

**LEGAL EDUCATION IN SEARCH OF A NEW MERITOCRACY AND VALUES FOR ADMISSIONS,  
GRADING, AND PEDAGOGY:  
A PERSONAL REFLECTION ON THE IMPORTANCE OF THE TEMPLE GRADUATE FELLOW  
PROGRAM**

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Throughout its history,<sup>1</sup> including through its placement of Graduate Fellows into the ranks of higher education professors, and even in its closing conference, the Temple Law School Graduate Fellow Program has played a provocative role in leading US legal higher education into an examination of its core values. In this essay I want to reflect on how the program centered me on a career of teaching and scholarship that explored the relationship of merit, skills and values. I was taught, or, perhaps better, caught, during my time at Temple and continue to explore in what follows from the program's mission that my particular role in legal education is to disrupt hierarchies through how legal educators decide questions of merit in three contexts. First, how should law schools decide who gets admitted? Second, how should I, as a professor, judge the performance of my students once they are admitted? Third, how will I teach values: the value of fealty to the rule of law, and at the same time the need for lawyers to argue for its change? Moreover, of key importance, how will I, as a legal educator, help contribute not only to the quality of the skills possessed by lawyers when they enter the practice of law, but also to their character, having formed attitudes that put service of client and institution above self?

The program's legal education seminar, and my discussions with other graduate fellows (Tom Guernsey, Barbara Britzke, Barbara Brenier, Gene Basanta, (1980) Al Poro, Don Beschle, and Ron Falco and myself (1981)), became formative for me on how I viewed my role as a legal educator. We learned together to question what attributes of merit law schools should look for in who ought to be admitted to law school. We discussed the market for legal educators and asked that if law schools, like Temple, through its S.P.A.C.E admissions program, or other newer law schools looking potentially to hire us, expanded access to law degrees beyond admissions of students from elite colleges, how should they decide who should gain admission. We discussed that if students entered without the traditional markers of merit, such as proven proficiencies as

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<sup>1</sup> Conversations with Joseph Harbaugh, one of the founders of the Grad Fellow program, confirmed that Temple University created the graduate fellow program, in part, to support its unique and creative approach to admissions. In the 1970s, Temple had eschewed the overreliance on LSATs and grades, and set for itself admission of a class of "nontraditional" prospective law students, including first generation lawyers, with particular emphasis on recruiting women and minority students, who may not have the traditional markers of what law schools considered as merited admissions: grades, elite colleges, or even college at all. According to Harbaugh, having set out to admit nontraditional students, it also endeavored through simulations and emphasis on clinical skills, to challenge students to explore the conditions of poverty and segregation that contributed to the hierarchical nature of the society. The Grad Fellows were then not only given teaching experiences in "traditional substantive" courses, but encouraged in teaching legal writing, to use simulations that raised these values. Our simulations, handed down from the previous year's Grad Fellows, included interviewing, counseling and negotiations, skills, integrated into our teaching of legal writing. At least in its inception, working with (supervising) law students in the Temple Legal Aid Office, we also challenged third year law students to serve the underserved population of clients at the highest skill level. The Grad Fellow program was initially designed not only to provide the Grad Fellow with teaching experience, but also a new set of pedagogical methods for using simulations to integrate the teaching of legal analytical skills, into the representation of real clients, with real problems, including issues of divorce, child custody, abuse and neglect, access of disabled children to education, and public services. Skills and professional values went hand in hand.

writers, or excellent grades, and high LSAT scores, then how should legal educators “catch them up” to arm them with the necessary skills and values for the practice of law.

In addition, we asked each other how we ought to measure the performance of students in our legal writing classes, not only to help define what constituted good legal writing, but also to help direct the student on the lifelong learning process of how to be a “good” lawyer. We asked not only about grades in legal writing, but also in other courses, including admission to the bar, and worried about our roles as measurers of merit in the law school class. Were we contributing to an overly competitive attitude for the practice of law, as opposed to fostering cooperative learning, practice and values?

We worried that our grading would foster elite hierarchies in society, rather than promote egalitarian values and a diverse and inclusive practice. We knew we were essentially ranking our students for jobs, with those with higher grades more likely getting jobs at big firms that paid higher salaries. Did we send the message that working for the big firm was of higher value than working in other institutions? I know many of us encourage students to do well and perhaps start in the large law firm, to maximize their chances to free up payment of debt, and then decide more freely what kind of law they wanted to practice. Was this grading an appropriate role for legal educators? And finally, we worried about how law students ought to be taught the skills and values they need for both the ethical and successful practice of law, whether in the private sector, or with the skills and values needed to provide leadership in the administrative law governmental bodies and civil society organizations. We understood that the skills and values they could learn to embody contributed to the service they provided these institutions and was important to the country’s flourishing. I have later come to learn that important research suggests that attitudes and values of those who lead institutions that put service of client and or service of a legal institution over self, contribute to a nation’s success, as opposed to “Why Nations Fail.”<sup>2</sup> I think many of us Grad Fellows caught these values from our mentors at Temple: or perhaps, intuitively, but, in either case, it gave meaning and importance to our attempts at teaching legal skills and professional values throughout our careers.

I came in to the program (1979–81) and found myself in the middle of a revolution in clinical legal education. (*Clinical* law was the predecessor term for what is now called *experiential* learning). We quickly became active participants in the clinical pedagogical debate about whether a “live client” experience was necessary to learning skills and values for the practice of law. Live client advocates argued that it was better for students to learn service-over-self-values through meeting real clients with real problems. On the other side of “live client” clinicians’ debate was the position adopted by most of us Grad Fellows; that we could use “classroom simulations” that involved students in role playing clients and lawyers, to raise important and typical issues imbedded in the practice of law. We could use a learning-by-doing pedagogy, followed by critique and reflection, to not only catch up the nontraditional student into the skills they needed as analytical thinkers and writers, but also engage all students, regardless of educational background, into the “real world of lawyering.” We were “classroom” clinicians. We came to believe that through our exposing students to realistic client situations, we could expose not only ambiguities in the law, as applied, but also sensitize them to both the role of the lawyer as advocate, but also as client-centered counselor. We could teach students how to put client over self. We came to believe that one of the key benefits of classroom clinical teaching

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<sup>2</sup>Daron Acemoglu and James A. Robinson, *WHY NATIONS FAIL? THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (Crown Business, New York, 2012).

method was an integration of an understanding of legal doctrine, with the skills and values important to the practice of law.

This was an extraordinarily exciting time for us, for we were learning as we were teaching about the practice of law. We taught out of Gary Bellow & Bea Moulton's book, *The Lawyering Process*,<sup>3</sup> about how legal education "socialized" us into adopting "professional values." It provided us with the theoretical ideas to help us integrate legal writing and skills and values.<sup>4</sup> We endeavored to teach this client-centered approach to lawyering, both with Professor Harbaugh,<sup>5</sup> in his Interviewing, Counseling and Negotiation seminar and with Professor Anthony J. Bocchino,<sup>6</sup> in teaching his Civil Litigation Seminar. With their help we used existing simulations they had developed, but then added our own, to teach not only close reading of cases and statutes, and how to persuade, gather information, and bargain in the negotiation setting, but also how to prepare an argument, interview witnesses and clients, counsel, and examine and cross examine witnesses in court. We learned how to prepare for and then conduct problem-solving discussions in the face of deadlock, and how to conduct formal and informal discovery, both in a deposition setting, but also with witnesses and clients. I considered myself extremely fortunate to having been mentored in learning skills and values I consider vital to the practice by two of the best teachers (Harbaugh and Bocchino) that I have ever known.<sup>7</sup>

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<sup>3</sup> Gary Bellow & Bea Moulton, *THE LAWYERING PROCESS*, (West, New York, 1978).

<sup>4</sup> As I look back, I see in the language of Bellow and Moulton, that I was also "socialized" into trying to teach skills and values of Client-Centered lawyering. I later modified the client centered model with models I learned from Maude Pervere, at Stanford, Carrie Menkel-Meadow, then at UCLA, and Roger Fisher, at Harvard.

<sup>5</sup> Joe Harbaugh, Tom Guernsey and I formed a career long relationship concerning the teaching of Negotiation and Mediation. Joe brought Tom and I into his Practicing Law Institute project. We collaborated on one of the first interactive online games designed to teach negotiation strategy and tactics. Tom and I joined together as co-authors in *Advanced Negotiation and Mediation Theory and Practice*, NITA. Other scholarship that grew out of my collaboration with Harbaugh includes: *Peacemaking, Religious Belief and the Rule of Law: The Struggle between Dictatorship and Democracy in Syria and Beyond*, (Routledge, Taylor and Francis Group, London and New York, 2018); *Principled Negotiation and Mediation in the International Arena: Talking With Evil*, (Cambridge University Press, 2013); *History, Creative Imagination, and Forgiveness in Mediation on an International Stage: Practical Lessons from Paul Ricoeur's Hermeneutics*, 30, 2 *Journal of Law and Religion*, (2015); *Social Media and Conflict Mapping in Syria: Implications for Peacemaking, International Criminal Prosecutions and for TRC Processes* (2015) 30 *Emory International Law Review* 169 (2015).

