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HARMONIZING CURRENT THREATS: USING THE OUTCRY FOR LEGAL EDUCATION REFORMS TO TAKE ANOTHER LOOK AT CIVIL GIDEON AND WHAT IT MEANS TO BE AN AMERICAN LAWYER

Cathryn Miller-Wilson*

Drawing from the broad and varied literature on legal ethics, this paper demonstrates that legal education and access to justice concerns can and should be addressed simultaneously in our current political and economic climate. Current threats to legal education, and to lawyering in general, present an opportunity for legal education transformation. Applying legal ethics theory to an analysis of these threats provides support for the creation of teaching law firms, similar in size and scope to teaching hospitals, that will employ clinical teaching methodology, substantially enhance ethics teaching and significantly address the issue of access to justice.

INTRODUCTION

Since my law school days, I have thought about the medical school education model. I had struggled with a relatively confusing legal education that failed to bridge the gap between “thinking like a lawyer” and actually practicing law, despite a clinical course, externships, summer jobs, and voluntary student projects. Wouldn’t it be wonderful, I thought, to have had the opportunity after receiving my J.D., to practice in a teaching law firm—like a teaching hospital—a large supervised setting with many rotations? Through live client representation, I could rotate through a variety of substantive areas, having myriad opportunities to represent clients in a diverse array of contexts. I would not only be able to utilize such an intensive experience to bridge the theory/practice gap, but also to be exposed to a wide variety of areas before having to specialize.

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Over the years, I mentioned these musings to friends and colleagues, many of whom agreed that such a model would be interesting and perhaps better than existing models. Ultimately, however, the conversation always turned to two seemingly intractable problems: 1) the cost of such a venture was too prohibitive to make it worth pursuing beyond a casual conversation and 2) ultimately, the analogy between hospitals and law firms failed because the nature of the work was too different.

Meanwhile, while I mused, I practiced public interest law. I was fortunate to spend the better part of seventeen years providing legal assistance to those who truly needed it. During those years, I learned hard lessons about how difficult it is to practice public interest law: how enormous the need is and how small the available resources are. While I practiced, the resources shrunk and the need grew. In my own small world, I tried to expand the capacity of our agency's ability to serve by developing mentoring programs and providing training for *pro bono* volunteers, supervising certified legal interns, and collaborating with other public interest agencies to try to share the workload. I tried to get fellowships for my agency so that we could hire more lawyers, and I, along with my colleagues, participated annually in letter-writing campaigns for donations and fundraising events for our agency. At the end of every fiscal year, after reviewing the growing numbers of clients and legal matters that our agency handled, we discussed the funding cuts and what we were going to do about them. Federal and state funders were constantly attacking legal services, and it didn't feel as if things could get any bleaker.

Then the financial crisis hit. Thousands of people lost their jobs and, consequently, their health insurance; their sources of income; and their ability to pay their utility bills, rent, or mortgages.¹ We saw many more homeless clients. Our clients were sicker, and their access to health care became increasingly difficult. They had trouble keeping their utilities on and difficulty obtaining the money necessary to come to our offices, keep their medical appointments, or pay the co-pays for their medications. Surely, we thought, the time has come for the gov-

¹ Michael D. Hurd & Susann Rohwedder, *Effects of the Financial Crisis and Great Recession on American Households* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 16407, 2010), available at <http://www.nber.org/papers/w16407>; Press Release, Public Agenda, Four in 10 Americans Struggle to Pay the Bills, Anxious About Maintaining Middle Class Life (Feb. 3, 2011), available at <http://www.publicagenda.org/files/pdf/struggling-in-america-press-release.pdf>.

ernment to recognize the importance of legal services. However, that dream was not to be. The funding cuts continued as the federal and state government dealt with the fall-out of the financial crises and their own shrinking budgets.²

In the midst of all of this, the financial crisis hit law firms and law schools. Suddenly, legal education and its connection—or lack thereof—to law jobs was in the news constantly. Corporations that had suffered great financial hits since 2008 were no longer willing to pay exorbitant fees for new “untrained” lawyers.³ Jobless graduates and frustrated firms turned to the law schools to demand greater accountability.

I saw an opportunity. What if all of these phenomena—the legal services crisis, the law firm changes, the legal education criticisms—could be viewed as parts of a whole? If connections could be drawn between a variety of legal system failures and legal education, perhaps it could be argued that the time had come to make legal education a public responsibility. And if that time had come, perhaps the political will could be found to support legal education financially and to assist law schools in developing a teaching law firm that would: 1) tremendously expand the legal resources available to the indigent; 2) enhance ethical training for lawyers by creating an environment that produced live ethical issues and the time and space to explore them with colleagues and professors, and through theoretical readings related to the dilemmas that they faced in their representation; 3) provide a diverse array of rotations that would permit new lawyers to experience several substantive legal areas, gaining practical experience without leaving behind the opportunity to continue their theoretical legal education; and 4) create jobs for practitioner law-professors, providing an expansion of the legal marketplace.

This paper makes the argument that, as with medical education after the 1950s, it is time to take public responsibility for legal education.⁴ Medical education, as traced by William Rothstein, changed a

² Press Release, Legal Services Corp., House-Senate Agreement Cuts LSC Funding (Nov. 15, 2011), *available at* <http://www.lsc.gov/media/press-releases/house-senate-agreement-cuts-lsc-funding>.

³ Ashby Jones & Joseph Palazzolo, *What's a First-Year Lawyer Worth?*, WALL ST. J., Oct. 17, 2011, at B1.

⁴ WILLIAM G. ROTHSTEIN, *AMERICAN MEDICAL SCHOOLS AND THE PRACTICE OF MEDICINE: A HISTORY* 224–25 (1987).

great deal after 1950 in large part because of the advances in medicine, which created greater public need and support for public funding.⁵ As one famous physician and medical educator noted in 1953:

It is increasingly the opinion of all medical educators that the financial support of our medical schools is inadequate, particularly if the needs of the nation for health and medical services are to be met in a manner consistent with our expanding body of scientific knowledge and the demands of our people.⁶

While there has not been an “expanding body” of legal knowledge, there certainly has been a tremendous increase in the number and complexity of our laws.⁷ The need for a legal representative in civil litigation contexts has risen dramatically, along with the direness of the consequences of proceeding without a lawyer.⁸ The current level of public financial support for legal services is insufficient and, as I argue, will remain so unless the funding is connected not only to the provision of legal services but also to educating future lawyers.

At the very least, using philosopher and legal ethicist David Luban’s conception of the morally activist lawyer,⁹ I believe that lawyers and their regulatory institutions should take greater responsibility for solving the current crisis in poverty legal services delivery by marrying it to the issues in legal education that exist today. As I discuss in greater detail below, if lawyers make resolving these issues together a priority, lawyers can use their powers of persuasion to convince the public of the value of supporting legal education’s transformation.

To make the case for public support of the creation of teaching law firms, I start with two assumptions that, for purposes of this paper, I will hold as truisms: 1) access to justice for all in this country is at an all-time low and 2) legal education, as we have known it for the past

⁵ *Id.*

⁶ *Id.* at 179 (quoting Ward Darley).

⁷ *Over-Regulated America: The Home of Laissez-Faire is Being Suffocated by Excessive and Badly Written Regulation*, ECONOMIST, Feb. 18, 2012 at 9.

⁸ Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010).

⁹ See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY xxii (1988).

roughly one hundred years, is problematic and needs to be “fixed.” There is a great deal of debate about the nature and extent of the “fix” that is necessary, but I will focus narrowly on the debates regarding ethical education of lawyers and the call for more “practice ready” lawyers.

This is not to say that I agree with every critic: I do not think law schools need to be more akin to trade schools and less venues for pondering legal theory,¹⁰ nor do I think that law school needs to be simply cheaper or simply shorter as many have written.¹¹ I believe deeply in the value of well-rounded education, both generally and for the effective lawyer. What both sides in the practice/theory debate seem to continually miss is the importance of mastering the theoretical understanding of law *and* its practical application for *both* the theoretician and the practitioner. Failing to take some time to experience law in action diminishes a necessary real-world understanding of how the theories developed in the classroom actually function and what one can learn from that experience and re-apply in the classroom. Similarly, failing to ground what one is seeing and doing in theory leaves one unable to broaden and deepen one’s experience and to learn from it. For these reasons, my proposal involves the creation of a *post-J.D.* teaching law firm that marries experiential and theoretical pedagogies in an effort to teach future practicing lawyers how to apply the theory that they’ve already learned to real-world practice situations and to re-

¹⁰ See Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1236 (1991) (arguing that teaching the “practice of law” has been removed from the law school curriculum, leaving graduates unprepared for legal practice); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (positing that emphasis on theory rather than ethical practice has called into question the practice of law as an “honorable profession”).

¹¹ See, e.g., Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, 82 N.Y. ST. B.A. J., Oct. 2010, at 20, 21 (discussing rising costs of legal education and how it exacerbates economic plight of students unable to attain sufficient post-graduation employment); Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37, 39–40 (1973) (discussing the attempts and failure to create two-year law schools); Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 129–30 (1997) (arguing for an “alternative third-year program” where “students may receive compensation for externship experience”); Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 266 (2001) (critiquing third year of law school as “largely irrelevant”).

ceive continual grounding in theory throughout their experiential education. Therefore, discussions about legal education reform prior to obtaining a J.D. degree are beyond the scope of this paper.

This is not to suggest that traditional law schools should remain exactly as they are. Borrowing from general conceptions of strategic planning theory, however, I believe it is most effective to start with the end goal and work backwards. The legal education reform discussion therefore starts with the question: What are the goals of legal education? Many suggest the answer is that the goals are and should be broader than “simply” teaching people how to become lawyers. The problem with this response is not that it is untrue or even true only for a small subset of law school graduates. It is that it reduces the art and science of effective lawyering to some kind of simplistic definition unworthy of legal education’s focus. If we can agree that learning effective, ethical lawyering thought processes, practices, and skills is complex, multi-faceted, and useful in both a utilitarian and philosophical sense, then it is not difficult to agree that teaching effective lawyering thought processes, practices, and skills is a goal for legal education. It is this very complexity of what it means to become an effective lawyer that law schools have struggled to address. In an effort to try to discover why this struggle has been so difficult for us, it is useful to look to other analogously complex professions, such as the medical one, to determine how they resolve or attempt to resolve this struggle.

Because this paper proposes a teaching law firm modeled after a teaching hospital, some discussion of medical education in general will be helpful to an understanding of why this particular model is one that I am proposing for addressing both the access to justice issue and the legal education crisis. Regarding the education issue alone, medical education has within it a very similar debate raging between theory and practice, framed as a debate between scientific research and applied medicine. Therefore, an examination of their efforts to resolve the seeming conflict between the two will help our discussion.

The questions that I address are: first, why should we, as lawyers, make access to justice not simply a concern but a central concern, so that part of our definition of effective lawyering includes a lawyer who is actively engaged in trying to solve the access to justice problem? Related to this question is what this problem has to do with legal education. In Part I of this Article, I explore the connections between access to justice, legal education, and ethical theories of lawyers’ role.

Second, if I have persuaded you that ensuring access to justice is actually an obligation, rather than merely an aspiration, of an effective lawyer, then how do we address this concern, whether effective lawyer-practitioners, lawyer-professors, lawyer-policymakers, or lawyer-entrepreneurs? My proposal is that we address the concern through the creation of a teaching law firm. Part II of my Article focuses on the medical education model—specifically the incorporation of teaching hospitals into its overall educational scheme—and whether there is a way, despite the obvious differences, to make this model translatable into a legal education model. To an extent, this section focuses on medical pedagogy and the effectiveness of the teaching hospital in addressing both the problems of access to quality health care for the poor and ensuring that our health care providers are effective. I also survey the literature about the research scientist versus practicing doctor debate. From there, we can determine what pedagogies would be most useful to emulate in the legal education context and describe the details of our teaching law firm.

Third, how we can create the teaching law firm? Part III of this Article addresses the inevitable economic question of how we can sustain a teaching law firm. Having provided the theoretical justifications for lawyers' responsibilities for addressing the access to justice issue and teaching and learning a new conception of ethical lawyering in Part I, and the educational justifications for discharging these responsibilities by supporting and creating a teaching law firm in Part II, what are the economic justifications and practical considerations for seeking and using government support for this? Embedded in the question of practical considerations are the concerns, which I will also address, about the real differences between lawyering and doctoring and how those differences impact a legal education proposal that is modeled after a medical one.

I. THE "MORALLY ACTIVIST" LAWYER AND THE ACCESS TO JUSTICE ISSUE

I start by introducing a radical re-conception of lawyering and lawyers' role created and described by philosopher and legal ethicist, David Luban, in his 1988 book *Lawyers and Justice*.¹² I am interested in this re-conception not only because I am intellectually sympathetic with the theory, but also because it has captured my imagination in

¹² LUBAN, *supra* note 9, at xxii.

thinking about how this re-conceptualization could be taught and what kinds of differences the teaching of this theory could make for lawyers and the justice system.

