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### Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy

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# **Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy**

LUCILLE A. JEWEL†

## INTRODUCTION

I became interested in the intersection between class and the legal education while attending a Continuing Legal Education seminar on strategies for success in the practice of law. At this seminar, the speaker gave an hour-long presentation on professional style and manners for attorneys, with lessons on how to shake someone's hand effectively, what types of attire make the most professional impression, and which fork to use at an upscale restaurant. This speaker's thesis was that attorneys need to master various etiquette rules in order to reach their full potential as practitioners. While sitting and listening to this well-intentioned speaker, I realized that I was essentially listening to a lesson on upper-class manners and clothing styles.

I then thought back to similar lessons that I have taught as a moot court coach and advocacy teacher. Before going to a job interview or an oral argument, I advise my students to take out their visible body piercings, hide their tattoos, avoid wearing too much perfume, leave the flashy

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† Assistant Professor, Atlanta's John Marshall Law School. J.D. 2000, Tulane University School of Law; B.A. 1996, Columbia University. I would like to thank Professors Martha McCluskey and Athena Mutua for organizing the ClassCrits workshops and for engendering such a supportive atmosphere for young critical scholars. I am grateful to Professors Jeffrey Van Detta, Kamina Pinder, and Kathleen Burch, whose comments, guidance, and encouragement kept me on the right track and enabled me to complete this project. Finally, I would like to thank my research assistant, Cara Rockhill, for applying her powerful editing skills to this piece on such short notice.

jewelry at home, and—avoid polyester at all costs. As I looked back on the substance of these lessons, I realized that I have been teaching my students to wear attire traditionally associated with the upper-class in America. I began to see other lessons on proper grammar, diction, and professional conduct as advocacy of upper-class mores. I wrestled with the idea that I was becoming the law school version of Henry Higgins.<sup>1</sup> Should I be more critical of these class-based lessons that I am teaching? Or, would that criticism hurt my students and prevent them from acquiring the skills they need in order to succeed at practicing law?

With these questions in mind, I decided to research the issue of class as it relates to legal education. In order to do this, I needed to find a class theory that could be applied to both the American legal profession and legal education. In terms of a theory of class for the legal profession, some theorists would stop the inquiry upon classifying attorneys, in terms of economic income, as members of the upper-middle-class. Although most would agree that in economic terms, the legal profession is a middle-class/upper-class profession, there are undeniable multi-dimensional striations that exist within the legal profession.<sup>2</sup> Pierre Bourdieu's work is relevant to the legal profession because it allows inquiry into these professional differences, by analyzing the amount of social and cultural capital a person

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1. GEORGE BERNARD SHAW, *PYGMALION* (Penguin Books 2003).

2. See, e.g., FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 42 (1981) ("For while the law in comparison with other occupations carries with it relatively high social status, the legal profession is far from monolithic."); Ronit Dinovitzer & Bryant C. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC'Y REV. 1, 2 (2007) ("Decades of work on the legal profession have confirmed that there are hierarchies in the profession that every lawyer knows."); RONIT DINOVITZER ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 42 (2004), [http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After\\_JD\\_2004\\_web.pdf](http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf) (detailing significant economic differences between lawyers, mapped by practice area and geographic location). See also JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005). *Urban Lawyers* contains the results of a detailed sociological study of the Chicago Bar conducted in 1995. This study followed up on a previous study of the Chicago legal profession conducted in 1975. See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (Russell Sage Found. 1982). The data collected by this study illustrates the social and economic striations within the Chicago Bar.

holds, in addition to economic capital. For instance, distinctions among members of the legal profession can be viewed in terms of differences in economic capital (some attorneys make much more money than others)<sup>3</sup>; differences in power relations in the workplace (some attorneys exercise managerial authority; others do not); and what Bourdieu refers to as “symbolic capital”<sup>4</sup> (levels of prestige and honor assigned based on credentials).

I was also drawn to Bourdieu because he devoted so much of his research to educational institutions. A central theme of his work is that educational institutions contribute to societal inequality because those who achieve the most within the system tend to have entered the system with a greater amount of social and monetary resources.<sup>5</sup> But the economic structures that underlie the allocation of power through educational credentials are hidden in the educational system, by narratives that focus on individual merit and ability, measured in objective terms.<sup>6</sup> Finally, Bourdieu was concerned about the ways in which educational pedagogy works to create a collective attitude that causes individuals to docilely accept their place within the greater social structure, without question.<sup>7</sup> Thus, despite its egalitarian and democratic ideals, western education contributes to inequality by allowing “inherited cultural differences to shape academic achievement and

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3. Another way to describe the stratification within the legal profession is to view it in terms of what type of clients attorneys represent. *See, e.g.*, Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 868 (2006-07) (citing HEINZ ET AL., *supra* note 2, at 868). The attorneys at the top of the hierarchical structure of lawyers represent large corporations. *See id.* at 864. Attorneys at the bottom primarily represent personal clients. *See id.* Attorneys who have corporations for clients receive substantially more income in the form of higher legal fees than attorneys who represent individual clients. *See id.*

4. *See* PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 182-83 (Richard Nice trans., Cambridge Univ. Press 1977). For instance, attorneys who work at large law firms, representing corporate clients, are viewed as having much more prestige than attorneys who engage in individual client representation. *See also* HEINZ ET AL., *supra* note 2, at 77-97.

5. DAVID SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 189-90 (1997).

6. PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 163 (Sage Publ'n Ltd. 2d prtg. 1990).

7. *See id.* at 31-35.

occupational attainment."<sup>8</sup> I found that much of what Bourdieu wrote about the tiered quality of French higher education to be applicable to American legal education.

There is also an important moral dimension within Bourdieu's theories. In speaking to fellow sociologists and academics, Bourdieu urged his colleagues to uncover and publicize the myths that lead to structural subordination. But he also cautioned theorists not to ignore potential conflicts between an objective view of social structures and an individual's conscious subjective view of herself. I found the moral aspects of Bourdieu's theories compelling because they addressed my own internal conflict as a teacher at a low-tier institution where many students are the first in their family to receive a professional degree. I would like my students to succeed in the practice of law and enjoy the higher status in society that a law license affords, but I do not want them to so blindly embrace the law's aristocratic ideals that they do not see how the professional culture produces inequality and division. I am also concerned with the thought that, just like Henry Higgins and Eliza Doolittle, if I teach my students how to master the upper-class culture of the law, there is still no guarantee that the legal profession will return the favor and accept my students as bona fide members. Thus, in this Essay, I look for a middle ground that would allow students to learn the rules and mores required in order to succeed as attorneys, but also become critically aware of how these rules and mores mask hidden processes that tend to reproduce institutional and societal structures, which in turn produce outcomes that favor advantaged groups at the expense of the disadvantaged.

#### SOURCES CONSULTED

Bourdieu's work spans the disciplines of anthropology, sociology, education, and history.<sup>9</sup> Because of the breadth of his work, there is danger of a misreading if one merely

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8. SWARTZ, *supra* note 5, at 190.

9. See Loïc J.D. Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu's Sociology*, in AN INVITATION TO REFLEXIVE SOCIOLOGY 1, 2 (Pierre Bourdieu & Loïc J.D. Wacquant eds., 1992).

chooses individually digestible pieces to work from.<sup>10</sup> In researching this Essay, I have tried to avoid the fallacy of a myopic view by looking at several of Bourdieu's writings, including: his anthropological fieldwork conducted on a pre-capitalist society in Kabylia, Algeria<sup>11</sup>; his exposition on taste and class<sup>12</sup>; his study, with Jean Claude Passeron of education<sup>13</sup>; and Loïc J.D. Wacquant's explanations of Bourdieu's theories found in the book, addressed to sociology students, co-written with Bourdieu.<sup>14</sup> To help me understand the context of Bourdieu, I have also consulted Elliot B. Weininger's *Foundations of Pierre Bourdieu's Class Analysis*, found in Erik Olin Wright's *Approaches to Class Analysis*,<sup>15</sup> as well as David Swartz's *Culture and Power*.<sup>16</sup> I also reviewed Bourdieu's recent essays on the suffering borne out by disadvantaged persons in contemporary France.<sup>17</sup> Finally, I looked at Bourdieu's general essay on the field of the law and the cultural production of law (which draws upon examples from French and American legal systems).<sup>18</sup>

## I. BOURDIEU'S THEORIES—A FOUNDATIONAL EXPLANATION

### A. *Types of Capital*

For Bourdieu, class analysis is not a matter of classifying and placing individuals into pre-defined groups,

10. See *id.* at 4.

11. BOURDIEU, *supra* note 4, at 182-83.

12. PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT [SIC] OF TASTE* (Richard Nice trans., Harvard Univ. Press 1984).

13. BOURDIEU & PASSERON, *supra* note 6.

14. Wacquant, *supra* note 9.

15. Elliot B. Weininger, *Foundations of Pierre Bourdieu's Class Analysis*, in *APPROACHES TO CLASS ANALYSIS* 82, 82-118 (Erik Olin Wright ed., Cambridge Univ. Press 2005).

16. SWARTZ, *supra* note 5.

17. Pierre Bourdieu & Patrick Champagne, *Outcasts on the Inside*, in *THE WEIGHT OF THE WORLD: SOCIAL SUFFERING IN CONTEMPORARY SOCIETY* 421, 422-24 (Pierre Bourdieu et al. eds., Priscilla Parkhurst Ferguson et al. trans., Stanford Univ. Press 1999).

18. Pierre Bourdieu, *The Force of the Law: Toward A Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 806 (Richard Terdiman trans., 1987).



such as the working-class, the middle-class, and the upper-class.<sup>19</sup> Rather, a person's class is determined by looking at how much and what types of capital a person has (economic, cultural, social, and symbolic), and how long the person has held that type of capital.<sup>20</sup> Thus, the term "class" can be defined as a person's specific place within a social sphere or *field*,<sup>21</sup> as determined by the value, composition, and trajectory of one's capital holdings.<sup>22</sup>

To determine class location, the most important factor is the volume of capital that a person has.<sup>23</sup> The overall amount of capital a person holds determines what class level she resides at.<sup>24</sup> Factors two and three, the composition of one's capital and the temporal trajectory of one's holdings, determine where a person will be situated within her class level.<sup>25</sup> The different types of capital include: economic (money and property); cultural (education, consumer practices/tastes); social (family or political connections); and symbolic (authority and prestige).<sup>26</sup> A person can hold different types of capital and each type is valuable in determining one's class status. For instance, a person with little economic capital but a larger amount of cultural capital (such as a teacher or professor) will generally reside in the same class as a "rags to riches" entrepreneur, who has much money, but little cultural and social capital in the form of education or family

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19. See BOURDIEU & PASSERON, *supra* note 6, at 11; SWARTZ, *supra* note 5, at 39; Weininger, *supra* note 15, at 86. The task of demarcating classes and class locations has been identified as more of a Marxist approach to class analysis, where individuals are placed in a class based on their occupation and relationship with the means of production. See, e.g., ERIK OLIN WRIGHT, CLASS COUNTS: COMPARATIVE STUDIES IN CLASS ANALYSIS (Cambridge Univ. Press 1997).

20. See BOURDIEU, *supra* note 12, at 114.

21. See Wacquant, *supra* note 9, at 17. A *field* is an arena of play, analogous to a battlefield, where players compete to establish control over the types of capital contained in the field, such as cultural and legitimate authority. See *id.*

22. See Weininger, *supra* note 15, at 89.

23. See BOURDIEU, *supra* note 12, at 114.

24. See *id.* at 114-15.

25. See *id.*

26. See *id.* at 114; SWARTZ, *supra* note 5, at 43, 74, 78.

connections.<sup>27</sup> The difference is that these two persons will reside in different spaces within their field.<sup>28</sup> The final factor concerns changes in capital volume and composition over time, as “manifested by past and potential trajectory in social space.”<sup>29</sup> For instance, whether a person is “old money” or “nouveau riche” is a question that relates to this third factor, which determines where, in the upper-class space, a person resides. Finally, although he views class in fluid terms, Bourdieu shares the Marxist view that dominant groups can be expected, as a matter of course, to subordinate weaker groups in inequitable ways.<sup>30</sup>

### B. *Valuing the Symbolic*

For Bourdieu, existing class structures within a field and within a society are reproduced when each new participant learns to accept, without question, an accepted value for symbolic capital and the placement that results from a person’s capital holdings. Bourdieu created the concepts of *habitus*, *objectification*, and *symbolic violence* to explain the process of how class structures come to be internalized and replicated by members of a society.

1. *Habitus, objectification, and symbolic violence.* “Habitus,” according to Bourdieu, is a series of preferences and dispositions that cause persons to behave a certain way and see the world in a certain way.<sup>31</sup> Habitus is created through a process of objectification, which occurs when a person internalizes the world’s external hierarchical structures into her mental structures, which creates a worldview that the person takes for granted as the way the world works.<sup>32</sup> An important point here, necessary to understand the domination component of Bourdieu’s theory,

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27. See BOURDIEU, *supra* note 12, at 115.

28. See *id.*

29. See *id.* at 114.

30. See SWARTZ, *supra* note 5, at 39 (“[Bourdieu] accepts from historical materialism the primacy of class conflict and material interests as fundamental pillars of social inequality in modern societies.”).

31. See Wacquant, *supra* note 9, at 18 & n.33.

32. See BOURDIEU, *supra* note 4, at 164-65. The concept of objectification, which Bourdieu sometimes referred to as misrecognition, has been analogized to the Marxist concept of false consciousness. See SWARTZ, *supra* note 5, at 39.

is that habitus evolved from a system in which dominant groups used physical coercion to maintain the established order.<sup>33</sup> Dominant groups foster the habitus, along with other institutional mechanisms, to provide a more efficient (as opposed to physical coercion) method for reproducing the established order because it enables the dominated to complicitly participate in their own domination.<sup>34</sup>

Habitus becomes ingrained when individuals in a given culture, through the process of objectification, agree upon the value of symbolic capital, such as honor, prestige, and credit.<sup>35</sup> Putting an agreed upon value on symbolic capital reinforces the "well-grounded illusion that the value of symbolic goods is inscribed in the nature of things, just as interest in these goods is inscribed in the nature of men."<sup>36</sup> Modern society's placement of an unquestioned, agreed-upon value for symbolic capital allows domination to occur in a self-automated way—the dominating actors do not have to constantly prove the value of the symbolic goods to create demand in the dominated.<sup>37</sup>

The creation of a habitus through objectification enables a society to switch from violent domination—where one individual exercises force over another individual, such as what occurs in slavery—to symbolic violence, where individuals participate in their own subordination to obtain symbolic capital, such as honor or prestige.<sup>38</sup> Bourdieu provides an example of symbolic violence, occurring in a pre-capitalist society, when peasants agree to work (for very little remuneration) for a prestigious landowner in exchange for gifts<sup>39</sup> and the honor and prestige of being associated with that landowner.<sup>40</sup> Because there is a collective understanding of what these symbolic goods are

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33. See BOURDIEU, *supra* note 4, at 82, 190-91.

34. See *id.* at 190-92.

35. See *id.* at 182.

36. *Id.* at 183.

37. See *id.* at 183-84.

38. See *id.* at 179, 190-92.

39. In the Kabylia societies that Bourdieu studied, gifts did not have as much economic value as symbolic value. See *id.* at 192-93. "[A] present in which what counts is not so much what you give as the way you give it . . ." *Id.*

40. See *id.* at 182.

worth (gifts and prestige), the peasant agreeably participates in his own domination; physical coercion is no longer necessary.

2. *Habitus and Rational Choice Theory.* At this point, a law and economics theorist might ask whether this exchange of labor for prestige is in fact coercive. Instead of coercion, could the exchange be the result of a market exchange where both actors are exercising free choice?<sup>41</sup> Bourdieu's response to such a question would be three-fold. First, in this early example of symbolic violence, the landlord would have resorted to brute coercion of the peasant's labor if the symbolic exchange did not work.<sup>42</sup> Thus, the threat of physical coercion, which shadows all symbolic exchanges in varying degrees, conflicts with the idea of choice. Second, the theory of objectification, or misrecognition, posits that persons are not usually in a position to make a purely free choice because a person's decisions are produced in part by her habitus.<sup>43</sup> Assuming the symbolic system works in the peasant/landlord example, the peasant works for the landlord in exchange for symbolic capital, not because he has a choice, but because it is the only course of conduct the habitus produces in his mind. In other words, persons believe that they are making choices but these choices are limited by ingrained expectations of what they can realistically do.<sup>44</sup>

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41. Such a question draws upon the implicit assumption within law and economics theory, that outcomes are a product of actors making rational choices in order to maximize profits and utility. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000) (explaining the concept of rational choice within the law and economics theory). The idea within liberal individualism that "individuals exist separate from and prior to their social environment and have the ability to choose their values and ends" is another premise that underlies rational choice theory. Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 325 (2005).

42. See BOURDIEU, *supra* note 4, at 191-92.

43. See *id.* at 164-65; SWARTZ, *supra* note 5, at 39.

44. See BOURDIEU, *supra* note 4, at 77 (explaining that the habitus causes persons to believe they are choosing a course of action even where such outcomes are inevitable). For a description of how habitus operates to produce a sense of choice in attorneys, see Dinovitzer & Garth, *supra* note 2, at 3 (explaining that individual "choices and expectations that reproduce patterns of stratification, so long as we recall that the 'dispositions that incline them toward this complicity are themselves the effect, embodied, of domination'" (citation omitted)).

On this point, Bourdieu has been criticized for his structural determinism, in which subordinated individuals are passive victims of a socially constructed environment without the agenic ability to transform social structures.<sup>45</sup> On the other hand, others view Bourdieu's habitus concept as an improvement over other forms of structuralism because the habitus mediates between individuals and action, allowing individuals some agency in determining their outcomes.<sup>46</sup> A final Bourdiesian response to a rational choice theorist would be that access to the same opportunities to participate in market exchanges is not available equally to every person.<sup>47</sup> The availability of choices, the ability to make a "rational" choice, and the outcomes that flow from those choices, are determined by accumulated and inherited capital in its economic, social, cultural, and symbolic forms.<sup>48</sup> The landlord would have enjoyed a wider array of choices than the peasant. Thus, the idea that social outcomes are a product of an actor's free choice in the market is a myth that masks the fact that most differential social outcomes result from pre-existing differences in capital holdings. Like the myth of merit that I discuss in a later section,<sup>49</sup> the free choice/rational choice theory allows dominant groups another narrative to justify their status and evade inquiries into the inequality and unfairness that produces their advantaged position.

