is in right now,

and in essence, the economic transfer that has taken place in moving from a system in which mostly corporate clients willingly paid for training of beginners at major law firms, to a place where we are right now, where the law firms don't really want to absorb the cost that Susan Myers was talking about. Some of them are having to do it, but they don't want to do it; they want to turn to the law schools and say "It's your turn folks, you have to do this for us." So, there is actually an economic transfer that is taking place in moving from a system of training beginners by corporate interests to an effort by law schools to do it. Already, our costs are too high for legal education and our application rates are too low for legal education. It's an enormous problem that we are going to cope with, and I don't think we can do it. We aren't doing it at Washington and Lee, except by forging partnerships with the practicing branch.

I think we are going to hear a lot about that today, about the old pyramid structure breaking down. So I won't do more than what I have already just done on that subject. I will note though that most of the focus on legal education trouble is on the past decade. And it sounds as if this is a result of the economic crisis. That is obviously not the case. This has been coming for a long time, in economic terms and the way legal education has tried to cope with it.

We're still trying to figure out how we get to the place where legal education really is about training lawyers. It's been a difficult road; it's taken over a hundred years now, but we're getting closer to it. I've been in the legal education reform business, if you will, for thirty years now. And the only thing I'll say to you is for all the reasons why it's a bad time for legal education, it's a great time to be a legal education reformer. Everybody is mad at law schools and wants us to do better. From the *New York Times*, to prospective students, to alums, to the practicing branch, to corporate interest, everybody wants us to do better right now, and we have to. So it's a good time to be a reform person, when everyone is behind your efforts.

We're also, I'm sure, going to hear some things about lowering the cost of legal education. I'm all about that. The idea of lowering costs very much resonates with me. I think we are going to see a reduction in the discount rate for legal education this year, next year, and the year after that. The sticker price might not go down, but the discount rate—what students actually end up paying—is going to adjust to the drop in applications we're seeing this year and projects out to future years.

I don't oppose what some people advocate as the "major cost

2013] *Can Law Schools Prepare Students to be Practice Ready?* 159

reduction technique,” which is to cut law school to two years instead of three. I don’t oppose that, but in the meantime, our approach at Washington and Lee and mine has been, “We got three years, let’s do something with that third year. Let’s not just continue to have it be a sort of wasteland where they bore you to death. Let’s do something better for the students we have right now.”

What do I mean by better? For me, it’s about a better designed, better implemented, wider ranging experiential education; education in the role of lawyer. Let’s put the students in the role of lawyer. Let’s train them up to do a lot of the things that are needed in practice.

If you think about the path that we’ve been on for about one hundred years, legal education only taught one skill: it taught how to analyze appellate opinions and it did it brilliantly. It still does it brilliantly, and it’s not something we should stop doing, but we don’t need to do it for three years. That was the one skill that was taught. Beginning in the seventies and eighties we started getting more clinical courses and we, in particular, got courses on writing, interviewing, negotiating, mediation, trial practice—that’s a basket of skills we started to teach in the seventies and eighties in addition to the one skill that we taught for over a hundred years. And we have to keep teaching those, too. But they’re far from enough.

What beginning lawyers really need these days are problem-solving skills. They need business sense and savvy. They need to know how to work as a member of a team. They need to know how projects are managed, and how they fit the role of a person on that team, and eventually how to be one of the managers of those projects. There’s a wide range of what students need to know to be a successful lawyer. And what we’re trying to do at Washington and Lee is essentially give our students a head start. But what we don’t expect to happen is that our students will be practice ready. That’s a term that’s been thrown around a lot and I think it is too high of a hurdle for any law school to expect that they are suddenly going to produce law graduates who are third-, fourth-, or fifth-year attorneys. That’s not going to happen in the time we have and with the resources we have. But we can give them a head start. And what we are really trying to do at Washington and Lee is give the students a jumpstart on the process of becoming valued in practice. If it used to take them three years to develop, maybe they can get it in a year, maybe a year and a half now, after they graduate and they move on in practice. We want to give them a head start.

All we’ve really done in our program is allocate a year to

experiential education. It's really simple and pretty straightforward. First and second years are largely unchanged. We added a few new courses to our first year on international law, administrative law, and professional responsibility; they are now first-year courses for us. But in essence the first and second year look a lot like they have for a very long time. But the third year involves students being involved in a full credit load of experiential education all in the role of lawyers.

There are some people who have come to the conclusion that we're experiential start to finish, that we don't do the first-year traditional thing. That's not the case. We're still doing the things that have been really brilliant about legal education in the first and second year. At the middle, what happens to students in this third-year curriculum is that they learn law the way lawyers do. They're not just learning a basket of skills.

We have a course, not called "Bankruptcy," but called "Lawyer for Failed Businesses." In that course, the students still learn bankruptcy law, but they learn it the way lawyers do to solve a client's problem. That's how lawyers interact with the law. They don't learn law after they graduate in order to take an exam, right? And so our students still do the "student thing" for two years. But then they are in a transition time for their mental pathways in that third year. They are moving from being the student to being a lawyer and thinking like it.

So, we're now in our second year of required participation. We had two years of phase in. It was optional in those first two years, but very popular and we've done a lot of studies to learn how it's gone. We did a very early extensive review with lots of student evaluations, focus groups, and so on. We had a faculty vote and gave it a vote of confidence with one minor adjustment that I'll mention in a minute.

So, what is it? Each semester starts with a two-week skills immersion. In the fall, every student in the third-year class is in a litigation immersion. They represent a person in a simple piece of litigation from start to finish. We have them interview the client, draft the pleadings, do a little bit of discovery, do a little bit of motion practice, negotiate, counsel with their client, and eventually they take that simple case to a truncated trial at the end of the two weeks.

In the spring, they do a transaction immersion and, again, all of our third-year students participate. Every single one represents the buyer or the seller in a transaction for the sale of a five- or six-million-dollar furniture manufacturing business that we've made up from whole cloth. Basically, we created all

2013] *Can Law Schools Prepare Students to be Practice Ready?* 161

the documents and everything about the company. Every student winds up representing someone who is another student role-playing the client. We just finished it; it's a lot of fun, but it's a lot of work.

Then, each student enrolls in at least two twelve-week experiential courses. Four of them total for their third year. Most students have taken five, actually. One of those four or five has to be a clinic or externship. It has to be a live client experience where they actually represent real clients. The others we are calling "practicums," courses like the Lawyer for Failing Businesses, The Litigation Department Lawyer, Poverty Law Litigation, Corporate Counsel. You will notice that each of these is built around a practice setting. We have some of our regular faculty teach these courses, and some are taught by wonderful lawyers who come in and essentially teach what they do. They put the student in the role of the litigation department lawyer, if that's their practice unit. We have an M & A practice unit from Hunt and Williams law firm in Richmond, and a higher education practice unit from McGuire Woods and on and on and on.

There's room for one traditional course per semester, if the student wants to take it, and most students do take one of the traditional courses.

This is really quite doable, it's rather shocking to see it. It's not a top-to-bottom redesign of the curriculum. There's room for a lot of faculty to do as they've always done. I call it the "leave us alone" factor. Lots of my colleagues, about half of them, think that this is a great idea, but they don't want anything to do with it. They just still teach the course they've always taught in the first- and second-year curriculum and they're sort of left alone. It's really just a statement that experiential education is just as important as the first year. Every law school has clinics, every law school has at least some courses that we would describe as practicum courses, maybe not quite enough to make them a requirement, but everyone has the resources in place to do this, and it's really just a matter of saying, "The way we require you to do the first year, we require you to do experiential education in the third year: it's just as important."

I mentioned all of the lawyers and law firms that are coming over to teach these courses—they teach those courses for next to nothing, quite frankly. They teach it for the love of doing it, and they're teaching students who are not only students at their big law firm, they're teaching whoever signs up for the course at Washington and Lee. And so, some of the resources that the practicing branch is not able to give to their beginning lawyers

anymore, they're giving it to any law student who signs up for the courses. We couldn't afford to do it otherwise. Look on Bill Henderson's blog if you want to hear more about this.

Our applications are up 33% rather than down 19% over the last five years since we started this project. The national numbers are down 19%, but ours are up.

I want to show just a couple of our statistics. So, there's a survey called the Law School Survey of Student Engagement. And it asks questions of law students about how wrapped up they are in their studies: How much time do you put into your studies? How often do you show up for class without preparing? How many papers do you write of different lengths? How often do you work with colleagues or other students on projects? How much of the time do you spend applying what you learned to real world problems? We ask a lot of questions like this.

In 2008, 28% of our third-year students said that "often" or "very often" they came to class without completing reading assignments. Our peer schools had almost exactly the same number in 2008 and they still have the same number in 2012. Now, none of our students come unprepared anymore (only 4.5%). The third-year students can't afford to come to class unprepared anymore; they don't do it!

What else is happening? They are collaborating with one another more. The survey asked: How often do you work with other students on projects? Our students, 11% of them, used to say they did that "often" or "very often" in 2008 before the new curriculum. Peer schools had almost the same number (13%). Now, 33% of our students say: "I work with other students often or very often" or "I'm doing that all the time!"

One thing they don't do more of, which I'm kind of happy about, is that they don't memorize things any more than they used to. Notice that it's not that all of our numbers just went up between 2008 and 2012. Memorizing facts—they don't do this any more than they used to. It's not what the new curriculum is about. They don't need to memorize any more than they ever did. We're not teaching them to memorize any more than they ever did. We're teaching them to use information, not just pack it into their brains.

What else are they doing? They're writing a lot. How many written papers of twenty pages or more? It used to be that 16% said, "I never did one." Now, they all are doing papers twenty pages or more, whereas our peers have stayed the same from 2008 to 2012.

This to me is even more significant, because in law practice

2013] *Can Law Schools Prepare Students to be Practice Ready?* 163

you don't write that many twenty-page papers; you write a lot of five-page papers and ten-page papers. Again, in 2008, 27% said, "I haven't done that at all this year." Now, nearly all of them have done five-page papers. But our peers have not improved.

What's really happened is that students are spending more time being more productive on things that will matter for them as lawyers. That's what our new curriculum has meant to us.

RIPKEN: Thank you very much Professor Moliterno. That was fascinating information. It gives us something to think about.

Our third presentation will be from Professor Michael Cassidy. Professor Cassidy teaches at Boston College School of Law and he is a national expert on prosecutorial ethics and criminal law.

CASSIDY: The topic of my presentation is law school affordability, and you might think that they placed me on the wrong panel: "What's he doing on a panel about how to make students more practice ready, when he's really concerned about affordability?" But I have also written about making students more practice ready. I recently have written an article in which I advocated for a change in law school pedagogy including things like more problem-solving skills, more group projects, more oral presentations and exams, and more multidisciplinary courses. Today, I'm going to move away from pedagogy and talk about the economic model of legal education. The way this is related is that the premise of my essay is that there are things that you can do to make law schools more affordable that would also improve the learning outcomes for our students. That is, I think we don't have to falsely assume that every good change is an expensive change. There are some cost-saving devices that would actually be an improvement.

I will just highlight a couple of things that motivated me to write the essay I'm writing, and that is the application drop in law schools. Between 2010 and 2012, law school applications dropped 25%. This year alone law school applications for next year's entering class have dropped 22.3%. Given this three-year double-digit drop, law schools are reacting one of two ways. They are either reducing the size of their classes, or some of the top-tier schools that don't need to reduce their class size are attracting students to fill their seats by offering a greater amount of tuition remission. Those are the two models: (1) reduce the size of the class, or (2) offer more tuition remission. Either model you follow you need to reduce costs at your law school, because we got less revenue coming in. If you reduce your class size, you got less

money coming in. If you give more money in scholarships, then you're discounting the tuition dollars: you've got less revenue coming in. You've got to find a way to curtail costs.

My essay is about how we can curtail costs at the same time that we are improving the education of our students. That's a very difficult conversation that law school deans, admissions, and faculty face. It's a conversation that's really important to all the students in this room. But, you know, we can't fiddle while Rome is burning. Literally, the time for change is now. The legal academy, the legal profession, is conservative in nature; it reacts slowly to change. But we either change now or many law schools are going to be defunct in my view. People are comparing right now the legal academy and the legal profession to Detroit in the 1970s; to the steel industry in Pittsburg in the 1980s. It's that serious. So you either change or you go home.

So what I'm writing about in this essay is eight changes to legal education that I actually think will improve the learning for our students and cost less money. I don't have time to talk about all of those eight changes now, but I'm going to highlight three of them.

One is that I think we should vary the model of the three years of legal education and give students a choice of what model to follow. Offer a two-year option, a three-year option, or a four-year option.

Brian Tamanaha's great book, *Failing Law Schools*, is very provocative; it's been instrumental in encouraging a lot of the debates we've been having right now. His overall conclusion is that law schools need to differentiate among themselves. We should have research law schools where the primary focus is scholarship, and we should have law schools where the primary focus is training practicing lawyers. I don't necessarily disagree with that premise, but I think that for schools that want to do both, for schools that might be in the middle, there is a way to let the students self-differentiate. That is, they should offer different paths for students of how to complete their degree. And one of those paths will be more cost-effective and less expensive.

Under my model (the "two-three-four program"), we would offer students the ability to complete law school in two and a half years. We would primarily offer that to students who are interested in going into government and public interest. We would spend the entire first summer, after the first year, which would essentially be their third semester, taking primarily online courses—that would be an incredible cost saving for the law school and we would charge less for those courses (per-credit,

rather than a semester of tuition). You would take your first year of law school, and you would take the summer (conceivable while also having a job) where you take an online course in some very common second year courses like Evidence, Corporations, Professional Responsibility, or Administrative Law. You would take fifteen credits in the summer and then come back in your second year and take seventeen credits both semesters and be done with law school in two years. But you would have essentially spent less than two and a half years worth of law school tuition—the amount of money you spent taking online courses would be charged at a lower rate, because it would be more cost effective for the law school to do. That would be one opportunity we could offer for our students. And, again, it would be primarily for the students who want to go into government or public interest work and who want to try to avoid having massive debt.

The third-year model would stay the same as it currently is.

The fourth-year model I'll call the "apprentice model." Under the fourth-year model, what I would recommend law schools consider is having students in for a traditional two-year curriculum, then having them take a year off. Think of a gap year for people before college or before law school. They are taking a year off and they are apprenticing for a law firm, legal services agency, or government law office, and that apprenticeship is set up by the law school. The law school agrees to freeze their tuition at the time they step out of the track to gain this apprenticeship experience, and then they come back for their fourth year of law school, which is essentially their third year of law school, a year later. They come back guaranteed they will receive the same tuition rate as when they left. But when they come back, they come back more focused on the area of law they want to practice. So, the third year doesn't become boring someone to death. They spend a year as an apprentice in an organization, and they get a better sense of what kind of law they want to practice, then they come back to take courses in that area.

Now, the way I envision this model working is that the law school would partner with mostly small to mid-sized firms, perhaps some general counsel offices, in setting up these apprenticeships. The law firms and general counsel offices would have an economic incentive to take on these apprentices, because they would be getting someone who has two years of legal training under their belt. So they're certainly more qualified than a paralegal, but less expensive than a first-year associate. They might pay them fifty to sixty thousand dollars to do this one-year

apprenticeship and get valuable services. After which, the student would come back to law school. And, maybe, if the relationship worked out and the firm was interested in hiring the student they might have an arrangement where the law student came back for the fourth year and went to class at night. That's all possible. But I think this four-year arrangement, with the apprenticeship year in the middle, would help keep costs down for law students because they could actually earn money while they're attending law school.

So that's idea number one.

Idea number two is actively being debated in the academy. I think those of us who are in favor of change really need to get behind the movement, and make it happen; and that's to allow pay for externships.

Right now, the ABA does not allow law students to both receive credit and be paid for an externship. It's either pay or credit. That requirement in the ABA standards has dated back to 1979, and the last time it was seriously debated was 1982. Jim Backman from BYU has done some interesting research on this. It turns out that law schools are one of two professional schools that have that rule. It's law schools and pharmacists. No other professional school limits the ability of a student to get credit and be paid for the same job. It's done in accounting, engineering, business schools, and it's very common.

The reason the ABA set that up as a bar in my view is twofold. One, it was done at a time when legal services clinics at many law schools were just beginning in the seventies, and we did not want to distract student interest from legal service to the poor by saying, "You could work in the legal service clinic for free, or get paid money at a law firm." We didn't want to drive student interest away from the neediest segment of our economy, and, politically speaking, those clinics were on unfirm footing in terms of funding and political status at law schools. We didn't want to send a message to those in-house legal clinics that we were driving resources away. I don't think that reason stands anymore. Legal aid clinics are now a very firm part of our curriculum. Students love it; it's a different career path for our students. But I don't think that career path is going to change if we offer students with an externship at Hyundai the right to earn money and keep their debt down in law school.

Critics argue that we shouldn't allow credit and pay for the same externship because it would detract from the education experience. That is, if law firms or general counsels can bill their externship students for the time they're working in the

externship, they're only going to give them work that they can bill and they're not going to give them the other experiences that are really important educational experiences, like the shadowing experience, sitting in a deposition, or shadowing a negotiation: "I'm not going to bring you to that, because I can't bill you for it so stay back and do some research." I think that criticism is overblown, and I think that it can be taken care of by the commitment letters that most of us who have been involved in externships do when we set up an externship program. We meet with the supervising attorney at whatever venue the student is going to work in, and we discuss the goals and objectives of the externship, we draft a follow up letter with the terms and conditions, and if it doesn't work out and the student gets work that is not appropriate, then we don't continue with that general counsel's office or law firm in the externship program. I think we have come far enough as law schools now that I think we have that ability. So that's my idea number two: allow pay for externships.

The third idea is that we need to diversify our model of faculty status and faculty responsibility. Scholarship is very expensive, libraries are very expensive, research is very expensive, summer research support is very expensive—and Brian Tamanaha's book has illustrated very clearly that it's students who are paying for the writing of law review articles and books in the summer. They pay for that with tuition dollars.

We're at the point in the academy where there are two types of professors. Many law schools have been better than my own at merging these into one track. But at many law schools, like Boston College, there are two tracks. There's the tenure track; and there's the clinical or experiential learning track, who under ABA standards have the security of position, but at my law school and many other law schools it's not tenure.

So those are the two common tracks for faculty. I think we need to open up a third track. We need to have really experienced lawyers and judges, who are senior in their career, join faculty on a short-term basis, for example, a "distinguished visitor from practice," we'll call it. This is not anything new. Medical schools and business schools already do this. They have distinguished lecturers that come in for two or three years. They might be at the end of their career. Many law firms have partnership agreements where people have to step down from the partnership at age sixty-two. At sixty-two, perhaps at the height of their abilities and influence, they're stepping down from their law firm partnership. Many people get out-of-state government and state judgeships also very early due to the state pension systems.

That's a source of untapped talent for law schools. These people would love to come to a law school and teach students what they know, and they would do it for one-third or one-fourth the cost of a tenured professor. I'm not saying that we should bring in retired judges to tell students war stories. Lots of these people are highly trained people who have already taught at our school as adjuncts. So, we've seen their teaching evaluations, we know they're good, and we know they're committed to teaching and not just telling war stories. We should find a path for them in the legal academy.

Harvard Law School is across the river from me. Nancy Gertner, a prominent federal judge in Boston (before that a prominent civil rights lawyer), just stepped down from the federal bench. She has joined Harvard as a distinguished visitor for the next three years. It makes perfect sense. Why aren't all of us doing it? It would be more cost-effective. As I see it, there's an outcry right now in higher education: "Tenure is dead, tenure is dead!" I don't think tenure is dead, nor do I think tenure should be dead. But I think the amount of people who are in that tenure category over time, due to cost considerations, should narrow. It's just unnecessary; there's a huge source of talent out there that doesn't need or want tenure.

So, those are three of my eight ideas. Maybe throughout discussion my other five will come out, but I'll just close with this. I do think we're facing a perfect storm right now: an oversupply of seats and a shrinking demand for legal services in certain sectors of the profession (NLJ 250 firms are hiring fewer students). That doesn't mean there are unmet needs for poor people throughout America, but there is shrinking demand for certain sectors of the legal economy and unfortunately those are the sectors that have traditionally hired most of our students. In my view, we ignore these two challenges at our peril. This is a crisis in legal education and we can't be blind to it; we can't ignore these challenges, because it would be like walking over a cliff and pointing to someone else as being responsible for the cliff. My view is that schools outside of the top twenty who are able to react most nimbly to these challenges are going to be most deserving of the valuable tuition dollars of our students and that's what we should be thinking about. Thank you.

RIPKEN: Thank you Professor Cassidy. Our final panelist this morning is Professor Sara Rankin. Professor Rankin is an associate professor of lawyering skills at the Seattle University School of Law.

RANKIN: One aspect of my bio that didn't get mentioned is that Mike Cassidy used to be my boss twenty years ago! I have

another confession: ever since I was invited to speak on this panel, I've been uncertain about which education reform issues I should emphasize, because there are just so many important issues we could discuss. I decided not to talk about what I will be writing about for the law review piece. The piece that I will be submitting to the law review essentially maintains that the best way to prepare students for practice, whether private sector or elsewhere, is to require public service. I'm not going to talk about that, I just wanted to throw that out there.

Instead, I wanted to focus my remarks on two points. One is a macro-process point, and the other for lack of a better phrase, I'll call a micro-product point.

The macro-process point is a response to some of the observations that have been made: "we're in a crisis." Here's my biggest fear: I suspect that the normative face of legal education will remain largely unchanged. I wish it weren't true, but that's my belief. We do see some incredible innovations taking place. We have Washington and Lee's program, we have some things happening at Boston College, and in a moment, I'll talk about what we're doing at Seattle University—actually requiring real client experience in the first year. These are important developments, but all of these innovations are really happening on the fringe, while the main stream of legal education remains unchanged.

It's not because these ideas are new. In fact, there's a whole lot of scholarship about the hallmarks of what we know legal education should look like. We've been discussing these hallmarks for over one hundred years. In fact, Paul Maharg wrote a great book about the reform of legal education, and he spotlighted a botched effort in the 1920s by Columbia Law School to make some of the types of legal reforms that we're still talking about today. So, the hallmarks of legal education reform that we're talking about today are not new. We have known about them for years and years and years.

For example, there is a long-standing general consensus that our students benefit from experiential learning. We know our students need to grapple with indeterminacy, that they have to struggle with complexity, that they are motivated by working with a real project. We've known this for a very long time. We've also known that we should be engaging them in "active learning," meaning students actually step-up and have some substantive role in the creation and direction of their own curriculum. We have known for a very long time that working collaboratively and in teams is going to benefit students in practice. We have known for a very long time that law faculty need to be able to

differentiate in terms of how we approach our students with different learning styles. We have also known for a very long time that we need to use alternative methods of assessment. All of these hallmarks are kind of baked into a lot of the legal education reforms that we're talking about today. Even though these hallmarks have been repackaged in new ways, our understanding of these hallmarks has actually been around a very long time.

It begs the questions: "Why are these innovations mostly happening at the margins?" "Why has the face of legal education basically remained the same for the last hundred years or so?" There's a reason why the word "status" in "status quo" is the same root as "stasis." Change is difficult. So, I decided to frame my comments today as a warning. We don't want to get too caught up in what I call the "narcotic of discussion." We can sit here and feel really good about talking about legal education reform, but then everyone will go home and do nothing about it. Discussing change can give the false impression that change is actually occurring. That's a common experience; it feels really good to discuss change, and yet, discussing it creates no obligation for us to change what we are doing in any significant way.

Change is also difficult because reform is inherently subversive. Everyone in here; you are all being subversive right now because you're talking about changing the status quo. And when you're engaged in a subversive activity, you have to approach it the same way you would approach a political revolution or a social movement. And these types of perspectives are not new. I'm not saying anything radical. Susan Myers works with people at Hyundai Capital whose only job is to understand change. They have master's degrees in organization change theory. And that's because corporations sell and acquire other businesses, they restructure, they evolve to respond to a volatile, ever-morphing market: successful businesses must be constantly prepared to change. Organization change theory is something that business people understand, but lawyers do not. We know we're really good at curriculum. We're really good at pedagogy. We're not so good at change. So one of the things I would urge us to do as legal education reformers is to organize. I'll be that sixties kid who says, "We need to get together, we need to organize." We do! We actually do, because we are engaged in a subversive activity, and real legal education reform will require the same type of organization and strategic collective action that corporations know how to do and community activists know how to do.

2013] *Can Law Schools Prepare Students to be Practice Ready?* 171

That's the first point I wanted to make. That's the macro-process point. I just don't want us to get too comfortable in the conversation. I would like to see us work more on becoming more engaged in the process of change and on determining what it is going to take to create long-term systemic change. I wrote an article about this not too long ago called *Tired of Talking*. I am happy to talk to anybody about it.

Regarding the micro-process point: the innovations that we're doing on the fringe at Seattle University. I'm one of several "subversive" faculty across the nation who are actually changing the first year to focus on real-client and real-world experiences. At Seattle University, we start by taking advantage of resources that already exist. For example, I teach lawyering skills, which in some places is called legal writing (I don't know why, it's not all about legal writing). I partner with our clinic faculty or with a community organization that has a legal department in it. I take a case from one of these partners, an issue that they're working on, and my first-year students tackle that "real life" legal issue. The students' client is either the clinic faculty and students working on that case, or it's the legal department in the community organization.

To give you an idea of the type of stuff I'm talking about, last year my first-year students' client was the National Coalition for the Homeless in Washington, D.C. The Coalition wanted us to advise them on their legislative advocacy efforts to get the homeless included in a federal statute, the Hate Crimes Statistics Act. The charge of my students, as they're shaking in their boots (none of them knew anything about the legislative process and none have ever had a real client before), was to research, analyze, and draft a document for the National Coalition for the Homeless to share with members of Congress, as well as homeless advocates nationwide. And at the end of the semester, the students taped oral arguments in support of legislative change, which the National Coalition for the Homeless featured on their website. Imagine being a first-year student being able to do something like that: you're interviewing the client, producing a document that's then disseminated nationwide, and then featured on a client's webpage. The experience was terribly exciting for them. My students have also, in our partnership with the clinic, worked on an appeal for a clinic client who was denied state Medicaid coverage for gender reassignment surgery. Some of our students had no idea what gender reassignment surgery was (it was a big eye-opening experience for them), and the impact of that work ultimately resulted in now a new proposed rule in our administrative courts.

It's remarkable what first-year students can do if they're given opportunities—realistic opportunities—to perform, and provided the proper supervision and encouragement to do it.

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Students to Meet Corporate Needs”**

Panel 2: “Finding a Better Way to Teach”*

Friday, February 1, 2013

Moderator:

*Dean Tom Campbell***

Panelists:

*David M. Moss****

*Clark D. Cunningham*****

* This transcript has been edited and excerpted. For the full video presentation, visit www.chapmanlawreview.com.

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Neil J. Dilloff^{*****}

Campbell: One should try to learn from comparative professional schools, and here are the quick lessons that I would just offer. First, the case method is not the only way that business schools teach; although, that is the reputation, that they have pioneered the case method. Just as in law, there is a certain amount of substance that has to be conveyed and then there are skills, which are developed in a different format. But one does not use the case method to decide whether the marginal product of labor is the first derivative of the production function with respect to labor. So, this doctrinal conveying of information doesn't lend itself, at least in my view, to the case method. You are going to learn microeconomics, you are going to learn accounting, and I am not particularly interested in having your views on whether the value of the marginal product equals marginal cost.

Secondly, there is a fundamental problem in law that is not present in business—we are a regulated profession. You can get an MBA, go out and practice business, and no state agency will test what you've learned. We, by contrast, can't avoid the bar. So, when you think in the law school curriculum how much opportunity we have for doctrinal learning and how much for skills training and case method, we are constrained in a way that business schools are not to teach the subjects that are on the bar. A very relevant point that was raised in the last panel is: Can we do something about this constraint? That it exists, perhaps not. But what is tested, perhaps. And where like Susan Myers, I also have not had occasion to use the rule against perpetuities, but I did for the bar. I was ready for the rule in Shelley's case or the fertile octogenarian. But, we do have to communicate that substantive law, and I don't think you learn that in the skills courses. So, if you are going to graduate people to become law professors, as was originally described as the purpose of law

"Plain Meaning and Hard Cases," co-authored with three linguists, has been cited by the United States Supreme Court in three different cases.

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schools, no. But if you want to graduate lawyers, you do.

Third, and last before I introduce our colleagues on the panel, there is a need to teach those attorneys who wish to practice with business and for business, the language of business. And to this end Chapman Law School has created a business emphasis certificate, just in the last year and a half, wherein students will become familiar with the vocabulary of business as well as have an externship in a business environment. In my first year as dean, the faculty kindly supported my request that we actually give externship credit for placements in corporate counsels' offices. It hadn't been the case before, and it's still not the case in the majority of law schools. You get externship credit if you are working for a 501(c)(3) or the government. But, the quality of that externship credit—just to choose an example, not to be provocative—if you are working on an environmental matter for Weyerhaeuser or an environmental matter for the Sierra Club, the quality of the externship is not determined by whether your client is a 501(c)(3), whatever your views may be.

I will conclude by saying there is an important difference between business training and law training, which I am trying to overcome through the business law emphasis program. We have five other emphasis programs at our law school, and I am proud of all of them. But this is particularly relevant to this subject, since I am comparing MBAs to law students. And here is the difference: the MBA appears before the Supreme Court of the United States by accident, she reads the card that says, "Mr. Chief Justice and may it please the Court," and proceeds as follows: "I have a totally new idea. I really want to excite you on this one. It hasn't occurred before, but I think if we can push the law to the outer edge we have a real potential to dominate the legal market with this new approach, so go with me on this, let's just run it up and see who salutes." The attorney by mistake shows up at Sand Hill Road to make a pitch to venture capitalists. The attorney comes in and says, "Hey, uh, Partners. Good to see you. My idea today is nothing new. It's been well settled; everybody knows about it, and it is really a very straightforward extension." You get my point.

Our first panelist is Professor David Moss, who is a perfect member of this panel as a professor of education.

Moss: I am cut from a different cloth. I have not been to law school and certainly have not practiced law, not legally anyways. I come to your questions through a different lens, so I hope you will indulge me about eight or nine slides, just to give you less of a formal presentation and more of a sense of what my thinking is regarding this area. Hopefully we'll have lots of time to discuss

issues as we move along.

I am a curriculum theorist, and I am interested in embracing complicated conversations. Certainly we have one here in terms of the reform of legal education with lots of stakeholders at both ends. Students seem to be voting with their feet in terms of the number of plummeting applications and the wide range of opportunities that graduates have from law school, in terms of where they might end up professionally. And all of those voices, from my perspective, are very much welcome. And so what I'd like to just briefly address this morning is the idea and notion of a culture of accountability—a culture of assessment, an evidence-driven culture—as we take into consideration all of those stakeholders and the complex and complicated needs that we all bring to this issue.

This seems to be a very fundamental notion that's on the table and not one to ignore, that professional schools face the challenge of balancing the so-called academic aims versus professional ones. And for years in education we avoided this dichotomy—this false dichotomy—of one versus the other. When we set things up in this either-or choice we are bound to leave something on the table. I might argue that what we need to consider is: What is rigorous legal education and how does it involve both of these elements? Redefining rigor beyond the ability to survive a first year and move to a second year. If we operationalize rigor as merely endurance, I think we've missed the point. There's an opportunity to really rethink this idea of rigor as we move towards a culture of accountability. There are essentially two basic barriers.

The first is how we think about curriculum and how law schools move toward reform. We all operate under a curriculum model that was published in the late 1940s; it has all the familiar terminology of objectives and outcomes. I think people are surprised with the publication date of 1949 as one that's driving twenty-first century curriculum development. I will talk less about that, because I am more interested in this idea of assessments. Perhaps one of the few advances in curriculum and curriculum theory and school reform work over the last decades that has been most significant, both positive and negative, has been this idea of assessment as an element of learning, teaching, and curriculum, and not something that comes after the fact. So, a question I might pose is, what are the ways, holistically, that law school students think about and construct ideas about the law and the legal profession? There is an interesting word there and that's "construct." If this were an education audience, right away you would know I am referring to a body of literature that

really explains how people, including adults, learn through what we call a “constructivist model.” When we talk about some of the best practices of legal education, we talk about opportunities for students to experience directly, beyond memorization, rich meaningful experiences in which students interact with ideas and knowledge and people in ways that are enduring. I think we all have a sense of them, but may not know that retention—learning retention—is something we worry about. And, in any given field, we can only expect over an extended period for folks to remember about ten percent of what we teach them through traditional models. That is a lot of money going into, and a lot of effort by a lot of folks, for something that only ten percent is going to be retained long term.

Quickly, some multiple purposes of assessment here—the who, the what, and the why. In terms of our track record for documenting students, in terms of what they do after they graduate as a key and fundamental element of a culture of assessment, that’s where I’d like to focus the next two or three minutes.

[The following discussion refers to images presented via Powerpoint.]

This is the assessment plan for the school of education where I work, and where I am currently the director of teacher education programs. I am sort of dipping my toe into the administrative waters for the first time. It’s cold and icy, and I don’t expect to wade much further in than I have, but I have endless respect for those folks who do it well, and you seem to be blessed with that here.

This is the first screen shot and what you see is an assessment plan. This is beyond our input assessments in education. There are about 1,200 accredited education programs in the country, I guess about 200 or so at law schools. About 1,000 of those education programs are really not worth discussing and could close tomorrow. And although we’d have less teachers on the market *per se*, I’m not sure it would impact the quality. But there are several hundred schools of education programs in the country that are similar to law schools in the sense that we have input exams, it’s a rigorous three-year model, and we have national exit exams. This may be news to some of you, because I think most of us are familiar with those thousand or so programs where it’s essentially open enrollment and people come through. But for those of us who don’t work in that model, beyond our rigorous assessments that are tied to courses, you should see a screen shot of the assessment plan for the Neag school, beginning with number one which is actually an

assessment of the assessment plan itself. How about that for an accountability culture? Every three years we take a look at the way we're assessing. We currently have in place, beyond our traditional tests and our rigorous assessments as part of our courses, forty-four large, validated data points that we regularly collect as part of our assessment of culture. We know a lot of things about our students before they come in, what they are doing, what they're thinking, how they are performing during our programs, and most importantly we track them mercilessly as they graduate. Most graduates are used to getting a call from the development office: "Can you write us a check? Can you write us a check?" Well, our graduates, they love calls from the development office because usually it's from our assessment offices: "Can you send us data? Can you send us data? Can you send us data?" But we can't imagine engaging in reform, making the kinds of decisions that it seems that you as a profession are poised to make in the coming years—perhaps the coming weeks or months—given the sense of urgency. I can't imagine making that level of decision without comprehensive data about what works and about what doesn't work. I am not suggesting that we shouldn't take risks, particularly in the near-term. I think we need to try things and they need to fail, and we need to try others. But we need to know why they are failing and in what way they are failing, which stakeholders they are not serving, and what we can do to improve those.

The red lines represent graduates from my program. The blue lines represent all the other graduates in the state of Connecticut. Basically, you see red lines above the blue lines. This is a particular measure; this happens to be at the elementary level in mathematics. What this says to stakeholders, to graduates, to parents, to kids, to policy makers, in the state of Connecticut, is that if you've got a kid in a classroom taught by a teacher from our program, your kid's going to do better academically. That's across the board and we've got that evidence. So, turn that around. Imagine a database that says graduates of this program, in whatever profession they go into, are going to be better lawyers. And you get to set those parameters. Imagine what that does for your job placements. Imagine what that does for your efficacy. Imagine what that does for your application numbers. Hard data that says we are preparing better lawyers and this is the data that shows it. I think we are just at the point now where we are beginning to craft what that means.

I might disagree with one of the comments from this morning about practice ready and this idea of preparing lawyers

as they would be four or five years out. I agree that it's unrealistic to expect that we can prepare lawyers with the experiences that are four or five years out, and we say that to our teachers as well. The only way to be an experienced teacher is to get the experience, and the same is true for lawyers. But, what we do have is very calibrated developmental stages, so we know what it means to be practice ready in our particular field as a beginning practitioner. I think we need to think carefully about this idea of practice ready, and it's not an experienced lawyer. I think developmentally we can calibrate and think what practice ready means as a first-year practicing lawyer. I suspect there's still a significant gap between what many law schools are graduating in terms of knowledge, attitudes, behaviors, and skills and that developmentally calibrated line here.

These are just a couple things we are working on now in terms of our continuous model of reform. That's the last point I'd like to make with you this morning: it is an ongoing and continuing culture of reform. Right now we are looking at courses and experiences that help our educators deal better with this issue. Dealing with English language learners, something that Los Angeles has been leading on for many, many years. And of course students with disabilities, which is now a growing, national challenge. As we can better diagnose kids on the autism spectrum, we've got a larger number of students who are receiving special services. We've set those as targets, really rethinking the whole notion of special education. We want to begin to put out teachers in our field who are able to deal with these issues proactively.

That may or may not resonate with you in terms of the field, but it should resonate with you in terms of this idea of looking ahead and knowing absolutely, confidently, and clearly what it is you want your graduates to be able to do differently than previous generations of graduates have done recently. You better have an assessment plan and data that helps you determine whether those graduates are, in fact, doing something differently than graduates from past years. Without those targets, and without that culture of evidence, we're going to spin our wheels much longer—given the very recent data—than we should—given the urgency. I don't think that reform of legal education is structural rather than cyclical, and I think that we should view these changes for the long term moving forward.

Campbell: I look forward to our Q & A particularly, David [Moss], on how we measure the successful lawyer.

Please join me in welcoming our next speaker, Neil Dilloff from DLA Piper.

Dilloff: I come to this topic with three basic perspectives.

First, before I joined DLA Piper, I was a lawyer in the United States Navy JAG Corps. I did criminal defense work. So, I come from a perspective of being a trial lawyer my entire life, whose role is to convince people to do what you want them to do. This is what it's all about, in other words: sales. I also have been training lawyers at our firm for many years. I was the head of our commercial litigation group for many years, so I also know what employers are looking for in people right out of law school. In those days, we actually hired people out of law school!

Second, I come from the perspective of a teacher. I've taught lawyers since 1982—continuing legal education in Maryland and other states—and I also teach law school students. They are a little different, as you might expect. The other thing that I do is I teach lawyers in-house. I will tell you that a lot of comments about the waning of in-house training, unfortunately are true. That applies not only to formal programs that we have in-house, but informal training as well. We still have some programs, but we used to have mock trials every year. The days when I could bring an associate with me to sit at a deposition, or sit at trial and get paid for that person's time are gone. So, what do I do? We eat the time. And I would say that's probably anathema to the economic culture of my firm, but I do it. That's the only way we will have people coming up through the ranks who, quite frankly, know what they're doing.

Third, my perspective is as a litigator, with apologies to all of the transactional lawyers. The ability to get up in front of a jury or a judge and sell a point of view is becoming a lost art. When I deal with lawyers in other firms, I'm shocked to find out that partners at other law firms, and some at our firm, have never done certain things. If you think about it in the context of the medical profession, how would you like a doctor operating on your brain who has only done it three times before? That's the situation we have. Therefore, that situation cries out for more experiential learning and trial activities at the law school level. When you get to a law firm like mine, unless you are lucky, you are going to be sitting in a room looking at a bunch of documents for some chunk of your time, as opposed to getting out in the world—unless you find a mentor to take you out of the prison and put you on the street.

I thought it might be helpful to give you an example of one of my courses and what we do at the University of Maryland School of Law. My students tell me that this is the only course they've taken at the law school like this. I'm assuming that's a good thing. In my class entitled "Alternative Methods of Dispute

Resolution,” we basically cover negotiation, mediation, and arbitration over the course of a semester. And from day one, everyday, the students are on their feet. I lecture relatively little.

Usually there is a waiting list for my class, which is theoretically limited to twenty students.

I try to focus on all of the things that lawyers need to know that are not taught in the law school for the most part: judgment, reacting to changing circumstances, dealing with difficult people, dealing with difficult lawyers—notice I distinguished between people and lawyers, they’re not the same, people are better—how to talk to people, etc. All those types of intangibles—some might say are soft skills that were probably looked down upon, a little bit, by academia—we talk about and we practice every day.

Let me start out with what we do. It’s the first day of class. Everybody now knows what they’re in for when they show up; this is not a class for shrinking violets. The first simulation that we do involves bringing two students up to the front of the class: the driver of a car and the driver’s girlfriend who’s about to be engaged to the driver. This is the first exercise in the negotiation portion of the course. Another student comes over and is the police officer. The objective of the exercise is for the driver, the boyfriend, to talk his way out of getting a speeding ticket. So, everybody is always a little nervous the first class, but after the first class it’s really a riot—everybody laughs. The police officer comes over in front of the whole class and says, “I see you were speeding. Let me see your drivers license.” He goes through the questions that a police officer would typically ask a speeding driver. The girlfriend is sitting there being silently supportive. Then I send the boyfriend driver out into the hall and I tell the girlfriend, “You just found out that your boyfriend has been cheating on you and you’re not happy. You want to punish him, got it?” “Got it.” The boyfriend comes in not knowing what’s going to happen and sits down. The cop comes over again and the first thing that comes out of the girlfriend’s mouth is: “He was speeding. He needs a ticket.” And the driver looks at her like, “What’s going on?” She says, “I’ve had it with you.” A big argument takes place and he doesn’t know what to do. Well, he’s got to figure out a way to react to changed circumstances, and we take it from there.

During the course, we have students play the roles of clients and lawyers for the clients. We conduct mock mediations in class. I also bring in guest judges from time to time and other speakers. The students serve as mediators. We have an arbitration panel where we select the arbitrators, and the students get together and select three people. The arbitrators are interviewed before

they are hired. All the different steps that would take place in the negotiation context, in the mediation context, and in the formal arbitration context, we do in class. And then at the end of the semester, we end up with a meeting of the United Nations. Everybody is a different country. Actually, some people came as “terrorists” one time, which was difficult in terms of how to organize everything because they kept throwing paper during the entire process and trying to disrupt everything, which was their assignment. The goal of the UN officials (students) is to try to come up with a nuclear non-perforation treaty where everybody has different interests. This forces the students to form separate coalitions and agreements and come together. Meanwhile, the people running the UN are trying to keep the meeting organized because by design, we create chaos. Everyone is screaming at each other. For example, Israel is screaming at Iraq, the terrorists are throwing paper wads at everybody, etc. Notwithstanding all of this, the class is to reach a treaty. And that’s the end of the course except for oral presentations of final papers.

Let me give you a couple of examples of why learning by doing can also be fun. One exercise that we do every year is a take off of on an actual matter about the advent of casino gambling in Maryland. Recently, there’s been a big brouhaha about whether or not there ought to be casinos in various places in Maryland. (By the way, we also did the Tiger Woods divorce case, a Toyota recall, and baseball arbitrations.) Before each class problem, the students receive an email from me with the roles. Certain students receive secret emails about how they’re supposed to act, what they’re supposed to do, and what their interests are. They are not supposed to share them with anybody. Everybody knows his or her role in advance. We also give out academy awards at the end of class.

So, getting back to the casino. We have a New York developer who wants to come down to Easton Maryland—which is a provincial town on the eastern shore of Maryland, very quaint, very insular—and open up a casino. Of course we have various factions in the town: we have the chamber of commerce; we have the women’s club who hates this idea; we have a couple of men who are very wealthy who have yachts who think this is all fine (instead of going up to Atlantic City, or going to Las Vegas, they can have a casino right at home); we’ve got the union workers who want the job to build this casino; and we’ve got various other constituencies. The casino operator wants to have a gentlemen’s club attached to the casino, and the town counsel of Easton—three students—has to decide what to do: whether to try

to stop the casino entirely, or agree to the gentlemen's club. Also, I've told the town counsel they are up for election. We also have bribes from some of the people to the council in an effort to get the council members to vote for their position. It's very much like a soap opera.

So, the first time we did it, we had all the students involved. This problem is near the end of the course and, for better or worse, most of the students are typecast in terms of how outgoing they are and what they do. There were two women in the class who have been very outgoing, and I told them that their roles were to be "ladies of the night." They fly in on their private jet from their penthouse at Mandalay Bay in Las Vegas. They have fifty-nine gentlemen's clubs all over the world. They've just written a book about their exploits. A movie is in the works. They are going to fly in on their private jet and appear in front of the town council. Their goal is to "wow" the council into permitting the casino to go forward along with the gentlemen's club.

The council conducts a town hall meeting. Everyone has a couple of minutes to talk. The "ladies of the night" are dressed in short black dresses with boots on—dressed the part. When the council committee chairperson says, "We're going to let you have a couple minutes," they both got up from their seats and went to the front of the class to a witness table. They put their feet up on the table in front of them, crossed their legs, and simultaneously put on dark glasses before they addressed the council. The class exploded in laughter. Part of the issue here is: What are you going to do when you are head of the town council and two people walk in and start doing this?