As stated in his introduction, Luban wrote the book in an effort to respond to societal complaints about the public perceptions of the disconnect between law and justice.¹³ Interested in debunking this claim and finding a way to reconnect law and justice, he examines lawyers and lawyering in two parts. In the first half of the book, he details and challenges the dominant picture, or “standard conception,” of lawyering—one that is based on three principles: 1) the theory of role morality (dealing with conflicts between “role morality” and “common morality”); 2) the adversary system excuse (excusing lawyers from common moral obligations to non-clients because of their duties to their own clients); and 3) the standard conception of lawyers’ role (consisting of the principles of non-accountability and partisanship).¹⁴

Note that the conversation about lawyers’ role and common morality is a lengthy one that spans centuries and countries. I focus on Luban’s discussion because it is so thorough. I do not mean to suggest, however, that his is the only voice in the conversation advocating for a theory of lawyering that addresses the common conflict between lawyer obligations of zealousness, partisanship, and even confidentiality on the one hand, and moral obligations to third parties and the community at large on the other.¹⁵

Luban argues that the three principles mentioned above, which have formed the dominant picture of lawyers’ ethics, are not supporta-

¹³ *Id.* at xvii.

¹⁴ *Id.* at xix–xx.

¹⁵ In fact, the discussion of a lawyer’s moral obligations conflicting with her other duties has been ongoing and the number of voices in the conversation is quite expansive. For further discussion of these topics, see generally Katherine R. Kruse, *Lawyers, Justice and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005) (discussing a lawyer’s obligations when she morally disagrees with her client’s actions); Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002) (advocating a shift from amorality to moral responsibility while maintaining zealous advocacy); Elliot D. Cohen, *Pure Legal Advocates and Moral Agents Revisited: A Reply to Memory and Rose*, 21 CRIM. JUST. ETHICS 39 (2002) (arguing that lawyers’ roles of pure legal advocate and moral agent inherently conflict); Kay Wheat, *Lawyers, Confidentiality and Public and Private Interests*, 1 LEGAL ETHICS 184 (1998) (discussing lawyers’ duty of confidentiality and its repercussions to the community-at-large).

ble outside the context of criminal defense and must therefore be replaced by a different theory of lawyer ethics: “moral activism.”¹⁶ As he defines it, the morally activist lawyer shares and aims to share moral responsibility for the ends that she is promoting in her representation and the means used to promote those ends along with her client.¹⁷ In short,

[T]he morally activist lawyer will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit. She will have none of the principle of non-accountability, and she sees severe limitations on what partisanship permits.¹⁸

Of course not all ethicists agree with Luban. Stephen Pepper famously argued that the lawyers’ role is amoral and that this amorality is ethical.¹⁹ In doing so, he elevates client autonomy as a primary societal value and suggests that what lawyers do is facilitate and even increase client autonomy. Therefore, pursuing the client’s legal objectives, without judgment, is in itself a moral good. Lawyering, as he states, is a means to “first class citizenship, to meaningful autonomy, for the client.”²⁰ Compellingly, at first blush, he addresses the inequality of access problem as a concern, but not one that requires extraordinary behavior on the part of lawyers. On the contrary, Pepper suggests that, “transforming the amoral facilitator role of the lawyer into the judge/facilitator role . . . would compound inequality upon inequality—first the inequality of access to a lawyer, then the inequality of what law that particular lawyer will allow the client access to.”²¹

There are several problems with this argument, however. First, Luban is not suggesting that the amoral facilitator role should be transformed into the judge/facilitator role. That Luban advocates lawyers’

¹⁶ LUBAN, *supra* note 9, at xxii.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613, 615–19 (1986).

²⁰ *Id.* at 617.

²¹ *Id.* at 620.

use of moral judgment does not mean that he is advocating a transformation from lawyer to judge. It means simply that lawyers' moral judgment must not be suspended in the name of effective lawyering. Lawyers sharing their moral judgments with their clients is not the same as "sitting in judgment" in the sense that Pepper seems to mean.

Second, the argument that the transformation suggested by Pepper would compound inequality is puzzling. Whether lawyers act more like judges has no bearing on whether their services are available to those who cannot afford them. While it is possible to see a judge-facilitator as limiting the type of legal services provided to one who has access, it does nothing to provide greater access to those who don't have that access in the first place.

Finally, as Luban suggests, Pepper's recognition of the notion of first-class citizenship, a citizenship using lawyers' assistance to take advantage of all that the law has to offer, undercuts his argument that the moral good of the increased autonomy the amoral lawyer creates outweighs any moral bad from the unequal distribution of access to the law.²² As is discussed in greater detail below,²³ first-class citizenship implies that there are those with second-class citizenship. In other words, those who do not have access to lawyers do not enjoy all that the law has to offer. This result means that the amoral lawyer of Pepper's description is one who is complicit in facilitating an inequality before the law. This moral bad is not outweighed by the moral good of facilitating autonomy in our society.

Later authors, and there are almost as many as there are authors who came before Luban, have grappled with the notion of lawyer role and ethics. David Thunder, for example, discusses Pepper's argument in, "Can a Good Person be a Lawyer?"²⁴ Thunder is concerned about the implications of Pepper's conception, which "places ethical blinders on the lawyer so restrictive that he loses the right and indeed the *duty* to take at least some responsibility for the social and moral purposes to which his services are put."²⁵ Thunder finds that Pepper's main flaw is in his "implausibly demanding view of autonomy."²⁶ This finding is

²² See LUBAN, *supra* note 9, at 167–68.

²³ See *infra* pp. 10–11.

²⁴ See generally David Thunder, *Can a Good Person be a Lawyer?*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 313 (2006).

²⁵ *Id.* at 316 (emphasis in original).

²⁶ *Id.* at 317.

similar to Luban's own response to Pepper and suggests that the value of autonomy, although concededly important, is not often more valuable than other, stronger moral considerations.

Whether or not one is compelled by the theory of moral activism, it is clear that the standard conception of lawyering, including the principles of non-accountability (Pepper's amoral lawyer) and partisanship, has been troubling to the public, to lawyers, and to legal ethicists for some time. Moral activism offers a chance to ameliorate, if not completely resolve, what is traditionally viewed as a conflict between professional duty and common morality. Teaching this theory to future lawyers, therefore, offers the tantalizing possibility of improving lawyering and, consequently, our justice system.²⁷

However, as Luban goes on to write about in the second half of his book, moral activism as simply a theory for one-to-one representa-

²⁷ Luban has a wonderful quote from Abraham Lincoln that he provides as an example of his conclusion in defense of the theory of moral activism that "nothing permits a lawyer to discard her discretion or relieves her of the necessity of asking whether a client's project is worthy of a decent person's service." See LUBAN, *supra* note 9, at 174. Lincoln is quoted as having said to a client:

Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.

Id. As Luban notes, "Lincoln freed the slaves; this may not be unconnected to the fact that in his practice of law he was himself no slave, not even to trade idioms that he surely thought were moral idioms as well." *Id.*

While this example is, to be sure, inspiring, it is also more difficult than it appears to emulate. It is rare that moral dilemmas that give rise to this sort of ethical dilemma are easy to address. In fact, as is true with any talented person who does something well, it is likely that even Lincoln did not behave this way easily despite our perceptions of how easy, graceful, and eminently obvious his words may appear to us now. Imagine, therefore, having the opportunity to try to teach all lawyers how to apply this level of integrity to their daily practice within the context of live client dilemmas, as diverse and as numerous as those encountered in a six or nine-semester rotation!

tion is not sufficient.²⁸ Moral activism is also a theory that permits lawyers to more clearly connect their training and professional endeavors to larger issues of justice. It is akin, suggests Luban, to Justice Brandeis's conception of the "opportunity in the law."²⁹ Brandeis saw that law provided an opportunity to balance and neutralize powerful private interests, which was a necessity for democracy. The morally activist lawyer, concerned as she is about the common morality that underlies democratic principles is committed, as was Brandeis, to the necessity of the "people's lawyer." The "people's lawyer" is the lawyer that provides this balance.³⁰

In this respect, moral activism offers a theory that supports lawyer responsibility for addressing the access to justice issue. Here, I am not suggesting that morally activist lawyers will all become "people's lawyers." Rather, I am suggesting that the responsibility for ensuring the political will (and the financial support that is a necessary corollary) for addressing the access to justice issue is the responsibility of all lawyers.

There is support for this proposition in the American Bar Association ("ABA") Model Rules, which speak of lawyers "having special responsibility for the quality of justice."³¹ What, precisely, does responsibility for the "quality of justice" mean? Presumably, it incorporates notions of fundamental fairness—for the quality of justice that is unfair would seem to be quite obviously poor—but that begs the question, what is fair? Arguably, what is fair is a process or procedure that treats all users of that process or procedure equally. This does not mean that all users are, in fact, equal. They may not be equal to one another in talents, looks, industriousness, or many other measures. However, our definition of fair government makes clear that they are each treated as equals before the law, regardless of their differences.³²

²⁸ See LUBAN, *supra* note 9, at 237–39.

²⁹ *Id.* at xxiii.

³⁰ *Id.* at 171–72. Luban credits Brandeis's discussion of the "people's lawyer" as being very close to the "progressive correction of classical liberalism—the private sector in an industrial democracy raises political threats comparable to those that democratic government faced in its confrontations with the various *anciens régimes*." *Id.*

³¹ MODEL RULES OF PROF'L CONDUCT Preamble & Scope (2012).

³² LUBAN, *supra* note 9, at 253.

Luban analyzes the United States Supreme Court building's famous promise of "Equal Justice Under Law" in order to determine whether it is actually a right.³³ He asks the question, is equal justice under law "part of our structure of political legitimacy?"³⁴ Citing several historical examples, including the right of women to sue in court before they had the right to vote, the Civil War amendments that made African Americans citizens and "allowed them access to American courts," and Supreme Court decisions that allowed non-citizens access to American courts, Luban argues that "equality-of-rights-not-fortunes has always been a common denominator of American political life."³⁵

The question then becomes whether equality of rights implies equality of legal rights. As Luban explains, early American writers were most likely thinking about moral rights, "or (more likely) rights given by God in natural law."³⁶ Therefore, in order to read equality of legal rights as implicit in the concept of equality of rights, it is necessary to view legal rights as connected to moral rights. As Luban states, ". . . [I]f the court system claimed that its activities have nothing much to do with respecting moral rights we would view it as seriously defective."³⁷

However, he goes on to state that the right to legal services is not a moral one, but rather, a political one.³⁸ In this respect, it is not similar to claiming rights to food, shelter, clothing or other kinds of "welfare rights;" instead, it "derives implicitly from the nature of political legitimacy."³⁹ Additionally, the derivation is relative to our particular system of government, so, again, unlike welfare rights that are more closely tied to a moral conception of human dignity, equality of legal rights only exists as a legitimation principle of our particular society:

Legitimation rights are claims to goods that form presuppositions of a people's common political life; when these rights are denied, the expectation that the affronted parties should con-

³³ *See id.* at 252–53.

³⁴ *Id.* at 252.

³⁵ *Id.* at 253.

³⁶ *Id.* at 254.

³⁷ *Id.*

³⁸ LUBAN, *supra* note 9, at 265.

³⁹ *Id.*

tinue to respect the political system—in other words, the expectation that they should continue to treat it as a legitimate political system—has no basis.⁴⁰

Thus, “absent equal access to the legal system . . . our system violates the principle of consistency and its own legitimation principles.”⁴¹ Quoting Locke, Luban concludes his argument in support of his contention that access to legal services for all is necessary to our democracy.⁴² Without it, there is in an implied right to resist, which can and should lead to revolution and war: “. . . [A]n illegitimate system generates a right of resistance: for resistance is the ultimate sanction when a political system undermines the premises of its own claim to govern a common life.”⁴³

Underscoring Luban’s point is his response to Pepper’s argument about first-class citizenship. As Luban points out, Pepper’s conception of the amoral lawyer as a facilitator of first-class citizenship is a comparative one:

[T]he components of first-class citizenship allow you to leverage yourself into a better position (economic or otherwise) than those who don’t have them. The resulting competitive advantage in turn give[s] you further leverage to augment your position still more Finally, your augmented position will get you the influence and power to push for rule changes that further enhance the packet of perks accruing to first-class citizens.

In this way, the differential granting of first-class citizens yields a self-producing vicious spiral of social inequality and outright damage to those who don’t have it. The problem is that when first-class citizenship is not universally

⁴⁰ *Id.* at 266.

⁴¹ *Id.* at 255.

⁴² *Id.*

⁴³ *Id.* at 266.

available, its components are not mere *benefits*; they are *advantages*.⁴⁴

It is therefore incumbent on the lawyer, as facilitator of this vicious cycle of power and damage infliction, to prevent this. The prevention does not occur by refusing to represent a corporation or even by imposition of lawyers' own moral values, but rather by ensuring a necessary balance and moral restraint through legal services access for all. Stated another way, access to justice, or lack of access, changes the very nature of what access confers on the represented. In a system where all have equal rights of access, the role of lawyers could be conceived as facilitators of citizenship benefits for all. Where, however, access to justice is unequal, the role of lawyers becomes facilitators of first-class citizenship for those with access, and, by implication, purveyors of second-class citizenship to those without. Simply by the act of representing parties in a system where others cannot obtain this representation, lawyers become complicit in the systematic and ongoing disadvantaging of those who are unable to obtain representation.

Further, as Luban points out, lawyers cannot disclaim responsibility for these unfortunate consequences of unequal access by asserting that legal services access is simply a fault of the economic system and not of the legal system.⁴⁵ This argument is based on the premise "that the state has not blocked poor people from having meaningful access to the legal system."⁴⁶ This premise is false because examples of governmental "blockages" of poor people from the legal system are numerous: 1) the complexity of regulation that necessitates legal intervention; 2) the fee structures regulated by the ABA Code and the Model Rules and enforced by the highest court in each state; 3) the court-appointed lawyer system, which is governed by state and federal court decisions and state and federal legislative budgetary decisions; and 4) the unauthorized practice of law regulations that prevent anyone other than lawyers from representing indigents in most legal contexts are just a few examples.⁴⁷ While it could be argued that the solution is to have less complicated laws and a greater ability for non-lawyers to provide representation, these solutions themselves would

⁴⁴ David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. B. FOUND. RES. J. 637, 644 (1986) (emphasis in original).