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45. See David Gartman, *Culture as Class Symbolization or Mass Reification? A Critique of Bourdieu's Distinction*, 97 AM. J. SOC. 421, 422 (1991).

46. See, e.g., Carle, *supra* note 41, at 370-71 (explaining the view that Bourdieu's theory does allow for some agenic control). Bourdieu himself argued that the habitus concept has some room for agency, since in some instances, "[t]he lines of action suggested by habitus may very well be accompanied by a strategic calculation of costs and benefits." Pierre Bourdieu & Loïc J.D. Wacquant, *The Purpose of Reflexive Sociology (The Chicago Workshop)*, in AN INVITATION TO REFLEXIVE SOCIOLOGY, *supra* note 9, at 61, 131. Though Bourdieu denied that he engaged in structural determinism, he did not develop any detail of how agency is practiced in the habitus model.

47. See, e.g., Pierre Bourdieu, *Forms of Capital*, in THE SOCIOLOGY OF ECONOMIC LIFE 96, 98-99 (Mark Granovetter & Richard Swedberg eds., 2d ed. 2001).

48. See Bourdieu & Wacquant, *supra* note 46, at 124-25 (explaining that the attributes of a rational choice actor "can only be acquired under definite social and economic conditions").

49. See *infra* Part II.

3. *Symbolic Violence and the Law.* As societies develop into modern capitalistic states, symbolic violence begins to occur systematically, that is, through processes that ensure “the reproduction of the established order by its own motion.”<sup>50</sup> Bourdieu identified the law as one such mechanism that enables symbolic violence to operate in modern democratic societies.<sup>51</sup> The production of law (which Bourdieu referred to as “the juridical process”) converts “direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy.”<sup>52</sup> Persons on the outside of the legal field (lay persons) must “submit to the ‘power of form,’ that is, to the symbolic violence perpetrated by those who, thanks to their knowledge of formalization and proper judicial manners, are able to put the law on their side.”<sup>53</sup> By maintaining a logical and aristocratic detachment, lawyers and judges are able to maintain the symbolic value of the legal system as a neutral and trustworthy way for resolving disputes, obscuring the fact that the law allows powerful groups to impose their vision of social order onto the less powerful.<sup>54</sup> Thus, for Bourdieu, common law and civil law processes encapsulate symbolic violence because the subordinated participate in their own subordination by allowing their disputes to be resolved through a process that favors the positions of socially dominant groups.<sup>55</sup>

### C. *Education and the Reproduction of Class Structure*

Bourdieu theorized that modern educational institutions are uniquely situated to foster the objectification process, thus playing a major role in reproducing a society’s class structures. Democratic educational systems<sup>56</sup> replicate existing class structures by

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50. BOURDIEU, *supra* note 4, at 189-90.

51. *See id.* at 188; Bourdieu, *supra* note 18.

52. Bourdieu, *supra* note 18, at 831.

53. *Id.* at 850.

54. *See id.* at 844, 848.

55. *See generally id.* at 839-50.

56. Bourdieu based his theories on the ethnographic research conducted on French secondary and post-secondary education. However, he recognized that his theories would apply to American secondary and post-secondary schools,

giving the school the authority to communicate meanings that have the function of reproducing the arbitrary<sup>57</sup> way that groups are organized.<sup>58</sup> Educational systems communicate meanings that favor the interests of the dominant class in three ways. First, educators teach in a way that mirrors the dominant culture through methods that are sanctioned by the dominant culture,<sup>59</sup> producing a student habitus that sees the pre-existing organizational structure as the natural way that things are.<sup>60</sup> Second, schools reinforce the theme that success is a product of individual merit or an innate gift, rather than any sort of inherited capital, economic or symbolic.<sup>61</sup> Finally, by giving socially approved sanctions an economic value, the educational system adheres to a structure that tends to reproduce economically-based social hierarchies.<sup>62</sup>

Bourdieu used the example of language to explain how teachers mirror and reinforce the dominant culture. In France, teachers must use "university" language, the abstract and detached language of the upper-class, or lose authority.<sup>63</sup> Teachers can also be expected to use upper-class language because they are teaching in the way that they were taught.<sup>64</sup> By using the language of the dominant class, the teacher encourages the belief that this language is the proper language, thus reproducing the dominant class's language and culture in her students.<sup>65</sup> This teaching causes students to recognize the legitimacy of the dominant culture, but to also see the illegitimacy of their

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which are stratified into tiers, much like French schools. See BOURDIEU & PASSERON, *supra* note 6, at xi.

57. Bourdieu defined "arbitrary" as something that "cannot be deduced from a universal principle, whether physical, biological or spiritual." *Id.* at 8. That groups are organized one way over another is arbitrary when you look at the way that groups are organized in the "sum total of present or past cultures or, by imaginary variation, to the universe of possible cultures." *Id.*

58. *See id.* at 5-11.

59. *See id.* at 27.

60. *See id.* at 31-35.

61. *See id.* at 20-21, 167.

62. *See id.* at 152-53.

63. *See id.* at 123-26.

64. *See id.* at 26, 60.

65. *See id.* at 123-26.

own subordinated culture.<sup>66</sup> Thus, students come to view an upper-class way of speaking as “proper” and more literal or colorful language employed as “vulgar.”<sup>67</sup> Throughout the learning process, the student does not see the arbitrary nature of these distinctions.<sup>68</sup>

Language also demonstrates how the French educational system hides the fact that success and rank might result from arbitrary factors (such as inherited capital) rather than innate ability. In order to succeed, a student must master “proper” language early.<sup>69</sup> A student who has inherited “linguistic capital” (a form of cultural capital) by being exposed to complex language transmitted by her family will have an advantage over students whose family members do not speak in a school sanctioned way.<sup>70</sup> Moreover, schools mask the importance of inherited cultural capital, such as linguistic capital, by defining “aptitude” in terms of individual merit and grades rather than as a product of “socially qualified teaching and learning.”<sup>71</sup>

In addition to using merit to mask the social factors that produce academic success, members of dominant groups will often devalue the performance of students who do not come to school with much educational or cultural capital. For instance, working class students who master the language skills necessary to enter post-secondary education in France are nonetheless subject to claims that their speaking is too “forced” and does not demonstrate “ease and distinction or university tone and breeding.”<sup>72</sup> They simply do not have “the ‘gift’” required for academic success.<sup>73</sup> Performance-based evaluations, such as oral examinations, lend themselves to class bias because the examiner has the authority to pass judgment using “the unconscious criteria of social perception on total persons,

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66. *See id.* at 41-42.

67. *Id.* at 118; *see id.* at 116-17, 123-26.

68. *See id.* at 11-15.

69. *Id.* at 118; *see id.* at 158-59.

70. *Id.* at 73.

71. *Id.* at 163-64.

72. *Id.* at 119, 162; *see id.* at 130.

73. *Id.* at 130.



whose moral and intellectual qualities are grasped through the infinitesimals of style or manners, accent or elocution, posture or mimicry, even clothing or cosmetics.”<sup>74</sup>

In addition to producing the habitus, or the mental acceptance of a society’s divisional structures, evaluative examination systems reproduce pre-existing economic differences between groups. The French examination system that Bourdieu studied places students into hierarchical tiers, which tend to reflect pre-existing economic and social differences between students.<sup>75</sup> The system is “democratized” in that secondary schools are open to students from all classes.<sup>76</sup> However, it is a tiered system: students who do well on exams at all stages of their education end up at “elite,” “prestigious” secondary schools, whereas students who do less well on these tests end up at marginalized institutions focusing on technical skills (as opposed to the skills that would enable a student to get into post-secondary schools).<sup>77</sup> French post-secondary schooling appears to have a similar hierarchy, also based on prestige and distinction.<sup>78</sup> Low-status students, excluded from the elite institutions and unable to see the arbitrary nature of the selection system, internalize the ideology of merit and adopt the belief that they deserve to be excluded as a matter of course.<sup>79</sup>

Degrees and diplomas from the various tiers within the French educational system are given different economic values, depending on their place in the hierarchy. The differing economic values conferred on academic degrees can also be viewed as a *status closure* device.<sup>80</sup>

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74. *See id.* at 162.

75. *See id.* at 153-59, 167.

76. *See id.* at 158-59.

77. *See id.* at 158-59.

78. *See id.* at 165.

79. *See id.* at 4-19, 208-10. *See also* Bourdieu & Champagne, *supra* note 17, at 421.

80. *See* BOURDIEU, *supra* note 12, at 133. *See also* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 548-49 (2004) (describing Bourdieu as a social closure theorist).

When class fractions who previously made little use of the school system enter the race for academic qualifications, the effect is to force the groups whose reproduction was mainly or exclusively achieved through education to step up their investments so as to maintain the relative scarcity of their qualifications and, consequently, their position in the class structure. Academic qualifications and the school system which awards them thus become one of the key stakes in an interclass competition which generates a general and continuous growth in the demand for education and an inflation of academic qualifications.<sup>81</sup>

Thus, the type of job and salary available to a graduate depends on the degree to which the student's academic qualifications "have been consecrated by the school and university."<sup>82</sup> Within the same professional post, a graduate with indispensable technical skills but with marginal academic qualifications is paid less than someone with a degree from a more prestigious and elite institution.<sup>83</sup> The privileged students who do well at all stages of their academic career end up with the most prestigious high-paying jobs.<sup>84</sup> The disadvantaged, who struggled to get through the system, most likely receive a degree worth very little.<sup>85</sup> By obscuring the self-preservation interests served by these status closure devices, and instead linking a graduate's hierarchical placement to individual merit, the educational system replicates existing social structures and disguises the unfair ways in which the privileged receive the most benefits from the system.<sup>86</sup>

#### D. *Symbolic Consumption-Taste*

In addition to studying how institutions replicate and reproduce class structures in society, Bourdieu also analyzed the creation of individual class identities through the consumption of goods. A major premise underlying Bourdieu's fieldwork in *Distinction: A Social Critique of*

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81. See BOURDIEU, *supra* note 12, at 133.

82. See BOURDIEU & PASSERON, *supra* note 6, at 4-19, 208-10.

83. See *id.* at 167.

84. See Bourdieu & Champagne, *supra* note 17, at 423-25.

85. See *id.*

86. See *id.*

*Taste*, is that social participants construct class identities through symbolic consumptive and behavioral practices.<sup>87</sup> Participants located near each other in a social space will exercise similar behavioral and consumer choices, sharing a similar *lifestyle*.<sup>88</sup> The ranking and ordering of lifestyle choices is completed through the exercise of *taste*, which translates these choices into signs that have different hierarchical values.<sup>89</sup> Because the dominant class has the most access to media forums in which cultural taste can be defined (e.g. theater reviews, etc.) and because taste is the internalized reflection of the existing social order (where the dominant class has the power), the dominant class is able to allocate value to different behavioral and consumer practices.<sup>90</sup>

Bourdieu noted, “[e]very group tends to set up the means of perpetuating itself beyond the finite individuals in whom it is incarnated.”<sup>91</sup> One way that groups do this is through representation and symbolization, which can come in concrete form (such as a tombstone or statue) but which can also appear through the display of taste and manners.<sup>92</sup> Thus, the outward display of manners and symbolic goods showing the purchaser’s taste cements the “unconscious unity of a class” through “bodily experiences.”<sup>93</sup>

A major opposition that determines the rank of a particular lifestyle is that of *distinction* versus *vulgarity*, which operates on a system of supply and demand.<sup>94</sup> Distinctive practices are ranked high because they are rare and difficult to obtain whereas vulgar practices are ranked low because they are “easy [to obtain] and common.”<sup>95</sup> By way of example, from Bourdieu’s study of consumer

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87. See Weininger, *supra* note 15, at 92.

88. See BOURDIEU, *supra* note 12, at 167-77.

89. See *id.* at 174-75.

90. See *id.*

91. See *id.* at 72.

92. See *id.* at 77.

93. The bodily experience may be “as profoundly unconscious as the quiet caress of beige carpets or the thin clamminess of tattered, garish linoleum, the harsh smell of bleach or perfumes as imperceptible as a negative scent.” *Id.*

94. See *id.* at 176.

95. See *id.*

practices in 1970s France, the upper-class approved the use of highly censored language and slow gestures, signaling passivity and restraint, but found spontaneous verbal outspokenness, agitation, and haste to be vulgar.<sup>96</sup>

In displays of taste, the privileged rely on a “sense of distinction” and signal their status through an “ostentatious discretion, sobriety and understatement.”<sup>97</sup> The display of “legitimate manners” is especially valuable because manners “manifest the rarest conditions of acquisition, that is, a social power over time which is tacitly recognized as the supreme excellence: to possess things from the past.”<sup>98</sup> Occasionally, members of the dominated classes seek to co-opt a marker of a higher social status and *bluff* their way into a higher social condition.<sup>99</sup> The example given is when one adopts body language that signals the “self-confidence, ease and authority of someone who feels authorized.”<sup>100</sup> The bluff is only successful if the participants higher up in the structure believe that a distinguished demeanor is an authentic signifier of the person’s higher condition.<sup>101</sup>

#### E. *The Moral Dimension of Bourdieu’s Theory*

Bourdieu argued that academics and intellectuals have a moral duty to uncover and demystify the myths of institutional domination.<sup>102</sup> If one accepts the premise that symbolic values help constitute the system of social order, then changing and questioning the values we place on the symbolic may “transform the world.”<sup>103</sup> However, in order to oppose dominant social structures, the educational “insider” must overcome two paradoxes: the liar’s paradox<sup>104</sup> and the paradox that arises when a person’s subjective

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96. *See id.* at 177.

97. *Id.* at 249.

98. *Id.* at 71.

99. *See id.* at 252-53.

100. *Id.* at 252.

101. *See id.* at 253.

102. *See* Wacquant, *supra* note 9, at 14; Weininger, *supra* note 15, at 117-18.

103. Wacquant, *supra* note 9, at 14.

104. *See* BOURDIEU & PASSERON, *supra* note 6, at 12.

understanding of herself conflicts with violent class structures.<sup>105</sup>

Bourdieu posits that all teachers who try to speak in opposition from within become embroiled in a liar's paradox: "[w]hat I am telling you is a lie."<sup>106</sup> This paradox arises because educational institutions' implicit role in the propagation of existing systems of domination automatically reduces the authority of anyone who wishes to criticize the existing system from within.<sup>107</sup> The dilemma is that oppositional academics are "trying to destroy and reconstitute an activity even while performing it."<sup>108</sup>

As a result of the liar's paradox, Bourdieu urges academics to do more than argue that the established order is wrong; academics must also study and critique how institutions reproduce the established order.<sup>109</sup> Silence, as to the role that education plays in replicating this order, supports objectification of these institutional processes and contributes to their fertility.<sup>110</sup> The implication is that educators must be willing to critique their own culture.<sup>111</sup>

The second paradox is a result of conflicts between a person's conscious subjective view of herself and what Bourdieu called the "objectivist" view of society's hierarchical structures.<sup>112</sup> Bourdieu urges the observer to look at the objective structures of domination but also at the "consciousness and interpretations of agents [that] are an essential component of the full reality of the social world."<sup>113</sup> When a conflict occurs, the dichotomous view that submission is always bad and resistance is always good

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105. See Wacquant, *supra* note 9, at 7-9.

106. See BOURDIEU & PASSERON, *supra* note 6, at 12.

107. See *id.*

108. Robert Con Davis, *A Manifesto for Oppositional Pedagogy: Freire, Bourdieu, Merod and Graff*, in REORIENTATIONS: CRITICAL THEORIES AND PEDAGOGIES 249 (Bruce Henricksen & Thais E. Morgan eds., 1990).

109. See BOURDIEU, *supra* note 4, at 188-89.

110. See *id.*

111. See Weininger, *supra* note 15, at 117-18. Bourdieu argued that sociologists must be willing to critique their own culture. *Id.* The same idea can be applied to educators.

112. See Wacquant, *supra* note 9, at 7-9.

113. *Id.* at 9.

does not always make social sense. For instance, resistance can be alienating if the person must proclaim “the very properties that mark [him] as dominated.”<sup>114</sup> On the other hand, submission can be empowering, such as when an actor works hard to obscure her class origins to obtain the economic and symbolic rewards available to those with a higher status.<sup>115</sup> This contradiction between submission and domination is, according to Bourdieu, an “unresolvable contradiction’ inscribed in the very logic of symbolic domination.”<sup>116</sup>

## II. BOURDIEU’S THEORIES APPLIED TO LEGAL EDUCATION

This part of the Essay explains how Bourdieu’s theories might be applied to legal education, from a structural and cultural standpoint. The first section looks at how legal education’s ranking and evaluation systems, based on concepts of merit, reproduce the social structure of the legal profession and help reinforce an important theme within the culture of the law itself, a theme that enables continued acceptance of the way our legal system operates. The second section looks at how law schools replicate the image of the legal profession as an upper-class culture and the ways in which these cultural expectations affect students.

### A. *Reproduction of Class Differences Through Tiered Rankings, Examinations, and the Myth of Merit*

Similar to the French educational institutions that Bourdieu studied,<sup>117</sup> American legal education replicates existing class structures by assigning each law school to a tier; ranking students within a law school; and utilizing the bar examination as a gate-keeping mechanism for entry into the profession. These classification methods and entry barriers replicate existing group relations because they advantage persons who already possess cultural or economic capital and disadvantage those who do not. Specifically, persons who do not possess much cultural or

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114. *Id.* at 23.

115. *See id.* at 23-24.

116. *Id.* at 24 (citation omitted).

117. *See* BOURDIEU & PASSERON, *supra* note 6, at 165.

economic capital are more likely to end up at low-status schools, have a low-class rank, or fail the bar exam, thereby receiving less economic value for their law degree (or no law degree at all). On the other hand, persons who have access to cultural capital, in the form, for instance, of a high-quality secondary education and family support for educational pursuits, will be in a better position to obtain admittance to a higher ranking institution.