So, the head of the town council asks the ladies "to please put your feet down. You only have a couple minutes. Please remove your glasses." A lot of these things have a purpose. Although they are very funny, there's a purpose, there's a method to the madness: how to deal with unexpected circumstances, how to keep control, etc. We also have people change personalities during problems. We have bad things happen during the course of the mediation. The landscape is constantly changing so that students not only must prepare for the problem, but have to react to changed circumstances, just like they would in the real world (e.g., when someone is on the witness stand and you think the witness is going to say X and they say Y).

Campbell: Thank you very much. Won't you join me in welcoming Professor Cunningham.

Cunningham: My topic is developing professional judgment. Neil [Dilloff] just a moment ago was talking about

things that you need that aren't taught at law school, and judgment was the first thing he mentioned.

The Carnegie Foundation for the Advancement of Teaching, which was founded in 1905 by Andrew Carnegie, has prompted a lot of important changes in higher education. In 1910, they did a report on medical education called the Flexner Report, which actually became the blueprint for modern medical education. There will be a fair amount of talk today on what's generally called the "Carnegie Report," for short. The actual title of the book is *Educating Lawyers: Preparation for the Profession of Law*, and it was published in 2007. There have been other reports on legal education, but this one, I think almost all of us would agree, has had significantly more impact than its predecessors.

What's special about the methodology of the report? It provides an independent outside perspective because only one of the five authors is a lawyer or law teacher. All of the other earlier reports were almost entirely authored by lawyers, or law professors, or both. In contrast, one of the authors of the Carnegie Report is a moral philosopher; three are social scientists.

The Carnegie Report uses comparisons with other kinds of professional education. The Carnegie Foundation was actually engaged in a comparative study of professional education, so there are other books about educating physicians, nurses, engineers, ministers, and rabbis. They were able to draw from that comparative study, and apply current research on teaching and learning. The Report was based on visits to sixteen law schools to see how teaching and learning really happen at law schools, rather than what we say we do—classroom observations, and interviews with teachers and students.

The Carnegie Report says that the goal of professional education can't be just knowledge, or even knowledge plus skills, because in real life knowledge, skill, and ethical behavior are interdependent. An actual practitioner cannot engage in professional activity without simultaneously applying knowledge, skills, and ethical decision-making.

What did the Carnegie Foundation find when they looked at law schools? It found that law schools provide inadequate support for developing the ethical and social dimensions of the profession. Empirical studies of the capacity for moral reasoning show that, for most students, legal education did not in any way improve their moral judgment. Approaches to teaching ethics that are purely theoretical—that perhaps draw a lot from philosophy—the Report says are unlikely to deeply affect the

learner. The Report calls the most common approaches to teaching professional responsibility “courses on the law of lawyering.” This kind of professional responsibility course in many ways looks like other courses in the law school curriculum, but it teaches from the rules of professional conduct; it teaches what’s the law of lawyering. In effect, it teaches you how to avoid punishment for unethical conduct, how not to be disciplined, how not to be sued for malpractice, and how not to lose a motion for disqualification. The Carnegie Report states that courses like this could actually do more harm than good (which is pretty sad because it’s often the only required course after the first year). Why? Because it limits what graduates of law schools perceive as ethical issues. If it isn’t the kind of thing that will get you punished, it’s not an issue of legal ethics. My favorite line from the book is, “Law schools create people who are smart without a purpose.” And that’s an actual quote from a student they interviewed. Well, what is the purpose of being a lawyer?

In 1905, a very famous account was given by Louis Brandeis, before he was a Justice of the Supreme Court, to the Harvard Ethics Society. He said that the ordinary person thinks of lawyers as people who try cases, but by far the greater work done by lawyers is not done in court but in advising on important matters. This is from someone who was a very successful trial lawyer. The lawyer is more like a statesman than a courtroom advocate. He said that the training of lawyers leads to the development of judgment. Now, put that purpose—as the lawyer is the person who exercises wise judgment for his or her client—with another famous book from the great legal educator Karl Llewellyn, who described the first year as “lopping off your common senses and knocking your ethics into temporary anesthesia. It’s not easy to turn human beings into lawyers this way, neither is it safe. A mere legal machine is a social danger, because it’s not even a good lawyer, because it lacks insight and judgment.”

Well, how can law school after the first year teach or develop professional judgment? A key is performance-based teaching and performance-based assessment. The Carnegie Report says higher education can develop moral thinking, but skills and ethical decision-making must be learned in a role. The student has to move from the role of observer to actor; you have to connect that performance to models of professional judgment in action so that performance can be planned and evaluated. Students then have to reflect on how their own sense of professional identity is affected by this kind of performance-based learning.

The Carnegie Report says that students need the ability to

recognize ethical questions even when they're obscure; they need wise judgment when values conflict, and integrity to keep self-interest from clouding judgment. This is a kind of paraphrase of a very well-developed and tested model for ethical conduct, particularly in the professional setting, called the "Four-Component Model." It has been developed in educational and moral development psychology. This model indicates that if you want to produce effective professional conduct, it's not enough for the person to be a good person, or to be well-intentioned. Professionals engage in misconduct all the time, even though they are good people and they intended to do the right thing. How can that happen?

You could lack moral sensitivity, or you could fail to recognize in a real-life setting that there is an ethical dilemma. The first thing you have to know is the standard—the rules of professional conduct—but you also have to recognize in a professional setting that the rules are implicated.

You also need moral judgment, because the most difficult moments of ethical decision making involve conflicting values. For example, you know your client wants to lie on the witness stand. The only reason you know that is because your client confided in you, so there's a tremendous value to honor client confidentiality. But there's also a value of candor to the court. How do you deal with these competing values in deciding what to do?

You have to have motivation. You recognize there's an ethical dilemma. You come up with, not a rationalization, but a justification for what you're going to do in that situation. And then you have to be motivated to do it, which typically involves acting against self-interest. Studies have shown that professionals who implement good ethical decisions do so because they have internalized the values of the profession and they have a strong professional identity. So, if you ask that lawyer, "Well, why did you do that?" he or she will say, "Well, that's what lawyers do." The same way some might say, "Well, I'm a doctor, that's what I'm supposed to do."

Finally, there has to be implementation. You can identify the ethical dilemma, you can reason through to the right thing to do in that context, and you can be motivated to do it. Yet, you can be ineffective at implementing it and still engage in professional misconduct. I'm going to illustrate this, but if you want more information, a piece is available for free download from www.teachinglegalethics.org called "Developing Professional Judgment."

I have used this exercise in my professional responsibility class, based on a real-life situation involving representing a corporation. This is about a real company called O.P.M. Leasing. It was a private company, not publically traded. Fifty percent was owned by Mordecai Weissman and fifty percent by Myron Goodman. At the time, it was one of the five largest computer-leasing companies in the United States. This was back when people had to rent big mainframes—which you may even not remember. The third character is John Clifton, who's the chief fiscal officer, but he's just an employee. Then there's the law firm, which is the general counsel for O.P.M., which produces sixty percent of their revenue. Andrew Reinhardt is the lead partner on the case; he's a personal friend of both stockholders, that's how they got the business. He's also the third member of the board of directors.

Imagine you are the student assigned to play the role of Reinhardt. Moments before CEO Goodman arrives in your office without an appointment, you've just read a confidential memo from the CFO, raising concerns that the CEO has engaged in fraudulent conduct. If it's true, there can be civil and criminal liability for the law firm as well.¹

So we are going to show just about a minute of this video. I'm just going to show it to you, and then I'm going to tell you what I want you to discuss.

Video:

Goodman: Hello, how are you doing today?

Reinhardt: This is pretty unexpected; I have a meeting to go to in about fifteen minutes, so what's on your mind?

Goodman: I'm sorry to barge in like this but, since you don't have much time, I'll just get right to the point: Did you get a letter from John Clifton lately?

[Video paused.]

Cunningham: Talk to the person sitting next to you, how would you respond if you were this person's lawyer?

[Crowd discussing.]

Cunningham: I use this kind of discussion in class. I've also used this exercise with considerable success in continuing legal education events for law firms and other kinds of settings. One of

¹ The instructions for this exercise indicate that it is intended to be a plausible recreation based on the facts of the case, but should not be treated as accurate about the real O.P.M. case nor should any statements in the instructions or role play be attributed to individuals involved in the actual O.P.M. case.

the nice things about it, I find, is people don't want to stop talking. From a teaching methodology, you've just seen that in effect I have a large classroom in front of me here and every one of you has had an opportunity to talk, which is the value of breaking into small groups for discussion.

I've put together an expert panel to do what I'd be asking my students to do. Susan Myers, who is an experienced in-house counsel; Neil Dilloff, who is an experienced private firm lawyer; and Robert Rhee, who was in business himself and teaches business ethics, among many other things, at the University of Maryland. They have, unlike the rest of you, read the two-page instructions that the students get to prepare for the next step. You can use this for a lot of things; you can use this to teach lots of substantive law issues. But, I particularly use it to illustrate the Four-Component Model.

I'm going to ask my expert panel as they watch the next four minutes to be thinking about how well this lawyer is doing in terms of ethical sensitivity. What kinds of ethical dilemmas does it appear that he's aware of and thinking of in the context? And what kind of moral reasoning is he engaging in? Are there conflicting values at work, and how is he balancing those values? What seems to be the role of professional identity? Who does he think he is? Where is he drawing the values that are driving his decision-making, and how effectively is he implementing them?

One thing I want to point out is that it's becoming increasingly common for, particularly law firms, to have an ethics partner. I go to a CLE and people say, "Oh, well, if an ethical problem comes up, I just send it to the ethics partner and they just tell me what to do." Well, this problem walked into your office and you had to decide that instant what you're going to say in response to that CEO. You didn't have any time to ask anyone else. So let's see what this student did:

Video:

Reinhardt: What is it pertaining to?

Goodman: I mean pertaining to the business. It would have been in the last few days if you got one. I was talking to him and he didn't really tell me what he was talking about, but he did make mention that he might send you a letter. I was wondering if he did, because, if he did, I need to talk to you about it. And he wouldn't really talk to me, which kind of irritated me because it has to do with the business.

Reinhardt: Well, I did receive a letter. What was your concern in regards to communications between me and the CFO?

Goodman: Well, there were some issues that he had briefly alluded to. I'm wondering what was said in that letter. Obviously, if it concerns the company then it's something I need to know about.

Reinhardt: Well, as you know, I am—you guys did contact me to be an attorney for the company.

Goodman: Yeah.

Reinhardt: So, as far as that letter's concerned, I won't be able to divulge to you what's exactly in the letter. It's basically confidential.

Goodman: I know, but Mordy and I are the only two who own the company. He's just an employee.

Reinhardt: Yeah.

Goodman: Obviously, you're on the board too and if there's stuff going on with the company, we need to know about it. I don't really appreciate Clifton going behind my back by sending this letter to you and not even telling me what he wrote to you about.

Reinhardt: I understand that, but at the same time, my representation of the company doesn't necessarily extend to employees or agents of the company unless I get consent.

Goodman: Well, you have my consent as a member of the board, so you can go ahead and reveal to me what that letter said. If there are problems, then we need to work on fixing them and getting to the bottom of it. I can't really do that unless I know—you know. I don't know why I've been excluded here on this information.

Reinhardt: Well, you've been excluded because your interests could be adverse to the company. There are some things that happened that could maybe lead to litigation, and I can't give you the information that's in that letter.

Goodman: How do you know that what's in that letter is accurate? How do you know it's not just mistakes and things that he saw that are incomplete? He didn't have all the information since he wouldn't really talk to me all that much about it. You're my personal attorney, too. We've been friends a long time. I'm here talking to you now as my personal attorney, possibly to ask you for some advice about what I should do now.

Reinhardt: Well, to avoid further conflicts of interests, you should probably get an outside attorney, being as this first communication was given to me from the company. Now you've come in and you could possibly be adverse to the company's

interests, so I can't represent both of you.

Goodman: But we've been friends for so long. The reason why you're at where you are now is because of our company. Now you're telling me that I have to go some place else and get another lawyer after all these years? We've been friends for, what, ten years now?

Reinhardt: Yeah [glumly, laughter from the audience].

Goodman: Can you tell me about the letter? Obviously it's not anything good. It had to do with some leases?

[Video Stop.]

Cunningham: Right now we're using this as a learning methodology; there are at least two ways this can be used for assessment. Obviously, we could be assessing the students themselves and the way they perform. In my course they aren't graded for their performance, but you could do that in a course that's more focused on teaching client communication skills. I would love to see in-house departments and law firms do this kind of thing to assess people who are rising in the ranks—put them in a situation like this videotape. We do it all the time for trial practice. Law firms pay people to go to the National Institute for Trial Advocacy, stand up in front of a video camera, and practice a direct and cross and watch themselves—painful as that is—and they get feedback. We could easily do it for this sort of thing and assess people in a very effective way, before they learn from their mistakes.

But, I actually do use it for assessment in a different way, because the students watch the video, analyze what happened, and talk about what happened. That's what I'm going to briefly ask our expert panel to do. Susan [Myers], you really can say anything that you like, but if it was my class, I would be encouraging people to try this model in terms of linking it to their evaluation of how the lawyer is doing. What would be the first couple of things that you'd say to this lawyer if this were somebody you were supervising?

Myers: He obviously knew that there were several layers of ethical issues. He was thinking about the fact that his client is the corporation, not any particular officer or director on the board. He also recognized that he himself is a board member, but I thought he said too much to the president based on his own role as being a board member.

Cunningham: What did he say that he perhaps should not have said?

Myers: He acknowledged that he had gotten the letter and

that he had communicated with the CFO about the letter, and that the president's own interests were possibly against the interests of the company.

Cunningham: He perhaps should not have said that?

Myers: I think no. Because of his role as a board member and as the attorney for the corporation, he probably should have told the president as soon as he came in that he could not speak to him and that he would recommend that he get outside counsel to advise on the matter.

Cunningham: It sounds like you're saying that, as to ethical sensitivity at least, there were some things that the lawyer picked up. He picked up that his duty was to the corporate entity, not to its owners or officers. He also picked up a conflict of interest between his relationship to that individual and that of the corporation. It's not as clear that he picked up the conflict of him being a member of the board of directors. There do seem to be some implementation problems, though, with how he's dealing with the one that he's aware of.

Rhee: Obviously, this lawyer really is in a pretty tough spot, and the reason why he is in a tough spot is there are so many different layers of conflict. He's a lawyer in the firm itself, he's a personal attorney to this individual who he owes a certain degree of career success, he's a lawyer for the corporation, and he's an outside director. He's got his personal interests as well. These are all of the different tugs and pulls on this person, in this spot. Furthermore, I think that he's got two separate institutions that he needs to think about. One is the company itself that he represents, and the other is his own firm. So, I think this is a very, very difficult situation that requires instantaneous decisions.

I also picked up on something that Susan [Myers] said, which was, "Wait a minute, there are issues about disclosing information as well." In light of the circumstance in this case, which is an unannounced visit, I wonder whether the quickest—the best—thing to do is to simply delay the decision points and maybe regroup and resettle.

Cunningham: Neil [Dilloff], are there things that you would suggest to the lawyer, that he perhaps could have done differently that haven't already been mentioned?

Dilloff: First thing is to shut up. In this situation you are damned if you do, damned if you don't. He's got conflicts coming from every single way. Here's what I would do: I'd say to the CEO, "Look because things have come to my attention, I cannot represent you in any capacity at this stage, so you've got to get

your own lawyer.” I would take the letter and I would call the guy that wrote the letter to say, “I think you need your own counsel, or else the company needs to appoint counsel for you.” I would keep a copy of the letter to make sure it doesn’t get destroyed. If you turn the letter over to the CEO to let him look at it and you don’t have a copy, you could have spoliation of the evidence problem—big time—which could be criminal in nature. So, get out of the situation as quickly as possible. Making sure that all of your now former clients have independent counsel is the quickest, safest answer to all this. Anything you do, you are violating the attorney-client relationship with one client or the other, or maybe doing something that can cause this guy to get fired. You’re a member of the board, you’re representing individual officers, and you represent the company.

Cunningham: You may notice that I direct something called the National Institute for Teaching Ethics and Professionalism. We do annually two workshops where we bring experienced practitioners and academics together to talk about methods of teaching ethics and professionalism. I presented this to the group and got some of the very wise feedback that you got. We basically concluded that there’s no good answer to the question. Because if he says, “No, I didn’t get it,” he’s just lied. If he says, “Yes, I got it,” there are problems. If you evade, you are also saying that you got it. So, probably, the only good option for the lawyer is to jump out the window before the client comes through the door. I’ve created an impossible situation for my students, so I’ve stopped using it as an assessment teaching exercise, but it’s very good for these purposes.

Campbell: Thank you very much. I think you have given material to us way beyond any expectations there might have been. Our panel focused on how we teach and I take away from this a potentially very effective means of teaching.

And I’ll conclude where I started; I met some criminals when I was in MBA education. We had a deal with the office of the United States Attorneys to bring in the most MBA-looking felon that they had. It was a condition of his parole, so he kind of had no choice. But, he came in and he had—I’m not making this up—the blue shirt, the white cuffs, the collar stay. He looked the part; he had an MBA. During the discussion hour before the evening presentation, he would go around and folks would say to him, “What school are you at?” or “What section are you in?” The school was large enough that you didn’t know everybody. Then when he spoke, he scared them straight, because he looked like them. The danger all of us have is saying that the moral dilemmas can only happen to somebody else. In that regard, in

2013]

Finding a Better Way to Teach

193

the education context, you can do something, at least to alert the students and cause them to say, “My gosh, it could be me, maybe I have a problem.” To carry it beyond law school is a life-long learning experience, but we have an obligation to start it in law school—that is overwhelmingly clear.

**Transcription of 2013 *Chapman Law Review*
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and Legal Education: How to Prepare
Students to Meet Corporate Needs”**

**Panel 4: Changing the Curriculum to Keep
Pace with Technology***

Friday, February 1, 2013

Moderator:

*Professor John Tehranian***

Panelists:

*David S. Levine****

*Deven Desai*****

* This transcript has been edited and excerpted. For the full video presentation, visit www.chapmanlawreview.com.

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*Denise Howell******

TEHRANIAN: I'm John Tehranian, I'm a professor of law at Southwestern Law School, and it's a delight to be back here at Chapman.

For this session, we have three wonderful panelists whose experiences run the gamut from business to the academy and journalism to public policy. They will be providing us with an interdisciplinary examination of technology and the law school curriculum, with a particular focus on intellectual property-related issues. The recent spate of headlines about the legal profession and concerns over the future of law school has made this symposium incredibly timely. As the panelists in the earlier sessions have discussed, there is now a wide-ranging and much-needed debate occurring about the evolution of legal education. One area that has not received as much attention as it perhaps should, however, involves how the curriculum might change to keep pace with technological developments. As our panelists' talks will demonstrate, this topic raises a number of distinct sub-issues: the way in which technology can impact substantive legal doctrine, the way in which technology can impact the methodology of law teaching, and the way in which technology can impact our understanding of the law.

So, without further ado, I'm going to turn it over to David [Levine].

LEVINE: I'm excited to be here today to talk about something I don't talk about as much as I would like, although I think about it quite often, which is "What can we do to address these issues concretely, given what several speakers have talked about are the practical realities of what law professors are asking us to do today?" So I want to focus on this concept of "What can we do on Monday to start addressing these issues?" I've taught Internet Law and IP Survey for six years, and I've previously practiced in the area. And what I want to talk about is how I approach these issues from a course-objective perspective and

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really get down to a meta-brass-tacks approach with some suggestions that I'll make today. It's been fascinating to meet many scholars in this area, whose work I know, and talk about these issues. I think I'm going to leave it largely to them for the horizon questions of what we're going to do long term. But I'm going to address the most vexing question that I generally had when I talked to colleagues at my school and other places, which is, generally speaking, "I agree that we need to make changes, so what can I do right now to go down that path?" I'm going to approach this with that perspective.

I think I'll start off with what I say for my course objectives for my Internet Law course, and I'm heavily influenced here by my mentor and friend Eric Goldman up in Santa Clara. When I talk to my students in Internet Law, where I use a combination of textbooks, other primary sources, and public domain materials, I emphasize these points: my primary goal for them in a three-credit survey course (where I don't, to be clear, require them to have any background in computer science, or intellectual science, or anything else) is to learn how to make smart decisions in a dynamically changing environment. How do you keep up as a lawyer? How do you advise clients? But particularly when reading a case (and I do use cases heavily, although not exclusively) I want them to ask themselves: "What would you do differently for these parties?" It's understandable that most law students, when approached with that question, start thinking about what the law says and what argument they can make. And I push them heavily to think about this, as I say in class, not just based upon the law but based as relevant upon business objectives, market forces, social norms, and last but not least, rules of professional responsibility. And again, for those of you familiar with the literature, there was a reference to the law of the horse earlier, the counterpart article by Larry Lessig, who is also a mentor and friend. I'm drawing heavily on his article regarding modalities of regulation there. So, while it sounds theoretical and while I do talk in theory, my primary concern when I'm teaching a course like this is that most of my students are not in fact (as we referred to earlier) going to go straight into academia (or ever go that route), but that does not mean that they shouldn't have a theoretical grounding in the law, particularly given how dynamic the field is. I take this concept, and of course it sounds good on paper, but how do you implement it? How do you go that route? What I've challenged myself with and what I want to talk about today is "How do I attempt to meet those goals in our current academic and professional environment?"

Many speakers, and I'm not going to go down that path, have talked about the structural changes occurring in the profession. I want to make three relatively simple suggestions to law professors, keeping in mind that we still, generally speaking, have tenure standards and promotions standards that focus on teaching scholarship and service. Whether that should be the case or whether we should tweak it, I'll leave for a separate discussion. I want to take the field as it is now and say, "Okay, those are the rules. What can I do within those rules to address the structural changes and challenges facing legal education today for the betterment of students?"

This is not climate change. This is not the issue of what we're living through now, having been impacted or created thirty years ago. We don't have a situation where we have lag time. We have changes occurring now, and the question that vexes me and that I face is: "What can I do for the graduates of Elon University who are going to be out in a few months in May 2013; what can we do now to address the changing landscape?" And pedagogical change, as opposed to climate change, I think has the blessing of happening relatively rapidly (at least as compared to climate change). I have the ability within my classroom (and this is certainly a blessing of being at Elon, which endorses this type of thing) to experiment, to try new things in the classroom, see if they work, see if they don't, talk to colleagues who will support either way, and tweak it.

I've had the fortune to be able to attempt some interesting ways to approach Internet Law, without divorcing the law from its theoretical underpinnings or putting theory aside, but at the same time facing the practical questions that earlier speakers (both from the field and academics) have talked about.

What do we do? Law schools, legal educators, and, by extension, the legal profession have to reprioritize. That reprioritization requires some immediate action. Two last caveats before I get to my three, and I emphasize this, modest suggestions for what we can do now. The first is that I personally reject the notion that we need to de-emphasize one of those three traditional pillars over the other two. I firmly believe that for faculty to address these issues we need to not only remain active in all areas, but to also affirm that each activity improves performance in the other two. And while a given faculty member may excel in or prefer one particular area over another, and there could be allocated more time to address those, my view is (given where we are today, now more than ever) that we need a lot of utility players; we need a lot of faculty who are going to be adept at all three areas, because that, indeed, is the world that

2013] *Changing the Curriculum to Keep Pace with Technology* 219

our students are entering. The world where you are not necessarily going to be a specialist, where you may not, at least initially, have the opportunity to say (as some of my students want to), “I want to focus on bio-technology patents.” My initial response is: “That’s wonderful, and I want to help you get there, but first let’s talk about how you can get some legal experience.” So too, I think in that sense faculty need to be generalists. And I say that, by the way, with a deep interest with Internet law and IP, in particular.

The second point that I want to make, and directly relevant to the topic of the panel, is that I am fortunate (and indeed it was a motivating factor for me, personally) to teach IP and Internet Law from 2005 and on and practice in it, because I enjoy the fact that it is dynamic, fast moving, theoretical, exciting, and reversal prone. I’ve never taught the course where a case that I taught that semester wasn’t literally reversed during the semester; and I, therefore, had to ask my students’ indulgence and say, “Remember that case we read last week? I don’t think it’s good law anymore. Now we’ll talk about what the law actually is.” I relish that. I enjoy it. So I do think that Internet Law and Intellectual Property, in particular, has forced not only students or law professors, but professors who would otherwise eschew what we call “practical skills,” because the area is so dynamic and fast changing. In that way, I feel blessed and fortunate to be able to do that, and I want to instill an enthusiasm for that dynamism in my students. Do I wish that students facing this could discuss it hypothetically? Of course. But the reality is this is real. Therefore, I attempt to turn Internet Law and IP, and their uncertainty and their dynamism, into a benefit that they could use in practice through addressing those issues directly and head-on in class. Those are my caveats.

Suggestion one: candor. I’m suggesting pausing (coincidentally or ironically) and listening. In 2005–2007 when I was at CIS, I experimented with virtual world teaching at the invitation of my colleague Lauren Gelman. I lectured using an avatar. I landed in a virtual world with a jet pack and began to talk about trade secret law and its impact on public transparency (there were about a half-dozen other avatars in the room who were other law professors). A few avatars wandered in; they just came across the landscape; they hung out; they kind of circled us; one of them stood on top of me at one point; and I just kept going, but then they left. I wondered, “What are they doing at that point?” They were in fact hearing what we were saying, so maybe they were just messing around. But the key idea is that they paused. They took some downtime and they listened. And I’m not sure we do

enough of that immediately in the classroom. In our zeal to react, we talk and increasingly act through concepts like engaging in experimental learning, which I laud and which I use, but that takes a lot of planning and a lot of time. A lot of planning and time that unfortunately, and I hope it will change, many faculty members simply feel they do not have the luxury of attempting.

But on Monday, a relatively easy thing to do is pause and listen. And I do this regularly through my Internet Law class through blawging. I have my students pick a current, which in Internet Law can be a couple weeks, legal issue and I have them write a five-hundred-word blawg post aimed at their hypothetical client who may not have the time to get into the weeds with them and may not be interested in the legal issue, but needs to know about it. I ask my students to blawg. I ask someone to post a reply. And then we discuss it in class. But we don't discuss it from an ivory-tower-theoretical perspective; we talk about it from the perspective of what the client would like to know about this case, and what it means for the law. It forces students, again, to pause, because I have a syllabus and we march through it (and we have cases and everything else), but in the beginning of each class, one student takes the lead (and I encourage my students to be difficult, to push back, and frankly, to get a little impatient because I want every presenter to have that feeling). At the same time, we talk about civility, and this is part of the ethics and professional responsibility point. At the same time that I want students to have that perspective, I also want them to know, as Judge Baer has written, "While our system is by its very nature adversarial, it goes without saying that such a system expects—indeed requires—a measure of civility." And so I use these types of cases. And Judge Baer from the Southern District of New York is a bit of a controversial judge; he's written a lot of long opinions, some that others may have disagreed with, but he's for that reason a good judge for a case to assign. And I say to students, "How do we work in that same concept, in discussing this area of law that your client may not be interested in, and discuss it civilly?" Discussions ensue. The pause happens. I do not test my students on anything presented in the blawg presentation, but I take the time, because in pausing and in reflecting I think we have the opportunity to restock and think through where we are, and we do this in every class.

On the scholarship side, bringing scholarship to the classroom allows for this change. And by scholarship I am talking of the more traditional professor because I think that is the audience that needs to hear more about this discussion and the audience that is going to push back and say, "When do I do these

2013] *Changing the Curriculum to Keep Pace with Technology* 221

new exciting ways of teaching that I think are great, but I don't think I have time to do?" Those blawg posts that the students write (no I don't plagiarize them and turn them into my own articles) open a discussion about my work, and who doesn't like talking about themselves? But it allows students to focus on some of the policy issues that we think about, some of the issues of theory, and students see that that exchange can occur, that influence can happen, that you can have the ability to be involved in that dialogue, which is exactly the type of leader and thinker that law schools need to present and encourage today to have a dynamic environment. Students for that limited time in the classroom, and for many students in their limited time in law school, have the same opportunity to influence public policy enjoyed by professors. One of the things I love about the Internet is that while it does not clearly level the playing field the way we might hope, it certainly provides for a greater opportunity for access for those who might not otherwise have it than we've ever seen before. And I want students to think creatively about whether they can influence, not just courts and judgments and juries, but the world at large. Aside from its pedagogical benefits, it can help the institutional fortitude to allow a school not only to survive the current crisis that they're facing but, perhaps, thrive. I am an optimist, despite everything, because I do not think that we (meaning a majority of law professors) have really tried new and exciting ideas to address this issue due to the pressures that others have spoken about.

So on Monday, pause, and think about, and talk about what it is we're doing here. Ask your students to write a five-hundred-word blawg post (which you can put on TWEN, Blackboard, or any other place) on a topic of their choosing. I'm happy to share my thoughts, having been influenced by people like James Grimmelmann, Bruce Boyden, and others who do this as well.

So, what about service? The third pillar, and some would say the third wheel, of tenure. But the reality is that service is not valued the way it should be. And it is perhaps the hardest concept to assess. But now more than ever (again, "what can we do on Monday?") I think professors need to embrace the reality that our job in this environment and in this economy does not only extend to helping our students pass the bar exam, but indeed, to what they are going to do with their careers. Being sensitive to the fact that we have a career services office (and I'm good friends with everyone there), I tell my students I want to use all of these wonderful means of communication: the Internet, email, and social media (after you graduate when I will become

your friend, because up until then I'm not your friend). I want to use that media to allow us to continue a discussion to disprove what in fact many students may think (perhaps erroneously in most cases)—that professors don't care what happens next, or at least that they're not willing to put time into it.

On Monday, I'm suggesting to any faculty member who might want to try it that you attempt to open that dialogue simply by making that point in class and then seeing how your students react. I found it very successful and surprising how excited students are to get that information.

In conclusion, I don't profess to be saying anything terribly profound here; I don't profess to be saying anything that may change what happens down the road. But, what can we do on Monday? We can try these three modest changes and see where they lead. Thank you.

HOWELL: David [Levine] has focused on how we might approach teaching differently. When I heard about the panel I immediately thought, "What should we teach differently in the IP law curriculum?" because a lot has changed since way back when I was in law school, way back in the Reagan era. It's good from the point of view that people like some things staying consistent, because some things haven't changed. Parking, for example, is still a nightmare. But lots and lots in the world has changed since I was in law school, and the same for my colleagues, and personally, as someone not involved in academia, I don't have a good grasp of how it has really changed to keep up with those things, but I have some ideas and some thoughts that might be productive if they're not already being implemented.

First thing is that we are living in so much more of a global society, and the Internet is a big factor in that. You put up one of David [Levine]'s students' blog posts and it has a global audience. As much as this is an academic exercise that is geared at their classroom and the students' learning, potentially there are legal ramifications. If someone comes along and posts a defamatory comment, there are terms of service that are going to govern that, and depending where that person is, you have a whole host of strange legal issues coming into play. Back when I was in law school (and I suspect not much has changed among these lines, because the bar exam is such a touchstone for getting people out into the workplace) we didn't really consider how the global marketplace affected the law that we were learning in class every day. We learned about California law at Boalt, we learned a lot about federal law, but we did not learn what happens when someone like Kim Dotcom establishes a global upload lacquering site that is centered in New Zealand, but the United States

2013] *Changing the Curriculum to Keep Pace with Technology* 223

government decides it's going to prosecute criminally in the United States and off we go to the races—extradition and all the rest. I think that a focus on the World Trade Organization and the various laws that operate globally in the field of intellectual property that are going to affect peoples' clients when they're out there in the work place should at least be touched upon, not only in an international law class in law school, but in the core IP curriculum. Point one: globalization.

Point two: I think we should think a little bit about the substance of intellectual property; why it exists. I think that students are often taught about getting out into the workforce and helping clients protect their rights (be it trademark, copyright, patents); that's the whole focus of the course. But as the Internet has developed we've seen a whole economic model come into play that didn't exist back when I was in law school, and that is the model of how you make a living when you're giving things away. Just in the last several months we've seen an unknown Korean singer named Psy achieve global ubiquity in large part because thousands of people have remixed and mashed up his original video, which has now over a billion views on YouTube. The model of how we give things away and still make a living out of it, I think deserves a place in the IP curriculum.

Thirdly, I would like to see the curriculum address the fact that IP is not just the province of large corporations, authors, musicians, or people making large commercial ventures off of their IP. IP today is the province of everyone today who uses Facebook, everybody who uses Twitter, and everybody who posts a picture somewhere online and has to worry about the ramifications of Facebook deciding, "According to our terms of service, AT&T loves this picture of your son sitting in front of the AT&T bus stop and wants to use it in their ad, and we've got to monetize our service somewhere and that's how we're going to do it." I think people care a whole lot about IP ramifications in their daily lives, but they don't read terms of service so they don't know if they're being taken by giving their creative endeavors to free sites online. So, there are two problems there. Number one is that IP is not really being taught as a creation of the masses; that you and I are good examples, but your neighbor down the street has IP too. The problem that it is not being taught as a universal thing is coupled with the fact that lawyers aren't being taught enough in law school (at least when I was in school) how to draft clear, understandable, and not overly broad terms of service so we get over this problem of people using tools and not understanding what actual rights they are giving away when they use them.

All of these changes are grounded in policy. And, again, back when I was in school I don't remember a whole lot of policy discussion around IP issues. The place where we got policy discussion was in Con Law and Tort Law, and even to some extent Contract Law. But in IP law where things are changing literally on a week-by-week basis, policy is everything. The courts are trying to navigate these difficult waters, and legislatures are responding from public opinion blowing from one side to another. I think it's really important towards the goal of having a civil society where we do agree on mores and implement them in a way that makes sense that those policy considerations are taught in law school from all sides of the equation (the open Internet people and the strong rights people); each side gets a voice and a lot of consideration from the students.

Finally, I would just like to end my opening remarks by saying one point on the "how we teach" aspect of this. And that is my show that I do every week has between six to twenty-five thousand listeners, and I tossed out into the ether, "What would you guys (a lot of them are law students) like to see change in the IP law school curriculum?" And the feedback that I got, which I'll share with you here, was a real desire to have current events and reality brought into the classroom; that if it's possible to get away from case law textbooks where you go back to the very old cases and follow them forward, instead try going backwards. Try sticking with the cases that are in the headlines, maybe delving into the briefing there and getting into the foundations of the law and what's being argued in court, because students certainly find it interesting and engaging for them to go at it that way.

Thank you very much.

DESAI: I think I'm here in part because, as some people had mentioned in the earlier panels, I wrote about the notion of a teaching law firm, and I have to say that this then turned into an independent law review article by Professor Rhee and Professor Borden, and to me that's a sign that someone else thought my wacky blog idea was worth pursuing on their own. I take that as verification, and as I'll explain later, that has come to an even more interesting fruition. But that's to come.

I followed up on that with a "mob blog" in the same year (I'd been in the academy for maybe a year and a half or two years) on Madisonian.net called, "What institution do we want law school to be?" I was able to rally four deans, including former deans and current deans at the time, such as Erwin Chemerinsky, Jim Chen, Nancy Rapoport, Rodney Smolla, and we also had fifteen law professors writing. And I want to go over what motivated me in that first post to do the "mob blog," what's changed in the

interim, and how I think law schools can leverage technology to meet practice challenges.

Now to be clear, I'm not sure we have a clue what the heck "practice ready" on day one means. That's the only thing I figured out, and no offense to anyone, but we're still figuring that out. Nonetheless, the law school curriculum absolutely needs to change. That's true. But what I'm hoping to figure out, or at least discuss in some meaningful way, is why. And maybe ways that it can change.

So, to start, why even think of a teaching hospital? I'd been teaching for a few years when Carnegie came out, and one thing that struck me, while it was very well done from one perspective, was that it rang totally false to me. I went to Yale; I went to Berkeley as an undergrad. And I now teach at Thomas Jefferson, which is not so highly ranked. The difference that I saw, in talking to many of my friends up and down the system of legal education, is that the claim that many schools were not doing clinical work and externships was wrong, because if you were not in the top twenty and certainly below the top fifty, you had to do it. And I knew too many people who were doing it. So I was wondering what was going on? And, by the way, Yale did have clinics. It was my error not using them when I was there and instead walking into an interview where a partner rightly said, "What in the world is this? I don't even know how to read your transcript." I'm replied, "I don't even know how to answer you," which is not a good sign either. Somehow I got through that.

Now, for training I was incredibly lucky. I will be honest, I loved my education, but at the same time I kind of had a feeling that it was time to get outside the walls. So I went to what was then a boutique, because I wanted to get my hands dirty. I was at Quinn Emanuel when it was only sixty attorneys. It is now the largest, I believe, pure litigation house in the country. I was fortunate. A guy named David Quinto mentored me, as did everyone there. And that was basically like a residency. I did not sleep. Even the partners who were considered to be psychotic billers were wondering what I was doing there. They bled all over my papers, but to their credit I was allowed to bleed over named-partner briefs as well, because that's how we learned. I then went in-house, and I was fortunate again. I wanted to do transactional work. One of the most bizarre things to me is that after a year or two of being a litigator, transactional attorneys claimed, "I don't know if you can handle this," and I'm thinking, "If I'd clerked for two years, I don't think you'd care." So there are really interesting divisions to think about here. But I was fortunate. I had a counsel who actually taught me how to draft a

contract, to read them the way we're talking about, and I even did a merger while I was there.

Other mistakes started to come to mind. Everyone says, "Oh! Firms, firms, firms." But I even remember when I was in law school NALP was saying close to fifty percent of all practicing attorneys are in firms of one to five. So then I started thinking about professions in general. I thought about my parents who are physicians and all my friends who are doctors, and I thought about residency. What came to mind was a sort of: "I don't sleep, but I am paid better than a resident." I felt, compared to most people at a powerhouse firm, that I could handle a case from bringing it in the doors all the way to appeals, because I'd actually done everything it entailed. I'm not saying I would have been brilliant at it. But I could say I could do it. I looked at other professions, and as some people have noted, many don't ever try to produce someone ready to go on that first day, training comes later. So that's swirling in my head, and that's where the idea for the "teaching hospital" came out. I believe it could fill a market gap; services to a lot of people who probably need to pursue what I call "preventative lawyering" (those of you who are students, there are a bunch of people out there that are absolutely abysmally unrepresented when they set up their small firms). Small business: when everyone talks about innovations, what they don't tell you is that it's actually the turnover in those businesses that drive the economy (you can check Hal Varian on this). Those people need attorneys to set it up, to talk about all the things that people have talked about today. A teaching law firm might be that middle market gap, where, yes, you would not be paid huge money, but you would learn a ton. And then you could maybe build a client base that realizes that a small contract may need an attorney (everyone thinks they can do a contract on their own, and I don't know why, it looks like English, but it's not). And if you're a really good lawyer, what I learned was that I got a little deal sheet and then I had two columns in eight-point font and that's where the real action was. I learned that the hard way, and I went to a pretty good school. A lot of average people out there who don't have legal training don't want to spend the few hundred dollars it would take to have one of you read that contract, but they could, and I think that's an opportunity for you.

So when I proposed the idea of the teaching law firm, the number of legal academics that said, "Oh-ho-ho, newbie; we thought about this one; it's never going to happen"—the usual stuff—I just said, "Well okay, I'm an IP guy; it was just an idea." And then, as I said, it was really exciting to see three years later,

“We’re going to write about it in a more public way,” and, as I will say in a moment, there have been some interesting breakthroughs.

For example, my colleague Luz Herrera at Thomas Jefferson has a solo practitioner track aimed at training those who want to do that one part of the profession that people forget, which is the thing that’s a really powerful part of our profession compared to medicine. You can hang out a shingle and the cost to do that is nowhere near what it is to be a solo general practitioner physician or dentist. It’s an Internet hook-up and some office space. While I do agree with Chancellor Strine that you should not reject the books, etc., it’s still possible. In addition, the school now has an incubator program modeled after what CUNY did. This provides some support for young attorneys to hang out their shingle, have a little structure, and a senior attorney for mentorship, plus a network plugged in (I believe it is through the family justice center there) so they can get paying clients and learn and grow their business. And here’s the best punch line: this week a friend of mine, Adam Chodorow, at Arizona State, opened a teaching law firm; he got the approval. It took him forever. I encourage anyone to contact him. He is fantastic.

So the reason everyone said “Oh-ho-ho, Deven it’s not going to happen,” is because the barriers were massive. But they’re changing. So what changed? I think the classic answer is the market. Fewer clients and firms are going to pick up training duties, and yet we have some innovations starting to crop up. I want to state firmly, however, law school and real-world training are indeed separate. There are absolutely reasons to make sure a law graduate knows how to think through any problem and can communicate the answer. Core thinking, writing, and yes, theory, enable lawyers to live up to the idea (this is where I have to disagree a little bit with Robert [Rhee]) that lawyers can translate their training into almost any field. A blend of theory, practice, and rigor allows for the creation of a fairly impressive person who can dance in the realm of legal doctrine and bring insights to disciplines other than the law. Jim Chen put it this way, “[W]e train people to become lawyers or to leverage their legal training into gainful employment in business, government, or education. Our students represent our ultimate product; their accomplishments, our greatest pride.”

Put differently, law schools may be at a point where the value offered is the training in the law and the ability to fulfill the idea that a law degree could be useful in many fields. But to live up to that vision, law schools may need to reconfigure their curriculum. We will need to keep theory as a foundation, but we

may need to expand the ways in which teaching and training occur. As law continues to permeate almost every professional endeavor, the law degree may distinguish one as having the ability to analyze the problem with rigor and strategic insight better than most; to use language better than most in an oral, written, and visual context, and then to provide and communicate a solution based on multiple inputs, including facts, theory, and different stakeholder views. This potential does not suggest that the ability to practice law will not be a core goal.

Now, law school may have drifted because of scholarship overshadowing implementation. Nonetheless, a hiring manager or partner cannot in any real sense think that a law student can be fully ready to practice. They can, however, demand that a law student have a clue, know how to jump into thickets, and hack their way out with a solution (and not just any solution, but a damn good one). So, how do we train that student to be what I call “coachable,” meaning someone with the foundations to have a fire hose of training blasted at them. As a side note, you may want to think about how well students are trained to be problem solvers before they come to law school. No offense to the students in the room, but even the so-called law students by default of today might be less trained through no fault of their own to be problem solvers and thinkers because of education at all levels prior to law school. In that sense, law is facing an issue that permeates education in general.

To talk about this a little bit more, I will go through a little bit about curriculum, and then I’ll talk a little bit about scale and costs. As a specific curriculum issue, the technology and cases that have been brought up today I think are absolutely the right way to go. But we need actual cases, as many people have mentioned, not just one exemplar which law calls “a case.” Med. schools have done this; business schools have done this. The synthetic model of med. school that is an organs system approach is a very good way to go. But as a specific recommendation in the IP realm, I would say that if you were to take what is going on and turn it into a two-semester course you could accomplish much. Sean O’Connor is doing a version of this, I believe a one-semester course, at the University of Washington.

You could start out with a business entity, a start-up group, a group of people, and have students actually understand what form they want. And then it gets crazy. What about the IP ownership? What about sweat equity? What about break-up rights? As I tell my students, it’s like a great rock band. At first, everyone loves each other. Your job: make them figure out what happens when everyone hates each other, because it’s going to

happen. You can go through raising capital, filing patents, trademarks, and copyrights (open source or not, as Denise [Howell] pointed out). Everything Denise [Howell] said could be synthesized into a course where you really think about all the options. What happens when the company matures? What about crossing the chasm and you all of a sudden need to get rid of a founder? What about the HR issues that come up? All of a sudden, labor and employment is something you get to study, all within the context of the real world. And what about the policy battles, because they're coming. More and more they show up, and it may not always be federal. It could be a city council, or it could be a state legislature. And if you think policy doesn't need theory, you're nuts. Policy is theory; it's just hidden. You're making a plea. The theory is, "It's fair, I worked on it, it's my labor, you're a thief." Believe it or not, there's a theory behind it; that's your "why." That's what you get out of theory. You know whether that's a good argument, or you know how to wield it. That's what we do when we teach theory well. But it does need to tie to something.

With all of that, we have another problem: Who's going to be able to put all that together? Who's going to grade all that? At Thomas Jefferson we actually give midterms. I give several (not just one) along with heavy feedback. Mike Madison at the University of Pittsburg assigns real partner-style memos, because he was a real partner, and he grades those. But as we talked about, there's a culture and law professors need to step up and change our incentive model. We need to get rewarded for giving you that feedback, and you all need to stop saying, "I don't want to be tested." I get it, but that's actually what you're paying for in the long run.

