The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Context

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I. Law School Socialization and Limited Professional Horizons

A fundamental lesson imparted by legal education, as it is organized and taught in virtually every law school in the United States, is that law practice is a highly constrained enterprise. While, by definition, the work of lawyers has an impact upon the parties to particular transactions and conflicts, in a more general sense, law students learn that the potential of legal activity to influence significantly the distribution of societal resources and power is partial and limited.

The force of this message is apparent in the attitudinal changes that law students undergo during their legal training. Regardless of their views with respect to the social and economic status quo, the pervasive and operative premise among students upon graduation from law school is that efforts by lawyers to "make society better" are naive and unlikely to succeed. Given that many of these same students report a desire, upon their arrival at law school, to obtain legal training in order to serve the public interest, it seems fair to conclude that legal educators play a considerable role in a profoundly disempowering process of professional socialization.

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1. Surveys of incoming law students report high levels of student interest in serving the poor and underrepresented, both as a reason for coming to law school and as a career goal upon completion of their legal education. ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (Howard S. Erlanger ed., 1989); James M. Hedegard, THE IMPACT OF LEGAL EDUCATION: AN IN-DEPTH EXAMINATION OF CAREER-RELEVANT INTERESTS, ATTITUDES, AND PERSONALITY TRAITS AMONG FIRST-YEAR LAW STUDENTS, 1979 AM. B. FOUND. RES. J. 791. Even if one partially discounts this data in light of the possible tendency of applicants to make public service claims for the instrumental purpose of obtaining admission to law school, these reports are significant.
Accompanying this powerlessness is the twin feature of learned amorality. Together, they constitute a pinched professionalism. The vast majority of students become convinced early in their training that lawyers' “private” beliefs and values are irrelevant to their representational work. Even if they manage to retain some sense of the connection between their “private” and “professional” lives, most students (and lawyers) are inclined to believe that the problems of poverty, racism, violence, and the like are intractable features of our society unamenable to solution by way of legal advocacy.

The goal of our teaching efforts has been to provide students, at an early juncture in their training, with an alternative vision of professional

2. For a discussion of lawyers' “amoral” role, see Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613. Pepper describes role amorality in the following terms: “As long as what the lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.” Id. at 614. This vision of professional ethics finds support in the familiar maxim that advocating a client's cause does not imply that the lawyer believes in it. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27, 2-29, 7-3, 7-4, DR 7-106(C)(3-4) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1989). Pepper makes clear that his notion of professional amorality does not result in a view of lawyers as “hired guns.” Instead, he argues that the image:

is that of the individual [client] facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can't get to work. This is 'the law' that confronts the individual in our society. It is theoretically there for his use, but he can't use it for his purposes without the aid of someone who has the correct wrenches, meters, and more esoteric tools, and knows how and where to use them . . . . It is ordinarily not the technician's or mechanic's moral concern . . . [for] what purpose the customer intends to use the car.

Pepper, supra, at 623-24. It is precisely this mechanistic view of legal doctrine and law practice that we believe is limiting and disempowering for law students and practitioners. Cf. DAVID LUBAN, LAWYERS AND JUSTICE 3-174 (1988) (arguing for transformation of the dominant conception of professional role, including the “adversary system excuse” for role amorality).

3. In adopting this distinction between one's “private” and “professional” lives we understand that we have implicated a vast literature on the public/private distinction. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). Because we are unsatisfied with the public/private characterization, at least in the present context, we provisionally have adopted a slightly different way of describing what we take to be a process of professional alienation of “self.” For a good example of the argument that this sort of alienation—of one's critical self from one's practicing self—is appropriate, see RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987).

4. In describing these efforts, the use of the pronouns “we” and “our” are frequent. While it will be obvious to the reader that our course—its conception, planning, and execution—was a joint and collaborative one, it may be less plain what we think and feel about that experience. For the purposes of this Article, we have chosen not to address the topic of co-teaching. It is worth noting that this is a topic almost completely ignored within legal education literature despite the fact that some of the most interesting teaching initiatives have been the expression of collaborative efforts. Though relegated to this single footnote, it is our
role and the possibilities of law. In our view, all cases, indeed all matters in which lawyers are involved, turn upon competing values, upon questions of distributive justice. Development of this idea requires that we work with students to uncover the doctrinal and rhetorical strategies employed by actors within the legal system to disclaim the political dimension of law and to reinforce a sense of institutional powerlessness. To be sure, this way of looking at law and lawyers' work is at odds with the basic tenets of legal formalism, including the notions that doctrine is neutral and objective, that the legal system is autonomous, and that legal decisionmaking and politics are independent. We recognize that we are not the first law teachers to undertake this form of analysis. The Realist critique of Langdellian educational practice is now decades old and, in a manner of speaking, largely accepted within the academy. As a conse-

strongly held conviction that co-teaching helped provide the insistence, accountability, and support that was necessary for the integrated presentation that was the centerpiece of this reconceived effort. It also made us better teachers, and was more interesting and fun. Not surprisingly, we believe that such payoffs are not limited to collaborative efforts in teaching but occur also when students collaborate in learning, when lawyers collaborate in practice, and when academics collaborate in scholarship.

5. For a good account of some of the rhetorical moves by which legal actors claim a false autonomy for doctrine, see Stanley Fish, Doing What Comes Naturally 514 (1989) (taking on H.L.A. Hart's notion that past precedent governs future decision making). For a powerful analysis of the rhetoric of helplessness, see Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 Geo. L.J. 1499 (1991). Ross notes:

In cases dealing with poverty, the rhetoric of judicial helplessness sometimes incorporates the idea that poverty is an intractable, if not inevitable, social problem. In this sense of helplessness, the judges are helpless both as individuals (poverty is a complex and intractable problem) and as judges (in any event, we are without the power to deal with this particular issue relating to poverty).

Id. at 1509 (citation omitted).


7. This acceptance is in part predicated upon the "disconnectedness" and "compartmentalization" that we describe in this section. Had the Realist critique transformed itself into an affirmative program that seriously threatened prevailing practices, it is not clear what the outcome would have been. On one hand, one remembers the harsh and protective reaction at some law schools to Realists and their successors. On the other hand, had there been a more aggressive confrontation by the Realists and their intellectual heirs, they might have succeeded, at least in some institutions, and legal education might be very different today. See generally Edward A. Purcell, Jr., The Crisis of Democratic Theory 74-94 (1973) (describing the rise of Legal Realism); id. at 159-78 (describing the resulting "attack" on Realism).
quence, many component parts of a different, and more empowering, educational experience are present within the current law school environment.\textsuperscript{8}

The influence of much nonformalist and nondoctrinal teaching, however, is minimized, or even negated, by many law teachers' decision to continue treating the materials and methods of study in a disconnected and compartmentalized fashion. A central consequence of this process is the lowering of student and lawyer expectations about the possibilities of their practice and of law more generally.

While refined doctrine in the form of appellate opinions remains the primary focus of study, at least within the first year curriculum, students at most law schools now have the opportunity to enroll in courses on the "lawyering process," "trial practice," "counseling and negotiation," as well as in courses that employ simulated or clinical exposure to the litigation and legislative processes. The "facts" may be given in the appeals courts cases that students read on a daily basis, but opportunities to explore the far more subtle relationships between factual occurrence and evidentiary proposition, to learn how a case is investigated and shaped in the shadow of legal rules, and to appreciate law practice as an exercise in creative history writing also exist within the curricula of many law schools.

The implicit premise of the Socratic method, that legal doctrine is neutral, objective, and deductive, remains a powerful influence upon much of the instruction that takes place. At other moments, however, Realist-derived insights with respect to the social context and the indeterminacy of legal rules and the powerful role of rhetoric and justification

\textsuperscript{8} Unfortunately, the power of doctrinal formalism, particularly in first year classrooms, remains immense. Among law teachers, there are a number of stylistic differences: from gruff to kind in manner, from structured to chaotic in organization, from explicit to deeply hidden in the articulation of goals, from participation to passivity in student involvement. Nevertheless, at core, the views and attendant values presented, and reinforced in the minds of large numbers of law students, are remarkably similar.

These dominant, pervasive views and values have been the subject, in the last decade particularly, of extensive description, discussion, and criticism. See, e.g., Jay M. Feinman, The Failure of Legal Education and the Promise of Critical Legal Studies. 6 CARDOZO L. REV. 739 (1985); Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW, supra note 6, at 40. Criticism has been so frequent, so abundant, so telling that many assume there have been fundamental changes in legal education. There have not.

We acknowledge the likely reactions: "That is not what I think"; "that is not how I teach." Our response is that there is serious and widespread discontinuity between what law teachers think and what law teachers do in their teaching. This is in part explained by our lack of training and study about teaching and learning, by our lack of critical and dispassionate reflectiveness about our work as instructors, and by the secondary value, regard, and prestige accorded teaching within the professional world of American law teachers.
in legal decisions are voiced in the classroom. On many law faculties, the ideas of Jerome Frank and his colleagues have been so fully accepted that teachers who do not offer and pursue some “policy analysis,” or who omit a consideration of the inevitable moments of doctrinal incoherence, are judged to be incomplete and inadequate in their teaching.