⁴⁵ LUBAN, *supra* note 9, at 246.

⁴⁶ *Id.*

⁴⁷ *Id.*

not solve the entire access problem and would create significant other problems.⁴⁸

It is clear that “the selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them.”⁴⁹ Most compellingly Luban concludes,

For a legal system does more than protect people from each other: it enormously expands our field of action, allowing us to do things that we couldn’t have done otherwise—to draft wills, adopt children, make contracts, limit liability. As people utilize these features of the system, a network of practices—of power and privilege—

⁴⁸ Note, for example, the United States Supreme Court’s recent decision in *Turner v. Rogers*, which involved the appeal of a child support defendant who was unrepresented by counsel. 131 S. Ct. 2507, 2512 (2011). The Court was unwilling to remedy the lack of representation issue through the appointment of counsel. *Id.* However, it clearly recognized the danger faced by the appellant in a forum that had been designed to be less formal in a misguided effort to respond to the numbers of litigants in that forum (child support) who were unable to obtain the assistance of counsel. *See id.* The Court suggests that due process requires, at a minimum, “alternative procedures” in which *inter alia* the trial court judge informs an unrepresented party of the critical issue and make a specific finding regarding that issue prior to making a ruling. *Id.* at 2519–20. These “alternative procedures” seem very like, however, the everyday procedures in a court of law whose procedures have not been significantly reduced in an effort to simplify the law.

Additionally, even where there are quite competent non-legal representatives, they are not equal to qualified legal representatives who represent the opposing party in a typical David and Goliath matter. In my experience, foreclosure matters illustrate this quite well. Philadelphia, in an effort to stem the alarming rise of foreclosures after the 2008 market crash, created an interim settlement procedure meant to provide unrepresented homeowners the opportunity to try to resolve their loan defaults with a loan modification. Federal and state funding allowed for an enormous expansion in the number of housing counselors—non-lawyers—who were trained and available to assist homeowners in default through this process. Despite the excellent service they generally provided, in most cases, if there was no lawyer for the homeowner, no loan re-structuring occurred. When *pro bono* lawyers or legal services lawyers ultimately intervened, pointing out or actually filing counterclaims to the foreclosure action, the re-structured loan that was originally proposed by the housing counselor suddenly became acceptable to the bank. When a knowledgeable housing counselor was able to identify and discuss these same issues with the bank, however, there was little responsiveness on the part of the bank because it was well aware that a homeowner, even with the housing counselor’s guidance, was unlikely to actually file any paperwork *pro se*.

⁴⁹ LUBAN, *supra* note 9, at 247.

is set up from which those who have no access to the system are excluded; and this exclusion itself intensifies the pariah status of the poor. It is hard to avoid the conclusion that the state has conferred the advantages of the legal system on those who can afford to use it and built it on the backs of those who cannot. The state has not been an innocent bystander observing the regrettable spectacle of economic inequality and poverty: it shares primary responsibility with the legal profession (and its well-off clients) for the fact that the poor have no meaningful access to justice and are made worse off by that fact.⁵⁰

Thus, while even the morally activist lawyer contributes to justice in providing ethical representation to her private sector client, the systemic exclusion of the poor from the legal system perpetuates disparities in power that undermine the legitimacy of the legal system as a whole. For these reasons, the morally activist lawyer, regardless of the identity of her clients, must also have as a central professional concern the plight of those who cannot afford representation.

So, what does this have to do with legal education? First, if regularly taught and employed, Luban's moral activism would result in more ethical lawyering. Second, if the pedagogy used to teach moral activism is experiential, and I will defend this as the best choice for rounding out ethical teaching below,⁵¹ then the effort to ensure that all lawyers receive experiential education can provide an opportunity for doing so through the provision of legal services to the indigent, significantly and positively impacting the access to justice issue.

A. *Applying Morally Activist Principles: "The Fourfold Root of Sufficient Reasoning"*

One way to explore whether teaching moral activism could actually make a difference in ensuring more effective ethical lawyering is to examine historical examples of lawyering where we would agree that there were ethical lapses and try to determine whether the employment of moral activist principles by the lawyers involved might

⁵⁰ *Id.* at 247–48.

⁵¹ *See infra* Part II.

have resulted in a different outcome. The Watergate and Enron scandals and the recent economic crisis are three examples that come immediately to mind and will be explored more fully below.

Preliminarily, it must be noted that, I recognize that the following analysis is an oversimplification of the deliberative process suggested by Luban as well as an overly formulaic application of a concept applied to situations that were more complex than suggested. Nevertheless, I believe that the analysis shows that if the theories posited by Luban were taught regularly and just as regularly discussed and deliberatively applied in a clinical setting to real world ethical problems, a kind of morally deliberative habit could be developed that could change the way lawyers operate for the better. Below, therefore, is Luban's theory and my own analysis of how application of that theory might have provided the lawyers involved with at least a branch to reach for as they floundered in the rapid and roiling currents of their practices.

Having concluded that common morality must be considered even when it is in conflict with "role morality," that is one's own understanding of one's professional obligations, Luban develops and explains a "structure of justification" that can also be used as a "structure of deliberation" to determine how to respond to the conflict: "The Fourfold Root of Sufficient Reasoning."⁵² Essentially, lawyers facing such a conflict should consider the justification, as demonstrated by its moral goodness, of the institution requiring the specific role obligation—the adversary system.⁵³ Next, lawyers should consider the justification of the role as demonstrated by the institution.⁵⁴ Third, lawyers should consider the justification for the role obligation by demonstrating its essentialness to the role.⁵⁵ Finally, lawyers should consider the role act being contemplated by demonstrating that the role obligations require that act.⁵⁶

In an effort to create a more deliberative structure that incorporates this reasoning, Luban suggests the following seven-step process:

⁵² LUBAN, *supra* note 9, at 105, 140–41.

⁵³ *Id.* at 128–32.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

- 1) Identify “the institution, the role, the role obligation and the role act.”
- 2) Assess “the institution, role and role obligation in the light of the ends they are to serve.”
- 3) Apply “the minimum-threshold test: determining whether, at each link” (in *The Fourfold Root of Sufficient Reasoning*), “the credits and debits indicate that the entity (institution, role, role obligation, role act) is justified;”
- 4) Apply “the cumulative-weight test: determining the total significance of the various policy arguments to the role act;”
- 5) Assess “the relevance of the policy arguments to the case at hand;”
- 6) Resolve “the dilemma by weighing the justification of the role act against the moral offense of performing it;”
- 7) Act.⁵⁷

So, we turn first to our example of the ethical lapses of the Watergate lawyers. What could we predict the outcome might have been if they had engaged in this exercise? In step one, of course, the institution is the adversary system, the role is advocate, the role obligation is zeal or loyalty, and the act their client, the White House, requested was orchestrating an illegal break-in of their opposing party’s headquarters in order to find information that could be used against their adversary.⁵⁸

The assessment in step two does not speak of the role act, merely of the preceding three entities. We already know, from both the standard conception of lawyer roles and the morally activist concep-

⁵⁷ *Id.* at 140. Note that Luban himself admits that this lengthy deliberative process might seem too much to ask. LUBAN, *supra* note 9, at 140. Further, he explicitly states that it is a “theoretical account of moral justification, not a recipe for real-time deliberation.” *Id.* Nevertheless, he goes on to state that it is still a valuable tool for an analysis of the rules of professional obligation. *Id.* This is how I apply it to the specific examples and, in so doing, hope to show how teaching this theory can be applied to live client dilemmas in order to teach the habit of ethical dilemma identification and problem-solving. Ultimately, as I will argue, it is teaching this habit that is paramount to shoring up lawyer ethical behavior.

⁵⁸ Mark Curriden, *The Lawyers of Watergate*, 98 A.B.A. J., June 2012, at 36, 38–40.

tion, that the three entities: the adversary system, the role of advocate, and the duty of zeal are justified. In step three, however, we encounter a problem. As we apply the minimum threshold test to each entity, we see that the final entity—the role act requested by the client—is not minimally justified. It is not even necessary to continue with the seven-step process of deliberation. Had the Watergate lawyers used this deliberative process, or something similar, they might have seen that their role obligations, as justified by their roles and the institution itself, were not sufficiently strong to overcome the lack of justification for the role act their client requested.

While the very fact that the role act requested was illegal may seem to render an ethical deliberative process about it absurd, listening to the reflections of two of the lawyers at the heart of the scandal is very telling. Attorney Egil Krogh, Jr., Deputy Assistant to President Nixon at the time of the Watergate scandal commented,

In law school, I took this curious course on ethics But there was nothing about conflicts or the role of lawyers. We were in completely unknown territory. I was completely unprepared. My loyalty to Richard Nixon was personal and total. And I had extraordinary loyalty to [assistant to the president for domestic affairs and formerly licensed attorney] John Erlichman.⁵⁹

Former White House Council John Dean, in reflecting on the Watergate scandal and his involvement stated, “If Bud and I had been able to sit down with each other back then at the White House, and we had been able to share our concerns, everything might have turned out differently.”⁶⁰

These comments beg the question, what prevented them from sitting down and sharing their concerns? In hindsight, the reality is not that they were unaware that the requested act was wrong. It was that their interpretation of their role duties of loyalty and zealous advocacy obscured the conflict between their professional role (as they saw it) and their personal role as a good citizen. Their habit was to resolve all

⁵⁹ *Id.* at 40.

⁶⁰ *Id.* at 64.

conflicts and potential conflicts in favor of the client, which ultimately led them to be blind to any conflicts. Teaching Luban's Fourfold Root of Sufficient Reasoning and applying it repeatedly over the course of several rotations can help lawyers identify dilemmas regularly and aid in their ability to solve them.

Perhaps it can fairly be argued that Watergate is a poor example of an obvious ethical failure since the role act requested by the client was not merely immoral but also illegal. We turn, then, to the scandal of the late 1990s involving Enron. Here, the lawyers' actions were much more complex. The role acts requested by the corporate client were, essentially, to keep confidential any accounting irregularities so that shareholders and government regulators were misled about Enron's assets and liabilities.⁶¹ Embedded in this request was also a request to certify as legal, and therefore permissible, various "loans" that were reported as "sales."⁶²

However, at the time that the liability information was being withheld and the manager-created "sales" were being reported, it was not entirely clear that doing so was immoral, illegal, and ultimately destructive of the client. There were many factors that contributed to this confusion.

First, Enron had followed the pattern of many corporations in phasing out the traditional manner of using one law firm or set of in-house lawyers to provide legal counseling and representation. Instead, they parceled out their work, spreading it amongst several law firms so that each individual law firm only had part of the picture about Enron's activities, proposals, and financial status.⁶³

⁶¹ See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1185–87 (2003).

⁶² See *id.* at 1185–86. This summary of events is clearly a gross oversimplification of what occurred. However, irrespective of the more complex details, application of Luban's moral theory to it is still meaningful to the question of how things could have come out differently had the lawyers involved been provided with a great deal more ethical training.

⁶³ In his article, "A New Role for Lawyers?: The Corporate Counselor after Enron," Robert Gordon examines this particular phenomenon in great detail. See *generally id.* As he describes it,

Big companies used to have a single outside law firm on which they would rely for most of their legal advice. . . . At its best . . . the system allowed lawyers to learn the business they were advising and, since they were not

Second, many managers discouraged the lawyers with whom they were consulting to investigate beyond the confines of the information provided them.⁶⁴ Presumably they did so in a manner that seemed at the time to be a little constraining but not directly obstructive as it later turned out to be. The lawyers therefore were misled into believing that the information that was kept from them wasn't all that relevant to their decision-making and therefore, upon meeting resistance from the managers, they didn't probe.⁶⁵

Third, the lawyers ultimately became confused as to who their client was. They relied too heavily on the assumption that high-level managers with whom they interacted had the best interests of their corporate client at heart, or, assuming that such managers were actually their clients, didn't question manager behavior.⁶⁶ Had they been more objective, the managers' behavior might have raised flags that would have prompted further probing.⁶⁷

easily replaced, to give independent and critical advice. . . .
 . . . [I]n recent years . . . [t]here [has been] no entity inside or outside the organization with the overall knowledge and prestige to give independent advice.

Id. at 1202 (internal citations omitted).

This phenomenon, specifically as it applies to what happened with the Enron crisis, lends plausibility to the lawyers' claim that they didn't really know or understand the Enron managers' proposals sufficiently to be able to give valid counsel. As Gordon writes, ". . . Enron never trusted any one set of lawyers with extensive information about its operations—it spread legal work out to over 100 law firms. . . . It is this layering of authority, fragmentation of responsibility, and decentralization that has made it possible for the chairman, CEO and board of directors of Enron, as well as the lawyers, to claim that they did not know much about what was going on in their own company." *Id.* at 1193–94.

Neal Batson, the court-appointed examiner of the Enron bankruptcy notes in his Final Report that "Enron employed over 250 in-house attorneys and retained hundreds of law firms." Final Report of Neal Batson, Court-Appointed Examiner at 48, *In re Enron Corp.*, (Bankr. S.D.N.Y. Nov. 4, 2003) (No. 01-16034) [hereinafter "Batson Report"].