The problem is that feedback works for small classes, but what about big ones? Unlike the undergraduate world, we don't have TAs. So this is the third part: technology. I was at Google as academic research counsel; some of these ideas come from there, but ask anyone there, I am not a tech panacea guy. Trust me. Still, a classic question is, "How do you scale?"

One answer is MOOCs, which is a rather unfortunate and rather bovine sounding acronym for Massive Open Online Courses. This is where a master instructor reaches thousands of people. It made a splash at Stanford, and most interestingly San Jose State is now trying to implement it. The problem with MOOCs is that they're not very good for law schools or state schools as they stand. They could address costs, and the idea of self-paced classes for remedial work sounds promising. But this works really well for math and science where you can have an

objective test graded; you could run code and see if it worked. The old model—things that you may want as students when you start debating your costs issues—is feedback when you showed your work. That feedback is deep when someone says, “This is why you didn’t get it right; this is how you can improve it.” That’s going to be harder to pull off in an online environment for now. Remember, the goal is increased skills and that needs feedback.

So MOOCs are a little bit limited, but what about “Khan Academy,” where you have short clips? This can be very promising for law schools because, if certain short video clips combined with text, combined with rich case study material, allow you to do a ton of work as students, then we as professors could do more work in the classroom that is problem based. But then people have to step up, and the problem is, you have to bridge that gap. One of the problems is, what about the large class versus the small? There’s going to be a gap. And the next wave of technology might help us here.

This is where artificial intelligence and machine learning might kick in. In one study recently, they did a direct comparison between human graders and software designed to grade students’ essays. They achieved virtually identical levels of accuracy, with software in some cases proving to be more reliable in this one groundbreaking study out of Akron. In other words, as professors we could start to assign twice-a-week, once-a-week, whatever it was, essays and you could get instant feedback. If I were to do this, I wouldn’t even grade in terms of how well you did it, it would be about you learning, because at first you don’t know anything. That’s fine. At the end you’d get graded, because then you had a semester to learn.

In other ways, you might start to get adaptive learning models, where you could actually start to get a cohort if it’s big enough, where several people do ok. But let’s say three people get it, and I couldn’t get it; I would get a new version of the same material to see if I understood the other way of presenting the ideas and information—and that’s coming. This is extremely exciting.

The other piece of this would be what Kevin Werbach and Dan Hunter have called “gamification.” We could actually start to use video game type interaction so that you would be able to go through simulations. Again, the work here is huge. So, as opposed to “on Monday,” it’s—I don’t know what day to be quite honest. But I think the case work we heard before would be the first foundation for some of this.

2013] *Changing the Curriculum to Keep Pace with Technology* 231

I want to reiterate, the idea of training a student to be practice ready is, I think, flawed. Schools can and should train lawyers to be more ready, but that readiness has to be so they can navigate a world that is changing at an astonishing pace. Neither the world nor the law sits still. The challenges facing a lawyer upon graduation will not be the same in five years, two years, or one. Overemphasis on specific near-term outcomes and the ability to jump through specialized hoops has some payoff but will defeat the reason a well-trained lawyer has value and a long career rather than an immediate job.

Cost issues and who will pay for training still need to be addressed. And the call to change law schools is partially a cost shift from clients, to firms, to schools. Given the cost for education and the lack of support for public education, we're going to have to find ways to bridge some of that gap. Nonetheless, no intelligent manager will want to hire someone who cannot learn on the job over time. As laws change, as businesses change, so too must employees. The ability to pick up and master new ideas and address and solve novel problems is the hallmark of a good attorney. Our task is to live up to training that sort of person so they can keep pace with the rapid change in IP technology in any business matter that arises in litigation or transactional work.

I took a class in high school that was called "Individual Humanities," and we read an unbelievable number of great works and drew on huge psychologists, but the core-animating concept came from Albert Einstein. When writing about education he said:

Sometimes one sees in school simply the instrument of transferring the maximum quantity of knowledge to the growing generation. But that is not right. Knowledge is dead; the school, however, serves the living. It should develop in the young individuals those equalities and capabilities which are a value for the welfare of the commonwealth. But that does not mean that individuality should be destroyed and the individual becomes a mere tool of community, like a bee or an ant. For a community of standardized individuals without personal originality and personal aims would be a poor community without possibilities for development. On the contrary, the aim must be the training of independently acting and thinking individuals who, however, see in the service to the community their highest life problem.

To me, this is what we should be training in attorneys, so that whatever you wish to be—a big firm attorney, a public defender, a prosecutor, a government attorney, or hanging out a shingle—you can choose how best to be an independently acting and thinking individual who, however, sees service to the community as your highest life problem. And to quote a different

Barkley (Sir Charles), "I could be wrong, but I doubt it." Thank you.

Redevelopment Reimagined: A Proposal to Revive California's Redevelopment Agencies to Attain the Greenhouse Gas Reduction Targets of Senate Bill 375

*Kyle D. Mott**

INTRODUCTION

California's sea level rose a dramatic seven inches over the past century, eroding the shorelines and threatening critical infrastructure in the process.¹ California's mountain snowpack—the state's largest natural reservoir—is also decreasing.² A reduction in the snowpack translates into a decreased summer water supply, threatening California's agricultural output and overall economy.³ Further, without a significant reduction in greenhouse gas emissions, it is predicted that over the next one hundred years California will experience a two-foot rise in sea levels, a doubling in the frequency of drought years, a fifty-five percent increase in the number of large forest fires, and an additional seventy-five percent loss in the snowpack.⁴

To curb these disturbing trends, California enacted the California Global Warming Solutions Act of 2006, better known as Assembly Bill 32 (AB 32), on September 27, 2006.⁵ The legislation called for the reduction of statewide greenhouse gas

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¹ Mary D. Nichols, *California's Climate Change Program: Lessons for the Nation*, 27 UCLA J. ENVTL. L. & POL'Y 185, 186 (2009) (citing CAL. CLIMATE CHANGE CTR., CAL. ENERGY COMM'N, OUR CHANGING CLIMATE: ASSESSING THE RISKS TO CALIFORNIA 12 (2006), available at <http://www.energy.ca.gov/2006publications/CEC-500-2006-077/CEC-500-2006-077.PDF>).

² *Id.* at 187.

³ *Id.* at 186.

⁴ *Id.* at 187. It is also predicted that \$2.5 trillion in real estate assets are at risk in California over the course of this century. CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, FACTS ABOUT CALIFORNIA'S CLIMATE PLAN (Sept. 25, 2010), available at http://www.arb.ca.gov/cc/cleanenergy/clean_fs2.pdf.

⁵ CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, FACTS ABOUT ASSEMBLY BILL 32: GLOBAL WARMING SOLUTIONS ACT (Dec. 7, 2009), available at <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf>.

emissions to 1990 levels by the year 2020.⁶ To meet this challenge, the California Air Resources Board (CARB) was appointed to create a sector-by-sector plan that would enable the greenhouse gas emissions targets to be reached.⁷

The California Legislature subsequently passed the Sustainable Communities and Climate Protection Act of 2008,⁸ popularly known as Senate Bill 375 (SB 375), to assist the transportation sector with the reduction of its emissions.⁹ The legislation is complex, but its concept is simple: close the distance between homes, jobs, services, and transit so that there is less of a need to drive, and, as a result, greenhouse gas emissions are reduced.¹⁰ While ambitious in terms of its vision, SB 375 lacks the funding and institutional leadership necessary for successful implementation. This Note proposes that California's redevelopment agencies (RDAs), which have years of experience

⁶ Assemb. B. 32, 2005–06 Leg., Reg. Sess. (Cal. 2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf

⁷ See generally CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN (Dec. 2008), *available at* http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf. The greenhouse gas emissions from the U.S. transportation sector are larger than the overall emissions of any other nation except China and Russia. NEHA BHATT ET AL., SMART GROWTH AM. AND NAT'L RES. DEF. COUNCIL, GETTING BACK ON TRACK: ALIGNING STATE TRANSPORTATION POLICY WITH CLIMATE CHANGE GOALS 5 (2010), *available at* http://www.nrdc.org/smartgrowth/files/GettingBackonTrack_report.pdf. Currently, the emissions from light trucks and cars account for thirty-two percent of the nation's greenhouse gas production. *Id.* at 2. Nearly an exact reflection of the national statistics, California's light cars and trucks account for thirty percent of the state's greenhouse gas emissions. INST. FOR LOCAL GOV., UNDERSTANDING AB 32 AND SB 375: A LEGAL ANALYSIS FOR LOCAL GOVERNMENT OFFICIALS, *available at* http://www.ca-ilg.org/sites/main/files/file-attachments/resources_Sept_8_AB32-SB375_Webinar_Slides.pdf. The overall transportation sector accounts for nearly half of the energy consumed in California and represents about thirty-six percent of the state's GHG emissions. CAL. ENERGY COMM'N, INTEGRATED ENERGY POLICY REPORT UPDATE 12 (2010), *available at* <http://www.energy.ca.gov/2010publications/CEC-100-2010-001/CEC-100-2010-001-CMF.PDF>.

⁸ S.B. 375, 2007–08 Leg., Reg. Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf

⁹ Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433, 435 (2010) ("SB 375 is, in effect, the implementing legislation to achieve the AB 32 GHG [greenhouse gas] reduction targets for the transportation sector, the largest source of global warming pollution in the state."). When signing SB 375, Governor Arnold Schwarzenegger announced that "[w]hen it comes to reducing greenhouse gases, California is first in tackling car emissions, first to tackle low-carbon fuels, and now with this landmark legislation, we are the first in the nation to tackle land-use planning. What this will mean is more environmentally-friendly communities, more sustainable developments, less time people spend in their cars, more alternative transportation options and neighborhoods we can safely and proudly pass on to future generations." Press Release, Office of the Governor, Governor Schwarzenegger Signs Sweeping Legislation to Reduce Greenhouse Gas Emissions Through Land-Use (Sept. 30, 2008), *available at* <http://gov38.ca.gov/index.php?press-release/10697/>.

¹⁰ Greenway, *supra* note 9, at 433.

in project development and financing, should be chosen to fill this critical void in the legislation.

California state law authorizes the creation and operation of redevelopment agencies.¹¹ Redevelopment is a process that allows city and county governments to “revitalize deteriorated and blighted areas in their jurisdictions.”¹² The process begins with a redevelopment agency developing a revitalization plan and providing the initial funding to begin the project.¹³ As the area is rejuvenated through the injection of capital and development, private sector investment is attracted to the area that would not have occurred but for the redevelopment project.¹⁴ The benefits derived from the revitalization include job creation, expanded business opportunities, improved housing and infrastructure, and the cleanup of contaminated areas.¹⁵ While not entirely without controversy,¹⁶ California’s redevelopment agencies possess a sizable portfolio of remarkably successful projects.¹⁷

Redevelopment agencies are uniquely suited to manage California’s efforts to curb climate change through SB 375.¹⁸ Senate Bill 375’s goal of reducing greenhouse gas emissions through a reduction of vehicle-miles traveled necessarily requires alterations in city planning to create more walkable and public transit-friendly cities.¹⁹ Redevelopment agencies have a wealth of experience in project planning and financing that could be utilized in this area.²⁰ Furthermore, under California law,

¹¹ CAL. HEALTH & SAFETY CODE §§ 33000–33855 (West 2012) (Community Redevelopment Law). At the time of writing, California has 398 active redevelopment agencies. Tracy Seipel, *California Supreme Court sets date for oral arguments in redevelopment lawsuit*, SAN JOSE MERCURY NEWS (Oct. 20, 2011, 6:18 AM), http://www.mercurynews.com/bay-area-news/ci_19150986.

¹² CAL. REDEVELOPMENT ASS’N, FREQUENTLY ASKED QUESTIONS ABOUT REDEVELOPMENT IN CALIFORNIA, available at http://www.calredevelop.org/tools/what_is_redevelopment.aspx (follow “FAQ” hyperlink).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *infra* Part II.B–C.

¹⁷ See generally Sam Lubell, *Ransoming Redevelopment?*, THE ARCHITECT’S NEWSPAPER (July 11, 2011), (noting the success of the redevelopment of downtown San Diego); Leland T. Saito, *From “Blighted” to “Historic”: Race, Economic Development, and Historic Preservation in San Diego, California*, 45 URBAN AFFAIRS REV. 166 (2009) (detailing the successful use of redevelopment in San Diego); Jay Claiborne, *Rebuilding Downtown San Jose: A Redevelopment Success Story*, 15 PLACES, Winter 2003, at 4 (discussing the effective rebuilding of San Jose, California); Larry Rosen, *Redevelopment Has Track Record of Success in Novato*, NOVATO PATCH (Jan. 17, 2011), <http://novato.patch.com/articles/redevelopment-has-track-record-of-success-in-novato>.

¹⁸ See *infra* Part III.A.

¹⁹ See *infra* Part I.C.

²⁰ See *infra* Part II.C.

redevelopment agencies are authorized to use tax-increment financing.²¹ This is a special type of financing that allows agencies to undertake projects that states or counties may not have the resources to complete on their own.²² As no organization or entity is currently charged with implementing plans developed under SB 375,²³ redevelopment agencies are the best option to fill this role.

But redevelopment agencies may not get the opportunity to lead SB 375 implementation. Governor Jerry Brown, tasked with fixing California's perennial budget crisis,²⁴ believes that the elimination of redevelopment programs could be part of the solution.²⁵ The governor signed Assembly Bill 1X27 (AB 1X27),²⁶ creating an "Alternative Voluntary Redevelopment Program," in which city and county redevelopment agencies can participate if they pay the legislatively established price.²⁷ Despite the "voluntary" label attached to the buy-in program, the companion bill, Assembly Bill 1X26 (AB1X 26), requires the dissolution of those redevelopment agencies that choose not to take part in the program created by AB 1X27.²⁸ The overall plan has little to do with the merits of redevelopment agencies, but instead is focused upon taking their money and repurposing it.²⁹ In fact, critics of the plan have declared that the money requested by the state is nothing more than ransom payments.³⁰

²¹ CAL. CONST. art. XVI, § 16(b).

²² See *infra* Part II.C.

²³ See *infra* Part III.

²⁴ In January of 2011, California had a projected \$25 billion budget deficit. LEGIS. ANALYST'S OFFICE, THE 2011–12 BUDGET: OVERVIEW OF THE MAY REVISION 3 (May 19, 2011), available at http://www.lao.ca.gov/reports/2011/bud/may_revise/may_revise_051911.pdf. In May of 2011, the state revised this deficit estimate to \$9.6 billion mainly as a result of expenditure reductions, fund shifting, and higher than expected state tax collections. *Id.*

²⁵ Lubell, *supra* note 17. Governor Brown's spokesman said that "[g]iven our challenging economic circumstances and our massive deficit the governor believes now is not the time to be subsidizing private developers while our public services are being bulldozed." *Id.*

²⁶ Assemb. B. 27, 2011–12 Legis., 1st Ex. Sess. (Cal. 2011) (enacted).

²⁷ *Id.* Each RDA's required payment is based on the average of two ratios: that RDA's share of statewide net tax increment (with deductions for payments to certain taxing agencies) during the 2008/2009 fiscal year and its share of the statewide gross tax increment (without the deductions). The resulting ratio is then applied to \$1.7 billion to determine each RDA's share of the total payment to be made during the 2011/2012 fiscal year. *Id.*

²⁸ Assemb. B. 26, 2011–12 Legis., 1st Ex. Sess. (Cal. 2011) (enacted).

²⁹ Michael J. Mishak, *California Gov. Jerry Brown defends cutting redevelopment agencies*, L.A. TIMES (Jan. 27, 2011), <http://articles.latimes.com/2011/jan/27/local/la-me-jerry-brown-20110127>.

³⁰ See, e.g., Stacie Chan, *Council Would Pay \$5 Million 'Ransom' to Keep Redevelopment Funds*, REDWOOD CITY PATCH (Aug. 24, 2001), <http://redwoodcity.patch.com/articles/council-would-pay-5-million-ransom-to-keep-redevelopment->

The California Redevelopment Association, the League of California Cities, and the cities of San Jose and Union City have joined together to challenge the constitutionality of the two bills.³¹ The case, *California Redevelopment Association. v. Matosantos*, S194861, (Cal. 2011), is now pending before the California Supreme Court and may very well decide the fate of many Californian redevelopment agencies. The California Supreme Court agreed to hear the case on an expedited basis and issued a stay on the AB 1X27 payments until making its decision.³² Without speculating on how the court will rule on the constitutionality of AB 1X26 and AB 1X27, the case is bringing California's redevelopment agencies and the powers they wield to the forefront of public thinking yet again.

This Note discusses California's efforts to reduce greenhouse gases through SB 375 and how redevelopment agencies could play an effective role in the implementation of the legislation. Part I discusses the greenhouse gas reduction goals established by AB 32, its relationship to SB 375, and the current progress being made to reach those goals. Part II of this Note addresses the use of eminent domain, the history of California's redevelopment agencies, and their current strengths and weaknesses. Part III concludes with a proposal to give redevelopment agencies the lead role in SB 375 implementation.

funds#; James Brasuell, *LA Votes to Pay \$97 Million, Keep Its Redevelopment Agency Alive*, CURBED L.A. (Aug. 10, 2011), http://la.curbed.com/archives/2011/08/la_votes_to_pay_97_million_keep_its_redevelopment_agency_alive.php; Alexis Fitts, *City, State Dispute \$1.7 Million "Ransom" Payment*, SONOMA VALLEY PATCH (Aug. 17, 2011), <http://sonomavalley.patch.com/articles/city-postpones-redevelopment-decision-disputes-17-million-ransom-payment>; Emil Marzullo, *Opinion: In redevelopment, negotiate a deal both sides can live with*, CAPITOL WEEKLY (Sept. 29, 2011, 12:00 AM), <http://capitolweekly.net/article.php?xid=1012w6yfwxtltf6>.

³¹ See generally *Pet. for Writ of Mandate, Cal. Redevelopment Ass'n. v. Matosantos*, S194861, (Cal. 2011), available at <http://www.courts.ca.gov/documents/1-s194861-pets-pfwom-07-18-11.pdf>. They allege that the volunteer payments for the AB 1X27 program are required by AB 1X26, contradicting the will of the voters by way of Proposition 22 (codified at Article XIII, Section 25.5(a)(7)(A) of the California State Constitution) which prevents the legislature from requiring "a community redevelopment agency (A) to pay, remit, loan, or otherwise transfer, directly or indirectly, taxes on ad valorem real property and tangible personal property allocated to the agency pursuant to Section 16 of Article XVI to or for the benefit of the State, any agency of the State, or any jurisdiction . . ." *Id.* at 14, 21. "Jurisdiction" was defined as "a local agency, school district, community college district, or county superintendent of schools," and Section 95(a) in turn defined "local agency" as "a city, county, and special district." *Id.* at 21. Thus, the cities and redevelopment agencies contend the payment, whose express purpose is to support public services and agencies, is unconstitutional. See *id.* at 5–6, 10–24.

³² News Release, Judicial Council of Cal., California Supreme Court to Decide Redevelopment Case (Aug. 11, 2011), available at <http://www.courts.ca.gov/documents/nr39-11.pdf>.

I. GLOBAL WARMING, GREENHOUSE GASES, AND CALIFORNIA'S HISTORIC FIGHT AGAINST AIR POLLUTION

A. Sources of Greenhouse Gas Emissions

Over the last two decades, national greenhouse gas emission rates rose twenty-seven percent.³³ The “multiplicative combination” of vehicle emissions per mile and vehicle-miles traveled³⁴ result in the transportation sector’s especially large quantity of greenhouse gas emissions.³⁵ Despite the reduction in greenhouse gas emissions from advancements in technology that have led to vehicles with increased fuel efficiency and the development of lower-emission fuels, the projected fifty percent increase in vehicle-miles traveled will erase any of the savings from those advancements.³⁶ Also, and not at all surprising, urban sprawl is a major contributing factor to the production of greenhouse gases as it necessitates vehicle travel.³⁷

Currently, vehicle-miles traveled are increasing three percent each year in California, handily outpacing the population growth rate of the state by almost fifty percent.³⁸ The number of vehicle-miles traveled annually results substantially from land use practices.³⁹ Accordingly, better land use projects at the local and regional level could provide significant reductions in

³³ BHATT ET AL., *supra* note 7, at 2.

³⁴ RESEARCH AND INNOVATIVE TECH. ADMIN. BUREAU OF TRANSP. STATISTICS, U.S. HIGHWAY VEHICLE-MILES TRAVELED, *available at* http://www.rita.dot.gov/bts/publications/multimodal_transportation_indicators/2013_02/system_performance/us_highway_vehicle_miles. Vehicle-miles traveled (VMT) is a form of data that is a commonly used measurement of roadway use. *Id.* “VMT are often used in estimating congestion, air quality, and potential gas-tax revenues, and can provide a general measure of the level of the nation’s economic activity.” *Id.*

³⁵ Joanna D. Malaczynski & Timothy P. Duane, *Reducing Greenhouse Gas Emissions from Vehicle Miles Traveled: Integrating the California Environmental Quality Act with the California Global Warming Solutions Act*, 36 *ECOLOGY L.Q.* 71, 78 (2009). Vehicle emissions per mile are calculated using data of both combustion efficiency of the vehicle, and the greenhouse gas intensity of its fuel source. *Id.* In 2002, AB 1493, the Pavley Bill, was passed into law and regulates the greenhouse gas emissions rates of vehicles sold in California and provides an indirect regulation of fuel efficiency. *Id.* at 78–79 (citing CAL. HEALTH & SAFETY CODE § 43018.5 (West 2008)).

³⁶ BHATT ET AL., *supra* note 7, at 2.

³⁷ Margot Roosevelt, *Legislature takes aim at urban sprawl*, L.A. TIMES (Aug. 21, 2008), <http://articles.latimes.com/2008/aug/21/local/me-sprawl21>. Sprawl also helps to explain the reported increases in average trip length, trips per capita, and the proportion of drivers traveling alone. BHATT ET AL., *supra* note 7, at 2. Vehicle-miles traveled are not directly subject to regulation by either California or the federal government. Malaczynski & Duane, *supra* note 35, at 79.

³⁸ Malaczynski & Duane, *supra* note 35, at 80 (citing CAL. ENERGY COMM’N, THE ROLE OF LAND USE IN MEETING CALIFORNIA’S ENERGY AND CLIMATE CHANGE GOALS: FINAL STAFF REPORT 9 (2007)).

³⁹ *See generally id.*

emissions from the transportation sector.⁴⁰ Researchers have determined that mixed-use development projects, the availability of alternative transit, and even landscape and building design can influence driving behavior.⁴¹ In addition, lower-density and single-use areas encourage longer and more frequent car trips⁴² as many necessities are out of reach for the average pedestrian.⁴³ Mixed-use communities with higher population densities, on the other hand, allow pedestrians to reach a wider number of places without resorting to vehicular travel.⁴⁴ In addition to allowing for walking and biking, these types of communities generally provide for efficient public transportation as well.⁴⁵

B. Curbing Greenhouse Gas Emissions Through Assembly Bill 32

California has a long and proud history of leading the nation when it comes to efforts taken to reduce harmful gas emissions. California was the first state to establish automobile emissions restrictions in 1961, and, in 1975, became the first state to use catalytic converters and limit the lead in gasoline.⁴⁶ Former Governor Arnold Schwarzenegger sought to continue California's leadership in the area of emissions reduction, and take a strong stand in the fight against global warming, through his issuance of Executive Order S-3-05 in June 2005.⁴⁷ The order called for a

⁴⁰ REID EWING ET AL., URBAN LAND INSTITUTE, GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 13 (2007), *available at* <http://www.smartgrowthamerica.org/documents/growingcoolerCH1.pdf>. A national report states that even modest changes to land use (such as increasing dwelling unit density per acre) could reduce vehicle-miles traveled by thirty percent nationwide. *Id.* at 9.

⁴¹ Malaczynski & Duane, *supra* note 35, at 80–81 (citing Interview with Elizabeth Deakin, Professor of City and Regional Planning, U.C. Berkeley, in Berkeley, Cal. (Feb. 8, 2008)).

⁴² TODD LITMAN, VICTORIA TRANSPORT POLICY INSTITUTE, LAND USE IMPACTS ON TRANSPORT 13 (July 26, 2012), *available at* <http://www.vtpi.org/landtravel.pdf>.

⁴³ A pedestrian's reach is considered to be a destination found within a quarter-mile radius. REID EWING, SMART GROWTH NETWORK, PEDESTRIAN- AND TRANSIT-FRIENDLY DESIGN: A PRIMER FOR SMART GROWTH 5 (1999), *available at* http://www.epa.gov/dced/pdf/ptfd_primer.pdf.

⁴⁴ Malaczynski & Duane, *supra* note 35, at 81.

⁴⁵ LITMAN, *supra* note 42, at 13.

⁴⁶ Mary Ellen Hogan, *California Climate Change Initiatives Leading the West and the Nation*, 22 NAT. RESOURCES & ENV'T 14, 15 (2008). Congress first recognized CARB's efforts in 1967 when it waived federal preemption of California's stricter motor vehicle standards. Nichols, *supra* note 1, at 191.

⁴⁷ Gov. Arnold Schwarzenegger, Exec. Order S-3-05, Office of the Governor (June 1, 2005), *available at* <http://www.dot.ca.gov/hq/energy/ExecOrderS-3-05.htm>. Governor Schwarzenegger cited the negative impacts of increasing temperatures on air quality and personal health, and the threat of rising sea levels to California's valuable coastline as reasons for issuing the order. Hogan, *supra* note 46, at 16. Governor Schwarzenegger gave a speech regarding his Executive Order at the United Nations World Environment Day Conference, stating that "[t]oday, California will be a leader in the fight against global

reduction of greenhouse gas emissions to year 2000 levels by 2010, 1990 levels by 2020, and then to eighty percent below 1990 levels by 2050.⁴⁸ But after the first progress report was issued, it became clear that the targets would not be reached as they lacked the enforceability of statute.⁴⁹ Accordingly, the California Legislature, led by Assembly Speaker Fabian Nuñez (D-Los Angeles), passed Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006.⁵⁰

Through AB 32, the legislature sought to continue California's "tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce emissions of greenhouse gases."⁵¹ The legislature's findings conclude that global warming poses a serious threat "to the economic well-being, public health, natural resources, and the environment of California."⁵² Similar to Executive Order S-3-05 issued by Governor Schwarzenegger, the overall goal of AB 32 is to reduce California's greenhouse gas emissions to 1990 levels by the year 2020.⁵³ The bill requires the California Environmental

warming . . . I say the debate is over. We know the science, we see the threat and we know the time for action is now." Darren A. Prum & Sarah L. Catz, *Greenhouse Gas Emission Targets and Mass Transit: Can the Government Successfully Accomplish Both Without a Conflict?*, 51 SANTA CLARA L. REV. 935, 947-48 (2011) (citing Kevin Heckkopf, *Arnold Targets Global Warming*, CBS NEWS (June 2, 2005), <http://www.cbsnews.com/stories/2005/06/02/tech/main699281.shtml>).

⁴⁸ Exec. Order S-3-05, *supra* note 47. The order required the Secretary of the California Environmental Protection Agency to issue a biennial report to the state legislature discussing the impacts of global warming according to known science, although this responsibility was later delegated to the California Energy Commission's Climate Action Change Center. Hogan, *supra* note 46, at 16. A Climate Action Team was formed to formulate the ways and means of reaching the emissions reduction targets. *Id.* The Climate Action Teams consists of a variety of agencies, boards, departments, and commissions, each having specific responsibilities in the development and implementation of plans to meet the emissions targets. Nichols, *supra* note 1, at 195 (citing CAL. ENVTL. PROT. AGENCY, CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE (Mar. 2006), *available at* http://www.climatechange.ca.gov/climate_action_team/reports/2006report/2006-04-03_FINAL_CAT_REPORT.PDF).

⁴⁹ Hogan, *supra* note 46, at 16.

⁵⁰ *Id.*

⁵¹ CAL. HEALTH & SAFETY CODE § 38501(c) (West 2012); *see also* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 264-65 (2006), *available at* <http://books.nap.edu/openbook.php?isbn=0309101514> (explaining why "California should continue its pioneering role in setting mobile-source emissions standards. The role will aid the state's efforts to achieve air quality goals and will allow it to continue to be a proving ground for new emissions-control technologies that benefit California and the rest of the nation.").

⁵² CAL. HEALTH & SAFETY § 38501(a).

⁵³ INST. FOR LOCAL GOV., *supra* note 7. In order to meet the 2020 emissions targets, California must reduce its yearly greenhouse gas emissions from "business as usual" by 169 million metric tons of carbon dioxide. Malaczynski & Duane, *supra* note 35, at 80. To reach the emissions targets, the equivalent of 33.8 million cars must be removed from the road. *Id.*

Protection Agency's Air Resources Board (CARB) to be responsible for monitoring and reducing statewide greenhouse gas emissions while requiring the preexisting Climate Action Team to coordinate efforts around the state.⁵⁴ While AB 32 has many different facets,⁵⁵ its foundation is the requirement of a "scoping plan."⁵⁶ The scoping plan creates the "framework of measures, policies and approaches for every sector of the economy to achieve the emission reductions sufficient to meet the 2020 target and to set California on course for much deeper, sustained reductions well into the future."⁵⁷ CARB issued the Climate Change Scoping Plan in October 2008 that detailed its intended execution of AB 32,⁵⁸ and then formally approved the plan two months later.⁵⁹

C. Senate Bill 375 and the Reduction of Emissions in the Transportation Sector

Unfortunately, California was not going to be able to attain the ambitious goals of AB 32 without improved land use and transportation policies.⁶⁰ Thus, Senate Bill 375 (SB 375), passed

⁵⁴ CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, FACTS ABOUT ASSEMBLY BILL 32 (Dec. 7, 2009), available at <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf>. Even though CARB is the lead agency overseeing the implementation of AB 32, the enormity of the effort requires resources across state government to come together. Nichols, *supra* note 1, at 195.

⁵⁵ The first step required by AB 32 was to develop an inventory of all greenhouse gas emissions, and establish an emissions baseline based on 1990 levels from which reduction plans could be developed and measured. *Id.* at 199 (citing California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38550 (West 2006)). An inventory of emissions sources was developed and included nearly 1,000 separate emitters of greenhouse gases. See *California Greenhouse Gas Emissions Inventory*, CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, <http://www.arb.ca.gov/cc/inventory/inventory.htm> (last visited Mar. 21, 2013) (displaying the emissions inventory). In addition to other mandates, AB 32 requires CARB to adopt an emissions cap for 2020, adopt mandatory reporting rules, adopt a plan to reach the established goals, and conduct impact studies prior to implementing any mandates or measures. FACTS ABOUT ASSEMBLY BILL 32, *supra* note 54.

⁵⁶ Nichols, *supra* note 1, at 200 (citing California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38561(a) (West 2006)). The 122-page scoping plan details recommended actions and timelines for achievement. See CAL. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, CLIMATE CHANGE SCOPING PLAN (Dec. 2008), available at http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf.

⁵⁷ Nichols, *supra* note 1, at 200 (citing California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38561 (West 2006)).

⁵⁸ Malaczynski & Duane, *supra* note 35, at 86.

⁵⁹ CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN, RESOLUTION 08-47 (2008), available at http://www.arb.ca.gov/cc/scopingplan/document/final_sp_resolution.pdf.

⁶⁰ S.B. 375, 2007–08 Legis., Reg. Sess. (Cal. 2008). By 2025, the United States population is expected to reach 350 million, an increase of 67 million people over the year 2000. Robert H. Freilich & Neil M. Popowitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in the 21st Century*, 42 URB. LAW 1, 2–3 (2010) (citing Arthur C. Nelson, *Leadership in a New Era: Comment on 'Planning Leadership in a New Era,'* 72 J. AM. PLAN. ASS'N 393, 394 (2006)). This increase

in 2008,⁶¹ essentially became the implementing legislation to achieve the greenhouse gas reduction targets established by AB 32 for the transportation sector.⁶² Traditionally, communities have planned their land uses—whether they be residential, industrial, business-oriented, or open space—and then looked to transportation plans that would serve the uses most effectively.⁶³ But SB 375 works to integrate these “disjointed planning activities and provid[e] incentives for local governments and developers to follow new conscientiously-planned growth patterns.”⁶⁴ The legislation also requires regional agencies to find a balance “between a ‘top down’ and ‘bottom up’ approach toward implementation, one that effectively involves local decision makers without undermining regional imperatives.”⁶⁵

Under SB 375, CARB is required to set regional greenhouse gas emissions targets for each of the state’s eighteen Metropolitan Planning Organizations (MPOs).⁶⁶ MPOs are federally mandated transportation policy-making organizations comprised of members from local governments, state agencies, and transportation authorities.⁶⁷ Prior to the passage of SB 375, MPOs were charged with developing long-term regional transportation investment plans; however, after the passage of SB 375, the MPOs must each create Sustainable Communities Strategies that aim to achieve the emissions reduction targets that have been established by CARB’s goal-setting sub-committees.⁶⁸ If the Sustainable Communities Strategies

in population will require 35 million new housing units, and another 17 million must be rebuilt, replaced or substantially renovated. *Freilich & Popowitz*, 42 URB. LAW 1, 3 (2010) (citing Nelson, 72 J. AM. PLAN. ASS’N at 398–99 (Tables 5 & 6)). Furthermore, the increase in population will require the United States to add about 26 million jobs, which will require an additional 15 billion square feet of nonresidential space and another 63 million square feet of nonresidential space must be replaced, rebuilt, or substantially renovated. *Id.* If this expansion of residential and nonresidential space is built under sprawl development patterns, “exponential and unsustainable burdens on the environment and public infrastructure services, the loss of environmentally sensitive, open space, and agricultural lands will become intolerable.” *Id.*

⁶¹ S.B. 375, 2007–08 Legis., Reg. Sess. (Cal. 2008).

⁶² Greenway, *supra* note 9, at 435.

⁶³ Nichols, *supra* note 1, at 207.

⁶⁴ Freilich & Popowitz, *supra* note 60, at 20 (citing Press Release, California Office of the Governor, Governor Signs Sweeping Legislation to Reduce Greenhouse Gas Emissions through Land Use (Sept. 30, 2008)).

⁶⁵ Greenway, *supra* note 9, at 435; see also Malaczynski & Duane, *supra* note 35, at 75 (noting that Governor Schwarzenegger declared in his signing statement that SB 375 “approaches the task with incentives rather than top-down regulatory mandates”).

⁶⁶ See CAL. GOV’T CODE § 65080(b)(2)(a)(i) (West 2012); see also *The Basics of SB 375*, INST. FOR LOCAL GOV’T, <http://www.ca-ilg.org/post/basics-sb-375> (last visited Mar. 23, 2013) (discussing the development of MPO targets).

⁶⁷ Freilich & Popowitz, *supra* note 60, at 21.

⁶⁸ CAL. GOV’T CODE § 65080(b)(2)(I) (West 2012); James Temple, *New Land Use*

plan cannot reasonably meet the reduction targets, an alternative planning strategy must be developed showing how the targets will be met through alternative development patterns, infrastructure, or other transportation measures.⁶⁹

Senate Bill 375 did not give CARB or the MPOs authority to require any specific land use or development plans to achieve reduction targets.⁷⁰ The law instead relies on its provision of incentives for projects built near transit stations by easing the environmental review standards established by the California Environmental Quality Act (CEQA).⁷¹ There are two types of projects that qualify under the CEQA incentive.⁷² The first kind includes residential projects that, if implemented, CARB agrees will help in the attainment of the emissions targets for the region.⁷³ The other type of qualifying projects are called Transit Priority Projects (TPPs), which receive full or partial exemption depending upon the ratio of residential and commercial usages and the distance from major transit.⁷⁴ Among other provisions, every eight years local governments are required to submit plans that identify areas that can accommodate predicted growth in the

Law's Message: Build Near Transit, S.F. CHRON. (Nov. 28, 2008, 4:00 AM), <http://www.sfgate.com/green/article/New-land-use-law-s-message-build-near-transit-3259950.php>.

⁶⁹ CAL. GOV'T CODE § 65080(b)(2)(I); Nichols, *supra* note 1, at 207.

⁷⁰ Malaczynski & Duane, *supra* note 35, at 84.

⁷¹ CENTER FOR A SUSTAINABLE CALIFORNIA, UNIV. OF CAL., BERKELEY, MAKE IT WORK: IMPLEMENTING SENATE BILL 375 18–19 (Oct. 2009) [hereinafter MAKE IT WORK], available at <http://sustainablecalifornia.berkeley.edu/pubs/SB375-POLICYBRIEF.pdf>. Decisions of California state and local government officials regarding land use decisions are subject to review under the California Environmental Quality Act. CAL. PUB. RES. CODE §§ 21000–21177 (West 2012). CEQA affects both public agencies and private developers whose plans call for a significant change to be made upon the existing landscape, and although it directly regulates only the actions of public agencies, the reach of CEQA extends to the projects of private parties inasmuch as they seek public approval or funding, or require any kind of public agency participation in the project. Malaczynski & Duane, *supra* note 35, at 82 (citing Guidelines for Implementation of the California Environmental Quality Act, CAL. CODE REGS. tit. 14, § 15002(c) (2008)). Interestingly, CEQA's definition of environmental impact requiring review was given a broad interpretation by the courts to include state and regional considerations, leading to inactivity on the part of the state government to adopt substantive state or regional planning measures. Freilich & Popowitz, *supra* note 60, at 15 (citing CORTESE-KNOX-HERTZBERG LOCAL GOVERNMENT REORGANIZATION ACT, CAL. GOV'T CODE § 56000 et. seq. (2009)).

⁷² Prum & Catz, *supra* note 47, at 954.

⁷³ *Id.*

⁷⁴ CAL. PUB. RES. CODE §§ 21155, 21159.28. Under the TPP classification, a project may qualify for either full or partial exemption. See PUB. RES. § 21155(a). To qualify for full exemption, the project must contain at least fifty percent residential use, have a minimum floor area ratio of 0.75 for commercial uses, a minimum net density of twenty units per acre, and a location within one-half mile of a "major transit stop" or "high quality transit corridor" recognized by a Regional Transportation Plan (RTP). Prum & Catz, *supra* note 47, at 954.

region, while still maintaining consistency with the Sustainable Community Strategies.⁷⁵ The local governments then have three years to rezone the land to reflect these plans, providing a strong incentive to build dense, transit-oriented developments.⁷⁶

Notwithstanding the incentives offered under SB 375, the bill itself does not generate any new funding.⁷⁷ As a result, public agencies will continue to finance their own transportation-related land use projects.⁷⁸ To successfully implement SB 375, more state money needs to reach transit-related land use projects,⁷⁹ as the incentives under SB 375 alone may be too weak to entice the scale of smart development needed.⁸⁰ This is where redevelopment agencies, with their land use experience and tax increment financing abilities, should be called upon to lead SB 375 implementation efforts.

II. REDEVELOPMENT AGENCIES AND THE POWERS THEY WIELD

A. California's Redevelopment Agencies and the Blight Requirement

The California Redevelopment Act was enacted in 1945 to address the rising problem of urban blight.⁸¹ The legislation authorized any city or county to create a redevelopment agency to combat blight.⁸² “[A]n area is blighted, and hence eligible for redevelopment, if it is predominantly urban and if it is adversely affected by economic and physical conditions too serious to be cured by private or governmental enterprise, thus necessitating redevelopment.”⁸³ Today, redevelopment agencies must make a

⁷⁵ Temple, *supra* note 68.

⁷⁶ *Id.* Once the new zoning is in place, it becomes difficult for government or residents to block builders from pursuing whatever projects are allowed in that particular zone. *Id.*

⁷⁷ Malaczynski & Duane, *supra* note 35, at 75–76.

⁷⁸ *Id.* at 75.

⁷⁹ MAKE IT WORK, *supra* note 71, at 6.

⁸⁰ *Id.* at 4.

⁸¹ Evans v. City of San Jose, 27 Cal. Rptr. 3d 675, 678 (Cal. Ct. App. 2005).

⁸² PUB. POLICY INST. OF CALIFORNIA, RESEARCH BRIEF, REDEVELOPMENT AND THE PROPERTY TAX REVENUE DEBATE, (Feb. 1998), available at http://www.ppic.org/content/pubs/rb/RB_298MDRB.pdf. To succeed in their mission, these redevelopment agencies are authorized to divert property taxes that otherwise would have gone to the state or other government entities; they may use public funds to subsidize private development; and they may utilize the power of eminent domain. Neilson v. City of California City, 53 Cal. Rptr. 3d 143, 150–51 (Cal. Ct. App. 2007).

⁸³ Cnty. of Los Angeles v. Glendora Redevelopment Project, 111 Cal. Rptr. 3d 104, 110 (Cal. Ct. App. 2010) (quoting Cnty. of Riverside v. City of Murrieta 76 Cal. Rptr. 2d 606, 609 (Cal. Ct. App. 1998)). The conditions demonstrating the existence of blight that the redevelopment agency must find before beginning a project are found in sections

finding that a project area is indeed blighted before beginning the redevelopment project.⁸⁴ A state court, through a validation action, can review a redevelopment agency's finding of blight.⁸⁵ If there is insufficient evidence of blight, the court must issue a judgment invalidating the redevelopment plan.⁸⁶ Indeed, California courts have invalidated a number of redevelopment projects due to a finding that blight was absent in the project area.⁸⁷

Redevelopment has proved to be an invaluable tool for local governments to accomplish important but expensive projects.⁸⁸ Redevelopment has also allowed local governments to utilize infill development on a number of projects.⁸⁹ Infill development is the process of developing unused or underutilized areas of land in areas that are already urbanized.⁹⁰ This process results in more efficient use of land and pre-existing infrastructure systems as well as higher density communities.⁹¹ The use of infill development is recognized as a method that can support sustainable development.⁹² Redevelopment agencies also have experience in transforming brownfields into useful and productive areas.⁹³ Brownfields are basically contaminated properties that go unused or underutilized due to the intensive efforts and high costs associated with cleaning up the area for

33030 and 33031 of the California Health and Safety Code. CAL. HEALTH & SAFETY CODE §§ 33030(b), 33031 (West 2012).

⁸⁴ *Evans*, 27 Cal. Rptr. 3d at 680.

⁸⁵ *Boelts v. City of Lake Forest*, 25 Cal. Rptr. 3d 164, 166 (Cal. Ct. App. 2005).

⁸⁶ *Id.*

⁸⁷ See, e.g., *Sweetwater Valley Civic Ass'n v. National City*, 555 P.2d 1099, 1104 (Cal. 1976); *Glendora Redevelopment Project*, 111 Cal. Rptr. 3d at 110; *Boelts*, 25 Cal. Rptr. 3d at 179; *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265, 279 (Cal. Ct. App. 2000); *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 98 Cal. Rptr. 2d 334, 366 (Cal. Ct. App. 2000); *Cnty. of Riverside v. City of Murrieta*, 76 Cal. Rptr. 2d 606, 614 (Cal. Ct. App. 1998).

⁸⁸ *WUF Westside Mayors Panel: Just Leave Redevelopment Alone!*, PLAN. REP. (Sept. 22, 2011), <http://www.planningreport.com/2011/09/22/wuf-westside-mayors-panel-just-leave-redevelopment-alone> (panel discussion of California mayors discussing various successful projects that were accomplished through redevelopment).

⁸⁹ See *Brownfields Redevelopment and Land Revitalization*, ENVTL. PROT. AGENCY, <http://www.epa.gov/SoCal/redevelopment/brownfields.html> (last visited Mar. 28, 2013). The Anaheim Redevelopment Agency was able to transform a brownfield that used to be the home of a manufacturing factory into 340 affordable housing units. *Id.*

⁹⁰ *Infill Development in Plain English*, MUN. RESEARCH AND SERVS. CTR. OF WASH., (June 2010), <http://www.mrsc.org/subjects/planning/lu/infill.aspx>.

⁹¹ *Id.*

⁹² See generally ETHAN N. ELKIND, REMOVING THE ROADBLOCKS: HOW TO MAKE SUSTAINABLE DEVELOPMENT HAPPEN NOW (Aug. 2009), available at http://www.law.berkeley.edu/files/Removing_the_Roadblocks_August_2009.pdf.

⁹³ See *Brownfields Redevelopment and Land Revitalization*, *supra* note 89.

safe use.⁹⁴ The rehabilitation of these areas has been found to promote both economic development and sustainability.⁹⁵

B. The Financing of California's Redevelopment Agencies

Following the acquisition of property, California's redevelopment agencies work with the local city council or a county board of supervisors to create development plans.⁹⁶ The agencies are prohibited from raising or collecting taxes.⁹⁷ Instead, to get the project off the ground, the agencies may issue bonds to provide initial project funding.⁹⁸ To pay back any bonds that are issued, redevelopment agencies are authorized to use a funding method called tax increment financing.⁹⁹ Tax increment financing allows the redevelopment agencies to receive a portion of the property tax revenues generated when property values rise as a result of investment.¹⁰⁰ Before a project begins, the property taxes existing at the time become the basis,¹⁰¹ and as investment flows into the project area, property taxes are expected to rise; the amount between the original taxes and the increased property taxes is called the "increment."¹⁰² The agencies then are able to pledge the tax increment so that they can repay bonds or other debt used to initiate the project.¹⁰³ Even when a redevelopment project area is established, other taxing jurisdictions continue to receive property taxes based on the

⁹⁴ *Brownfields Reuse*, CAL. DEP'T OF TOXIC SUBSTANCES CONTROL, <http://www.dtsc.ca.gov/sitecleanup/brownfields/> (last visited Mar. 28, 2013).