What is significant about the typical consideration of “cases” is that individual opinions frequently are discussed at only one intellectual level. The consequence of treating formal doctrine in some cases (or lines of cases), rhetorical manipulation in others, and social and economic context in still others is that students are denied the insight that all legal disputes involve all of these elements. More importantly, by dealing with legal justification, historical context, and “policy” as topics distinct from formal legal rules and doctrinal formulations, we signal to students that most rule-based work within the legal system does not depend upon societal factors external to the litigation. We suggest to them that outcomes which derive from argumentative strategy or social or economic considerations only occur when the rules are incomplete, inconsistent, or otherwise break down.

9. See generally Frank, supra note 6. Probably the most commonly acknowledged examples of doctrinal incoherence are those points, within any area of law, where factually similar cases are decided inconsistently by courts in different jurisdictions or circuits, or even by courts within the same jurisdiction.

10. Some, even many, law teachers may consider individual cases at more than one intellectual level. The problem, however, is that students do not generally understand why the teacher has made the choice, at any given moment in the semester, to go beyond doctrine. Indeed, because of their failure to appreciate a pattern or method to the pedagogy, students tend to discount these nondoctrinal elements in favor of the certainty of a rule bound approach. This dynamic is reflected by common student complaints that prior to class they never know how a particular case will be discussed. For a similar observation, see Anthony Amsterdam, The Lawyering Revolution And Legal Education (unpublished manuscript, on file with authors).

11. Refined doctrine, in the form of highly edited appellate opinions remains the primary focus of study. “Cases” are presented to accomplish three generalized purposes. First, some cases are used to present doctrinal categories and established rules of an area of law under study. Examples include the cases about the requirements of offer, acceptance, and consideration in contract, or actus reus, mens rea, and result in criminal law. The treatment afforded these materials is usually formal, respectful, and direct. Some teachers are content with the construction of elaborate rule systems. Others choose to elaborate upon the classical categories, pushing their students to appreciate, at increasing levels of abstraction, the subtlety of the doctrinal formulations.

A second type of cases might be denominated “the sports.” These are the opinions which are historical curiosities, doctrinal anomalies (e.g., Lochner v. New York), or simply excursions along tangential doctrinal paths of interest to the particular teacher. Finally, there are the cases that might be described as “cutting edge.” These opinions illustrate for students the areas where the law is still evolving, where doctrinal categories overlap, or where doctrine falls short of being obviously determinative of outcomes. See Kennedy, supra note 8.
A profound but unintended consequence of this is that students routinely devalue the nondoctrinal elements present but largely unexplored in everything they read. We have all experienced the phenomena of students putting down their pens and leaning back in their chairs at those moments in the semester when "policy questions" are the topic of discussion. Our failure to link doctrine, rhetoric, and social context reinforces the formalist notions held by our students, or perhaps leaves them with an even more constrained understanding of the law than might obtain were we simply to limit ourselves to doctrinal presentation and analysis.

A parallel pattern is present in the method by which diversification has occurred across the law school curriculum more generally. Students now gain exposure to facts as well as law, to "law in operation" as well as "law on the books." However, we undo our best intentions by virtue of our organizational and presentational choices. Even within a diversified curriculum, students' experience of the first year remains remarkably immune from the effects of pedagogical innovation.

The lineup of first year courses in virtually every law school continues to be dominated by private law subjects taught through appellate opinions to large groups of students. To the extent that public law is present, it remains at the periphery while questions relating to private gain facilitated by the market dominate the core of these courses. By the time students gain exposure to a more contextualized presentation of the law in trial practice, simulation, or clinical courses, they are in their second or third year and they have already adopted a hard-to-shake account of law and law practice.

When students confront public law subjects in their upper years of law school, they have already embraced a picture of legal disputing in which parties are equally situated participants in a well functioning mar-

12. This is the study of doctrine in isolation. There is little or no talk about lawyers, clients, or the other human beings who people these cases, give rise to them, move them along, and suffer the consequences of them. The boundaries and cant of facts are limited to the presentation of the appellate opinion. Thus, life intrudes in only the most disembodied and acontextual way. We suspect that, even though the professorate has become more diverse, only occasional attention is paid to gender, even less to the dimension of race, and almost none to the consideration of class.

Doctrine in isolation is intensified by law in isolation. There is no deliberate study, or even sustained discussion, of the larger political economy of which the legal process is but a constituent part.

13. One notable exception to the generalized practice of delaying a contextualized presentation is the curricular development by Anthony Amsterdam. At New York University, Professor Amsterdam offers first year students a course and clinic relying on extensive simulation. In the formative stages of developing the LTP curriculum, our former dean, Michael J. Kelly, characterized Amsterdam's and allied efforts as a "pedagogy of facts."
ket economy. Disputes are bipolar and party controlled. Everyone has access to a competent lawyer. Even students in upper-level clinical courses regard legal disputes involving poor and powerless clients as exceptional, thereby further marginalizing the legal disputes of already marginalized people. Second and third year courses that involve students in fact investigation and trial preparation are almost always unsatisfying to students and teachers because the students seem incapable and resistant to forging intellectual links between their fact-focused work and the doctrinal categories and rule systems they have absorbed during their first year.

Finally, in the instruction they receive, students continue to hear both explicit and implicit mixed messages directed to the formation of notions of professional role and responsibility. Legal ethics courses persist in offering a traditional vision of the profession and the lawyer's role. This is a vision in which the integrity of the adversary system, the importance of attorney neutrality, and the centrality of partisanship are all featured. Within most courses, students are still taught to distinguish procedure from substance, to distinguish their own beliefs and goals from those of their clients, and to understand the adjudicatory system as an institutional mechanism for the equalization of social power and for the provision of redress for infringements on legal rights and entitlements.

Nevertheless, within discrete pockets of most law schools' curricula, students increasingly are exposed to the seemingly irreconcilable tension between partisanship and loyalty to one's client on the one hand, and truthfinding and loyalty to the forum on the other; to the "value questions" lurking beneath disputes; and to the distortive influence of social and economic power imbalances on the adjudicatory system and its claims of procedural regularity. In the last few years, there has been a growing trend toward building into the law school agenda attention to the maldistribution of legal resources. A handful of faculties have adopted voluntary or mandatory pro bono requirements for their students as a means of alerting future practitioners to the needs of the poor, people of color, children, and other underrepresented client populations.

In the face of these developments, it is with considerable surprise and frustration that teachers talk about their students' resolute refusal to acknowledge the always present value questions inherent in legal disputes. Similarly, students rigidly hold onto traditional notions of professional role and procedural regularity, even in the face of experiential data which clearly demonstrate that unequal relationships outside of the legal system translate into unfair and systematic disadvantage within the courtroom. Student resolve and rigidity often persists, even in clinical
courses, despite working with indigent clients denied eligibility to welfare benefits, tenants about to be dispossessed of their homes, or AIDS patients refused needed medical assistance.

The diversification of pedagogy and the curriculum has had little influence on students' perceptions of the legal system, their adopted profession, or their career aspirations. Law students and novice lawyers continue to believe their choices are few and their opportunities to influence their communities for the better are limited. Sadly, they practice law within a limited horizon, even if they take on an occasional pro bono case. The great army of today's lawyers, like their predecessors in the profession, leave law school with their heads down, their feet squarely on the path, and their creative instincts and social aspirations largely held in check.14

14. The National Association for Law Placement (NALP) reports annually on graduating law students' career choices. NALP's 1990 national survey indicates that only 2.1% of those reporting had accepted public interest jobs upon graduation. See National Association for Law Placement, 1990 National Report (prepared by the Columbia University Center for the Social Sciences) (on file with authors).

A common experience is suggestive of the powerlessness students feel about law, the profession, and their legal lives. Students often approach us and ask if they can use us as a reference in their search for employment. Our typical response is "sure." We ask the students if they would like us to look over their resumes and cover letters. Usually, students are hesitant, but in the face of an offer of help and the prospect of suggestions, most students begrudgingly agree.

Students arrive with their one page resumes and perfunctory cover letters in hand. Our inquiries about what they want to do or where they hope to get a job are usually met with the responses "anywhere" or "with anyone that will hire me." Our questions about how they intend to go about looking for a position typically elicit responses about an intention to sign up with all of those firms interviewing "on campus" or with reference to a list of forty or fifty, or even eighty or one hundred firms whose names and addresses the student has compiled from Martindale-Hubbell. These sort of student responses are frequent and come from students with very different backgrounds, law school experiences to date, and privately held aspirations.

Student resumes are no better. They reflect the very same passivity and acceptance of prevailing norms. A review of a dozen resumes, side-by-side, would reveal no differences from one student to the next except for their cumulative average on end-of-semester examinations. Essentially these students are presenting themselves as if they are interchangeable, fungible units. Students with mediocre grades dutifully report their "C+ averages" and their class rank of "112 of 189." When asked why they include such information and if they think such information will enhance the initial impression of prospective employers, students report that they do not think it will but believe they are "required" to do so and that failure to include such information will result in prospective employers refusing to review their resume.