⁶⁴ Gordon, *supra* note 61, at 1203.

⁶⁵ There is some controversy about whether the misleading was intentional or merely the unintended consequence of managers trying to get results quickly and efficiently. Either way, however, the message received by the lawyers was that they didn't need to probe; they just needed to perform.

⁶⁶ "One explanation for the attorneys' failure may be that they lost sight of the fact that the corporation was their client. It appears that some of these attorneys considered the officers to be their clients when, in fact, the attorneys owed duties to Enron." Batson Report, *supra* note 63, at 115.

⁶⁷ *Id.* at 114–15.

There are more cynical explanations for the lawyers' failures, of course, involving their own greed and consequent willingness to keep Enron's business at almost any costs.⁶⁸ Acknowledging this argument, however, fails to erase the very real role conflict issues that this corporate representation raised for the individual lawyers involved.

There are also those that would argue that there was no lawyer failure; instead, the Enron lawyers simply engaged in their duties of confidentiality and zealous representation.⁶⁹ Some suggest the real culprits are the directors of Enron, who were, to varying degrees, provided with evidence that the transactions were risky and fraught with conflict of interest problems but failed to act.⁷⁰ With the benefit of hindsight, there is little doubt that there were multiple culprits in the Enron debacle. Whether the lawyers are less to blame than the directors or the intentionally fraudulent Enron managers does not change the need, as lawyers and educators of lawyers, to analyze what occurred and suggest that there was room for the lawyers to improve their effectiveness, at a minimum.

Analyzing the role acts that the Enron lawyers were asked to engage in repeatedly, we can see two distinct patterns: 1) maintaining client confidences and 2) providing advice regarding the legality of various client-proposed transactions. The role conflict occurred in addressing the context of both of these fairly quotidian lawyer acts. In the first instance, Enron sought legal assistance in avoiding disclosure of certain facts that ordinarily would have been required to be provided to the Board of Directors, Enron's shareholders, and various government agencies. Given that the default was to report, a lawyer asked to withhold information should immediately be concerned about whether doing so would run afoul of existing legal obligations and therefore trigger the deliberative process necessary to determine whether the requested role act is justified and therefore performable.⁷¹

⁶⁸ See Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1109–11 (2003) (detailing numerous wrongdoings by Enron's main law firm and tying their revenues to the success of Enron, their largest client).

⁶⁹ See Gordon, *supra* note 61, at 1194 (laying out a similar defense as the "classic defense for the corporate lawyer's role").

⁷⁰ Fisch & Rosen, *supra* note 68, at 1118–19.

⁷¹ Batson Report, *supra* note 63, at 28.

Doing so now, we can see that the role act of confidentiality could have been justified (along with the adversary system and the lawyer role) as meeting the minimum-threshold test as required by step

It should be noted here that some believe that whether it is minimally obligatory to raise questions about specific client requests is, in the first instance, resolved by how the role is defined. So, for example, if a lawyer sees herself as an independent advisor and/or takes on the role of gatekeeper, then clearly lots of questions should be asked prior to approving a particular client proposal. If, however, the lawyer sees herself simply as the client's advocate, the lawyer's role is to find a way to approve the client's proposed schemes. Luban, Gordon, Fisch and Rosen all agree that the distinction between these roles changes the moral calculus. Luban and Gordon, however, argue that the pure advocate role is inappropriate in the civil corporate representation context. See LUBAN, *supra* note 9, at 11–18; Gordon, *supra* note 61, at 1204–06. On the other hand, Fisch and Rosen argue that, while not inappropriate, it does cause ethical issues that could be best addressed by increasing and improving corporate regulation rather than lawyer regulation. See Fisch & Rosen, *supra* note 68, at 1102–04, 1131. For purposes of our discussion I do not believe that the distinctions in lawyer role matter.

A pure advocate who “merely” finds a way to do what his client wants, without regard to the implications of the client's proposals is arguably as ineffective as the gatekeeper who fails to investigate. Enron is the perfect example of this ineffectiveness. The lawyers' zealous defense of the managers' proposals ultimately contributed to their client's collapse. The problem, then, was not the differing perspective on role but the lawyers' failure to understand who their client was and to engage in the appropriate probing of facts that would have protected their client. The larger point, however, is that, even if the managers and not the corporation had been their clients, effective *advocacy* (not just effective advising) requires probing. An effective advocate, who, after appropriate research and investigation, discovers that a client's proposed scheme isn't workable, can work with the client to determine a workable way to meet her client's goals. The ineffective advocate, just like the ineffective advisor, exposes her client to potential liability. The question for legal educators, therefore, is how can we teach lawyers to probe sufficiently, regardless of their role, so that advice and representation are comporting with ethical and community moral standards at all times.

As Professor Steven Schwarcz specifically recommends, in his analysis of the financial crisis of 2008, educators must take more time to ensure that lawyers are taught: “to be aware that client actions can cause harmful consequences that may not be immediately obvious,” “why market participants do not always see or appreciate the potential that their actions will cause harm,” and that “complexity exacerbates these concerns. It can undermine disclosure's adequacy. It can also tempt individuals to make oversimplifications, to overrely on heuristics such as agency ratings and mathematical risk models.” Lawyers should also be taught, “to recognize that business people often have higher risk tolerances, as well as different, legitimate, pressures (e.g., budgets), that tend to influence their decisions.” Finally, lawyers should be taught “to better understand the core principles of corporate law and finance, thereby broadening their perspectives and enabling them to better identify and assess consequences.” Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTL. J. CORP. L. 214, 225–26 (2010) (citations omitted).

three. In step four, the total significance of the various policy arguments weighing in favor of client confidentiality can be assessed as high. Further, the relevance of the policy arguments to the case at hand is also high, as presumably the duty of confidentiality in this case contributed a great deal to Enron managers' willingness to share their schemes with their lawyers to the extent that they actually did so.⁷² However, when we move to resolving the dilemma by weighing the justification of the role act against the moral offense of performing it, we see that once again, the justification of role act fails.

Enron was a multi-billion dollar corporation. It employed thousands of people and shareholders had invested billions of dollars in it. It had outstanding contractual obligations around the world.⁷³ The lawyers knew or should have known the policies behind the various disclosure and reporting requirements from which Enron was seeking to escape. Certainly, nothing should prevent a lawyer from investigating whether a particular regulatory requirement as applied to her client is somehow unfairly onerous and therefore challengeable. But, as Gordon states, this is a far cry from being, "free to ignore, subvert, or nullify the laws because the value [the corporation] contributes to society justifies its obeying the higher-law imperatives of profit-seeking and shareholder-wealth-creation."⁷⁴ Justification for disobeying regulatory requirements and fiduciary duty simply because the managers sought to further their wealth-maximizing schemes was precisely what the lawyers were being asked to do. Engaging in the weighing process required by step six of the The Fourfold Root of Sufficient Reasoning enables the lawyer to see this fact and clarifies the stakes of the consequences of the task that the Enron lawyers were asked to perform.

⁷² As discussed above, Gordon revealed that in fact the managers disclosed very little to the professionals involved or left their lawyers' questions unanswered. Gordon, *supra* note 61, at 1203. This, of course, undercuts the broad traditional justification for confidentiality. Arguably, therefore, simply on the grounds that the managers were NOT revealing confidences but instead were discouraging the few lawyer attempts to get information, the lawyers should have and would have been justified in disclosing information or at least warning the managers that they could not provide the necessary legal counsel without further information.

⁷³ See Kurt Eichenwald & Diana B. Henriques, *Enron's Many Strands: The Company Unravels; Enron Buffed Image to a Shine Even as it Rotted from Within*, N.Y. TIMES (Feb. 10, 2012), <http://www.nytimes.com/2002/02/10/business/enron-s-many-strands-company-unravels-enron-buffed-image-shine-even-it-rotted.html?pagewanted=1>

⁷⁴ Gordon, *supra* note 61, at 1199.

Keeping confidences, instead of working with executives to disclose and correct their schemes, resulted in the loss of thousands of jobs, millions of dollars, ultimately the destruction of the client and, perhaps even more critically, faith in the justice system.⁷⁵ If, as many stated in the aftermath, such corrupt and damaging behavior could be perpetuated and kept secret in the name of the adversary system,⁷⁶ then something was very broken with that system.

The second role act of the Enron lawyers was providing advice regarding the legality of various proposed transactions. As with confidentiality, this particular role act is wholly consistent with all conceptions of lawyering. So, what went wrong? The trigger for the deliberative test that could have, if engaged in, prevented numerous harms was not the request for advice itself, but rather the manner in which that request was asked to be executed.

The Batson Report declares that several Enron attorneys violated their ethical obligations because they failed to adequately investigate the facts underlying the proposed transactions.⁷⁷ One of many examples illustrates the problem clearly. The law firm of Vinson & Elkins was reportedly Enron's primary outside law firm.⁷⁸ Enron allegedly sought "true sale opinions" regarding some of their transactions in order to be able to list gains rather than losses on their disclosure forms.⁷⁹ According to the Batson Report, Enron sought such an opinion regarding a particular transaction with Sundance Industrial, even though the lawyers had no information that there was a "valid business purpose" for the "sale," which is an essential component of a "true sale."⁸⁰

Turning to our seven deliberative steps, then, as with the confidentiality issue discussed above, we can move easily through the first five steps. However, at the sixth step, weighing the justification—

⁷⁵ Julie Appleby, *Many Who Lost Savings, Jobs Pleased*, USA TODAY (May. 25, 2006, 10:07 AM).

http://usatoday30.usatoday.com/money/industries/energy/2006-05-25-enron-workers-usat_x.htm.

⁷⁶ See, e.g., Fisch & Rosen, *supra* note 68, at 1109.

⁷⁷ See Batson Report, *supra* note 63, at 48–55.

⁷⁸ *Id.* at 48.

⁷⁹ See *id.* at 49 (stating that Vinson & Elkins delivered a true sale opinion to Enron while representing them).

⁸⁰ *Id.*

willful ignorance of the zealous advocate—against the moral offense—misleading the public regarding the strength and legality of a particular transaction—leads to the unmistakable conclusion that the role act is not justified. This is particularly true where, as here, that willful ignorance leads to an act that actually harms one’s client. Finally, as Gordon points out, the willful ignorance of the zealous advocate is not justified in the non-adversarial context of advice-giving.⁸¹

One further note on the importance of teaching moral activism both theoretically and in practice is recognition of the true meaning of simply discussing a code of ethics, federal or state, without regard to moral doctrine. As Thomas Bost pointed out, in reflecting on the Enron collapse, “[T]he Code makes fewer moral claims . . . today than in the past.”⁸² Citing Mary Ann Glendon’s historical analysis of the changes in the canons of ethics adopted by the ABA, Bost notes that in 1908 the Canon suggested that effective lawyers should “impress on the client . . . exact compliance with the strictest principles of *moral law*.”⁸³ Today, however, the “ABA Model Rules, no doubt reflecting the current diminished ‘consensus on what is right and wrong for lawyers,’ contain no comparable moral imperative.”⁸⁴

This lack of emphasis on morality, importantly, should not be mistaken for “value-neutral” teaching. Citing the work of Deborah Rhode and Paul Paton, Bost points out that extracting morality from

⁸¹ Gordon, *supra* note 61, at 1205 (“The advocacy ideology regularly and persistently confuses the managers, who ask for lawyers’ advice, with the lawyers’ actual client, the corporate entity.”).

After a detailed analysis of the distinction between the criminal defense lawyer’s role and the corporate attorney’s role, Gordon concludes that there is actually a common factor between the two and that is that both roles involve a public aspect. *Id.* at 1204–07. “The real lesson from the defense lawyer’s or advocate’s role is simply that the lawyer is, in addition to being a private agent of his clients, a public agent of the legal system, whose job is to help clients steer their way through the maze of the law, to bring clients’ conduct and behavior into conformity with the law—to get the client as much as possible of what the client wants without damaging the framework of the law. He may not act in furtherance of his client’s interest in ways that ultimately frustrate, sabotage, or nullify the public purposes of the laws.” *Id.* at 1207.

⁸² Thomas G. Bost, *The Lawyer as Truth-Teller: Lessons from Enron*, 32 PEPP. L. REV. 505, 514–15 (2005).

⁸³ *Id.* at 515 (emphasis added by Bost) (citing MARY ANN GLENDON, A NATION UNDER LAWYERS 80 (1994) (quoting CANONS OF PROF’L ETHICS Canon 32 (1908))).

⁸⁴ *Id.* (quoting GLENDON, *supra* note 83, at 79).

the curriculum sends an “unmistakable message” that “conformity to the Code” is what is expected—and nothing more.⁸⁵ While Bost ultimately falls short of advocating for broad-based moral teaching, he concludes his article with a call to Christian lawyers to understand how their religious teachings should inform their own kind of morally activist approach.⁸⁶

While I recognize, as Bost does, that it is quite challenging to reach consensus on moral and ethical values, I reject the notion that this failure of consensus should permit the elimination of explicit discussions of moral values unless the discussion is amongst a closed group with presumed shared moral values. In fact, it is precisely because of the diversity of moral and ethical viewpoints that exist in a pluralistic society such as ours, that values-based discussions, allowing for diverse viewpoints, should become a mainstay of legal ethics teachings. Further, as I argue, there is no better way to ensure that there are myriad opportunities to see this diversity of moral and ethical viewpoints and struggle with how to act consistently as both a moral being—however that is defined—and a lawyer than in the course of the representation of multiple, culturally and economically diverse clients in a variety of different substantive contexts. Beyond the details of lawyer role in the Enron collapse, and how an application of the deliberative process developed by Luban might have created a different and better result, a broader lesson from Enron is how the failure to include discussions of morality and values in the teaching of ethics makes it much less likely that lawyers facing a complex ethical problem will be able to appropriately identify and analyze their ethical obligations.