⁹⁵ *Id.*

⁹⁶ FREQUENTLY ASKED QUESTIONS ABOUT REDEVELOPMENT IN CALIFORNIA, *supra* note 12.

⁹⁷ See *Huntington Park Redevelopment Agency v. Martin*, 695 P.2d 220, 225 (Cal. 1985) (holding that redevelopment agencies are prohibited from levying taxes); FREQUENTLY ASKED QUESTIONS ABOUT REDEVELOPMENT IN CALIFORNIA, *supra* note 12 (noting same).

⁹⁸ *General Finance Information: Financing Redevelopment Projects*, SAN JOSE REDEVELOPMENT AGENCY, <http://www.sjredevelopment.org/FinancingRedevel.htm> (last visited Mar. 28, 2013); see also CAL. HEALTH & SAFETY CODE § 33641 (West 2012).

⁹⁹ CAL. CONST. art. XVI, § 16; HEALTH & SAFETY § 33670; *Marek v. Napa Cmty. Redevelopment Agency*, 761 P.2d 701, 709 (Cal. 1988); SAN JOSE REDEVELOPMENT AGENCY, *supra* note 98. California's redevelopment agencies can retain tax increments only for repayment of obligations. HEALTH & SAFETY § 33670(b). Obligations which may utilize the increment include paying the principal and interest on loans, money advancements, indebtedness incurred in financing or refinancing the redevelopment project, and honoring contracts so as to avoid breach. See CAL. CONST. art. XVI, § 16; HEALTH & SAFETY §§ 33670, 33675. The redevelopment agencies have a maximum of forty years to pay off any indebtedness. HEALTH & SAFETY § 33333.6(a).

¹⁰⁰ HEALTH & SAFETY § 33670.

¹⁰¹ See FREQUENTLY ASKED QUESTIONS, *supra* note 12.

¹⁰² *Id.*

¹⁰³ *Id.*; HEALTH & SAFETY § 33671; CAL. CONST. art. XVI, § 16.

assessed value of the properties before the project began.¹⁰⁴ Only after the debts have been paid off, or the time limit for the project has been reached, do the other taxing jurisdictions begin to receive the increased property taxes.¹⁰⁵

A redevelopment agency prefers that it start producing tax increments beginning the year after the project boundaries are established.¹⁰⁶ If the project does not immediately produce a tax increment, the agency must be paid from local general funds in order to meet its obligations.¹⁰⁷ To avoid becoming a burden to the city or county, redevelopment agencies search for sites, usually a vacant or easily cleared area, which will likely produce a sizeable tax increment.¹⁰⁸ Consequently, redevelopment agencies recognize that despite their power to acquire property for use in projects, they still need to attract profit-minded developers to the project area.¹⁰⁹ In general, developers will not be enticed to the worst parts of cities, leading redevelopment agencies to search for “the blight that’s right”—places blighted enough to qualify for redevelopment, but good enough to attract developers.¹¹⁰ The lack of oversight of redevelopment agencies and their blight designations has created problems; indeed, some redevelopment agencies’ blight designations have been overturned by reviewing courts.¹¹¹

Tax increment financing has proven to be “irresistibly attractive” to cities and counties that lack the funds to finance the projects from their own coffers.¹¹² However, this reliance on the tax increment financing method becomes problematic when property tax revenue declines in a project area, as they have in many areas over the course of the recent recession.¹¹³ In fact,

¹⁰⁴ HEALTH & SAFETY § 33670.

¹⁰⁵ *Id.*

¹⁰⁶ George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1003 (2001).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 994.

¹¹⁰ *Id.* at 994–95 (citing BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 23 (MIT Press, 1990)).

¹¹¹ Dakota Smith, *CRA Audit Finds Other Cities Look Worse than LA*, CURBED L.A. (Mar. 7, 2011), http://la.curbed.com/archives/2011/03/cra_state_audit.php (noting that state controller’s audit of eighteen redevelopment agencies exposed that a 4.5-star Palm Desert golf course and an area of multi-million dollar beachfront homes in Coronado were deemed blighted in redevelopment plans).

¹¹² Lefcoe, *supra* note 106, at 998. To place a check on the use of tax increment financing on redevelopment projects, the law requires that agencies prepare a report for affected taxing agencies describing the proposed projects and how they expect to remedy the blighting conditions found in the preliminary project report. See CAL. HEALTH & SAFETY CODE § 33344.5 (West 2012).

¹¹³ Stan Humphries, *No Respite From Housing Recession in First Quarter*, ZILLOW

more than two-dozen redevelopment districts in California had annual debt payments that exceeded or nearly exceeded their annual tax revenue in the fiscal year ending June 2009 as a result of plunging property-tax collections from redevelopment projects.¹¹⁴ If a city is forced to default on bond debt, its credit rating is adversely affected, which leads to increased costs of borrowing and may even eliminate the ability to obtain financing.¹¹⁵

III. UTILIZING REDEVELOPMENT AGENCIES TO REACH EMISSIONS TARGETS

A. How Redevelopment Agencies Can Help Attain SB 375 Goals

As previously noted, California boasts a history of forward-thinking and progressivity when it comes to taking measures to reduce greenhouse gas emissions.¹¹⁶ The leadership in California's public and private sectors "has empowered public servants, stakeholders from community groups and nongovernmental organizations, businesses, the scientific and academic community, and everyday individuals to develop creative and cost-effective policy solutions that are grounded in fact and science."¹¹⁷ California should continue its national leadership in this arena by granting its redevelopment agencies, which have over a half-century's worth of experience in fighting blight and curbing urban sprawl, a lead role in the pursuit to attain the goals of SB 375.

REAL ESTATE RESEARCH (May 8, 2011), <http://www.zillow.com/blog/research/2011/05/08/no-respite-from-housing-recession-in-first-quarter/>.

¹¹⁴ Justin Scheck & Bobby White, *Blight Cures Drain City Coffers*, WALL ST. J. (Apr. 9, 2011), <http://online.wsj.com/article/SB10001424052748704843404576251103140821350.html>. For example, the town of Hercules, California, sold \$260 million in redevelopment bonds to purchase land that would be used to revitalize the economically-depressed area. *Id.* However, lower-than-expected property values caused by the recession eliminated any chance to collect tax increment gains. *Id.* Consequently, Hercules has been forced to cut police salaries, trim its parks budget, and tap reserve funds to make bond payments. *Id.*

¹¹⁵ *Id.* In fact, some cities default, with credit-rating company Standard & Poor's reporting that 110 U.S. municipal-bond issues totaling \$2.65 billion defaulted in 2010. *Id.* The largest number of defaults "came from the type of debt issued by redevelopment agencies, representing 36% of defaults." *Id.* California's redevelopment agencies reported approximately \$29 billion in debt outstanding in June 2009, representing a large portion of California's overall municipal debt of \$182 billion. *Id.* Recently, in March of 2011, Moody's Investors Service downgraded the redevelopment debt of Oakland and Riverside County, as a result of poor tax revenues. *Id.* Standard and Poor's also downgraded the redevelopment debt of Lancaster to junk status and Fitch gave similar ratings to the redevelopment debt of Banning and Pittsburg, California, where property values fell by over 15% over the last year. *Id.*

¹¹⁶ See *supra* Part I.B. (discussing some of California's environmental achievements).

¹¹⁷ Nichols, *supra* note 1, at 193.

Redevelopment agencies and SB 375 are a logical pairing. For example, “SB 375 is essentially the only state law with an influence over local planning decisions, and redevelopment is the only state-sponsored funding scheme for local development.”¹¹⁸ By allowing redevelopment agencies to head the implementation of SB 375, they would be able to use their unique experiences working with local officials and community organizations to efficiently initiate and complete projects. In essence, the redevelopment agencies would continue with the work they have been accustomed to doing over the years, but projects would be focused around the achievement of SB 375 objectives. Furthermore, a realignment of the mission of redevelopment agencies towards SB 375 implementation would also help to quell some of the criticisms regarding redevelopment in its current form. While redevelopment agencies have “frequently been criticized for straying from [their] mission to fight blight—often by defining blight too liberally for some tastes—many say that SB 375 provides the ideal impetus for saving redevelopment.”¹¹⁹

To reduce greenhouse gas emissions, SB 375 encourages new development in urban areas.¹²⁰ Redevelopment agencies have a vast amount of knowledge and experience when it comes to infill and brownfield development, both of which take place in urbanized areas.¹²¹ The use of both infill and brownfield development have been found to help to create higher density mixed-use developments and reduce the number of vehicle-miles traveled.¹²² This type of development also attracts people to those areas that were previously unused or underutilized, and these people, according to city planners “are just the sort who will leave their cars behind, if given access to transit and walkable amenities.”¹²³ Thus, after recognizing the strengths of redevelopment agencies and the goals and requirements of SB 375, the ability of redevelopment agencies to lead in achieving those goals becomes apparent.

An Environmental Protection Agency (EPA) study lends support to the proposal to allow redevelopment agencies to take a

¹¹⁸ Josh Stephens, *Fight Over Redevelopment Could Stifle Efforts to Curb Climate Change*, CAL. PLAN. & DEV. REP. (Feb. 28, 2011, 10:57 PM), <http://www.cp-dr.com/node/2890>.

¹¹⁹ *Id.*

¹²⁰ Freilich & Popowitz, *supra* note 60, at 19–20.

¹²¹ See *Brownfields Redevelopment and Land Revitalization*, *supra* note 89.

¹²² LAUREN C. HEBERLE, CONNECTING SMART GROWTH AND BROWNFIELDS REDEVELOPMENT 4–5 (Nov. 2006), available at <http://louisville.edu/cepm/Connecting%20Smart%20Growth%20and%20Brownfields%20Redevelopment.pdf>.

¹²³ See Stephens, *supra* note 118.

lead role in the reduction of greenhouse gas emissions. After surveying projects in Charlotte, Denver, and Boston, the EPA issued a finding that redirecting jobs and households to brownfield and other infill sites reduces overall travel, congestion, and emissions from cars.¹²⁴ In Boston, infill development was examined in a small portion of the metropolitan area. The study tested how changing growth patterns in one corridor could improve the air quality outlook of the region as a whole. Denver examined the overall region to see how focused development in a few large urban and suburban centers would compare to current development and expansion trends. Charlotte instead focused on the impact of infill development concentrated around a new light-rail transit line.¹²⁵ Each of the studies concluded that the redirection of development to more walkable, transit-accessible areas reduces driving and emissions. A shift of five to ten percent of a region's homes and jobs to infill locations was estimated to produce two to five percent less vehicle travel and a three to eight percent reduction in emissions.¹²⁶ By directing new growth into reclaimed brownfield and infill sites, redevelopment agencies can help meet the need for growth while simultaneously addressing regional air quality issues.¹²⁷

B. Financing the Expanded Mission of California's Redevelopment Agencies

To assist with the high costs of implementing SB 375, local redevelopment agencies could utilize tax increment financing if given the opportunity to lead in the implementation.¹²⁸ Tax increment financing is the only program in California that allows local officials to incur long-term debt without voter approval, which undoubtedly increases their attractiveness to local governments.¹²⁹ However, tax increment financing faces difficulties when there are declines in property values that eliminate the positive tax increment.¹³⁰

¹²⁴ ENVTL. PROT. AGENCY, MEASURING THE AIR QUALITY AND TRANSPORTATION IMPACTS OF INFILL DEVELOPMENT 1 (Nov. 2006), *available at* http://www.epa.gov/dced/pdf/transp_impacts_infill.pdf.

¹²⁵ *Id.* at 7.

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 12.

¹²⁸ CAL. CONST. art. XVU, § 16.

¹²⁹ RESTRUCTURING REDEVELOPMENT: REVIEWING THE GOVERNOR'S BUDGET PROPOSAL, SENATE COMMITTEE ON GOVERNANCE & FINANCE 17 (Feb. 9, 2011) (the summary report from the legislative oversight hearing), *available at* http://senweb03.senate.ca.gov/committee/standing/GOVERNANCE/Summary%20report%20PDF02_09_2011.pdf.

¹³⁰ *See supra* note 114 (discussing the situation faced by the city of Hercules, CA).

To alleviate the concerns regarding tax increment financing that developed as a result of the recent nationwide decline in property values, it may be possible to lower the amounts of tax increment required by combining its use with other forms of bonds available to local officials. Cities and counties can utilize general obligation bonds requiring two-thirds voter approval that are repaid by imposing an ad valorem property tax rate in addition to the standard one percent property tax rate.¹³¹ Because property tax revenue backs these bonds, they are considered low-risk and thus possess low interest rates.¹³² Limited obligation bonds present another viable option to cities and counties, again requiring two-thirds voter approval.¹³³ These bonds, commonly used to finance public works projects, are repaid by dedicating a fraction of the municipality's general fund revenue and involve slightly higher interest rates.¹³⁴ Finally, assessment bonds may be appropriate in projects that will provide special benefits for those in the project area.¹³⁵ Here, each property owner pays in direct proportion to the benefit received from the project.¹³⁶ To utilize this form of bond, a vote must be held where property owners in the assessment area receive weighted votes according to their proposed assessments.¹³⁷ While any combination of these financing options does not unequivocally solve redevelopment-related financing concerns, it does present options that can and should be explored to lessen the impact on the state budget.

Should redevelopment agencies be called upon to lead the state's efforts in greenhouse gas emissions, another option that deserves a lot of consideration is the public-private partnership (PPP). A PPP is:

[a] contractual agreement formed between public and private sector partners, which allow more private sector participation than is traditional. The agreements usually involve a government agency contracting with a private company to renovate, construct, operate, maintain, and/or manage a facility or system. While the public sector usually retains ownership in the facility or system, the private party will be given additional decision rights in determining how the project or task will be completed.¹³⁸

¹³¹ RESTRUCTURING REDEVELOPMENT, *supra* note 129, at 17.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 17–18.

¹³⁵ *Id.* at 18.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Seth Eaton & William D. Locher, *Give PPPs a Chance*, L.A. LAW., Jan. 2009, at

A PPP reduces the time and public expense normally required by a public-only project.¹³⁹ These partnerships have already been utilized nationwide to complete such projects as mixed-use developments, urban renewal projects, and affordable housing.¹⁴⁰ Public agencies are able to leverage their public assets and increase their control over the development project.¹⁴¹ In return for their efforts, the private entity—usually a for-profit professional developer or investor—receives steady income by leasing the improvement to the public entity for a predetermined amount of time and can also be allowed revenues gain from the improvement, such as tolls or user fees.¹⁴² For example, if a partnership was entered into to help finance an SB 375-related project, the private partner could be given a share of public transportation fares for a given amount of time in return for initial capital investment in the project. Redevelopment agencies could be encouraged to utilize these partnerships to not only reduce the amounts borrowed under tax increment financing, but also to gain more popular support.

C. Modifying the Charter of California's Redevelopment Agencies

In order for redevelopment agencies to pursue the targets established under AB 32 and SB 375, their charter needs to be expanded. Currently, Section 33131 of the Health and Safety Code allows redevelopment agencies “[f]rom time to time [to] prepare and carry out plans for the improvement, rehabilitation, and redevelopment of blighted areas.”¹⁴³ The agencies are already allowed to “[p]repare applications for various federal programs and grants relating to housing and community development.”¹⁴⁴ Thus, it is proposed that the section be modified to eliminate the blight requirement that guided redevelopment agencies for most of the last century, and instead require the redevelopment agencies to coordinate and implement development, redevelopment, and overall land use policies that are tied to the achievement of the goals established by AB 32 and SB 375.

20–24, *available at* <http://www.lacba.org/Files/LAL/Vol31No10/2552.pdf>.

¹³⁹ *Id.* at 24.

¹⁴⁰ MARY BETH CORRIGAN ET. AL., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC/PRIVATE PARTNERSHIPS, at v (2005), *available at* http://www.uli.org/wp-content/uploads/ULI-Documents/TP_Partnerships.ashx_.pdf. The city of Chattanooga, Tennessee, has successfully utilized public-private partnerships to improve regional growth patterns and reduce air pollution problems. *Id.* at 6.

¹⁴¹ *Id.* at vi.

¹⁴² Eaton & Locher, *supra* note 138, at 24.

¹⁴³ CAL. HEALTH & SAFETY CODE § 33131(a) (West 2012).

¹⁴⁴ HEALTH & SAFETY § 33131(c).

CONCLUSION

As the rates of industrialization and consumerism climb while natural resources are irreversibly depleted, the earth's climate is threatened with permanent alteration.¹⁴⁵ The popular awareness of this looming crisis is sparking calls for change at all levels of society, and is leading governments, industries, and individuals to reexamine and reduce their own environmental impacts through adoption of sustainable measures.¹⁴⁶ California has already made substantial steps in an attempt to curb the emissions of greenhouse gases that contribute to global warming. AB 32 and SB 375 are pieces of ambitious legislation that need to be aggressively pursued in order for their targets to be reached. By employing California's redevelopment agencies to oversee the implementation of land use policies and projects that will reduce the emissions of greenhouse gases, California would again be leading the nation in the fight against global warming.

¹⁴⁵ Freilich & Popowitz, *supra* note 60, at 2 (citing JAMES A. KUSHNER, GLOBAL CLIMATE CHANGE AND THE ROAD TO EXTINCTION: THE LEGAL AND PLANNING RESPONSE (2009)); *see also* Jesse W. Abair, *Green Building: What It Means to Be "Green" and the Evolution of Green Building Laws*, 40 URB. LAW. 623, 623 (2008).

¹⁴⁶ Freilich & Popowitz, *supra* note 60, at 2.

Addendum

February 24, 2013

The main portion of this Note was written during the fall semester of 2011. Over the past year and a half, much has transpired in the realm of California redevelopment. To bring readers up to date, this Addendum will first address the decision in the case of *California Redevelopment Association v. Matosantos*, and then will consider the subsequent effect on redevelopment agencies and sponsoring municipalities. The Addendum will also provide an updated theory on how the goals of SB 375 can still be met through a resurrection, and slight reincarnation, of redevelopment agencies. Finally, the Addendum will provide an update on the progress made thus far in the implementation of SB 375.

CALIFORNIA REDEVELOPMENT ASSOCIATION V. MATOSANTOS

In *Matosantos*,¹⁴⁷ the California Supreme Court considered (1) whether redevelopment agencies, once established, have a protected right under the state constitution to exist that immunizes them from statutory dissolution under AB 1X26; and (2) whether redevelopment agencies and their sponsoring municipalities have a protected right not to make the pay-to-play payments required under AB 1X27.¹⁴⁸

The court issued its decision on December 29, 2011.¹⁴⁹ In a unanimous vote, the court ruled that AB 1X26, the bill abolishing redevelopment, was constitutional.¹⁵⁰ The court found the dissolution measure to be a valid exercise of the legislature's constitutionally granted power.¹⁵¹ The legislature's power "includes the authority to create entities, such as redevelopment agencies, to carry out the state's ends and the corollary power to dissolve those same entities when the Legislature deems it necessary and proper."¹⁵² The required dissolution did not violate Proposition 22 because Proposition 22 did not attempt to restrict the legislature's power to dissolve redevelopment agencies.¹⁵³

¹⁴⁷ Cal. Redevelopment Ass'n v. Matosantos, 267 P.3d 580 (Cal. 2011).

¹⁴⁸ *Id.* at 587–88.

¹⁴⁹ *Id.* at 580.

¹⁵⁰ *Id.* at 588, 611.

¹⁵¹ *Id.* at 588.

¹⁵² *Id.*

¹⁵³ *Id.*

But in a surprising 6-1 vote, the court struck down AB 1X27 as violative of Proposition 22.¹⁵⁴ The court found that “Proposition 22 (specifically Cal. Const., art. XIII, § 25.5, subd. (a)(7)) expressly forbids the Legislature from requiring such [pay-to-play] payments.”¹⁵⁵ Because the bill did not contain a severability clause, the bill had to be invalidated in its entirety.¹⁵⁶

Thus, the court’s holding not only upheld the mandated dissolution, but also struck down their option to make payments in order to stay in business.¹⁵⁷ Both parties found themselves unprepared for this outcome.¹⁵⁸ Steven L. Mayer, a lawyer for the redevelopment agencies in the case, declined to second guess the legal strategy used in seeking the invalidation of both AB 1X26 and AB 1X27, stating, “Hindsight is always 20-20, isn’t it?”¹⁵⁹ Governor Brown, on the other hand, expressed his satisfaction with the result of the case, saying that it “validates a key component of the state budget and guarantees more than a billion dollars of ongoing funding for schools and public safety.”¹⁶⁰ Long-time redevelopment opponent Assemblyman Chris Norby (R-Fullerton)¹⁶¹ was also pleased with the result, saying that the redevelopment agencies “should have shut up” rather than suing to overturn the laws.¹⁶² However, Chief Justice Tani Cantil-Sakauye had a much more appreciative view of the now-defunct redevelopment agencies:

Although the system of redevelopment in this state has been far from perfect, it certainly is worth noting redevelopment projects like the restored Public Market Building in downtown Sacramento, the Bunker Hill project in downtown Los Angeles, Horton Plaza and the Gaslamp Quarter in downtown San Diego, HP Pavilion in San Jose, and Yerba Buena Gardens in downtown San Francisco. When

¹⁵⁴ *Id.* at 588, 611.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 607.

¹⁵⁷ James Nash, *Defaults May Loom on California Redevelopment Agency Debt*, BLOOMBERG (May 31, 2012), <http://www.bloomberg.com/news/print/2012-05-31/defaults-may-loom-on-california-redevelopment-agency-debt.html>.

¹⁵⁸ Seth Merewitz & Ethan J. Walsh, *Redevelopment After RDAs*, L.A. LAW., Feb. 2013, at 26, available at <http://www.lacba.org/Files/LAL/Vol35No11/3003.pdf>.

¹⁵⁹ Maura Dolan et al., *California high court puts redevelopment agencies out of business*, L.A. TIMES (Dec. 29, 2011), <http://articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230>.

¹⁶⁰ *Id.*

¹⁶¹ Assemblyman Norby is the founder and director of Municipal Officials for Redevelopment Reform (MORR), “a growing network of elected officials and volunteer groups, all of whom are concerned about rising redevelopment abuses.” *About, MUNICIPAL OFFICIALS FOR REDEVELOPMENT REFORM*, <http://www.redevelopment.us/about/> (last visited Mar. 28, 2013).

¹⁶² Dolan et al., *supra* note 159.

faithfully administered and thoughtfully invested in the interests of the community, a redevelopment agency can successfully create jobs, encourage private investment, build local businesses, reduce crime and improve a community's public works and infrastructure.¹⁶³

A. The Process of Dismantling Redevelopment Agencies

Under AB 1X26, "successor agencies" were to be created following the closure of the redevelopment agencies and tasked with managing the dissolution process.¹⁶⁴ AB 1X26 designates the municipality that authorized the redevelopment agency as the successor agency.¹⁶⁵ However, the local governing body has the option of declining this appointment, and instead, an "applicable local agency" can elect to become the successor agency.¹⁶⁶ Finally, if no agency elects to become the successor agency, the governor can appoint a three-member "designated local authority" to take on the duties of the successor agency.¹⁶⁷ Among a host of other duties,¹⁶⁸ these agencies must submit payment schedules every six months to oversight boards and the California Department of Finance,¹⁶⁹ and if approved, the successor agencies will be allocated a small amount of property tax revenue to make the payments and cover the obligations that once belonged to the redevelopment agency.¹⁷⁰ Governor Brown's aides believe that \$30 billion in outstanding redevelopment debt will now have to be paid by the cities' and counties' successor agencies.¹⁷¹

¹⁶³ Cal. Redevelopment Ass'n v. Matosantos, 267 P.3d 580, 623 (Cal. 2011).

¹⁶⁴ Merewitz & Walsh, *supra* note 158, at 26.

¹⁶⁵ CAL. HEALTH & SAFETY CODE § 34171(j) (West 2012).

¹⁶⁶ HEALTH & SAFETY § 34173(d)(1)–(2) (defining a "local agency" as "any city, county, city and county, or special district in the county of the former redevelopment agency").

¹⁶⁷ HEALTH & SAFETY § 34173(d)(3)(A).

¹⁶⁸ See HEALTH & SAFETY § 34177 (listing the duties of the successor agency).

¹⁶⁹ HEALTH & SAFETY § 34177(l). An oversight board consists of seven local officials appointed by different local stakeholders. HEALTH & SAFETY § 34179(a)(10). The varied duties of the oversight board are also established by statute. See HEALTH & SAFETY § 34181 (listing the actions that the oversight board must direct the successor agency to undertake).

¹⁷⁰ HEALTH & SAFETY § 34188. There is a dispute between successor agencies and the Department of Finance as to what obligations are enforceable. Merewitz & Walsh, *supra* note 158, at 26. To clear up the confusion the legislature passed AB 1484, but it has not provided the intended clarification. *Id.* at 26–27. The successor agencies are also subject to independent audits. *Id.* at 27. After a review by the Department of Finance, additional payments may be required. See *id.* If the agency does not make the required payments, the amount can be taken out of the sales or property taxes that would otherwise go to the municipality that originally formed the redevelopment agency. *Id.* Over two dozen lawsuits involving over fifty jurisdictions have already been filed challenging AB 1484. *Id.*

¹⁷¹ Nash, *supra* note 157.

Local officials see this as another “raid on their coffers” as they still must pay down redevelopment debt, but can only use a fraction of the tax-increment revenue that the redevelopment agencies could have used.¹⁷² In fact, around one hundred municipalities that elected to create their own successor agencies may not get the tax revenue that they expected to use to make the payments.¹⁷³

The elimination of tax increment financing from the municipalities’ revenue-creating arsenals unfortunately occurred while many local economies were looking for capital infusions.¹⁷⁴ The loss of tax increment financing, coupled with reductions in state and federal grants, forced local governments to make difficult financial decisions.¹⁷⁵ For example, the elimination of redevelopment in Oakland has caused the city \$28 million in losses and resulted in the termination of more than one hundred city workers.¹⁷⁶ Rancho Cucamonga has been forced to delay a major transportation project following the loss of financing.¹⁷⁷ In Monrovia, the successor agency missed an \$11.75 million note payment and went into default.¹⁷⁸

Culver City is searching for a way to make up \$7.5 million a year in lost revenue following the end of redevelopment agencies.¹⁷⁹ After declaring a state of fiscal emergency, the city asked voters to raise the sales tax by half a cent for the next ten years to generate \$8 million each year.¹⁸⁰ Jeff Muir, the city’s chief financial officer explained, “Unfortunately, the economy is still slumping and the state was once again successful in pushing its budget issues onto the backs of local government and we have a very significant and real problem.”¹⁸¹

¹⁷² Jim Christie, *Loss of redevelopment adds to pain for California cities*, REUTERS (Oct. 9, 2012), <http://www.reuters.com/assets/print?aid=USL1E8L93OK20121009>.

¹⁷³ Nash, *supra* note 171.

¹⁷⁴ Merewitz & Walsh, *supra* note 158, at 24.

¹⁷⁵ *Id.*

¹⁷⁶ Pamela M. Prah, *Redevelopment in California: The Program That Disappeared*, STATELINE: THE DAILY NEWS SERVICE OF THE PEW CHARITABLE TRUSTS (Sept. 19, 2012), <http://www.pewstates.org/projects/stateline/headlines/redevelopment-in-california-the-program-that-disappeared-85899418135#>.

¹⁷⁷ *Id.*

¹⁷⁸ Christie, *supra* note 172.

¹⁷⁹ Alison Vekshin, *Brown Redevelopment Fund Seizure Pushes City Tax Increase*, BLOOMBERG BUSINESSWEEK (Aug. 8, 2012), <http://www.businessweek.com/news/2012-08-08/brown-redevelopment-fund-seizure-pushes-city-tax-increase>. Of the \$7.5 million in lost funds, approximately \$3.3 million paid for twenty-four employees in housing and redevelopment positions, and \$1.2 million helped pay for police, code enforcement, and graffiti removal. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* David White, the City of Fairfield’s director of finance and deputy city manager had similar sentiments: “They ended redevelopment to secure funds to deal with their

The elimination of redevelopment is one reason why the city of Atwater declared a fiscal emergency and nearly filed Chapter 9 bankruptcy.¹⁸² While Atwater eventually averted bankruptcy,¹⁸³ the same could not be said for Stockton, San Bernardino, and Mammoth Lakes.¹⁸⁴ Referring to the decision to declare bankruptcy, the loss of redevelopment funds “was the straw that broke the camel’s back,” said San Bernardino City Attorney James Penman.¹⁸⁵

In Los Angeles, the designated local authority has “very specific goals and instructions: to complete the unwinding as expeditiously as possible and to maximize value.”¹⁸⁶ Many projects that were in the planning phases prior to the forced closure of the redevelopment agencies are now faced with uncertain futures.¹⁸⁷ Los Angeles Councilman Tony Cardenas called the *Matosantos* decision “a major blow to the City of Los Angeles and its ability to recover from this economic recession.”¹⁸⁸

The total effect of the fallout following the elimination of redevelopment agencies are not yet known, but if the experiences addressed above are any indication, the closure of over four hundred redevelopment agencies will have a dramatic impact on municipal financing and development.

budget mess The impact for us has been an organization that’s gone through four to five years of budget cuts and the prospect of future cuts that threaten the life and character of this community.” *Id.*

¹⁸² Christie, *supra* note 172.

¹⁸³ See Michael B. Marois, *California’s Atwater Steps Back From Bankruptcy Push*, BLOOMBERG BUSINESSWEEK (Nov. 14, 2012), <http://www.businessweek.com/news/2012-11-14/california-s-atwater-steps-back-from-bankruptcy-push> (noting that the city suspended bankruptcy talks “after winning concessions from unions that will pare labor costs”).

¹⁸⁴ Christie, *supra* note 172.

¹⁸⁵ Vekshin, *supra* note 179.

¹⁸⁶ Terry Pristin, *An Uncertain Fate for Urban Projects in California*, N.Y. TIMES, Apr. 11, 2012, at B10, available at <http://www.nytimes.com/2012/04/11/realestate/commercial/an-uncertain-fate-for-urban-projects-in-california.html?adxnnl=1&adxnnlx=1361746177-+/RHDDeuV0QS/07L25cpXJQ> (quoting Nelson Rising, one of the three people appointed to the designated local authority by Governor Brown).

¹⁸⁷ See *id.* (discussing the uncertainty surrounding the transformation of Santa Barbara Plaza into Marlton Square in South Los Angeles).

¹⁸⁸ Dolan et al., *supra* note 159. Councilman Cardenas said by growing up in a blighted area, he was able to watch firsthand “how a community can be revitalized with the right kind of redevelopment, like what we’ve seen with Pacoima Plaza, the NoHo Arts District and Bunker Hill. . . . Without redevelopment agencies I am afraid we won’t see the kind of investment our neediest communities deserve.” *Id.*

B. Resurrecting and Reimagining Redevelopment Agencies to Meet the Goals of Senate Bill 375

The same day that the decision in *Matosantos* was handed down by the California Supreme Court, the *Los Angeles Times* noted that “[a]dvocates for the agencies are expected to return to the Legislature to ask lawmakers to recreate them, probably under some sort of revenue-sharing agreement.”¹⁸⁹ The biggest push for re-creation actually came from within the legislature, and it came in the form of Senate Bill 1156 (SB 1156).¹⁹⁰ Senate President Pro Tempore Darrell Steinberg (D-Sacramento) introduced the bill.¹⁹¹ SB 1156 was to give municipalities the ability to use a variety of development and housing tools through the creation of a Community Development and Housing Joint Powers Authority (JPA).¹⁹² The JPAs would have carried out the preexisting redevelopment law provisions, but, notably, JPAs would not have been required to make a finding of blight as previously understood.¹⁹³ Rather, the JPAs would have adopted a redevelopment plan for a project area that, when redeveloped, would have essentially worked to achieve the goals of SB 375.¹⁹⁴

SB 1156 stated that if within an MPO, project areas could include transit priority areas where a transit priority project may be constructed or “small walkable communities” located outside of MPOs.¹⁹⁵ The bill also allowed for redevelopment project areas

¹⁸⁹ *Id.*

¹⁹⁰ S.B. 1156, 2011–12 Legis., Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1156_bill_20120831_enrolled.pdf. For a short summary of the bill, see Office of President pro Tempore Darrell Steinberg, *SB 1156 (Steinberg) As Amended March 30, 2011 Community Development and Housing Joint Powers Authority: “Redevelopment 2.0”*, available at <http://www.climateplan.org/wp-content/uploads/2012/04/1156-fact-sheet1.pdf>.

¹⁹¹ S.B. 1156, 2011–12 Legis., Reg. Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1156_bill_20120831_enrolled.pdf.

¹⁹² *Id.* (proposing the addition of CAL. HEALTH & SAFETY CODE § 34191.20); S. Governance & Fin. Comm., S.B. 1156 B. Analysis, at 2 (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1156_cfa_20120412_133808_sen_comm.html.

¹⁹³ See S.B. 1156, 2011–12 Legis., Reg. Sess., at 6 (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1151-1200/sb_1156_bill_20120831_enrolled.pdf; *id.* at 5 (adding HEALTH & SAFETY § 34191.12, which declares that problems created through development patterns are a form of blight); *id.* (adding HEALTH & SAFETY § 34191.13, which states: “This new program shall use tax increment revenue to fight blight as it is understood in the contemporary setting without including those aspects of the former redevelopment program that created so much controversy . . .”).

¹⁹⁴ See *id.* at 8 (adding HEALTH & SAFETY § 34191.25, which details what can constitute a Sustainable Communities Investment Area).

¹⁹⁵ *Id.* at 8–9 (proposing the addition of HEALTH & SAFETY § 34191.25). A “small walkable community” is defined by the bill as “a project that is located in a small walkable community project area.” *Id.* at 18 (proposing amendments to CAL. PUB. RES.

to include sites that have approvals or restrictions limiting their use to clean energy manufacturing, or are otherwise consistent with the SCS if within an MPO.¹⁹⁶ The bill also allowed for the use of tax increment financing provided that the local government adopted a number of provisions regarding transit priority project areas.¹⁹⁷

Madeline Janis, a Senior Fellow at the UCLA School of Public Affairs, called SB 1156 “one of the most important job creation and environmental bills in recent memory.”¹⁹⁸ Lauding the legislation, Janis stated, “Senate Bill 1156 would create jobs and affordable housing, and promote a vision of health and sustainability that we can be proud of.”¹⁹⁹

Yet, despite passage in both the assembly and the senate,²⁰⁰ Governor Brown vetoed SB 1156 and five other bills that would have given a range of economic development powers back to municipalities.²⁰¹ Although Brown vetoed SB 1156, his veto message did provide a glimmer of hope. The message stated: “The planning and investment that is envisioned by this bill would help to develop and redevelop a California that is sustainable and thriving. I prefer to take a constructive look at implementing

CODE § 21094.5). A “small walkable community project area” means an area within an incorporated city that is not within an MPO and meets a variety of density and area restrictions. *Id.* The bill prohibited a redevelopment plan from designating more than one “small walkable community” project area with a city. *Id.* at 9.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Madeline Janis, *Sustainable Communities Bills Sent to Governor Brown*, CAL. PROGRESS REP. (Sept. 13, 2012), <http://www.californiaprogressreport.com/site/print/10395>.

¹⁹⁹ *Id.*

²⁰⁰ See *Bill Votes, SB-1156 Sustainable Communities Investment Authority*, CAL. LEGIS. INFO., <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> (listing senate and assembly votes for SB 1156).

²⁰¹ Gov. Jerry Brown vetoes replacements for redevelopment agencies, L.A. TIMES (Sept. 29, 2012, 3:57 PM), <http://latimesblogs.latimes.com/california-politics/2012/09/replacements-redevelopment-agencies-vetoed.html>. Among the rejected bills was AB 2144 by Assembly Speaker John Perez (D-Los Angeles). *Id.* The bill would have allowed cities to create “infrastructure and revitalization financing districts” if approved by fifty-five percent of voters. *Id.* Perez desired cities to be able to use property tax and bond revenue to buy and develop land or renovate existing buildings. *Id.* In his veto message, Governor Brown stated: “This measure would likely cause cities to focus their efforts on using new tools provided by the measure instead of winding down redevelopment. This would prevent the state from achieving the General Fund savings assumed in this year’s budget.” *Id.* The other vetoed bills included AB 2144 (“Local government: infrastructure and revitalization financing districts”); AB 2551 (“Infrastructure financing districts: renewable energy zones”); SB 214 (“Infrastructure financing districts” and repeal of voter approval); and SB 1030 (“Redevelopment Property Tax Trust Fund allocations: excess Education Revenue Augmentation Fund moneys”). Josh Stephens, *Brown Adds Insult to Injury with Redevelopment Vetoes*, CAL. PLAN. & DEV. REP. (Sept. 30, 2012, 10:12 AM), <http://www.cp-dr.com/node/3268>.

this type of program once the winding down of redevelopment is complete and General Fund savings are achieved.”²⁰²

Bill Fulton, a nationally renowned urban planner and former mayor of Ventura, CA,²⁰³ suggested two likely reasons why Governor Brown vetoed SB 1156.²⁰⁴ First, he said, there is “still bad blood between [Governor Brown] and the cities. And second, he doesn’t want to do anything that would stimulate the revival of a redevelopment lobby in Sacramento.”²⁰⁵ Fulton also called SB 1156 “a pretty solid piece of legislation,” but noted that it did not contain any state oversight.²⁰⁶ He further opined that despite what cities might desire, state oversight is going to have to be included in any bill involving tax-increment financing.²⁰⁷

Thus, redevelopment as we once knew it is over, and is likely not coming back. But given Governor Brown’s comments and the swift action taken by the legislature to revive major aspects of redevelopment, it seems probable that redevelopment will emerge again—albeit in a new-and-improved form. Next time, as demonstrated by SB 1156, there will hopefully be a major emphasis on achievement of SB 375 objectives.

C. Senate Bill 375: Four Years of Progress

Four years after the passage of SB 375, the MPOs covering Southern California, Sacramento, and San Diego have become the first three metropolitan regions in America to adopt transportation plans that were individually tailored to reduce greenhouse gas emissions.²⁰⁸ As envisioned under SB 375, these metropolitan areas developed Sustainable Community Strategies

²⁰² Letter from Edmund G. Brown, Jr., Governor of Cal., to Members of the California State Senate (Sept. 29, 2012), *available at* http://gov.ca.gov/docs/SB_1156_Veto_Message.pdf. Seven months before Governor Brown vetoed SB 1156, Sen. Alex Padilla (D-Los Angeles), speaking at a conference at UCLA, said legislators were contemplating how redevelopment could be replaced, but believed “the biggest obstacle” would be the governor. Josh Stephens, *Padilla: Governor May Be Biggest Obstacle to Redevelopment 2.0*, CAL. PLAN. & DEV. REP. (Feb. 22, 2012, 1:51 PM), <http://www.cp-dr.com/node/3135>.

²⁰³ *Smart Growth America welcomes Bill Fulton, Mayor of Ventura, CA and urban planning expert, to staff*, SMART GROWTH AMERICA (Nov. 28, 2011), <http://www.smartgrowthamerica.org/2011/11/28/smart-growth-america-welcomes-bill-fulton-mayor-of-ventura-ca-and-urban-planning-expert-to-staff/>.

²⁰⁴ Bill Fulton, *Saving Redevelopment One Project at a Time*, CAL. PLAN. & DEV. REP. (Oct. 23, 2012, 10:53 AM), <http://www.cp-dr.com/node/3278>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ AMANDA EAKEN & JUSTIN HORNER, A BOLD PLAN FOR SUSTAINABLE CALIFORNIA COMMUNITIES: A REPORT ON THE IMPLEMENTATION OF SENATE BILL 375 2 (2012), *available at* <http://www.nrdc.org/globalwarming/sb375/implementation-report/files/implementation-report.pdf>.

(SCSs) consisting of a custom mix of policies, land use decisions, and transportation investments.²⁰⁹ These SCSs “lay the foundation for smarter, more efficient growth and healthier communities.”²¹⁰ A report by the Natural Resources Defense Council praised the efforts of these regions and noted a plethora of benefits that these plans derive.²¹¹ For example, the Sacramento region has allowed for a thirty-nine percent increase in population by 2035, while actually planning a reduction in traffic congestion.²¹² This will be achieved by investments in new housing and jobs in walkable neighborhoods near transit.²¹³

To ensure effective implementation of the plans, the report recommended redevelopment reform that “encourages SB 375-friendly planning, eliminates abuses, and keeps schools funded.”²¹⁴ Thus, there is still an imbalance between what targets SB 375 requires, and the tools that are required to meet those targets.²¹⁵ While coordination between transportation and land use planning will allow for the MPOs to implement their SCSs successfully, the MPOs have no true authority over land use.²¹⁶ Achievement of the state’s climate goals is unlikely unless MPOs are allowed much more control over resources and municipalities are encouraged, through mandates or incentives, to plan their development in accordance with the SCSs.²¹⁷

Without redevelopment agencies and their ability to utilize tax increment financing, it will be more costly for communities to develop SB 375-oriented projects, and there will be less revenue to cover their costs.²¹⁸ But PPPs remain a very viable vehicle of project financing.²¹⁹ In fact, “public-private arrangements will become critical to funding public infrastructure, development, and commercial and industrial projects.”²²⁰ However, as previously noted in the main body of this Note, the success of

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 32.

²¹² *Id.* at 3.

²¹³ *Id.*

²¹⁴ *Id.* at 27.

²¹⁵ Elisa Barbour & Elizabeth A. Deakin, *Smart Growth Planning for Climate Protection*, 78 J. AM. PLAN. ASS’N 70, 75 (2012), available at http://www.des.ucdavis.edu/faculty/handy/TTP220/BarbourDeakin_SB375Eval_SmartGrwothClimateProtection_JAPA_2012.pdf (stating that SB 375, “in spite of ambitious goals, provides few new resources or mandates for either plan development or implementation”).

²¹⁶ *Id.* at 72, 83.

²¹⁷ *Id.* at 83.

²¹⁸ Merewitz & Walsh, *supra* note 158, at 24.

²¹⁹ *Id.* at 27.

²²⁰ *Id.*

PPP financing is unlikely unless the parties are able to align their interests and allocate risk effectively.²²¹

The results of the NRDC study are encouraging as they demonstrate that the SCSs required under SB 375, if properly implemented, will lead to smarter development and will reduce greenhouse gas emissions. But, as was the problem when redevelopment agencies were active, total achievement of SB 375's goals is improbable unless the proper financing, tools, and leadership are organized.

CONCLUSION

Redevelopment was not perfect, nor did anyone seriously contend that it was. But over time it will become evident that the benefits of redevelopment—job creation, economic revitalization, and affordable housing—outweighed its shortcomings.²²² Yet, if SB 1156 is any indication, the foundation underlying California's former redevelopment is going to be continually explored and reworked in the future. Also, as exemplified in SB 1156, any iteration of redevelopment agencies that may be conceived in the future should emphasize sustainable development and air quality—the focal points of SB 375—to preserve California and provide an example to the rest of the nation that smart development can achieve economic and environmental objectives.

²²¹ *Id.*

²²² *Id.* at 28.

Thirty Years of *Adams v. Howerton*:¹ Changed Circumstances, DOMA,² and a Vision of a DOMA-Free World

By Karel Raba*

INTRODUCTION

February 25, 1982, was a bittersweet day for gay rights activists. That Thursday, Wisconsin Governor Lee Dreyfus signed into law a bill prohibiting employment discrimination based on sexual orientation.³ Wisconsin became the first state to enact such a statute.⁴ In bad news, the Ninth Circuit denied spousal status to a same-sex bi-national couple in *Adams v. Howerton*.⁵ By rationalizing the limitation of the term “marriage” to opposite-sex couples for purposes of federal immigration law, it served as both a predecessor to the Defense of Marriage Act (DOMA) and later as its justification.⁶ In light of recent attempts at invalidating DOMA, *Adams* must be well understood for it may become guiding precedent in the Ninth Circuit if DOMA is repealed without replacement.⁷

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¹ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

² The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

³ Ch. 112, 1981 Wis. Sess. Laws; William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 91 n.1 (2007). It took another nine years before another state passed a similar statute. Turner, *supra*, at 93; *see, e.g.*, Act 2, sec. 1, 1991 Haw. Sess. Laws 3, 3; Act 2, sec. 3, 1991 Haw. Sess. Laws 4–5.