In fact, a look at the history of American legal education reveals that class exclusion was the explicit goal behind the adoption of many of these ranking procedures. Although law schools and the legal profession no longer practice exclusion based on social origin, recent studies indicate that the structure wrought by our recent history remains—socio-economic status still plays a substantial role in the structure of legal education and the legal profession. Recent studies of the legal profession support the following premises. First, the types of law practice that law graduates will enter into are given varying levels of prestige, from high-level corporate work at large law firms to low-level work representing individual clients in a solo practice setting. Second, the law school attended and how well a graduate did at that law school has a bearing on the status level of the legal work a law graduate will end up doing. Third, students who come to legal education with amassed cultural and social capital are more likely to attend better law schools and achieve higher grades in law school than students who lack the same amount of cultural and social capital. Thus, the level of status and prestige that one can attain in the practice of law is related to law school status and law school performance, which are, in turn, related to cultural capital advantages. As I will explain in the last piece of this section,<sup>118</sup> these differential outcomes, combined with market-forces, have recently led to the creation of what can only be described as an underclass of American attorneys—with no autonomy, no contact with clients, and no job security.

Although socio-economic factors have a major bearing on a student's status and place within the legal profession, these context-based inequalities are not reflected in the dominant discourse. Instead, the place where a student

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118. *See infra* Part VI.

ends up in the legal profession is represented in terms of merit, supported by “objective” test-score entrance requirements and examination-based ranking systems. Thus, the myth of merit encourages law students to mentally internalize the institution’s structures without questioning their arbitrary nature. Perhaps more insidiously, the myth of merit mirrors and reinforces the way that our common law tradition uses themes of equality and objectivity to foster the idea that social outcomes are the fair result of neutral processes rather than the result of pre-existing inequalities.<sup>119</sup> In this way, a habitus is formed that, when it is fully ingrained, causes unquestioning acceptance of the legal profession’s structure as well as the role that the law continues to play in resolving our moral and social problems.

1. *The Historical Evolution of Class-Based Hierarchy Within Legal Education and the Law Profession.* The major historians who have studied American legal education agree that, in the nineteenth and twentieth centuries, elite lawyers created a hierarchical structure within legal education that had the effect of excluding “the great ‘unwashed’ masses” from educational institutions as well as the bar.<sup>120</sup> A brief summary of nineteenth century legal history might be helpful at this point. During the first half of the nineteenth century, entry into the profession was relatively informal; in line with the ideals of Jacksonian Democracy, Abraham Lincoln exemplified the ability of the everyman to practice law after spending time “reading

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119. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 4-6, 212-14 (2007) (explaining the process by which the law employs abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues); *supra* notes 4-20 and accompanying text (explaining Bourdieu’s theory of how the law emphasizes neutrality and objectivity in order to instill public faith in the system, a process that tends to obscure how legal outcomes often favor dominant groups).

120. ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 26-27 (1992). See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 102-24 (1976). While Robert Stevens takes a more measured approach to legal education history than Auerbach’s indignant view, both authors agree that xenophobia and class-based fear played a large role in these exclusionary practices. See also RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 148-59 (1979); ROBERT STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 99-101 (1983).



law."<sup>121</sup> As the power of Jacksonian Democracy faded, legal education moved toward a more structured university affiliated model (although it would not be until the next century that all legal education was centered in a formal setting).<sup>122</sup> The new university law schools marketed themselves as institutions that were uniquely situated to teach America's gentry.<sup>123</sup> They tried hard not to admit immigrants, Jewish applicants, African Americans, women, or any other applicants who did not come from white, male, Anglo stock.<sup>124</sup>

As an alternative to the exclusionary university law, the first part-time law schools were established in the 1860s to provide a legal education to working students and immigrant students.<sup>125</sup> As immigration increased within American cities, more part-time schools sprang up.<sup>126</sup> With lax admission policies, these part-time and night schools provided working students with legal educational opportunities and a means for social advancement.<sup>127</sup>

Most part-time law school graduates took jobs as solo practitioners, in part because the newly emerging "white-

121. See COLLINS, *supra* note 120, at 149-50. A slight exception to this rule would be the appearance of a few elite proprietary law schools during this period, such as the Litchfield School. See STEVENS, *supra* note 120, at 3, 23.

122. See STEVENS, *supra* note 120, at 20.

123. The University of Georgia, in announcing the establishment of a law school marketed themselves as follows:

[I]t is not those only who intend to devote themselves to the law, that we invite to attend our school. There is in our State a large number of young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers. To them a knowledge of the general principles of law is of inestimable value.

*Id.* at 21 (quoting Announcement, Univ. of Ga. Law Dep't. (June 1, 1859)).

124. For instance, at a Yale faculty meeting in 1923, it was proposed that the school not use grades as a basis for admission because doing so would allow admission of foreign students rather than students of "old American" stock. *Id.* at 101.

125. See *id.* at 74.

126. See COLLINS, *supra* note 120, at 155; GRANFIELD, *supra* note 120, at 33; STEVENS, *supra* note 120, at 75.

127. See AUERBACH, *supra* note 120, at 88; STEVENS, *supra* note 120, at 75; JOSEPH T. TINNELLY, PART-TIME LEGAL EDUCATION 5, 12 (1957).

shoe"<sup>128</sup> corporate law firm adhered to strict hiring policies that excluded graduates from low-status schools (defined, at the time, as any school that was not Harvard, Yale, or Columbia).<sup>129</sup> The result was that graduates of the low-status schools, for the most part, went into practice as solo practitioners, while graduates from the elite university-centered law schools practiced law at the nation's emerging corporate law firms.<sup>130</sup> Elite attorneys, believing that the influx of immigrant and ethnic attorneys threatened the status of the legal profession, characterized the night-school trained solo practitioners as corrupt shysters with no professional standards or discretion.<sup>131</sup> Personal injury lawyers, in particular, were maligned for not being able to

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128. The adjective "white shoe" derives from the "white buck shoes that were a fashion requirement within elite social organizations in the 1950s." Investopedia Dictionary, <http://www.investopedia.com/terms/w/whiteshoe.asp> (last visited Oct. 11, 2008).

Historically, the term "white-shoe" conveyed class envy and a gentle ridicule of the educated effete. The wealthy could afford special shoes for boating, tennis, and other genteel pursuits, and in the summer they wore white bucks—perhaps with a bow tie and a seersucker suit—to the exclusive Wall Street firms where they worked.

Elizabeth Chambliss, *The Shoe Still Fits: The White Buck Is Gone From Elite Law Firms, But The Snobbery It Represented Lives On*, 4 LEGAL AFF. 18 (2005).

129. See AUERBACH, *supra* note 120, at 24, 26-27. Apparently, John Foster Dulles was rejected from a job at Sullivan & Cromwell because his law degree, from George Washington University, was not acceptable. *Id.* at 25-26. Even a successful Jewish graduate of Harvard or Columbia would not be accepted as an associate at the emerging white shoe firms, which refused to hire non-WASP graduates of the elite schools. *Id.* at 25-27.

130. See *id.* at 5, 62; STEVENS, *supra* note 120, at 92.

131. See AUERBACH, *supra* note 120, at 41-42; TINNELLY, *supra* note 127, at 12. In her historical accounts of class issues within turn of the century legal institutions, Susan Carle described a few of the "ethical" complaints leveled against immigrant and working class attorneys. Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 8 (1999) [hereinafter Carle, *Justice*] (quoting an ABA committee report which bemoaned "the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, [who] pursue their nefarious methods with no check save the rope of sand of moral suasion"); Susan D. Carle, *How Should We Theorize Class Interests in Thinking About Professional Regulation?: The Early NAACP as a Case Example*, 12 CORNELL J.L. & PUB. POL'Y 571, 584 (2004) [hereinafter Carle, *Class Interests*]. Here Carle quotes one ethicist who stated that "the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals." *Id.* (quoting Charles A. Boston, *A Code of Legal Ethics*, in 20 THE GREEN BAG 224, 228 (Sydney R. Wrightington ed., 1908)).

“speak the King’s English correctly,” leading to the conclusion that “[t]hese men by character, by background, by environment, by education were unfitted to be lawyers.”<sup>132</sup> Lawyers who accepted criminal defense work were similarly disparaged.<sup>133</sup> A common theme in the attack on low-status lawyers was that they were corrupted by the pursuit of legal fees.<sup>134</sup> Lawyers should not, thought the elite lawyers of the day, actively solicit clients.<sup>135</sup> Rather, they should await clients “[l]ike young maidens awaiting suitors.”<sup>136</sup> Implied in the dichotomy between the corrupt ambulance chasing attorney and the virtuous passive attorney was the Aristotlean idea that only lawyers of pre-existing wealth and means are in a position to maintain the dignity of the profession.<sup>137</sup>

At the beginning of the nineteenth century, as ethnic immigrant attorneys gained more power, many in conjunction with Irish-Catholic political machines in urban areas, white Anglo-Saxon protestant attorneys, fueled by

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132. AUERBACH, *supra* note 120, at 48-49 (citing Isidor J. Kresel, *Ambulance Chasing, Its Evils and Remedies Therefor*, in 52 NEW YORK STATE BAR ASSOCIATION: PROCEEDINGS OF THE FIFTY-SECOND ANNUAL MEETING 323, 337 (1929)). This concern over fitness for the practice of law ultimately led to the creation of character and fitness requirements for state bar applicants. *See id.* The character examination would “eliminate those who lacked proper antecedents, home environment, education, and social contacts.” *Id.* at 49.

133. *See id.* at 26.

134. *See id.* at 48-49. A leading lawyer characterized the contingency fee system as “the great blot on the history of the American bar” because the lure of money encouraged “undesirable persons” to enter the profession. *Id.* at 48 (quoting REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 86 (1919)).

135. *See id.* at 41.

136. *Id.*

137. *See id.* The ideal of the passive, virtuous attorney was ultimately canonized in the ABA’s Code of Professional Conduct, which outlawed attorney advertising and direct solicitation of clients. *Id.* at 42-43. Susan Carle has written a detailed historical account that seeks to reconcile class issues with the adoption of the first Code of Professional conduct, in 1908. *See, e.g.*, Carle, *Justice, supra* note 131. Carle studied the issue again, in her study of class issues within the NAACP. *See Carle, Class Interests, supra* note 131, at 575-76. Professor Carle agrees, in part, with Auerbach’s position that elite attorneys drafted the Code of Professional Conduct in response to nativist fears and in an effort to maintain their class privileges. *See id.* at 584-85. But ultimately, she points to historical documents showing that the debates surrounding the Code of Professional Responsibility were more nuanced and full-bodied than the overarching class theory that Auerbach posited. *See id.* at 584-90.

nativist class fears and xenophobia, worked to create exclusionary educational policies to combat the threat of the corrupt immigrant attorney.<sup>138</sup> Elite members of the profession charged that the night schools, with their low admissions requirements (many did not require any college coursework) and lecture instruction methods, were “unqualified” to prepare students for the practice of law.<sup>139</sup> Other critics mounted professionalism attacks on the practice-oriented schools, arguing that the night schools were failing to produce socially responsible attorneys.<sup>140</sup> Thus, the part-time and “night” schools began receiving the derogatory remark of being nothing more than “trade schools,” incapable of instilling any professional ideals into their student bodies.<sup>141</sup>

Concern over legal education standards grew until the point where members of the American Bar Association (ABA) and the American Association of Law Schools (AALS) mobilized to raise standards and institutionalize those

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138. See COLLINS, *supra* note 120, at 152-53; STEVENS, *supra* note 120, at 92-103. The project of raising education standards for admission to the bar was carried out in part by the nation's first local bar associations, which were country-club like social organizations, formed for the purpose for drawing together the best elements of the profession. See AUERBACH, *supra* note 120, at 62-63. The American Bar Association was founded with the same ideals in mind. ERWIN N. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 23 (1965) (“[The ABA's] objectives were chiefly social, and it was a rather exclusive organization, open only to those who were regarded as leaders of the bar in their communities.”). See also Amy R. Mashburn, *Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 669-70 (1997).

139. See AUERBACH, *supra* note 120, at 97-101; COLLINS, *supra* note 120, at 155; TINNELLY, *supra* note 127, at 8-11.

140. See AUERBACH, *supra* note 120, at 99-101. Auerbach points out that the professionalism arguments of this time period were thinly veiled anti-semitic and nativist rants. *Id.* at 99.

141. See STEVENS, *supra* note 120, at 113, 114-15 (quoting JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 70 (1914)). Another force in the conflict between the night schools and the university schools was the role that relatively new university law professors played to establish their professional identity and control within the education marketplace. See generally John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985). Joining forces with the ABA and AALS to advocate for higher standards was a way for Langdellian university law professors to drive out the practitioner professor incumbents. See *id.* at 321-22.

heightened standards through state bar examiners. In the 1920s, the ABA, together with the AALS, created a body of accreditation requirements that excluded many of the part-time schools with admissions requirements and curricular offerings deemed too lax.<sup>142</sup> In turn, state bar examiners began requiring a diploma from a school accredited by the American Bar Association, in order to sit for that state's bar examination.<sup>143</sup> Whether attributable to these higher standards or the financial effects of the depression, during the 1930s, many low-status schools went out of business.<sup>144</sup>

The history of American education in the late nineteenth and early twentieth century illustrates how classist and xenophobic forces helped mold the shape of modern legal education. Fast-forwarding to contemporary American legal education, we see that class-based elitism remains within the structure of legal education, but it is now cloaked in terms of objective merit and individual ability. Now that we no longer have country-club lawyers keeping the gates of our legal institutions locked from within, the idea of a meritocracy has become more difficult to criticize.<sup>145</sup> Although it is tempting to celebrate the fact that elite American law schools have gotten rid of overt ethnic bias and will open their doors to anyone with a high enough LSAT score, studies support the idea that the law school meritocracy is still a myth. Professional divisions are still being produced, although they are now based on pre-existing socio-economic differences instead of racial or ethnic differences.<sup>146</sup>

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142. See STEVENS, *supra* note 120, at 115; Warren A. Seavey, *The Association of American Law Schools in Retrospect . . .*, 3 J. LEGAL EDUC. 153, 153-67 (1950).

143. See Seavey, *supra* note 142, at 162-63, 166-67.

144. See STEVENS, *supra* note 120, at 177-78.

145. See, e.g., David Brooks, *Bobos in Paradise*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 304-10 (David B. Grusky ed., 2007) (celebrating the changes in the New York Times Weddings and Celebrations pages from the 1950s to the present, wherein coverage moved from limited reports of WASP weddings to more diverse coverage of highly credentialed nuptials).

146. There is a strong relationship, of course, to socio-economic disadvantage and race. Years of violence and apartheid have created severe socio-economic disadvantages that obstruct the ability of many poor African Americans to succeed in the education game. See, e.g., William Julius Wilson, *The Sources of Poverty and the Underclass*, in SOCIAL STRATIFICATION, *supra*

2. *The Rankings System in Contemporary Legal Education.* Accreditation accomplished the ABA and AALS' goal of driving out the least desirable law schools, but historical *de facto* stratification within legal education remains intact. Contemporary American law schools are striated into a tiered continuum, with elite schools at the top and low-status schools at the bottom.<sup>147</sup> An informal hierarchical ranking system has been in place as far back as 1870, when Harvard Law School's president declared that he would make Harvard the best law school by making it the "longest and toughest."<sup>148</sup> John Henry Schlegel uncovered a proto law school rankings system within the West publication, the *American Law School Review*, as early as 1902.<sup>149</sup> Since 1990, the *U.S. News and World Report* has made the structure of American legal education publicly available in print and online.<sup>150</sup> The magazine places law schools into four tiers, with the most elite schools at the top and the low-status, "local" law schools filling the

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note 145, at 340-49; Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, in SOCIAL STRATIFICATION, *supra* note 145, at 349-59. The segregation and discrimination continues to occur, but dominators express their discriminatory intent in terms of class, not race. See Wilson, *supra*, at 346-47. For instance, in one study, employers (both black and white) expressed negative feelings about employing inner-city blacks because of perceptions that the applicants would not have proper language skills. See *id.* One of the major problems of a class analysis that does not account for race is that a color-blind class analysis ignores inquiry into the violent, discriminatory roots of class disadvantage. Because it is not illegal to discriminate against someone based on their class, blame is diffused. Moreover, if intentional discrimination or segregation is still occurring, it is easily masked in terms of class rather than color.

147. See GRANFIELD, *supra* note 120, at 123; PHILLIP C. KISSAM, THE DISCIPLINE OF LAW SCHOOLS 19-23 (2003).

148. Richard Buckingham et al., *Law School Rankings, Faculty Scholarship, and Associate Deans for Faculty Research* 7 (Suffolk Univ. Law Sch. Research Paper, Working Paper No. 07-23, 2007), available at <http://ssrn.com/abstract=965032> (citing Paul D. Carrington, *On Ranking: A Response to Mitchell Berger*, 53 J. LEGAL EDUC. 301, 301 (2003)).

149. Schlegel, *supra* note 141, at 319 (finding that a review of the faculty announcements in that publication reveals a "nascent pecking order" where provincial state law schools—Montana and North Dakota—were at the bottom and Chicago, Michigan, Columbia, and Harvard were at the top).

150. See David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249, 251-56 (1997). Although there are other law school rankings systems, the most prominent is the ranking system conducted by the *U.S. News and World Report*. *Id.* at 251.

bottom tiers.<sup>151</sup> Large law firms accept the *U.S. News and World Report* as credible authority and make hiring decisions based on it.<sup>152</sup> By basing the rankings on factors that already support a school's elite status (LSAT scores, career placement, reputation), schools who have long held elite status (e.g. Harvard, Yale, University of Pennsylvania, University of Chicago, Stanford)<sup>153</sup> are guaranteed to appear within the top of this ranking system. Indeed, the list of top law schools that appear every year in the *U.S. News and World Report* do not differ, in great part, from those schools that were considered elite in the 1920s.<sup>154</sup>

By using LSAT scores and undergraduate grades as ranking factors, the *U.S. News and World Report* rewards elite law schools for their self-perpetuating admissions policies while access law schools, committed to providing a legal education to the underserved, are forever consigned to the bottom tiers.<sup>155</sup> The historic disdain for practice-oriented schools<sup>156</sup> also continues. The *U.S. News and World Report* rankings reward schools that develop a reputation for research and scholarship and devalue schools that emphasize teaching and practice skills.<sup>157</sup> Many

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151. See *Law Rankings, 2008 EDITION: AMERICA'S BEST GRADUATE SCHOOLS: U.S. NEWS AND WORLD REPORT* 44, 44-47 (2007).