Finally, we move to the financial crisis of 2008. Here, there were many phenomena that contributed to the event.⁸⁷ The involvement of lawyers related to their role in designing and approving new financial instruments and disclosing (or not disclosing) information related to those instruments that sellers and buyers relied on to make their decisions. There is debate about whether lawyers bear any responsibility at all for what occurred.⁸⁸ Many maintain that the new fi-

⁸⁵ *Id.* at 515 (quoting Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 37 (2002)).

⁸⁶ *Id.* at 518.

⁸⁷ See generally Sewell Chan, *Financial Crisis was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 26, 2011, at A1.

⁸⁸ Compare Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and Why it Matters*, 4 ENTREPRENEURIAL BUS. L.J. 323, 344 (2010) (“In any event, lawyers were not themselves involved in anything they knew or had reason to suppose

nancial instruments that were created are still a good idea and an example of an innovative and exciting way to develop new financial products.⁸⁹ These same scholars opine that the problem lay not with the products themselves or with the lawyers but with the perverse incentives that they created and which were unchecked by regulation.⁹⁰

Even assuming this contention is true, there remains consensus that if there were stronger, more effective legal advisors, some of the consequences could have been forecast and minimized if not avoided altogether.⁹¹ Without getting too mired in the details of the financial transactions and the lawyers involved, what is relevant for our purposes is determining whether an analysis of the myriad role acts that were requested, using Luban's theory, could have been helpful.

One small part of the beginnings of the crisis was the development of a vehicle that pooled subprime loans with other prime loans.⁹² It seemed like an ingenious creation, allowing low-income borrowers to purchase homes and lenders to reduce or eliminate their risk while further allowing a chain of investors to earn profits. In a strong real estate market, it is easy to see why this appeared to be a win-win. As defaults on the subprime loans increased, however, there should have been a re-thinking of the vehicle. Instead, market players not wanting to look back, simply increased the numbers of subprime loans.⁹³

was fraudulent or even deeply flawed.”), with Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 517 (2012) (“To date, we lack the ‘smoking gun’ evidence of extensive lawyer complicity with client fraud in the aftermath of the financial crisis[;] [s]till, I suspect that some lawyers were close enough to those events that they could have functioned as gatekeeper if willing and able.”).

⁸⁹ See Hill, *supra* note 88, at 324.

⁹⁰ See, e.g., *id.* at 348–49 (suggesting “better monitoring of ‘systematic risk’” and “adjustments of compensation structures of investment bankers” as possible solutions); Shaun Barnes, Kathleen G. Cully & Steven L. Schwarcz, *In-House Counsel's Role in the Structuring of Mortgage-Backed Securities*, 2012 WIS. L. REV. 521, 531–32 (2012) (“[C]ompensation structures that reward accomplishing short-term goals like the successful negotiation of a deal or the execution of an asset transfer, can be perverse incentives for managers.”); Brian E. Berger, *The Professional Responsibility of Lawyers and the Financial Crisis*, 31 REV. BANKING & FIN. L. 3, 11 (2011) (“[E]fforts aimed at reducing harm should focus not on lawyer conduct but on whether to legally prohibit or otherwise limit potentially harmful transactions.”).

⁹¹ See generally Langevoort, *supra* note 88; Schwarcz, *supra* note 71; Berger, *supra* note 90.

⁹² Hill, *supra* note 88, at 329–30.

⁹³ See *id.* at 341.

Originators realized that since they sold the loans almost immediately, whatever problems might arise with bad loans would not face them. They reasoned that they bore no responsibility beyond following legal disclosure requirements for ensuring that what the buyers purchased was viable. Thus, satisfying themselves that they were doing nothing wrong, the number of subprime deals that were created, packaged, and sold increased precipitously with little to no regard about the quality of the loans being packaged.⁹⁴ The development was, of course, gradual, and therefore easier in hindsight to pinpoint than it was as it was occurring. Nevertheless, it should have become clear at some point to the lawyers that the deals were moving too quickly for a “full and thorough review.”⁹⁵ As Claire Hill notes, the lawyers “probably did notice . . . that the loans they were helping to securitize were being made to borrowers of steadily declining quality But they also knew that the transaction structure was designed precisely to carve out some high-quality interests from pools of low-quality mortgages.”⁹⁶

Professor Donald Langevoort puts perspective on this kind of detail that lends plausibility and sympathy to the lawyers’ involvement. As he explains, among the several possible explanations for “intermediary behavior,” “[T]here was a systematic under-appreciation of the risk on both the sell and buy sides.”⁹⁷ How this under-appreciation occurred can be traced to the gradual eroding of “professional independence” through market changes that included, as Gordon and Batson noted with respect to the Enron scandal, a diffusion of legal work across multiple lawyers, a financial incentive system that rewarded lawyer deal-making rather than lawyer-provided advice and restraint, and the development of complex financial instruments and transactions that were beyond legal training.⁹⁸ These conditions created a “cognitive co-dependency” that has resulted in lawyer habits of blessing corporate proposals rather than scrutinizing them critically.⁹⁹

Thus, with the financial crisis of 2008, it is difficult to pinpoint individual lawyer ethical lapses. What emerges is a picture of collective corporate representation that fostered support for facilitating more

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Langevoort, *supra* note 88, at 498.

⁹⁸ *Id.* at 498–99.

⁹⁹ *Id.*

business—at any cost—rather than restraint on business practices that would sufficiently account for ethical implications. The issue, then, is not how to prevent one particular lawyer act but rather how to develop and sustain the cognitive independence necessary to provide ethical lawyering support.¹⁰⁰

At various points during the years leading up to the melt-down, lawyers were asked to provide advice regarding the legality of financial products that would cost the corporations less and earn them more, to sanction contract enforcement procedures that were more efficient regardless of whether such procedures comported with evidentiary requirements, and to not involve themselves in internal matters despite receiving multiple reports regarding the corporation's own ethical handling of those matters. Each of these actions or inactions provided opportunities for the lawyers to deliberate in the fashion suggested by Luban. Had they done so, the justification of role could not have been outweighed by the moral obligation to speak up when dire consequences of conduct could be predicted and, if necessary, abandon the role or the role act when continuing was not morally justified. Lawyers' role of providing advice regarding the legality of a particular product or transaction requires in depth investigation of the facts and law surrounding the creation of the product and the transaction. Such an investigation takes time and, had it been done, could have slowed down some of the poorest transactions that lead to the crash. Abandoning their role act of investigation because, as zealous advocates, they were required to provide "advice" to their clients quickly, was not justified.

Critics of this assessment will point out that this argument is somewhat circular since most scholars agree that a large factor in the

¹⁰⁰ This, of course, rests on the assumption that cognitive independence is actually important to ethical corporate representation. In the context of the Enron collapse, we have briefly touched on the differing views of lawyer role for a corporation: the gatekeeper vs. the advocate. As with the depth of investigative functions, it is my contention that cognitive independence is necessary regardless of how the corporate lawyer defines her role. It is only by continually maintaining objectivity that a person can identify and attempt to resolve potential problems with corporate proposals and behavior. And this is not to suggest, as others have, that this means that a lawyer starts to tell the corporation how to make business decisions. The suggestion is merely, as stated by Steven Schwarcz, that a lawyer should undertake to understand the business and legal ramifications of the decisions being proposed so that the legal and societal ramifications can be discussed with her client. Schwarcz, *supra* note 71, at 225–26.

failure of lawyer intermediaries was the overwhelming volume and speed of client demands that prevented any possibility of the thorough investigation that we now believe could have mitigated some of the damage.¹⁰¹ Additionally, as stated prior to beginning this analysis, the above is an oversimplification of the deliberative process suggested by Luban as well as an overly formulaic application of a concept applied to situations that were more complex than the analysis suggests. These are fair criticisms and should not be ignored.

Again, however, the analysis suggests not a magic formula to avert world crises. Rather, it provides support for the possibility of developing a kind of morally deliberative habit. Certainly, the possibility of such a lawyer transformation is much more likely if the theoretical underpinnings were part of assigned readings and discussions for not just two or three cases, but ten or twenty.

My larger point is that all lawyers, prior to becoming licensed to practice, must go through an education that is so thorough with respect to ethics theory and practice that it forms a habit of ethical issue identification and resolution. This level of ethics education is currently missing. Therefore, while arguably corporate client demand would not be different in a post-teaching law firm world, presumably, the strength of lawyer habit, when shared by all lawyers available and engaged in corporate representation, could more successfully have withstood the demand and pushed back, insisting on time and resources to investigate properly.

B. The Connection between Teaching Morally Activist Lawyering and Addressing the Access to Justice Issue

I have argued that moral activism can do much for assisting the lawyer in resolving conflicts between role obligations and common morality. It is useful as an ethical tool for practitioners and could have substantially reduced the harmful role of the lawyers involved in three large historical events with wide-reaching, disastrous implications. Given this fact, shouldn't we find a way to teach future lawyers about this theory and how to apply it?

¹⁰¹See Sarah Kellogg, *Financial Crisis 2008: Where Were the Lawyers?*, DCBAR (Jan. 2010), http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/financial_crisis.cfm (discussing competitiveness and boom mentality as contributing to the financial crisis).

I suggest that creating a teaching law firm that serves the goal of meeting access to justice needs will do exactly this. It will provide a context in which every-day ethical dilemmas involving role conflict will arise and be grappled with by new lawyers in a supervised setting that provides time and space to explore the appropriate ethical responses to these dilemmas. This is not to suggest that as part of the more traditional law school curriculum, podium courses offering readings and discussions about ethics and jurisprudence are ineffective or should be eliminated. What Luban and the application of Luban's theories in the contexts described above teaches, however, is that the complexity of learning habits of ethical reasoning demand more than a one semester podium course. Experiential learning theories, discussed more fully in Part II provide us with support for the notion that traditional ethics courses must be supplemented by "ethics-in-action" learning opportunities.

While these opportunities may be provided in a traditional clinic setting, the limitations of current law school clinics militate against relying on this venue as the sole source of teaching ethics in the way I have described. Many, if not most, law schools do not have sufficient space to ensure that every law student can take a clinic before graduation. Clinics, moreover, are generally only one semester long, during which time a student will represent at most three clients. Finally, clinical students generally participate on a part-time basis, so that they must divide their time between their clinical education and their other law school obligations. Given both the discussion about the absence of ethical deliberative habit, and its consequences, above, and the comparison to medical schools, which require post-medical school residency programs despite two years of clinical rotations during medical school, it is clear that clinical education as it is currently conceived is insufficient. Additionally, regarding the access to justice issue, the clinics themselves, although contributing a great deal towards providing representation to those who cannot afford it are, in the bigger picture, much too small in their impact given the level of need.

At least one law professor, who also has her Masters in Public Health, speaks of one of the medical model's "primary advantages . . . over law schools" as "the luxury of time."¹⁰² As she examines the ben-

¹⁰² Jennifer S. Bard, "Practicing Medicine and Studying Law": How Medical Schools Used to Have the Same Problems We Do and What We can Learn from Their Efforts to Solve Them, 10 SEATTLE J. SOC. JUST. 135, 155 (2011).

efits of the medical school model, Jennifer Bard stops short of advocating its large-scale adoption because she does not challenge the current time-limited three-year law school education. By pointing to the variety of sources of government funding for medical education that do not currently exist for legal education,¹⁰³ Bard essentially echoes critiques that a restructured legal education would prove too expensive and not truly analogous. While I address both of these concerns later,¹⁰⁴ I raise her particular articulation of them here as an admission that the barriers to the creation of a teaching law firm modeled after a teaching hospital are not at all theoretical. In other words, that law schools, as they currently operate, do not have the time or the money to create a post-graduate law residency program does not mean that law schools are sufficiently meeting the goal of teaching effective lawyer thought processes, practices, and skills.

Whether barriers to adding more experiential offerings to the law school curriculum (during or post-law school) are cost or pedagogically-related is a long standing debate within the legal community. The 1992 MacCrate Report, issued by the ABA but heavily influenced by clinical professors, focused primarily on the gap between legal education, as it then stood, and the legal profession.¹⁰⁵ Specifically, the report developed a “Statement of Fundamental Lawyering Skills and Fundamental Values,”¹⁰⁶ which are “central to the role and functioning of lawyers in practice.”¹⁰⁷ It then analyzed ways in which these skills and values were being taught and made recommendations for, among other things, curricular expansion of these teaching methods.¹⁰⁸ A flurry of critical publications—some decrying the costs of implementation of its recommendations and others denying that legal education was in need, pedagogically, of such major transformations as those recommended—followed in its wake.¹⁰⁹

¹⁰³ See *id.* at 154.

¹⁰⁴ See *infra* Part III.

¹⁰⁵ See generally A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter “MACCRATE REPORT”].

¹⁰⁶ *Id.* at 121–221.

¹⁰⁷ Russell Engler, *The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 113 (2001).

¹⁰⁸ MACCRATE REPORT, *supra* note 105, at 32–38.