⁴ Turner, *supra* note 3, at 93.

⁵ *Adams*, 673 F.2d at 1043. The Ninth Circuit decided the case on February 25, 1982. *Id.*

⁶ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006) (limiting “marriage” to “a legal union between one man and one woman”); 28 U.S.C. § 1738C (2006); *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at *4 (C.D. Cal. Sept. 28, 2011) (dismissing an equal protection challenge to DOMA because its rationality “ha[d] been decided by *Adams*”).

⁷ Seung Min Kim, *Senate Dems Move to Repeal DOMA*, POLITICO (Nov. 10, 2011), <http://www.politico.com/news/stories/1111/68075.html>; *see, e.g.*, Respect for Marriage Act, S. 598, 112th Cong. (2011); Respect for Marriage Act, H.R. 3567, 111th Cong. (2009); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA is unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA is unconstitutional).

Today's validity of the *Adams* decision is best seen in the context of historical developments in the gay rights arena internationally as well as domestically. No country worldwide allowed same-sex unions when *Adams* was decided in 1982.⁸ Now, Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden all grant full marriage rights to same-sex couples.⁹ Gay rights have also garnered greater attention domestically.¹⁰ Anti-discrimination laws similar to that pioneered by Wisconsin in 1982 had been embraced by another thirteen states and the District of Columbia by 2003.¹¹ Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia now extend marriage to same-sex couples and another nine states allow civil unions or registered partnerships.¹² At the same time, however, a number

⁸ Amy R. Brownstein, *Why Same-sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT'L & COMP. L. REV. 763, 767 (1994).

⁹ Emily Alpert, *Gay marriage: Where is it legal?*, L.A. Times (Mar. 26, 2013), <http://www.latimes.com/news/world/worldnow/la-fg-wn-gay-marriage-where-is-it-legal-20130326,0,5848512.story>; *International Progress Toward the Freedom to Marry*, FREEDOM TO MARRY (Dec. 2012), <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry>; Jason Miks, *Same-sex marriage around the world*, CNN (Mar. 25, 2013), <http://globalpublicsquare.blogs.cnn.com/2013/03/25/same-sex-marriage-around-the-world-2/>.

¹⁰ Turner, *supra* note 3, at 91 n.1 (2007); Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 287 (2011). Although Wisconsin was the first state to grant positive anti-discrimination rights to homosexuals, a number of state legislatures and courts had taken steps to at least legalize homosexuality in the preceding decades. *See* Turner, *supra* note 3, at 92. Illinois was the first state to decriminalize sodomy in 1961 followed by Connecticut in 1969. Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1123 n.111 (2004). Prior to *Adams*, twenty more states repealed their sodomy laws legislatively and two with court involvement. *Sodomy Laws in the United States*, SODOMY LAWS (Nov. 24, 2007), <http://www.glapn.org/sodomylaws/usa/usa.htm>; *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980) (invalidating Pennsylvania's sodomy law); *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980) (striking down New York's sodomy law). In the years preceding *Adams*, state courts saw a number of other gay rights challenges though most were unsuccessful. *See, e.g., Inman v. City of Miami*, 197 So. 2d 50, 52 (Fla. Dist. Ct. App. 1967) (rejecting a challenge to Miami's ordinance prohibiting the operation of gay bars); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (rejecting a challenge to a statute limiting marriage to opposite sex couples); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (rejecting a teacher's wrongful discharge claim because, as a homosexual, "his ability and fitness to teach was impaired").

¹¹ *Laws Prohibiting Job Discrimination Based on Sexual Orientation And/Or Gender Identity*, AMERICAN CIVIL LIBERTIES UNION (June 9, 2003), http://www.aclu.org/lgbt-rights_hiv-aids/laws-prohibiting-job-discrimination-based-sexual-orientation-andor-gender-ident. Among the states with job discrimination provisions, some went further to also include "gender identity." *See, e.g.,* MINN. STAT. § 363A.03(44) (2011). By 2012, sixteen states and the District of Columbia had laws prohibiting discrimination on the basis of gender identity or expression. *Non-Discrimination Laws That Include Gender Identity or Expression*, TRANSGENDER LAW & POLICY INSTITUTE (Feb. 17, 2010), <http://www.transgenderlaw.org/ndlaws/index.htm>.

¹² *Same-sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF

of states have incorporated provisions similar to DOMA, so-called “mini-DOMAs,” into their own constitutions.¹³

The divide between the states is akin to the tense and often back-and-forth position of the federal government on gay rights

ST. LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>. Note that only New Hampshire, New York, Vermont, and the District of Columbia legalized same-sex marriages without court involvement. See Forde-Mazrui, *supra* note 10, at 287; Thomas Kaplan, *After Long Wait, Gay Couples Marry in New York*, N.Y. TIMES, July 24, 2011, at A4. Massachusetts, Connecticut, and Iowa legalized same-sex marriage with court compulsion. See Forde-Mazrui, *supra* note 10; Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009). Also, the highest courts of California and Hawaii have ruled in favor of same-sex marriage, but the decisions were later overturned by referenda. Forde-Mazrui, *supra* note 10, at 287–88; In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

¹³ Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 305–06 (2001); see, e.g., ALA. CONST. art. I, § 36.03 (“Marriage is inherently a unique relationship between a man and a woman.”); ALASKA CONST. art. I, § 25 (“[A] marriage may exist only between one man and one woman.”); ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”); CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized.”); COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); FLA. CONST. art. I, § 27 (“[M]arriage is the legal union of only one man and one woman.”); GA. CONST. art. I, § 4, ¶ 1 (“This state shall recognize as marriage only the union of man and woman.”); HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”); IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized.”); KAN. CONST. art. XV, § 16 (“Marriage shall be constituted by one man and one woman only.”); KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”); LA. CONST. art. XII, § 15 (“Marriage . . . shall consist only of the union of one man and one woman.”); MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage.”); MISS. CONST. art. XIV, § 263A (“Marriage may take place and may be valid . . . only between a man and a woman.”); MO. CONST. art. I, § 33 (“[A] marriage shall exist only between a man and a woman.”); MONT. CONST. art. XIII, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”); NEB. CONST. art. I, § 29 (“Only marriage between a man and a woman shall be valid or recognized.”); NEV. CONST. art. I, § 21 (“Only a marriage between a male and female person shall be recognized and given effect.”); N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized.”); OKLA. CONST. art. II, § 35 (“Marriage . . . shall consist only of the union of one man and one woman.”); OR. CONST. art. XV, § 5a (“[O]nly a marriage between one man and one woman shall be valid or legally recognized.”); S.C. CONST. art. XVII, § 15 (“A marriage between one man and one woman is the only lawful domestic union.”); S.D. CONST. art. XXI, § 9 (“Only marriage between a man and a woman shall be valid or recognized.”); TENN. CONST. art. XI, § 18 (“The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract.”); TEX. CONST. art. I, § 32 (“Marriage . . . shall consist only of the union of one man and one woman.”); UTAH CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”); VA. CONST. art. I, § 15-A (“[O]nly a union between one man and one woman may be a marriage valid in or recognized.”); WIS. CONST. art. XIII, § 13 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”).

issues.¹⁴ In 1996, as a reaction to the Hawaiian debate and other advances made by the states, Congress passed the Defense of Marriage Act (DOMA).¹⁵ DOMA set forth that “the word ‘marriage’ means only a legal union between one man and one woman.”¹⁶ While same-sex marriage rights have not been recognized for federal purposes, in a number of instances the federal government has made great strides in support of gay rights.¹⁷ The Immigration Act of 1990 removed homosexuality from the list of grounds for exclusion from immigration to the United States.¹⁸ On October 28, 2009, President Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, a measure which expanded federal hate crime law to include crimes motivated by a victim’s actual or perceived sexual orientation or gender identity.¹⁹ Finally, Don’t Ask Don’t Tell,²⁰ an official government policy banning openly homosexual citizens from serving in the military, was repealed in 2011.²¹

In its decisions regarding gay rights, the stance of the federal judiciary also reflects inconsistencies similar to those seen among the states and in the uncertain and at times opposing positions of

¹⁴ Perhaps the best example of the erratic position of the federal government is President Obama’s order to the Department of Justice to stop defending DOMA and Congress’s subsequent decision to defend DOMA in court. David G. Savage and James Oliphant, *Obama Administration Shifts Legal Stance on Gay Marriage*, L.A. TIMES (Feb. 23, 2011), <http://articles.latimes.com/2011/feb/23/nation/la-na-obama-gay-marriage-20110224>; see also Adam Liptak, *The President’s Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5.

¹⁵ H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23; Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 68 (2011).

¹⁶ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). The law also limited the scope of the Full Faith and Credit Clause by allowing states to decide whether or not to recognize same-sex marriages entered into in other states. *Id.*

¹⁷ *Civil Rights*, WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Sept. 8, 2013); Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L.J. 201, 201 (1994); *Asylum Based on Sexual Orientation and Fear of Persecution*, INDIANA UNIVERSITY (2000), <http://www.indiana.edu/~overseas/lesbigay/advise/asylum.html>; Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, at A13.

¹⁸ McGoldrick, *supra* note 17, at 201.

¹⁹ 18 U.S.C. § 249(a)(2); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (Oct. 28, 2009).

²⁰ 10 U.S.C. § 654 (2006), repealed by Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011). The policy was introduced under President Clinton in 1993 as a compromise. Robert I. Correales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 417 (2008). The policy allowed homosexuals who were not open about their sexual orientation to serve in the military. *Id.* at 415. Prior to Don’t Ask, Don’t Tell, homosexuals and bisexuals were not allowed to serve in the military at all. DEP’T OF DEFENSE DIRECTIVE 1332.14 (1993), available at <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d133214p.pdf>.

²¹ 10 U.S.C. § 654.

the federal legislative and executive branches.²² With specific regard to DOMA, in a 2009 employment dispute resolution hearing, the Ninth Circuit found the law violative of Due Process.²³ In 2010, the United States District Court for the District of Massachusetts invalidated DOMA in two cases as unconstitutional.²⁴ A bankruptcy court in the Central District of California made a similar finding a year later.²⁵ Yet, on September 28, 2011, the Federal District Court in the same California district summarily dismissed a bi-national same-sex couple's equal protection challenge to DOMA in *Lui v. Holder*.²⁶ Curiously, the court seemed to suggest that the question of the 1996 law's validity "ha[d] been decided by *Adams*" in 1982.²⁷ This summary judgment resolution of an equal protection challenge to DOMA is in the least worrisome. Not only does it suggest that the court did not take into account any developments in international and domestic law and policy concerning gay rights over the past thirty years, it also reminds that *Adams* is good law and in the case that DOMA is repealed without replacement, *Adams* may reenter the field as the leading authority on non-recognition of spousal status of same-sex couples under federal immigration law.²⁸

This Note proceeds in four parts and analyzes the validity and applicability of *Adams* today in light of political, social, and judicial developments. Part I describes the history behind the

²² See, e.g., *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding Florida's bar on adoption by homosexuals); *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (upholding Louisiana's refusal to recognize out-of-state adoptions by same-sex couples). But see *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (holding an Oklahoma statute preventing recognition of out-of-state adoptions by same-sex couples unconstitutional); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA is unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA is unconstitutional).

²³ *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009).

²⁴ *Massachusetts*, 698 F. Supp. 2d at 253 (holding that DOMA exceeds Congress's power under the Spending Clause and violates the Tenth Amendment); *Gill*, 699 F. Supp. 2d at 397 (holding DOMA unconstitutional as violative of equal protection).

²⁵ *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (finding that DOMA violated the debtors' equal protection rights).

²⁶ *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at *5 (C.D. Cal. Sept. 28, 2011); Andrew Harmon, *Judge Throws Out Binational Couple's DOMA Lawsuit*, THE ADVOCATE (Sept. 29, 2011), http://www.advocate.com/News/Daily_News/2011/09/29/Judge_Throws_Out_Binational_Couple_s_DOMA_Suit/.

²⁷ *Lui*, 2011 WL 10653943, at *4.

²⁸ There are also a number of cases seeking to invalidate DOMA that have been appealed. See, e.g., *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 1 (1st Cir. 2012) (joining and appealing *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) and *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)). *Windsor v. U.S.* is currently pending in the Supreme Court. *Windsor v. United States: Eddie Windsor Challenges DOMA*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma>.

federal judiciary and legislature's involvement in defining marriage, including *Adams*, DOMA, and the recent challenge in *Lui v. Holder*. Part II then catalogues thirty years of political, social, and judicial changes in the gay rights arena, which may now affect the allegations on which *Adams* and DOMA relied. This Note concludes that in today's political, social, and judicial climate the validity of *Adam's* today is seriously undermined. Part III proposes two solutions that can assist in avoiding a resurrection of *Adams* in later years and help bi-national same-sex couples gain the right to receive spousal status for immigration purposes in accord with current cultural developments.

I. FEDERAL MARRIAGE: THE HISTORY OF DEFINING THE TERM "MARRIAGE" FOR PURPOSES OF FEDERAL LAW

The debate about the meaning of the word "marriage" began in the decade preceding *Adams*.²⁹ With a growing trend to recognize rights traditionally denied to homosexuals, courts around the United States began to see a new kind of equal protection challenge in the 1970s.³⁰ The era of the gay liberation movement first brought same-sex marriage into the spotlight.³¹ As a result of increasing tolerance of the American society, two males were able to obtain a marriage license and sue for federal immigration benefits in *Adams*.³² The Ninth Circuit did not

²⁹ H.R. REP. NO. 104-664, at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-23. The "vigorous public debate" on the definition of the term marriage came later with *Baehr v. Lewin*. Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 109 (1996).

³⁰ See Brownstein, *supra* note 8, at 767; *see, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). In the early 1970s, gays began to pursue legal acceptance of same-sex marriage. Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316, 316 (2009). *Baker* was the first case to challenge the constitutionality of the prohibition of same-sex marriages. Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 964 (1998).

³¹ *Anti-Homosexual Laws*, WASH. POST, May 31, 1977, at C18; Cynthia Gorney, *District's Gays Gain Power After Shedding Secrecy; District's Gays Add to Power by Subtracting From Secrecy*, WASH. POST, May 23, 1977, at C1; *see also* *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499-501 (N.Y. Sup. Ct. 1971) (holding that a marriage between two males was a nullity); *Baker*, 191 N.W.2d at 187 (rejecting a challenge to a statute limiting marriage to opposite sex couples); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that two females cannot enter into a marriage or have a marriage license issued to them); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that a statutory prohibition against same-sex marriages does not violate equal protection).

³² William Greider, *We're Becoming a More Tolerant Society*, WASH. POST, Nov. 25, 1979, at C1. While *Adams v. Howerton* was not decided until 1982, Adams and Sullivan married in 1975 amidst the gay liberation movement of the 1970s. *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982); *Adams v. Howerton*, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980). They resided in Los Angeles and read a magazine article that a clerk in Boulder, Colorado, was issuing marriage licenses to same-sex couples. Scott C. Titshaw,

confer those benefits and instead made crystal clear that “marriage” under the Immigration and Nationality Act (INA) meant a union of one man and one woman.³³ The common law governed this understanding until the passage of DOMA in 1996.³⁴ DOMA brought the holding of *Adams* into the United States Code.³⁵ Since then, DOMA has been the reason for denying immigration benefits to bi-national, same-sex spouses.³⁶ This section delineates the story behind *Adams*, charts the reasoning of the district court and the Ninth Circuit in deciding the case, and clarifies Congress’s rationale in enacting DOMA.

A. *Adams v. Howerton*³⁷

The personal story behind the case started with what ordinarily is a happy moment—a wedding. On April 21, 1975, Sullivan, a male Australian citizen, married Adams, a male citizen of the United States.³⁸ The couple wed in Colorado and soon after Sullivan applied for adjustment of status to permanent residence based on his classification as an immediate relative of his United States citizen husband.³⁹ The Immigration and Naturalization Service (INS) denied immigration benefits to Sullivan because he “failed to establish that a bona fide marital relationship can exist between two faggots.”⁴⁰ The couple appealed the administrative denial in court.⁴¹

The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA, 16 WM. & MARY J. WOMEN & L. 537, 589 (2010). They traveled to Boulder and got married by a minister. *Id.*

³³ *Adams*, 673 F.2d at 1043.

³⁴ 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); see generally Strasser, *supra* note 13; see, e.g., *Sullivan v. I.N.S.*, 772 F.2d 609, 611 (relying on *Adams* and affirming that the Board of Immigration Appeals did not abuse its discretion by ordering deportation of a same-sex spouse); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. App. Div. 2d Dep’t 1993) (relying on *Adams* in holding that prohibiting homosexual partners from electing against decedent’s will as surviving spouse did not violate the constitution).

³⁵ 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife”); *Adams*, 486 F. Supp. at 1122 (“[T]he term ‘marriage’ . . . refers to a contract and ceremony involving . . . ‘a man and a woman.’”).

³⁶ Alicia Caldwell, *Same Sex Couples Denied Immigration Benefits By U.S.*, HUFFINGTON POST (Mar. 30, 2011), http://www.huffingtonpost.com/2011/03/30/same-sex-couples-denied-i_n_842646.html.

³⁷ *Adams*, 673 F.2d 1036; *Adams*, 486 F. Supp. 1119.

³⁸ *Adams*, 486 F. Supp. at 1120; Sullivan was previously married to a woman and granted Permanent Resident Status but his status was revoked as not bona fide. Titshaw, *supra* note 32, at 588–89.

³⁹ *Adams*, 486 F. Supp. at 1120.

⁴⁰ *Id.* at 1121; Titshaw, *supra* note 32, at 588; *Quotes*, A.B.A. J., Aug. 1984, at 33.

⁴¹ Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 355 (2007).

1. District Court Decision⁴²

Perplexed with a lack of definition of the word “spouse,” the court promulgated a rule for determining spousal status for immigration purposes.⁴³ The court deduced that congressional intent demands that courts look to the law of the place where the marriage was contracted, unless “the state law (or in certain instances the foreign law) is one which offends federal public policy.”⁴⁴ In such instance, federal public policy should prevail.⁴⁵

In evaluating the state law element the court refused to brand the union between Adams and Sullivan a “marriage.”⁴⁶ First, it reasoned that “‘marriage’ as used throughout Colorado law refers to a contract and ceremony involving . . . ‘a man and a woman.’”⁴⁷ Second, “every legal source that [the Judge] examined, starting with Black’s Law Dictionary” supported the same conclusion.⁴⁸ Third, a number of states, namely New York,⁴⁹ Minnesota,⁵⁰ Kentucky,⁵¹ and Washington,⁵² in various cases defined marriage as a union of a man and a woman. Lastly, the court pointed out that “no court has yet recognized a union between persons of the same sex as being a legal marriage.”⁵³ On these grounds, the Court concluded that Adams and Sullivan were not married under Colorado law.⁵⁴

Judge Hill then analyzed the federal public policy exception, particularly the “societal values which underlie the recognition of marriage and the reasons that it has been a preferred and protected legal institution.”⁵⁵ Among the societal values crucial to reserving marriage solely for heterosexual couples, the court listed “propagation of the human race,” centuries of scriptural

⁴² *Adams*, 486 F. Supp. at 1119.

⁴³ *Id.* at 1121–22.

⁴⁴ *Id.* at 1122.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* Note that today Colorado allows civil unions for same-sex couples. Dan Frosch, *Colorado Legalizes Civil Unions for Same-Sex Couples*, N.Y. TIMES (Mar. 12, 2013), http://www.nytimes.com/2013/03/13/us/colorado-legalizes-civil-unions-for-same-sex-couples.html?_r=0.

⁴⁸ *Adams*, 486 F. Supp. at 1122.

⁴⁹ *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499–501 (N.Y. Sup. Ct. 1971) (holding that a marriage between two males was a nullity).

⁵⁰ *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (rejecting a challenge to a statute limiting marriage to opposite sex couples).

⁵¹ *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that two females cannot enter into a marriage or have a marriage license issued to them).

⁵² *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that a statutory prohibition against same-sex marriages does not violate equal protection).

⁵³ *Adams*, 486 F. Supp. at 1122–23. *Contra Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (upholding validity of same-sex marriages in California).

⁵⁴ *Adams*, 486 F. Supp. at 1123.

⁵⁵ *Id.*

and canonical teachings, and “vehement condemnation in the scriptures of [Christianity and Judaism] of all homosexual relationships.”⁵⁶ For the above reasons, even if Colorado law had recognized Adams and Sullivan’s union as a marriage, federal policy would not grant them spousal status for immigration purposes.⁵⁷

The court then rebutted any arguments that the above rule constituted a denial of the couple’s constitutional rights.⁵⁸ It concluded that it served a compelling state interest and was narrowly tailored to that effect.⁵⁹ As for the interest, the court pointed to “encouraging and fostering procreation . . . and providing status and stability to the environment in which children are raised.”⁶⁰ The court found the restriction of marriage to heterosexual couples to be the least intrusive option narrowly tailored to achieve the above goal.⁶¹ It did so because the one alternative to this end, testing couples for sterility and questioning them regarding their desire to have children, “would themselves raise serious constitutional questions.”⁶² With this reasoning the court granted summary judgment for the INS.⁶³

2. Ninth Circuit Decision⁶⁴

Adams and Sullivan appealed to the Ninth Circuit.⁶⁵ The court set out to answer the same questions as the court below.⁶⁶ First, whether the term “spouse” in the Immigration and Naturalization Act is limited to heterosexual couples, and second, whether such statutory construction is constitutional.⁶⁷ In determining the validity of a marriage for immigration purposes, the court presented a two-step analysis similar to that of the district court.⁶⁸ To be recognized for federal immigration purposes, a marriage must be (1) “valid under state law” and (2) “qualif[y] under the [Immigration and Nationality] Act.”⁶⁹ The

⁵⁶ *Id.* Christian traditions have played a major role in American jurisprudence and the Bible has been cited in hundreds of decisions. J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187, 187 (1991).

⁵⁷ *Adams*, 486 F. Supp. at 1123.

⁵⁸ *Id.* at 1124.

⁵⁹ *Id.* at 1125.

⁶⁰ *Id.* at 1124.

⁶¹ *Id.* at 1125.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

⁶⁵ *Id.*; see Francoeur, *supra* note 41, at 355.

⁶⁶ See Francoeur, *supra* note 41, at 355.

⁶⁷ *Adams*, 673 F.2d at 1038.

⁶⁸ *Id.*

⁶⁹ *Id.*

court refused to address the first element.⁷⁰

Instead, it set out to define the intent of Congress to determine whether the marriage qualifies under the Act.⁷¹ It concluded that it does not.⁷² First, the court gave deference to the Immigration and Naturalization Service,⁷³ as the agency charged with the interpretation of the Immigration and Nationality Act, and its interpretation that homosexual marriage does not confer spousal status for immigration purposes.⁷⁴ Second, as a matter of statutory construction, the court found that “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,” which in this case favored opposite-sex couples.⁷⁵ Third, because the 1965 amendment to the INA that added the word spouse also clearly expressed intent to make homosexuality a ground for inadmissibility to the United States, the court concluded that Congress did not intend to confer spousal status on same-sex marriages.⁷⁶

⁷⁰ It has been argued that the court went too far in wanting to define the meaning of marriage for federal immigration purposes since it had good evidence that the first prong of the test was not met under Colorado law. See Titshaw, *supra* note 32, at 590. In fact, the district court even cited an opinion by the Colorado Attorney General stating that same-sex marriages were of no legal effect in Colorado. *Id.*

⁷¹ *Adams*, 673 F.2d at 1039.

⁷² *Id.* at 1040.

⁷³ The Homeland Security Act of 2002 dismantled the Immigration and Naturalization Service. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). On March 1, 2003, the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP) took over the responsibilities of the INS within the newly created Department of Homeland Security. *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (May 25, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/vgnnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD>.

⁷⁴ *Adams*, 673 F.2d at 1040.

⁷⁵ *Id.* The court supported its point by reference to Webster's Third New International Dictionary and Black's Law Dictionary and their definition of marriage as between a man and a woman. *Id.* Similar reasoning was used in *Jones v. Hallahan*, 501 S.W. 2d 588, 589 (Ky. 1973) (“[Marriage] must . . . be defined according to common usage.”). *Jones* referred to Webster's New International Dictionary, The Century Dictionary and Encyclopedia, and Black's Law Dictionary. *Id.*

⁷⁶ *Adams*, 673 F.2d at 1040–41. The exclusion of homosexuals from immigration has an interesting history. The Immigration and Nationality Act of 1940 denied immigration benefits to those who could not demonstrate good moral character, but it did not specifically include homosexuality. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy*, *Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 930 (1997). The Immigration and Nationality Act of 1952 (McCarran-Walter Act) prohibited immigration into the United States of those “afflicted with psychopathic personality.” *Id.*; Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, ch. 477, § 212(a)(4), 66 Stat. 163, 182 (repealed 1990). The INS interpreted this language to exclude homosexuals and bisexuals. Eskridge, *supra*, at 930. A number of cases unsuccessfully challenged this interpretation. *Id.* To strengthen the INS interpretation of the law, Congress added “sexual deviation” as a basis for exclusion in 1965. Eskridge, *supra*, at 932. The exclusion of homosexuality was firmly set in place by the Supreme Court in 1967. *Id.*; *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123–25 (1967) (holding that homosexuality is covered

The Ninth Circuit then assessed the constitutionality of this interpretation.⁷⁷ The court applied rational basis scrutiny because Congress has “almost plenary power to admit or exclude aliens.”⁷⁸ It noted that irrationality lies where the interpretation is “so baseless as to be violative of due process” but that “there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.”⁷⁹

It first analogized the exclusion of same-sex marriages to other close family relationships that Congress did not place into the immediate relative category.⁸⁰ Finally, the court reasoned that because “homosexual marriages never produce offspring, . . . they are not recognized in most, if in any, of the states, . . . [and] they violate traditional and often prevailing societal mores,” it was rational for Congress to intend to exclude them from spousal status under the INA.⁸¹ With this reasoning the court affirmed the District Court’s judgment.⁸²

B. The Defense of Marriage Act⁸³

Prior to the passage of DOMA, courts were left to their own logic in delineating the scope of the term “marriage.”⁸⁴ *Adams* remained the leading point of reference in defining “marriage” for federal immigration purposes until 1996.⁸⁵ A Congressional Report from the same year very well clarified the history

in the INA under the “psychopathic personality” provision). In later years the situation improved with the INS’s “ingenious don’t ask, don’t tell policy” which stated that “[a]n alien shall not be asked any questions concerning his or her sexual preference during primary inspection.” Eskridge, *supra*, at 937. For those whose homosexuality was known, the INS adopted a policy of routinely granting waivers of excludability. *Id.* at 939. Finally, the Immigration Act of 1990 removed homosexuality as grounds for exclusion from immigration to the United States. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

⁷⁷ *Adams*, 673 F.2d at 1041–43.

⁷⁸ *Id.* at 1041; *see also* *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“The power of Congress over the admission of aliens and their right to remain is necessarily very broad.”); *Demore v. Kim*, 538 U.S. 510, 511 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Boutilier*, 387 U.S. at 123 (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”).

⁷⁹ *Adams*, 673 F.2d at 1041–43.

⁸⁰ *Id.* at 1042. Today the United States Code notes that “the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

⁸¹ *Adams*, 673 F.2d at 1042–43.

⁸² *Id.* at 1043.

⁸³ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

⁸⁴ *Titshaw*, *supra* note 32, at 588.

⁸⁵ *Strasser*, *supra* note 13, at 270.

surrounding the need for DOMA.⁸⁶ On a political level, the law was “a response to a very particular development in the State of Hawaii.”⁸⁷ Namely, Congress feared that Hawaii or another state would soon begin issuing marriage licenses to same-sex couples.⁸⁸ Such occurrence would likely have had a wide impact since the word “marriage” appeared more than 800 times and the term “spouse” in over 3,100 instances within federal statutes and regulations.⁸⁹ Yet, neither of the two words was expressly defined in federal law.⁹⁰ In fact, the report noted that “there was never any reason [for Congress] to make explicit what has always been implicit.”⁹¹ The Committee compiling the report noted with certainty that none of the laws “were thought by even a single Member of Congress to refer to same-sex couples.”⁹² The House Committee on the Judiciary found it “beyond question” that Congress did not intend to extend the terms “marriage” and “spouse” to same-sex couples.⁹³ Armed with such strong reasoning, the bill passed Congress and in the late hours of September 21, 1996, President Clinton signed the Defense of Marriage Act into law.⁹⁴ In the House Report on DOMA, Congress also identified four areas of governmental interest that DOMA advances.⁹⁵

First, the law advances the interest of “defending and nurturing the institution of traditional heterosexual marriage.”⁹⁶ In elaborating on that goal, Congress identified the “ends of marriage.”⁹⁷ Accordingly, society has an interest in “encouraging responsible procreation and child-rearing.”⁹⁸ It does so through marriage—an institution that “approves and encourages sexual

⁸⁶ H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23.

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 4–7. This fear stemmed from tension between the Hawaii Supreme Court and the state legislature. *Id.* The Court sought to extend marriage rights to same-sex couples under the state constitution while the legislature attempted to word and pass a constitutional amendment that would limit marriage to opposite-sex couples and withstand judicial review. *Id.*; *Baehr v. Lewin*, 852 P.2d 44, 54–55 (Haw. 1993).

⁸⁹ H.R. REP. NO. 104-664, at 10.

⁹⁰ *Id.* The Congressional Report notes “very limited exceptions” where federal law in some way did elaborate on the meaning of the term “spouse.” *Id.*; *see, e.g.*, 29 U.S.C. § 2611(13) (1965) (defining “spouse” for the purposes of family and medical leave as “a husband or wife”). Since the terms “husband” and “wife” are used among same-sex couples, this distinction did not convey any further clarification of the term with respect to same-sex couples.

⁹¹ H.R. REP. NO. 104-664, at 10.

⁹² *Id.*

⁹³ *Id.* at 10 n.35.

⁹⁴ 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

⁹⁵ H.R. REP. NO. 104-664, at 12.

⁹⁶ *Id.* at 12.

⁹⁷ *Id.* at 13.

⁹⁸ *Id.*

intercourse and the birth of children.”⁹⁹ This makes marriage a means of signaling to couples that their long-term relationship is “socially important.”¹⁰⁰

Second, DOMA “defend[s] traditional notions of morality.”¹⁰¹ Specifically, the law “reflect[s] and honor[s] a collective moral judgment about human sexuality.”¹⁰² Congress noted that there are two components to this moral judgment—“disapproval of homosexuality” and a “conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”¹⁰³ Congress found it “entirely appropriate” to make such judgment to protect “immoral” conduct from trivializing and demeaning traditional marriage.¹⁰⁴

Third, DOMA “protect[s] state sovereignty and democratic self-governance.”¹⁰⁵ Mimicking the tension between the state legislature and the state judiciary in Hawaii, the House Report voices fear that judicial control over the matter of marriage diminishes democratic self-governance.¹⁰⁶ The report argues that it should be the legislature that “preserve[s] the will of the people” not the courts.¹⁰⁷

Fourth, DOMA “preserve[s] scarce government resources.”¹⁰⁸ Simply put, the federal government expressed a concern that the recognition of same-sex marriages would create “certain fiscal obligations” by means of having to pay federal benefits to same-sex spouses.¹⁰⁹

⁹⁹ *Id.* at 14.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 15.

¹⁰³ *Id.* at 16; *see also* Medina, *supra* note 56.

¹⁰⁴ H.R. REP. NO. 104-664, at 16. Morality arguments have often been made in older court cases with reference to homosexuality. *See, e.g.*, Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1345 (Wash. 1977) (“Homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times.”); Norton v. Macy, 417 F.2d 1161, 1165 n.18 (D.C. Cir. 1974) (“Homosexual conduct is commonly considered as ‘immoral’ under the prevailing mores of our society.”). Although infrequently, such arguments are still occasionally seen in judicial opinions. *See, e.g.*, Ex Parte H.H., 830 So. 2d 21, 28 (Ala. 2002) (Moore, J., concurring) (“The Courts of Alabama should continue to recognize that a homosexual lifestyle is ‘illegal under the laws of this state and immoral in the eyes of most of its citizens.’”).

¹⁰⁵ H.R. REP. NO. 104-664, at 12.

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.* at 18. While conservative voices think that it “would cost the government too much money if same-sex couples had access to Social Security,” there are no reliable numbers available. *Repeal of DOMA Passes Senate Judiciary Committee*, WASH. INDEP. (Nov. 10, 2011), <http://washingtonindependent.com/115804/repeal-of-doma-passes-senate-judiciary-committee>; Andrew Harmon, *A Major Milestone? DOMA Repeal Advances in the Senate*, ADVOCATE (Nov. 11, 2011), http://www.advocate.com/News/Daily_News/2011/11/10/Senate_Committee_to_Vote_on_DOMA_Repeal_Bill/. Note also the immeasurable

With the above justification, DOMA officially limited the reach of the term “marriage” under federal law to opposite-sex couples.¹¹⁰ Since then, in a number of instances members of Congress have attempted to repeal DOMA.¹¹¹ Recently, the law has created a divide between the executive branch and the federal legislature.¹¹² Today, the Department of Justice no longer defends DOMA in courts.¹¹³ While the statute remains in effect, it raises serious questions of constitutional law.¹¹⁴

C. *Lui v. Holder*¹¹⁵

Lui and Roberts are a same-sex couple. Lui, a citizen of Indonesia, married Roberts, a United States citizen, in Massachusetts¹¹⁶ in 2009.¹¹⁷ Roberts filed a petition with the U.S.

costs imposed upon the same-sex spouses who cannot take advantage of “some 1,100 federal benefits, ranging from filing joint tax returns to qualifying for side-by-side burial in a US military cemetery.” Warren Richey, *Senate hearing chronicles costs of DOMA: lost dignity, financial ruin*, CHRISTIAN SCI. MONITOR (July 20, 2011), <http://www.csmonitor.com/USA/Politics/2011/0720/Senate-hearing-chronicles-costs-of-DOMA-lost-dignity-financial-ruin>.

¹¹⁰ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

¹¹¹ Respect for Marriage Act, S. 598, 112th Cong. (2011); Respect for Marriage Act, H.R. 3567, 111th Cong. (2009). The most recent initiative, Senate Bill 598 proposed by Diane Feinstein, successfully passed the Senate Judiciary Committee on November 10, 2011. Paul Guequierre, *Senate Judiciary Committee Approves Bill Repealing Discriminatory Defense of Marriage Act*, HUMAN RIGHTS CAMPAIGN BLOG (Nov. 10, 2011), <http://www.hrc.org/blog/entry/senate-judiciary-committee-approves-bill-repealing-doma>. President Obama supports the above bill. David Nakamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, WASH. POST (July 19, 2011), http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/g1QA03eQOI_story.html. Note Senator Feinstein’s curious history. When serving as the Mayor of San Francisco she had to apologize for anti-gay remarks and in fact vetoed a domestic partnership bill passed by the San Francisco Board of Supervisor in 1982 because she found something that “mimics a marriage license” unacceptable. See Eskridge, *supra* note 76, at 946.

¹¹² Robert J. Delahunty, *The Obama Administration’s Decisions to Enforce, but Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 69 (2011); Michelle Garcia, *81 Reps Condemn Obama’s DOMA Stance*, THE ADVOCATE (Mar. 15, 2011), <http://www.advocate.com/News/Daily-News/2011/03/15/81-Reps-Condemn-Obamas-DOM-A-Stance/>.

¹¹³ See Delahunty, *supra* note 112, at 69. On February 23, 2011, in a letter to Congress, Attorney General Eric Holder wrote that “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.” *Id.*

¹¹⁴ Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 936 (2010). A minority of scholars believe that DOMA is fully constitutional. Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 974 (2010).

¹¹⁵ *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943 (C.D. Cal. Sept. 28, 2011).

¹¹⁶ Massachusetts began issuing marriage licenses to same-sex couples on May 17, 2004, as a result of a decision by the state’s Supreme Court. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16. At that time,

Citizenship and Immigration Services (USCIS) to classify Lui as an immediate relative.¹¹⁸ Following a denial of the petition and a dismissal of their appeal, the plaintiffs filed suit in the United States District Court for the Central District of California.¹¹⁹ The couple alleged discrimination in violation of the INA's anti-discrimination provision and challenged DOMA's definition of "marriage" on equal protection grounds.¹²⁰ The Service responded with a partial 12(b)(6) motion seeking to dismiss the plaintiffs' first claim.¹²¹ The Bipartisan Legal Advisory Group for the U.S. House of Representatives¹²² intervened and moved to dismiss the DOMA claim.¹²³

The court granted both summary judgment motions.¹²⁴ With respect to the constitutional challenge to DOMA, the court reasoned that this issue had been settled in *Adams*.¹²⁵ The court found *Adams* binding because the definition of "marriage" in that case and in DOMA were the same.¹²⁶ Although the plaintiff made it clear to the tribunal that much has changed since *Adams* was decided, the court expressly declined to critique *Adams*'s reasoning.¹²⁷ It ultimately concluded that *Adams* resolved

out-of-state residents were unable to obtain marriage licenses in the state. The Honorable Roderick L. Ireland, *In Goodridge's Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1428 (2010). A 1913 law prohibited those who could not marry in their own state to contract a marriage in Massachusetts. *Id.* at 1427. Following an unsuccessful legal challenge to the law in 2006, the legislature repealed the discriminatory statute in 2008. *Id.* at 1429; *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 631 (Mass. 2006); 2008 Mass. Acts ch. 216 §§ 1–2 (repealing MASS. GEN. LAWS ch. 207, §§ 11–13, 50).

¹¹⁷ *Lui*, 2011 WL 10653943, at *2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*; 1 U.S.C. § 7 (2006).

¹²¹ *Lui*, 2011 WL 10653943, at *1.

¹²² Following President Obama's refusal to defend DOMA in court, the House of Representatives stepped in to defend the law in courts. Jennifer Steinhauer, *House Republicans Step in to Defend Marriage Act and Dodge a Party Debate*, N.Y. TIMES, Mar. 5, 2011, at A16; Brian Brown, *Gay Marriage and Obama's End Run Around Democracy*, WASH. POST, Feb. 24, 2011, at A17. The Bipartisan Legal Advisory Group voted along party lines to initiate this action to defend DOMA and hired the law firm of King & Spalding and specifically one of its partners, former solicitor general Paul Clement, to lead the litigation team. Nancy Pelosi, *Pelosi Statement After Bipartisan Legal Advisory Group Vote on DOMA* (Mar. 9, 2011), available at <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-statement-after-bipartisan-legal-advisory-group-vote-on-doma.shtm>; Sandhya Somashekhar, *Firm Defending Defense of Marriage Act Withdraws from Case*, WASH. POST, Apr. 25, 2011, at A2. After criticism from gay rights groups, King & Spalding withdrew from the representation. *Id.* Paul Clement resigned from King & Spalding and brought the case to Bancroft, PLLC. *Id.*

¹²³ *Lui*, 2011 WL 10653943, at *1.

¹²⁴ *Id.* at *5.

¹²⁵ *Id.* at *4.

¹²⁶ *Id.*

¹²⁷ *Id.*; Defendants' Opposition to Bipartisan Legal Advisory Group's Motion to Dismiss, at *5–6 n.7, *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx) (C.D. Cal. Sept. 26, 2011).

“Congress’s decision to confer spouse status . . . only upon the parties to heterosexual marriages has a rational basis.”¹²⁸ On that ground, the court summarily dismissed the case.¹²⁹

II. POLITICAL, SOCIAL, AND JUDICIAL DEVELOPMENTS OF THE PAST THIRTY YEARS UNDERMINE THE REASONING BEHIND *ADAMS* AND DOMA

Judge Stephen Wilson declined to address the reasoning of *Adams* when he justified the dismissal of *Lui* with the *Adams* precedent. However, to truly understand the validity of *Adams* and DOMA today, this Note evaluates each of the pillars of the *Adams* decision and Congress’s reasoning behind enacting DOMA in light of political, social, and judicial developments of the past thirty years.

A. Political Developments (1982–Present)

The Congressional Report attached to DOMA clearly based part of its reasoning on the fact that “same-sex marriage is allowed in no country . . . in the world.”¹³⁰ The same held true in 1982 when *Adams* was decided.¹³¹ Today, same-sex marriages are legal in Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden.¹³² Additionally, a number of countries around the world allow civil unions and registered partnerships, a development that did not occur until 1989 when Denmark became the first country to legalize same-sex unions.¹³³

Big changes have also occurred domestically.¹³⁴ The court in *Adams* justified its decision in part by the fact that in 1982 same-sex marriages were “not recognized in most, if in any, of the states.”¹³⁵ The supporters of DOMA provided similar reasoning in noting that “[n]o State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.”¹³⁶ Today, Connecticut,¹³⁷ Iowa,¹³⁸ Massachusetts,¹³⁹

¹²⁸ *Lui*, 2011 WL 10653943, at *4.

¹²⁹ *Id.* at *5.

¹³⁰ H.R. REP. NO. 104-664, at 3 n.1 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23.

¹³¹ Brownstein, *supra* note 8, at 767.

¹³² *Same-sex marriage around the world: From criminal prosecutions to legal unions*, CBC NEWS (May 29, 2009), <http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html>.

¹³³ Brownstein, *supra* note 8, at 767; see, e.g., *Activities in other countries: Albania, Brazil, Czech Republic, and England*, RELIGIOUS TOLERANCE (June 29, 2010), http://www.religioustolerance.org/hom_mary.htm.

¹³⁴ Brownstein, *supra* note 8, at 763.

¹³⁵ *Adams v. Howerton*, 673 F.2d 1036, 1041–43 (9th Cir. 1982).

¹³⁶ H.R. REP. NO. 104-664, at 3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23.

¹³⁷ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) (holding

New Hampshire,¹⁴⁰ New York,¹⁴¹ Vermont,¹⁴² and the District of Columbia¹⁴³ perform same-sex marriages.¹⁴⁴ Maryland does not perform same-sex marriages but, as opined by the Maryland Attorney General, extends the applicability of the Full Faith and Credit Clause to marriages performed elsewhere.¹⁴⁵ The first civil

that restriction of marriage rights to opposite-sex couples violated same-sex couples' state constitutional rights). In 2009, the Connecticut legislature scratched the old marriage law that had been invalidated by the court and replaced it with a gender-neutral counterpart. Chase Matthews, *Connecticut Gov. signs gay marriage into law*, CHICAGO PRIDE (Apr. 23, 2009), <http://chicago.gopride.com/news/article.cfm/articleid/7272400>. Today, the Connecticut statute, besides age limitations, prohibits marriage only between a person and his or her parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent, or stepchild. CONN. GEN. STAT. § 46b-21 (2009).

¹³⁸ *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (requiring statutory language banning same-sex marriage to be stricken). Iowa began issuing marriage licenses to same-sex couples on April 27, 2009. Monica Davey, *A Quiet Day in Iowa as the State Begins Allowing Same-Sex Couples to Marry*, N.Y. TIMES, Apr. 28, 2009, at A12.

¹³⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (validating same-sex marriages in Massachusetts).

¹⁴⁰ N.H. REV. STAT. ANN. § 457:1-a (2009). The law today states that "[m]arriage is the legally recognized union of 2 people" and "[a]ny person . . . may marry any other eligible person regardless of gender." *Id.* Governor John Lynch signed the law on June 3, 2009. Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

¹⁴¹ N.Y. DOM. REL. LAW § 10-a (McKinney 2011). New York began issuing marriage licenses to same-sex couples in July 2011 and is the most recent state to legalize same-sex marriage. Michael Barbaro & Nicholas Confessore, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

¹⁴² In 1999, the Supreme Court of Vermont ruled that "exclusion of same-sex couples from the benefits incident to a civil marriage" is violative of the state constitution. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). On July 1, 2000, Vermont became the first state to grant civil unions to same-sex couples with the same legal rights and responsibilities of marriage. *Exchanging of Vows by Gays in Vermont*, N.Y. TIMES, July 2, 2000, at 10. Years later, in a heated exchange between the Vermont legislature and the state's Governor, the state legislature overruled the Governor's veto of a bill legalizing same-sex marriage. *Triumph for Equality*, WASH. POST, Apr. 8, 2009, at A16. In 2009, Vermont then became "the first state to legally recognize gay marriage through a legislative act rather than a court order." *Id.* Interestingly, legislators in the District of Columbia voted to recognize gay marriage performed elsewhere on the same day. *Id.*

¹⁴³ D.C. CODE § 46-401 (2010). The statute reads that "[m]arriage is the legally recognized union of 2 persons" and "[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender." *Id.* Another major victory came in the months following the passage of the same-sex marriage law. On July 15, 2010, the District of Columbia Court of Appeals held that allowing an initiative seeking to define marriage as between a man and a woman to be put on a ballot would violate the District of Columbia Human Rights Act. *Jackson v. D.C. Bd. of Elections and Ethics*, 999 A.2d 89, 120 (D.C. 2010); *Victory for Gay Marriage in D.C.*, THE ADVOCATE (July 15, 2010), http://www.advocate.com/News/Daily_News/2010/07/15/Victory_for_Gay_Marriage_in_DC/.