152. See Jonakait, *supra* note 3, at 876-77 (citing William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 *IND. L.J.* 183, 194 (2006)).

153. When a group of NYU professors were asked, in 1954, to list the top-rated law schools in the country, they named: Harvard, Yale, Columbia, Pennsylvania, Michigan, Stanford, California, Minnesota, Tulane, and Chicago. Yamada, *supra* note 150, at 250.

154. See *id.*

155. See KISSAM, *supra* note 147, at 270.

156. See *supra* note 130 and accompanying text.

157. See, e.g., WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS* 90 (2007) (explaining that legal academia disincentivizes innovation in teaching because it conflicts with factors [such as scholarship] that contribute to a law school's standings and prestige); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 *SAN DIEGO L. REV.* 347, 360-61 & n.144 (2001) (citing Editorial, *How U.S. News Ranks Graduate Programs*, *U.S. NEWS & WORLD REPORT*, Apr. 10, 2000, at 59). In his influential article on learning theory and legal education, Schwartz explains: "[The] emphasis on scholarship derives from law schools' aspirations for upward mobility within the law school hierarchy. Law schools enhanced their prestige based, in significant part, on faculty

schools with innovative practice-centered curricula remain at the bottom of the rankings.<sup>158</sup>

The law school ranking system sets a process in motion that perpetuates the historic stratification within the legal profession. In terms of the way that the law school attended determines one's law practice, little has changed from the turn of the century when graduates from elite schools handled mostly corporate clients and graduates of the lower-rung schools handled personal clients.<sup>159</sup> The consensus among the scholars who study sociological trends in legal education is that persons from disadvantaged backgrounds are more likely to attend a low-tier school, whereas graduates of elite schools are "overwhelmingly the children of advantage."<sup>160</sup> Graduates from elite schools are better able to secure high-paying, high-status jobs at large law firms while, for the most part, graduates from low-status law schools enter practice making substantially less money, representing personal clients and small

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publications; teaching skill or effectiveness is not considered in the [U.S. News and World Report] rankings." *Id.* at 360. See also Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 U. TOL. L. REV. 517 (2007); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools,"* 100 DICK. L. REV. 647-48 (1996).

158. See Garon, *supra* note 157, at 523. See also Posting of Michael Dorf to Dorf on Law, <http://michaeldorf.org/2007/09/did-chemerinsky-dodge-bullet.html> (Sept. 16, 2007, 12:01 EST) ("The schools that have made [practical skills training] central to their curriculum, e.g., CUNY, Northeastern, have had some local success, but that has not translated into moving themselves [sic] schools up in the pecking order or getting the innovations widely adopted.").

159. See STEVENS, *supra* note 120, at 92, 96; Jonakait, *supra* note 3, at 864-65 (citing HEINZ ET AL., *supra* note 2). In line with historic trends, corporate law firm work continues to carry a higher level of symbolic status and prestige, whereas personal client representation continues to be marginalized. See HEINZ ET AL., *supra* note 2, at 81-87 (explaining that the attorneys surveyed for the studies ranked corporate work as having the highest prestige and personal client representation as having the lowest prestige).

160. See DINOVTZER ET AL., *supra* note 2, at 20 ("The more selective the law school, the more likely it is to educate the children of relative privilege, and the less selective schools are notably more accessible to the less privileged students."); HEINZ ET AL., *supra* note 2, at 50 ("[P]ersons with prestigious law degrees . . . are more likely to have a privileged socioeconomic background, to have been born into an upper-class or upper-middle-class family, and to have useful social connections."); Dinovitzer & Garth, *supra* note 2, at 33-35.



businesses.<sup>161</sup> While recent studies indicate that students from less elite schools are having more success at finding jobs at large law firms,<sup>162</sup> the data also suggests that the students who do succeed in getting these jobs (whether from urban law schools or elite law schools) have high socio-economic indicators.<sup>163</sup> The trend appears to be that with heightening law school admissions standards, more students from advantaged backgrounds are attending low-status schools.<sup>164</sup> The night school tradition of providing a legal education to working-class students appears to be diminishing in strength.<sup>165</sup> In line with Bourdieu's theories, having the connections that come from an advantaged background seems to provide social capital that is helpful for obtaining a high-paying job at a large law firm.<sup>166</sup>

The *After the JD* data detailing the experiences of students who graduated from low-status schools but who have obtained large law firm jobs provides further support that stratification, based on the rank of law school attended, continues to exist. For instance, the statistics

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161. With respect to how law school attended determines practice area, see David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 497 (2007) ("Compared to elite graduates, urban graduates are more likely to work as solo practitioners . . . They are also much less likely to work in large firms."). With respect to salary differentials, the median salaries for recent graduates of third-tier and fourth-tier schools was \$60,000 and \$56,341, respectively, whereas the median salary for graduates from a top ten school was \$135,000. Jonakait, *supra* note 3, at 878 (citing DINOVTZER ET AL., *supra* note 2). See also Joyce Sterling et al., *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389, 414 (2007) (explaining that data from the *After the JD* study indicates that graduates from elite law schools make substantially more money than graduates from non-elite schools).

162. Wilkins et al., *supra* note 161, at 444-45. Graduates of lesser status schools are being hired by the large law firms, but law firms employ a "sliding scale" for credentials. See *id.* at 454, 461. As the law school's status decreases, the required academic and extra-curricular credentials (G.P.A., class rank, and law review) increase. See *id.*

163. *Id.* at 502. See also Sterling et al., *supra* note 161, at 409-10.

164. Wilkins et al., *supra* note 161, at 458.

165. See *id.* at 404-05 ("In general, law schools are comprised of relatively few individuals from highly disadvantaged backgrounds.").

166. See *id.* at 409-10. But see ZEMANS & ROSENBLUM, *supra* note 2, at 95 (finding a statistically significant relationship between the prestige of a law school and a student's social background [measured by the occupation of the father] but not finding a statistically significant relationship between an attorney's social background and the prestige of her law practice and setting).

show that even when graduates from low-status schools succeed in obtaining a job at a large law firm, after two to three years, these graduates are making substantially less money than their more credentialed counterparts.<sup>167</sup> Within the large firms, graduates from top schools are more likely to perform high-prestige work that focuses on securities and general corporate law, whereas graduates from lesser schools will specialize in lower-status work such as personal injury defense, family law, or general practice.<sup>168</sup> Finally, students from less elite schools also face a lesser probability of making partner than associates with more elite credentials.<sup>169</sup>

3. *Class Rank.* Ranking students within a law school, based on grades they receive through the case-book law school examination system<sup>170</sup> also replicates pre-existing structures. Class rank and a competitive selection process for law review membership began in earnest in 1887, when Harvard established its law review and selected members based on their academic rank.<sup>171</sup> Most of the other university-centered law schools followed Harvard's lead and established their own student-edited law reviews that invited members based on academic performance.<sup>172</sup> The class rank system grew further when newly-emerging corporate law firms began basing hiring decisions on a student's class rank and law review membership.<sup>173</sup>

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167. See Wilkins et al., *supra* note 161, at 497.

168. See *id.* at 492.

169. See *id.* at 482 (explaining that a graduate from a top law school has a twenty-one percent chance of becoming partner at a large law firm, while a graduate from a non-elite school has an eight percent chance). Another study indicated that in a pool of large law firms, seventy percent of all partners graduated from one of thirteen top schools. *Id.*

170. Similar to the LSAT, Charles Langdell's casebook method (of which the law school exam is a product) also arose out of the desire to use objective principles to "winnow[ ] out large numbers of students, allowing only the 'fittest' and the most able (who also happened to be the most affluent and Anglo-Saxon) to survive." Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 84 CAL. L. REV. 1449, 1481 (1997) (citing STEVENS, *supra* note 120, at 55).

171. See AUERBACH, *supra* note 120, at 27.

172. See *id.* at 27, 30.

173. See *id.* at 27-28. While the newly emerging corporate law firms used academic merit to make hiring decisions, the process was not a pure meritocracy. *Id.* For the most part, academically talented black, Jewish, and

The class rank system has not changed substantively from its origins at Harvard in 1887.<sup>174</sup> Class rank, based on grades received on law school examinations, continues to serve as the competitive selection process for membership on law review, law school honors, and as a gate-keeping mechanism for legal employers.<sup>175</sup> Legal employers use a student's class rank to determine who they will interview for positions, refusing to consider students who do not make the strict cut-off point.<sup>176</sup> Moreover, even if a law firm elects to interview students from lower-tiered schools (and many will not), the class rank cut-off point for graduates at lower-tiered schools is significantly lower than where it is for graduates at more prestigious schools.<sup>177</sup> Thus, similar to what occurs with the overall ranking of law schools, the economic value of a law degree will depend on the class rank of the student.<sup>178</sup>

The class ranking system favors students who have amassed cultural and economic capital over others with less capital. For instance, students who have gone to high quality secondary and undergraduate schools are better able to master exam taking skills than students who have had less exposure, in secondary and undergraduate education, to rigorous analysis and logic.<sup>179</sup> Or, students

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female law school graduates were excluded from these law firms. *Id.* at 29-30.

174. While some of the more elite schools have abolished the class-rank system, the lower-status schools continue to employ the system. *See, e.g.,* Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 JURIMETRICS J. 413, 433 (2005) (explaining that Yale and University of California–Berkeley follow an honors/pass/fail system that does not utilize traditional class ranks).

175. *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 81 (2004); KISSAM, *supra* note 147, at 52; Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 405-06 (1994) (quoting Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 411-12 (1997)).

176. *See* KISSAM, *supra* note 147, at 52. *See also* John M. Conley, *Tales of Diversity: Lawyers' Narratives Of Racial Equity in Private Firms*, 31 LAW & SOC. INQUIRY 831, 841-42 (2006).

177. *See* David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response To Sander*, 57 STAN. L. REV. 1915, 1929 n.53 (2005).

178. *See, e.g.,* KISSAM, *supra* note 147, at 52-53.

179. In her article "*Boalt-ing*" *Opportunity?: Deconstructing Elite Norms in Law School Admissions*, 6 GEO. J. ON POVERTY L. & POL'Y 199, 217 (1999), Abiel

who can afford to attend law school without having to work will have advantages over students who must balance a job and child-care responsibilities while studying law.<sup>180</sup> It does not help that many law schools deemphasize factors that, if afforded greater weight, might create broader opportunities for academic distinction and merit. For instance, in many law schools, coursework that emphasizes more contextualized forms of communication and analysis, such as client counseling, alternative dispute resolution, trial advocacy, and negotiation, are considered non-rigorous and graded on a pass/fail/no-credit basis.<sup>181</sup> The work done in these classes does not affect a student's class rank. As another example, there is no room in the class rank system for a student to improve her class standing through "non-academic" work such as community service or pro-bono work. Some might argue that class rank outcomes are genuinely merit-related—students with greater natural talent and work ethics can be expected to perform better in law school than students with less "merit." What this merit-based argument fails to account for, however, is that the cultivation of talent and a work ethic requires the

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Wong explains that when the casebook method was first introduced, students with less formal educations were at a major disadvantage. *Id.* "Because the case-method was completely removed from any real-life experience, less-advantaged, self-taught individuals were placed at a substantial disadvantage in law schools emphasizing abstract, hypothetical teaching, vis-à-vis wealthier students with more formalized education." *Id.* Arguably, these disadvantages continue to exist today, where there are major differences in the rigor and quality of education opportunities in America. See also Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1719, 1724-25 (1995) (arguing that merit-based academic success depends on access to cultural and educational capital, which the objective criteria tend to ignore).

180. See Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities For Multicultural Students in Law School*, 31 NEW ENG. L. REV. 739, 750 (1996) (citing Linda F. Wightman, *Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men*, LSAC RESEARCH REPORT SERIES (1996)). The evidence for this thesis also exists anecdotally and by analogy to the experiences of students studying for the bar exam. See, e.g., Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 495 n.657 (2003) [hereinafter Glen, *Thinking Out of the Bar Exam Box*]; Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1701 nn.13-14 (2002) [hereinafter Glen, *When and Where We Enter*].

181. See Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 416 (1994).

deployment of cultural capital, in the form, for instance, of the knowledge and encouragement that a family transmits to a student at home.<sup>182</sup> The reality of our narrowly defined concept of law school merit is that it allows the advantaged to use inherited capital to retain their elevated station and place the disadvantaged on a lower level, maintaining the existing structure.<sup>183</sup>

4. *A New Lawyer Underclass?* The tiers, ranks, and differential levels of prestige, detailed above, have led to a recent (and alarming) stratification trend within the legal profession, one that is linked to both class rank and law school prestige. In the past few years, large law firms have begun employing temporary attorneys, at hourly rates with no benefits, to perform low-level legal tasks, such as large-scale document reviews and coding.<sup>184</sup> The depressing reports, keyed in by temporary attorney bloggers, read more like an account of pre-*Lochner* era working conditions than a professional, autonomous work environment.<sup>185</sup> The anonymous temporary attorney bloggers tell stories of spending long hours in front of computer screens reviewing and coding documents in dreggy basement workspaces with dead cockroaches on the floor, blocked exits, and overflowing bathrooms.<sup>186</sup> Workers must obtain permission

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182. See, e.g., Bourdieu, *supra* note 47, at 96, 98-99 (explaining within the context of education the role that cultural capital plays in the cultivation of talent and academic achievement).

183. See Bourdieu & Champagne, *supra* note 17, at 423-25.

184. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1, available at [http://online.wsj.com/public/article\\_print/SB119040786780835602.html](http://online.wsj.com/public/article_print/SB119040786780835602.html); Barbara Ehrenreich, *CEOs vs. Slaves*, THE NATION, May 29, 2007, <http://www.thenation.com/doc/20070611/ehrenreich>.

185. See, e.g., Black Sheep of Philly Contract Attorneys, <http://blacksheepcontractatty.blogspot.com> (last visited Oct. 11, 2008); My Attorney Blog, *The Life of a Contract Attorney in Temp Town*, Washington D.C., <http://www.myattorneyblog.com> (last visited Oct. 11, 2008); Temporary Attorney: The Sweatshop Edition, <http://temporaryattorney.blogspot.com> (last visited Oct. 11, 2008). See also Julie Tiedman, *Slaves of New York*, THE AM. LAW., Mar. 2006, at 19, 19. Workers must obtain permission to use the bathroom and are not allowed to leave the premises to, for instance, walk outside to get a cup of coffee, unless it is during the forty-five minute lunch time allocation. See *id.* See also Posting of helpme123 to Temporary Attorney: The Sweatshop Edition, <http://temporaryattorney.blogspot.com> (Jan. 28, 2008, 00:16 EST) [hereinafter Posting of helpme123] (detailing the work requirements for a document review job at a major New York law firm).

186. See Posting of helpme123 to Temporary Attorney: The Sweatshop

to use the bathroom and are not allowed to leave the premises to, for instance, walk outside to get a cup of coffee, unless it is during the forty-five minute lunch time allocation.<sup>187</sup> Temporary attorneys do not do legal research, they do not go to court, and do not ever meet with clients.<sup>188</sup> The attorneys who take these temporary jobs graduated from low-tier institutions and do not have the academic credentials to acquire jobs as associates at the large law firms.<sup>189</sup> With temporary attorneys, large law firms appear to have created a new lawyer underclass that greatly conflicts with the idea that attorneys are members of a noble, autonomous profession. Moreover, the same profit incentives that caused law firms to utilize temporary attorneys are now leading law firms to embrace the benefits of globalization and outsource low-level, routine legal work to India, where the market rate for attorneys is \$6,000 a year—or \$2 an hour.<sup>190</sup> Although the broader subject of the effects of late-capitalism and globalization on the legal profession and professional identity is outside the scope of this Essay,<sup>191</sup> the institutionalized hierarchical structures within legal education are playing a role in these new developments.

5. *The Bar Examination.* Because it functions as a barrier to entry into the profession, the bar examination is perhaps the strongest mechanism that tends to replicate the pre-existing social makeup of the legal profession.

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Edition, <http://temporaryattorney.blogspot.com> (July 14, 2008, 2:20 EST) (describing the smell of overflowing bathrooms in the basement document review workspace as that of “an open sewer”); Triedman, *supra* note 185, at 19 (describing temporary attorneys working twelve hour days in “windowless basement room[s] littered with dead cockroaches” with “six or seven” blocked exits).

187. *See id.* *See also* Posting of helpme123, *supra* note 185.

188. *See* Arin Greenwood, *Attorney at Blah*, WASH. CITY PAPER, Nov. 19, 2007, available at <http://www.washingtoncitypaper.com/display.php?id=34054>.

189. *See id.*; Efrati, *supra* note 184, at A1, A11.

190. *See* Daniel Brook, *Are Your Lawyers in New York or New Delhi*, LEGAL AFF., May/June 2005, [http://www.legalaffairs.org/issues/May-June-2005/scene\\_brook\\_mayjun05.msp](http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp); Arin Greenwood, *Inside India's Hottest Legal Outsourcing Firm: Manhattan Work at Mumbai Prices*, 93 A.B.A. L.J. 36, 40 (2007), [http://abajournal.com/magazine/manhattan\\_work\\_at\\_mumbai\\_prices/](http://abajournal.com/magazine/manhattan_work_at_mumbai_prices/).

191. For an in-depth look at globalization, outsourcing, and its effect on the legal profession, see Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007).

Although the bar examination is not conducted under the auspices of a legal educational institution, its structure and format mirror that of written law school exams.<sup>192</sup> The currently accepted justification for the traditional bar examination is that it screens out applicants who are not fit for law practice.<sup>193</sup> The high-stakes pressurized format of the bar examination is justified because "the life of the lawyer is inevitably one of constant testing."<sup>194</sup> However, like the status-based classification scheme of law schools, the origins of the modern American bar examination also has roots as an attempt by the upper-class to exclude members of the lower classes.<sup>195</sup> As explained above, the influx of immigrant and ethnic attorneys around the turn of the century posed a great threat to the legal profession's upper-class image and ideals.<sup>196</sup> Accordingly, the campaign carried on by the ABA and the AALS to create a written examination requirement for admission to practice law has been characterized as "an effort to reassert traditionalistic upper-class and WASP monopoly over legal practice."<sup>197</sup>

Notwithstanding the exclusionary goals of the original proponents of the bar examination, the bottom line is that those who fail the examination are refused entry into the profession and access to its economic benefits. The bar examination operates as the ultimate status closure mechanism<sup>198</sup> by limiting the supply of lawyers to ensure

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192. See COLLINS, *supra* note 120, at 153-54.