In going over the resumes, students' entries are often highly edited, sparse in information conveyed, and minimizing of their roles, responsibility, interest, and skills. Questions (and exhortations) from us about why they are presenting themselves in such limited and diminishing ways, particularly in the face of what are often an array of past experiences and accomplishments that can be well-used to their advantage, result in responses that they are doing what they are "supposed to in conformity with Placement Office or employer requirements." Stylistic variations aside, the essence of student behavior is widespread conformity with what
The now familiar survey data regarding lawyer dissatisfaction, substance abuse, and generalized alienation are strong evidence that a mere diversification of the curriculum is unlikely to make a real difference.\textsuperscript{15} The fragmented nature of law teaching and the legal curriculum—its disconnected and compartmentalized quality—helps to explain why our aspirations as teachers fail so completely to comport with the results of our pedagogical efforts. The walls, which we believe disempower students, are constructed both within individual course offerings and across the three years of the curriculum.

II. The Possibility of Counter-Socialization

In Spring 1991, we offered a different kind of course at the University of Maryland School of Law. Our goal was to make a meaningful presentation of doctrine inseparably linked to a conception of lawyering with expanded horizons. Throughout our planning and teaching of this course, the single most important element was our commitment to breaking down the compartmentalization we describe in the preceding section. This course, which was offered to students in their first, formative year of legal training, was described in the Law School's catalog as “Legal Theory and Practice/Torts.”\textsuperscript{16}

they perceive to be the preferences, requirements, and needs of others. While their perceptions are often mistaken, they believe there is little opportunity for expression of their preferences, requirements, and needs in the identification and pursuit of their law jobs and legal life.

Our response—now, almost a litany—ranges from suggestions that students be more inclusive and expansive with their resumes, that they shorten their wholesale lists of potential employers, that they make some decisions about what it is they want to do, and that they research and target prospective employers that respond to those interests and desires. These suggestions are greeted with disbelief and a suspicion that we are “out of our minds.” Many students experience real dissonance at the prospect of taking initiative and having responsibility for job search outcomes. Even as early as their second semester of law school, when they seek their first summer jobs, students are resistant to such messages.

If students secure a job they desire, they are “lucky”; it is aberrational. The idea of exercising initiative and influence on the outcome of this process in a systematic way is beyond the imagination of many students. The analogue is apparent and quite real between the strong sense of student powerlessness, their limited horizons in influencing job search outcomes, and novice lawyer expectations for their participation in the legal world more generally. The horizon of expectation is at best the single transaction or the individual client. This foreshortening of ambition is all the more intensified for those would-be lawyers who seek to serve the poor.

15. Of course, there are many factors, in addition to the form of legal education, that contribute to these pervasive professional problems. Similarly, it is not our claim that our alternative pedagogical approach alone will counter them.

16. There were 50 second semester students in this course. They were organized into two sections of roughly equal size. One of us was assigned to each. These “small sections” are the basic curricular unit in the first year program at the University of Maryland Law School. By working with 50 of the 190 first year students in the Law School’s day division, we were able to
A. Legal Theory and Practice

Our claim is that a legal education divided into component parts functions to disempower students. This dynamic remains true even if the range of instruction is quite expansive. The consequence of this sort of compartmentalized legal training is that students and novice lawyers hold a vision of law practice in which their role is understood as largely ministerial. After graduation, students tend not to feel an obligation to take responsibility for—or to "own"—the consequences of their lawyering work. They proceed as if their practice does not have an impact beyond the tight constellation of parties directly involved in the matters to which they are assigned. While they concede that cases of great moment or broad import do probably exist, the repeated claim we have heard is that in their cases, and in the practices of most lawyers, significant societal interests are not at stake. Given this view, it becomes relatively easy for young practitioners to treat their efforts on behalf of clients as alienated piecework.

We view our teaching as an effort to intervene early and forcefully in the socialization process our students undergo in law school. Counterpoised against the dominant vision, in which most matters are understood to raise only narrow or self-contained questions, we seek to provide an alternative account which presses the claim that all cases are fundamentally political. At this juncture the link between legal theory and the practice of law becomes critical. For students whose experience in the classroom bears little or no connection to their experience in the field, it is simply too easy to concede the indeterminacy of legal rules and the impact of disparate social power on legal process in the cases of poor and disempowered clients, while holding steadfastly to the view that most cases—i.e., the great run of cases to which they are exposed in the classroom—involves little more than the application of formal doctrine to given facts.

Distressingly, this marginalization of the "political cases" tends to occur even when significant classroom time is devoted to the study of those social forces that we understand influence the legal system. Thus, develop a significant presence, so that virtually all first year students were aware of our enterprise.

Our course was structured so that all 50 students met together with the two faculty members for one class session each week. Each of the two sections met separately with its individual instructor for two additional class sessions each week. Small groups of four to eight students met weekly with a teaching assistant (each of whom was a graduate of a prior LTP course) for the purpose of planned exercises and discussions, which drew upon topics covered in the larger classes and allowed students to work actively with the materials. Client work supervision also took place in small groups and in individual meetings.
even regular presentations and discussions focused upon racism, gender
discrimination, institutional poverty, and the like fail to shake our stu-
dents' belief in legal formalism. They are unable, or unwilling, to see
these issues as inextricably bound up with every moment of doctrinal
analysis.17

For nearly three years, we have struggled with this powerful reluc-
tance on the part of our students to embrace the connections between
theory and practice. An evaluator, from another law school,18 wrote of
our work:

[T]hese courses incorporate, rightly in my view, an experiential com-
ponent, a skills component, and a doctrine and concepts component.
Inherent in this design is the fact that if each of these parts is consid-
ered standing alone, the course will appear to be, and to some extent
will indeed be, unsatisfying . . . . But what [Legal Theory and Prac-
tice] courses can do that other elements of the curriculum cannot do, is
to relate social experience, professional competence, and legal doctrine
one with the other. The ability to see these relationships is in my view
crucial to full development as a lawyer, and one of the things least
well-taught in the traditional curriculum. It is clear to me that the
professors teaching in the [Legal Theory and Practice] Program are
dedicated to drawing those connections. It is less clear to me that they
are successful in their efforts. The students to whom I talked, who
were fans of the program, spoke mostly of the value of what they had
experienced rather than of the new intellectual insights they had
gained. And when I spoke to the teachers in the program, it was not
clear to me how much they had focused on this integrative aspect of
what they were doing.19

In fact, all the faculty members teaching primarily in Maryland's
Legal Theory and Practice (LTP) courses have engaged in a concerted

17. Students are apt to recognize some matters as "political." Thus, we can expect gen-
eral agreement that the early DES cases, e.g., Sindell v. Abbott Lab. 26 Cal. 3d 588, 607 P.2d
924 (1980), or groundbreaking products liability litigation, e.g., Escola v. Coca-Cola Bottling
Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), involve more than the application of formal legal
document. These are cases that students describe as involving "policy." Our strong claim, on
the other hand, is that all litigation involves contested values and is therefore "political." It is
not our contention that outcomes within the legal system always constitute the systematic
expression of the interests of the most powerful in society. When we believe such patterns are
present, however, we do make special efforts to identify them.

18. Professor Todd Rakoff of Harvard Law School was one of five "outside" evaluators
of the LTP courses. These evaluators, each of whom is an accomplished educator and has
been concerned in one fashion or another with the issues present in our effort, visited the Law
School several times to observe our classes and activities, reviewed our materials, and inter-
viewed members of the faculty and student body. In addition to Professor Rakoff, we had the
benefit of review by Professors Bea Moulton of Hastings, Howard Lesnick of Pennsylvania,
David Matz of the University of Massachusetts, and William Simon of Stanford.

19. Letter from Todd D. Rakoff, Professor, Harvard Law School, to Michael J. Kelly,
Dean, University of Maryland Law School (Oct. 30, 1990) (on file with authors).
effort to develop pedagogical techniques and course structures intended to make available for students the link between theory and practice. Our past failure to succeed in these efforts was our single most important concern as we proceeded to teach LTP/Torts in the spring of 1991, and our planning was directed toward identifying alternative approaches for achieving better results in this regard.

As we looked over the various iterations of LTP courses that had been offered in the past, one common feature stood out. In every instance we had endeavored to foster a better understanding of the relationships between legal theory and practice by working on increasingly sophisticated and intensive methods for supervising our students' client work. In the shorthand that we had come to employ in our many discussions on the point, we had been engaged in the project of developing new and better methods for "bringing field experiences back into the classroom" for focused study and examination.

The conclusion we reached after this review of our previous teaching efforts was that we should revise our direction and attempt to focus more on the theory side of the theory/practice divide. Clearly, in order to generate the sort of student insight we were after, we needed both a classroom component and a carefully structured set of client-work experiences, and we continued to labor over the field-work component of the course. Nevertheless, our new insight was that students would continue to resist an integrated understanding until we offered a reconceived classroom model to which they could attach their field experiences.

The goal, in short, was not to offer more in the way of clinical supervision or reflection, but instead to offer a more compelling account of legal doctrine and theory in the classroom. In the past, we had sought to build a bridge by setting the first pylons on the "practice" side of the theory/practice gorge. In this course, by contrast, we began our construction project on the firm ground of doctrinal material available on the classroom side of the divide.

20. Roger Cramton has described the law curriculum in general as neither sufficiently theoretical nor sufficiently practical. The intensive curriculum of the first year and the "bread-and-butter" curriculum of the upper years is characterized by "sameness": "the absence of focused attention on either theory or practice." Roger C. Cramton, The Current State of the Law Curriculum, 32 J. LEGAL EDUC. 321, 330 (1982). Our effort in all of the LTP courses has been to engage students in theory work and in practice, but to do so in a way that makes the connections apparent.