¹⁴⁴ *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 21, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>.

¹⁴⁵ The Honorable Richard S. Madaleno, Jr., *Marriage — Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, OFF. OF THE ATT'Y GEN. (Feb. 23, 2010), <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>. While Maryland's recognition of out-of-state, same-sex marriage is not black letter law, the advisory opinion of the Attorney General has been given credence by courts. Don Aines, *Judge: Woman doesn't have to testify against same-sex spouse*, HERALD-

union laws in the United States also did not appear until the previous decade.¹⁴⁶ With the addition of Hawaii and Delaware on January 1, 2012, eleven states now recognize civil unions or registered partnerships.¹⁴⁷ Besides same-sex marriage and civil union laws, since 1982, states have passed a number of other bills granting additional rights to homosexuals.¹⁴⁸ For example, as of 2012, sixteen states, the District of Columbia, and 143 cities and counties had passed positive anti-discrimination statutes that not only provide protection from discrimination based on sexual orientation but also gender identity.¹⁴⁹

The federal government's view of homosexuality has also changed in ways that were unthought-of in 1982.¹⁵⁰ After many decades, homosexuality was removed as a basis for exclusion from immigration in 1990.¹⁵¹ Persecution on account of sexual orientation has been officially recognized as grounds for asylum in the United States since 1994.¹⁵² The discriminatory Don't Ask, Don't Tell military policy was finally repealed in 2011.¹⁵³ Today, the Department of Justice no longer defends DOMA in courts because of the President's view that the law is unconstitutional.¹⁵⁴

MAIL (June 23, 2011), <http://www.herald-mail.com/news/local/hm-judge-rules-that-samesex-spouse-can-invoke-spousal-privilege-20110623,0,3777097.story>.

¹⁴⁶ Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L.Q. 333, 347 (2008). Vermont was the first state to begin granting civil unions in 2000. *Id.*

¹⁴⁷ *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 21, 2013), <http://www.ncsl.org/default.aspx?tabid=16430>. As of March 2013, nine states and the District of Columbia offer marriage licenses to same-sex couples and five states "allow" civil unions. *Id.* Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia authorize same-sex marriages. *Id.* Delaware, Hawaii, Illinois, New Jersey, and Rhode Island allow civil unions which "[provide] state-level spousal rights to same-sex couples." *Id.* California, Nevada, Oregon, and Washington "grant[] nearly all state-level spousal rights to unmarried couples." *Id.*

¹⁴⁸ *Non-Discrimination Laws that include gender identity and expression*, TRANSGENDER L. & POL'Y INST. (Feb. 17, 2010), <http://www.transgenderlaw.org/ndlaws/index.htm>

¹⁴⁹ *Id.*; see, e.g., MINN. STAT. § 363A.03(44) (2011).

¹⁵⁰ See Brownstein, *supra* note 8, at 767.

¹⁵¹ See Immigration Act of 1990, PL 101-649, 104 Stat 4978 (1990); see, e.g., Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 295 (1984); Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What Is the Future for Homosexual Aliens*, 7 YALE L. & POL'Y REV. 201, 201 (1989).

¹⁵² *Asylum Based on Sexual Orientation And Fear of Persecution*, INDIANA U. (2000), <http://www.indiana.edu/~overseas/lesbigay/advise/asylum.html>.

¹⁵³ 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011). James Dao, *Don't Ask, Don't Tell Ends This Week With Celebrations, Revelations and Questions*, (Sept. 19, 2011, 7:00AM), <http://atwar.blogs.nytimes.com/2011/09/19/dont-ask-dont-tell-ends-this-week-with-celebrations-revelations-and-questions/>.

¹⁵⁴ See Delahunty, *supra* note 112, at 69. In the immigration context, the USCIS has also shown signs of trying to find ways to accommodate same-sex couples while

The international and domestic political changes charted above show how different the political climate is today from what it was in 1982 and 1996. For those same reasons, it is questionable why the *Lui* court so stringently held onto *Adams*—a decision from an era when same-sex marriages were merely a wish of many and the concept of civil unions was yet to materialize.

B. Social Developments (1982–Present)

The following section juxtaposes major social developments of the past three decades to the reasoning of the *Adams* court and that of Congress in enacting DOMA. It begins with the concept of social mores, the developments in the customary meaning of the words “marriage” and “spouse,” and ends with the meaning and importance of procreation for today’s society.

1. Social Mores

The *Adams* decisions, as well as Congress in passing DOMA, relied on arguments that take into account social mores.¹⁵⁵ The fundamental cornerstones of that reasoning no longer hold true today. The Ninth Circuit specifically based its reasoning on the fact that same-sex marriages “violate traditional and often prevailing societal mores.”¹⁵⁶ In fact, the district court in *Adams* was wise to point out the “vehement condemnation in the scriptures of [Christianity and Judaism] of all homosexual relationships.”¹⁵⁷ Similarly, the House Committee also pointed out its “conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”¹⁵⁸ There is little doubt that heterosexual marriages are truly more “traditional” in the sense that they have been around for centuries.¹⁵⁹ Yet, what may have a long history, as does discrimination against blacks in the United States, or is sanctioned in the Bible or Torah, such as mandating levirate marriage, is not necessarily a prevailing societal more today.¹⁶⁰

Research shows that homosexuality is accepted by a majority

DOMA is being litigated in court. Julia Preston, *Confusion Over Policy on Married Gay Immigrants*, N.Y. TIMES, Mar. 30, 2011, at A14. One of the debated options was delaying decisions on immigrant visa petitions filed by same-sex spouses. *Id.*

¹⁵⁵ *Adams v. Howerton*, 673 F.2d 1036, 1042–43 (9th Cir. 1982); H.R. REP. NO. 104-664, at 15–16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23.

¹⁵⁶ *Adams*, 673 F.2d. at 1043.

¹⁵⁷ *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

¹⁵⁸ H.R. REP. NO. 104-664, at 16; *see also* Medina, *supra* note 56, at 191.

¹⁵⁹ *See Adams*, 673 F.2d at 1042–43.

¹⁶⁰ *Deuteronomy* 25:5–6; *Genesis* 38:8; Marcia Johnson, *The Systematic Denial of the Right to Vote to America’s Minorities*, 11 HARV. BLACK LETTER L.J. 61, 62 (1994).

of the society in the United States.¹⁶¹ In 2007, the media released a poll pointing out that “since 1977 public support of legalization of ‘homosexual relations between consenting adults’ has risen from 43% to a record-breaking 59%.”¹⁶² On the same note, Gallup’s opinion poll from May 2010 shows that 62% of men and 59% of women between the ages of eighteen and forty-nine call gay relations “morally acceptable.”¹⁶³ “The number [of those] who report[] having a gay friend or close acquaintance rose from 22% in 1985 to 56% in 2000.”¹⁶⁴ As to legalizing gay marriage, Gallup reports that public support “is near record highs.”¹⁶⁵ As an alternative to gay marriage, the support for civil unions has also grown rapidly.¹⁶⁶ Pew Research Center reported that 49% of Americans supported civil unions in 2004 and 57% in 2009.¹⁶⁷

2. Customary Meaning of the Word “Marriage”

Aside from changed societal mores, the world today also does not view the words “marriage” and “spouse” in the same way as it did a couple of decades ago.¹⁶⁸ *Adams*’s point that the word “spouse” refers to only opposite-sex couples because of its “ordinary, contemporary, common meaning” is no longer valid on at least two grounds.¹⁶⁹ First, as described above, the concept of civil unions and registered partnerships was practically unknown at the time. Accordingly, the *Adams* court would have been unable to extend the definition of “spouse” to any such concept.¹⁷⁰

¹⁶¹ Elizabeth O’Brien & John-Henry Westen, *Gallup Pole Shows Highest-Ever Acceptance of Homosexuality in America*, LIFE SITE NEWS (May 30, 2007), <http://www.lifesitenews.com/news/archive/ldn/2007/may/07053003>. In fact, even among white evangelical Christians eighteen to twenty-nine years of age, 58% “support at least some legal recognition of same-sex couples.” Koppelman, *supra* note 114, at 942–43.

¹⁶² Elizabeth O’Brien & John-Henry Westen, *Gallup Pole Shows Highest-Ever Acceptance of Homosexuality in America*, LIFE SITE NEWS (May 30, 2007), <http://www.lifesitenews.com/news/archive/ldn/2007/may/07053003>.

¹⁶³ Lydia Saad, *American’s Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

¹⁶⁴ Koppelman, *supra* note 114, at 940.

¹⁶⁵ Saad, *supra* note 163.

¹⁶⁶ *Majority Continues to Support Civil Unions*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

¹⁶⁷ *Id.*

¹⁶⁸ Robert George, Sherif Girgis & Ryan T. Anderson, *What Is Marriage?*, CATHOLIC EDUC. RESOURCE CENTER (2010), <http://www.catholiceducation.org/articles/marriage/mf0139.htm>. There are at least two generally accepted competing views on the definition of the term “marriage.” *Id.* First, the conjugal view which states that “[m]arriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together.” *Id.* Second, the revisionist view which makes marriage “the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life.” *Id.*

¹⁶⁹ *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982).

¹⁷⁰ See Laquer Estin, *supra* note 146, at 346–47.

Second, not even the sources the court relied on support the same conclusion today.¹⁷¹ The court referred specifically to Webster's Dictionary and Black's Law Dictionary.¹⁷² The House Committee on the Judiciary likewise referred to Black's Law Dictionary in justifying DOMA in 1996.¹⁷³ Webster's Dictionary has since expressly added that marriage can mean "the state of being united to a person of the same sex."¹⁷⁴ Black's Law Dictionary defines marriage as a "legal union of a couple" and does not make any distinction between same- and opposite-sex couples.¹⁷⁵ This development strongly suggests that at least factually the reasoning of the *Adams* court and that of the House Committee on the Judiciary in supporting DOMA is inapplicable today.

3. Procreation

The last major social argument advanced in the reasoning of the *Adams* court and Congress deals with procreation.¹⁷⁶ Both the district court and the Ninth Circuit in *Adams* based their decisions, at least in part, on the importance of childrearing.¹⁷⁷ The district court pointed to a federal policy of "fostering procreation of the race . . . [and] providing status and stability to the environment in which children are raised."¹⁷⁸ The circuit court took issue with the fact that "homosexual marriages never produce offspring."¹⁷⁹ Little over a decade later, the House

¹⁷¹ *Adams*, 673 F.2d at 1040.

¹⁷² *Id.*

¹⁷³ H.R. REP. NO. 104-664, at 29 (1996), reprinted in 1996 U.S.C.C.A.N. 2905-23. Note that also *Jones v. Hallahan* relied on various dictionaries in defining "marriage." 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (referring to Webster's New International Dictionary, The Century Dictionary and Encyclopedia, and Black's Law Dictionary).

¹⁷⁴ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 425 (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/marriage>.

¹⁷⁵ BLACK'S LAW DICTIONARY 532 (9th ed. 2009).

¹⁷⁶ *Adams*, 673 F.2d at 1043; H.R. REP. NO. 104-664, at 13. In fact, "[o]ne of the primary arguments that states (and the amicus curiae briefs filed in their support) have made in defense of withholding legal recognition from relationships between same-sex couples involves procreation." Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 403 (2009). This argument needs to be distinguished from arguments hinting at today's "enormous social interests in responsible procreation" advanced by some scholars. See, e.g., Wardle, *supra* note 114, at 300 (emphasis added). This comment does not take on the issue of whether heterosexual parents are more responsible in bringing children into the world than homosexual couples. It is only worth noting that according to the Center for Disease Control and Prevention, even after a decline, U.S. teen births are "highest of all industrialized countries." *Teen Birth Rates Declined Again in 2009*, CENTER FOR DISEASE CONTROL AND PREVENTION (July 1, 2011), <http://www.cdc.gov/features/dsteenpregnancy/>.

¹⁷⁷ *Adams*, 673 F.2d at 1043 (noting that "homosexual marriages never produce offspring"); *Adams v. Howerton* 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("[T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race.").

¹⁷⁸ *Adams*, 486 F. Supp. at 1124.

¹⁷⁹ *Adams*, 673 F.2d at 1043.

Committee also noted that the institution of marriage “encourages sexual intercourse and the birth of children.”¹⁸⁰

The rationality of promoting human propagation and production of offspring by not recognizing same-sex marriages and not granting immigration benefits to same-sex couples is at best questionable.¹⁸¹ First, many heterosexual individuals who cannot have children are allowed to marry.¹⁸² Second, with technological advances, many same-sex couples produce offspring in today’s “gayby boom.”¹⁸³ Third, it is doubtful that gay individuals will enter into heterosexual relationships and procreate in order to propagate the human race in the event that same-sex marriages are not recognized.¹⁸⁴ By the same token, it is unlikely that heterosexual couples will procreate less if same-sex marriage is recognized for immigration purposes.¹⁸⁵ As it was amply put by Daniel Foley, one of the attorneys involved in the suit against Hawaii’s same-sex ban, “[y]ou’ll have marriage, the sky won’t fall, straight people will still procreate, and the race will not become extinct.”¹⁸⁶ Even if the *Adams* court or the 1996 Congress believed otherwise, such justifications appear less and less likely to pass even the rational basis test today.

Another development that undermines the above mentioned procreation argument is rising world population. In 1980, when the district court decided *Adams*, there were fewer than 4.5

¹⁸⁰ H.R. REP. NO. 104-664, at 14.

¹⁸¹ See Stein, *supra* note 176, at 435.

¹⁸² In a number of jurisdictions there are special marriage laws for couples that cannot procreate. Stein, *supra* note 176, at 413. “Wisconsin, for example, allows first cousins to marry if the woman is over fifty-five or if either party to the marriage is sterile.” *Id.*

¹⁸³ Stein, *supra* note 176, at 414; John Blake, ‘Gayby boom’: Children of gay couples speak out, CNN (June 28, 2009), http://articles.cnn.com/2009-06-28/living/gayby_1_same-sex-couples-lesbian-parents?_s=PM:LIVING.

¹⁸⁴ Joy S. Whitman, Harriet L. Glosoff, Michael M. Kocet & Vilia Tarvydas, *Exploring ethical issues related to conversion or reparative therapy*, AM. COUNSELING ASS’N (May 14, 2006), <http://ct.counseling.org/2006/05/exploring-ethical-issues-related-to-conversion-or-reparative-therapy/>. The American Counseling Association does “not endorse” reparative therapy as a viable treatment option. *Id.* In fact, such therapy has been recognized to be potentially harmful. *Id.* Sandra Boodman, *Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual, Experts Call That a Prescription for Harm*, WASH. POST, Aug. 16, 2005, at F01. See also *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (“[T]his court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.”).

¹⁸⁵ John Gallagher, *Last Minute Marriage Preparations: Will Hawaii Be Ringing its Wedding Bells for Gay Marriages this Year?*, THE ADVOCATE, Nov. 25, 1997, at 38, available at http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=20013292.

¹⁸⁶ *Id.*

billion people living in the world.¹⁸⁷ In 1996, when Congress enacted DOMA, there were over 5.7 billion people alive.¹⁸⁸ Today, according to the United Nations, over 7 billion people share the planet.¹⁸⁹ With respect to the United States population, the U.S. Census Bureau reported a population of about 227 million in 1980.¹⁹⁰ This number has grown to over 312 million by 2012.¹⁹¹ According to *Adams* the human race was not propagating enough thirty years ago.¹⁹² The same reasoning was raised when DOMA was signed into law in 1996.¹⁹³ Today, from the court's dismissal of *Lui v. Holder*,¹⁹⁴ it appears that for the Central District of California Homo sapiens will never procreate enough. Surely, a point will come when this rapid procreation will no longer remain in our interest.¹⁹⁵

Even more worrisome is the district court's approach. Besides procreation, the court held that not recognizing same-sex marriage for immigration purposes is not only rationally related to, but also narrowly tailored to providing status and stability to children.¹⁹⁶ This "gays make bad parents" argument was prevalent primarily in the 1970s.¹⁹⁷ However, scientists today

¹⁸⁷ *World Development Indicators*, WORLD BANK (Jan. 17, 2013), available at https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&tdim=true&dl=en&hl=en&q=world%20population.

¹⁸⁸ *Id.*

¹⁸⁹ Sam Roberts, *U.N. Says 7 Billion Now Share the World*, N.Y. TIMES, Nov. 1, 2011, at A4.

¹⁹⁰ *Monthly Estimates of the United States Population: April 1, 1980 to July 1, 1999, with Short-Term Projections to November 1, 2000*, U.S. CENSUS BUREAU (Jan. 2, 2001), <http://www.census.gov/popest/data/national/totals/1990s/tables/nat-total.txt>.

¹⁹¹ *U.S. POPClock Projection*, U.S. CENSUS BUREAU (Mar. 1, 2013), <http://www.census.gov/population/www/popclockus.html>.

¹⁹² *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

¹⁹³ H.R. REP. NO. 104-664, at 6 n.16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-23.

¹⁹⁴ *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at *5 (C.D. Cal. Sept. 28, 2011).

¹⁹⁵ *Sustainability and Water*, OVERPOPULATION (Apr. 12, 2010), <http://www.overpopulation.org/water.html>. Many believe that with current population growth, Earth's water supply is unsustainable. *Id.*

¹⁹⁶ *Adams*, 486 F. Supp. at 1123.

¹⁹⁷ Stein, *supra* note 176, at 408. For recent court opinions that embrace the "gays make bad parents" argument, see *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 527-28 (Conn. 2008) (Zarella, J., dissenting); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 998-1003 (Mass. 2003) (Cordy, J., dissenting); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006) (plurality opinion); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion). For a discussion of such arguments made in the legislative context of attempts to pass a federal constitutional amendment defining marriage as between one man and one woman, see Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 Wash. U. L.Q. 611, 658-60 (2004). Often, courts do not even evaluate any "conclusive evidence demonstrating why [opposite-sex parenting] is the 'optimal setting' for children." Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 280 (2007).

recognize that “interests of children are served equally by same-sex parents and opposite-sex parents.”¹⁹⁸ Even if gays really made bad parents, to the contrary of the House Committee’s belief that “recognizing same-sex ‘marriages’ would almost certainly have implications on the ability of homosexuals to adopt children as well,” marital and adoption rights do not always come hand in hand.¹⁹⁹ Already in 2006, reports showed that courts in twenty-one states and Washington, D.C. had granted adoptions to same-sex couples, while Massachusetts was the only state that allowed same-sex marriages at the time.²⁰⁰ All in all, any arguments that homosexuals make bad parents, like that of the district court in *Adams*, appear vulnerable to attack by modern science. Similarly, in light of the widespread same-sex adoptions procedure, any slippery slope arguments and worries appear moot.²⁰¹

Thus, while heterosexual marriages may always be more traditional in the sense that they are predated by millennia of precedent, research shows that homosexual relations are no longer vehemently condemned.²⁰² In fact, it appears that a majority of the American public accepts homosexuality and same-sex relationships.²⁰³ It may be inferred that the prevailing societal mores and traditions that *Adams* and the House Committee Report refer to no longer exist. Moreover, with dictionaries no longer defining marriage as between members of the opposite sex and in light of evident questionability of the traditionally used procreation arguments, it seems wise to reevaluate the validity of the *Adams* case in light of modern social developments.²⁰⁴

4. Judicial Developments (1982–Present)

The following section charts some of the major judicial changes of the past thirty years that affect *Adams*’s rationale. It first reiterates the successes of recent same-sex marriage litigation and follows with the position of the Supreme Court in

¹⁹⁸ *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009).

¹⁹⁹ H.R. REP. NO. 104-664, at 7 n.21 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23; Lavelly, *supra* note 197, at 247.

²⁰⁰ *Gay Adoption in the U.S. and Abroad*, PUB. BROADCASTING SERV. (Apr. 7, 2006), <http://www.pbs.org/now/politics/fightforfamily3.html>; *Goodridge*, 798 N.E.2d at 948.

²⁰¹ Lavelly, *supra* note 197, at 272–73.

²⁰² Koppelman, *supra* note 114, at 942–43.

²⁰³ *Majority Continues to Support Civil Unions*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

²⁰⁴ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 761 (11th ed. 2008); BLACK’S LAW DICTIONARY 1059 (9th ed. 2009); *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009); Forde-Mazrui, *supra* note 10, at 315.

Lawrence v. Texas.²⁰⁵

Contrary to the rationale of the district court in *Adams*, courts today have upheld same-sex marriages.²⁰⁶ Starting with *Baehr*, a number of courts have stricken prohibition of same-sex marriages based on violations of either the federal or the state's constitution.²⁰⁷ Closer to home to the *Adams* court, in *Perry v. Schwarzenegger*,²⁰⁸ the Northern District of California ruled that Proposition 8, an amendment to the California Constitution limiting marriage to a union of one man and one woman, violated Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁰⁹ In *Varnum v. Brien*,²¹⁰ the Iowa Supreme Court found that a statute limiting marriage to a union between a man and a woman violated the state constitution.²¹¹ It is clear that the approach taken by the judicial apparatus has changed.²¹² If only for the above reasons, it is time for lower courts within the Ninth Circuit to reconsider *Adams* or at least approach the case very cautiously as precedent.

Additionally, the negative view of homosexuality previously promulgated by the Supreme Court of the United States has also changed.²¹³ In the 1980s, in two decisions the Supreme Court made clear that it was not ready to extend positive rights to homosexuals.²¹⁴ An important change occurred in 2003 with

²⁰⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁰⁶ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum*, 763 N.W.2d. 862.

²⁰⁷ *Baehr*, 852 P.2d at 68; *Goodridge*, 798 N.E.2d at 948; *Kerrigan*, 957 A.2d at 415; *Varnum*, 763 N.W.2d. at 872.

²⁰⁸ *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010). California used to allow same-sex marriages following a 2008 California Supreme Court case but shortly after the state adopted a constitutional amendment that ended the practice. In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

²⁰⁹ *Perry*, 704 F. Supp. 2d at 994–98; CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

²¹⁰ *Varnum*, 763 N.W.2d. 862.

²¹¹ *Id.* at 872.

²¹² Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1383–85 (2010).

²¹³ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 (2004). Some have voiced the opinion that today's Supreme Court is even ready to take on the issue of same-sex marriage and decide in its favor since it “has not always waited for the values of society to change.” See, e.g., Justin Driver, *Why this Supreme Court could be the best hope for gay-marriage advocates*, WASH. POST, June 25, 2011, http://www.washingtonpost.com/opinions/why-this-supreme-court-could-be-the-best-hope-for-gay-marriage-advocates/2011/06/20/AGFLnhjH_story_2.html.

²¹⁴ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985) (holding that only “normal sexual appetites” which appeared to exclude homosexuality, are protected by free speech); *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986). *Bowers* upheld a Georgia sodomy statute which provided a punishment for the crime of sodomy of up to twenty years. *Id.*; Tribe, *supra* note 213, at 1900 n.19. The statute defined sodomy as “any sexual

Lawrence v. Texas.²¹⁵ In that case the Supreme Court invalidated as unconstitutional a Texas sodomy law.²¹⁶ Many called this the “most significant legal victory in the gay rights movement.”²¹⁷ Soon a decade will pass since the *Lawrence* decision and the Supreme Court has yet to address same-sex marriage.²¹⁸ When *Lawrence* was decided, Massachusetts had not even begun issuing marriage licenses to same-sex couples.²¹⁹ Thus, given the evident lack of hesitation of state courts to rule in favor of same-sex marriage and in light of the increase in the Supreme Court’s acceptance of homosexuality, lower courts referring to aged precedent such as *Adams* should very cautiously evaluate the reasoning of the previous decisions in light of modern developments.²²⁰

III. LOOKING FORWARD: A DOMA-FREE WORLD

Lui’s reliance on *Adams* evidences that *Adams* remains good law as precedent for not granting spousal status to bi-national, same-sex couples under U.S. immigration laws. It is so even after the passage of DOMA and despite the political, social, and judicial developments of the past three decades.²²¹ The passage of DOMA “did not change the prior federal marriage-recognition

act involving the sex organs of one person and the mouth or anus of another.” GA. CODE ANN. § 16-6-2 (1984).

²¹⁵ Andrew D. Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 605 (2010).

²¹⁶ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Unlike the Georgia sodomy statute, the Texas law only applied to homosexuals and stated that a “person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* at 563; Tex. Penal Code Ann. § 21.06(a) (2003).

²¹⁷ Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20. While the decision did not in any way “imply recognition of same-sex marriage,” many saw the decision as paving the way to same-sex marriage. Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision*, N.Y. TIMES, Nov. 19, 2003, at A24. In the very least, the decision “anchored the gay-rights claim at issue in the case firmly in the tradition of human rights at the broadest level.” *Id.*

²¹⁸ *Lawrence*, 539 U.S. at 558; Chase D. Anderson, *A Quest For Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry*, 60 DUKE L.J. 1413, 1415 (2011). Scholars have voiced a belief that *Perry v. Schwarzenegger* has a chance of becoming the case that brings the topic of same-sex marriage to the Supreme Court. *Id.* at 1416; *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010).

²¹⁹ *Lawrence*, 539 U.S. at 558; Belluck, *supra* note 116.

²²⁰ Tribe, *supra* note 213, at 1895.

²²¹ Some scholarly work questioning the future role of *Adams* in case DOMA is repealed or invalidated has previously been published by scholars. See, e.g., Titshaw, *supra* note 32, at 546. *Lui*’s resurrection of *Adams* together with the recent congressional success in pushing the Respect for Marriage Act through committee only makes the issues previously addressed by scholars more pressing. *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at *3 (C.D. Cal. Sept. 28, 2011); Respect for Marriage Act, S. 598, 112th Cong. (2011).

rule.”²²² Today, DOMA serves as a “place-holder” and even if repealed, worries exist that same-sex couples “might not be treated as married by the federal government as to some particular program.”²²³

With respect to immigration benefits specifically, if DOMA is simply repealed without replacement, the second prong of the *Adams* test—that the state marriage must qualify under the INA—might be resurrected by the courts.²²⁴ It is entirely possible that without more guidance from Congress, some lower courts could conclude that for the purposes of federal immigration law same-sex marriage does not confer spousal status even if DOMA is repealed.²²⁵ Such finding might also be more difficult to judicially challenge because only rational basis inquiry is used by the courts in evaluating laws pertaining to the entry and exit of aliens.²²⁶ Accordingly, it is important that the federal legislature pays good attention to any unintended consequences of a possible DOMA repeal. This section charts two specific solutions that can help ensure that bi-national, same-sex couples are granted spousal status for immigration purposes in the event DOMA is repealed.

First, Congress should not seek to repeal DOMA without replacement. Instead, it should specifically enact a statute, which states that an individual is considered married for the purposes of federal law if that individual’s marriage is valid in the state or country where the marriage was entered into. This phrasing follows the example of the 2011 Respect for Marriage Act and helps alleviate worries of *Adams*’s resurrection after the repeal of DOMA.²²⁷ An even better replacement would include an amendment specific to the INA. This could include the grant of spousal status under U.S. immigration law to couples with valid civil unions and domestic partnerships.

Second, whether or not DOMA is repealed or remains on the

²²² Wardle, *supra* note 114, at 956.

²²³ *Id.*; Tara Siegel Bernard, *What a Repeal of the Gay Marriage Ban Means*, N.Y. TIMES BLOG (June 9, 2011, 4:23 PM), <http://bucks.blogs.nytimes.com/2011/06/09/what-a-repeal-of-the-gay-marriage-ban-means/>.

²²⁴ *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); Titshaw, *supra* note 32, at 601–05.

²²⁵ Titshaw, *supra* note 32 at 603–04.

²²⁶ *Demore v. Kim*, 538 U.S. 510, 511 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967) (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (noting that courts should defer to Congress in the immigration field and only evaluate any laws for rationality).

²²⁷ Respect for Marriage Act, S. 598, 112th Cong. (2011).

books, courts should approach the use of *Adams* as precedent very cautiously. As shown, the cultural context has vastly changed with respect to homosexuality since the 1980s and especially so in the last decade.²²⁸ If the Ninth Circuit is confronted with *Adams* in the future, the tribunal should reevaluate its reasoning in light of modern developments.

CONCLUSION

The *Lui* court seemed to hang on every word of the *Adams* decision. Yet, it disregarded the district judge's final and most powerful words. Chief Judge Irving Hill then concluded that "[t]he time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced."²²⁹ Over thirty years have passed. The social, political, and judicial changes that this country and the world have seen make it clear that we are now far in the future. Gay marriage has been recognized by a number of states and foreign countries.²³⁰ The social mores that played such an integral part of the *Adams* decision and DOMA's rationale are rapidly changing.²³¹ Many courts around the country have debated the topic of same-sex marriage and ruled in favor of gay rights activists and same-sex couples.²³² The Supreme Court has taken an affirmative step to support gay rights in *Lawrence v. Texas*.²³³ This is just a brief recapitulation of the changed circumstances that undermine the validity of *Adams* today.

It is questionable whether DOMA will be repealed, judicially invalidated, or will remain valid law. With either possibility, however, judges facing DOMA challenges should critically evaluate the precedent used to support their holdings. Specifically in the context of immigration benefits for bi-national couples, *Adams* might officially still be good law, yet the changed circumstances presented in this Note call for a critical review of the case by any court seeking to refer to *Adams* as precedent. Only by paying close attention to our constantly changing world can the judiciary truly perform its function. One day, perhaps

²²⁸ Koppelman, *supra* note 114, at 940–43.

²²⁹ *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).

²³⁰ *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 2013), <http://www.ncsl.org/default.aspx?tabid=16430>; *Same-sex marriage around the world*, CBC NEWS (May 29, 2009), <http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html>.

²³¹ Koppelman, *supra* note 114, at 940.

²³² *Forde-Mazrui*, *supra* note 10, at 287–88; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 415 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d. 862, 872 (Iowa 2009).

²³³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

2013] *Vision of a DOMA-Free World* 293

soon, we will live in a DOMA- and *Adams*-free world where justice adequately reflects changing cultural context.

Addendum

August 21, 2013

When this Note was completed in December of 2011, a DOMA-free world was merely a vision. Supported by the then-recent repeal of Don't Ask, Don't Tell,²³⁴ this vision became more realistic with the Senate Judiciary Committee's favorable vote on the Respect for Marriage Act in November 2011.²³⁵ However, as argued in the preceding Note, such congressional repeal also posed a threat of bringing no change in the immigration context.

While it was the prospect of a congressional repeal that gave rise to the vision of a DOMA-free world, it was the power of the judiciary that in the end made it a reality.²³⁶ Less than twenty years after being signed into law, in June 2013, the United States Supreme Court ruled Section 3 of DOMA unconstitutional under the equal protection guarantee of the Fifth Amendment in *United States v. Windsor*.²³⁷ Fortunately, the Court's milestone decision has already led to the USCIS providing the same immigration benefits to married same-sex couples as it has to couples of opposite sexes.²³⁸

²³⁴ 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011).

²³⁵ *Senate panel OKs repeal of Defense of Marriage Act*, USA TODAY (Nov. 10, 2011), <http://usatoday30.usatoday.com/news/politics/story/2011-11-10/democrats-gay-marriage/51152184/1>; Respect for Marriage Act, S. 598, 112th Cong. (2011).

²³⁶ 1 U.S.C. § 7 (2012) (held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013)).

²³⁷ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *Windsor*, 133 S. Ct. at 2695–96. The Court's decision came with increasing public support. Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html?pagewanted=all&_r=0. In fact, months before the decision was made, even its signer, Bill Clinton, expressed his support for overturning the law. Bill Clinton, *It's time to overturn DOMA*, WASH. POST (Mar. 7, 2013), http://articles.washingtonpost.com/2013-03-07/opinions/37528448_1_doma-defense-of-marriage-act-marriage-equality. Unlike Clinton, Barack Obama has openly opposed DOMA for a number of years. David Nakamura, *Obama backs bill to repeal Defense of Marriage Act*, WASH. POST (July 19, 2011), http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html.

²³⁸ *Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 2, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

Thinking Out Cloud: California State Sales and Use Taxability of Cloud Computing Transactions

Matthew Adam Susson*

“I have no idea what anyone is talking about. It’s really just complete gibberish. What is it? When is this idiocy going to stop?”

– Larry Ellison, CEO of Oracle Corporation, on cloud computing¹

INTRODUCTION

Confronted with growing budget deficits and decreasing tax bases, states are necessarily looking for new ways to generate revenue.² In recent years, states have sought to expand sales tax laws to capture revenue from sales of digital products, a complicated and relatively nascent subject of taxation.³ Just as states have begun to impose such taxes, however, the shift from downloaded products to cloud-based data and applications poses new challenges to the states’ abilities to reach such transactions with their taxing powers.

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¹ Larry Ellison, Chief Executive Officer, Oracle Corp., Address at the 2008 Oracle OpenWorld Conference (Sept. 24, 2008).

² Jennifer Medina, *California, With Revenue Shortfalls, Will See More Budget Cuts*, N.Y. TIMES, Dec. 14, 2011, at A20 (“Mr. Brown and his fellow Democrats argue that the problem is not that the state is spending too much, but that the revenues are not enough to pay for services that most citizens want, like schools and programs for the needy.”); see also Matt Richtel, *Starved Budgets Inspire New Look At Web Gambling*, N.Y. TIMES, Aug. 14, 2011, at A1 (explaining that a number of states, including California, are looking to tax Internet gambling to generate revenue and address local budget problems).

³ See KARL FRIEDEN, CYBERTAXATION: THE TAXATION OF E-COMMERCE 47 (2000) (“The growth of E-commerce raises complicated issues regarding the taxation of multijurisdictional transactions and the sourcing of sales or income from services or intangible property transactions that are relevant to transactional (sales and use, VAT), income, gross receipts, and property taxes.”).

Generally speaking, the cloud is a large group of interconnected computers (personal computers or network services), and may be either public or private.⁴ Cloud computing allows users to access their applications and documents from anywhere in the world, which frees them from the confines of desktop computing and permits greater ease of group collaboration among users.⁵ In a broad sense, cloud computing describes the way in which information is stored and processed on computers elsewhere—in the “cloud”—and brought back to your screen.⁶

With the rise of cloud computing, companies looking to mitigate IT infrastructure costs have eschewed the traditional model of purchasing prewritten software and server hardware—both largely taxable—in favor of third-party web-based, hosted computer facilities and applications.⁷ More generally, the increasingly frequent transfer of activity to the cloud poses substantial questions about how (or whether) cloud services fit in the existing framework of state taxation.⁸ Unable to keep pace with developments in technology, and with little guidance, state governments have taken inconsistent and patchwork approaches towards determining taxability, largely through letter rulings, audits, and departmental interpretations.⁹ Furthermore, they have used such approaches to apply *existing* provisions related to tangible personal property, services, or data or information processing.¹⁰ As a result, cloud service providers and their

4 MICHAEL MILLER, CLOUD COMPUTING: WEB-BASED APPLICATIONS THAT CHANGE THE WAY YOU WORK AND COLLABORATE ONLINE 9 (2009); *see also Clash of the Clouds*, ECONOMIST, Oct. 17, 2009, at 80 (“Much of computing will no longer be done on personal computers in homes and offices, but in the ‘cloud’: huge data centres housing vast storage systems and hundreds of thousands of servers, the powerful machines that dish up data over the internet. Web-based e-mail, social networking and online games are all examples of what are increasingly called cloud services, and are accessible through browsers, smart-phones or other ‘client’ devices.”).

5 MILLER, *supra* note 4, at 7–8 (“With cloud computing, the software programs you use aren’t run from your personal computer, but are rather stored on servers accessed via the Internet. If your computer crashes, the software is still available for others to use. Same goes for the documents you create; they’re stored on a collection of servers accessed via the Internet. Anyone with permission can not only access the documents, but can also edit and collaborate on those documents in real time. Unlike traditional computing, this cloud computing model isn’t PC-centric, it’s document-centric. Which PC you use to access a document simply isn’t important.”).

6 Geoffrey A. Fowler & Ben Worthen, *The Internet Industry Is on a Cloud -- Whatever That May Mean*, WALL ST. J., Mar. 26, 2009, at A1.

7 A.J. Nezamabadi, *State Governments Reach for the Cloud*, MICHAEL JAMES SALES TAX SOLUTIONS, LLC, Sept. 21, 2011, <http://mjsalestax.com/?p=3532>.

8 Dolores W. Gregory et al., *Cloud Computing Emerges as a Tax Conundrum as States Seek to Squeeze ‘New Paradigm’ Into Old Ways of Thinking*, BNA, Dec. 9, 2011, at 1, available at <http://www.sutherland.com/files/upload/TM-WSTR.pdf>.

9 *Id.*

10 *Id.*

customers are left without definitive guidance as to their sales and use tax obligations.¹¹ Is a given transaction a sale or lease of tangible personal property, sale of software, sale of taxable services, or sale of nontaxable services? Service providers and their customers face the possibility that each state will define the character of their transactions differently.

Unfortunately, state tax departments lack sufficient resources to address the complicated policy questions raised by the cloud.¹² In light of this, business interests have already pushed for a federal solution.¹³ In the meantime, one looking for timely guidance on the issue is likely to find that a sales tax regime built for a manufacturing economy is more likely to confuse than enlighten.¹⁴

If California wishes to stanch its revenue bleeding and budgetary problems,¹⁵ it must do more than simply repurpose existing state provisions ad hoc and shoehorn new business paradigms into old categories. While budget problems may hinder the state's ability to undertake a substantial policy project like cloud computing, California's ongoing transition to an information services economy¹⁶ requires a coordinated effort to effectively tax crucial revenue.¹⁷ California must also amend its tax code to allow taxation of some services—specifically digital services—if it hopes to maintain a steady stream of sales tax revenue prospectively. It must too provide comprehensible guidelines to service providers and retail customers as to the taxability of cloud services. Established guidelines will provide the certainty and stability necessary to incentivize cloud-based business in the state, and streamline the tax collection and remittance process. Finally, California should work in concert with other states to, among other things, commonly define goods

¹¹ Nezamabadi, *supra* note 7.

¹² Gregory et al., *supra* note 8, at 1.

¹³ *Id.* (noting that businesses would like the federal government to require states that want to tax these transactions to do so through new legislation and not administrative measures).

¹⁴ *Id.*

¹⁵ On November 6, 2012, in an attempt to address cuts in education, police and fire protection, healthcare, and other critical state and local services, the people of California voted to pass Proposition 30, Governor Jerry Brown's measure to temporarily increase the state sales tax by a quarter percent, and state income taxes on high-earners by one to three percent. CAL. SEC'Y OF STATE, DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 6, 2012, GENERAL ELECTION 13 (2012), *available at* <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>; *see also* Editorial, *Californians Say Yes to Taxes*, N.Y. TIMES, Nov. 9, 2012, at A30. For the full text of Proposition 30, see The Schools and Local Public Safety Protection Act of 2012, Proposition 30, at 81–84 (proposed Nov. 6, 2012), *available at* <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf>.

¹⁶ *See infra* Part IV.B.2.

¹⁷ *See discussion infra* Part IV.B.2–3.

and services and create a consistent national vocabulary. Such a coordinated effort would greatly simplify the levying and collection of sales taxes on interstate transactions, and pave the way for unifying federal action.

The rise of cloud computing raises a number of complex legal issues.¹⁸ While legal scholars have written at length about the privacy,¹⁹ antitrust,²⁰ e-discovery,²¹ and copyright enforcement²² concerns of cloud computing, even the state sales tax implications are too nuanced to discuss comprehensively here. While California must address crucial nexus²³ and sourcing²⁴ issues as

¹⁸ Horacio E. Gutiérrez, *Peering Through the Cloud: The Future of Intellectual Property and Computing*, 20 FED. CIR. B.J. 589 (2010–11) (“Courts, legislatures, technology providers, consumers, and businesses will collectively seek to address a growing number of complex legal, regulatory, and public policy issues presented by cloud computing.”).

¹⁹ William Jeremy Robison, Note, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1196 (2010) (“In exchange for ‘free’ cloud computing services, customers are authorizing service providers to access their data to tailor contextual and targeted advertising.”); see also Randal C. Picker, *Competition and Privacy in Web 2.0 and the Cloud*, 103 NW. U. L. REV. COLLOQUY 1, 7 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/25/LRColl2008n25Picker.pdf> (“[A]s we move from products and local storage to services and centralized storage, who owns the data and what establishes rights to the access and use the data?”); *Battle of the Clouds*, ECONOMIST, Oct. 17, 2009, at 16 (“[S]toring so much personal information [in the cloud], and using it to target advertising, has privacy implications.”).

²⁰ David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. COLLOQUY 285, 286–87 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/13/LRColl2008n13Evans.pdf> (“The internet economy is likely to raise antitrust concerns—and possible demands for regulation—for years to come . . . Competition authorities and private parties can challenge the practices of these leading firms under the antitrust laws of most jurisdictions.”).

²¹ *United States v. Weaver*, 636 F. Supp. 2d 769, 772 (C.D. Ill. 2009) (focusing on the unique nature of web (or cloud)-based email services); see also *Flagg v. City of Detroit*, 252 F.R.D. 346, 347 (E.D. Mich. 2008) (rejecting a proposed reading of the federal Stored Communications Act as establishing a sweeping prohibition against civil discovery of electronic communications).

²² Marc Aaron Melzer, Note, *Copyright Enforcement in the Cloud*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 403, 404 (2011) (“The development of cloud computing, heralded by more-expansive and less-expensive broadband Internet connections, is poised to add a new challenge to copyright enforcement as more users take to the cloud to store, transmit, manipulate, and share content.”).

²³ “Nexus” is a term used to describe the existence of a sufficient connection between the vendor and the taxing state such that the taxing state can impose a use tax collection duty on the out-of-state vendor. MARYANN B. GALL & SALLY ADAMS, SALES AND USE TAX NEXUS: PRACTICAL INSIGHTS AND STRATEGIES, at v (2002); see also Michael A. Jacobs & Kelley C. Miller, *Pennies From Heaven—U.S. State Tax Implications Within Cloud Computing*, in TRANSCENDING THE CLOUD: A LEGAL GUIDE TO THE RISKS AND REWARDS OF CLOUD COMPUTING 10, 11 (Joseph I. Rosenbaum & Adam W. Snukal eds., 2010) (describing nexus as the amount and degree of business activity an entity must have with a state before the state can subject the entity to state tax). The Supreme Court has addressed the issue of substantial nexus numerous times over the past sixty years, each time requiring at least some physical presence to compel taxation. GALL & ADAMS, *supra* note 23, at 1; see, e.g., *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue*, 386 U.S. 753, 759 (1967). Most recently, the Court reaffirmed the physical presence requirement in *Quill Corp. v. North Dakota*, 504 U.S. 298, 317–18 (1992); GALL & ADAMS, *supra* note 23, at 1.

part of any broad policy dealing with state sales and use taxation of the manner discussed in this Comment, the complexity of each invites rigorous examination beyond the scope of this narrower analysis.

This Comment will address only the threshold issue of the taxability of cloud computing transactions, and the California state tax implications thereof. Part I consists of a brief survey of current California sales and use tax law, and provides context for the subsequent sections and discussion.²⁵ Part II provides a history of computing and networking, and discusses the trend towards cloud-based computing models.²⁶ Part III introduces and explains the phenomenon of e-commerce—a jumping off point for the discussion of taxation of cloud computing transactions—as well as federal and state responses to Internet taxation issues in

In *Quill*, the Court ruled that before a state could impose a sales tax collection obligation on an entity, the Commerce Clause of the United States Constitution required the entity to have a “substantial nexus” with the state, as indicated by physical presence. 504 U.S. at 317–18. Thus, out-of-state Internet retailers engaged in business in the State of California are required to collect sales tax. CCH EDITORIAL STAFF, 2011 STATE TAX HANDBOOK 857 (Timothy Bjur et al. eds., 2010) [hereinafter CCH, 2011 HANDBOOK]. State nexus statutes are always subject to federal constitutional restrictions. *Id.* Using a website to make sales to California residents, however, does not create legal nexus with the State of California sufficient to require collection of state sales tax. *Id.* at 860. In the event a vendor has no substantial nexus to the taxing state, the *consumer* is required to remit the use tax to their state government, though compliance is very low. Steven Maguire, *Internet Transactions and the Sales Tax*, in INTERNET TAXATION 1, 4 (Albert Tokin ed., 2003) [hereinafter Maguire, *Internet Transactions*]. A sales tax may be imposed on retail stores in the state if such stores operate as an authorized representative of an out-of-state Internet retailer if the stores can accept returns of the Internet retailer's goods, and provide customers returning merchandise with an exchange, store credit, or a credit card credit. *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 184 (2005). “Nexus determinations tend to be highly fact-specific, and rely on an application of a complex mix of U.S. constitutional and state statutory law.” Jacobs & Miller, *supra* note 23, at 11. The Court has yet to revisit *Quill* to determine whether the mere presence of electronic data is a physical presence sufficient to establish nexus. *Id.*

²⁴ “Sourcing” requires a determination of which state may tax a particular transaction. Jacobs & Miller, *supra* note 23, at 12. Multiple taxation problems may arise where the location of a sale is ambiguous. Nonna A. Noto, *Extending the Internet Tax Moratorium and Related Issues*, in INTERNET TAXATION 17, 30 (Albert Tokin ed., 2003) (“For example, consider the case of a purchase from a seller in one state, by a person who lives in a second state, over an Internet server in a third state, charged to a credit card account in a fourth state, and delivered as a gift to a person in a fifth state. Multiple taxation could occur if more than one of these states claimed the right to levy a sales or use tax on the sale, without the taxpayer being able to claim a credit for tax paid to another state.”). For purposes of determining which local taxes apply to a given transaction, retail sales are considered to occur at the seller's place of business, regardless of both the physical location of the sold property and the location at which title to the property passes to the buyer. CAL. REV. & TAX. CODE § 7205 (West 2010). Cloud computing, however, allows both vendors and consumers to access and interact with a completely Internet-based scheme, which “obviates the ability to determine where the consumer is located and where it is using the objects of cloud computing.” Jacobs & Miller, *supra* note 23, at 12.