¹⁰⁹ *Id.* at 117–18.

Citing to a 2011 White Paper by the National Health Policy Forum, Bard states,

“Agreement is longstanding in the medical profession that undergraduate medical education is insufficient to prepare freshly minted MDs for hands-on independent medical practice.” The current system of extended postgraduate, hospital-based training, commonly referred to as “residency” but called Graduate Medical Education (GME) within the world of US-based medical training, was developed based on this common understanding.¹¹⁰

What is made clear by this discussion is that law school clinical programs, while necessary, are insufficient. Further, law school reliance on clinical programs, which are often limited in size and scope, is motivated more by cost concerns than evidence that they are sufficient and most pedagogically appropriate for lawyers.

The importance of the resolution of this debate, and the reason I raise it here, is critical to the future of legal education. If, as I am proposing, the real barrier to the creation of a teaching law firm (or at a minimum a transformative expansion of current clinical offerings) is cost, application of moral activism theory requires lawyer and societal commitment to fund this endeavor. Arguments that what we have currently is pedagogically sufficient can be put to rest. At this point, twenty years after issuance of the MacCrate Report, it is no longer defensible to claim that barriers to expansion of skills and values teaching are pedagogical. There is now an abundance of scholarly work, both in and out of the legal profession, that document the success of clinical pedagogy, which are analyzed in Part II below.

Moral activism allows us to see that both the effective ethical training of lawyers and the democratic imperative of trying to resolve or substantially reduce the access to justice issue should outweigh concerns of cost. Taking a morally activist stance regarding these issues, of course, doesn’t eliminate the cost concerns, and so I address the question of how to fund these firms in Part III. However, it is important to understand how viewing lawyering from a morally activist

¹¹⁰ Bard, *supra* note 102, at 155–56.

perspective both motivates and requires lawyers to seek public support for substantially increased experiential opportunities despite their costs.

Creating a post-graduate, large-scale teaching law firm that employs *all* law school graduates who wish to become licensed attorneys will have a much greater impact on the access to justice problem as well as a much better chance of truly providing an effective skills and ethical education. It will engage all new lawyers in fulfilling their democratic obligations to ensure access to justice for all and respond to the justified pedagogical criticisms of law schools by creating that necessary but currently missing bridge to effective practice.

The teaching law firm that I am proposing is a post-graduate mechanism that provides an opportunity for new law school graduates to represent live clients and within that context learn how to challenge the principles of partisanship and accountability of the standard conception. My proposed curriculum provides an opportunity for learning how to effectively represent clients from a morally activist viewpoint as well as from a traditionally legal realist view.¹¹¹ It provides new lawyers the opportunity to practice law in an “exacting apprenticeship” that allows for “the steady, incremental development of their individual responsibility.”¹¹² Moral activism not only makes the creation of a teaching law firm possible but also teaches, after Watergate, Enron, and the recent financial crisis, that it is necessary.

¹¹¹ Luban has remarked on the origins of the standard conception of lawyering as being, in part, from legal education’s theoretical bias towards legal realism. He speaks of Oliver Wendell Holmes as “the patriarch of realism” and goes on to state, in the words of Roger Cramton, that legal realism is “the ordinary religion of the law-school classroom.” LUBAN, *supra* note 9, at 19, 20. A full discussion of the concept of legal realism is beyond the scope of this paper. Nevertheless, I include this small paragraph and footnote for the point that this theory, which holds that law in action is never a given and is always contestable because it is, ultimately, the law as imperfect human beings understand and enforce it, is largely responsible for the principles of non-accountability and partisanship that are taught in law schools today. It is only by studying the implications of legal realism and the arguments that refute it that future law students and new lawyers can be trained to re-consider the standard conception and attempt to adopt a morally activist view.

¹¹² Steven Lubet, *Like a Surgeon*, 88 CORNELL L. REV. 1178, 1181 (2003). As Lubet goes on to state, “Physicians are purposefully taught to practice their profession in a way that attorneys are not.” *Id.*

II. THE MEDICAL MODEL: HIGHLIGHTS & APPLICATIONS TO THE LEGAL EDUCATION CONTEXT

As a result of the famous 1910 Flexner Report,¹¹³ medical education transformed itself from a fairly hodgepodge collection of apprenticeships in hospitals and dispensaries, and lectures in lecture halls to a standardized, lengthy, costly, and rigorous path.¹¹⁴ That path consists of undergraduate medical education, which includes scientific study, clinical internships, and post-graduate education consisting primarily of residency programs at large teaching hospitals. The development of a course of scientific study as a pre-requisite to clinical and post-graduate residencies developed as scientific research and knowledge expanded.¹¹⁵

Along with the growth in scientific knowledge, came the public realization that doctors had something incredibly important—and increasingly expensive—to offer. There were a series of developments, both in medical practice and medical education, which led to an increase in the cost of health care.¹¹⁶ These started with the Flexner Report, which resulted in improved medical education and increased public confidence in the medical profession as a whole.¹¹⁷ However, subsequent technological advances in health care also raised health care costs both generally and in hospitals, which had traditionally been charitable institutions for persons of limited means.¹¹⁸ With these technological advances, better-trained physicians, and, in the 1930s and 1940s, the development of antibiotics, purely charitable institu-

¹¹³ See generally ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING*, BULLETIN NUMBER FOUR (1910) [hereinafter FLEXNER REPORT].

¹¹⁴ See generally ROTHSTEIN, *supra* note 4; see also Molly Cooke et al., *American Medical Education 100 Years After the Flexner Report*, 355 *NEW ENG. J. MED.* 1339 (2006) (summarizing the changes in medical education since Flexner's 1910 assessment of all medical schools then in operation).

¹¹⁵ See generally ROTHSTEIN, *supra* note 4.

¹¹⁶ Melissa A. Thomasson, *From Sickness to Health: The Twentieth-Century Development of U.S. Health Insurance*, 39 *EXPLORATIONS IN ECON. HIST.* 233, 235–36 (2002).

¹¹⁷ *Id.* at 236.

¹¹⁸ *Id.* at 235–36.

tions were no longer financially feasible.¹¹⁹ As a result, hospitals started charging patients for the care that they received.¹²⁰

Hospitals developed prepaid health care plans—a precursor to modern American health insurance¹²¹—and the real divide between those who could afford health care and those who could not began. There was growing recognition that without public support, an increasing number of persons would not be able to afford health care.¹²² In addition, there was growing recognition that there was health care worth having. Finally, the technological and pharmaceutical advances led to public excitement about the possibilities of research. All of this led to the public's willingness to contribute to the ever-growing costs of health care. Teaching hospitals, supported in large part by federal and state dollars, permitted the on-going excellent training of doctors and research scientists while simultaneously ensuring that patients without financial means could be seen and treated.¹²³ The solution has not kept health care costs down and is expensive. However, it has significantly positively impacted the issues of doctor training, on-going medical discovery and patient access.

As I suggested in the introduction, while there are as many articles regarding medical education and how it might be improved as there are for legal education, American medical training is considered one of the best in the world.¹²⁴ It is clear that the methods of teaching theory and practice that are combined in medical education are working. So, what, precisely are medical educators doing right and how can those lessons be applied to legal education? In 2005, Lee Shulman, President of the Carnegie Foundation for the Advancement of Teaching, wrote an article comparing professional pedagogies. As he describes it, “In professional education, it is insufficient to learn for the

¹¹⁹ *Id.* at 236.

¹²⁰ *See id.* at 236–37.

¹²¹ *Id.* at 237.

¹²² *See generally* L.E. Fishman & J.B. Bentley, *The Evolution of Support for Safety-Net Hospitals*, 16 HEALTH AFF. 30 (1997).

¹²³ *Id.*

¹²⁴ *See QS 2012 World University Rankings by Subject—Medicine*, QS TOP UNIV., <http://www.topuniversities.com/university-rankings/university-subject-rankings/2012/medicine> (last visited Apr. 21, 2013) (ranking several United States medical schools at the top of the list, with Harvard at number one).

sake of knowledge and understanding alone; one learns in order to engage in *practice*.”¹²⁵ The obvious question, then, is how best to do this.

From the time of the Flexner Report, medical educators have agreed that doing medicine is critical to ensuring that students can learn best practices for actually engaging in the professional practice of medicine. But Flexner did more than simply pronounce the importance of experiential learning. A kind of experiential learning was already abundant at the time that he engaged in his comprehensive study, in the form of apprenticeships, both formal and informal.¹²⁶ Flexner, however, recognized that medical education at the time, consisting as it did in an assortment of lectures and apprenticeships, was not sufficiently organized scientifically or pedagogically to ensure the delivery of quality health care.¹²⁷

As described in a recent article, Flexner criticized, “the mediocre quality and profit motive of many schools and teachers . . . and the nonscientific approach to preparation for the profession.”¹²⁸ Flexner felt that both “formal analytic reasoning, the kind of thinking integral to the natural sciences” and “a clinical phase of education in academically oriented hospitals, where thoughtful clinicians would pursue research stimulated by the questions that arose in the course of patient care and teach their students to do the same” was critical to a complete and effective medical education.¹²⁹ The call for formalized analytic and comprehensive experiential learning has been repeatedly confirmed as a successful pedagogy through research.¹³⁰

Shulman, writing almost one hundred years after Flexner, notes that with professional pedagogies, the attempt is to try to link “key

¹²⁵ Lee S. Shulman, *Pedagogies of Uncertainty*, LIBERAL EDUC., Spring 2005, at 18 (emphasis in original).

¹²⁶ ROTHSTEIN, *supra* note 4, at 115–16.

¹²⁷ Cooke et al., *supra* note 114, at 1341.

¹²⁸ *Id.* at 1339.

¹²⁹ *Id.*

¹³⁰ See, e.g., P.W. Teunissen et al., *How Residents Learn: Qualitative Evidence for the Pivotal Role of Clinical Activities*, 41 MED. EDUC. 763 (2007); see also Bard, *supra* note 104, at 152 (“medical education is based upon evidence found in scholarly literature about what does, and what does not, constitute effective teaching . . . [c]urriculum development in medical education is a scholarly process that integrates a content area with educational theory and methodology and evaluates its impact . . . they are adopting contemporary best practices in education based on empirical research.”) (citation omitted).

ideas and effective practice.”¹³¹ In other words, professional pedagogues are trying to create the bridge between theory and practice. Shulman unpacks these overused concepts, however, in a way that is helpful to our understanding of the many facets of what we are trying to teach:

. . . [A] true professional does not *merely* practice: he or she performs with a sense of personal and social responsibility. In the work of a professional, the performances of practice must not only be skilled and theoretically grounded; they must be characterized by integrity, by a commitment to responsible, ethical service.¹³²

Ethics, responsibility, and integrity – these sound a lot like values, like common morality as well as role morality. However, Shulman proceeds, “[I]t’s also insufficient to claim that a combination of theory, practice, and ethics defines a professional’s work; it is also characterized by conditions of inherent and unavoidable uncertainty.”¹³³ Therein lies the strongest argument for the teaching law firm.

Conditions of uncertainty cannot be re-created through the use of the hypothetical. A hypothetical client, a hypothetical legal issue, a hypothetical ruling by a hypothetical judge are all limited by the constraints of the problem set. In the real world, as we well know, uncertainty is a daily, almost hourly, occurrence. A client comes in with a problem. It is uncertain what is the best strategy for resolving that problem: the client may not have the resources to execute all possible strategies; the opposing party may have a great deal of information that could change the outcome of the problem; the client may not be sharing everything; or the judge that you will be in front of may have information of her own that could affect the case. The number of possible uncertainties in a given real life situation are virtually limitless.

So how, asks Shulman, can a professional address and account for all of these uncertainties? Through the exercise of judgment.¹³⁴ And how does one exercise judgment in an uncertain situation?

¹³¹ Shulman, *supra* note 125, at 18.

¹³² *Id.* (emphasis in original).

¹³³ *Id.*

¹³⁴ *Id.* at 18–19.

Through “cognizance of the consequences of one’s actions” (i.e., experience).¹³⁵ Certainly, experience can be gained through reading and discussing precedents, working as an associate or a clerk in a summer or part-time job, being a research assistant, volunteering at a non-profit law office, or participating in a clinical program. So, why isn’t this enough? Shulman directly compares legal education with medical education and concludes:

[L]awyers are not taught to practice; law schools are nearly devoid of clinical instruction. Law schools do a brilliant job of teaching students to think like a lawyer, a marginal job of teaching students to practice like a lawyer, and a questionable job of teaching them to be professionals with a set of values and moral commitments. The pedagogies of medicine, however, put enormous emphasis on learning to practice the profession. Education is a seamless continuum in which each segment has consequences for all others.¹³⁶

Certainly, clinical legal education within law schools has exploded within the last fifteen or twenty years,¹³⁷ so it is perhaps unfair to state that law schools are nearly devoid of clinical instruction. Nevertheless, despite the wonderful gains, there remains an un-evenness in clinical offerings, a reticence on the part of many law school administrators to support law clinics and their expansion and division amongst law school faculty between podium teachers and clinicians.¹³⁸ Even in greatly supportive law school environments, where both kinds of faculty are treated equally in terms of expectations, salaries, benefits, and promotions, there remains a sense that what these two types of faculty

¹³⁵ *Id.* at 19.

¹³⁶ *Id.* at 22.

¹³⁷ See Margaret M. Barry, Jon C. Dubin & Peter A. Joy, *Clinical Legal Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 30–32 (2000).