21. Among the techniques that have been employed by LTP faculty members are journal writing and case presentations.

22. For a partial description of the work undertaken by our students on behalf of clients during the semester, see infra Section II.B.(2).

23. As we explain below, the study of legal doctrine took on an extremely important role
Our aim for the start of the course was not to argue for a nonformalist account of legal doctrine. Rather, our plan was to foster in a serious and demanding way, the study of doctrine. Both in class and in the students’ legal work on behalf of clients, we would attempt provisionally to map the role and the limits of doctrine in reaching case outcomes. We wished to reassure students, to gain credibility for ourselves in the unfolding enterprise, and to create a need on their part for a better, fuller explanation of how the legal system really functions.

If the presence of doctrine was familiar, our choices with respect to materials, instructional style, and use of the students’ time was not.

Our analytic work was clearly directed, from the first moment of the course, not simply to an end-of-the-semester examination, but to students’ real and imagined work on behalf of clients in need. When we read the decisions of courts, including such familiar old horses as Vaughn v. Menlove, United States v. Carroll Towing, Palsgraf v. Long Island Railroad Co., and Escola v. Coca-Cola Bottling Co. of Fresno, we always read them as instances of doctrinal elaboration and rhetorical conflict and the expression of social vision. We explained to our students on the first day of class that we would explore all of the materials under study at each of these three intellectual levels. By hewing to this promise whenever we met as a class, a pattern or rhythm quickly developed in which the students quite naturally moved from rule manipulation to rhetoric to contested values.

In our classroom efforts to develop in our students a deeper understanding of theory. Our strong preference was not to begin with discrete questions of theory, but to engage our students in demanding doctrinal inquiry in order to press the point that useful theoretical inquiry frequently emerges out of the lacunae of deconstructed legal rules.

While our topical focus was the law of torts, the work of the course required students to read and analyze not only appellate opinions but also trial court decisions, trial records, discovery documents, pleadings, lawyers’ file materials, statutes, administrative regulations, media accounts, and virtually anything else of pertinence that we could get our hands on.

We sought to structure our teaching in the course in order to foster our students’ developing instincts to move from one level of analysis to the next. Thus, one portion of the semester...
For a clearer idea of what we mean when we speak about the three intellectual levels of study, we offer some concrete examples. Many torts casebooks include the case of *Boomer v. Atlantic Cement Co.*, as a fairly standard nuisance case. The case involved a defendant cement company whose operations were damaging neighboring land owners. The trial court found that these damages, in the form of dirt, smoke and vibration emanating from the plant, were relatively small in comparison to the value of the business. Because the trial court found that granting an injunction would result in substantial damage to the defendants and to the economy of the region, money damages were granted while injunctive relief was denied. The ruling was upheld by the intermediate appellate court, and an appeal was taken to the New York Court of Appeals.

In its majority opinion, the Court of Appeals engages in some straightforward doctrinal analysis with respect to the law of equitable relief and servitudes on the land. In the end, however, the court grants a "conditional injunction," that the defendant was entitled to avoid by paying money damages. Our work with this case led students to understand that the court's use of prior New York cases, while conventional in appearance, provided little guidance or support for its resolution of the matter. Indeed, we pointed out that the court was forced to rely on out-of-jurisdiction cases and a treatise to establish even an illusion of doctrinal regularity.

Having come to the conclusion that doctrinal analysis was inadequate for understanding the opinion, students eagerly moved to the second level (the rhetorical level). Here, they discovered that the court's claims for authority were in large part purely formal, highly manipulable, argumentative structures. Thus, the court's majority makes arguments with respect to its institutional competence (judges should not attempt to balance public health concerns, economic forces, and the like.

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was devoted to a unit of study we entitled "The Socialization of Risk." Within this unit, we included a series of doctrinal topics governing the expansion and contraction of tort liability based upon the parties' relationship to the harm. In a more traditional torts course, these topics—including plaintiff's conduct, vicarious liability, and causation—would be dealt with separately and at moments in the semester widely spaced in time. By placing them together, however, we hoped to encourage students to see beyond the application of particular legal rules or rhetorical devices, to the common economic and societal forces at work.

31. Id. at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315.
32. Id.
33. Id.
34. See, e.g., id. at 223-25, 257 N.E.2d at 874-75, 309 N.Y.S.2d at 315-16.
35. Id. at 226, 257 N.E.2d at 875, 309 N.Y.S.2d at 317.
in the course of deciding individual disputes), while the dissent argues morality ("the majority is, in effect, licensing a continuing wrong") and social welfare (the majority is undermining incentives to alleviate air pollution).

Finally, with respect to the third level of analysis (involving the larger social and economic interests at contest in the case), students quickly offered important observations about the tension between property and nonproperty interests, about the role of the market and market-driven tort doctrine in an area of extensive administrative regulation, and about the differences between individualized remedies in the form of money damages and community-based relief in the form of an injunction that would have protected more intangible, but no less real, interests such as the health of nonproperty owning members of the community. Moreover, students raised questions about the configuration of the parties; about the lawsuit's structure as a dispute between a private corporation and a number of private property owners in the area, rather than as a polycentric dispute; and about the uneasy fit between the interests represented by counsel in the litigation and the interests present indirectly in the matter but left unrepresented by the lawyers who had appeared.

When we spoke about legal rules in this course, we always spoke about the process of constructing evidentiary accounts. The first of countless times that we asked students in the classroom to think about what witness or other evidence they would offer at trial for a given legal proposition, they fell silent. By the end of the semester, however, they were asking this question, and testing their proposed answers, from the perspectives of different clients and lawyers, without our prompting. They regularly imagined the investigatory process, both formal and informal, that they would go through to obtain the document or testimony they desired. They also imagined the likelihood and effect of discovery and production.

We were never content to identify but a single version of a rule or case outcome. Instead, for each doctrinal issue, we attempted to construct a "continuum of possibilities"—a range of choices available to lawyers, clients, and judges in the resolution of any particular doctrinal question. Similarly, it was never enough merely to identify the doctri-

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36. Id. at 222-23, 257 N.E.2d at 871, 309 N.Y.S.2d at 314.
37. Id. at 230, 257 N.E.2d at 876, 309 N.Y.S.2d at 321.
38. Id. at 229, 257 N.E.2d at 875, 309 N.Y.S.2d at 320.
39. One familiar example of a doctrinal continuum involves the legal recognition of emotional and dignitary harms. This continuum reaches from one pole where evidence about such harms is inadmissible, to a middle ground where the admission of such evidence is permitted only as to "parasitic" damages attached to another recognized cause of action, to the opposite
nal possibilities. It also was essential to consider how the class, race, and
gender of the participants in the legal process might influence any partic-
ular outcome.  

Questions of policy, of competing social visions, and of competing
claims for a dramatically disproportionate distribution of societal re-
sources, were treated not as unusual moments in unusual cases, but as
essential considerations in all cases. The work of lawyers, and in fact of
our students acting as lawyers for poor people, was never treated as min-
isterial or mechanical. Rather, in our conversations in the classroom and
in legal work supervision meetings, the persistent focus was always on
the open-textured nature of law practice, on the range of choices that
most practitioners never see, on the opportunities to reframe disputes, to
recharacterize relationships, to unsettle the ordinary, usual workings of
the law.  

Our tentative conclusion reached after teaching this new course for
the first time is that our refocused efforts did indeed begin to move stu-
dents toward a better understanding of the links between theory and
practice. A review of the information available to us, including student
performance in class, in their written work, and on behalf of their clients,
persuades us that our renewed efforts to teach about the necessary rela-
tionship between doctrine, rhetoric, and social context did assist students
in their development of a fuller, more integrated vision of law.  

40. As part of such inquiry, it is helpful to consider cases where such factors are lurking
or even covert, as well as cases where race, gender, or economic standing is more explicit. See,
e.g., Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116, cert. denied, 317
N.C. 334, 346 S.E.2d 140 (1986) (claim for intentional infliction of emotional distress centering
upon harassment of pregnant employee); Dawson v. Zayre Dep't Stores, 346 Pa. Super. 357,
499 A.2d 648 (1985) (claim for emotional distress growing out of defendant's employee's use of
racial epithets).

41. To be sure, there are differences case-by-case in the extent of a lawyer's opportunity
to recharacterize the dispute or to pursue a particular and favorable doctrinal formulation.
The most accomplished and effective lawyers are those who are able to perceive these opportu-
nities and take advantage of them. For our purposes, in this first year course, our emphasis
was upon persuading students about the existence of such possibilities and equipping them
with what amounted to no more than the most rudimentary proficiency. For this, and other
reasons discussed elsewhere in the text, subsequent and repetitive experiences are necessary to
enlarge student understanding and enhance student skill.