<sup>6</sup> I am likewise indebted to Professor Bocchino. His effect on my career is likewise pervasive. He introduced me to the National Institute for Trial Advocacy, made me an Assistant Team Leader, involved me in the creation of NITA's Deposition Program, Motion Practice Program, Appellate Program, Legal Strategy Program, Interviewing and Counseling Program, and Negotiations Programs. He facilitated my becoming NITA's Director of In-House Training, and then Public Programming. I also helped develop international curriculum and program design for NITA, Lawyers Without Borders (LWOB) and then USAID, in Micronesia, China, Africa, Eastern Europe, soviet republic of Georgia, Africa, Mexico, and Russia. Books and articles that grew directly from my collaborations with Tony include, *Fact Investigation: Interviewing, Case Analysis, and Counseling for Effective Representation*, 2d ed. (NITA, 2015)(with Bocchino); *Exhibit Rules*, 2d. ed. (NITA 2019)(with Malone and John Zwier); *Effective Expert Testimony*, 4th ed. (NITA, 2015)(with Malone); *Legal Strategy*, (NITA 2005); *Teaching Legal Strategy* (NITA 2005)(with Siemer and Rothschild); *Expert Rules*, (NITA,2011)(with Malone); *Prosecutions and for TRC Processes* (2015) 30 *Emory International Law Review*, 169, 2015; *Moving From an Inquisitorial to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law and Trial Advocacy Implications*, 26 *Emory Journal of International and Comparative Law* 189 (2012)(with Alexander Barney).

<sup>7</sup> I would also be remiss if I did not mention two other Temple Professors who guided my substantive collaborations while I was at Temple. Professor Dianne Maleson collaborated with me in Torts, and opened up for me the world of "Law and . . .,"; law and economics, law and feminism, critical legal studies. She encouraged my scholarship in causation that launched my scholarship in Torts. Professor Handsel Minyard was also a terrific collaborator in Business Associations, leading to my teaching Business Associations at University of Richmond for 10 years.

I don't think that I was alone in feeling like I was part of a movement that was challenging the status quo. It felt like we Grad Fellows could arm our law students with both the skills and values that they longed for so that they could disrupt hierarchies and challenge elite assumptions, even if it was on a case by case basis. Our mission was to inspire prospective lawyers in their roles on behalf of real clients, with problems that ranged from divorce, child custody, and property disputes, but also confronted conditions of poverty and racism that good lawyering could help overcome.

On a closer look at legal education at Temple, and then after leaving Temple, and in my career at University of Richmond School of Law (18 years) and University of Tennessee College of Law (4 years) and now Emory University School of law (15 years), it became clear that not everyone had bought into this clinical revolution. Some professors and students seemed, at best, neutral to the hierarchical nature of legal education and the practice of law. Both students and colleagues didn't want to be distracted from discussions of current legal doctrine (coverage) in the classroom by issues of the clash between values like liberty, or equity, inclusion or vulnerability. They were not immediately enamored with learning-by-doing simulations and resisted being put on the spot to perform before their peers. Many expressed a preference for the traditional law school classroom, out of fear of subjective non-anonymous grading, and all the bias that can creep into that pedagogy. Moreover, many students seemed focused on their chance to compete for the highest paying jobs, and, as first-generation lawyers, focused primarily on the goals of caring for themselves and their families. They saw the practice of law as their chance at a higher standard of living. And, who could blame them?

"Is it on the exam?" drove much of what students seemed initially to want to learn and I had to win them over by explaining the pedagogical purpose and justification for using simulations. In traditional subjects, these students still clamored to know what the rules were. They willingly discussed ambiguity in the law, but seemed primarily interested to learn how they could exploit the rules in the direction that maximizes the client's freedom, or personal gain and advancement. Discussion of ethical and professionalism issues was more difficult. Many students remained skeptical of the paternalism inherent in discussion of values. "Leave it to us, as individuals for how we can choose what law to practice and how to practice it. This is my chance, and the coin of the realm is high grades in traditional courses."

In the academy many law professors also seemed less than interested in the hierarchical nature of legal education, at least as embedded in pedagogy. Some were comfortable with the hierarchies in the practice of law. They were unperturbed by the high cost of legal education, the large classroom settings, the one-exam-final grading pedagogy, and impersonal lecture as a means to convey traditional legal doctrines. They willingly perpetuated the myth that grades are related to merit, and so ranked students so that the market can make choices about who it wants to hire. They then retreated to their offices to pursue their scholarship, and consulting, and use the hierarchical nature of legal education (I'm a professor, I get to choose) to exercise their individual liberty of what "values" they choose to pursue, on their own time.<sup>8</sup>

I have to be honest, however, in admitting that many of these colleagues are outstanding lecturers and scholars. Many spend their careers in teaching and scholarship in attacking hierarchies. Many students attribute their "values" formation to what they learned from these

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<sup>8</sup> Isaiah Berlin, "TWO CONCEPTS OF LIBERTY," Four Essays on Liberty, (Oxford, England: Oxford University Press, 1969), p. 118-172.

[http://cactus.dixie.edu/green/B\\_Readings/I\\_Berlin%20Two%20Concpets%20of%20Liberty.pdf](http://cactus.dixie.edu/green/B_Readings/I_Berlin%20Two%20Concpets%20of%20Liberty.pdf)

professors. On graduation they cite to these teachers as examples of rigor and outstanding scholarly approach to the subject matter. They value their ability to break down a complex subject matter to help them gain insight, and the care and compassion that they had for students. They sense of that care came from both their lectures, and in office hours that followed. Many of my colleagues, perhaps the majority, produce “progressive scholarship” that challenges legal hierarchies, both inside and outside of the practice of law. Such is the complaint of the Federalist Society. Moreover, as outstanding analytical minds steeped in scholarship and experience in debating important legal issues at the highest levels, they produce memorable, challenging, and insightful classroom experiences. Only those students completely lacking in intellectual curiosity fail to admire the knowledge and insight these faculty bring to the classroom experience, whether they have a liberal or conservative bent.

As a result, though I remain committed to the pedagogy I learned at the Graduate Fellow program, I certainly do not feel it is required by other law professors. I try to make it clear in my discussions with students, that simulations are important for exploring values, but are not the only way to learn them. In the run up to upper-level classes, (including my Evidence class) I pitch the simulation as a different pedagogy, designed for upper-level students who already know they are not as good at learning under the traditional criteria of legal education. I use discussion of simulations as a way of highlighting a different hierarchy of skills, one less dependent on the student’s ability to remember information presented in reading and oral lectures, and more focused on learning from experience. I argue that pedagogy prepares the students, cognitively and affectively, for the actual practice. It helps them find the values of service that will give their practices meaning, beyond what income it produces.

Yet, while I am agnostic about whether classroom clinics, or “hybrid clinics” are better than the traditional teaching methods, I am still bothered by the institutional structures that incentivize a professor’s time to spending time away from students, and on individual scholarly projects. I attribute my discomfort, again, to the values I learned as a Graduate Fellow. I learned from the program that scholarship not only can grow from engaging in historical examinations of cases to see changes in society and values that can lead to injustice. It not only occurs through taking an interdisciplinary approach to law through “law and” scholarship—law and society, law and sociology, law and anthropology, law and economics, law and race, law and feminism, law and gender, law and science, law and philosophy, law and religion. I see my own scholarship as having “bubbled” up from examinations of law and practice. Clinics and clinical classrooms, can be the source of the study of difficult and complex ways that law has consequences for not only clients, but for the lawyers who represent them. Again, learning can be both cognitive and “affective” and so legal education, and its scholarship, should also be concerned, more broadly, like in medicine, with clinical issues.

I confess that I enjoy my “liberty” in scholarship, choosing what I want to study and write about. I became particularly interested in teaching trial skills, as they were such a confidence booster for leadership in a wide-ranging set of circumstances, far beyond the courtroom. This interest took me around the world doing advocacy and judicial education. Through that work I became interested in rule of law development as way to promote human rights. My scholarship then grew out of my international experience.