²⁵ See *infra* Part I.

²⁶ See *infra* Part II.

a sales and use tax context.²⁷ Part IV delves into California's taxation of Internet and e-commerce transactions, analyzes cloud computing transactions and current federal law from a California perspective, and suggests a number of options California might pursue in addressing looming sales tax problems.²⁸

I. A BRIEF SURVEY OF CALIFORNIA SALES AND USE TAX LAW

California sales tax is imposed²⁹ on a retailer "[f]or the privilege of selling tangible personal property,"³⁰ while a use tax is imposed on the purchaser "storing, using, or otherwise consuming . . . tangible personal property"—purchased from a retailer without being subjected to the sales tax—in the state of California.³¹ The sales tax is imposed on the *seller*,³² as "[i]t is not a tax on the sale or because of the sale but . . . an excise tax for the privilege of conducting a retail business" ³³ As such, the buyer is under no obligation to the State of California with respect to the sales tax.³⁴

The base against which both the sales and use taxes are applied is "generally the consideration paid for goods sold."³⁵ Sales tax is imposed on California retailers as a percentage of their gross receipts³⁶ from sales of tangible personal property.³⁷

²⁷ See *infra* Part III.

²⁸ See *infra* Part IV.

²⁹ The California Legislature has inherent power to enact sales tax laws, in the absence of constitutional prohibition. *Roth Drugs v. Johnson*, 57 P.2d 1022, 1031 (1936); see also *People v. Coleman*, 4 Cal. 46, 46, 49 (1854) ("The Legislature, in its discretion, may, therefore, discriminate in the imposition of taxes on certain classes of persons, occupations, or species of property, taxing same and exempting others."). The State Board of Equalization, however, administers and enforces the provisions imposing sales and use taxes. CAL. REV. & TAX. CODE § 7051 (West 2010).

³⁰ CAL. REV. & TAX. CODE § 6051 (West 2010); see also *De Aryan v. Akers*, 87 P.2d 695, 698 (1939) ("The taxpayer, the seller, is charged with the mandatory duty to add the amount of the tax to his sales price, and to collect it from the purchaser along with the sales price. He has all the authority to collect this added sum which he has to collect, his sales price. The law intervenes and adds the amount of the sales tax which the seller must pay to the state to the price he must collect from the purchaser. It is collected to reimburse the seller for what he must pay the state. The ultimate burden of the tax is thus passed on to the customer."); *Mkt. St. Ry. Co. v. Cal. State Bd. of Equalization*, 290 P.2d 20, 24 (1955).

³¹ CAL. REV. & TAX. CODE § 6202 (West 2010); see also *Bank of Am. Nat'l Trust & Sav. Ass'n v. State Bd. of Equalization*, 26 Cal. Rptr. 348, 355 (1962).

³² *W. Lithograph Co. v. State Bd. of Equalization*, 78 P.2d 731, 735–36 (1938).

³³ *City of Pomona v. State Bd. of Equalization*, 347 P.2d 904, 906 (1959) (quoting *Livingston Rock & Gravel Co. v. De Salvo*, 288 P.2d 317, 319 (1955)); see also *W. Lithograph Co.*, 78 P.2d at 736; *De Aryan*, 87 P.2d at 699.

³⁴ *Nat'l Ice & Cold Storage Co. of Cal. v. Pac. Fruit Express Co.*, 79 P.2d 380, 384 (Cal. 1938); *Mkt. St. Ry. Co.*, 290 P.2d at 30.

³⁵ *Dell, Inc. v. Superior Court.*, 71 Cal. Rptr. 3d 905, 911 (2008).

³⁶ California defines "gross receipts" as the total amount of the sale, lease, or rental price, as the case may be, of the retail sales of retailers, valued in money whether received in money or otherwise, ordinarily without any deductions for the cost of the property sold,

Use tax is imposed on consumers as a percentage of the sales price of tangible personal property stored, used, or consumed in California.³⁸

California imposes general sales and use taxes,³⁹ as well as a number of selective sales and use taxes applicable to particular commodities or transactions, such as cigarettes and tobacco products,⁴⁰ motor vehicle fuel,⁴¹ and alcoholic beverages.⁴² In addition to the state, counties, and cities⁴³—as well as local transit districts⁴⁴—that may levy general sales and use taxes. The sales or use tax levied on any given transaction is the sum of the basic state sales and use tax, the Bradley-Burns local tax,⁴⁵ and additional local transactions and use taxes, if any. Prior to this writing, California imposed a 7.25% minimum state sales tax, of which 6.25% constituted the state rate and 1.00% the local rate.⁴⁶ Due to California voter approval of Proposition 30,⁴⁷ the

materials, labor or service cost, interest paid, losses, other expenses, transportation costs, or federal or state gasoline taxes imposed. CAL. REV. & TAX. CODE § 6012 (West 2010).

³⁷ CAL. REV. & TAX. CODE § 6051 (West 2010); *see also Dell, Inc.*, 71 Cal. Rptr. 3d at 911. The sales tax is not imposed on individual sales of merchandise. *W. Lithograph Co.*, 78 P.2d at 735. The State presumes that all gross receipts are subject to sales tax unless otherwise established. CAL. REV. & TAX. CODE § 6091 (West 2010).

³⁸ CAL. REV. & TAX. CODE § 6201 (West 2010); *see also Dell, Inc.*, 71 Cal. Rptr. 3d at 911.

³⁹ CAL. REV. & TAX. CODE § 6001 (West 2010).

⁴⁰ CAL. REV. & TAX. CODE §§ 30001–30482 (West 2010).

⁴¹ CAL. CONST. art. XIX, § 2.

⁴² CAL. REV. & TAX. CODE § 32151 (West 2010).

⁴³ CAL. CONST. art. XIII, § 24(a) (authorizing local governments to impose taxes for local purposes). The Bradley-Burns Uniform Local Sales and Use Tax Law, enacted in 1955, permits counties and cities to impose sales and use taxes. CAL. REV. & TAX. CODE § 7201 (West 2010); CALIFORNIA STATE BOARD OF EQUALIZATION, CALIFORNIA CITY AND COUNTY SALES AND USE TAX RATES 20 (Oct. 1, 2012), *available at* www.boe.ca.gov/pdf/pub71.pdf. As noted above, the Internet Tax Freedom Act permits a state, county, and city to concurrently tax the same e-commerce transaction due to the geographical verticality of the taxing bodies. *Noto, supra* note 24, at 30.

⁴⁴ *See* CAL. PUB. UTIL. CODE §§ 29140–29143 (West 2010) (San Francisco Bay Area Metropolitan Rapid Transit District); CAL. PUB. UTIL. CODE §§ 40330–40336 (West 2010) (Orange County Rapid Transit District); CAL. PUB. UTIL. CODE §§ 70223–70223.5 (West 2010) (Marin County Rapid Transit District); CAL. PUB. UTIL. CODE §§ 98290–98296 (West 2010) (Santa Cruz Metropolitan Transit District).

⁴⁵ *See supra* note 43 and accompanying text.

⁴⁶ CALIFORNIA STATE BOARD OF EQUALIZATION, CALIFORNIA CITY AND COUNTY SALES AND USE TAX RATES 20 (Oct. 1, 2012), *available at* www.boe.ca.gov/pdf/pub71.pdf. For current sales and use tax rates in California cities and counties, visit <http://www.boe.ca.gov/cgi-bin/rates.cgi>. Of the 6.25% constituting the State rate, 3.6875% goes to the State's General Fund pursuant to CAL. REV. & TAX. CODE § 6051, 6201 (West 2010); 0.25% goes to the State's General Fund pursuant to CAL. REV. & TAX. CODE § 6051.3, 6201.3 (West 2010); 0.25% goes to the State's Fiscal Recovery Fund to pay off Economic Recovery Bonds pursuant to CAL. REV. & TAX. CODE § 6051.5, 6201.5 (West 2010); 0.50% goes to the Local Public Safety Fund to support local criminal justice activities pursuant to CAL. CONST. art. XIII, § 35; 0.50% goes to the Local Revenue Fund to support health and social services programs pursuant to CAL. REV. & TAX. CODE § 6051.2, 6201.2 (West 2010); and 1.0625% goes to the Local Revenue Fund 2011 pursuant

6.25% statewide base sales and use tax rate increased by 0.25% on January 1, 2013, yielding a 7.5% minimum state sales tax.⁴⁸

The sales and use taxes imposed by California together form a comprehensive tax system applicable to the “sale, use, storage or consumption of tangible personal property within the state.”⁴⁹ Sales and use taxes are mutually exclusive but complementary, designed to exact from consumers of tangible personal property within California an “equal tax based on a percentage of the purchase price of the property in question.”⁵⁰ Generally, “[a] sales tax is a tax on the freedom of purchase . . . [a] use tax is a tax on the enjoyment of that which was purchased.”⁵¹ While complementary, however, the two taxes are separate and not interdependent.⁵²

With a cursory understanding of California’s general sales and use tax law sufficient to frame the discussion, we turn next to the phenomenon of cloud computing.

to CAL. REV. & TAX. CODE § 6051.15, 6201.15 (West 2010). *Detailed Description of the Sales and Use Tax Rate*, CALIFORNIA STATE BOARD OF EQUALIZATION, <http://www.boe.ca.gov/news/sp111500att.htm> (last visited Nov. 25, 2012). As of January 1, 2013, additional state sales tax funds raised as a result of the passage of Proposition 30 will go to additional local funds, the details of which lie beyond the scope of this discussion. See CAL. CONST. art. XIII, § 36; *infra* note 48.

⁴⁷ See *supra* note 15.

⁴⁸ *Sales and Use Tax Rate: Increases January 1, 2013*, CAL. STATE BD. OF EQUALIZATION, <http://www.boe.ca.gov/rateincrease/> (last visited Nov. 25, 2012). Proposition 30 amended the California Constitution, adding a new section to Article XIII. CAL. CONST. art. XIII, § 36. The higher tax rate will apply for four years—January 1, 2013 through December 31, 2016. CAL. CONST. art. XIII, § 36(f)(1)(A) (“In addition to the taxes imposed by Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code, for the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers at the rate of 1/4 percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State on and after January 1, 2013, and before January 1, 2017.”).

⁴⁹ *Wallace Berrie & Co. v. State Bd. of Equalization*, 707 P.2d 204, 208 (Cal. 1985); *Douglas Aircraft Co. v. Johnson*, 90 P.2d 572, 575 (Cal. 1939); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 86 Cal. Rptr. 2d 362, 367 (1999). The United States Supreme Court concisely summarized the interplay of California’s sales and use taxes: “The [sales tax] levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the [use tax] imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government.” *S. Pac. Co. v. Gallagher*, 306 U.S. 167, 171 (1939).

⁵⁰ *Agnew v. State Bd. of Equalization*, 981 P.2d 52, 56 n.3 (Cal. 1999); see also *Wallace Berrie & Co.*, 707 P.2d at 208.

⁵¹ *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944); see also *Union Oil Co. of Cal. v. State Bd. of Equalization*, 386 P.2d 496, 503 (Cal. 1963); *Auerbach v. Assessment Appeals Bd. No. 2 for Cnty. of L.A.*, 85 Cal. Rptr. 3d 105, 107 n.2 (2008).

⁵² *Bank of Am. Nat’l Trust & Sav. Ass’n v. State Bd. of Equalization*, 26 Cal. Rptr. 348, 356 (1962).

II. THE EMERGENCE OF CLOUD COMPUTING

While cloud computing is a relatively new phenomenon, one must grasp the evolution of computing and networking to fully understand its importance and the rather fundamental shift in computing it may represent.

A. A Brief History of Computing and Networking

Prior to 1980, computing operated on a client/server model in which software, data, and control resided on mainframe computers, known as servers.⁵³ To access data or run a program, the end user connected to the mainframe via a computer terminal, sometimes called a “dumb terminal” due to its lack of memory, storage space, or processing power.⁵⁴ The terminal existed as a mere gateway to the mainframe’s functionality.⁵⁵ Due to the architecture and limited processing power, no two users could access the same data on the mainframe simultaneously.⁵⁶

In 1968, an engineer at the Stanford Research Institute, Douglas Engelbart, introduced the mouse, word processing, collaborative documents and more, in the context of an easy to understand graphical user interface (GUI).⁵⁷ Seven years later, Bill Gates and Paul Allen founded a company called Micro-Soft, and began writing software for the newly invented personal computer (PC).⁵⁸ The PC soon supplanted the mainframe as the center of corporate computing, and allowed individual users to install applications and store data on their own equipment.⁵⁹ By 1984, Apple had released the Macintosh, the first commercially

⁵³ MILLER, *supra* note 4, at 11. The price tag on mainframe computers was cost-prohibitive for most companies—the rent on a typical IBM computer was approximately \$30,000 a month in the mid 1960s. NICHOLAS CARR, *THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE* 52 (2008).

⁵⁴ MILLER, *supra* note 4, at 11. Mainframes were secluded in separate rooms, operated by a staff of technicians. CARR, *supra* note 53, at 52; *see also* PAUL E. CERUZZI, *A HISTORY OF MODERN COMPUTING* 77 (2d ed. 2003) (“Customers with the largest needs installed large mainframes in special climate-controlled rooms, presided over by a priesthood of technicians.”).

⁵⁵ Robison, *supra* note 19, at 1197.

⁵⁶ MILLER, *supra* note 4, at 11.

⁵⁷ JOHNNY RYAN, *A HISTORY OF THE INTERNET AND THE DIGITAL FUTURE* 49–50 (2010). *But see* WILBERT O. GALITZ, *THE ESSENTIAL GUIDE TO USER INTERFACE DESIGN: AN INTRODUCTION TO GUI DESIGN PRINCIPLES AND TECHNIQUES* 7 (3d ed. 2007) (crediting Ivan Sutherland from the Massachusetts Institute of Technology with first introducing graphics with his Sketchpad program in 1963, and Xerox with patenting today’s mouse in 1974).

⁵⁸ CARR, *supra* note 53, at 54.

⁵⁹ *Id.* at 55; *see also* Picker, *supra* note 19, at 4 (noting that, prior to the web, Microsoft Office and desktop computing “were the tools that we used to create documents that resided on the hard disks in our desktops or laptops”).

successful PC with a GUI, followed the next year by Microsoft's introduction of Windows.⁶⁰ For the first time, the value of desktop PCs sold in the United States surpassed sales of mainframe machines.⁶¹ Business organizations summarily moved away from a single mainframe model, and embraced a network of many PCs that everyone could use.⁶²

PC users began to interconnect through private, internal networks to communicate with co-workers.⁶³ Subscription services like CompuServe—which initially offered its services only in corporate contexts—America OnLine (AOL), and Prodigy soon offered up their own self-contained networks for home use.⁶⁴ The World Wide Web appeared in 1990, and offered integration of individual networks via the Internet.⁶⁵ In light of the increased popularity and prevalence of the web in the mid-1990s, these services eventually offered their subscribers a connection to the vast array of content on the web.⁶⁶

By 1997, more than fifty-six million Americans could access the Internet at home, work, or school.⁶⁷ The same year, the

⁶⁰ RYAN, *supra* note 57, at 53.

⁶¹ David E. Sanger, *Bailing Out of the Mainframe Industry*, N.Y. TIMES, Feb. 5, 1984, at F1; *see also* DAVID REYNOLDS, ONE WORLD DIVISIBLE: A GLOBAL HISTORY SINCE 1945, at 513 (2000) (stating that personal computer sales eclipsed those of large corporate mainframes by 1984).

⁶² RYAN, *supra* note 57, at 73.

⁶³ *Id.* (“Local Area Network (LAN) allowed organizations and universities to network the new generation of PCs.”); *see also* CERRUZI, *supra* note 54, at 291–95; Robison, *supra* note 19, at 1198.

⁶⁴ RYAN, *supra* note 57, at 71; *see also* Robison, *supra* note 19, at 1198; Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1990–91 (2006) [hereinafter Zittrain, *Generative Internet*] (discussing self-contained “walled garden” networks like CompuServe and Prodigy, which connected members to one another and to content managed by the network proprietor).

⁶⁵ Robison, *supra* note 19, at 1198; *see also* Zittrain, *Generative Internet*, *supra* note 64, at 1992–93 (observing that the development of graphical World Wide Web protocols and PC browsers to support them, together with Internet-enabled applications, marked the “beginning of the end of proprietary information services,” and ushered in the era of a broadly accessible Internet); KARL FRIEDEN, CYBERTAXATION: THE TAXATION OF E-COMMERCE 5 (2000) (“The Internet and its graphical subnetwork called the World Wide Web . . . enable millions of computers and other communication equipment using different hardware, operating systems, and software application programs to link to each other by a common protocol.”).

⁶⁶ RYAN, *supra* note 57, at 72; *see also* Zittrain, *Generative Internet*, *supra* note 64, at 1992–93 (“As PC users found themselves increasingly able to access the Internet, proprietary network operators *cum* content providers scrambled to reorient their business models away from corralled content and toward accessibility to the wider Internet. These online service providers quickly became mere [Internet Service Providers], with their users branching out to the thriving Internet for programs and services.”); Peter H. Lewis, *A Boom for On-Line Services*, N.Y. TIMES, July 12, 1994, at D14 (“Some of these consumer services already offer, and others plan to offer, access to the Internet, a worldwide network of some 2.2 million host computers that provide information and services to an estimated 25 million people.”).

⁶⁷ ERIC C. NEWBURGER, U.S. CENSUS BUREAU, COMPUTER USE IN THE UNITED

combination of more powerful PCs and faster Internet speeds coalesced to produce a new widespread phenomenon of music piracy, which inspired a novel file transfer method known as “peer-to-peer” (P2P).⁶⁸ As more Internet users connected using faster broadband speeds, providers such as Hulu,⁶⁹ Apple,⁷⁰ and Skype⁷¹ joined existing P2P models in distributing content and offering Internet-based services.⁷²

The continuing increase in Internet speeds, coupled with the prevalence of mobile Internet access, facilitated new and interactive Web-based behavior, and the rise of so-called “Web 2.0.”⁷³ Users progressed beyond mere document creation in Microsoft Office, for example, and now maintain active online presences.⁷⁴ They search for information on Google,⁷⁵ buy and sell goods on eBay,⁷⁶ consume audio and video content on YouTube,⁷⁷ and socialize on Facebook,⁷⁸ to name several common examples.⁷⁹

B. The “Cloud” Formation

Cloud computing denotes a significant shift in the method by which we store information and run applications.⁸⁰ Users run

STATES 9 (1997), available at <http://www.census.gov/prod/99pubs/p20-522.pdf>; see also Robison, *supra* note 19, at 1198; FRIEDEN, *supra* note 65, at 3 (“In the United States, the number of households that have access to the Internet increased from 0.2 percent in 1993 to 14 percent in 1996 to 37 percent in 1999.”).

⁶⁸ RYAN, *supra* note 57, at 153; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

⁶⁹ HULU, <http://www.hulu.com> (last visited Nov. 25, 2012).

⁷⁰ APPLE ITUNES, <http://www.apple.com/itunes/> (last visited Nov. 25, 2012).

⁷¹ SKYPE, <http://www.skype.com> (last visited Nov. 25, 2012).

⁷² RYAN, *supra* note 57, at 153; Robison, *supra* note 19, at 1198. In 2009, sixty-three percent of American adults had a broadband Internet connection in their home. JOHN HARRIGAN, PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2009, at 9 (2009), available at <http://www.pewinternet.org/~media/Files/Reports/2009/Home-Broadband-Adoption-2009.pdf>.

⁷³ Robison, *supra* note 19, at 1199; RYAN, *supra* note 57, at 137–39 (differentiating between early websites—which were “simply another way to broadcast information to an audience”—from the Web 2.0 environment, in which “information and content on the Internet are plastic and mutable, open-ended and infinitely adaptable by users”); see also Picker, *supra* note 19, at 4 (“This is the emergence of a new class of online intermediaries. The emergence of these Web intermediaries is one of the defining aspects of Web 2.0. They typically operate over the Internet through a Web browser.”). See generally Tim O’Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, Sept. 30, 2005, <http://oreilly.com/web2/archive/what-is-web-20.html>.

⁷⁴ Picker, *supra* note 19, at 2; see also RYAN, *supra* note 57, at 138 (discussing the dramatic growth of Wikipedia via the contribution of random and anonymous users as evidence that users are exerting ever-greater control over Internet-based mediums).

⁷⁵ GOOGLE, <http://www.google.com> (last visited Nov. 25, 2012).

⁷⁶ EBAY, <http://www.ebay.com> (last visited Nov. 25, 2012).

⁷⁷ YOUTUBE, <http://www.youtube.com> (last visited Nov. 25, 2012).

⁷⁸ FACEBOOK, <http://www.facebook.com> (last visited Nov. 25, 2012).

⁷⁹ Picker, *supra* note 19, at 2.

⁸⁰ MILLER, *supra* note 4, at 7; see also Picker, *supra* note 19, at 5 (observing that we are headed in a new direction regarding computing power, for purposes of both calculation

fewer programs and store less data on individual computing devices, and instead host everything in the cloud, a “nebulous assemblage of computers and servers accessed via the Internet.”⁸¹ Apple’s iCloud⁸² and the web-based file hosting service Dropbox⁸³ are two such examples of widely adopted cloud-based services designed to facilitate the shift to cloud-hosted applications and data. The cloud structure permits division of tasks—such as running applications and storing data—into discrete parts, distributed among the servers’ aggregate resources.⁸⁴ While many have proffered definitions of cloud computing, the concept is as hazy as its name connotes.⁸⁵

On a network computing model, applications and documents are hosted on a single company’s server and accessed only over the company’s network.⁸⁶ By contrast, cloud computing encompasses multiple companies, servers, and networks, and

and storage, and that “[s]ome content may be stored locally on your machine, while other content—content that you in some powerful sense think belongs to you—will be stored remotely. Where actually? You won’t have a clue.”); CARR, *supra* note 54, at 55–56 (noting that the ubiquity of the PC, a single-purpose system, has resulted in low levels of capacity utilization). “One recent study of six corporate data centers revealed that most of their 1,000 servers were using less than a quarter of their available processing power.” *Id.* at 56. The advent of the electrical utilities grid serves as an apropos correlative example. Whereas prior to the advent of electrical utilities, businesses and farms produced their own energy supplies, the emergence of the electrical grid permitted them to purchase more reliable electricity from the utilities at a lower price than they could produce on their own. MILLER, *supra* note 4, at 8.

⁸¹ MILLER, *supra* note 4, at 7; see also RYAN, *supra* note 57, at 7 (“The defining pattern of the emerging digital age is the absence of the central dot.”); Gutiérrez, *supra* note 18, at 589 (“We have entered a new era in computing in which Internet-based data storage and services in ‘the cloud’ offer individuals and business increased control of information, while enabling more engaging, seamless experiences across their computers, cell phones, televisions, and other devices.”).

⁸² ICLOUD, <http://www.apple.com/icloud/> (last visited Nov. 25, 2012); *Apple Introduces iCloud: Free Cloud Services Beyond Anything Offered to Date*, APPLE (June 6, 2011), <http://www.apple.com/pr/library/2011/06/06Apple-Introduces-iCloud.html>; see also *Clash of the Clouds*, *supra* note 4, at 81 (reporting in 2009 that Apple was constructing a \$1 billion data center, perhaps the world’s largest, in North Carolina).

⁸³ DROPBOX, <http://www.dropbox.com> (last visited Nov. 25, 2012).

⁸⁴ Robison, *supra* note 19, at 1199.

⁸⁵ PETER MELL & TIMOTHY GRANCE, THE NIST DEFINITION OF CLOUD COMPUTING: RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY 1 (Sept. 2011), available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (“Cloud computing is an evolving paradigm. The NIST definition characterizes important aspects of cloud computing and is intended to serve as a means for broad comparisons of cloud services and deployment strategies, and to provide a baseline for discussion from what is cloud computing to how to best use cloud computing. The service and deployment models defined form a simple taxonomy that is not intended to prescribe or constrain any particular method of deployment, service delivery, or business operation.”); see also ROBERT GELLMAN, WORLD PRIVACY FORUM, PRIVACY IN THE CLOUDS: RISKS TO PRIVACY AND CONFIDENTIALITY FROM CLOUD COMPUTING 4 (2009), available at http://www.worldprivacyforum.org/pdf/WPF_Cloud_Privacy_Report.pdf (“The definitional borders of cloud computing are much debated today.”).

⁸⁶ MILLER, *supra* note 4, at 8.

enables access to services and storage anywhere on Earth via an Internet connection.⁸⁷ Cloud computing services vary considerably and include data storage sites, health record sites, social networking sites, and many more.⁸⁸ Any information a user may store locally on a computer may also be stored in a cloud.⁸⁹ Perhaps ironically, the emerging cloud structure bears a resemblance to the earlier mainframe computing model, in which the PC serves as a sort of “dumb terminal” to access the cloud’s resources through the Internet.⁹⁰

Among the major players precipitating the shift towards a broad model of cloud computing is Google.⁹¹ The company’s

⁸⁷ *Id.* at 8–9; see also Picker, *supra* note 19, at 5 (noting that most people do not concern themselves with the locale of their computer calculations—whether processing power exists locally is mere detail. The re-centralization of computing power is simply an engineering issue “that turns on the relative costs of central as opposed to local processing power and on inter-computer as opposed to intra-computer communication”). The end user’s agnosticism regarding the location of computing power depends upon an implicit assumption of cloud neutrality, which dictates “where processing or storage is done should be irrelevant, or neutral, for outcomes, legal and otherwise.” Picker, *supra* note 19, at 5; *Battle of the Clouds*, *supra* note 19, at 16 (noting that users of cloud-based email services can access their mail from any web browser).

⁸⁸ GELLMAN, *supra* note 85, at 4; see also *Battle of the Clouds*, *supra* note 19, at 16 (listing Google, Microsoft, Yahoo!, and Apple among the companies currently offering cloud services to consumers, along with specialists like Salesforce and NetSuite—who offer similar services to companies—and Amazon—who rents out cloud-based computing capacity).

⁸⁹ GELLMAN, *supra* note 85, at 4 (listing email, word processing documents, spreadsheets, videos, health records, photographs, tax or other financial information, business plans, PowerPoint presentations, accounting information, advertising campaigns, sales numbers, appointment calendars, and address books as examples of the many types of information that can be stored in a cloud); see also CARR, *supra* note 54, at 17 (“Instead of relying on data and software that reside inside our computers, inscribed on our private hard drives, we increasingly tap into data and software that stream through the public Internet.”).

⁹⁰ Christopher Lawton, ‘Dumb Terminals’ Can Be a Smart Move, WALL ST. J., Jan. 30, 2007, at B3, available at http://online.wsj.com/public/article/SB117011971274291861-oJ6FWrnA8NMPfMXw3vBILth1EiE_20080129.html (discussing a new generation of simplified devices that allow users to perform personal computing tasks by accessing the Internet); see also Robison, *supra* note 19, at 1200; JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 125 (2008) [hereinafter ZITTRAIN, THE FUTURE OF THE INTERNET] (acknowledging computer users have less reason to factor generative capacity—the capacity to produce unprompted, user-driven change—into a PC purchasing decision because of increased Web-based computing); *Battle of the Clouds*, *supra* note 19, at 16 (“If you store more and more things online, and access more and more software through an ordinary web browser, it suddenly matters much less what sort of computer you have, and what kind of software it is running.”); *Clash of the Clouds*, *supra* note 4, at 80 (“Technological developments have hitherto pushed computing power away from central hubs: first from mainframes to minicomputers, and then to PCs. Now a combination of ever cheaper and more powerful processors, and ever faster and more ubiquitous networks, is pushing power back to the centre in some respects, and even further away in others. The cloud’s data centres are, in effect, outsize public mainframes.”).

⁹¹ GOOGLE, <http://www.google.com> (last visited Nov. 25, 2012); see also Steve Lohr & Miguel Helft, *Clash of the Titans: Google Gets Ready to Rumble With Microsoft*, N.Y. TIMES, Dec. 16, 2007, at B1 (recalling Google’s introduction of Google Apps, online

Google Drive⁹² and Google Calendar⁹³ exemplify the cloud computing model's displacement of word processing-like tasks to the cloud, and the industry's move to capitalize on the growing trend.⁹⁴

Another key example of a company seeking to capitalize on the shift is Amazon.⁹⁵ Over the past eight years, Amazon has constructed a vast cloud computing platform that hosts its own web operations, as well as operations for a number of massive Internet companies.⁹⁶ Its own Kindle products utilize a propriety browser to surf the Internet, but harness the power of Amazon's cloud servers to do much of the processing.⁹⁷ As a content provider, Amazon maintains a cloud-centric perspective in which streamed (not downloaded) content is more important than hardware.⁹⁸ Amazon's Elastic Compute Cloud (Amazon EC2) web service, lesser known among its retail customers, provides "resizable compute capacity in the cloud."⁹⁹ Amazon thus provides customers with a virtual computing environment in which they can use web service interfaces in the context of a

software offerings that include e-mail, instant messaging, calendars, word processing, and spreadsheets, and their efforts to deliver computing capability to users over the Internet); MICHAEL MILLER, CLOUD COMPUTING: WEB-BASED APPLICATIONS THAT CHANGE THE WAY YOU WORK AND COLLABORATE ONLINE 9 (2009) ("Google hosts a cloud that consists of both smallish PCs and larger servers. Google's cloud is a private one (that is, Google owns it) that is publicly accessible (by Google's users)."); Richard Rubin & Juliann Francis, *States Pursue Sales Tax Revenue Vanishing Into Computing Cloud*, BLOOMBERG (Nov. 6, 2011, 3:44 PM), <http://www.bloomberg.com/news/2011-08-22/states-pursue-sales-tax-revenue-vanishing-into-computing-cloud.html> (noting that companies like IBM, Amazon, and Google are seeking to capitalize on a global market for cloud computing that is expected to increase to \$241 billion by 2020, citing data by Forrester Research Inc.); *Clash of the Clouds*, *supra* note 4, at 81 (reporting that, according to estimates, Google has built a global network of three dozen data centers with two million servers).

⁹² GOOGLE DRIVE, <https://drive.google.com/start> (last visited Nov. 25, 2012).

⁹³ GOOGLE CALENDAR, <http://www.google.com/calendar/> (last visited Nov. 25, 2012).

⁹⁴ *Battle of the Clouds*, *supra* note 19, at 16; *see also* Robison, *supra* note 19, at 1200.

⁹⁵ AMAZON, <http://www.amazon.com> (last visited Nov. 25, 2012); *see also* Larry Dignan, *Amazon CEO Jeff Bezos: Cloud services can be as big as retail business*, ZDNET (May 27, 2010, 2:14 AM), <http://www.zdnet.com/blog/btl/amazon-ceo-jeff-bezos-cloud-services-can-be-as-big-as-retail-business/35111> (quoting Jeff Bezos, CEO of Amazon, as stating that Amazon Web Services has the potential to be as big as its retail business).

⁹⁶ Steven Levy, *Jeff Bezos Owns the Web in More Ways Than You Think*, WIRED (Nov. 13, 2011, 9:00 PM), http://www.wired.com/magazine/2011/11/ff_bezos/. Among Amazon's Web Services clients are Foursquare, Harvard Medical School, NASA Jet Propulsion Lab, Newsweek/The Daily Beast, PBS, SmugMug, United States Department of Agriculture, Virgin Atlantic, and Yelp. *Id.* Arguably its most important—and impressive—client, however, is Netflix, who uses Amazon Web Services to power its video streaming service, which accounted for twenty-five percent of United States Internet traffic at the time of this writing. *Id.*

⁹⁷ *Id.* (quoting Jeff Bezos as classifying its mobile browser Silk as a split browser, because it exists half in the cloud and half on its Kindle Fire device).

⁹⁸ *Id.*

⁹⁹ AMAZON ELASTIC COMPUTE CLOUD (AMAZON EC2), <http://aws.amazon.com/ec2/> (last visited Nov. 25, 2012).

variety of operating systems, and load onto them a custom application environment.¹⁰⁰ In essence, a customer may purchase a scalable virtual environment in which to operate its business or maintain its web presence, and may increase or decrease computing and server capacity depending on needs.¹⁰¹

Additional examples are numerous, and suggest that the transition in computing is more than a mere fad. Based on historical trends and the growing ubiquity of the Internet, cloud-based services and data clearly represent the next step in the evolution of computing. The rather complex nature of the goods and services that cloud companies provide, however, poses some rather thorny sales taxation problems.

III. TAXATION OF THE INTERNET AND “E-COMMERCE” IN THE UNITED STATES

The Internet’s increasing ubiquity poses a number of challenges to the global tax system, particularly in the context of e-commerce,¹⁰² “a seamless, borderless, and timeless marketplace.”¹⁰³ Internet retailing has “vastly expanded the proportion of ‘remote’ commerce that can be conducted almost instantaneously between vendors based in one location and consumers in another.”¹⁰⁴ The trend towards remote commerce undermines traditional taxation models largely tailored to sales of tangible property and local or regional commerce.¹⁰⁵

A. The Transition to a Service-Based Economy

As the world has shifted from a manufacturing-based economy towards a more service-based economy facilitated by Internet transactions, governments have struggled to keep regulatory pace.¹⁰⁶ Emerging in the late 1990s, e-commerce

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² FRIEDEN, *supra* note 65, at 8 (“E-commerce is generally defined as transactions that involve the exchange of goods and services by electronic means. *Direct* E-commerce involves goods and services that are both purchased and delivered by electronic or digital means. *Indirect* E-commerce involves goods and services that are purchased by electronic means but delivered in tangible form by common carriers or some other traditional form of delivery.”).

¹⁰³ *Id.* at 1 (noting that production and consumption in the new global economy are more mobile, dynamic, intangible, and multinational).

¹⁰⁴ *Id.* at 1–2 (noting that the digital age permits commerce between anyone, anytime, and anywhere).

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.* at 1–2; *see also* JEFF BAXENDALE ET AL., SALES AND USE TAXATION OF E-COMMERCE: STATE TAX ADMINISTRATORS’ CURRENT THINKING WITH CCH COMMENTARY iii (2000) (“Tax laws that were passed with an eye toward twentieth century industry and agriculture are ill-suited to deal with an age of telecommunications and digital products.”); Rubin & Francis, *supra* note 91 (“State sales tax systems created to generate

cemented its place as a viable economy of its own, generating \$507 billion in 1999 in the United States alone—more than the energy, automobile, and airline sectors.¹⁰⁷ From 2007 to 2008, e-commerce increased 12.1% to \$3.7 billion.¹⁰⁸ In 2009, e-commerce accounted for 42% of manufacturers' total shipments to the tune of \$1.8 *trillion*, while retailers' e-commerce sales alone totaled \$145 billion, and constituted 4% of all retail sales.¹⁰⁹ While services and goods will continue to be distributed via traditional models, many business and consumer items—such as movies, books, software, music, and news—are and will become more easily deliverable over the Internet.¹¹⁰

Cross-border transactions, both domestic and international, are a troublesome area of taxation, and pose an increasing number of problems as “dot-coms and click-and-mortar companies” continue to avail themselves of additional jurisdictions with different tax rules.¹¹¹ Digital commerce, in which goods and services are both purchased and delivered by electronic or digital means, compels states to grapple with “issues such as the characterization of income, the bundling of services and products, sourcing rules, transfer pricing, and the valuation of intangibles.”¹¹² Furthermore, as corporations engaging in e-commerce narrow their core competencies, they provide themselves greater flexibility to relocate in jurisdictions with more favorable tax rules and rates.¹¹³

revenue from face-to-face exchanges of tangible goods are struggling to keep up with the rapid shift of business transactions into the so-called cloud of the Internet.”); Steven Maguire, *Internet Transactions and the Sales Tax*, in *INTERNET TAXATION* 1, 6 (Albert Tokin ed., 2003) [hereinafter Maguire, *Internet Transactions*] (noting the “apparent shift in the United States from an economy based on transactions of tangible personal property to intangible products and services”).

¹⁰⁷ FRIEDEN, *supra* note 65, at 21.

¹⁰⁸ U.S. CENSUS BUREAU, “E-STATS” (May 27, 2010), *available at* <http://www.census.gov/econ/estats/2008/2008reportfinal.pdf>; STEVEN MAGUIRE, *STATE TAXATION OF INTERNET TRANSACTIONS* 1 (June 7, 2011), *available at* <http://www.fas.org/sgp/crs/misc/R41853.pdf> [hereinafter MAGUIRE, *STATE TAXATION*].

¹⁰⁹ U.S. CENSUS BUREAU, *supra* note 108.

¹¹⁰ FRIEDEN, *supra* note 65, at 21–22 (listing financial transactions, video conferencing, educational and training materials, e-mail, information services, bulletin boards and chat rooms, telecommunications, internet access services, magazines, electronic bill payments, stock trading, newspapers, games, business databases, remote medical diagnosis, remote repairs, and home banking as additional constituents of the digital economy). A virtual “mall,” open twenty-four hours a day, seven days a week, and fifty-two weeks a year, may ultimately supplant more traditional brick-and-mortar retailers. *Id.* at 36.

¹¹¹ *Id.* at 47.

¹¹² *Id.* at 48.

¹¹³ *Id.* at 49 (predicting that tax laws will need to develop new rules for apportioning the income of more mobile and dynamic businesses).

B. The Internet Tax Freedom Act and Sales Tax Law in the United States

In 1996, Congress—in an attempt to address Internet taxation—formed a bipartisan Congressional Internet Caucus.¹¹⁴ Two years later, Congress enacted the Internet Tax Freedom Act, which prohibited the imposition of new state or local sales¹¹⁵ or use¹¹⁶ taxes on Internet access or online services during a determinable period, as well as the imposition of any multiple or discriminatory taxes on e-commerce.¹¹⁷ Most recently, Congress extended the tax moratorium until November 1, 2014.¹¹⁸

Though the federal government has made efforts to address the issue, state governments have devoted the most significant amount of political attention to the taxation of e-commerce, for

¹¹⁴ *Id.* at 55; see also CONGRESSIONAL INTERNET CAUCUS ADVISORY COMMITTEE, <http://www.netcaucus.org> (last visited Nov. 25, 2012).

¹¹⁵ See MAGUIRE, STATE TAXATION, *supra* note 108, at 2 (characterizing the sales tax generally as “a transaction tax on the transfer of tangible personal property, as expenditures on most services are typically excluded from the state sales tax base.”); Maguire, *Internet Transactions*, *supra* note 106, at 6.

¹¹⁶ See *id.* at 2 (“For remote transactions where the vendor and consumer are in different states, the consumer is responsible for remitting the use tax. The use tax is levied on the *use* of a product or service.”). The use tax is only levied if the vendor has no physical presence, or substantial nexus, in the consumer’s state of residence. *Id.* at 2 n.1. The use tax appeared in 1938 as a companion to the sales tax and a means of capturing revenue from sales made out-of-state. *Id.* at 4 n.7.

¹¹⁷ FRIEDEN, *supra* note 65, at 55. Discriminatory taxes consist in taxes applied only to e-commerce, but not to similar goods or services ordered and/or delivered non-electronically. *Id.* The Internet Tax Freedom Act defines electronic commerce as “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.” Noto, *supra* note 24, at 29; see also U.S. GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, FIRST ANNUAL REPORT 13 (Nov. 1998), available at <http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/U.S.%20Government%20Working%20Group%20on%20Electronic%20Commerce.pdf> [hereinafter GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE]

I [President Clinton] direct the Secretary of the Treasury to work with State and local governments and with foreign governments to achieve agreements that will ensure that no new taxes are imposed that discriminate against Internet commerce; that existing taxes should be applied in ways that avoid inconsistent national tax jurisdictions and double taxation; and that tax systems treat economically similar transactions equally, regardless of whether such transactions occur through electronic means or through more conventional channels of commerce.

¹¹⁸ Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, 121 Stat. 1024 (2007). The extension clarifies that services such as instant messaging, email, and personal online storage are included in the definition of “Internet access” and are not taxable by states. JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE 763 (6th ed. 2008). On January 25, 2011, Senator John Ensign introduced S. 135, the “Permanent Internet Tax Freedom Act of 2011,” with the intent to “make the moratorium on Internet access taxes and multiple and discriminatory taxes on electronic commerce permanent.” S. 135, 112th Cong. (2011).

good reason.¹¹⁹ State and local taxes in the United States account for over \$700 billion in revenues, or about 45% of all tax dollars raised in the country.¹²⁰ State governments rely on sales and use taxes for approximately one-third of their total tax revenue.¹²¹ Currently, forty-five states and the District of Columbia impose such sales taxes.¹²²

Sales tax in the United States, generally, is “any tax which includes within its scope all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage, with the exceptions noted in the taxing law.”¹²³ Vendors typically collect state and local sales taxes at the point of transaction, calculated as a percentage of the product’s retail price.¹²⁴ Similarly imposed use taxes are not collected by the

¹¹⁹ FRIEDEN, *supra* note 65, at 56.

¹²⁰ *Id.* at 57.

¹²¹ MAGUIRE, STATE TAXATION, *supra* note 108, at 1 (noting that state general sales and use taxes amounted to approximately \$241 billion in 2008). State governments generated just over \$228 billion in general sales and use taxes during the 2009 fiscal year, whereas local governments generated approximately \$62 billion in similar general sales and use taxes during the same period. U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT FINANCES BY LEVEL OF GOVERNMENT AND BY STATE: 2008–09, *available at* <http://www.census.gov/govs/estimate>; *see also* JOHN R. LUCKEY, STATE SALES TAXATION OF INTERNET TRANSACTIONS 2 (2004); JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 1 (2d ed. 1994) (“The sales tax is the most important tax, revenue wise, in the states today, and has been so for several decades.”). Local governments derive a lesser percentage of their tax revenue—11.6%—from such taxes, though still managed to collect the substantial sum of approximately \$64 billion in 2008. MAGUIRE, STATE TAXATION, *supra* note 108, at 1.

¹²² MAGUIRE, STATE TAXATION, *supra* note 108, at 1; DUE & MIKESELL, *supra* note 121, at 1; Maguire, *Internet Transactions*, *supra* note 106, at 2 (stating that forty-five states and the District of Columbia require retail outlets to add a fixed percentage to the sales price of taxable items, and that the sales tax is applied to transactions occurring in store, where it is collected and remitted by the vendor); *see also* FRIEDEN, *supra* note 65, at 57 (“Along with the 45 states and the District of Columbia that currently impose sales or use taxes at the state level, there are approximately 7,500 counties, cities, towns, and special districts that also impose sales or use taxes on transactions occurring within their borders.”); CCH, 2011 HANDBOOK, *supra* note 23, at 783 (noting that Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a general, statewide sales and use tax). While the Internet Tax Freedom Act prohibits double taxation by two or more jurisdictions at the same level of government, it permits multiple sales and use taxes that are geographically vertical. Noto, *supra* note 24, at 29–30. Thus, states and their subdivisions—counties and cities—may impose their sale or use tax on the same e-commerce transaction. *Id.* at 30.

¹²³ ROBERT MURRAY HAIG & CARL SHOUP, THE SALES TAX IN THE AMERICAN STATES 3 (1934); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION: II SALES AND USE, PERSONAL INCOME, AND DEATH AND GIFT TAXES AND INTERGOVERNMENTAL IMMUNITIES 12-3 (3d ed. 2010). Another writer defined sales tax as a tax for which “the amount of tax payable is produced by a constant rate applied to the volume or value of commodities or services transferred or exchanged.” NEIL H. JACOBY, RETAIL SALES TAXATION 8 (1938).