¹³⁸ Stephanie M. Wildman, *Democracy and Social Justice: Founding Centers for Social Justice in Law Schools*, 55 J. LEGAL EDUC. 252, 258 (2005) (discussing the “marginalization” of clinical education); See also Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 259, 261 (2004) (discussing the gap between “pure clinical instruction” and more traditional “podium” teaching).

do is entirely separate. This division is not a helpful model for future lawyers.

As far as Shulman's last criticism about the teaching of professionalism, it sounds very similar to the criticism that Luban raised about the standard conception of the lawyer role.¹³⁹ In fact, a more accurate characterization of what currently occurs in law school is not a failure to teach lawyer values, but rather a failure to teach those values within the bigger context of common morality. Graduating law students are well aware of the professional values and obligations of loyalty, confidentiality, and zeal. As Luban points out, what, they have a tremendous amount of difficulty doing, however, is addressing these professional values when they come into conflict with common morality.¹⁴⁰ It is the process of learning how to identify and address this conflict that is critical to making the transformation from thinking like a lawyer to exercising the good judgment of a professional lawyer.

Medical education accomplishes the transformative process of becoming a professional precisely because of those educators' understanding that "[a]t the center of this pedagogy is the idea of formation: the recognition that teaching and learning are about much more than transferring facts or even cognitive tools."¹⁴¹ It is well recognized among medical educators that repetitive experiences with multiple patients provides what Shulman calls the "signature pedagogies" that allows for complex thought as well as mastery of routine procedures.¹⁴² In fact, it is precisely the habitual, routinized process of medical rounds that provides the mental space to engage in learning about more complex patient-related issues.¹⁴³

Clinical law teaching pedagogy similarly advocates for this focus on the transformative process of learning and the irreplaceable value of live client experiences. Clinical education is regarded as a method of teaching, rather than as a broad and vague label for any kind of hands-on experience. More specifically, it is a method of teaching

¹³⁹ See LUBAN, *supra* note 9, at xx.

¹⁴⁰ *Id.*

¹⁴¹ J. Donald Boudreau, Sylvia R. Cruess & Richard L. Cruess, *Physicianship: Educating for Professionalism in the Post-Flexnarian Era*, 54 PERSP. IN BIOLOGY & MED. 89, 99 (2011).

¹⁴² Shulman, *supra* note 125, at 22.

¹⁴³ *See id.*

students “how to learn from experience.”¹⁴⁴ While the expense of clinical legal education has been an ongoing criticism, both in financial and temporal terms, legal educators have largely embraced its effectiveness in bridging the gap between theory and skills.¹⁴⁵

There are also ongoing debates about what is most effective: a traditional in-house clinic, a field clinic, or an externship in a law office.¹⁴⁶ While there is some data available about the effectiveness of clinical education and the traditional in-house variety in teaching certain skills,¹⁴⁷ there is very little data that provide support for favoring one type of experiential learning over another. It makes intuitive sense, however, that if we agree that reflection is a key component to learning how to learn from experience, a hands-on opportunity where there are too many cases or a teacher-supervisor who is not reflective herself is going to provide less of an educational benefit than would an opportunity to work with smaller case-loads and appropriately reflective teachers. Most educators, however, feel that offering a variety of experiential learning opportunities is good, although schools that seem to favor one experiential type over another may suffer criticism from clinical teachers.

Regardless of the differences in currently available experiential opportunities, it still appears from this review that a great deal is being done currently to address the need for transformative educational ex-

¹⁴⁴ Barry et al., *supra* note 137, at 17 (arguing that the primary goal of clinical programs is learning through experience).

¹⁴⁵ *Id.* at 20–30 (discussing the costs of law school clinics and various methods to reduce them); Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why are Students Falling Off the Bridge and What are Law Schools Doing to Catch Them?* 85 U. DET. MERCY L. REV. 429, 443 (2008) (discussing clinical education as the main method law schools employ as a bridge between theory and practice); Suzanne V. Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 527–41 (2003) (discussing the benefits of clinical legal education on law students).

¹⁴⁶ James E. Moliterno, *On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010*, 46 J. LEGAL EDUC. 67, 77 (1996) (explaining debate between in-house clinics and externships); Ann M. Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 SW. L. REV. 1, 8–9 (2010) (explaining functional differences between in-house clinics and externships).

¹⁴⁷ See generally Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359 (2008).

periences in legal education. Why, then, is this not sufficient? There are four reasons.

First, what currently exists is not enough. There are many schools that make some form of experiential learning mandatory but these are by far the minority of schools.¹⁴⁸ Additionally, because of the costs of clinical education, those schools that do require experiential learning treat many different kinds and qualities of experiences as equivalent and sufficient.¹⁴⁹ Finally, even for those fortunate students who have the opportunity to enjoy the “Cadillac” clinic experience, they do so on a part-time basis, while juggling other classes and part-time jobs and rarely do so for more than a semester.¹⁵⁰ Too many law students graduate without ever having had one experience with a live client. For those that have had these experiences, they are generally short-lived. If the idea is to learn from experience, surely the more experience one has from which to learn, the more effective one will be! This is certainly what medical education research has taught us.

¹⁴⁸ According to a recent clinical teacher’s Listserv survey, sixteen of the approximately 202 ABA-approved or provisionally approved law schools in the United States require credit-bearing clinics or externships for graduation: 1) CUNY 2) Thomas Cooley 3) Gonzaga University 4) University of California-Irvine 5) University of Dayton 6) University of Detroit, Mercy 7) University of District of Columbia 8) University of Maryland 9) University of Montana 10) University of New Mexico 11) University of Puerto Rico 12) University of Washington 13) University of St. Thomas, Minneapolis and 14) Washington & Lee 15) Northeastern University 16) University of Connecticut Law School. E-mail from Professor Karen Tokarz, Washington University School of Law, Oct. 9, 2012 (on file with the author). This means that credit-bearing clinics or externships are required for law school graduates in less than 10% of United States accredited law schools.

¹⁴⁹ Kimberly E. O’Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 CLINICAL L. REV. 335, 337–39 (2005) (noting the failure of law school clinics to apply a uniform method of evaluation as a disservice to the professional development of law students). Note, as well, that twenty years ago the MacCrate Report devoted an entire section to discussing the relative merits of in-house clinics versus externships. Without expressing, for the moment, a preference between the two, what is important to highlight is that there are significant differences. Most educators agree that the optimal goal is for a student to have the opportunity to engage in myriad experiential opportunities – from in-class simulations to externships to more traditional clinics. As these experiences all have slightly different pedagogical goals, educators also agree that they are not interchangeable. *See also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 165–205 (2007).

¹⁵⁰ Margaret M. Barry, et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 450–51 (2012).

Second, there is no substitute for seeing the standard conception of lawyering in action and using theories of moral activism to challenge that conception and learn to identify and address role conflicts. As we have seen, assisting a client in resolving a problem, regardless of the nature of the problem and the strategy being considered, has ramifications that not only must be identified but also are often not easily addressed.¹⁵¹ Experience in the field not only helps reinforce classroom learning about ethics, it also provides the habit of solving problems ethically.

Third, the reach of Legal Services Corporation lawyers is limited. Admittedly, they have helped thousands of low income Americans and have done so often in near impossible conditions: with no resources for hiring experts or getting the latest technology, in shrinking offices with little to no administrative support.¹⁵² They have shouldered unimaginably enormous and complex caseloads for very little compensation. They are, for many, modern day heroes. However, the unremitting dwindling of government support resulting in increasingly restricted work and continuously shrinking budgets is crippling and rendering them ineffective.¹⁵³ Creating a teaching law firm the size of a teaching hospital, where most of the law schools' graduates will handle between three and five low-income cases per rotation, would provide the large-scale effort necessary to seriously address this issue. A teaching law firm could renew the possibility of equal access to justice while simultaneously ensuring that all lawyers are fulfilling their duty to be actively engaged in providing such access.

¹⁵¹ Schwarcz, *supra* note 70, at 222 (acknowledging that “[a]ll transactions create externalities” and recommending that lawyer education work to help future lawyers identify and discuss them). Although Schwarcz argues that educators should teach future lawyers how to identify and address externalities, an obligation, imposing liability, should not be placed on lawyers to do this as it is impossible to know when lawyers or clients have more knowledge about consequences of a particular transaction or proposal. *Id.* at 223–24.

¹⁵² LEGAL SERV. CORP., 2011 ANNUAL REPORT 2, 3 (2011); Press Release, Legal Serv. Corp., Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-Funded Programs (August 15, 2012), available at <http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded>; Press Release, Legal Serv. Corp., *House-Senate Agreement Cuts LSC Funding* (November 15, 2011), available at <http://www.lsc.gov/media/press-releases/house-senate-agreement-cuts-lsc-funding>. See Heather Rogers, *The Relentless Push to Bleed Legal Services Dry*, REMAPPING DEBATE (June 6, 2012), www.remappingdebate.org/node/1304.

Fourth and finally, while law students can practice in many arenas under certain circumstances under state student practice rules,¹⁵⁴ they cannot practice in any arena. Law students have not, after all, completed their legal education prior to taking on the enormous responsibility for preventing a client from becoming homeless, representing an abused child or assisting a disabled client from getting desperately needed income benefits. Despite these limitations, as is seen by the large variety of growing clinical programs and literature, traditional clinical legal education, prior to graduation from law school, is very effective. For that reason, and for reasons similar to the justifications for the clinical model in medical education, I do not propose replacing undergraduate clinical legal education with the graduate teaching law firm. Adding a post-graduate teaching law firm, however, would ensure that the vast number of low-income persons receiving free representation would be represented by J.D.s rather than law students.

For all of these reasons, my proposal does not involve simply creating either a traditional law firm or a traditional legal aid office and forcing students to practice within it. I have had the experiences of supervising law students as a staff attorney in a traditional legal aid office, teaching law students in a field clinic that resembled my supervisory experience but added a seminar component that I also taught, supervising a student in an externship, and teaching a traditional in-house clinic. Between the extensive research that has already been done and my own personal experiences, I am convinced that a teaching law firm that does not provide support for true clinical teaching methodology will not create effective lawyers.¹⁵⁵

If we are to truly learn from our mistakes and our own experiences as educators, an effective teaching law firm will provide support for low case-loads for students, traditional scholarship for the lawyer-

¹⁵⁴ See, e.g., PA. BA. R. 322 (2012); Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 267 (1999) (noting all states currently have student practice rules in place); Barrett Halls, *'I'll Supervise, Your Honor' Ethical and Legal Considerations Arising from the Use of Law Students in Court Proceedings*, 36 J. LEGAL PROF. 225, 226–27 (2011).

¹⁵⁵ As one observer notes in stating that legal education currently has no equivalent to the comprehensive training provided to doctors, “Even at large law firms, where the flow of work and long hours bear some resemblance to teaching hospitals, the assignment of associates is almost exclusively profit-driven, with little similarity to the methodological exposure of medical residents to cases” LUBET, *supra* note 112, at 1181.

professors, and ongoing reflection meetings that provide students with the opportunity to continually engage in collegial consultation about how various situations were handled as well as how various situations should be handled. For this type of experience, in addition to looking at our own history and variety of experiential opportunities, the teaching hospital is an excellent model.

III. PUBLIC RESPONSIBILITY FOR THE ACCESS TO JUSTICE ISSUE AND IMPLICATIONS FOR THE CREATION OF A TEACHING LAW FIRM

Having made the case in Part I that lawyers' "special responsibility to the quality of justice" includes actively addressing the access to justice issue,¹⁵⁶ the question remains whether there are sufficient grounds for society in general to take responsibility for addressing this issue. Given that the justification for the necessity of the people's lawyer is political, rather than moral, it seems clear that the answer is yes.

Our system of government is premised on the notion of equality before the law. While practically speaking an impoverished person can physically walk into a courthouse and be heard by a judge, we have known since *Gideon v. Wainwright*¹⁵⁷ that such physical access will rarely, if ever, result in any meaningful ability to defend oneself or obtain requested relief.

Our refusal to ensure legal representation in civil contexts, however, is not because of a feeling that in those contexts unrepresented folks are better able to make their case than in the criminal one. Rather, the refusal is based on the belief that in the civil context, as matters are brought by private parties, the indigent litigant is not forced to prosecute or defend her claims against the awesome power of the state. The right to counsel in the criminal context, as well as many other important rights, is more about concern for balance when the adversary is the government than it is about particularized concern for the indigent litigant.¹⁵⁸

¹⁵⁶ See *supra* Part I.

¹⁵⁷ 372 U.S. 335, 344 (1963).

¹⁵⁸ I am summarizing here what Luban compellingly shows in great detail over the course of several chapters, that "criminal defense is an exceptional part of the legal system, one that aims at the people's protection from the state rather than accurate outcomes." LUBAN, *supra* note 9, at 63. Interestingly, Luban also discusses the fact that in "today's" civil litigation, a private indigent litigant is as likely to be facing the awesome power of the corporate giant, whose wealth and consequent access

As Luban highlights, however, the lesson of *Gideon* is not only about the need to guard against the awesome power of the state. The decision also teaches that meaningful access to the legal system is not access to a courtroom without knowledge of the workings of the courtroom, the details of the laws being applied there, and an understanding of those details.¹⁵⁹

Pepper articulates this point as well in describing his theory of first-class citizenship. As he explains,

[I]n a highly legalized society such as ours, autonomy is often dependent upon access to the law. Put simply, first-class citizenship is dependent on access to the law. And while access to law . . . is formally available to all, in reality it is available only through a lawyer.¹⁶⁰

Since equal access to the law is one legitimizing principle, denying that access by refusing to ensure legal representation for all delegitimizes the government. The interest in ensuring a legitimate government, that is one that will *not* generate a right of resistance, is not only an interest for lawyers. Hence, the responsibility to ensure equal access to justice is a public one.