I know that my scholarship interests grew from my freedom to define for myself what gives my life its meaning. I know my scholarly track is not unlike that of my colleagues, as it grows out of what they care about. I believe we all benefit from the academic freedom that is brought about by gaining the rank and status of a tenured full professor. Yet, I am still troubled

that the scholarship that grows out skills-based practice experience isn't as valued by the legal profession as clinical scholarship is valued in medicine or psychology. I also am bothered by the "siloed" nature of scholarly endeavors, and worry that law students come away from their legal education without much of an understanding of being part of community of shared values and shared purposes. I also worry that in not "valuing" clinical professors by awarding them tenure, and other opportunities to do scholarship, legal education sends the message to the students that it doesn't value the practice of law. I believe these practices contribute to the loss of community and shared mission between law professors and students.<sup>9</sup>

I come away from my time at the Temple closing conference with my libertarian philosophy toward scholarship, intact, but also am more troubled than ever, by existing hierarchies. Perhaps this is because I was admitted into the Temple Program, and started on my path to a career in legal education, despite my not having had traditional credentials for being a law professor (without elite law degrees or clerkships). I see myself as not only having broken through the traditional hierarchical barriers to teach law, but, having been so "blessed," I feel a need to return the favor to my students by seeking admission policies in the law schools in which I teach, that will admit the non-traditional students, and that I will emphasize in my teaching, both as to what I teach and how I teach, a commitment to disrupting hierarchies.

In the remainder of this essay I will make some observations about both law school admissions and pedagogy, which I still see as first arising out of my time as a Graduate Fellow. These reflections will lead me to conclude with a worry and a hope: a worry that other law professors will continue to challenge legal education with experiential learning and other pedagogies designed to disrupt elitism in the practice of law, and a hope that Temple will see the value of what it can and has offered in the its Grad Fellow program, and renew its commitment to offer a Graduate Fellow program with the skills and values that guided it during its founding.

## **Merit in Admissions**

One of the values learned in the Graduate Fellow program was that legal education should seek admissions policies that favor first generation lawyers,<sup>10</sup> and or those from marginalized communities. As a result, law schools should promote more egalitarian admissions policies. One reason for law schools to do so is that in seeking non-traditional law students, it will have to confront the difficulties of ridding itself of its elite assumptions. It will make each law school be critical of elite systems and methods for identifying future lawyers. Its search for new criteria will make it confront the need for a new meritocracy. How does one eliminate privilege endemic in merit measured by grades, LSAT scores, student essays, strength of

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<sup>9</sup> Legal education needs to continue to take a hard look at the status of clinicians, and legal writing teachers, to better support their work, especially where support is needed to continue to develop simulations that can lead to more realistic and ethical best practices for representing clients, whether as advocates, counselors, negotiators, problem-solvers and mediators. I worry that without Graduate Fellows ready to engage law school faculties both from within the traditional scholarly community and from the clinical perspective, that something will be lost. I am discouraged that law schools seem to continue to segregate the legal writing and "skills" faculty, which contribute to hierarchies concerning the nature and value of practice, and even the type of practice the law school values. I admit that it has led me to pursue more traditional types of scholarship in order to bridge the gap between clinicians and traditional faculty.

<sup>10</sup> Presentations made at the conference by Deans Anthony Niedwiecki, (Golden Gate), Katharine Traylor Schaffzin, (interim Dean of Memphis School of Law), and James McGrath, (Cooley).

academic institutions, and even applicant interviews? What instead should law schools look for in student applications that will be the true measure of merit warranting admissions?

Criteria of merit that tries to strip away legacies of privilege and race and economic advantage are hard to come by. While elitism and privilege seemed seldom to give rise to egalitarian values, and values of diversity and inclusion, they are, nonetheless related to values and character formation as old as Aristotle.<sup>11</sup> Old notions embedded in the education of aristocrats taught that wealth and privilege gave rise to obligations towards the poor. “Citizens” could only enter the body politics after they formed the character for putting service to the community above self. A properly educated “gentleman” was supposed to be educated into values and character attributes that eschewed dishonesty, lying, cheating, stealing, and even pressing for a selfish advantage if they harmed others, especially the poor. Religious education was also supposed to prepare the aristocrat for public service.

Yet, too often, “values” education became an excuse to favor the existing elites and protect wealth from disruptive ideas and competition. Would it then be better for the disruption of hierarchies to have students and lawyers from outside the established community, better able to press for not only equality, but affirmative advantages for minority communities, regardless of the cost on the civility norms and practices of the existing majority? But what values will then constrict the minority community if and when it reaches a majority? Will diversity, focused on established minority hierarchies, lead to its own brand of tribalism? Perhaps there are other values, or additional values that law students ought to have when they are admitted. Answers to these questions are complex and difficult.<sup>12</sup> These have been lifelong pursuits for many of us since leaving the program. Some of us have led experiments at law schools with Admission by Performance programs.<sup>13</sup>

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<sup>11</sup> Aristotle’s Political Theory, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/aristotle-politics/>

<sup>12</sup> The Harvard admissions process and the Chinese applicant shows the difficulty and complexity of designing a truly merit based admissions process. See, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation)*, <https://int.nyt.com/data/documenthelper/1865-harvard-admissions-process/fcb2b57c15f154b139df/optimized/full.pdf#page=1>. Having reviewed the statistical data for discriminatory impacts based on stereotypes, and finding conflicting data, the court concludes:

Harvard’s admissions process survives strict scrutiny. It serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity. Consistent with the hallmarks of a narrowly tailored program, applicants are afforded a holistic, individualized review, diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way. See *Fisher*, 136 S. Ct. at 2214; *Grutter*, 539 U.S. at 337–38. The Admissions program also satisfies the other principles articulated in *Fisher II* in that it does not have a quota or use a fixed percentage and all applicants compete for all available seats. Further, Harvard has met its burden of showing that there are not currently any available or workable race-neutral alternatives. Finally, there is nothing about Harvard’s admissions process that is at odds with the reason for subjecting racial classifications to strict scrutiny—to ensure little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. *J.A. Croson Co.*, 488 U.S. at 493. The use of race benefits certain racial and ethnic groups that would otherwise be underrepresented at Harvard and is therefore neither an illegitimate use of race or reflective of racial prejudice. Accordingly, judgment for Harvard shall enter on Count I, intentional discrimination. *Id.* at 126

<sup>13</sup> Harbaugh brought an Admission by Performance program to the University of Richmond, when he was Dean there. Admission by Performance programs experiment with providing “nontraditional” students with summer school opportunities, or non-JD courses, to help students gain access to legal education. ABA rules continue to discourage these efforts, and not without reason. How does a law school fairly justify charging tuition to test a students’ ability to become a lawyer? After all, finally, admission to the practice is determined by the state, according to a bar examination. That examination itself has hierarchical criteria that favor fast reading and thinking

It has been the special history of US legal education, that it has not limited the admission lawyers to the practice to the aristocrat. As we will briefly discuss, that history will create a paradox in US legal education. How will it open its admission to everyone, while maintaining some standard of excellence in who practices law, to ensure those who practice in the law environment will place the service to the client or to the legal institution over their individual gain?

To see the paradox, we have to revisit Alex De Tocqueville's examination of Democracy in America, and especially his Chapter XVI, which is devoted to the unique role that lawyers play in American society.<sup>14</sup> Remember that Tocqueville was concerned that Democracies, like occurred in France following the French Revolution, would be captured by the "Tyranny" of the majority, and would devolve into a society ruled by a majority, which would sooner or later

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skills, and performance on a combination of multiple choice questions and performance based tests. State bars worry that law schools mislead prospective lawyers lacking the analytical ability to ever pass their bar examination.

<sup>14</sup> [http://xroads.virginia.edu/~HYPER/DETOC/1\\_ch16.htm](http://xroads.virginia.edu/~HYPER/DETOC/1_ch16.htm) Chapter XVI: CAUSES WHICH MITIGATE THE TYRANNY OF THE MAJORITY IN THE UNITED STATES

***ABSENCE OF CENTRALIZED ADMINISTRATION. The national majority does not pretend to do everything--Is obliged to employ the town and county magistrates to execute its sovereign will.***

I HAVE already pointed out the distinction between a centralized government and a centralized administration. The former exists in America, but the latter is nearly unknown there. If the directing power of the American communities had both these instruments of government at its disposal and united the habit of executing its commands to the right of commanding; if, after having established the general principles of government, it descended to the details of their application; and if, having regulated the great interests of the country, it could descend to the circle of individual interests, freedom would soon be banished from the New World.

But in the United States the majority, which so frequently displays the tastes and the propensities of a despot, is still destitute of the most perfect instruments of tyranny.

...A privileged body can never satisfy the ambition of all its members: it has always more talents and more passions than it can find places to employ, so that a considerable number of individuals are usually to be met with who are inclined to attack those very privileges which they cannot soon enough turn to their own account.