42. We believe that many of our students found our antiformalist approach empowering
because they were able to imagine a much broader range of intellectual activities as properly
within the definition of lawyers' work. As a consequence of this enlarged vision, some students
also were able to think of their own efforts on behalf of clients as having the potential to make
We believe these results can be accounted for in two related ways. First, our experience suggests that careful, repeated patterns of inquiry in which students confront all of the course material at each of the three intellectual levels we have described results in their gaining both the ability and the inclination to apply a similar process of analysis to their field work on behalf of real clients. For example, throughout our course, a doctrinal construction that received considerable classroom attention involved the use of statutes, administrative regulations, and other statute-like authority as the basis for nonstatutory causes of action and defenses. At an early point in the semester we undertook the study of a familiar line of cases in which the breach of a statute was urged as conclusive evidence of negligence. Our starting point for working with this doctrinal material was to help our students see that the cases fell along a continuum in which one end is marked out by courts who refuse to admit or give any evidentiary weight to the breach of statutory duties, while the other end is made up of decisions in which the breach is treated as the basis for imposing strict liability. In between, students learned about increasingly determinative presumptions of negligence growing out of the violation of legislative or regulatory pronouncements.

As we worked through this body of doctrinal materials, however, we also engaged students in an analysis of the argumentative strategies employed by lawyers and judges in the cases in order to support a resolution at a particular point on the continuum. More importantly, we used our examination of the inconsistencies and incoherences in this doctrinal area to encourage a sustained consideration of the nondoctrinal forces at

43. See supra note 29 and accompanying text.

44. In addition, some students have reported to us that they have brought these new analytic skills to bear upon their work in other “traditional” law school courses. If these reports are true, this sort of teaching may have even greater potential for transforming the law school experience of some number of our students.


46. For example, in the case of Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976), in justifying its decision that evidence of violation of a statute creates a rebuttable presumption of negligence, the court employs institutional competence and fairness arguments. Id. at 135-36, 243 N.W.2d at 279. Later in the opinion, the court offers variations of the earlier fairness argument and adds an administrability justification. Id. at 139, 243 N.W.2d at 281. For a useful typology of legal rhetoric and argumentative categories and tropes, see Jeremy Paul, A Bedtime Story, 74 VA. L. REV. 915 (1988); Duncan Kennedy, A Semiotics of Legal Argument (1989) (unpublished manuscript, on file with authors).
work. Almost organically, students began to gain a heightened understanding that claimed factual distinctions between cases often do not account for different doctrinal outcomes. Similarly, students developed increasingly keen insights about the claimed merits of policymaking undertaken by legislatures as opposed to courts, and about the competing interests of different groups in society as civil liability is expanded or contracted according to rules governing the use of statutes in common-law actions.

As the students gained more sophistication at each of these intellectual levels, they also began to apply their insights to their work on behalf of clients. Some students had been assigned personal injury cases involving lead paint poisoned children living in Baltimore's inner city rowhouses. While students in earlier LTP courses working on similar cases had conducted case development investigations, devised litigation strategies, drafted pleadings, and prepared for trials, they had not, on their own initiative, considered the possibility of developing additional causes of action derived from statutory and regulatory materials governing the use of lead paint. Many students in our course, on the other hand, immediately grasped the possibility of adding such counts to the more familiar claims already raised in the cases.

In the process of considering legislative and regulatory authority in this fashion, the students began to evidence a deeper understanding of the competing economic interests between poor tenants and property owners. They began to see the legislative process and administrative rulemaking as battlegrounds in addition to the court system, where the effects of social disempowerment might also play out with disadvantageous consequences.

Through a learning process that began with close doctrinal analysis of early 20th century contributory negligence cases and ended with heated case planning sessions on behalf of lead poisoned children, the students had formed connections between doctrine, theory, and practice. We made these connections frequently and we emphasized them. In response, the students began to offer up richer visions of lawyering and lawyers' role, far different from those with which they had begun and far different from those we had been able to stimulate in prior courses. This developing inclination and skill formed one essential span of the integrative bridge we had set out to construct.

Additionally, our use of doctrinal analysis as a means to open up questions of rhetoric and social context began to make the lurking value conflicts inhering in all legal disputes more visible. This unobscuring and demarginalizing of the political element present throughout the law of
torts,\textsuperscript{47} in turn, made some students' personal beliefs regarding fundamental questions of justice relevant to their developing notions of law and lawyering. That which students previously had considered to be wholly within the province of their "private" world was increasingly made essential to their "professional" work.

Once we began to persuade students of the relevance of their beliefs to their practice as lawyers, we were able to explore with them the substance of their often deeply-held images of society. Discussions, which in prior courses had elicited complaints from students that we were trying to "teach values" (an enterprise which they understood as inappropriate in professional school), were now met with greater enthusiasm and occasional openness. Students began to feel a stake in both the mechanics of legal analysis and the foundational values in contest in that analysis.

B. Visions of Practice: Expanded Professional Horizons

A pervasive, although usually unarticulated, feature of the formalist landscape is the premise that lawyers are universally available to all parties in all legal disputes. An allied, similarly implicit, but absolutely central feature of the formalist world is the assumption of an "equality" of counsel. To study even a single case in which one of the parties appears \textit{pro se} or, alternatively, in which counsel for one side has been institutionally or systematically disadvantaged is unheard of. There is little suggestion that counsel may differ based on skill or energy, and absolutely no mention of the profound differences in available resources, regulatory restrictions, or caseload demands.\textsuperscript{48}

Formalist notions of the availability and equality of counsel are reinforced by the cultural beliefs of incoming law students. Despite increasing diversification of student bodies, law students have not, for the most part, experienced difficulty in their own or their families' lives in securing representation. The main engine of these cultural impressions is the media. The popular cultural landscape simply does not include persons in legal need unable to secure the services of a lawyer, or if lucky enough to have a lawyer, one who is at a systematic disadvantage.\textsuperscript{49}


\textsuperscript{48} If such cases were introduced only on occasion, they would reinforce the notion that the absence or inequality of counsel is aberrational, almost regardless of the teacher's intention.

\textsuperscript{49} In our age of television, the law is an often chosen vehicle and these shows' heroes are the lawyers: Grace Van Owen, Leland McKenzie, Victor Sifuentes, Arnie Becker, and Michael Kusack. The plots are about these lawyers' lives and their representational victories or difficulties. Earlier decades were no different. It was Perry Mason to whom we were ex-
Law teachers ought to know better. But, for a variety of reasons, this knowledge remains distant, and rarely introduced in the classroom. Some law teachers are completely uninterested in "law in operation," others are concerned only with areas of practice in which the limited availability of counsel is not a pervasive fact of life. Many of us, however, come from practice backgrounds and commitments in which the desperate shortage and disadvantage of lawyers is a constant and harsh reality. Yet, the subject of the gross and disproportionate unavailability of counsel to low-income people is often treated by lifeless incantation, or left to be understood by students through their experience with clients and the legal system in their clinical experiences.\footnote{50}

In LTP/Torts, consistent with our enhanced conception of integration, we attempted to build upon traditional LTP presentations about need, availability, and lawyer response.\footnote{51} In the classroom, this meant expanding the standard litany of questions forwarded about each case, cause of action, or legal rule to include questions about parties,\footnote{52} and the availability, kind, circumstances, and outcome of representation. These questions were pursued from the perspective of both prospective clients and prospective lawyers.\footnote{53}

\footnote{50} Our insight and imagination seems to reach no further than to call for greater federal funding or adoption of mandatory pro bono requirements.

\footnote{51} In many ways our previous presentations, in LTP courses, about the legal needs of the poor were not much different. Every LTP course we had taught included reading excerpts from the recent "legal needs assessment" conducted for the state of Maryland. A class or two was devoted to discussing this report. We always highlighted the report's findings that fewer than 20% of the poor in Maryland secure the services of a lawyer for their legal needs, and pointed out that it was this very report which led to creation of the LTP courses at the University of Maryland. As for presentations about lawyers for the poor, the institutional settings in which they work, and the work they pursue, those presentations were similarly limited in scope.

Over time, and as LTP courses have proliferated, so too has the variety of presentation about the legal needs of the poor and the structure of the delivery of legal services in contemporary America. Similarly, legal need and the availability and nature of representation has figured more or less prominently, more or less explicitly in the choice and pursuit of legal work in the various courses. There have been and continue to be significant differences in the ideas of the various LTP faculty about the features of an effective response to this situation of chronic need. Common to the different LTP courses, however, was that the presentations about "need" and "availability" were sporadic, contained, and discrete. Like other elements of the diversified curriculum, they were marginalized as part of student understanding and likely limited in influencing subsequent professional behavior.

\footnote{52} This included not only an effort to have a fuller, more factual and more contextual understanding of the parties, but also an effort to make specific inquiries into their economic status, gender, and race.

\footnote{53} From the perspective of the client, for example: "If a low-income client had experienced this sort of injury, how would he or she go about finding, contacting, and pursuing a
Our goal was and is to construct some very different pictures and forms of practice—ones with very different professional and political consequences. At the outset, it is important to describe two harbored ideas that animate the prevailing forms of LTP legal work, law school clinical education legal work, Legal Services and public defender work, and bar association pro bono efforts. The first animating idea relates to "need"; the second to forms of practice.

On the surface, the first is a rather straightforward idea. The basic proposition is that upon gaining an awareness of the important needs of others less well situated, those better situated and able in some way to respond will do so. Slightly embellished and contextualized, the proposition becomes that in the face of the legal need of poor, disadvantaged, and unrepresented people, lawyers as part of their professional identities and responsibilities will respond to demonstrated need. While this proposition is widely assumed and, upon examination, is at the heart of virtually all programmatic responses to the legal needs of the poor, it is rarely stated explicitly. Stating it explicitly makes clear what a layered, complex, and potentially questionable proposition it is. At the level of the individual, the claim includes presumptions about the basic personality and disposition of human beings; it romanticizes the very nature of professionalism despite substantial evidence to the contrary; it masks the role of class, race, and gender in the settled allocation of place and power in our social world.