193. See, e.g., Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—"Do The Work!"*, 40 CAL. W. L. REV. 321, 335 (2004).

194. Erwin N. Griswold, *In Praise of Bar Examinations*, 60 A.B.A. J. 81, 82-83 (1974) (citing BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 160-62 (1931)).

195. COLLINS, *supra* note 120, at 153-56.

196. See *id.* at 156.

197. *Id.* But see Daniel R. 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, 1200 (1995) (citing STEVENS, *supra* note 120, at 21) (Hansen argues that the written bar examination arose to replace oral examination procedures; there was no specific intent to exclude students from less-elite law schools).

198. See *supra* text accompanying notes 80-86. In addition to the bar examination, the evolution of modern fitness standards might also be seen as a status closure mechanism designed to limit the supply of attorneys in order to halt salary erosion.

that the price of legal services remains elevated.<sup>199</sup> One theory is that these economic concerns have been driving recent efforts by states to enact higher bar passage standards.<sup>200</sup> Although a common justification for increasing bar passage standards has been that law school graduates are of inferior quality than those in previous generations, evidence showing an oversupply of attorneys in the labor market gives credence to the status closure theory.<sup>201</sup> Attempts to heighten bar passage standards could be, in reality, an attempt to limit the number of attorneys entering the job market in order to halt salary erosion.<sup>202</sup>

Another substantive problem with the bar examination is that its structure is grounded in the older, white-shoe law firm mentorship model which presupposes that the bar examination does not need to test practice skills because attorneys do not need real-life practice skills when they begin work. Rather, lawyers can expect to receive skills instruction on the job, through the mentoring and instruction of the firm's senior associates and partners.<sup>203</sup> Thus, for the elite large law firms and the law school graduates who will work for these firms, all that is necessary to enter the profession is the ability to master the structure and form of the test.<sup>204</sup> The bar examination does not assess whether or not attorneys have the skills necessary to succeed in a small firm or sole practice, where

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199. See Kidder, *supra* note 80, at 548-49, 555. Class rank may also function as a status closure device because it reserves access to the legal profession's most valuable economic benefits—the exorbitant salaries paid by the elite law firms—to those students who meet the rigid credential requirement of a high class rank.

200. See *id.* at 547-63.

201. See *id.* at 552, 556-63.

202. See *id.* at 581-82. Regardless of the reasons for the higher standards, Professor Kidder argues that those higher standards have a disparate impact and create unfair results for bar applicants of color. *Id.* at 581-82.

203. See Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons From the Medical Profession*, 53 J. LEGAL EDUC. 340, 355 (2003) (explaining that the understanding for law students was that licensure was merely the first step toward professional competence; professional competence came later, after training and mentoring from law firm partners and senior associates bridged the gap between licensure and practice competence).

204. In recent years, the large law firms are allocating less resources and time to mentoring young associate attorneys. See *id.*



mentoring opportunities are limited.<sup>205</sup> There is also a curricular effect—because the bar examination does not assess practice skills, but rather, places value on abstract knowledge of legal rules, practice skills tend to be devalued within law school curricula.<sup>206</sup>

Persons who come from disadvantaged socio-economic backgrounds have a more difficult time with the bar examination than those who have access to more educational and economic capital.<sup>207</sup> As is the case with law school examinations, students who received quality secondary and undergraduate educations are more likely to have greater test-taking skills than those who did not.<sup>208</sup> Students who can afford to take commercial bar exam preparation classes will have advantages over students who cannot afford those classes.<sup>209</sup> Although there are no existing empirical studies that correlate a bar applicant's individual economic and social situation (amount of debt,

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205. See, e.g., A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 277-78 (1992) [hereinafter *The MacCrate Report*] (explaining that the traditional bar examination does not assess many of the fundamental lawyering skills necessary for the successful practice of law); Barnard & Greenspan, *supra* note 203, at 354-55 (arguing that although licensure suggests that new lawyers are fit to open an office and begin practicing law, the reality is that solo and small-firm lawyers are ill-equipped to handle that responsibility).

206. See *The MacCrate Report*, *supra* note 205, at 278 (“[T]he examination influences law schools, in developing their curricula, to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills.”). See also *infra* Part VI (discussing how law teachers are often constrained to present the law conservatively, in a form that will be rewarded by the bar examiners).

207. See Glen, *When and Where We Enter*, *supra* note 180, at 1701 nn.13-14 (citing LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 37-38 (LSAC Research Rep. Series 1998)); Hansen, *supra* note 197, at 1206 (positing that bar passage rates correlate to LSAT scores).

208. In fact, this is the position of the National Council of Bar Examiners (NCBE) in explaining disparities in bar performance between white and ethnic applicants. See also STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION 38 (GANSK 1993); Kidder, *supra* note 80, at 565 (citing Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature*, N.Y. St. B.J. 28-33 (Oct. 1989)). Professor Kidder's view is that the NCBE has overly de-emphasized the disparate impact that the bar examination has had on persons of color.

209. See Glen, *Thinking Out of the Bar Exam Box*, *supra* note 180, at 494; Glen, *When and Where We Enter*, *supra* note 180, at 1704.

hours worked for income per week, child-care responsibilities) with performance on the bar examination,<sup>210</sup> anecdotal evidence suggests that students who must work and/or shoulder child-care responsibilities while also studying for the bar are materially disadvantaged in terms of bar exam success.<sup>211</sup> Because persons with fewer economic and educational resources have less of a chance of succeeding on the bar examination than those with more, the bar examination favors entry for the advantaged, thereby replicating pre-existing hierarchical structures.<sup>212</sup>

6. *The Myth of Merit.* The success of an American law student—gaining admission to a highly ranked school, obtaining a high class rank, and passing the bar exam—is largely defined in terms of merit, which obscures the arbitrary ways in which professional status is awarded. By defining success in law school and in the profession in terms of merit and ability, the legal profession hides the

210. See Glen, *Thinking Out of the Bar Exam Box*, *supra* note 180, at 494.

211. See *id.* at 495 n.57

(At CUNY, we have often surmised that paying for the bar review course . . . and supplying childcare and similar substitutes for our graduates' familial work and community responsibilities would be the most effective strategy for raising bar pass rates. Our own lack of resources has, however, made this hypothesis impossible to test.);

Glen, *When and Where We Enter*, *supra* note 180, at 1703-04 (explaining anecdotal evidence that graduates of CUNY Law School who must work full-time, take care of children, and study for the bar may have a higher likelihood of failing the bar exam than students who have no child-care responsibilities and are able to study full-time for the bar exam).

212. In describing the exclusionary history and effect of the bar examination, I am not proposing here that states should eradicate the bar examination altogether. Rather, my hope would be that state admissions authorities would embrace alternative methods of evaluation, which take a more holistic approach and which genuinely seek to measure and assess an applicant's ability to practice law, as it is actually practiced and experienced. See, e.g., Barnard & Greenspan, *supra* note 203, at 355 (proposing a bar admissions process, focusing on practice and doctrine, that would be administered in pieces, throughout law school); Kristin Booth Glen, *In Defense of the PSABE, and Other "Alternative" Thoughts*, 20 GA. ST. U. L. REV. 1029, 1031 (2004) (proposing a Public Service Bar Alternative Exam that would be a "true performance test" where applicants would have to demonstrate minimum competence in core lawyering skills over a ten to twelve week period of time); Hansen, *supra* note 197, at 1231-35 (proposing bar admission requirements that would include an "intensive supervised research project" and a mandatory clerkship).

fact that, in many instances, the privileged are the ones who benefit the most from the legal educational system.<sup>213</sup> In Bourdieusian terms, the myth of merit<sup>214</sup> creates a habitus that causes law students to internally arrive at individual expectations and goals based on the legal profession's existing hierarchy.<sup>215</sup> Through this process of objectification,<sup>216</sup> students come to believe that status within the law profession is not arbitrary, but is instead based on principles of individual merit and intelligence. By focusing on these ranking mechanisms alone, proponents of the system see legal education as a democratic meritocracy; they do not see the social barriers that affect the award of status.<sup>217</sup> The myth of merit excludes the possibility that a poor performance might result from a dearth of social and economic capital, in the form, for instance, of an ability to live in districts with better kindergarten, elementary, and secondary schools<sup>218</sup>; to pay for Kaplan/Princeton Review

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213. See BOURDIEU & PASSERON, *supra* note 6, at 167.

214. The myth of merit, as it appears in educational institutions, originated in the work of Max Weber. See MAX WEBER, 2 *ECONOMY AND SOCIETY* 998-1001 (Univ. Cal. Press 1978).

215. See Wacquant, *supra* note 9, at 18 & n.33.

216. See BOURDIEU, *supra* note 4, at 164-65.

217. For instance, reminiscing about his days at Harvard Law School between 1903-1906, Felix Frankfurter celebrated Harvard's "democratic" class-blind and color-blind academic ranking system, without taking into account that at the time, Harvard's admissions requirement of a college degree barred ninety-six percent of the American population from the chance to excel academically. See AUERBACH, *supra* note 120, at 28-29 (citing FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 26-27 (Reynal & Co. 1960)). Frankfurter also glossed over the fact that even if a Jewish student (like himself) excelled academically, the chances were slim that the student would be able to use his credentials to get in the door at most Wall Street law firms, which refused to hire Jews. See *id.* Although law schools no longer make exclusionary admissions decisions based on race, sex, or class, modern law school admissions criteria and ranking mechanisms have the same limiting effect.

218. There is empirical evidence that applicants from lower socio-economic backgrounds do not score as well on the LSAT as applicants from higher socio-economic backgrounds. See Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 42-43 (1997). Professor Wightman posits that the difference in performance might be related to "differences in educational opportunity." *Id.* at 42.

LSAT tutoring<sup>219</sup>; or to benefit from the knowledge of family members who can help guide a student through the educational system.<sup>220</sup>

The myth of merit also causes advantaged law students to believe that their success is based on their individual merit, gaining the “supreme privilege of not seeing themselves as privileged.”<sup>221</sup> On the other hand, disadvantaged students see their failure in terms of their “lack of gifts or merits, because in matters of culture[,] absolute dispossession excludes awareness of being dispossessed.”<sup>222</sup> Thus, American legal education, with its emphasis on symbolic prestige and merit, enables the privileged classes “to appear to be surrendering to a perfectly neutral authority the power of transmitting power from one generation to another, and thus to be renouncing the arbitrary privilege of the hereditary transmission of privileges.”<sup>223</sup> Students learn to expect and accept, as a matter of course and without any kind of fight, their assigned station in the profession.<sup>224</sup> Thus, within the legal profession, this un-coerced participation in the subordination process enables the efficient replication of the existing structure for future generations.<sup>225</sup>

It would be quite an overstatement to argue that legal education’s replication of existing inequalities within the legal profession is one of the more unjust instances of social stratification in American society. The legal profession, despite its ingrained hierarchy, does afford all of its members a certain amount of professional prestige and the economic benefits of having a middle-class/upper-class

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219. See Kirsten Edwards, *Found! The Lost Lawyer*, 70 *FORDHAM L. REV.* 37, 45 (2001) (enumerating the socio-economic factors that correlate with academic achievement in high school and college, which lead to acceptance at an elite law school); Wong, *supra* note 179, at 232-33 (positing that higher LSAT scores can be had by those who can afford to pay for commercial LSAT preparation courses).

220. See BOURDIEU & PASSERON, *supra* note 6, at 172-173 n.22; Bourdieu & Champagne, *supra* note 17, at 424.

221. See BOURDIEU & PASSERON, *supra* note 6, at 210.

222. See *id.*; Bourdieu & Champagne, *supra* note 17, at 421.

223. BOURDIEU & PASSERON, *supra* note 6, at 167.

224. See BOURDIEU, *supra* note 4, at 192.

225. See *id.*

income. However, the way that our legal educational institutions reproduce the structure of the legal profession is a micro-example of the way that our legal educational institutions, in general, engender deeply ingrained beliefs about the fairness and neutrality of our legal systems and discourage inquiries into the underlying inequalities and injustices operating beneath the structural foundation of the law. Elizabeth Mertz's recent book, *The Language of Law School: Learning to "Think Like a Lawyer"* provides ample evidence of this process at work in the law school classroom.<sup>226</sup>

Professor Mertz's study shows that when students learn to "think like a lawyer" they are acquiring, in Bourdiesian terms, a powerful habitus that works collectively to achieve outcomes using abstract, "objective" notions of procedure and precedent, which tend to make social and moral contextual factors invisible or, in the language of legal analysis, irrelevant.<sup>227</sup> Moreover, the process by which certain meanings become dominant is invisible, because of the ostensible neutrality that the legal language affords.<sup>228</sup> Legal education's role in recreating the striations within the legal profession is but one example of such a hidden process at work. Beyond the unfairness that results from our multi-tiered legal education system, the analogy between legal education's role in replicating the existing structure of the legal profession and the law's power, in general, to propel acceptance in legal outcomes that favor the privileged makes this problem worth pointing out.<sup>229</sup>

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226. See MERTZ, *supra* note 119. Professor Mertz's book contains the results of a linguistic study on the socializing effect of legal language. A central theme that emerges from Professor Mertz's study is that the common law method of legal analysis used in the United States, which students learn in law school, requires mastery of a core legal language. *Id.* at 4. When used to solve legal problems, this core language privileges technical form and levels of legal authority over social contexts and moral issues. *Id.* at 4-6, 212-14. The core legal language taught at American law schools also tends to situate legal actors equally and erase and ignore social differences. *Id.* Although the dominant method of legal analysis has been used to achieve liberating results (such as the case with the 1950s and 1960s Civil Rights litigations), it also causes some viewpoints to become invisible and others to dominate. *Id.* at 212-14.

227. See *id.* at 4-6, 212-14.

228. *Id.* at 5.

229. Pointing out the problem is in line with Bourdieu's belief that academics should critique and study the educational institutions they are a part

### B. *The Exhibition of Taste and Distinction*

In addition to its ranking systems and merit ideology, law schools replicate the imagery of the law profession as an upper-class culture by teaching students to adopt upper-class “professional” mannerisms and behaviors.<sup>230</sup> The American legal profession has long been viewed as occupying the cultural and social space of the aristocracy.<sup>231</sup> The prestige of the legal profession is advanced, in part, through the outward display of symbolic goods and manners, which create auras of taste, distinction, and high culture.<sup>232</sup> The display of symbolic goods (in the form of tasteful, conservative clothing) and the performative aspects of professional manners (speaking with proper restraint and diction) promotes the legal profession as a noble, elite profession.<sup>233</sup>

The culture of the law values upper-class styles and manners.<sup>234</sup> From a common sense perspective, the legal profession’s obsession with upper-class culture can be explained in terms of self-serving notions of status—lawyers certainly like to view themselves as members of a

of in order to uncover and demystify the invisible ways that our institutions operate to maintain the structures of our society. *See, e.g.,* Wacquant, *supra* note 9, at 14; Weininger, *supra* note 15, at 117-18.

230. *See, e.g.,* KENNEDY, *supra* note 175, at 54. *See also* GRANFIELD, *supra* note 120, at 109-142; Mary O’Brien & Sheila McIntyre, *Patriarchal Hegemony and Legal Education*, 2 CAN. J. WOMEN & L. 69, 79 (1986).

231. The famous De Tocqueville quote speaks for itself:

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (1954).

232. *See supra* notes 80-81 and accompanying text.

233. The analogy here is to the concept that groups reinforce their image displaying purchases and behaviors that create a bodily experience. *See* BOURDIEU, *supra* note 12, at 77.

234. *See* ELLEN JOAN POLLOCK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK, TWEED: WALL STREET’S GENTLEMEN TAKE OFF THEIR GLOVES* 45-46 (1990) (describing how the law firm’s culture of aristocratic manners and styles were passed down from generation to generation); Chambliss, *supra* note 128, at 18.

high-status group. Another explanation may lie in the fact that adopting upper-class manners and language styles may actually help maintain public faith in the validity of the legal profession and legal institutions. The detached manners of the upper-class help represent the law as neutral, objective, and non-violent, creating faith in the fairness of legal process and obscuring the unfair ways in which the law privileges the powerful.<sup>235</sup>

1. *Acquiring Taste and Distinction.* While in law school, students acquire cultural capital and learn, either directly or through observation, how to exhibit what Bourdieu calls “taste” and “distinction,”<sup>236</sup> and to participate in a lifestyle<sup>237</sup> that will mark them as members of the legal profession. Law students learn to pick up “mannerisms, ways of speaking, gestures, which would be ‘neutral’ if they were not emblematic of membership in the white middle class male universe of the bar.”<sup>238</sup> A rational, measured tone is cultivated by observing law teachers comment, critique, and correct student case analyses in the Langellian/Socratic classroom.<sup>239</sup> Students may also learn class markers by interacting with their peers, understanding, for instance, that Brooks Brothers is the proper place to go to purchase a suit for an interview or a court appearance.<sup>240</sup>

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235. See Bourdieu, *supra* note 18, at 830 (explaining how the law uses “ascetic and simultaneously aristocratic attitudes” in order to transform “conflicts of personal interest into rule-bound exchanges of rational arguments between equal individuals”).

236. See BOURDIEU, *supra* note 12, at 174-75, 249.

237. See *id.* at 169-77.

238. KENNEDY, *supra* note 175, at 80. However, I disagree with Professor Kennedy’s characterization of the law culture as “middle class.”

239. See, e.g., MERTZ, *supra* note 119, at 21-22 (the teacher’s use of language in the law classroom brings students to a “new social identity”); Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 351 (2001) (The theory behind the Socratic method assumes “professor’s comments, questions, and corrections . . . not only will help the selected student, but will rub off on all the students in the class”).