I do not, then, assert that all the members of the legal profession are at all times the friends of order and the opponents of innovation, but merely that most of them are usually so. In a community in which lawyers are allowed to occupy without opposition that high station which naturally belongs to them, their general spirit will be eminently conservative and anti-democratic. ...

Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power; and, provided the legislature undertakes of itself to deprive men of their independence, they are not dissatisfied.

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. ... They like the government of democracy without participating in its propensities and without imitating its weaknesses; whence they derive a twofold authority from it and over it. The people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation, because they do not attribute to them any sinister designs. The lawyers do not, indeed, wish to overthrow the institutions of democracy, but they constantly endeavor to turn it away from its real direction by means that are foreign to its nature. Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.



prefer a despot that would purport to support their interests, over the freedoms and liberties that might otherwise initially proliferate in a democratic society. Law and order would be the purpose or driving force whereby the despot would impose his or her or their will on the society. Tocqueville observed that the way the despot enforced their will was through the legal aristocracy. He was curious, then to examine the American version of democracy to see how it would combat that tyranny that would otherwise soon slide into authoritarianism.<sup>15</sup>

One of the features of the American legal system that resisted the slide to tyranny, shared by the English, and not by the French, was that it was based on the common law and the conservative doctrine of legal precedent.<sup>16</sup> A second feature of the American experience was

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<sup>15</sup> Alex De Tocqueville, THE TEMPER OF THE LEGAL PROFESSION IN THE UNITED STATES, AND HOW IT SERVES AS A COUNTERPOISE TO DEMOCRACY.

*Utility of ascertaining what are the natural instincts of the legal profession--These men are to act a prominent part in future society--How the peculiar pursuits of lawyers give an aristocratic turn to their ideas--Accidental causes that may check this tendency--Ease with which the aristocracy coalesces with legal men--Use of lawyers to a despot--The profession of the law constitutes the only aristocratic element with which the natural elements of democracy will combine--Peculiar causes which tend to give an aristocratic turn of mind to English and American lawyers--The aristocracy of America is on the bench and at the bar--Influence of lawyers upon American society--Their peculiar magisterial spirit affects the legislature, the administration, and even the people.*

IN visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence; that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause, which it is useful to investigate, as it may be reproduced elsewhere.

...Some of the tastes and the habits of the aristocracy may consequently be discovered in the characters of lawyers. They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other} men, are governed by their private interests, and especially by the interests of the moment.

In a state of society in which the members of the legal profession cannot hold that rank in the political world which they enjoy in private life, we may rest assured that they will be the foremost agents of revolution. But it must then be asked whether the cause that then induces them to innovate and destroy results from a permanent disposition or from an accident. It is true that lawyers mainly contributed to the overthrow of the French monarchy in 1789; but it remains to be seen whether they acted thus because they had studied the laws or because they were prohibited from making them.

<sup>16</sup> Id.

This aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and in England than in any other country. This proceeds not only from the legal studies of the English and American lawyers, but from the nature of the law and the position which these interpreters of it occupy in the two countries. The English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and decisions of their predecessors. In the mind of an English or American lawyer a taste and a reverence for what is old is almost always united with a love of regular and lawful proceedings.

This predisposition has another effect upon the character of the legal profession and upon the general course of society. The English and American lawyers investigate what has been done; the French advocate inquires what should have been done; the former produce precedents, the latter reasons.

...The position that lawyers occupy in England and America exercises no less influence upon their habits and opinions. The English aristocracy, which has taken care to attract to its sphere whatever is at all analogous to itself, has conferred a high degree of importance and authority upon the members of the legal profession. ...

And, indeed, the lawyer-like character that I am endeavoring to depict is most distinctly to be met with in England: there laws are esteemed not so much because they are good as because they are old; and if it is

that lawyers had not obtained their position through aristocracy. They gained it by their knowledge of the law, not by title or by inheritance.<sup>17</sup> Related to the American features of the American lawyer, was the unique role that its Constitution would play in combatting tyranny. Lawyers could use the law against the tyranny of the majority by arguing that the majority must abide by the terms of the Constitution, or amend it, if it wanted to remain legitimate.<sup>18</sup>

Still, as Tocqueville pointed out, the Constitution (and rule of law) extended far beyond the law itself, and into the very fabric of the American Society. As long as the citizens viewed lawyers as “neutral” instruments of the law, as conservative as they might be in holding the society to its legislative enactments and past precedents, Tocqueville was optimistic that the American version of democracy could maintain itself, in the face of the tyranny of the majority

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necessary to modify them in any respect, to adapt them to the changes that time operates in society, recourse is had to the most inconceivable subtleties in order to uphold the traditional fabric and to maintain that nothing has been done which does not square with the intentions and complete the labors of former generations. The very individuals who conduct these changes disclaim any desire for innovation and had rather resort to absurd expedients than plead guilty to so great a crime.

<sup>17</sup> Id.

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. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. 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. The more we reflect upon all that occurs in the United States the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors.

<sup>18</sup> Id.

Chapter (XVI). Armed with the power of declaring the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs. He cannot force the people to make laws, but at least he can oblige them not to disobey their own enactments and not to be inconsistent with themselves. I am aware that a secret tendency to diminish the judicial power exists in the United States; and by most of the constitutions of the several states the government can, upon the demand of the two houses of the legislature, remove judges from their station. Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself.

that would slide into despotism.<sup>19</sup> Tocqueville sees the American lawyer as vital to the sustainability of its democracy.<sup>20</sup>

Note that to maintain their unique role as lawyers in a democracy that admission to the legal profession must be made open to all groups in the society, but, also, *citizens*<sup>21</sup> have to see lawyers as having fealty to law, over fealty to self.

The access to becoming a lawyer is paramount, according to de Tocqueville. If all groups have access to being lawyers, they increase their numbers in legislative bodies and in leading legal institutions. Note also that if admission to law schools and their meritocracy of evaluation of performance is entry into becoming a teacher, then diversity of admission should eventually fix any tyranny that might become integrated into the academy through the perspectives of those who teach it. There are two countervailing forces at work within the academy. There is an elitism that inevitably captures legal education and those who teach in it.<sup>22</sup>

On the other hand, contrary to the warnings from Markowitz, what has been taught, as opposed to who is doing the teaching, has most often been more “progressive” and challenging current legal structures than conservative, and protecting them. For some, the academy has been captured by the liberal progressives, who have routinely written and taught about the need for law and legal institutions to put aside its more conservative impulses, in order to foster more creativity and diversity.<sup>23</sup> Whether seen as a tendency toward “nobles oblige,” or stemming from values “traditionally taught in the aristocracy,” the values of the legal profession are supposed to

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<sup>19</sup> Id.

It must not be supposed, moreover, that the legal spirit is confined in the United States to the courts of justice; it extends far beyond them. As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution. ...

The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs.

<sup>20</sup> Id.

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them.

<sup>21</sup> Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/aristotle-politics/>, Aristotle’s definition of *citizen* includes the idea of person’s in society committed to a “noble” life.

<sup>22</sup> Daniel Markowitz, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLECLASS, AND DEVOURS THE ELITE* (2019, Penguin Press). Yale Law Professor Markowitz argues that elite law schools have been captured by legacy and wealth that have made a mockery of merit. Markowitz argues that what we call merit is, “a pretense, constructed to rationalize an unjust distribution of advantage.” He argues that “If you know what you’re doing and if you have enough money to spend on expensive tutors and prep schools, the meritocracy is easily gamed.” (I assume that he worries that capture has also occurred in elite law schools, though he does argue that law students at Yale are excellent students, hardworking and very skilled in the law. His reason to be suspicious of law schools having been gamed by the elite and wealthy depends mostly on the demographics of these law students, that they come from families of disproportionate wealth—top 1%, and are three times in number to those whose family wealth is middle class or lower. Thomas Frank (Markowitz’s NYT reviewer) is also not sure whether merit based on SAT and Grades, and recommendations from professors from elite undergraduate schools is worse than meritocracies based on Calvinism (wealth as an indication of God’s favor,) or Social Darwinism (again gravitates to success—and survival skills—as a measure of merit, but certainly better than eugenics. ) NYT Book Review, Thomas Frank, *Unfair Play*, 13, November 17, 2019).