¹²⁴ MAGUIRE, STATE TAXATION, *supra* note 108, at 1; *see also* HART, *supra* note 118, at 761 (6th ed. 2008) (“In states that impose a sales tax, buyers are obligated to pay sales tax and sellers that operate within the state are obligated to collect sales tax and remit it to the government.”).

vendor unless the vendor has substantial nexus¹²⁵ in the consumer's state.¹²⁶ Rather, consumers must remit use taxes to the appropriate taxing jurisdiction for the use of the purchased product, though compliance with the requirement is low.¹²⁷ Sales and use taxes, as discussed earlier, are mutually exclusive but complementary.¹²⁸

States—even after the passage of the Internet Tax Freedom Act—retain the power to impose a sales tax on in-state sales accomplished via the Internet,¹²⁹ and to tax transactions between residents and out-of-state sellers with no connections to the state.¹³⁰ Whether state governments can tax Internet sales impacts not only government tax revenue, but also the business operations of brick-and-mortar retailers who may be forced to collect sales taxes their online competitors do not.¹³¹

The revenue that state sales and use taxes generate depends upon the base of the tax and the tax rate.¹³² States' tax bases are non-uniform, and tax rates vary considerably, depending on the

¹²⁵ See *supra* note 23.

¹²⁶ MAGUIRE, STATE TAXATION, *supra* note 108, at 1.

¹²⁷ *Id.* at 1; see also Maguire, *Internet Transactions*, *supra* note 106, at 6 (noting that Internet shoppers' failure to judiciously remit use taxes as prescribed by state law amounts to an evasion of the traditional sales and use tax that services to exacerbate the regressiveness of the sales tax in the short run).

¹²⁸ Wallace Berrie & Co. v. State Bd. of Equalization, 707 P.2d 204, 208 (1985); see also Agnew v. State Bd. of Equalization, 981 P.2d 52, 55 (1999).

¹²⁹ The Internet Tax Freedom Act defines "Internet" as "collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio." Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 1101(e)(3)(C), 112 Stat. 2681-719, 720 (1998); see also GOVERNMENT WORKING GROUP ON ELECTRONIC COMMERCE, *supra* note 117, at iii ("The *Internet Tax Freedom Act* places a three-year moratorium on new and discriminatory taxes on Internet commerce and creates a commission to develop a uniform system for the application of existing taxation of remote sales.").

¹³⁰ LUCKEY, *supra* note 121, at 2; see also HART, *supra* note 118, at 762 ("The Internet Tax Moratorium . . . did not prohibit states from taxing Internet sales, though many believed that it did. The moratorium merely prohibited taxation of Internet access fees and imposition of taxes that discriminated against Internet transactions, for example, by taxing them more heavily than other transactions.").

¹³¹ HART, *supra* note 118, at 762; Maguire, *Internet Transactions*, *supra* note 106, at 4 ("Because interstate Internet transactions do not have the sales and use tax added to their price by out-of-state vendors, it is argued that Internet retailers and catalogue retailers have a competitive advantage over traditional 'bricks and mortar' vendors who are required to collect the tax.").

¹³² MAGUIRE, STATE TAXATION, *supra* note 108, at 2; Maguire, *Internet Transactions*, *supra* note 106, at 5 ("The revenue a sales and use tax generates depends upon the chosen rate and the base to which the rate applies."). The narrower the base, the higher the tax rate must be in order to generate equivalent revenue. *Id.* Some transactions, including business-to-business transactions in a number of states, are not subject to the retail sales tax. *Id.* at 3.

state's tax-related revenue structure.¹³³ In sum, state and local governments around the country generated approximately \$291 billion during the 2009 fiscal year.¹³⁴ Of that total, California generated just under \$29 billion in general sales and use taxes at the state level, and another \$8 billion or so at the local government level.¹³⁵

In addition to sales tax, most states levy income taxes to generate revenue.¹³⁶ Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming, however, do not impose such an individual income tax.¹³⁷ Unsurprisingly, of all the fifty states, Washington, Tennessee, and South Dakota rely most upon the sales tax in generating revenue.¹³⁸ Washington has recently expanded its sales tax laws by enacting provisions that tax digital products with service-like characteristics.¹³⁹ California ranks square in the middle of all states, relying on sales tax revenue for 22.1% of its total tax revenue.¹⁴⁰ States without an individual income tax—Washington in particular—will likely lead the push for Internet taxation reform out of sheer necessity.

IV. CALIFORNIA STATE SALES AND USE TAX TREATMENT OF CLOUD COMPUTING TRANSACTIONS

While e-commerce, generally, engenders numerous tax questions,¹⁴¹ a number of components of cloud computing transactions raise specific state tax implications.¹⁴² It is often difficult to determine whether cloud computing transactions are products or services of a type that are subject to state sales tax.

¹³³ MAGUIRE, STATE TAXATION, *supra* note 108, at 2; Maguire, *Internet Transactions*, *supra* note 106, at 5.

¹³⁴ U.S. CENSUS BUREAU, *State and Local Government Finances Summary: 2009*, 6 (2011), available at <http://www.census.gov/govs/estimate>.

¹³⁵ *Id.*

¹³⁶ MAGUIRE, STATE TAXATION, *supra* note 108, at 7.

¹³⁷ CCH, 2011 HANDBOOK, *supra* note 23, at 293. "New Hampshire and Tennessee levy a tax on income from dividends and interest." MAGUIRE, STATE TAXATION, *supra* note 108, at 7.

¹³⁸ MAGUIRE, STATE TAXATION, *supra* note 108, at 7–8. In 2008, Washington relied upon sales tax revenue for 48.0% of its total tax revenue, while Tennessee and South Dakota relied upon sales tax revenue for 46.3% and 40.1%, respectively, of their total tax revenue. *Id.*

¹³⁹ See WASH. REV. CODE § 82.04.050(8) (West 2011) (taxing access to data and data processing); see also Jacobs & Miller, *supra* note 23, at 10.

¹⁴⁰ MAGUIRE, STATE TAXATION, *supra* note 108, at 7.

¹⁴¹ BAXENDALE, *supra* note 106, at iii.

¹⁴² Rubin & Francis, *supra* note 91

The tussles over taxation of cloud computing extend beyond the familiar e-commerce dispute about whether states can require out-of-state companies to collect taxes on sales to in-state consumers. Tax authorities and companies are debating whether companies that sell software and data accessed through the cloud are peddling a taxable good or a nontaxable service.

Furthermore, such transactions often include a lease element—typically a lease of server space—which would normally be treated as a sale for the purposes of the statutory provisions governing sales and use taxes, so long as the leased property is tangible personal property.¹⁴³

Cloud computing allows a consumer to engage servers, storage, and bandwidth on an as-needed basis, such that “the customer may . . . consum[e] services (computer and data services) and space, while simultaneously purchasing applications and the right to access data (lease of server space).”¹⁴⁴ Cloud vendors may offer augmented computing power or storage space, a platform for providers to develop and access specific applications, and customized software development and hosting.¹⁴⁵ As to the latter, a cloud vendor may offer a customized application that can interface with a vendor’s database.¹⁴⁶ An application program interface (API) would then permit the customized application to “interact with the API, often across multiple servers.”¹⁴⁷ As such, cloud computing transactions consist in a “web of interactions between vendor and consumer, involving multiple, simultaneous exchanges of services and products occurring in numerous locations.”¹⁴⁸ The nuance and complexity of such transactions, in which a server lease may be bundled with a variable service and a number of software components, poses a substantial problem to a sales tax system that best copes with easily classifiable transactions.

A. Taxability of Cloud Computing Transactions Under Current California Law

California directs its sales and use taxes primarily at tangible personal property. California defines “tangible personal property” as “personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.”¹⁴⁹ Thus, California law does not impose a tax on the sale of intangible personal property¹⁵⁰ or on

¹⁴³ CAL. REV. & TAX. CODE § 6006(g) (West 2010).

¹⁴⁴ Jacobs & Miller, *supra* note 23, at 11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ CAL. REV. & TAX. CODE § 6016 (West 2010); *see also infra* note 150.

¹⁵⁰ There seems to be no comprehensive definition of intangible property. Robert L. Cowdrey, *Software and Sales Taxes: The Illusory Intangible*, 63 B.U. L. REV. 181, 200–03 (1983); *Navistar Int’l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 110 (1994). “Such property is generally defined, however, as a ‘right’ rather than a physical object.” *Navistar*, 884 P.2d at 110; *Roth Drugs v. Johnson*, 57 P.2d 1022, 1028 (1936) (“Tangible property is that which is visible and corporeal, having substance and body as contrasted

the performance of services,¹⁵¹ though neither concept is defined by statute. As the court in *Roth Drugs v. Johnson*¹⁵² stated:

The taxing of tangible personal property as distinguished from intangible property is perfectly natural and reasonable. . . . The reason for distinguishing between tangible and intangible property for the purpose of taxation is very evident. The first is visible, accessible, and easy to identify and levy upon, while the other is not so readily located or its value ascertained. There is no room for logical controversy over the right to distinguish between tangible and intangible property for the purpose of taxation.¹⁵³

While a top-level distinction between tangible and intangible property is logically defensible, a recurrent problem of taxation—as with software, for example—lies in distinguishing tangible and intangible in the first place.

1. Software

Canned¹⁵⁴ software delivered on tangible personal property is generally taxable in all fifty states, plus the District of Columbia.¹⁵⁵ Sales or licenses of prewritten computer software delivered electronically, however, evoke mixed responses from states.¹⁵⁶ In California, sales of canned software delivered

with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper, annuities and the like.”). For taxation purposes, “intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences.” *Navistar*, 884 P.2d at 110; see also *Dilley v. Ketchikan Gateway Borough*, 855 P.2d 1335, 1336–37 (Alaska 1993) (relying on Black’s Law Dictionary’s definition of intangible property as such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stocks, bonds, promissory notes, copyrights, and franchises).

¹⁵¹ While there exists no statutory definition, the Supreme Court of California has defined “service” as “the performance of labor for the benefit of another.” *Navistar*, 884 P.2d at 110–11; *Culligan Water Conditioning v. State Bd. of Equalization*, 550 P.2d 593, 599 (1976).

¹⁵² 57 P.2d 1022 (1936).

¹⁵³ *Id.* at 1028.

¹⁵⁴ “Canned” and “prewritten” will be used interchangeably to indicate “non-custom.”

¹⁵⁵ CCH, 2011 HANDBOOK, *supra* note 23, at 816–17. In Florida, “[s]oftware used predominantly for research and development may qualify for exemption.” *Id.* at 816. In Tennessee, “[e]xemptions may apply for the use of software developed and fabricated by an affiliated company or for fabrication of software by a person for that person’s own use or consumption.” *Id.* at 817. In Virginia, “[s]oftware used directly and exclusively in exempt research and development activities may qualify for exemption.” *Id.*

¹⁵⁶ *Id.* at 818–19. Sales of canned software delivered electronically are taxable—with certain exceptions—in Alabama, Arizona, Colorado, Connecticut, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 818–19. Sales of canned software delivered electronically are exempt from state sales taxation—with certain exceptions—in Arkansas, California, Florida, Georgia, Iowa, Maryland, Missouri, Nevada, Oklahoma, Rhode Island, South Carolina, and Virginia. *Id.*

electronically are exempt from state taxation.¹⁵⁷ Custom software delivered on tangible personal property is similarly exempt from taxation in California,¹⁵⁸ as are sales or licenses of custom computer software delivered electronically.¹⁵⁹ Customization of canned software is, however, taxable in California, although “[s]eparately stated charges for modifications to canned software prepared exclusively for a particular customer [are] exempt only to the extent of modification.”¹⁶⁰ Additionally, sales of digital products transferred electronically—including downloaded music, videos, and books—are exempt from taxation in California.¹⁶¹

Adding to the confusion, a recent California appellate court decision cast some doubt on California’s ability to tax certain software.¹⁶² In *Nortel Networks Inc. v. State Board of Equalization*, the California Court of Appeal held that a license of prewritten software falls within California’s sales and use tax exemption for transfers of intangible property pursuant to a

¹⁵⁷ *Id.* at 818 (“Prewritten programs transferred by remote telecommunications [are] exempt, provided that [the] purchaser does not obtain possession of any tangible personal property (such as storage media) in the transaction.”).

¹⁵⁸ *Id.* at 820. Sales of custom software delivered on tangible personal property are taxable—with certain exceptions—in Arkansas, Connecticut, the District of Columbia, Florida, Hawaii, Mississippi, Nebraska, New Mexico, Ohio, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 820–22. Sales of custom software delivered on tangible personal property are exempt from taxation—with certain exceptions—in Alabama, Arizona, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.*

¹⁵⁹ *Id.* at 823. Sales or licenses of custom computer software delivered electronically are taxable—with certain exceptions—in Connecticut, the District of Columbia, Hawaii, Mississippi, Nebraska, New Mexico, South Dakota, Tennessee, Texas, and West Virginia. *Id.* at 823–24. Sales or licenses of custom computer software delivered electronically are exempt from taxation—with certain exceptions—in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *Id.*

¹⁶⁰ *Id.* at 825.

¹⁶¹ *Id.* at 833. Sales of digital products transferred electronically are subject to tax—with certain exceptions—in Alabama, Arizona, Colorado, Connecticut, the District of Columbia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Nebraska, New Jersey, New Mexico, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming. *Id.* at 833–34. Sales of digital products transferred electronically are exempt from taxation—with certain exceptions—in Arkansas, California, Florida, Georgia, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, West Virginia, and Wisconsin. *Id.*

¹⁶² *Nortel Networks Inc. v. State Bd. of Equalization*, 119 Cal. Rptr. 3d 905, 913–15 (2011).

technology transfer agreement (TTA).¹⁶³ While the California State Board of Equalization (SBOE) will likely seek to construe the *Nortel* holding narrowly, transferors of software and intangibles in California would be well served to act cautiously, pending further guidance. In May of 2011, however, the SBOE clearly indicated that the *Nortel* ruling will not affect the application of sales tax to typical off-the-shelf retail sales of canned software, as the typical retailer does not hold any copyrights or patent interests in the software.¹⁶⁴

Software in a cloud computing context further complicates matters by incorporating strong service elements. Software as a service (SaaS), a category of cloud computing, provides a means of access to software and applications centrally hosted on the provider's computers, which are often located in out-of-state data centers.¹⁶⁵ Some states—Indiana, Michigan, Utah, and Vermont—have found that remotely accessed software meets the definition of tangible personal property.¹⁶⁶ A second category, infrastructure as a service (IaaS), provides access to physical or virtual machines located on servers in the provider's data centers, which allows the user to take advantage of the machines' storage and computing resources.¹⁶⁷ Finally, platform as a service (PaaS) delivers a cloud-based platform that allows application developers to design, develop, deploy, and manage the customer's software solutions, without purchasing the underlying hardware.¹⁶⁸

For the most part, however, state tax laws crafted on the distinction between canned and custom software are unable to cope with categories like SaaS, IaaS, and PaaS, and instead clumsily employ the old paradigm to determine tax treatment.¹⁶⁹

¹⁶³ *Id.* at 919. A "technology transfer agreement" is "any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest." CAL. REV. & TAX. CODE §§ 6011(c)(10)(D) (West 2010), 6012(c)(10)(D) (West 2010). Under California tax law, any amount charged for intangible property pursuant to a TTA is exempt from sales tax.

¹⁶⁴ Press Release, Chairman Jerome E. Horton of the State Board of Equalization, *Nortel Case Does Not Affect Sales Tax On Off-The-Shelf Software* (May 27, 2011), available at <http://www.boe.ca.gov/news/2011/66-11-H.pdf>.

¹⁶⁵ Martin I. Eisenstein & Barbara J. Slot, *Let the Sunshine In: The Age of Cloud Computing*, TAX ANALYSTS, <http://www.tax.org/www/features.nsf/Articles/2128DFA5C8217C9D852579580051F965> (last visited Nov. 25, 2012).

¹⁶⁶ Gregory et al., *supra* note 8, at 3.

¹⁶⁷ Eisenstein & Slot, *supra* note 165, at 575.

¹⁶⁸ *Id.*

¹⁶⁹ See generally *id.* The distinction between canned and custom software dates from the 1980s when prewritten software, delivered on a disk, was easily classified as tangible personal property. See Gregory et al., *supra* note 8, at 3. Custom software, by contrast, was designed for a unique user and delivered on a "load and leave" basis, and taxed (or

States take a predictably variable number of tacks. Connecticut, for example, has a computer sales and data processing services tax at 1%.¹⁷⁰ In Arizona, the imposition of a tax depends upon whether the vendor issues a license.¹⁷¹ In Nebraska, software delivered by any means—including delivery and load and leave¹⁷²—is subject to tax, though when an application service provider (ASP) charges for services allowing remote access of software applications via the Internet, such transactions are *not* taxable if the ASP retains title to the software and does not grant the customer a license with ownership rights.¹⁷³ North Carolina likewise distinguishes between prewritten software and digital property, yet subjects both to tax.¹⁷⁴

New York has issued a series of advisory opinions in which it held that ASP sales, even if delivered electronically, are licenses to use prewritten software, and therefore, taxable as tangible personal property.¹⁷⁵ The state does not, however, tax digital property—which it regards as an intangible asset not subject to tax—unless it is transferred as part of a taxable service.¹⁷⁶

These impractical distinctions that separate taxable from nontaxable software, in California and elsewhere, substantially impede the characterization of a cloud transaction. Rather than contort the existing distinction between canned and custom software to encompass a cloud service in which the taxpayer does not take physical possession of software, California should look to amend the manner in which it taxes *services*.

2. Services, Leases, and Application Interfacing

As mentioned above, cloud computing transactions often bundle together the sale of services with access to server or disk space—frequently structured through a lease—and the ability to interface with vendor applications.¹⁷⁷ Sold separately, state

not taxed) as a service. *Id.*

¹⁷⁰ CONN. GEN. STAT. §§ 12-407(a)(37), 12-408(1) (West 2012); *see also* Eisenstein & Slote, *supra* note 165, at 575.

¹⁷¹ Gregory et al., *supra* note 8, at 3.

¹⁷² The “load and leave” method refers to a situation in which the software vendor brings the software to the customer’s location on some medium (a flash drive, for example) belonging to the vendor. Carolynn Iafrate Kranz & Iris Kitamura, *Taxing Software and Cloud Computing: Yesterday’s Law, Today’s Technology*, TAX ANALYSTS, Dec. 12, 2011, at 739. After installing the software for the customer, the vendor removes the medium by which she transported the software. *Id.* The vendor never transfers any tangible media to the customer. *Id.*

¹⁷³ Gregory et al., *supra* note 8, at 3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See* Jacobs & Miller, *supra* note 23, at 11.

taxing authorities would treat each of these services or products in quite disparate manners.¹⁷⁸

“Drawing the line between a taxable sale of tangible personal property and the nontaxable sale of services is [also] a major source of controversy in sales taxation.”¹⁷⁹ Data processing, graphic arts, and customized computer software, for example, occupy a grey area between tangible personal property and the rendition of services, and have given rise to numerous sales tax controversies.¹⁸⁰ In California, the basic distinction in a bundled transaction¹⁸¹ is whether “the real object sought by the buyer is the service per se or the property produced by the service.”¹⁸² If the true object or dominant purpose of the contract is the *service* per se, the transaction is *not* subject to tax, despite some transfer of tangible personal property.¹⁸³

If, however, a service contract is a separate object of a transaction—in a mixed sale involving tangible personal property—at a readily ascertainable value, it may be treated as a distinct nontaxable transaction.¹⁸⁴ In other words, a tax may be allocated between taxable and nontaxable items bundled together if the value of the nontaxable item is separately stated.¹⁸⁵ Unlike bundled transactions, “the goods and services in

¹⁷⁸ *Id.*

¹⁷⁹ HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-92; *see also* Dell, Inc. v. Superior Court, 159 Cal. App. 4th 911, 923 (2008).

¹⁸⁰ HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-92.

¹⁸¹ A “bundled transaction” involves goods and services that are “inextricably intertwined” in a single sale. *Dell, Inc.*, 159 Cal. App. 4th at 924. In a bundled transaction, “the true object test applies and the entire transaction is generally taxed or not taxed *as a whole*.” *Id.*; *see also* CAL. CODE REGS. tit. 18, § 1501 (2010).

¹⁸² CAL. CODE REGS. tit. 18, § 1501 (2010); *see also* Navistar Int’l. Transp. Corp. v. State Bd. of Equalization, 884 P.2d 108 (1994) (construing the regulation).

¹⁸³ CAL. CODE REGS. tit. 18, § 1501 (2010) (noting that “the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation. The author is the consumer of the paper on which he has recorded the text of his creation. However, the tax would apply to the sale of mere copies of an author’s works or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the purchaser’s primary interest is in the physical property. Tax would also apply to the sale of artistic expressions in the form of paintings and sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form.”). The true object test applies only to transactions involving the performance of a service, and the California Supreme Court has rejected the position that a “a transfer of tangible property is not taxable if the transfer is incidental to the transfer of intangible property.” *Preston v. State Bd. of Equalization*, 19 P.3d 1148, 1157 (2001), *disapproved of by* *City of Boulder v. Leanin’ Tree, Inc.*, 72 P.3d 361, 364 (Colo. 2003).

¹⁸⁴ *Dell, Inc.*, 159 Cal. App. 4th at 925.

¹⁸⁵ HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 17-15. In California, for example, if specified transportation costs of goods are separately stated, they are statutorily exempted from sales and use tax. CAL. REV. & TAX. CODE §§ 6011(c)(7), 6012(c)(7) (West 2010).

a mixed transaction are distinct (not intertwined) and each is a significant object of the transaction (not one incidental to the other).¹⁸⁶ As such, for tax purposes, the individual elements of the transaction are analyzed as distinct transactions: the tangible property element is taxed, while the service aspect is not.¹⁸⁷

State sales taxes exclude most services from sales taxation for largely historical and political—as opposed to fiscal—reasons.¹⁸⁸ States have gradually expanded the sales tax base to reach a number of services.¹⁸⁹ In addition to public utility, entertainment and amusement, and hotel and motel services,¹⁹⁰ examples of taxable services include repair of tangible personal property, repair of real property, data processing services, information services, and cleaning services.¹⁹¹

California taxes comparatively few services in relation to other states.¹⁹² If California were to include the retail sale of services—along with the retail sale of tangible property—in the sales tax base, many of the complex legal controversies borne by the retail sales tax would cease to be.¹⁹³ It would no longer face the difficult task of determining whether the “true object” or “dominant purpose” of a transaction was the purchase of tangible personal property or services, particularly when both the property and services constitute inseparable elements of a single transaction (as is often the case in cloud computing transactions).¹⁹⁴ Such an approach makes a great deal of sense, as there exists no sound principle of tax policy on which rests the distinction between tangible personal property or services, and thus there is no rational analytical basis for drawing a line that

¹⁸⁶ *Dell, Inc.*, 159 Cal. App. 4th at 925.

¹⁸⁷ *Id.*

¹⁸⁸ HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-96.

¹⁸⁹ *Id.* at 12-97.

¹⁹⁰ DUE & MIKESELL, *supra* note 121, at 93–94 (noting that hotel and motel services are universally taxed, though some states tax these services at the local rather than the state level, and some states tax them under levies formally distinct from the general sales tax); HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-97.

¹⁹¹ HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-97; *see also* DUE & MIKESELL, *supra* note 121, at 92–97. States have yet to extend the sales tax base to services that would generate the greatest revenues, such as construction, professional services, and health care. William F. Fox, *Importance of the Sales Tax in the 21st Century*, in *THE SALES TAX IN THE 21ST CENTURY* 1, 3 (Matthew N. Murray & William F. Fox eds., 1997).

¹⁹² HELLERSTEIN & HELLERSTEIN, *supra* note 123, at 12-98 (noting that Hawaii, New Mexico, and South Dakota, as well as other states, have embraced taxation of the broadest range of services, while California, Illinois, and Virginia, among other states, tax relatively few services).

¹⁹³ *Id.* at 12-100.

¹⁹⁴ *Id.*

should never have been drawn in the first place.¹⁹⁵ As a matter of retail sales tax policy, there is no sense in separating two inextricably intertwined aspects of a transaction, each of which amounts to personal consumption.¹⁹⁶ Though state legislatures have yet to conform the sales tax to the ideal of a single-stage imposition on the final sale of goods and services to the consumer,¹⁹⁷ efforts to remove the hazy distinction would substantially simplify future determinations of the proper tax treatment of cloud computing transactions.

A number of states currently tax services that bear upon cloud transactions. The District of Columbia,¹⁹⁸ Ohio,¹⁹⁹ and Texas²⁰⁰ each tax data processing services. Florida handles charges for access to a provider's computer as a computer rental subject to sales tax, though the tax is levied upon the lease of personal property, and thus only due if the provider's computer is located in Florida.²⁰¹ In a private letter ruling, the Utah Tax Commission addressed the taxability of remote data and information hosting services provided by a company with servers in Utah.²⁰² The commission found that the service consisted in a "lease of disk space and server equipment and hardware," which was "therefore . . . taxable as a lease of tangible personal property."²⁰³

Though California's tax code includes no provisions dealing specifically with computer access, leases and rentals of tangible personal property are generally taxable.²⁰⁴ California currently exempts from taxation, however, sales and leases of canned software transferred remotely "to or through the purchaser's computer" if "the purchaser does not obtain possession of any tangible personal property."²⁰⁵ This exemption likely applies (at least) to SaaS because software is not transferred to the purchaser via tangible medium, but instead, is transferred

¹⁹⁵ *Id.* at 12-99.

¹⁹⁶ *Id.* at 12-100.

¹⁹⁷ *Id.* at 12-101.

¹⁹⁸ D.C. CODE §§ 47-2001(n)(1)(N), 47-2201(a)(1)(K) (2010).

¹⁹⁹ OHIO REV. CODE ANN. §§ 5739.01(B)(3)(e), 5739.01(Y)(1) (West 2010).

²⁰⁰ TEX. TAX CODE ANN. §§ 151.0101(a)(12), 151.351, 151.0035 (West 2011).

²⁰¹ FLA. ADMIN. CODE ANN. r. 12A-1.032(3) (1980).

²⁰² Utah Priv. Ltr. Rul. 06-004 (July 27, 2006), available at <http://tax.utah.gov/commission/ruling/06-004.pdf>.

²⁰³ *Id.*

²⁰⁴ CCH, 2011 HANDBOOK, *supra* note 23, at 875-76. Leases and rentals of tangible personal property are taxable in forty-nine states plus the District of Columbia. *Id.* In Illinois, lessors pay use tax upon acquisition, though a purported lease to a nominal lessee may be subject to the retailers' occupation tax. *Id.*

²⁰⁵ CAL. CODE REGS. tit. 18, § 1502(f)(1)(D) (West 2010).

“through” the purchaser’s computer.²⁰⁶ Any efforts to reform California’s taxation of services must address the exemption of leased canned software described above and devise a way to tax digital services in a manner that includes every breed of cloud computing.

B. Streamlining the Taxation of Cloud Computing Transactions Under California Law

A number of states have recognized that their statutes and regulations are ill-equipped to deal with changing technology and have begun to address cloud computing. Louisiana, for example, recently organized a working group to address—or attempt to address—the issue.²⁰⁷ Illinois, instead of issuing a letter ruling on a cloud computing issue, called for new regulations on the matter.²⁰⁸ In California, a number of committees and government officials have recently proposed legislation and initiatives to address some of the issues as well, several of which are discussed below.²⁰⁹

Perhaps no state, however, has led the field in taxing both digital goods and services so much as Washington.

1. Washington’s Example

Under Washington’s tax law, “any service transferred electronically that uses one or more software applications” is a digital automated service.²¹⁰ It adopted the definition of a “digital automated service” in an effort to address shifting technology as part of a law designed to look at the ways that digital products are delivered, accessed, and transferred.²¹¹ Rather than define each cloud computing or digital automated service subject to taxation, the state “enact[ed] a broad definition . . . and then adopt[ed] exclusions for activities it did not want to tax.”²¹² According to a member of the group whose two-year study led to the law, the digital automated services definition was the

²⁰⁶ Eisenstein & Slot, *supra* note 165.

²⁰⁷ Gregory et al., *supra* note 8, at 5.

²⁰⁸ *Id.*

²⁰⁹ Brevity concerns dictate that a number of these efforts, such as Senator Durbin’s Main Street Fairness Act (S.1452), be excluded from the discussion. *See generally* S. 1452, 112th Cong. § 3 (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1452is/pdf/BILLS-112s1452is.pdf>.

²¹⁰ WASH. REV. CODE § 82.04.192(3)(a) (West 2011).

²¹¹ Gregory et al., *supra* note 8, at 5. According to Dylan Waits, managing senior policy counsel with the Washington Department of Revenue, the state has “specific statutes that say nexus is not established by using a third-party server in Washington. So if you have information or software on a server in Washington that does not belong to you, that alone will not establish physical presence in the state of Washington.” *Id.*

²¹² *Id.*

legislature's attempt to "throw a blanket over everything and say 'we don't know what else might be out there—but we'd like to tax it.'"²¹³ Washington also imposes sales tax on remote access software—prewritten software provided remotely—which suggests it would also tax SaaS.²¹⁴

By including a substantial array of digital services, including those that use "one or more software applications," Washington's tax represents an attempt to reconcile the various elements of cloud computing into a single, umbrella transaction.²¹⁵ While the category may be too broad to function effectively long-term, Washington's efforts to date place it well ahead of virtually all others in attempting a workable solution.

California should closely observe the results of Washington's efforts to tax digital services. While California, unlike Washington, may continue to rely on revenue generated by its state income tax, the ongoing transition to a service-based economy demands action sooner than later. When California ultimately decides on the manner in which to reach cloud transactions with its taxing powers, it ought to heed Washington's example and *legislate* the change rather than issue a letter ruling or rely on a regulatory solution.

2. The Streamlined Sales Tax Project

California opted to join—as only an observer state—the Streamlined Sales Tax Project (SSTP),²¹⁶ "an accord among individual cooperating sovereigns . . . [that] provides a mechanism among the member states to establish and maintain a cooperative, simplified system for the application and administration of sales and use taxes under the duly adopted law of each member state."²¹⁷ As of this writing, twenty-four of the forty-four member states have passed legislation conforming to the Project's goals—California is not among those states.²¹⁸ According to the Board of Equalization, California "is not

²¹³ *Id.*

²¹⁴ *Digital Products Bills (ESHB 2075 & SHB 2620)*, DEPARTMENT OF REVENUE WASHINGTON STATE, <http://dor.wa.gov/Content/GetAFormOrPublication/PublicationBySubject/TaxTopics/DigitalProducts.aspx> (last visited Nov. 25, 2012).

²¹⁵ Jacobs & Miller, *supra* note 23, at 12.

²¹⁶ CAL. REV. & TAX. CODE § 6028 (West 2010).

²¹⁷ CAL. REV. & TAX. CODE § 6030 (West 2010); *see also* Noto, *supra* note 24, at 36.

²¹⁸ *Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Nov. 25, 2012) ("The following states that have passed legislation to conform to the Streamlined Sale and Use Tax Agreement: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.").

currently actively participating in the SSTP but does receive updates on the actions of the project from the Multistate Tax Commission (MTC).²¹⁹

In essence, the member states seek to simplify and better synchronize individual state sales and use tax laws, particularly when it comes to business conducted over the Internet.²²⁰ The Streamlined Sales and Use Tax Agreement (SSUTA) identifies ten points of focus, which “can be condensed into four general requirements for simplification: (1) state level administration, (2) uniform tax base, (3) simplified tax rates, and (4) uniform sales sourcing rules.”²²¹ “The SSUTA would establish a system in which states would use common definitions for goods and services,” after which “states would then indicate whether the good or service is taxable.”²²² It also provides for the unbundling of bundled transactions into their separate parts in an effort to help states apply their taxing power to the relevant portion of the transaction and bypass a “real object” inquiry in a number of scenarios.²²³

An interstate accord under the SSUTA need not successfully resolve all the characterization problems of cloud computing transactions. It would, however, contribute immensely to the tenor of national sales and use tax reform efforts. If every state, including California, were to actively participate, open the channels of dialogue, and foster such a collaborative undertaking, Congress would be better situated to take unifying action—with consent from the states—at the federal level.²²⁴

²¹⁹ Streamlined Sales Tax Project, CAL. STATE BD. OF EQUALIZATION, <http://www.boe.ca.gov/sstp/> (last visited Nov. 25, 2012).

²²⁰ See *Streamlined Sales and Use Tax Agreement*, STREAMLINED SALES TAX GOVERNING BOARD, INC. 7 (Dec. 19, 2011), <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2012-19-11.pdf>; see also Noto, *supra* note 24, at 36.

²²¹ MAGUIRE, STATE TAXATION, *supra* note 108, at 9.

²²² *Id.* at 13. Another focal point of the SSTP is reducing compliance costs for sellers, such that “Congress might be willing to authorize states to require use tax collection by remote sellers without nexus, or the Supreme Court might revise” its “requirement of physical presence for nexus” under *Quill*. Noto, *supra* note 24, at 36.

²²³ STREAMLINED SALES TAX GOVERNING BOARD, INC., *supra* note 220, at 68–70. The provision applies only to telecommunication services, ancillary services, Internet access service, audio or video programming service, and prewritten computer software when combined with an optional maintenance agreement. *Id.*

²²⁴ This is particularly crucial in relation to issues of nexus. The interstate agreement would represent “an effort on behalf of the participating states to demonstrate to Congress that the simplified sales tax system does not impose unfair costs on out-of-state business and thus would not interfere with interstate commerce.” Staff of the Board of Equalization, *Background Paper on the Streamlined Sales and Use Tax Agreement Prepared for the Assembly Revenue and Taxation Committee’s Informational Hearing on “The Streamlined Sales and Use Tax: How it Works and Why it Should be Considered”* 3 (July 6, 2009), available at http://www.boe.ca.gov/legdiv/pdf/Streamlined_Sales_and_

If California *were* to join the SSTP as a member state, it would still retain the power to decide what is taxable and what is exempt, though the California State Legislature would have to conform to the definitions set forth in the SSUTA.²²⁵ Like all member states, California would also have to submit a taxability matrix upon which sellers and service providers could rely, which would promote greater certainty and stability in California's sales and use tax system, and precipitate greater reliance on the system by more informed tax remitters.²²⁶

Finally, while the SSUTA represents a promising vehicle for national sales and use tax reform, it must itself address cloud computing more explicitly.²²⁷ Scott Peterson, Executive Director of the Streamlined Sales Tax Governing Board, expects that the Governing Board will take up cloud computing at some point.²²⁸ If the SSTP is able to promptly initiate an informed debate about cloud computing amongst SSUTA states, there is some hope the SSUTA has an opportunity to keep pace with the technological curve.

3. The Think Long Committee For California

California's tax system, designed for an agricultural and manufacturing economy, has become outdated, and its state legislature is often impeded by the state's initiative process—the main feature of California's "direct democracy."²²⁹ In 1950, California received sixty percent of its revenues from sales

Use_Tax_Agreement.pdf [hereinafter BOE, *Background Paper on the SSUTA*]. Congress would still have to pass federal legislation to allow states to require out-of-state sellers without a physical presence in the state to collect the relevant use taxes. *Id.*

²²⁵ See BOE, *Background Paper on the SSUTA*, *supra* note 224, at 3 ("If the Agreement defines a product, then a member state Legislature may exempt all items within that definition, but cannot exempt only part of the items included within that definition, unless the Agreement expressly permits the Legislature to do so, or unless the exemption is based on the use of the property (determined by the buyer's use of the product), or the entity making the purchase (i.e., an exemption based on who the purchaser is). As an example, the Agreement currently includes diapers within its definition of 'clothing' and does not permit the Legislature to deviate from that definition. California law does not currently exempt sales of clothing or diapers from the imposition of sales or use tax. Pursuant to the SSUTA, California's Legislature would not be able to provide a general exemption for diapers. Instead, the Legislature would have to create an 'entity-based exemption' for diapers, such as an exemption for diapers purchased by day care facilities.").

²²⁶ *Id.* at 5; see also State Taxability Matrix, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=state-taxability-matrices> (last visited Nov. 25, 2012).

²²⁷ Gregory et al., *supra* note 8, at 6.

²²⁸ *Id.*

²²⁹ *California's dysfunctional politics, Help on the way: Out west, a different supercommittee might yet do rather well*, ECONOMIST, Nov. 26, 2011, at 44 [hereinafter ECONOMIST, *Help on the way*].

taxes.²³⁰ In the years since, untaxed services have dominated California's economy.²³¹ Over the same period, California has relied increasingly on highly volatile income taxes.²³²

A bipartisan committee known as the Think Long Committee for California—assembled by investor Nicolas Berggruen—has taken steps to utilize the initiative process to address California's tax system.²³³ In essence, it seeks to extend sales taxes to services while simplifying and cutting income tax rates.²³⁴

Roughly half of California's \$2 trillion economic output goes untaxed precisely because its once manufacturing- and agriculture-based economy is now dominated by services and information activities.²³⁵ To address the problem, the committee proposes that California tax all business and consumer services at a rate of 5–5.5%, excluding health care and educational services.²³⁶ Among its other proposals, it would also lower the sales tax on goods to 4.5%, and provide a sales tax rebate to low-income households to offset the impact of the new sales tax on services on the average household with similar income.²³⁷ In concert with its other proposed adjustments, the committee expects \$10 billion in new revenues once the proposals are fully phased in.²³⁸

Embracing the committee's suggestion to extend California's sales tax to services would, as discussed above,²³⁹ ease the

²³⁰ *Id.* California's 1950 sales tax similarly applied only to tangible goods. *See, e.g.,* Maganini v. Quinn, 221 P.2d 241, 243 (1950).

²³¹ ECONOMIST, *Help on the way*, *supra* note 229, at 44.

²³² *Id.* ("Income taxes, mainly on the richest Californians, have during that time grown from 10% of total revenues to more than half, making state revenues highly volatile."); *see also* Revenue Estimates, GOVERNOR'S BUDGET SUMMARY—2012–13, at 45, available at <http://2012-13.archives.ebudget.ca.gov/pdf/BudgetSummary/RevenueEstimates.pdf>; Nicolas Berggruen Institute, *A Blueprint to Renew California: Report and Recommendations Presented by the Think Long Committee for California*, at 10 [hereinafter *A Blueprint to Renew California*], available at http://berggruen.org/files/thinklong/2011/blueprint_to_renew_ca.pdf (noting that California policy makers used a temporary twenty-three percent surge in revenues during the 1999–2000 fiscal year—"when the dot-com boom resulted in massive, but temporary, increases in capital gains and stock options"—to permanently expand spending commitments and further narrow the tax base).

²³³ ECONOMIST, *Help on the way*, *supra* note 229, at 44; *see also* Torey Van Oot & Kevin Yamamura, *'Think Long' coalition will propose overhauling California's tax system*, THE SACRAMENTO BEE, Nov. 20, 2011, at 3A.

²³⁴ *A Blueprint to Renew California*, *supra* note 232, at 11–13. As of the time of this writing, the Think Long Committee was positioning its tax reform for the 2014 general election. *Id.*

²³⁵ *Id.* at 10.

²³⁶ *Id.* at 11.

²³⁷ *Id.*

²³⁸ *Id.* at 12.

²³⁹ *See supra* note 196, at 12–99.

regulatory burden of differentiating nontaxable services from taxable goods. Specifically, in a cloud computing context, softening the distinction between goods and services would alleviate the state's reliance on increasingly complex positions on software taxation.²⁴⁰ Furthermore, it would allow California to impose a more realistic consumption tax commensurate with the modern complexion of California's economy.

4. The Digital Goods and Services Tax Fairness Act of 2011

Rep. Lamar Smith of Texas recently sponsored H.R. 1860,²⁴¹ the Digital Goods and Services Tax Fairness Act of 2011, which intends to promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services and create a national framework for the taxation of cloud computing.²⁴² Essentially, it would require that cloud computing be taxed as a service.²⁴³ If states chose to tax the service, they would first need to enact legislation deeming it taxable and propound a clear definition for taxability purposes.²⁴⁴ While the proposed legislation sets out a potentially problematic sourcing regime beyond the scope of this discussion, it nonetheless represents a proactive effort to address some policy issues around cloud computing and a progressive stance on the taxation of services.

CONCLUSION

Clearly, the law is unable to keep pace with technological innovation.²⁴⁵ Though California is home to Silicon Valley²⁴⁶ and companies like Apple, Google, and Facebook, its ability to tax cloud computing transactions relies squarely on state administrators applying an anachronistic tax code ill-equipped for such purposes. Over time, fewer transactions will resemble the simpler exchanges of tangible goods for which California

²⁴⁰ See *supra* Part IV.A.1.

²⁴¹ Digital Goods and Services Tax Fairness Act of 2011, H.R. 1860, 113th Cong. (2011) (listing Rep. Lamar Smith as the sponsor for the bill).

²⁴² Gregory et al., *supra* note 8, at 5.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Robison, *supra* note 19, at 1197

The law cannot keep up with the pace of change in computer networking. By the time legislatures or courts figure out how to deal with a new product or service, the technology has already progressed. It is, therefore, useful to learn the state of technology at the time Congress enacted a law or the Judiciary issued a legal opinion to clarify the logic and principles that girded its decision.

The notion that law lags behind technology, in virtually every context, is far from novel.

²⁴⁶ See Yukari Iwatani Kane, *Tech Rebound Gives Silicon Valley Housing Market a Lift*, WALL ST. J. (June 30, 2011), <http://online.wsj.com/article/SB10001424052702304314404576411712493024274.html> (discussing the current boom in technology and a resurgence in the Silicon Valley tech industry).

designed its tax code, while increasingly more will involve bundled services and intangible goods of the kind discussed above.

California must address the taxability issue²⁴⁷ through formal legislation, and it cannot afford to proceed on an audit-by-audit basis or via piecemeal administrative rulings. Rather, the state should tax digital goods and services pursuant to state *legislation*.²⁴⁸ It can ill afford to ascribe to a long-term policy of reliance on interpretive decisions by revenue agencies as to what constitutes a taxable cloud transaction.

Furthermore, California ought to focus its energies on amending the manner in which it taxes services. The state's current preference to leave services untaxed is untenable in light of California's changing economic realities. California must develop clear policies regarding SaaS and digital services, for example, and think more progressively in generating its tax policy on such novel issues. It must also propound guidelines to service providers and their customers—on whom the state cannot rely to characterize their own transactions—as the fact-specific inquiries of case-by-case determinations will amount to a drain on precious state resources.

Finally, California should look to open lines of communication with revenue departments in other states, virtually all of which are facing the same difficulties. Without some nominal consensus among the several states, Congress is unlikely to interpose itself substantially. Federal guidance and policymaking assistance, however, would prove invaluable, particularly as states face dire budget crunches.

The explosive growth of the Internet and the increasing number of Internet users around the world suggest that the current trend toward cloud-based services and data in a global marketplace will persist.²⁴⁹ If America wishes to keep pace as a breeding ground for technology and innovation, it absolutely must provide its businesses—both large and small—with clear guidance on issues of taxation. Though California undoubtedly faces serious structural and institutional problems in addressing

²⁴⁷ The issue of taxability of certain transactions and services is wholly distinct from the budgetary issues addressed by Proposition 30. While the author believes a mere sales tax increase will not, *ipso facto*, sufficiently address the problems addressed by this Comment, the author does not intend to opine on the virtue of increasing the statewide base sales and use tax rate, or the limited purposes to which Governor Jerry Brown addressed the ballot measure.

²⁴⁸ See *supra* Part IV.B.1.

²⁴⁹ See HERRIGAN, *supra* note 72, at 3–4.

its budgetary woes,²⁵⁰ the world's eighth largest economy²⁵¹ should seize the opportunity to flex some political muscle and generate some much-needed revenue for The Golden State.²⁵²

²⁵⁰ *The trouble with California*, ECONOMIST (Jun. 10, 2009, 7:08 PM), http://www.economist.com/blogs/freeexchange/2009/06/the_trouble_with_california.

²⁵¹ The Associated Press, *Sorry Arnold, California isn't sixth any more*, MSNBC.COM (Jan. 12, 2007 7:21 PM), http://www.msnbc.msn.com/id/16600877/ns/businessus_business/t/sorry-arnold-california-isnt-sixth-any-more/; see also *Comparing US states with countries: Stateside substitutes*, ECONOMIST (Jan. 13, 2011, 10:05 AM), http://www.economist.com/blogs/dailychart/2011/01/comparing_us_states_countries (noting that California's closest equivalent economy belongs to Italy).

²⁵² CAL. GOV'T CODE § 420.75 (West 2011).