240. GRANFIELD, *supra* note 120, at 116-18. See also Peter Gabel, Commentary, *The Spiritual Foundation of Attachment to Hierarchy*, in LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 154, 160 (2004) (“Lower-middle class students learn not to wear an undershirt that shows, and that certain patterns and fabrics in clothes will stigmatize them no matter what

In law school, there is a danger of class bias in any performance-based evaluation. For instance, through comments by moot court judges, students learn that a woman's legitimacy as an advocate depends on clothing choices that match upper-class ideals of what a professional woman should wear.<sup>241</sup> Or, a law student may receive the comment that her speaking style and diction is too "forced" and "unnatural" that, perhaps, she just does not have the "gift" of oral advocacy.<sup>242</sup> In this way, members of the dominant class devalue those skills that they deem "cannot be learned," dismissing disadvantaged students because they lack the "natural" abilities necessary for the practice of law.<sup>243</sup>

Students who are able to excel academically but who do not master the necessary stylistic professional mannerisms and lifestyle preferences may nonetheless find themselves rejected from a job.<sup>244</sup> Further, students from disadvantaged backgrounds who learn and acquire social markers that signify the distinctive taste of the legal profession are always vulnerable to a claim, from someone with more power, that bluffing is going on.<sup>245</sup> Whenever a student slips up in some way, by inadvertently using slang or an accent, the fear is that the student will be exposed as a charlatan.<sup>246</sup> While a legal education does give students a

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their grades.”).

241. See K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1148-49 (1985). See also BARBARA EHRENREICH, *BAIT AND SWITCH: THE (FUTILE) PURSUIT OF THE AMERICAN DREAM* 103-04 (Owl Books 2005) (explaining that acceptable professional business attire should enable one to “pass as a hereditary member of the upper-middle class”).

242. See BOURDIEU & PASSERON, *supra* note 6, at 20-21, 167.

243. See *id.* at 130, 162.

244. See, e.g., Delgado, *supra* note 179, at 1722-23

([T]he interview, or job test, rewards the candidate who has the greatest store of cultural capital, the one who soaked up cultural knowledge so easily at his father's or mother's knee. The household had the right kind of music and books. The dinner table conversation taught precisely the mannerisms, conversational patterns, and small talk skills that the employer finds comforting, familiar, and reassuring.)

245. See, e.g., *supra* notes 94-101 and accompanying text.

246. Bell Hooks, in writing about class in the undergraduate context, explains the fear that if non-disadvantaged students shows any aspect of their



chance to increase their status in the structure, students often have no control over how they are perceived in these performance-based evaluations because those in power control the classification system.<sup>247</sup>

2. *The Language of Distinction.* Law school stresses a measured, unemotional, and grammatically sound form of communication, which correlates to the preferred communication style of the upper-class.<sup>248</sup> In so far as the use of good grammar and tone is an upper-class attribute,<sup>249</sup> law schools teach students that proper grammar and a formal tone will cause readers to perceive text as legitimate, whereas bad grammar or a strident, emotional tone will cause the reader to view a text and its author with suspicion. More substantively, a formal and objective discourse helps present the law as neutral and fair, perhaps obscuring the unfair results that happen outside of the law's formal margins.<sup>250</sup> If we accept

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vernacular culture in the classroom they will be "placed . . . always in the position of [the] interloper." Bell Hooks, *Confronting Class in the Classroom*, in *THE CRITICAL PEDAGOGY READER* 142, 145 (Antonia Darder et al. eds., RoutledgeFalmer 2003). Many non-advantaged students experience "psychic turmoil" in trying to negotiate the conflict between what they view as their true selves and the way they must present themselves in elite settings. *Id.*

247. See BOURDIEU, *supra* note 12, at 174-75.

248. See *id.* at 176-77; BOURDIEU & PASSERON, *supra* note 6, at 123-26 (although Bourdieu was writing about French citizens in the 1970s, the description also correlates with American perceptions of a cultured or distinguished speaking style). See also NELSON W. ALDRICH, *OLD MONEY: THE MYTHOLOGY OF AMERICA'S UPPER CLASS* 88 (1996) (describing Theodore Roosevelt's upper-class "cultured" words as "cool and gracious" whereas Huey Long's lower-class speaking style involved shouting and over-gesticulation). Bell Hooks, writing about her undergraduate classroom experiences, explains that

[I]oudness, anger, emotional outbursts, and even something as seemingly innocent as unrestrained laughter were deemed unacceptable, vulgar disruptions of classroom social order. These traits were also associated with being a member of the lower classes. If one was not from a privileged class group, adopting a demeanor similar to that of the group could help one to advance.

Hooks, *supra* note 246, at 143.

249. One of the respondents, identified as working-class, in Granfield's study of students at Harvard University stated that if she were from the middle class, she would not have lapses of grammatical errors. GRANFIELD, *supra* note 120, at 113.

250. See, e.g., MERTZ, *supra* note 119, at 4-6, 212-14 (explaining the process by which the law employs abstract and formalistic legal reasoning, which

Bourdieu's theories about how class is mentally internalized, then we should expect that law students will come out of law school with the view that their education has provided them with the natural way, the only way, to think and speak about the law.<sup>251</sup> Moreover, because the dominant discourse favored by the law tends to ignore those narratives that do not fit into an acceptable form, students are prevented from seeing the full effects of the law in action.

### III. THE MORAL DIMENSION—A SELF-CRITIQUE

Bourdieu argued that academics have a moral obligation to study how educational institutions replicate the class structure of our society.<sup>252</sup> As law teachers, we should critique our own role in reproducing inequalities within the legal profession.<sup>253</sup> At this point in my Essay, I offer a reflective critique that asks whether or not legal scholars—even progressive legal scholars—may be contributing to the subordination of students who graduate from low-tier law schools. How does this happen? In this section, I have identified two questions for law professors to consider. First, how does the dominant research oriented model of legal education reproduce the existing stratification within the legal profession? Second, in discourses about the legal profession and the role of legal education, how do law teachers reinforce the low status afforded to non-elite legal career choices? Then, from a normative standpoint, I discuss some modest steps that we might take to begin the process of dismantling the institutional biases that produce the cultural dispositions that enable hierarchy in the law and legal profession to continue. Finally, I conclude with some thoughts on how

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emphasizes procedure and precedent, at the expense of social context and moral issues); Bourdieu, *supra* note 18, at 819-20 (explaining how the law receives its force from "syntactic traits" that emphasize the passive and impersonal, establishing impartiality and objectivity).

251. See BOURDIEU & PASSERON, *supra* note 6, at 21, 31-35; Bourdieu & Champagne, *supra* note 17, at 424; Wacquant, *supra* note 9, at 24.

252. See, e.g., Wacquant, *supra* note 9, at 14; Weininger, *supra* note 15, at 117-18.

253. See Weininger, *supra* note 15, at 118 (citation omitted).

we, as critics, should not ignore the experiential understanding that our students have toward the legal profession, which may conflict with the theory that they are being subordinated.

A. *Does Legal Education's Research and Scholarship Tradition Encourage Stratification?*

The most highly-ranked law schools are research institutions<sup>254</sup> that adhere to a curriculum that has historically been designed to prepare students for work in a large law firm setting.<sup>255</sup> The research-based approach to teaching and learning is rewarded by the *U.S. News and World Report* ranking system.<sup>256</sup> Scholarly publications, no matter how politically progressive—or even radical<sup>257</sup>—elevate a faculty member's professional status and her institution's status.<sup>258</sup> On the other hand, many low-tier

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254. See Garon, *supra* note 157, at 519-26 (Dean Garon explains how the *U.S. News and World Report* grants high status to those institutions that engage in "elitist" scholarship while devaluing schools that try to introduce alternative student-oriented models of legal education); Terry, *supra* note 157, at 667-75 (Professor Terry argues that instead of holding all law schools to the standard of research institutions, law schools should be ranked on two different tracks—research institutions and teaching institutions).

255. See KISSAM, *supra* note 147, at 10-11.

256. See Garon, *supra* note 157, at 524 (Dean Garon argues that faculty who pursue "elitist standards of scholarship" in their own self interest and their institutional self-interest, do so at the expense of quality teaching and student learning).

257. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); George S. Swan, *The Thirteenth Amendment Dimensions of Roe v. Wade*, 4 J. JUV. L. 1 (1980) (analogizing the unborn to slaves).

258. This view is supported by Professor Leiter's increasingly popular weblog rankings, which rank law schools based on faculty reputation, scholarly output, and scholarly impact. See, e.g., Bryan Leiter, Bryan Leiter's Law School Rankings, <http://www.leiterrankings.com/faculty/index.shtml> (last visited Oct. 11, 2008). Despite any criticisms that might be leveled against Leiter's system, elite legal scholars of all persuasions are represented in his ranking system. See also KISSAM, *supra* note 147, at 127, 162, 184. Kissam's thesis is that radical reform-oriented legal theories do not succeed in changing the structure of legal education because institutional structures mitigate the power of these theories "by fragmenting, marginalizing and infiltrating them, by enfolded them within itself and by ensuring that reforms serve rather than subvert the discipline's values and practices." *Id.* at 126. Implicit in Kissam's critique is that reform-based legal theories lack teeth, in part, because radical theorists are corrupted

schools define themselves as student-centered schools with a mission to prepare students for the practice of law, specifically—for representing individual clients.<sup>259</sup> However, schools that emphasize teaching and practical training do so at the expense of their prestige and rank.<sup>260</sup> Student-oriented teaching schools have long been dismissed as mere trade schools, incapable of producing well-rounded students with professional ideals.<sup>261</sup> Thus, in broad-strokes, American legal education values research and scholarly output, but devalues alternative educational models that would be most useful to attorneys who plan to represent individual clients.<sup>262</sup>

*B. In Debating Where There Is Value Within the Legal Profession, Do Law Teachers Reinforce the Low Status of Non-Elite Law Students?*

In debates about what types of law practice lawyers have the most social value, the legal academy tends to ignore individual client representation, the type of work that many graduates of low-status schools end up doing. For an example, we can look at the politicized debate between “practical” scholarship and critical legal theory.<sup>263</sup>

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when they use their work to elevate their own institutional status. *See id.*

259. *See* Garon, *supra* note 157, at 524; Terry, *supra* note 157, at 670-71.

260. *See* Terry, *supra* note 157, at 670-71. *See also* Posting of Michael Dorf to Dorf on Law, <http://michaeldorf.org/2007/09/did-chemerinsky-dodge-bullet.html> (Sept. 16, 2007, 00:01 EST) (“The schools that have made [practical skills training] central to their curriculum, e.g., CUNY, Northeastern, have had some local success, but that has not translated into moving themselves schools [sic] up in the pecking order or getting the innovations widely adopted.”).

261. As discussed, *supra*, the pejorative designation of a “trade school” dates back to the turn of the century and was used to disparage students at part-time night schools. STEVENS, *supra* note 120, at 113, 114-15. The appellation survives in the present and is used to insult low-tier schools that emphasize teaching and skills training. *See* Terry, *supra* note 157, at 668-69 nn.61-62.

262. *See* KISSAM, *supra* note 147, at 11 (explaining that the dominant model of legal education in the United States is designed to train new associates for corporate law firm jobs, but fails to even meet this limited goal). Professor Kissam further explains that the entrenched form of legal training “subordinates valuable teaching methods that address a broader set of legal skills and different models of lawyers that are important to sectors of the legal profession such as the representation of personal clients, public agency work and small general practice law firms.” *Id.*

263. For the conservative view of what scholarship should be, see Harry

On one side in this debate, conservative elites believe that legal education should prepare students for traditional practice in the large law firm or judicial clerkship setting.<sup>264</sup> On the other hand, there are the progressive elites, who see progressive, interdisciplinary learning as valuable for students entering a career in law reform and public service.<sup>265</sup> Encouraging elite students to enter a career in law reform or public service mirrors the historic view that law reform and public service are the special province for elite, credentialed experts.<sup>266</sup> Strains of professionalism can also be heard in the argument that law students must be exposed to different interdisciplinary ways of thinking about the law because law schools “are training people who will be in profound positions of power—future lawyers, judges, politicians, policymakers, and so on.”<sup>267</sup>

What these arguments miss is that many law students from low-status schools are not getting anywhere near

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Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). In this article, Judge Edwards argues that “many law schools—especially the so-called ‘elite’ ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. *Id.* at 34. For the progressive response to Edwards’ critique, see Derrick Bell & Erin Edmonds, *Students As Teachers, Teachers As Learners*, 91 MICH. L. REV. 2025 (1993). In this article, the authors justify what Judge Edwards calls “impractical theory” as helpful for students who “are committed to careers in public service or law reform.” Students, they argue, need exposure to non-traditional legal theories so that they can “write briefs that effectively challenge the many injustices that now threaten our society in ways so dire, so dangerous, that few in policymaking positions are willing even to contemplate, much less attempt, much-needed reform.” *Id.* at 2026.

264. Although Judge Edwards does not explicitly say that law schools should prepare students for large law firm practice, his belief that students should master “basic doctrinal skills” reflects the traditional view that a Langdellian legal education, steeped in doctrine, effectively prepares students for large firm practice. Edwards, *supra* note 263, at 38; see KISSAM, *supra* note 147, at 11 (arguing that the dominant model of legal education is designed to train “new associates for corporate law firms who are technically adept at productive doctrinal analysis”).

265. See, e.g., Bell & Edmonds, *supra* note 263, at 2026.

266. See AUERBACH, *supra* note 120, at 82-85 (“[T]he cry for reform, trumpeted by law teachers, enhanced the prerogatives of those who fully accepted the basic contours of the social system and trained young men for success within it.”).

267. Posting of Daniel Solove to Legal Affairs Debate Club, [http://www.legalaffairs.org/webexclusive/debateclub\\_2yr0905.msp](http://www.legalaffairs.org/webexclusive/debateclub_2yr0905.msp) (Sept. 20, 2005, 12:51 EST).

“profound positions of power.”<sup>268</sup> Due to economic barriers or a perceived lack of credentials, many graduates of low-status institutions are thwarted from entering a corporate law practice or a career in public service. It is well known that elite law firms shut their doors to students who lack elite credentials.<sup>269</sup> What is less publicized is that, because of the limited opportunities available and because of the law’s systemic obsession with credentialed prestige, public policy and public service jobs are also highly competitive, requiring the same elite credentials and top grades that the large firms require.<sup>270</sup> Moreover, many low-status law school graduates, facing a median law school debt load of nearly \$90,000,<sup>271</sup> decide that they cannot afford the low salaries that public sector jobs pay.<sup>272</sup> Even though there are large differences in salary between large firm practice

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268. See *id.* The contrast between the normative concept of what attorneys will be doing and the realities of a low-status practice becomes especially visible when we look at what may be an emerging underclass of temporary attorneys, some of whom are reportedly required to sign their name in front of a supervisor in order to take a bathroom break. See Triedman, *supra* note 185, at 13; Posting of helpme123 to Temporary Attorney, *supra* note 185.

269. See *supra* text accompanying notes 201-04. See also Jonakait, *supra* note 3, at 879-80 (“[T]he large-firm preference for elite school graduates continues, and it can be expected to increase further.”); David E. Van Zandt, *Merit at the Right Tail: Education and Elite Law School Admissions*, 64 TEX. L. REV. 1493, 1493-94 (1996) (reviewing ROBERT KLITGAARD, CHOOSING ELITES (1985)).

270. See, e.g., Georgetown Law School, Office of Public Interest and Community Service, Fellowship Planning Timeline, <http://www.law.georgetown.edu/opics/fellowships/timeline.html> (last visited Oct. 11, 2008) (“Many students are surprised to learn that, despite the huge disparity in salaries, public interest jobs are harder to obtain than large law firm jobs.”); The University of Chicago Law School, Public Service and Public Interest Opportunities, [http://www.law.uchicago.edu/careersvcs/public\\_service.html](http://www.law.uchicago.edu/careersvcs/public_service.html) (last visited Oct. 11, 2008) (“[E]ven unpaid [summer] positions can be hard to get, because public interest employers are not equipped to handle an inflow of 50 to 100 summer associates in the way that large law firms can.”).

271. For the 2006-2007 academic year, the median debt load for private law school graduates was \$87,906; the debt load for public law school graduates was \$57,170. American Bar Association Lawyer Statistics, Average Amount Borrowed, <http://www.abanet.org/legaled/statistics/charts/stats%20-%202020.pdf> (last visited Oct. 11, 2008).

272. For instance, the minimum yearly salary required to make payments on an \$80,145 debt load is \$42,493. George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 136 tbl. (2003).

and public interest work, both areas of practice enjoy a certain amount of symbolic prestige.<sup>273</sup> Although the statistics vary, approximately one-third of all lawyers in the United States are solo-practitioners who represent individual clients.<sup>274</sup> And yet, this career trajectory is not considered, by the profession or the academy, as having any kind of prestige.

The problem is that the business of the elite schools remains the same as it has always been: preparing elite students for law practice—either in a private law firm setting or in the culturally prestigious public interest sector. The career plans of low-tier students, who are effectively shut out (for lack of elite credentials or because of economic barriers) from these high-status areas, are devalued. It does not help matters that the vast majority of law teachers have been inculcated at elite educational institutions,<sup>275</sup> which creates a gulf between the actual experiences of low-status students and the experiences and

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273. See, e.g., BOURDIEU, *supra* note 4, at 182-83 (defining symbolic prestige in cultural, rather than economic terms). But see HEINZ ET AL., *supra* note 2, at 95-96. In the *Urban Lawyers* survey, when participants were asked to rank practice areas in terms of prestige, public defenders and other lawyers for impoverished clients received a low prestige rank. *Id.* However, in a slightly different survey question, responders gave “civil rights/civil liberties” work a higher prestige rank. *Id.* at 84. Notwithstanding the somewhat ambiguous nature of the survey results, my argument is that reform traditions at the elite law schools have stamped these career choices with a certain amount of honor, if not prestige.

274. The lawyer demographic statistics compiled by the American Bar Association (last updated for the year 2000) indicate that of the 74% of attorneys in private practice, 48% are solo practitioners. American Bar Association Lawyer Demographics, [http://www.abanet.org/marketresearch/Lawyer\\_Demographics\\_2007.pdf](http://www.abanet.org/marketresearch/Lawyer_Demographics_2007.pdf) (last visited Oct. 11, 2008). The *After the J.D.* study found that 32% of all recent graduates had entered into a sole practice. DINOVITZER ET AL., *supra* note 2, at 27. With respect to small-firm practice, a recent NALP survey indicated that 71% of the graduates of the class of 2006 went into practice at law firms with 50 attorneys or less. Press Release, NALP, *A Picture Worth 1,000 Words* (2007), <http://www.nalp.org/content/index.php?pid=522>.