<sup>23</sup> The Federalist Society was formed, in part, to not only combat the progressivism of the judiciary, but also in the academy.

include special obligations to take unpopular causes, increase liberty for all, and, as opposed to aristocratic beliefs in the different worth or merits of individuals depending family and status, promote truly democratic values, including egalitarianism: that each individual will be treated as if they have equal (and have infinite) worth. (Promoting rights of everyone to vote, serve on juries, and have universal access to education, health care, and other vital service, not dependent on one's ability to pay or meet other criteria.) For lawyers and legal educators to be interested in examining society for its hierarchies seems evidence of the persistent role of law in the US, that it balance the importance of certainty and fairness with the need to place the needs of the individual citizen, including new arrivals and minority groups, ahead of the tyranny of any majority.

Of course, a lot has changed since Tocqueville made his observations of the unique role that America's lawyers played in maintaining its democracy in the face of the tyranny of the majority. The age of "Lincoln, the Lawyer," as the ideal image that anyone, with hard work and access to the law, could learn the law, and become a lawyer, was gradually replaced by the institutions of legal education. Still, I believe that much is at stake for US law schools and for the US political system, generally, in the answer to how to define the new meritocracy for admitting students. As Daron Acemoglu and James A. Robinson argue in their book, "Why Nations Fail?,"<sup>24</sup> nations will fail when leaders (including lawyers) have no regard for the health and flourishing of the citizens generally, (think corruption) and when institutions lack the competence to administer its laws. One need only examine how the "rule of law" is manipulated by totalitarian leaders—from Putin to Assad, Khomeini to Kim il Sun—to see the corrupting impact of corrupt leaders. Acemoglu and Robinson argue that in the end, the difference between North Korea and South Korea is in the attitude of their leaders, including the managers of their governmental institutions, and an ability to put the interests of the citizens ahead of a leader's or manager's self-interest.

But one need not go very far from home to worry about whether the same corrupting influence is finding its way, even more than usual, into US lawyers, even at the highest levels of government. One need only examine the facile way that lawyer/representatives on the House Judiciary Committee and Senate White House Counsel<sup>25</sup> manipulate facts to serve their

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<sup>24</sup> Daron Acemoglu and James A. Robinson, *Why Nations Fail? The Origins of Power, Prosperity and Poverty*, Crown Business, New York, 2012) *Cf.*, the examples of China and Vietnam, which belie the belief that democracy and rule of law are necessary to a flourishing economy. The question for lawyers today is how important is it for the society to be protected from Undemocratic and indeed totalitarian decision-making? Will the society/nation fail, once the corruption from the top so infiltrates the government and society generally that citizens question why they should abide by the rule of law, if their leader does not.

<sup>25</sup> Some White House counsel ignore prohibitions against being an advocate in a case where they are a witness. See, Stephen Gillers, <https://www.justsecurity.org/68264/impeachment-trial-and-legal-ethics-pat-cipollone-should-be-a-witness-not-a-trump-lawyer/>. Others have ignored their obligations of candor toward a tribunal. See **ABA Ethical Rules of Professional Responsibility, M.R. 3.3** (a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false.

**Just a Few of Many Misrepresentations of Fact (from letter to author from Elisa S. Rives, LLC e-mail: [esrives@esrivesllc.com](mailto:esrives@esrivesllc.com)) (letter on file with author).**

**The Impeachment Proceedings Day 1 CBS January 21, 2020.** <https://www.youtube.com/watch?v=TB-CF8p-HrE>  
**Cipollone at Time 3:52:40.**

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“Do you want to know about due process? I’ll tell you about due process. Never before in the history of our country has a president been confronted with this kind of impeachment proceeding in the house. It wasn’t conducted by the judiciary committee, not Mr. Nadler when he applied for that job told his colleagues when they took over the house that he was really good at impeachment. But, what happened was, the proceedings took place in a basement of the house of representatives. The president was forbidden from attending. The president was not allowed to have a lawyer present. In every other impeachment proceeding, the president has been given a minimal due process, nothing here. Not even Mr. Schiff’s republican colleagues were allowed into the SCIF. Information was selectively leaked out. Witnesses were threatened. Good public servants were told they would be held in contempt. They were told they were obstructing. What does Mr. Schiff mean by obstructing? He means unless you do exactly what he says regardless of your constitutional rights, then you are obstructing. The president was not allowed to call witnesses. By the way, there is still evidence in the SCIF that we haven’t been allowed to see. I wonder why. No witnesses.”

**Cipollone at 3:56:37** refers to a subpoena as a threat.

**Cipollone at 3:59:38** “They locked the president out.”

**Cipollone at 4:03:36** “...fraudulent investigation, conducted in secret, with no rights”

**Sekulow at Time 3:41:22**

“I’ll give you a trifecta. During the proceedings that took place before the judiciary committee, the president was denied the right to cross examine witnesses, the president was denied the right to access evidence, and the president was denied the right to have counsel present at hearings. That’s a trifecta” [https://www.youtube.com/watch?v=TB-CF8p-HrE\\_](https://www.youtube.com/watch?v=TB-CF8p-HrE_)

TRUMP lawyer PAT CIPOLLONE: “Not even Mr. Schiff’s republican colleagues were allowed into the SCIF” A Sensitive Compartmented Information Facility (SCIF; pronounced "skiff") is a secure government facility where classified intelligence can be discussed without eavesdropping.

THE FACT: In the recent impeachment, House Speaker Nancy Pelosi, D-Calif., instructed three House committees — Oversight, Intelligence and Foreign Affairs — to carry out an investigation that the House Judiciary Committee eventually used to draft articles of impeachment. All three committees and all of their members (republican and democrats) had access to depositions in the SCIF. There are nine Republicans on the House Intelligence Committee, 17 on the House Oversight Committee, and 21 on the [House Foreign Affairs Committee](https://www.politifact.com/truth-o-meter/statements/2020/jan/21/pat-cipollone/senate-trial-pat-cipollone-was-wrong-gop-access-sc/). <https://www.politifact.com/truth-o-meter/statements/2020/jan/21/pat-cipollone/senate-trial-pat-cipollone-was-wrong-gop-access-sc/>

TRUMP lawyer PAT CIPOLLONE: “Why would you lock everybody out of it from the president’s side? ... It’s evidence they themselves don’t believe in the facts of their case.”

THE FACTS: Trump wasn’t locked out. He rejected an invitation from the House Judiciary Committee to participate in the hearings that ultimately produced the articles of impeachment. <https://apnews.com/2ce0cdd506b5347b69607a1cabe7d1ab>

TRUMP lawyer MIKE PURPURA: “The record that we have to go on today is based entirely on House Democratic facts pre-cleared in a basement bunker.”

THE FACTS: That’s not true. The case also is based on text messages, emails and other documents provided to the House Intelligence Committee, which had public hearings. Many witnesses testified and Republicans on the committee attended and questioned them, just as Democrats, did. <https://apnews.com/2ce0cdd506b5347b69607a1cabe7d1ab>

The President was not locked out of the proceedings. <https://apnews.com/Trumpimpeachment> (AP article for the impeachment specifically has the articles and Nadler’s letter prior to the judiciary committee hearing).

“As for the dark reference to a “basement bunker,” that’s a secure facility at the Capitol where, at times, dozens of members of the House, from both parties, attended depositions and meetings.”, Supra.

**The Impeachment Proceedings Day 6 January 27, 2020.**

purposes, how they use language in pursuit of power to realize how “merit” without character, soul, or conscious regard for others can turn legal analysis into a tool of power to protect power.<sup>26</sup> Not to be too pessimistic, but what may be most telling from the impeachment process are the signs that the lawyers and Senators are no longer putting service of country over service of party.

To protect its citizens from attitudes that unabashedly put self above service, (even to the Constitution), law school admissions offices seek students with the right motivations married by a desire to serve the public good. These efforts not only look at grades overall, but place hope in institutions with reputations for rigor and ability to challenge and build character through service-learning projects and the like. Also, law schools seek merit through LSAT tests. These institutions had presumably already selected their student by measuring their motivation and desire in “hard” AP classes (AP subjects are graded through standardized tests designed to rank students regardless of school). However, of course, these grades are not only the result of ability, but a result of earlier education, tutoring, exposure, and practice. Getting a five on an AP test is not only a measure by overcoming obstacles, in studying hard subjects, but learning and practicing test-taking skills in “fast thinking” that can be acquired, if one has the resources and desire to get a 5.