Based upon our experience in both law teaching and in practice for the poor it is our conviction that, no matter how compellingly made, a demonstration of need alone will not support and sustain effective legal practice on behalf of the poor. Need alone will not support a Legal Services lawyer beyond the first years of practice; need alone will not support law students beyond a mandatory semester in making career choices or honoring continuing professional obligations to serve the poor. Something more gratifying, more affirmative, more theoretically complete, more effective is required.
A second animating idea at the heart of most legal education and practice for the poor is that virtually any kind of activity, which enables or increases the participation by the poor in the legal system is "good." The goal here is to increase "access." Access evokes notions of participation in the legal process. Sometimes this participation takes place through traditional forms of lawyer representation; with increasing frequency, the participation contemplated is pro se representation. Lay training programs, redrafting court forms and procedures in plain language, and other proposals of this sort enjoy much currency. The aims are to persuade low-income persons of the importance of legal proceedings, to inform them where, when, and in what form those proceedings will take place, to encourage and to permit them to participate, and sometimes to improve the quality of their participation. Participation that is "access" is the end to which these efforts aspire.

Much more rarely do we direct our attention and our efforts to an end firmly fixed on substantive results. For example, a recent informal Legal Services study of the Boston Housing Court revealed that unrepresented tenants, opposed by represented landlords, lost in every case that was observed by the study team. Thus, regardless of the level of participation, regardless of the "access," not one tenant received a result that was favorable. Such attention, directed to substantive results, is unusual.

At the heart of the preoccupation with access is the largely unarticulated and widespread assumption (or is it hope?) that the courts are essentially meritocratic: If someone can get to court, appear at the correct time, and make known their case in an intelligent fashion, then there is a reasonable chance they will prevail. Yet, we know this is simply not true. Poor people do not win a fair share or even an appreciable fraction of their cases. This is not a failure of access or a failure of participation. Instead, it reflects a fundamental and antagonistic disposition toward the interests of the poor.

The preciousness of available legal resources for the poor, and the concomitant obligation to use available resources with maximum effectiveness, are facts of life for all poverty lawyers. Despite this reality, lawyers who attempt to serve the poor regularly make decisions that result in randomness in their conception of professional role, legal work, and operation of law. Such randomness is fundamentally at odds with the effective expenditure of limited resources on behalf of progressive, reformist, or productive legal services for the poor.

54. For another similar account, see Barbara Bezdek, Silence In the Court: Participation and Subordination of Poor Tenants' Voices In Legal Process, 20 HOFSTRA L. REV. (forthcoming 1992).
In teaching LTP/Torts, we believed it essential to begin to build for our students a descriptive picture of the nature and structure of the delivery of legal services in contemporary America. Our preliminary picture described the profession at large, but included special emphasis on the delivery of legal services to the poor. While there were special readings, class sessions, and clinical experiences directed to these topics, they were also points of inquiry and discussion within the daily fabric of the course. We tried to take our insights about integration seriously and put them into operation.55

Similarly, we were not content with merely offering a descriptive account of the contemporary landscape. Part and parcel of such descriptions were evaluative accounts. We made an effort to expose students to a variety of political perspectives on the performance of the profession generally, and of those lawyers representing the poor specifically. We shared with students our own particular accounts, which are the product of considerable personal involvement, concern, and study.

As with other course topics, it was and is our view that offering a descriptive and critical account is insufficient. This is particularly so in the face of our aspirations to support career-long, effective activity by our students on behalf of the poor. Thus, it was incumbent upon us to begin to offer our students an affirmative account of the contours of practice possibilities that have the potential to be effective; that is to moderate or eliminate the practices which systematically disadvantage the poor.

(2) Affirmative Visions of Practice

It was not our intention to offer students a set-piece model of practice. We did not seek to give them a completely articulated practice setting in which all of the decisions about clients, issues, conception and approach, practice standards, and acceptable case outcomes had been dictated and would be completely replicable. Instead, our goal, as part of

55. Consistent with our critique of the “access” model for responding to the inadequate delivery of legal services to underrepresented client populations, we examined the experience of poor litigants in cases we read throughout the semester. Our goal was to help students see that as a pervasive matter throughout the law of torts, the application of formal legal rules, even when parties of unequal power both were represented by counsel, frequently resulted in outcomes more favorable to wealthy parties. For examples of the persistent distortive influence of class, as part of our study of workers’ compensation, we read with our students the cases that made up the “trinity of employers defenses” at common law. See, e.g., Lamson v. American Ax & Tool Co., 177 Mass. 144, 58 N.E. 585 (1900); Farwell v. Boston & W. R.R. Corp., 45 Mass. (4 Met.) 49 (1842). See also LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 413-14 (1973) (discussing how contributory negligence, assumption of risk, and the fellow servant rule were doctrines employed by American courts to shift the cost of industrial accidents from entrepreneurs to workers).
constructing alternative visions of practice, was to give students some experience and knowledge of how to go about developing and then pursuing an effective practice.

We were both relatively new to the geographic area and wanted to learn more about the various actors in the legal community, about particular client needs, and about possibilities for change. We wanted practice settings in which the duration of our involvement would be limited, so that we would be free to reflect upon what we had learned and to revise the nature of our involvement; relatively "high volume" settings, so that we might gather a good deal of data in a short period of time; settings that would expose us to an array of perspectives within our respective areas of interest to assist us in fashioning longer-term involvement; and settings in which our lawyer learning would be complemented by the delivery of actual services. Thus, we picked general areas of activity that were, in some sense, extensions of our earlier work. We chose two practice settings and divided our course students into two groups. The first would address the needs of low-income persons with drug and alcohol dependence; the second, the needs of low-income persons as they relate to defective and dangerous rental housing. We had no pre-existing client or funding constituencies. There was no pretense here; at the outset these were lawyer-driven decisions.

Our first group of course students were assigned to work with low-income persons with drug and alcohol problems. In light of those clients' needs and their frequent involvement with the criminal, regulatory, and social service systems, a decision was made to represent treatment centers. These treatment centers are the intersection of many social and legal needs of the chemically-dependent poor.

Much stigma and great hardship attaches to the designation of someone as an "addict." Potentially negative consequences flow from such identity in the areas of education, health care, employment, housing, and the provision of other services. Much of this hardship is traceable to the unlawful sharing by drug and alcohol abuse treatment programs of confidential information to the detriment of the chemically-dependent poor.

There are existing legislative and administrative rules prohibiting the dissemination of confidential information. These provisions recognize that treatment programs are an important repository for potentially harmful information. Bringing their information distribution practices into conformity with existing statutory and regulatory provisions would
go a long way toward diminishing some of the barriers and disabilities inflicted upon the chemically-dependent poor.56

A number of treatment programs, employing a variety of treatment modalities, were contacted. We offered to serve as the programs' counsel for the purposes of assessing their compliance with applicable confidentiality provisions, devising solutions for the correction of shortcomings, and designing and offering staff training. As treatment programs of all descriptions are financially pressed, this is not a legal function that many programs are able to undertake. Most were delighted at the prospect of receiving such assistance at no cost.

In exchange for representation, programs agreed to permit course students regular access to program participants and staff. Thus, in addition to having the opportunity to learn about the actual workings of a number of treatment programs, especially with respect to their handling of patient information, there was the opportunity for course students to talk with program participants and begin to learn more widely about the experiences and problems of persons, poor and nonpoor, as they confront various governmental agencies and the elaborate network of adjunct organizations.

There were several goals to this effort. First, it was our intention to deliver services to treatment programs and individual clients/patients in the hope that this would diminish the disclosure and enhance the confidentiality of information about chemically-dependent persons. A second goal was to learn more about the institutional landscape of governmental actors, service providers, and other organizations involved in limiting, punishing, and treating drug and alcohol use. A third goal was to learn more about individuals—their experiences and problems—as they were confronted by and sought assistance from this network of public and quasi-public organizations. A fourth goal was to test the amenability of these organizations to "in-house" advice and counsel. Would they change program procedures and practices as well as staff behavior?

56. One central goal in the students' work with these institutional clients was to help the treatment programs develop protocols and practices relating to patient records and confidentiality. This area of law is governed by a complex scheme of federal statutes and regulations, as well as overlapping and sometimes conflicting state law provisions. The federal statutes that govern the area are 42 U.S.C. §§ 290dd-3, 290ee-3 (1988). These provisions are implemented by way of a complex set of federal regulations. 42 C.F.R. §§ 2.1-2.67 (1991). In every jurisdiction, these federal laws and regulations frequently come into conflict with state law provisions. For example, in Maryland, they are in tension with the statutes that create a Tarasoff-like obligation for mental health care workers, Md. Cts. & Jud. Proc. Code Ann. § 5-316 (1989); create an obligation to report child abuse and neglect, Md. Fam. Law Code Ann. § 5-701 to 5-715 (1984); and require the reporting of HIV infection, Md. Health-Gen. Code Ann. § 18-337 (1990).
Our ultimate goal was to develop an understanding of, and responses to, a set of practices that disadvantage a significant number of chemically-dependent poor persons. It seemed almost a guarantee that additional information and experience would lead to a refinement of our strategies for involvement and change. Course students were obligated to undertake activities that led to an involvement with programs and patients. They were also required to be constantly aware of the sorts of decisions that had been made about how to utilize scarce legal resources, to monitor constantly the effectiveness of their involvement in attacking widespread problems, and, to the extent necessary, to devise modifications or alternatives for more effective involvement.