However, there are other data sources that indicate that the percentage of attorneys entering into sole practice, particularly in urban areas, is shrinking. See HEINZ ET AL., *supra* note 2, at 100, fig.5.1 (indicating that the percentage of sole practice attorneys practicing in Chicago has diminished from 21% in 1975 to 15% in 1995).

275. See, e.g., Brian Leiter’s Law School Rankings, *Where Tenure Track Faculty Went To Law School, 2000-02*, [http://www.leiterrankings.com/faculty/2000faculty\\_education.shtml](http://www.leiterrankings.com/faculty/2000faculty_education.shtml) (last visited Oct. 11, 2008).

expectations of their teachers. The academy's failure to value the experiences of non-elite attorneys might also reflect an upper-class contempt for working attorneys who provide legal services in order to make a living.<sup>276</sup> Academics should ask whether or not we are communicating meanings that favor elite members of the legal profession and discourage questions about how the profession's tiered structure is created and maintained.<sup>277</sup> As law teachers, we should be willing to critique ourselves, because, as Bell Hooks has pointed out, "there can be no intervention that challenges the status quo if we are not willing to interrogate the way our presentation of self as well as our pedagogical process is often shaped by middle-class norms."<sup>278</sup>

The danger of silence is that it strengthens the habitus, making the institution a more fertile mechanism for reproducing existing inequalities, within our profession and within our society as a whole.<sup>279</sup> In writing about the danger of not building in a critical discourse for students learning the language of the law, Professor Elizabeth Mertz points out that the law "does not have a mechanism by which its own basic orientations and structure can be opened to question."<sup>280</sup> American legal education institutions mirror and reinforce this closed system by ignoring inquiry into how its underlying structures reproduce pre-existing inequalities. Developing a critical self-awareness will open up dialogues that help us identify ways to share the resources of our legal educational institutions in a way that furthers the liberating and democratic ideals of American legal education.<sup>281</sup>

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276. See *supra* notes 126-28 and accompanying text.

277. See BOURDIEU & PASSERON, *supra* note 6, at 8.

278. Hooks, *supra* note 246, at 147; see also BOURDIEU, *supra* note 4, at 188-89.

279. See BOURDIEU, *supra* note 4, at 188-89.

280. MERTZ, *supra* note 119, at 219.

281. Thurgood Marshall's legal education is but one example of the liberating effect that a legal education can have. In discussing the legacy of *Brown v. Board of Education*, David Wilkins aptly pointed out the race/class divide between Thurgood Marshall and John W. Davis. David B. Wilkins, *From "Separate Is Inherently Unequal" To "Diversity Is Good For Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1548-49 (2004). Harvard educated Davis, "as the senior



### C. Normative Strategies

What follows represents some actions that we, as educators, might take to weaken the power of the institutional mechanisms that reproduce the economic and cultural stratification within the legal profession and our society. However, because our institutions are so deeply entrenched in the *U.S. News and World Report* system of tiered prestige and because law schools are not likely to give up what power and prestige they have amassed, I recognize that these strategies may not do anything more than remove a thin layer of the foundational structure. Nonetheless, I think it is important to imagine how alternative models of legal education and legal services could lead to substantive reform.

1. *Embrace Alternative Educational Models.* Professor Randolph Jonakait argues that low-status “local” law schools should make more of an effort to teach lessons that will be useful to students planning to represent individual clients.<sup>282</sup> I would go one step further and urge legal education to stop devaluing this type of instruction. Schools that emphasize skills training should not be penalized by the law school rankings system, which expects every school

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partner of the Wall Street law firm Davis, Polk, Wardwell, Sunderland & Kiendl[,] . . . epitomized the power and prestige of the [white] elite corporate bar in the years following World War II.” *Id.* at 1548. Far apart from Davis’s world of “corporate titans, elite standing, and sumptuous fees” stood the Howard educated Thurgood Marshall, who struggled as a solo practitioner before being hired as the NAACP’s second full-time attorney. *Id.* at 1549 & n.8. *See also*, JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998). Juan Williams relates a revealing conversation with Justice Marshall that demonstrates the potential for breaking out of the hierarchal mold of “top-tier” school thinking:

Q: Do you ever feel like these guys (colleagues on the court) have had a better education?

A: No, I don't see anybody, I don't think so. Do they have SJD's? I don't think anybody here, no. But they're from better law schools. They're from Harvard, I'm from Howard. It didn't compare with Harvard.

Q: Do you wish you had a better education to compete with these guys?

A: Oh no, no. I know as many cases as they do. . . .

Interview by Juan Williams with Thurgood Marshall, <http://www.thurgoodmarshall.com/interviews/justices.htm> (last visited Oct. 11, 2008).

282. *See* Jonakait, *supra* note 3, at 864, 887-901.

to model itself after Ivy League research-oriented institutions.<sup>283</sup> If we can give students the entrepreneurial and practice tools that will enable them to develop successful law practices that do not follow the dominant large law firm model, that may create a competitive threat to the large law firm model, which in turn might lead to a reorganization of how status is allocated within the profession. Indeed, large law firms may soon have to change the way they do business as younger lawyers, who value time and flexibility more than traditional notions of status and prestige, may start choosing entrepreneurial opportunities available at small firms or sole practices in lieu of big firm careers.<sup>284</sup>

2. *Recognize the Value of Alternative Career Paths.* Law teachers should also consider redefining the types of law practice that we value. Either by choice or because of credential-based exclusion, a student from a low-status school is likely to enter practice as a solo practitioner or work at a small firm doing personal injury work, criminal defense work, family law, or residential real-estate law.<sup>285</sup> From recent studies that have been done on the legal profession, we know that many attorneys view these types of law practices as low-status work.<sup>286</sup> For instance,

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283. See, e.g., Garon, *supra* note 157, at 522-26; Terry, *supra* note 157, at 667-75. I agree with Dean Garon that the rankings system should begin recognizing and rewarding different models of legal education. I do not agree, however, with Professor Terry's idea that legal education should divide itself into two tracks or even two ranking systems—one for practical education and one for academic/research education. Formally separating legal education into two tracks would exacerbate the existing status differences within the law and may take us down the path of de jure stratification, as envisioned by Alfred Reed in 1921. See, e.g., ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 419 (1921).

284. In fact, law firms are already struggling with the legal profession's decline in status among younger attorneys, who view status in terms of "ideas of flexibility and creativity, concepts alien to seemingly everyone but art students even a generation ago." Alex Williams, *The Falling Down Professions*, N.Y. TIMES, Jan. 6, 2008, §9, at 1, available at [http://www.nytimes.com/2008/01/06/fashion/06professions.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/01/06/fashion/06professions.html?_r=1&oref=slogin).

285. See, e.g., HEINZ ET AL., *supra* note 2, at 58-59; Jonakait, *supra* note 3, at 864, 875.

286. See Jonakait, *supra* note 3, at 903-04; see also HEINZ ET AL., *supra* note

personal injury attorneys are still characterized as greedy ambulance chasers.<sup>287</sup> Criminal defense attorneys who defend paying clients are also considered to have low status and a practice that requires little intellectual skill.<sup>288</sup>

An attorney who helps a client receive compensation for a personal injury may not be pursuing social justice in its traditional sense, but there is an important social purpose served in helping individuals obtain remedies for wrongs done to them (often by corporations). Similarly, defending persons accused of a crime in exchange for legal fees, is not public service in the traditional sense (public defender work would be), but attorneys who do this work provide a valuable service within our justice system. The same can be said for attorneys who provide middle-income and lower-income individuals with access to legal services in the realm of family law and residential real-estate. Small firm and sole practice models also allow us to re-imagine law practice in ways that differ from the oppressive large firm model, with its entrenched hierarchies, billable hours requirements, and commitment to big-business private law. Working at a small law firm or in sole practice provides an attorney with more autonomy to choose to serve underserved clients or perform community service.<sup>289</sup> For

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2, at 81-97; ZEMANS & ROSENBLUM, *supra* note 2, at 94.

287. See Mary Nell Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.L. SCH. L. REV. 215, 216 (2006-07) ("Plaintiffs' personal injury lawyers are commonly portrayed as greedy 'ambulance chasers' who will take any case regardless of merit."); see also John Fabian Witt, Op-Ed., *First Rename All the Lawyers*, N.Y. TIMES, Oct. 24, 2006, at A29 (concluding that although the personal injury tort lawyers' association changed its name from the Association of American Trial Attorneys to the American Association for Justice [in order to improve their image], "some will say that the trial lawyers are still chasing ambulances").

288. See Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorney's Fees in Criminal Cases*, 41 B.C. L. REV. 1, 51-52 n.254 (1999) (collecting sources reporting that most attorneys view criminal defense work as having low status and low prestige). See also, HEINZ ET AL., *supra* note 2, at 93-97 (indicating that the lawyers surveyed in the study gave a low prestige rank to criminal defense work). On the other hand, certain types of criminal defense work, capital cases, for instance, might be considered prestigious because of its association with reform oriented public service. See *supra* note 270 and accompanying text.

289. There is a conflict, within western educational institutions, between teaching students to become participants in a democratic society and training students to function in "relatively authoritarian work regimes." See MERTZ,

instance, David Wilkins has argued that attorneys at small minority-owned law firms are more likely to represent minority clients, engage in community service, and mentor younger attorneys than minority attorneys at majority law firms.<sup>290</sup> Others see small and sole firm models as providing a format for women to create profitable part-time and flex-time practices, particularly in high-tech suburbs, where telecommuting is an acceptable way of working.<sup>291</sup>

D. *In Critiquing the Legal Profession and Legal Education, Law Teachers Should Not Ignore the Subjective Experiences of Students*

Finally, we should look at the social effects of criticizing the idea that law school is an instrument of empowerment and social good when so many students and their families are relying on a law degree to raise their status in the system and their self-esteem.<sup>292</sup> We should be loathe to destroy the self-esteem that our students have built up for themselves, based on their attendance at law school. This relates back to the paradox Bourdieu identified as the empowering nature of subordination and the alienating

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*supra* note 119, at 25. To the extent that law professors are uncomfortable with our role of preparing students for the “authoritarian work regime” of a large firm corporate practice, training students to enter alternative practice models in which they have more autonomy and control over their work presents a more satisfying role.

290. See Wilkins, *supra* note 281, at 1604 n.240 (explaining that lawyers working at smaller, minority-owned law firms are more likely “to serve black individuals and small black businesses, to mentor young black lawyers (including ones in other institutions), and otherwise to be an important presence in the black community”).

291. See Carroll Seron, *The Status of Legal Professionalism at the Close of the Twentieth Century: Chicago Lawyers and Urban Lawyers*, 32 LAW & SOC. INQUIRY 581, 602-03 (2007).

292. In a comment written in response to Duncan Kennedy’s *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, Peter Gabel argues that “the only plausible explanation for why law students don’t spontaneously resist and reject their assimilation to a hierarchy that ‘maims’ them and deprives them of their authentic selfhood is that the reproduction of hierarchy is the reproduction of our own social alienation, to which, absent some liberating social movement that frees us for a more authentic form of social connection, we have no choice but to succumb.” Gabel, *supra* note 240, at 161-62.

nature of resistance.<sup>293</sup> Many students who attend low-tier law schools buy into the liberal idea that law school and the law is an instrument of good. Many students from lower socio-economic backgrounds look forward to the upward social mobility and membership in a high-prestige profession when they obtain their degree.<sup>294</sup> Of course, in order to reach this point, we must teach our students to be "gentlemen"<sup>295</sup> who can conform to the rules, speak the language of the law, and display all of the correct mannerisms required for entry to the profession. Whether we accept the view that this conformity is subordination or not, obtaining the degree and passing the bar leads to a very real personal and family happiness and sense of empowerment.<sup>296</sup>

Thus, when we speak about law school as a negative mechanism that subordinates and reproduces class hierarchies, we risk maligning the self-esteem of our students. Some might argue that it is best to tell all law students, elite and non-elite, to be proud in their accomplishments and not to question the inequalities within the legal profession or how those inequalities have come to be. However, a greater risk inures when students never see beyond the myths that hide the arbitrary location of the chutes that determine status within the profession. Students need to be armed before they enter the field of law so that they can predict how their reputation and status will be affected, make reasoned choices in response to the realities and, ultimately, refuse to buy into the myths that explain their place in the profession.

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293. See Wacquant, *supra* note 9, at 23-24.

294. See ZEMANS & ROSENBLUM, *supra* note 2, at 30-31 (explaining that one of the most popular reasons that students give for attending law school is the prospect of an above average income and the social prestige that comes from being an attorney); Dinovitzer & Garth, *supra* note 2, at 38-39 (explaining that students at low-status schools view law school as a means for social mobility).

295. See, e.g., LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997). The title of Professor Guinier's book derives from advice a male professor gave a first-year class: "To be a good lawyer, behave like a gentleman." *Id.* at 29.

296. In his commentary to Kennedy's polemic, Peter Gabel warns that we should not expect students to resist hierarchy as soon as they learn about it because students may be more inclined to avoid the social suffering that might occur in an act of resistance. Gabel, *supra* note 240, at 163.

Critiquing ourselves and identifying ways that we, as teachers, might be unconsciously contributing to the non-egalitarian structure of legal education and the legal profession is a vital step, but it is equally important that we identify active teaching approaches that we can employ in the classroom to ensure that we do not reproduce a mindset in our students that enables stratification to continue within the legal profession. But more importantly, critical evaluation of ourselves and our teaching may also help prevent legal processes from continuing to operate in a way that privileges the advantaged while maintaining the appearance of neutrality and reason. With this goal in mind, what follows are some ideas for discussions that teachers might conduct to bring students to understand how class bias is invisibly interwoven throughout American legal institutions.

#### IV. PEDAGOGICAL STRATEGIES

Opponents of our current system would agree that a law teacher should induce something of a critical consciousness<sup>297</sup> in her students, creating an awareness of the ways in which the law school system replicates class structure, which harms current and future students of the law as well as the rest of society.<sup>298</sup> On the other hand, as law teachers, we also have an obligation to teach our students the mannerisms and skills they will need to succeed in the practice of law. This necessarily means that we will be teaching our students explicit and implicit lessons on upper-class mores. How can we teach these lessons while also criticizing them? The compromise I propose is to instill a critical class consciousness in students while still teaching the skills necessary to succeed at the law game. Paulo Freire's concept of critical consciousness or, *Conscientização*, is the ability of a person to reflect on

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297. See PAULO FREIRE, EDUCATION FOR CRITICAL CONSCIOUSNESS 16-20 (Myra Bergman Ramos ed. & trans., 1994).

298. It is also possible to change the law school institution from the outside. Franklin Snyder has proposed that the emergence of non-hierarchical web-based discourse through law blogs and Social Science Research Network (SSRN) might actually lead to a "breaking down of caste." Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy's Legal Education and the Reproduction of Hierarchy in an Arkansas Motel Room*, 11 NEXUS 111, 121-24 (2006).

herself and her role in the cultural climate, thereby transcending a naïve or magical understanding of reality.<sup>299</sup> However, teaching critical consciousness within the context of law school creates a liar's paradox because we are teaching students to be critical of the system while at the same time teaching the skills necessary to succeed within that system.<sup>300</sup> Lori Lefkowitz, writing about this paradox in teaching remedial English composition at the undergraduate level, suggests we teach students to recognize the margins: "To teach students to write within the margins of the page and the culture, to obey the rules of the dominant discourse, and to be aware of the possibilities for challenging the placement of margins, we need to make the margins themselves visible."<sup>301</sup>

As a practical method for making visible the metaphorical margins dividing dominant legal tradition from the real work of people's lawyers, I suggest a classroom teaching paradigm that focuses on posing a series of questions to students designed to shed light on the ways in which the production of law tends to privilege the views of socially dominant groups while excluding and marginalizing the experiences and voices of lower status groups. The idea underlying such a paradigm is that students will not only learn the rules encapsulated within dominant legal texts, but will also learn to see beyond the text and into the processes by which rules of law are formulated and canonized. Some of the areas that would lend themselves to critical student inquiry might include judicial authorship, the routines by which attorneys make their living, the professional ideals ensconced in American ethics rules, and the curricular choices that law schools offer students.

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299. See FREIRE, *supra* note 297, at 18-19. The Bourdieu corollary to Freire's magical or naïve understanding of reality is the habitus, where one does not question the external structures which are embodied in her internal structures, but rather, because of objectification, accepts the world the way it is as the natural way, as a matter of course. See BOURDIEU, *supra* note 4, at 80. Freire himself developed a way to develop critical consciousness while also successfully teaching Brazilian students how to read and write. See FREIRE, *supra* note 297, at 41-58.

300. See BOURDIEU & PASSERON, *supra* note 6, at 12.

301. Lori H. Lefkowitz, *The Subject of Writing Within the Margins*, in REORIENTATIONS, CRITICAL THEORIES AND PEDAGOGIES 168, 172 (Bruce Henricksen & Thais E. Morgan eds., 1990).

### A. *Judicial Authorship*

In the process of teaching legal doctrine, law teachers might consider leading students to see how the process of judicial authorship, which relies on an objective veneer of neutrality and objectivity, reduces judicial actors to inhuman objects, thereby obscuring the way in which the law privileges the views of dominant groups and ignores the experiences of less powerful groups.<sup>302</sup> As a starting place, we might turn to the now-classic example of Judge Noonan's retelling of the *Palsgraf* decision.<sup>303</sup> In this case, familiar to law students and lawyers alike, Judge Cardozo shifted issues of tort liability, based on foreseeability of the harm suffered, away from the jury question of proximate cause and instead analyzed foreseeability in terms of a relational duty owed, a question of law for the judge.<sup>304</sup>

Under Cardozo's approach, because plaintiffs had to fit foreseeability issues into a strict judge-controlled doctrine rather than having a jury resolve these issues, it became more difficult for torts plaintiffs to win cases. Although Judge Cardozo's approach is no longer favored, the decision, along with Judge Andrews' dissent, continues to function as a canon of tort law.<sup>305</sup> Upon reading Noonan's account of the decision, we see how Judge Cardozo employed his famous clipped prose style to excise all personal information, reducing the case actors to abstract characters

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302. See generally Bourdieu, *supra* note 18, at 848 (explaining how the operation of the law allows dominant groups to "impose an *official representation* of the social world which sustains their own world view and favors their interests"). Professor Penelope Pether has also written about how the process of judicial authorship impoverishes American law, through the institutional hierarchy created by judges, "elbow" law clerks, and staff attorneys. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007). Specifically, Professor Pether points out how the court's bureaucratic and hierarchical structures create ingrained habitus that privileges certain types of cases (corporate and complex civil litigation) over others (criminal and pro-se appeals). *Id.* at 53-54.

303. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928); JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 111-51 (1976).

304. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 98-99, 125 (2003).

305. See *id.* at 138.



that might appear in a law school hypothetical.<sup>306</sup> Left out of the published opinion are the facts that Mrs. Palsgraf was a "very poor" mother of three children who made \$416 a year as a house cleaner with substantial legal and medical debts.<sup>307</sup> The Court of Appeals' award of \$350 in court costs against Mrs. Palsgraf left her a destitute debtor, owing money to her doctor, her lawyer, and the Long Island Railroad Company (which, at the time, had at least \$100 million dollars in assets).<sup>308</sup> The great logical power of Judge Cardozo's foreseeability/duty rule depends, in part, on his removal of all references to the personal and economic hardships suffered by the plaintiff as a result of the rule's application.

One question worth posing to students is how and why did Cardozo come to decide that these personal facts were not relevant for crafting the rule of law? Judge Cardozo's approach in this famous decision is emblematic of the linguistic approach that Professor Mertz identifies as the "filtering linguistic ideology" implicit in legal language.<sup>309</sup> The *Palsgraf* decision thus "focus[es] on form, authority, and legal-linguistic contexts rather than on content, morality, and social contexts."<sup>310</sup> This detached and unemotional language of the law instills a sense of public faith in the neutrality of modern democratic legal processes and hides the social inequities and injustices that result from the operation of the law.<sup>311</sup>

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306. See NOONAN, *supra* note 303, at 112-13. Jerome Frank also critiqued Cardozo for using "a private time-machine to transport himself back into 18th Century England" in order to translate "himself into a past alien speech environment." Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 631 (1943) (Jerome Frank). Cardozo's language allowed him to promote his prose as reasoned analysis when, in Judge Posner's view, it was really a "substitution of words for thought." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 119 (1990).

307. See NOONAN, *supra* note 303, at 125-28.

308. See *id.* at 128-29, 139, 144.

309. MERTZ, *supra* note 119, at 5.

310. *Id.*

311. See, e.g., MERTZ, *supra* note 119 and accompanying text (explaining the process by which law internalize abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues); Bourdieu, *supra* note 18, at 819-20 (explaining how the law receives its force from "syntactic traits" that emphasize the passive and impersonal, establishing impartiality and objectivity).

Judge Cardozo may have also had a more personal need to maintain objectivity and neutrality in his judicial opinions. Justice Cardozo's father, Albert Cardozo, served as a New York State Supreme Court Judge during New York's Tammany Hall era and faced trial for corruption before resigning from the bench in disgrace.<sup>312</sup> Did Cardozo create his famous detached prose style as a defensive measure, to distance himself from the "corrupt" ethnic lawyer represented by his father?<sup>313</sup> We might use the *Palsgraf* case and others like it to point out how formalism works to dehumanize judicial actors, obscure the unfair effects that court decisions have on low-status groups, and serve institutional and self-preservation goals by building public faith in the legal system and elevating the status of the text's author.<sup>314</sup> A deeper understanding of how dominant legal texts are produced and canonized show students another way in which our legal institutions use hidden mechanisms to allocate power in unfair ways.

### B. *Demystifying the Routine and Mundane*

John Noonan's retelling of the *Palsgraf* case also allows us to take a peak into the bureaucracized world of legal practice where legal decisions and strategy are not always made in the best interest of the client in a space with unlimited resources, but instead reflect the limitations imposed by money and time. John Henry Schlegel describes this world as containing

the conditions in which the lawyer practices—the need to earn a living, the need to keep various bureaucracies essential to daily life reasonably happy, the client's ability to pay, and ethical or

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312. See NOONAN, *supra* note 303, at 143. See also RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO* 24-31 (1997).

313. See generally COLLINS, *supra* note 120, at 152-53 (detailing upper-class attorneys' xenophobic and class-based fears of corrupt ethnic attorneys affiliated with the urban political machines that had risen to power around the turn of the century). Jerome Frank seems to think that Cardozo could have crafted his judicial writing style in reaction to the embarrassment of his father's corruption trial. See Mous, *supra* note 306, at 625, 630.

314. While one judge (Jerome Frank) was not impressed with Cardozo, another was enamored of his style. See, e.g., POSNER, *supra* note 306, at 42 (celebrating the economy of the *Palsgraf* statement of facts as "refreshing and . . . in striking contrast to the flaccid prolixity of ordinary judicial prose").

moral obligations, both self and other-imposed—all of which influence what a lawyer is capable of doing to meet the client's objectives.<sup>315</sup>

As Jerome Frank pointed out long ago,<sup>316</sup> there is often a disconnect between how law is represented in the classroom, where strategy and choice is not limited by time or money, and how lawyers really practice law. For instance, in his retelling of the *Palsgraf* case, Noonan describes the railroad company's defense counsel as a "workmanlike lawyer earning his salary with an economy of motion."<sup>317</sup> The solo practitioner who represented Mrs. Palsgraf is said to have presented an "economical" and "sparely presented and sparely financed case."<sup>318</sup> We see how economic realities shape legal outcomes again when the legal services of the junior railroad company attorney is characterized as being "cheap"—which negatively affected the plaintiff's leverage for settlement.<sup>319</sup> When law professors review cases and charge that the negative outcome for the plaintiff was a result of the lawyer's failure to ask questions or failure to take the time to investigate the facts more thoroughly,<sup>320</sup> they present the idea that legal solutions are to be considered in space where time, money, and other concepts related to making a living do not come into play. This is rarely how practice works in real life.

To provide another example from Schlegel, when criminal procedure professors chastise graduates for failing to present every available defense in a pretrial motion, they ignore the complex maze of competing interests that

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315. John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955, 962 (2003).

316. See generally Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) (pointing out the chasm between the type of knowledge learned in law school and what lawyers learn from practice).

317. See NOONAN, *supra* note 303, at 122.

318. See *id.* at 124.

319. See *id.* at 125.

320. See, e.g., Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-The-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 368 (1998) (criticizing Ms. Palsgraf's attorney for not asking more context based questions that would have developed a more context based case theory).

criminal defense have to get through, in the form of limited fees, limited time, and pressure from judges and prosecutors alike, not to file pretrial motions that would retard the case's progress on the trial calendar.<sup>321</sup> But we really cannot fault law professors too much for following the ingrained view that lawyering is a noble calling where income just happens as a matter of course.<sup>322</sup> I am not saying that we should accept the hard choices, between achieving success for clients and making a living, that lawyers confront in the trenches every day. I agree with Schlegel in thinking that empirical scholarship that seeks to demystify and reform these micro routines is something that would benefit students, especially students "who are not to the manor born," but I also agree that such endeavors present challenges, for this subject is not at all sexy or catchy.<sup>323</sup> Sidestepping the question of a scholarship of micro routines, it would be beneficial for law teachers to teach law in a way that conveys some of the complex, bureaucratic, and mechanized ways in which it is actually practiced, even if the picture is not always pretty. Despite the resounding lack of support for any idea that pushes legal education in the direction of a "trade school," I would hope that law professors appreciate that students come to law school to learn to be lawyers and acquire all of the upwardly mobile benefits that being a lawyer entails. I do not think we should deny our students in that regard.

### C. Professional Identity

Professional Responsibility courses may offer another chance to raise student consciousness of the ways that the legal profession replicates its hierarchical structure. While students must learn the Model Rules of Professional Responsibility in order to pass the Multi-State Professional Responsibility Exam,<sup>324</sup> there is no reason not to expose students to the eye-opening historical background behind

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321. Schlegel, *supra* note 315, at 965-66.

322. *See, e.g., supra* notes 123-24 and accompanying text.

323. Schlegel, *supra* note 315, at 963-64. Schlegel reminds us that the law's "institutions, assumptions, and circumstances" are upper-middle-class institutions. *Id.* at 964.

324. *See* Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 *FORDHAM L. REV.* 1299, 1303 (2003).

many of the ABA's canons of professional responsibility, particularly the rules regarding lawyer advertising, direct solicitation, and contingency fees. As explained in part above,<sup>325</sup> the cadre of upper-class WASP lawyers who dominated the ABA and local bar associations adopted the first ethics canons in response to a perceived threat to the profession from the influx of ethnic and immigrant attorneys into American cities at the turn of the century.<sup>326</sup> And, although WASP ascendancy is no longer the story for the legal profession, pieces of that culture remain in contemporary law practice, in the form of wood-paneled walls, oil paintings of named partners, golf outings, and Brooks Brothers uniforms.

While students must learn the rules, they should also be able to critique these rules and see that many of these rules (such as the prohibitions on lawyer advertising) may have been designed to subordinate lower caste attorneys rather than preventing any kind of palpable harm to the public.<sup>327</sup> Moreover, as students contemplate professional ideals such as Kronman's lawyer-statesman model, which idealizes the everyman lawyer who never seems to worry about money, but instead is "a devoted citizen . . . [who] cares about the public good and is prepared to sacrifice his own well-being for it,"<sup>328</sup> they should question whether these tropes create a profession that truly serves the public good or whether they are just self-serving narratives that preserve the social power that attorneys have amassed in American society.<sup>329</sup>

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325. See *supra* text accompanying notes 142-44.

326. See AUERBACH, *supra* note 120, at 40-42, 48-52 (explaining that many jurisdictions adopted ethics codes in response to perceived threats that immigrant attorneys practicing in urban areas were lowering the status of the legal profession as a whole).

327. See *id.* at 43. See also Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 672 (1994) (explaining that "the ABA's ethics codes replicate[ ] the hierarchy and prestige strata of the legal profession by codifying the self-serving judgments of those who had (and still have) power in the ABA").

328. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 13-14 (1993).

329. See, e.g., HEINZ ET AL., *supra* note 2, at 221-22 (citing KRONMAN, *supra* note 328, at 363-64).

*D. Alternatives to Professor Kingsfield's Bow-Tie*<sup>330</sup>

Finally, law teachers might lead students to question why they are taught the law in a certain way. Elite schools are in a better position to teach the law from a more theoretical and critical perspective than less elite institutions.<sup>331</sup> Doctrinal teachers at low-status schools with bar pass challenges would like to teach alternative methods and competing theories for analyzing the law, but we are often constrained to teach legal substance and analysis in a conservative way so that students can reproduce their knowledge of the law in a form that will be rewarded by the bar examiners.<sup>332</sup> The specter of the bar examination also affects the curricular choices that a school can offer its students.<sup>333</sup> The curriculum at low-status schools is often made up of a large number of core required classes with few

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330. In the 1973 movie, *The Paper Chase*, actor John Houseman portrayed fictional Harvard law professor, Charles Kingsfield, a bow-tie wearing curmudgeon who used the Socratic method to browbeat his students. *THE PAPER CHASE* (Twentieth Century Fox Corp. 1973). Despite having been created over 25 years ago, the Kingsfield character still resonates, which is perhaps a testament that legal education has not changed much since the 1970s. To this day, many law students will express fear that their professor will go "Professor Kingsfield" on them in class.

331. See, e.g., MERTZ, *supra* note 119, at 209-10 (collecting sources supporting the theory that elite schools favor more critical and theoretical pedagogies than less elite schools). See also HEINZ ET AL., *supra* note 2, at 57 (explaining a study of curricular offerings at Chicago area law schools indicating that the most elite schools offered the most interdisciplinary courses).

332. See Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 928 (1997) (explaining how "bar exams determine the curriculum that schools teach . . . [by creating a] canon of legal education, making certain courses central and exiling others to the periphery"); *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 448-49 (2002) (generally discussing how the bar exam affects student choices in structuring their education, leading students to take subjects tested on the bar examination at the expense of clinical courses and interdisciplinary courses). See also *supra* text accompanying note 203 (discussing how the bar examination leads law schools to deemphasize practical skills instruction that would be useful for lawyers entering sole or small firm practice). By way of example, property law teachers must teach the antiquated property-rights subjects (the Rule Against Perpetuities, Shelley's case, etc.) at the expense of subjects (redlining practices) that are more aligned to social justice issues.

333. See Howarth, *supra* note 332, at 928-29.

chances to take interdisciplinary classes.<sup>334</sup> While low-status schools must hew to the dominant methods of analyzing and learning about the law, because that is what is rewarded on the bar examination, students can still be exposed to competing legal theories and gain an understanding of why and how only certain ways of discussing the law are recognized as legitimate. After reading Elizabeth Mertz's detailed research that instantiates the long-held criticism that the case-method indoctrinates students into a very confined understanding of the law that tends to wash out all social differences in favor of a body of abstract legal principles,<sup>335</sup> I began to think that more collaborative pedagogic approaches might be another solution.<sup>336</sup> Clinical and skills teachers, having a greater ability to teach more client-centered approaches to lawyering, are in a unique position to teach legal knowledge in a contextual way that weakens the "thinking like a lawyer" constrictions.<sup>337</sup> For instance, as Joan Smith

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334. *See id.*; *see also* HEINZ ET AL., *supra* note 2, at 57 (explaining a study of curricular offerings at Chicago area law schools indicating that the most elite schools offered the most interdisciplinary courses).

335. MERTZ, *supra* note 119, at 54-59. Professor Mertz's exhaustive review and analysis of recordings from eight first-year contracts classrooms showed, quite specifically, the ways that professors use subtle conversational cues to reward students who approached a case from the "correct" perspective, which emphasized abstract precedential and procedural authority, and punish students who spoke about cases in a way that emphasized the "irrelevant" social contexts or narrative concepts from a case. *Id.*

336. For instance, when my colleague, Jeffrey Van Detta, taught labor law using a nontraditional collaborative problem solving approach, the students developed a deep understanding of the law and produced analyses that had a higher level of sophistication and quality than that seen in the traditionally taught course. Jeffrey A. Van Detta, *Collaborative Problem-Solving Responsive to Diverse Learning Styles: Labor Law as an Active Learning Experience*, 24 N.C. CENT. L. J. 46, 46-49, 75-78 (2001).

337. Skills and clinical training is, in fact, one area that Professor Mertz identifies as having a possibility of achieving a counterbalance, by encouraging other kinds of legal discussions—beyond the casebook method. MERTZ, *supra* note 119, at 220-21. The liberating potential that clinical and skills teachers might bring to bear within legal education is an idea that can be traced back to Jerome Frank and the Legal Realists movement. *Id.* at 26. Although clinical and skills education have been incorporated into modern law school curricula, the continuing resonance of Frank's ideas is perhaps testament to how little our legal educational model has changed. That clinical and skills teachers continue to occupy, in the academy, a lower class than doctrinal casebook method teachers is an important subject, but it is outside the scope of this Essay.

suggests, professors teaching case theory can lead students to develop a critical understanding of the legal system, with an aim for identifying and sidestepping systemic biases, with the end goal of developing a strategy that affords the client the best chance for success.<sup>338</sup> This client-centered approach is not only practical, it also allows opportunities for students to visualize the unspoken ways in which the law's institutional structures replicate and reproduce existing power structures throughout the law and our society.<sup>339</sup>

These modest suggestions are oriented toward bringing legal education closer in line with democratic, egalitarian ideals. The hope is that law graduates will contribute to an enlightened evolution of the law through critical reflection—on not merely what the things are that lawyers do, but also why lawyers do the things they do. By getting students to see and discuss the hidden processes within our legal institutions, we can develop a critical discourse which will, hopefully, chip away at the ingrained habitus, the invisible glue that holds our unequal society together.<sup>340</sup> Specifically, if students develop a sufficient awareness of the suffering that the current legal system continues to cause, despite advances during five centuries in America, the hope is that they will see the ways in which their participation in the system contributes to the subordination of persons of lesser status and will seek alternatives to the existing structures.<sup>341</sup>

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338. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 88-89 (2001).

339. Elizabeth Mertz suggests, in the context of teaching students how to talk about the law, that teachers help students reach “a more self-conscious understanding of the limitations of legal language for apprehending social phenomena, training students to be wary of the hubris that inheres in law’s aspiration of universal translation across so many diverse social realms.” MERTZ, *supra* note 119, at 208.

340. See BOURDIEU, *supra* note 4, at 169-70.

341. This is similar to Peter Gabel’s urge to generate a resistance as a “morally compelling, spiritual activity rather than merely an intellectual/political revolt of free individuals against a surrounding false consciousness.” Gabel, *supra* note 240, at 165.



## CONCLUSION

Legal education contributes to inequalities within the legal profession and reinforces the representation of the legal profession as an upper-class profession. Historically, powerful members of the legal profession joined together with elite legal educational institutions to accomplish the expressly stated goal of excluding members of the lower classes from legal education and the practice of law. Although overt class-exclusion has disappeared, the legal profession's elite and exclusionary traditions remain ensconced within the structure of legal education, cloaked in terms of professional values and merit-based prestige. When students do gain admission to a legal educational institution, they learn that they must behave and dress in an upper-class way in order to cultivate a "professional" image. The emphasis on merit encourages students to internalize the law's hierarchical structure into their mental consciousness and peacefully accept their place in the established order. The problem with the *c'est la vie* habitus is that no one sees beyond their daily routines to recognize the unfair sorting process that places them on a lower rung than others or that those same processes place others on a lower rung than themselves. Law teachers have an obligation to study and demystify the processes by which educational institutions reproduce unequal outcomes, an endeavor that necessarily includes an evaluation of the law teacher's role in these processes. It also goes without saying that law professors should also engender critical consciousness within their teaching, finding ways to show students how legal meanings are generated that favor dominant groups at the expense of weaker groups. If we do not identify and talk about the ways in which legal institutions, especially legal educational institutions, reproduce the law's existing social structures, we enable the existing inequalities within the legal profession and our society to continue for subsequent generations.