Perhaps law schools have been captured by the elites by and through their capture of undergraduate schools.<sup>27</sup> Yale Law Professor Markowitz argues that legacies and wealth have captured elite law schools that make a mockery of merit. Markowitz argues that what we call

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#### **Ms. Pam Bondi**

Pam Bondi’s presentation around Hunter Biden and Burisma and Joe Biden’s involvement therein was factually incorrect. <https://www.cnn.com/2020/01/27/politics/fact-check-joe-biden-burisma-pam-bondi/index.html> (Bondi omitted and misrepresented facts)

#### **Mr. Alan Dershowitz**

Mr. Alan Dershowitz relied on Justice Benjamin Curtis to argue “High Crimes and Misdemeanors” in the Constitution requires the President to be charged with a crime. <https://www.youtube.com/watch?v=uqmhfyH09jM>. This is a minority and novel view of the Constitutional language for grounds for impeachment. <https://www.law.berkeley.edu/wp-content/uploads/2019/10/Open-Letter-from-Legal-Scholars-re-Impeachment.pdf>. To credit Mr. Dershowitz, he did point out to the Senate his view of the Constitution, in regards to Impeachable conduct, is a minority view. However, Mr. Dershowitz may have failed to point out a key fact. According to a documentary by the Public Broadcasting Service, Justice Curtis is most notably known for convincing the Senate an impeachment is a judicial proceeding requiring witnesses and evidence. Fox, John. “The First Hundred Years: Biographies of the Robes, Benjamin Robinson Curtis.” Public Broadcasting Service (Retrieved May 13, 2012). [https://www.thirteen.org/wnet/supremecourt/antebellum/robes\\_curtis.html](https://www.thirteen.org/wnet/supremecourt/antebellum/robes_curtis.html)

#### **AP Fact Checks**

Associated Press article for the impeachment specifically fact checks representation made by attorney’s for President Trump. <https://apnews.com/Trumpimpeachment>

See also:

<https://apnews.com/4f2eac395c94a7ade29fc6e32c71a872>;

<https://apnews.com/c565f440467e4fd5cd6a11d7c8abc842>;

<https://apnews.com/ffc57a10c14a09fe1a459adc065bab18>;

<sup>26</sup> Proceeding of the House Judiciary Committee. Have Republican law makers (who are lawyers) acted on ethically? *Cf.*, Michael Stern, Ethical Obligations of Congressional Lawyers, 63 NYU Annual Survey of American Law, 191, [http://www.law.nyu.edu/sites/default/files/ecm\\_pro\\_064592.pdf](http://www.law.nyu.edu/sites/default/files/ecm_pro_064592.pdf) (arguing that lawyer obligations may apply to lawyers during Congressional hearings).

<sup>27</sup> Daniel Markowitz, *The Meritocracy Trap: How America’s Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (2019, Penguin Press).

merit is, “a pretense, constructed to rationalize an unjust distribution of advantage.” He argues that “If you know what you're doing and if you have enough money to spend on expensive tutors and prep schools, the meritocracy is easily gamed.” I assume that he worries that capture has also occurred in elite law schools, though he does argue that law students at Yale are excellent students, hardworking and very skilled in the law. He is suspicious of law schools because he feels they have been gamed by the elite and the wealthy and supports that position because of the demographics of these law students. Law students at elite law schools come from families of disproportionate wealth—the top 1% are three times in number to those whose family wealth is middle class or lower. Thomas Frank (Markowitz’s NYT reviewer) is also not sure whether merit based on SAT scores and grades, and recommendations from professors from elite undergraduate schools, is worse than meritocracies based on Calvinism (wealth as an indication of God’s favor,) or Social Darwinism (again attributes relative merit to success and survival skills.) Frank finds any of these measures of merit, better than eugenics.<sup>28</sup>

The question of merit in the record of a law school applicant raises squarely the question of whether values, primarily those that value the health of society and its citizens above self, are formed in the family and through early education, or taught through the socialization process that occurs during law school. If the latter, then should at least some law schools, especially those with an egalitarian mission, have “open admissions” for anyone seeking a legal education? Temple has been right at the forefront of this debate about law school admissions and the new meritocracy. It recognized the hierarchies in admissions, and set out to design a more open admissions process, not one so reliant on LSATs and grades from elite institutions. Temple developed an admissions process that included an interview that looked for nontraditional markers of the skills and values it thought necessary for attaining excellence as a lawyer. It was particularly committed to first generation lawyers, but also to minorities, who may have lacked access that privilege might have provided to others. They found these students nonetheless often showed promise in commitment, drive, and character, to obtain the necessary skills that were the mark of a successful lawyer. They looked at signs beyond grades of good analytical skills, writing skills, both in advocacy and objective situations. They looked for evidence the students had the values to the community and the rule of law that warranted access to legal education. It was one of few law schools to make explicit its search for a new meritocracy. Others have picked up the mantle in their admissions criteria. Still, something seems lost with the end of the Temple program, and the marriage of its admissions and curriculum, with an LLM program designed to support its efforts to admit and prepare according to its new meritocracy.

### **Merit and Values in the Law We Teach and How We Teach It.**

Perhaps for most of us from the Graduate Program—those not Deans, or directly involved in admissions—are more concerned and self-critical of what we teach, and how we teach than about whom we are teaching. We leave admissions to those we hire, assuming that whom we hire have the values that we think essential to guide the admissions process. They will be able to spot those with at least the beginnings of or signs that they have a character for service.

Whatever the admissions process used does not end our concerns for disrupting hierarchies. Perhaps that is because our Graduate Fellow experience has socialized us into asking whether our subject matter and pedagogy promotes false measures of merit, and contributes to

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<sup>28</sup> NYT Book Review, Thomas Frank, *Unfair Play*, 13, November 17, 2019.

the continuing establishment of elite, classist, and racist hierarchies. I have internalized the values learned during our time at Temple, not only concerning whom to admit, but more importantly, how to teach and grade, and our approach and responsibilities to at least raise questions of values as well as skills in our teaching. In this last section, I reflect on what we teach and how we teach it to examine if these are consistent with the Temple values.

## A. What We Teach

What role is there for law schools like Temple (and Mitchell Hamline and Cooley), and others who admit “non-traditional” students, to also try to instill the values and competencies in its graduates? How do they promote leaders with the values that both put citizens’ interests ahead of the person? How does it create competencies in the administration of laws and regulations that protect society as a whole? For law schools to have a mission to disrupt hierarchies presents a political paradox in two senses. First, there is a paradox because the concept of law, according to the common law, assumes a particular context; the authority or hierarchy (any system of persons or things ranked one above another) used to resolve a dispute. Second, the concept of education assumes that what the teacher does is to teach some particular set of skills and values students need to be successful in the profession, and grade accordingly.

While the judicial process<sup>29</sup> for deciding the rule of law applicable in any decision is somewhat fluid, it nonetheless bows to an analytical process. This analytical process purports to base the law for any one case on precedent, a close reading of applicable statutes, and reasoning that might auger for new interpretations in situations of changing circumstances, where to apply precedence would work an injustice. It would seem paradoxical for the law professor, once having gained access to the academy, to seek to undermine the meaning and values imbedded in the common law processes, where the judge has the authority to decide questions of law and the jury, questions of fact. In other words, to disrupt hierarchies in legal education can’t mean doing away with, all together, the hierarchies in the common law without undermining the legitimacy of the common law itself. On the other hand, perhaps it is the mission of the Graduate Fellow to demonstrate that the emperor has no clothes. Perhaps it is particularly incumbent on them to be critical of the way that hierarchies impact the common law and subvert its basic principles. Perhaps it is our mission to show that there really is no distinction between facts and law, between opinions and misrepresentations, between politics and law, and the sooner we disrupt these false dichotomies the sooner the revolution will come. (Yet it seems ironic and paradoxical for a legal educator to be continually critical without also taking on the task of describing what will replace the existing common law system and how any legal system will devoid itself from the abuses of power that come from wealth and status).

Still, it would seem, at the very least, duplicitous, to argue a mission for law professors, (be they legal writing instructors, clinicians, of teachers of business law in business or schools, or more traditional law professors), and their law students, who have finally gained entry into the

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<sup>29</sup> Benjamin Cardozo, *THE NATURE OF THE JUDICIAL PROCESS*, (1921). In the forward to the 2010 paperback edition Andrew Kaufman (ix) summarizes Cardozo’s jurisprudence as follows: Cardozo described four major sources of material for judicial decision-making—logic, history, custom, and public policy. It seems apparent that history and custom will be powerful factors in the relatively few cases where there is enough evidence of either from which to dispose of the case. He regarded logic using deductive analysis from principles already established as having a certain presumption in its favor and as governing absent strong arguments from history, custom, or public policy. While logic, as he defined it, was backward looking, his incorporation of the notion of deciding by analogy also had a forward looking aspect.



legal system to pursue their goals and interests should now set out to destroy the very processes that they have gained access to in order to pursue these goals. While they might develop healthy skepticism for the law, or understanding of the legal process that gives to judge and jury the authority to decide a case, it might not be best to ultimately educate lawyers in Machiavellian attitudes and values that ignore procedural rules and due process if they get in the way of their client's goals. Students will need to understand the value limits to their attacks on hierarchies to be effective advocates for their clients. I would argue that we should not teach them that they will ultimately need to subvert values of service above self, and get rid of ethical proscriptions on truth speaking and procedural fairness, in the name of the ultimate good in disrupting of hierarchies.