A second group of course students began with a very different set of perceived problems. These problems were an expression, in one way or another, of seriously defective, physically dangerous rental housing. Like the other course legal work, an effort was made to identify a pivotal institutional actor—in this instance, the Baltimore City Department of Housing and Community Development (HCD)—and to make arrangements for “in-house” participation in that institution’s functioning.

We sought to reform the prevailing practices of HCD in its failure to identify and prosecute quickly and aggressively property owners who fail to keep their rental residences in compliance with applicable safety and habitability standards. More specifically, we sought to increase prosecutions against owners of large numbers of rental units and to decrease appreciably the time between the issuance of violation notices and criminal prosecutions for failure to make needed repairs. Once prosecutions were begun, we wanted them to be vigorously pursued, so that convictions and maximum penalties were obtained and enforced.

Students pursued different strategies and sought different remedies against some of the same owners and in some of the same neighborhoods. Course students represented families and their children who

57. Cutting across all of these particular goals was our aim to integrate this work into the students’ developing understanding of tort law. While at first blush this practice area would seem to be quite specialized, our experience was that general notions regarding negligence, medical malpractice, privacy, and intentional torts were brought into play in the students’ work on behalf of their institutional clients.

58. A regular landlord retort to the prospect of vigorous enforcement is the threat of abandonment. This threat is, in turn, often used by HCD officials to explain their lack of enforcement. This situation is mirrored in many other cities and settings. One goal of our involvement was to begin to test such threats, to map when they were merely threats and when abandonment was likely, and to determine when abandonment was desirable and when it was not.

59. This admixture of civil and criminal practice allowed students the opportunity to explore some of the relationships between tort law and criminal law. We both are attracted to
had been lead poisoned because of defective physical conditions in their rental homes. Students investigated, developed, shaped, and drafted complaints in these traditional tort damages actions. In some instances, the cases progressed to discovery or motions or even trial, but on the whole the bulk of student involvement was in the case development phase.

Criminal prosecutions and damages actions were complemented by a third type of representational work. Students represented families who had been sued for nonpayment of rent through a highly abbreviated and widely utilized summary dispossessory proceeding. Students represented these tenants in the local "housing court" where they advanced a full range of defenses and counterclaims articulating landlord breaches of the warranty of habitability. They sought injunctions and orders to repair, escrow accounts, abatement of rent, and damages of all descriptions. They employed an extremely aggressive style of advocacy, litigating each and every issue, with "papers," hearings, and a style and quality of advocacy that was truly foreign to this lowest-level trial court, but which matched the implicit assumptions underlying the formalist system.

Once again, we sought to deliver immediate services. We also sought to gain information about the broader political economy of which low-income housing is an important constituent part in a city like Baltimore. We were continuing to experiment with different forms of "targeting" and "aggregation." Some of the clients and cases were chosen because of the geographic location of the residences; some were chosen because of the identity of the adversary; and some were chosen because of the nature of the unlawful activity itself.

This was an initial experiment in assessing the comparative efficacy of different legal approaches to the same offending practice of defective housing: criminal prosecutions, affirmative damages actions, habitability defenses. There are advantages and disadvantages to each.61

the idea that students develop deeper understandings of tort law when it is presented alongside criminal law, as a sort of unified study of "legal wrongs."

60. It must be said that student complaints embodied a broader and more novel array of causes of action than might be labeled "traditional" or even "tort."

61. For example, criminal prosecutions have the advantage of the sanction of censure and incarceration which is quite threatening to many landlords, but these powers are appropriated to the state's prosecutor whose cooperation and commitment is irregular and often speculative. Affirmative damages actions have the potential to create significant economic incentive toward desired landlord behavior, but take place over an extended period of time and are extremely resource consuming to litigate. In contrast, habitability defenses lend themselves much more readily to high volume participation and targeting. Considering the widespread use of summary eviction proceedings in a city like Baltimore, there are many opportunities to experiment with habitability defenses and to compare variations in approach and outcome. But, their
Our involvement with clients was at odds with much of the current literature regarding law practice for the poor. This is not because we think that a model of lawyering that employs relatively traditional skills and fora is the only valid conception of lawyering. Actually, we think the contrary to be true. However, we do believe that traditional skills and fora, when coupled inexorably with reconceived notions of role and dramatically expanded ambitions, can lead to much more effective law practice for the poor. Such practice has real reformist potential. It is this proposition which we pursued, and are continuing to pursue in our LTP teaching.

Here again, a concrete example of the relationship between our classroom methodology and our students' practice experience may be helpful. A recurring issue for students engaged in legal work with substance abuse treatment programs involves the tension between federal and state law provisions governing the reporting of suspected child abuse and neglect. Under the federal regulations governing the confidentiality of drug and alcohol abuse treatment records, treatment providers are directed to comply with their state law reporting obligations when they suspect that a person in treatment has neglected or abused a child; however, this exception to the ordinary rule prohibiting disclosure is limited to an initial report.

The problem for students charged with advising treatment personnel as to this interplay between federal and state law is to determine what sort of a report they should make, given that Maryland's statute generally requires both an oral disclosure and a follow-up written report within a specified period of time. The statutory scheme lends itself to two plausible interpretations: first, that an initial report is limited to oral disclosure; and second, that both reports constitute the allowable communication of information under the federal regulations.

A student who had taken on the task of resolving this problem came to us with the proposal that she request a formal opinion on this legal question from the federal agency charged with oversight in the area. She
had drafted a letter requesting such an opinion, but had taken no position among the competing interpretations. We suggested to her that effective lawyering would mean that she should identify which position would best serve her client’s interests, and that she should advocate for that position in the request letter. It had not occurred to this student that she could influence the outcome of this question. Indeed, she expressed considerable surprise upon learning that she could shape the development of the law in this area, instead of merely ascertaining what some other decisionmaker might decide. This is the sort of disempowerment we were attempting to overcome.

Next, the student asked us which position she should adopt. Here, we began to employ the three-tiered analysis we used every day in class. At the doctrinal level, the student quickly concluded that the statutory and regulatory authority would support either position. At the third level of analysis, the student framed the problem in terms that made the outcome dependent upon which approach would best protect the health and well-being of children as well as their parents. After some substantial conversation at this level, the student determined that her position had to take account of: the inadequacies of the child protection bureaucracy in our state; the likelihood that ongoing counseling taking place at the substance abuse treatment center might more effectively address the neglect or abuse; and the danger that a full report might drive a parent from treatment because the parent would experience the report about the family situation as a breach of loyalty. Based upon this more abstract articulation of the problem, the student determined that a more limited interpretation of the treatment program’s reporting obligation was desirable.

Once the student had determined that she would advocate for this more limited interpretation, she returned to the actual language of the statutory and regulatory material in order to draft her letter. This led us to a discussion not unlike our classroom analysis of rhetoric in appellate cases. We were able to draw on our earlier teaching about argument structure in order to provide the drafting assistance our student needed. Although the student had not seen the link between our classroom teach-

64. Of course, before the student could adopt an advocacy position with respect to this issue, she had to be clear about who her client was. In the course of working through this legal issue, the student began to rethink her relationship with her formal client (a methadone maintenance treatment program) in order to take account of her strongly-felt obligations to her secondary clients (the patients of the program and their children). Indeed, at moments, this student quite thoughtfully suggested that her work had potential consequences for an even larger group of people, those drug abusing parents who might be dissuaded from entering treatment by virtue of their concerns over confidentiality.
ing and her field work when she first came to us with this problem, by the end of our session these connections were plain to her.

Our conceptions of practice, in which our students participated and which we discussed in class, introduced operational priorities for case selection, practice protocols for directing legal work, and articulated practices which we sought to reform and by which we could measure the effectiveness of our work. To be sure, these practice settings were designed with an eye to such concerns as logistics and first year student capabilities. More importantly, the design of the practice experiences was meant to reflect a set of very different ideas and values than those which traditionally dominate legal practice for the poor.

By offering a practice setting firmly grounded in a commitment to the identification of systematic practices that disadvantage poor persons and fashioning responses specially designed to attack, reform, or at least ameliorate those systematic practices, we hoped to provide students with one or more models of practice that did not merely involve them in the considerable needs of the poor. We sought, also, to support them in imagining and fashioning forms of practice that might respond to the needs of the poor in ways which are both substantively meaningful and professionally satisfying. Consistent with our animating insights, and other aspects of the course, it was not adequate to attempt to make this presentation exclusively by way of the design and execution of the course's legal work. Here, too, it was necessary to intensify our classroom efforts. It was essential that we add significantly, and in a thoroughly integrated way, to our intellectual presentation about visions of practice. Consistent with other learning from this course, by changing our classroom practices, much more than by refinement of our legal work choices, we have been able to enhance and intensify student learning in this regard.