Why does this matter? For economic reasons. Law schools alone cannot fund a proposal as extensive as a large-scale post-graduate teaching law firm. In the introduction to this paper, I mentioned the increasing drum-beat about law school failures after the economic crisis. As one law professor has recently stated, “The economic model of law schools is broken. The cost of a legal education today is substantially out of proportion to the economic opportunities obtained by the majority of graduates.”¹⁶¹ The numbers of new law schools accredited by the ABA has steadily risen, flooding the market with new lawyers while the market for lawyer jobs has steadily

to lawyers, knowledge, technology and the politically powerful is certainly as terrifying, if not more so, than the government. *Id.* at 64–65. Given this reality, the justification of limiting free lawyers to indigent criminal defendants is quite weak. For our purposes, however, whether or not the litigant opposing an indigent is large and powerful has no bearing on the reality of the complexities of our justice system.

¹⁵⁹ *Id.* at 245.

¹⁶⁰ Pepper, *supra* note 19, at 617 (internal citations omitted).

¹⁶¹ BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* x (2012).

shrunk.¹⁶² Given the tuition increases, more scrutiny than ever before is being given to the traditional three-year law school model. Law school graduates and critics of the current law school educational system have been asking increasingly whether the same things can be accomplished in less time and for less money.¹⁶³

Perhaps the answer is yes. But my proposal implicitly deals with the effectiveness question, which is not something that can be dealt with by simply throwing away all of the important theoretical and clinical teaching that is currently happening. It also deals with the access to justice issue, something that none of the current outcries address, other than to notice the vast number of law graduates without jobs and the even vaster number of low-income persons without access to legal representation. In sticking with these two issues, then, I will not comment on the question of what undergraduate legal education should look like other than to suggest that some combination of theoretical and clinical teaching similar to what currently exists be retained.

My proposal of the graduate teaching law firm comes from a growing belief that whatever forms of undergraduate legal education are undertaken, it is not enough to accomplish the twin goals of teaching professionalism, as that term has been defined and analyzed by Shulman, and addressing the access to justice issue. Bridging the gap between theory and practice; forming deliberative habits of identifying, assessing, and addressing role conflicts and seriously and significantly addressing the access to justice issue are things better accomplished at the post-graduate level, as we have seen with medical education. Meeting these goals should be a societal as well as a lawyer imperative. And if that is true, then government funding should play a large role in legal education.

¹⁶² J. Gordon Hylton, *Looking at the Increase in the Number of Law Schools and Law Students, 1950–2010*, MARQUETTE UNIV. L. SCH. FAC. BLOG (July 25, 2012), <http://law.marquette.edu/facultyblog/2012/07/25/looking-at-the-increase-in-the-number-of-law-schools-and-law-students-1950-2010/>; Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES (June 27, 2011, 11:00 AM), <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/>.

¹⁶³ See, e.g., Steven M. Davidoff, *The Economics of Law School*, N.Y. TIMES (Sept. 24, 2012, 3:01 PM), <http://dealbook.nytimes.com/2012/09/24/the-economics-of-law-school/>.

Here, it is necessary to pause a moment to acknowledge that in the midst of an economic crisis affecting the world, the nation, and the legal market, including law schools, I am proposing a commitment of more funds rather than a scaling back. My response to this predictable criticism is to look at other moments of economic crises in our history—and governmental response.

There are many sources, the most obvious to me being President Franklin Delano Roosevelt's response to the Great Depression and President Obama's response to the current financial crisis. Economists and politicians alike debate whether these government spending responses were the right responses to make, whether they were effective or whether austerity was the more logical and appropriate response, and some even say that the large scale spending that did take place was not nearly sufficient and should have even been greater than it was. I am clearly not going to be able to resolve these debates within this paper. I raise them as a reference point merely to show that while there is a significant amount of scholarship on both sides of the issue, my proposal is in line with the literature that suggests that economic crises require more spending, not less.¹⁶⁴

I said in the beginning of the paper that I would devote this section to economic and practical considerations. Here I would like to do just that by discussing the detailed vision of my teaching law firm and how, beyond government contributions and addressing the moral dimensions of lawyering, it can be sustained and remain practically enriching.

You will recall that one of the early and frequent criticisms of even attempting to discuss a teaching law firm like a teaching hospital is that law and medicine are not truly analogous. More specifically, poor people have the same anatomy, circular, and vascular systems as wealthy people because they are human beings. Therefore, medical

¹⁶⁴ For a brief sampling of articles in favor of government spending in times of recession, see Greg Hannsgen & Dimitri Papadimitriou, *Did the New Deal Prolong or Worsen the Great Depression*, 53 CHALLENGE 63, 80 (2010) (concluding after extensive analysis that FDR's stimulus was likely not large enough, as opposed to too large, to have the impact his administration hoped); Arjun Jayadev & Mike Konczal, *When is Austerity Right? In Boom, Not Bust*, 53 CHALLENGE 37, 39 (2010); Michael Grunwald, *Think Again: Obama's New Deal*, FOREIGN POL., September-October 2012, at 45, 47; Peter Temin, *The Great Recession & The Great Depression*, 139 DAEDAELUS 115 Fall (2010).

residents who treat primarily low-income patients will learn just as much as if they were treating all wealthy patients. All of their knowledge will be transferable to any practice they choose because diseases and injuries do not discriminate between rich and poor.

Legal problems, however, most certainly do. Thus, a legal resident completing rotations in, for example, landlord-tenant law, mortgage foreclosure defense, and social security disability income benefit appeals will not be well equipped to land a post-residency job in a large law firm representing a multi-million dollar corporation; neither will a lawyer completing an immigration rotation, a family law rotation, or a rotation dealing with debtor-side consumer issues. These are fair criticisms.

I therefore suggest as a response to these criticisms, as well as a possible source of funding contribution, that rotations in real estate, corporate merger, tax, and many other traditionally private firm contexts be part of our teaching law firm. And before it is predictably cried, "But then what of the access to justice mission?" I suggest that all rotations be considered as potential links in a chain of specialization.

So, for example, all residents would be required to represent low-income clients in at least one-third of their total rotations. Residents with an interest in private practice real estate would do their low-income rotation representing low-income tenants and low-income homeowners in mortgage foreclosure matters. However, they could also do rotations in real estate, tax, and even small business representation. Similarly, residents wanting to specialize in international business could include low-income rotations in immigration and could also do rotations in international business, small business, tax, or other related legal fields. Clients seeking representation in the private rotations would pay sliding scale rates and those fees would be used to support the work of the firm. Clinical professor advisors could assist students in creating a series of related rotations that would ready them for a specialized practice in an area of interest.

Foreseeable complications would be conflicts of interest and opposition from the private bar. As for the former, depending on the level of conflict, a "Chinese wall" would suffice; however in others, where an opposing party is low income, the paying client would have

to find representation elsewhere. Regarding the latter complication, I think the response is to think realistically about whether truly threatening competition would exist from a teaching law firm.

As a teaching law firm, first and foremost, no lawyer resident would have more than approximately three clients at a time. Second, as the private rotations would be for those students that want to specialize in that particular area, not all lawyer residents would rotate through each private area, which again would limit the number of actual clients served. Third, similar again to teaching hospitals, teaching law firms would develop their own specialty identities. For example, a Gary, Indiana teaching law firm might have many rotations that could lead to specialties in tax and real estate offerings but very little in the way of international business offerings. Thus, a lawyer in private practice would easily be able to find clients needing representation in specialty areas not taught by that area's teaching law firm. Finally, a teaching law firm of the scale that I envision becomes, in and of itself, a job creator rather than something that threatens law jobs.

These arguments, I believe, take care of the concerns about the ability to use teaching hospitals as adequately analogous models for teaching law firms. One other distinction, which only helps the economic concerns, is the fact that law firms will have nowhere near the costs associated with the equipment and laboratory needs that teaching hospitals do. Other than computers, printers, and photocopiers, law firms don't need expensive equipment. On the whole, while grand and expensive in terms of person costs, teaching law firms should be cheaper than teaching hospitals.

Another consideration is the combination of breadth and depth of experiences that teaching law firms would offer. First, because all residents would be required to rotate through two or three poverty law rotations, those residents who also choose private practice rotations would have the opportunity to see the issues from both sides as well as the opportunity to gain live client experiences in fields that might only be tangentially related to their ultimate chosen fields. This could greatly enhance their ability to practice in their chosen fields.

As an example, consider a resident who provides social security benefit income representation during their first year of residency and then ultimately goes on to do personal injury work. As a direct result of the social security work that the resident did, the resident will

understand that when representing a plaintiff whose sole source of income is social security benefits, it is likely that prior to any settlement or resolution of the personal injury action a special needs trust will have to be created or the plaintiff will lose her benefits upon receipt of the personal injury action proceeds. Similarly, a resident in a family law rotation will have a much greater understanding of the implications of divorce when later specializing in bankruptcy or tax law.

A final practical consideration is the chance that teaching law firms offer to assist law students in gaining expertise with local rules and connections to local practices. If my vision were to be realized, a teaching law firm with a focus on a legal area that the resident lawyer was interested in, which was also geographically situated in a place that the resident lawyer wanted to ultimately practice upon completion of the residency program, would not only provide the resident lawyer with the certifications that she wanted but also with invaluable familiarity and experience with local players and local practice rules and customs.

In order to have this possibility, it is part of my vision that many future lawyers would choose to attend two different legal education institutions: a more traditional law school and a post-J.D. teaching law firm affiliated with a law school different from the one which they attended. In that way, law schools could retain their unique identities, class sizes, and faculty, and then create an affiliated teaching law firm that would gradually, over time, build reputations in specialties that might or not be similar to those for which the law schools have reputations. Students would seek admissions to a residency program at a particular teaching law firm based on their own interests, perceptions of the law firm's reputation, and geographic preferences. Admissions to the residency programs would be competitive in the same way that they are for admissions to medical school residency programs, and the possibility of joining a residency program in the state where you ultimately intend to practice could introduce the possibility of significantly reducing the need for a bar exam.

Bar examinations are traditionally exams created by states in an effort to ensure that those licensed in the particular state meet the state's standards. Much has been written about the lack of worthiness

of these exams of acting as any kind of quality control mechanism.¹⁶⁵ Actually and successfully representing clients, and therefore clearly having significant knowledge and understanding of that state's rules and procedures, could not be better evidence that the resident in question is qualified for a license in that state.

Certainly there will be instances where a lawyer licensed in one state wishes to move to and practice in another or where a lawyer attends a residency program in one state but ultimately for a host of reasons, desires to practice in another. For those attorneys, the states will presumably retain their traditional licensing procedures. But for the lawyers, presumably the vast majority, who participate in a residency program in the state where they ultimately practice, the bar exam requirement could be eliminated. Instead, evidence of successful completion of the residency program could be presented in exchange for a law license. The law school affiliated with that teaching law firm and the state could determine what evidence would be sufficient.

CONCLUSION

Creating teaching law firms modeled after teaching hospitals, is not a new idea.¹⁶⁶ In fact, a move in this direction has already been undertaken by Arizona State University.¹⁶⁷ Nevertheless, the concerns and

¹⁶⁵ Daniel Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1205–11 (1995); Kristin B. Glen, *Thinking Outside of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 368–72 (2003).

¹⁶⁶ See generally Cunniffe, *supra* note 11 (arguing that the public will be better served by a more diverse body of lawyers if law students are relieved of the requirement to spend their third year of legal training within a law school); Devan Desai, *Thought Experiment: Why Not a Teaching Law Firm to Increase Experiential Learning?*, MADISONIAN.NET (Mar. 27, 2008),

<http://madisonian.net/2008/03/27/thought-experiment-why-not-a-teaching-law-firm-to-increase-experiential-learning/>; Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1 (2011) (claiming that law schools can better prepare their students for practice by establishing, and placing students in, a professionally-managed, revenue generating, non-profit law firm).

¹⁶⁷ Karen Sloan, *Think of It as a Residency for Lawyers*, NAT'L L. J., (June 4, 2012),

<http://www.law.asu.edu/LinkClick.aspx?fileticket=d0ItKL24KdU%3D&tabid=803>. See also Ethan Bronner, *To Place Graduates, Law Schools are Opening Law Firms*, N.Y. TIMES (Mar. 7, 2013) <http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?smid=pl-share>. Note that the S. J.

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criticisms regarding the economic feasibility of such firms and precisely how they would function given the imprecise analogy between health care and legal assistance are valid. Addressing those concerns and criticisms fully requires a discussion of the goals of a teaching law firm.

As I have argued, while there are many practical benefits, the goals of my proposed teaching law firm are to respond to broader and more deeply troubling ethical concerns about lawyering in general and to the crisis in access to justice that is of central concern to our democracy. Consideration of a re-conception of the lawyering idiom holds a great deal of promise for resolving these issues.

Quinney College of Law in Utah also sees their new building as providing them with the opportunity to “create a teaching hospital for law.” See *College of Law Finalizes Plans for New Building*, ULAWTODAY, <http://today.law.utah.edu/2013/01/college-of-law-finalizes-plans-for-new-building/>, (last visited Apr. 22, 2013).