We law professors may love what we do, both in theory and in teaching. We are engaging law students in discussions of the nature of law, and enjoy our status and ability to shape the next generation of lawyers. But again, the Graduate Fellow program taught me that there is a paradox in the mission of legal education, where we seek to disrupt hierarchies in legal education: it may undermine the very ideal of the rule of law. After all, law, and the common law in particular, values existing rules and precedence over progressive forces that call for greater protections of the minorities. On the other hand, too much law ends up stifling society in legal process. We argue in the classroom that less regulations promotes greater liberty. We ask how much we as citizens need to be skeptical of legal solutions to complex problems.<sup>30</sup>

How much should law restrict liberty in pursuit of the cause of the protection of others from harm? Should we limit such regulations only by the will of the majority? What risks do we run from a "tyranny of a majority"? Thus, the legal profession is vital to Democracy precisely because it values the past, and is conservative, and neutral in its adherence to the law, but also because it understands the limits of law and regulations, as overly restricted of personal liberty. Again, these are ideas first learned during the Graduate Fellow program that I somehow missed in my regular legal education. While I am sure that other colleagues learned to care about these same issues in other ways, I am grateful for the Temple program, for having opened my eyes to these issues.

The second sense the graduate fellow's mission to disrupt hierarchies presents a paradox, is found in the meaning of "education." Education contains another at least apparent contradiction or paradox for "disrupting hierarchies." Education is the act or process of imparting or acquiring particular knowledge or skills, as for a profession. As Graduate Fellows, our mentors notably trained us for teaching nontraditional law students who are desirous of legal education so they can get access to skills and values they need to represent their chosen clientele. According to the Carnegie Report,<sup>31</sup> legal education is about teaching of skills (close reading,

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<sup>30</sup> We learned that some legal scholars take a "Burkian" approach to law—that applying force or coercion to existing relationships is to use a simple tool to fix a complex situation. It would not work, practically, and was outside the authority given to the sovereign. Burke, American Taxation. The Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/burke/#7>. Modern Burkians worry that criminalizing behavior engaged in by a substantial number of the citizens does not work, much less promote the general welfare, whether relating to the prohibition of the sales of alcohol or marijuana, or criminalize those seeking or providing access to abortion.

<sup>31</sup> Carnegie's major recommendation was an integrated curriculum:

To build on their strengths and address their shortcomings, law schools should offer an integrated, three-part curriculum: (1) the teaching of legal doctrine and analysis, which provides the basis for professional growth; (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.

higher-order reasoning and problem-solving, precise, concise, and comprehensive writing skills, both objective analysis of facts and regulations, and advocacy within prescribed ethical limitations), as well as values consonant with the fundamental purposes of legal education (analysis of the consequences of legal decisions on various groups and individuals and society at large). Legal education not only endeavors to teach skills and values, but also produce lawyers who are “excellent” in their having attained these skills and values. In other words, Bellow and Moulton were right that there is a *socialization* process in legal education that imparts knowledge and values. We design simulations to test whether students will act ethically or lie during the role that they play. Legal educators and bar examiners test for these and measure student performance in competition with each other to provide legal institutions and organizations with information about whether the student has attained these skills and values and at an excellent level. The paradox in legal education is that disrupting hierarchies can’t mean doing away with the rigorous educational process to best prepare law students to be “successful” in the market for lawyers, whether they choose to represent whistleblowers and plaintiffs, and legal disrupters, or public or private institutions. At the same time, professional values include a special obligation to provide representation to “unpopular” even “repugnant” cause.<sup>32</sup> The legal professional should not be too beholden to the elites and their values.

The Temple University Graduate Fellow program did not shy away from these paradoxes. The Temple program placed us right at the heart of them, purporting to provide our future employers with faculty skilled in imparting skills and values through teaching pedagogy and scholarship designed to impart such skills and values at an excellent level. Our employment might allow law schools to expand their admissions. We could have the skills to teach the skills that our traditional colleagues might not have or know how to teach. It was not that these colleagues were uninterested, but that their experiences as clerks on the Supreme Court, or Courts of Appeal, or through interdisciplinary work in sociology, economics, or religion, had not exposed them to clinical education.

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... the teaching of legal analysis, while remaining central, should not stand alone as it does in so many schools. The teaching of legal doctrine needs to be fully integrated into the curriculum. It should extend beyond case-dialogue courses to become part of learning to “think like a lawyer” in practice settings. ([http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf), pp. 8-9)

<sup>32</sup> Model Rules of Professional Responsibility, 6.2. Stephen Jones, *A Lawyer’s Ethical Duty to Represent the Unpopular Client*, 1 Chap. L. Rev. 105 (1998). Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol1/iss1/5>.

Joseph Harbaugh made the political nature of graduate fellow’s mission in legal education plain to me when he talked me out of the law and humanities side of the program, and into becoming a clinical fellow. I remember that he explained there was no chance that I could break into teaching on the law and humanities side. What legal education needed was someone who could teach, talk the language of, and write like a traditional faculty member, but have an understanding of the practicing skills needed for lawyers to represent real people, in order for law schools to justify their three year programs as prerequisite for practicing law. He argued that I see my insecurity in not having an elite degree, and clerking experience, and make it a strength, by being both willing and able to engage the academy with the practice of law. He warned that I would present a threat, for I would be able to confront the more idealistic aspects of the academy with the realities of the practice. I would be able to use the skills of the lawyer to cross examine colleagues with inconsistencies in their positions, violations of due process, and anecdotal unfounded nature of their supposedly expert opinions. Better not to separate myself on a different tenure track, but to take on challenges of teaching classroom clinical courses and writing legal scholarship that grew out of the practice experience.

In other words, our Temple LLM education allowed us to gain access to privilege. We could also take advantage of the access it provides to write and do scholarship that tries to speak truth to that privilege. Many of us then try to use the privilege while not being coopted by it.

## **B. How We Teach It.**

As Grad Fellows, we had immersed ourselves in the nuances of teaching skills, both analytical skills, especially in the deconstruction of the process of legal writing, and substantive knowledge. Many of us were “sold” to the legal education market as having special skills in using integrative teaching methods and helping to design a better curriculum. We were supposed to care about not only how lawyers analyzed cases, but also how they wrote persuasive briefs, made persuasive oral arguments in trial and appellate settings, and created client-centered relationships through skillful interviewing, counseling, and negotiation. We were supposed to be especially skilled at teaching legal writing, the skill of preeminent importance to legal employers.

“Sold,” especially during the time of expansion of new law schools in the market for students, we were supposed to be able to teach “values” as well as skills. We taught values of “client-centered” lawyering. Following the Watergate scandal, we were supposed to be skilled at teaching ethical problem-solving approaches to lawyering. There was a market for teaching “soft” skills, including listening, empathy, and the benefits and limitations of negotiation and mediation.

Lacking in extensive experience in practice ourselves, we could not lecture from on high about what values were necessary for the practice. We taught values by seeding our simulations with challenging facts, designed to raise conflicts between personal values, societal values, and the goals of the client. Our pedagogy depended on the insights the students would bring to the simulation, as they confronted how these values impacted their conduct. We tried out pedagogies that used collaborative learning, and simulations, and “flipped” classrooms, so that students discovered for themselves how to put on the robe of lawyering. We used learning-by-doing and simulations, followed by video critiques, or coaching, both for teaching trial advocacy, but also pretrial litigation skills, and counseling, and negotiation skills. We tried to teach “advanced empathy.” We used reflection to deconstruct and make aware of and make choices against imposing our values on others. We designed simulations to emphasize and reexamine practitioners’ attitudes towards difference, whether, with poverty, class, or race, that can blind the lawyer to the consequences of the arguments they make, the options they advocate for, and the policies that they may unwittingly advance.

In addition, the beauty of simulations and role-playing is that they provide a better chance for reflection. We followed up the role-playing with detailed playback, often with the help of video recordings. Students could confront directly what they said and did. Their values, expressed in their questions and advocacy, bubbled up to the attention of the class, in a non-hierarchical way. Students discovered for themselves what biases and behaviors they can unwittingly fall into and try on a discussion of their “better selves,” to start to plan for and choose what values would guide them in their individual practices.