Recently, we have begun testing our students' progress toward this aspiration. In the 1991-1992 academic year, we taught a second round of LTP/Torts. In this subsequent offering, course students from the prior year were used as teaching assistants. Instead of assuming that the practice settings would be identical, or instead of assigning a ready-made caseload, we required these advanced students to draw upon their earlier

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65. It is undoubtedly true that as we have become more experienced, we have been able to make better choices about course legal work. We use the term "better" here to convey improvement in the selection of work that is not only realistic but also meaningful to students—more educational about the need for such services, about the structuring of currently available services and its shortcomings, and about alternative, affirmative images of what effective practice models for the poor might look like.
experiences and learnings to design and implement a legal practice for the new course students they would be supervising. While we provided general contours and criteria for their decisionmaking, they were left with great latitude. It was their task to articulate a vision of practice that provided a meaningful educational experience and represented an effective use of scarce legal resources for the poor. Beyond the articulation of a vision, these advanced students also were directed to “operationalize” their choices. This required that they target their legal work, locate community leaders and resources, match their ambitions with those of prospective clients, frame specific case selection criteria, establish practice protocols, and determine measures for the success or failure of their students’ work.66

We have several observations about the advanced students’ work in developing their practice areas. First, the students made very different choices one to the next in building their caseloads. It was not enough for them simply to make choices; they were required to articulate, justify, and persuade us that they had made sound decisions. Second, upon receiving this assignment, we were reassured to see that students had ideas about how to begin such an undertaking. We took this capacity for self-direction to be evidence that the prior year’s learning had taken hold and was transferable to a new project. Finally, in the face of a second opportunity to learn about and explore these issues, these students exhibited increased initiative and enhanced skill and judgment, which represented a significant advance as compared to their first round efforts.

66. For example, one teaching assistant identified the consistent failure of the sitting “housing court” judge to recognize methods short of the receipt of a certified letter for giving landlords notice of conditions that breach the warranty of habitability. This is in direct conflict with explicit statutory language that provides for a variety of means by which to give notice, including communications by telephone or in person. The teaching assistant concluded that the judge’s unduly constrained definition of notice was a systematic bar to literally hundreds of tenants in advancing habitability claims. Thus, one selection criterion for all of her cases was that they include a habitability claim that would rest upon notice by means other than certified letter. Her thought was that repeated, careful advocacy about this issue before the judge would be more likely to cause him to rethink his position than would the random pro se claims the judge would ordinarily hear. This strategy meant that with each and every case, course students prepared “papers” addressing this legal issue, as well as presenting this issue as part of the merits of their individual cases. Initially, in the face of this concentrated advocacy, the judge continued to deny recognition to alternative forms of notice. However, the students persisted in bringing new claims and pursued appeals in the cases that had been unsuccessful. As a consequence, the judge now has begun to employ a broader definition of notice, at least in those cases in which course students appear. In an effort to break down the double standard that has developed due to the judge’s practice of using the more restrictive standard of notice in cases in which tenants are unrepresented, the teaching assistant directed her course students to visit the court and observe the judge’s rulings in the cases of pro se tenants. She has now begun to bring motions for new trials and revised judgments in those cases.
C. At a Formative Juncture: In the First Year

Compartmentalization, with its deleterious effect upon students’ initiative and capacity to imagine more ambitious forms of practice, occurs in two dimensions: within individual courses and across the law school curriculum. Therefore, an additional design feature of our course, that complemented its “internal” integration, involved its location within the first year program of our institution. The very powerful, often unarticulated, messages about law, lawyer’s role, and professional values that students receive in the first year core curriculum were important topics that we sought to address in our course.

Doctrinal analysis is at the heart of the legal curriculum. This particularized analysis represents a very narrow range of intellectual inquiry; nevertheless, for law students, it becomes synonymous with legal thinking or legal reasoning. This kind of analysis is experienced by students as “hard,” “precise” (meaning semi-scientific), “rigorous,” “distinctive”; in short, “lawyer-like.”\(^\text{67}\) For students who are floundering intellectually and in an emotional tizzy, as are most first year students, there is a premium on certainty and correctness.\(^\text{68}\) Many students believe that doctrine offers such promise.

Conversely, accounts that describe law as open-textured, imbued with choice and abundant discretion, and rarely inevitable or certain are experienced as “soft,” “mushy,” “interdisciplinary,” and “mere policy.” By comparison, such accounts are unattractive for they intensify already high levels of student anxiety. They are to be avoided, rejected, or at least regarded as less important. Yet, it is just such an account that is more likely to be suggested by presentation about and involvement with law-in-action, and particularly law as it operates upon the poor.

The dominant intellectual tradition at our law school, and virtually every other law school, is to present these various accounts of law-on-the-books versus law-in-operation in sequential or separate fashion. We have described what we believe to be at least some of the untoward consequences of this compartmentalization. In contrast, we believe that in the first instance—as part of the formative experiences of law students—there should be teaching and learning about law and lawyering in a way

\(^{67}\) This activity is appealing to large numbers of law students. This is particularly so in that much of the first year is experienced as tense, confusing, scary, disorienting. This may also be so when law school student bodies are composed of sizable numbers of relatively young students; students recently converted from science, premedical, or business undergraduate majors; and students who are heavily market-focused.

that permits students to imagine themselves performing competently and productively for the poor and unrepresented, and teaching and learning that affirms such representation as important, rewarding, and lawyer-like. The presentation of such a picture, and its associated messages, in the second or third year of law school comes too late.

Because our goal is to support and enlarge our students’ professional conception of service to include the needy, we believe it is important to include such teaching and learning in concert with the rest of the first year presentation. For those students who arrive at law school with such interests, they will find support and reinforcement for their initial inclinations. For those students who are uncertain about their career directions, teaching and learning about alternative conceptions of professional role and value will add to their exposure and eventual choice.

There is a related dynamic, which placement of our teaching effort in the first year is intended to moderate. One consequence of the first year curriculum, and its emphasis upon a limited range and disconnected set of cognitive learning objectives, is that many students feel incompetent, not only as beginning law students but also as they imagine themselves as lawyers. Within the typical curricular progression, clinical experience, offering novice lawyer training and skills of autonomous learning for career-long development, is delayed until the upper level or is deferred completely. Once again, it is our strong sense that such delay is fatal to the aspirations of many students.

At the same time, there are widespread, but erroneous, student notions about what sorts of job placements offer training otherwise unavailable in law school. In large numbers, students believe that “big firm” practice offers careful, incremental, continuing tutelage in the associate years. A companion student idea is that training is “better” in private
practice than in public settings. Neither of these notions is necessarily true. Some of the best on-the-job training is offered by governmental agencies and public interest organizations. Conversely, a number of law firms, yielding to what they perceive as contemporary economic reality, expect their associates (even those newly arrived) to go right to work. Training is minimal. Nevertheless, students act on these often inaccurate perceptions in choosing jobs.

An additional idea that contributes to student feelings of prospective practice incompetence, and thus career steering away from poverty practice and public interest pursuits, is the conclusion that it is harder to represent poor clients. The law is often antagonistic, the resources few, and the clients difficult. In some respects, these conclusions are correct. When compounded and intensified by the absence of prestige, including intellectual prestige, and invoking traditional first year associations about doctrine, poverty law is seen as soft not hard, mushy not precise, policy or social work not law.

The cumulative toll of felt incompetence has one of two effects. For those students who persevere and represent poor clients, they must often struggle with a strong, sometimes overwhelming sense of being disabled and second-class. For other students the prospects of poverty practice loom too unattractively or with too much difficulty. They decide on practice paths and professional identities with more limited horizons, and which lead in different directions. These impressions and decisions are often made before the first year has come to an end. We believe an integrated presentation in the formative first semesters of law school provides at least a partial remedy for some students.

Taken together, the messages conveyed by the first year curriculum concerning lawyer competence, status, and ambition form a powerful socializing influence. Our course was but a preliminary counter-socializing experience. For some, possibly many, students this experience was at best destabilizing. For some lesser number, our course provided an alternative vision of professional role and professional possibility. By either
account, this course was but a first step. Students require additional supportive experiences throughout the remainder of their law school and professional careers.\(^\text{71}\)

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71. The obvious curricular choices for additional, sequential experiences are elective clinical offerings. Clinical electives have the potential to provide momentum to students who have begun to question the dominant vision. However, even such offerings are likely to be insufficient. There also need to be classroom based courses that reinforce and build upon the insights, connections, and skills of a reconfigured first year course. We need to develop a menu of other sequenced offerings in the upper years.

While we are not advocating a single, lockstep sequence, one progression that commends itself is for students to proceed from an integrated first year course to a range of reconceived electives, including clinical, public law, and jurisprudential offerings, and then to return to the reconfigured first year course as teaching assistants participating in the instruction of incoming students.

We were fortunate to have the aid of nine advanced students in LTP/Torts whose legal education had more or less followed such a progression. While these teaching assistants were a tremendous help to us in our work with course students, our sense is that the experience was even more valuable to them in advancing and solidifying their own learning. Cf. Jay M. Feinman, *Teaching Assistants*, 41 J. LEGAL EDUC. 269 (1991).

As part of their semester's work, our teaching assistants participated in a weekly seminar at which we discussed their supervision of course students. Equally important, however, was the considerable time and energy devoted in the seminar to an elaborated study of tort doctrine, legal theory, and professional role. Our advanced students have reported to us that this additional teaching was of great value to them as they continued to develop their own visions of practice.