As former Grad Fellows we have learned to be concerned beyond the more egalitarian mission has been accomplished in admissions. We share a concern that law schools should not fall prey to the same faulty measures of privilege and elitism—grades, writing ability, and analytical ability, “fast thinking” skills—that help traditional legal educators rank students for

legal institutional consumption. Indeed, many of us also seek to show how the law itself often creates hierarchies that serve the elites and the wealthy. We use legal theory to point out the law's failings. Many of us learned how to raise these issues not just in our discussion of cases, but by designing simulations that allowed these issues to bubble up from the practice of law. And it is in this last endeavor where we can bring students to encounter the paradoxical nature of the practice of law: that it both honors and values precedent, but also advocates, where necessary, for its change.

I will conclude then by raising two brief examples of how the Graduate Fellow program and its mission led to changes in the curriculum and pedagogy at two law schools where I have taught, and then end with a brief story. In each of the two curricular examples, I will try to show how they create an opening for values clarification discussions designed to give students openings to describe their values. Again, what I attribute to my Temple LLM, is that I want to teach the students how, as lawyers, they need to confront their duty of putting the client first above their interests. Also, even in their advocacy of their client, first, they need to confront how that value alone might not be sufficient to their duties to the body politic. In representing institutions, in particular, there will be paradoxes and values conflicts. How will they balance serving their stakeholders, above their interest to win, or the overall welfare of the citizens above the narrower interests of even the parties involved, will be their lifelong challenge.

## **1. First-Year Law School Curriculum.**

The Temple Graduate fellow program inspired curriculum design choices at the University of Richmond Law School. We created a two-year legal skills course, based on a continuing simulation that introduced the students to the "soft skills" of lawyering as well as gave them a deep dive into a difficult substantive issue. In addition, many of the traditional classes introduced shorter simulations that raised practical issues, whether in how to value a case for settlement purposes, or how to negotiate a contract provision. The curriculum and pedagogy reflected the paradoxes in US legal education, but did not shy away from them. It led to law school programs that integrated skills, both analytical and non-analytical, in order to raise practice issues to incentivize better and promote first-year law student understanding of the practice. In addition, some in the first-year curriculum experimented with team-based learning. Law students had professors who often did not answer a question, or even answered that they did not know the answer, and asked what a student thought, brainstorming how to use the internet and other resources to begin to answer the question. As a faculty, we discovered the challenges in the first year to a teacher using a "flipped" classroom, where much of the assigned readings raised not only the ambiguities in the relevant substantive legal doctrines, but also in the conflicting values at work in the lawyering process. We used team projects and learned together how new ABA requirements for stating learning goals and objectives helped students navigate the paradox of hierarchies embedded in the first-year curriculum. I remember it to this day as one of the most exciting and rewarding times in my law school teaching career. I know I was a better participant in the project because I had been a Temple Grad Fellow. It would forever shape my work at Emory, in guiding the Trial, Pretrial, and ADR curriculum, but also in my approach to the work I would do, on the international rule of law, in Micronesia, Mexico, China, Africa, and Russia.

## **2. Hybrid Clinics and Collaboration: Reuben Guttman.**

One additional effect of the Grad Fellow program for me, most recently, is that I have drawn again from my days as a Grad Fellow in helping to design two-hybrid clinics. These are hybrid in that they draw on real client experiences and ongoing disputes to shadow the practical setting, without having direct responsibility for it. The real-world case and setting are then adopted into a simulation in order to role play out different aspects of the dispute. The class can then compare the simulation to what happened or is happening in the real world.

As you might imagine, the success of these classes depends on the skills and values of the practitioner co-teachers. These kinds of courses have been extremely stimulating as vehicles to learn with the students the substantive understanding of legal doctrine. The simulations also provide the practical setting, all the while encouraging students, faculty and practitioners to be self-critical of the legal agenda of the stakeholders. The students can better learn how their agendas can create unintended consequences and even injustice in results. For example, teaching a course in collaboration with The Carter Center has taught us how even a human rights agenda can potentially subvert vital conflict resolution objectives. Over the last years, we have learned together the effects of the International Criminal Court and the Rome Statute, on the efforts of peacemakers to end conflicts, whether in Liberia, Kenya, or in Sudan.

Alternatively, consider a collaboration with Reuben Guttman, one of the country's most prominent and respected "whistleblower" lawyers. On the one hand, few clients are more motivated to disrupt corporate and institutional hierarchies than whistleblower clients and their lawyers. On the other hand, one can imagine how fraught with ethical issues is the practice of law under the False Claims Act (FCA), especially in the area of lawsuits against "Big Pharma." Win a big judgment, and the client and lawyer can win a bounty and be set for life.

We have learned together:

- How to carefully read the False Claims Act (FCA)
- How to recognize the conflicting interests in the marketing of drugs and promotion of the prescription of drugs with their "indications."
- How to carefully read the principle cases interpreting the FCA... And to take the time to "sit with" the cases, and slow down our thinking, in order to understand the policies and principles at play in the FCA
- How to examine the conflicts of interest in the role of the whistleblower, and guide against illegal and unethical behaviors in the whistleblower's gathering of evidence
- How to examine the lawyer's own conflicts of interest with their role as an advocate for those harmed by the defendant's conduct, but ultimately, to the whistleblower, leaving it to the government to protect itself and the public from harm
- How to recognize the conflicts for payment of legal fees, and best practices for settling cases in a way the separates out the conflicts and personal interests on fees.
- How to examine the issue of drug pricing and balance the profit incentives and incentives for the discovery of new and improved drugs over the "over marketing" and "gouge pricing" to patients. Do pharmaceutical companies have the correct incentives to discover cheap cures as opposed to creating dependencies on drugs that treat symptoms, to maximize their use?

Collaborations with counsel are rich learning experiences for all involved. To avoid them devolving into a series of self-aggrandizing "war stories," such courses require a practitioner

willing to be self-reflective and to submit themselves to a “learning-by-doing” simulation pedagogy. Practitioner experiences can serve to help critique student performances, but also to be used by the law professor to raise questions and critique the values that emerge from the practitioner’s critiques. Then the practitioner provides feedback to the law professor about the values and consequences to practice embedded in the professor’s critique. The students then join the discussion and critique. Especially revealing are discussions about the differences between “real case” and the simulation setting.

It is my view that these kinds of courses are the future of a three-year legal education. It allows students to gain both a substantive and practical experience within an area of the practice that can kick start their entrance into that area of practice, once they graduate. It can accelerate their learning and make their work for future clients worth the fees that they need to charge, to both pay back their student loans, but also reflect the value of the services they perform. That value is enhanced because the student’s learning has been both “socialized” by practitioner, but also challenged by the professor, to both the practical considerations, but also to the public policy and ethical discussions that occurred during the discussion of the simulation. On the one hand, the practitioner sends the most powerful message as to the reputational effects from both negligent writing and analysis, but also shoddy practices. They also help the students realize the real-world consequences of having gotten caught doing the unethical (like encouraging a whistleblower to steal documents from a client, only to later learn that such conduct will likely steer the US attorney away from intervening). At the same time, the professor gets to ask the practitioner and class to think about other hierarchies that are embedded in practice. Is there a moral hazard at work in the whistleblower incentives to bring the case that clouds the judgment of both client and counsel? In other words, the students learning in a hybrid setting will have been tested by both practical critique and theoretical and philosophical critiques rather than by grades. They also learn without having a client bear the costs of their choices. Inevitably questions of self-interest and service in the practice of bubble into the discussions.

## **Conclusion**

I am reminded of a story Roelf Myers told me, that I make a practice of telling my students, in just about all of my classes. Its lesson captures best what I, as a Temple Grad Fellow, try to pass on to my students.

A few years back, (2013, during the Syrian civil war), I was working in Beirut, Lebanon, with The Carter Center (TCC). TCC was working with a group of Syrians from Civil Service Organizations. It was trying to reimagine a way to peace with Assad during their civil war. The TCC had brought South African Roelf Myers to speak to the Syrians. Myers described how South Africa’s then-President DeKlerk asked him to reach out to Nelson Mandela, while Mandela was still in prison, to start the process to end apartheid in South Africa. Myers urged the Syrians to think about how and whom they might use to reach out to Assad to end the civil war in Syria. The discussion was passionate, personal, and expert. Could these Syrians even stomach reaching out to Assad, and working with him, after all he had done to them, to their families, and their communities?

After the meeting, I asked Myers how he, as a white South African, developed the values to be open to such a process. Myers told me, “You tell your law students that it was in conversations with my fellow law students in law school where I concluded that apartheid was indefensible. I owe my attitudes to my legal education.”

In the end, then, it might be that I take myself way too seriously in thinking that how I teach can really shape the foundational values needed for the practice of law and legal leadership of institutions. Perhaps the main beauty and benefit of legal education are how it provides the forum, opportunity, and privilege to students to engage in conversations with each other, about what they value most, and why.

Stimulating students and international lawyers and judges to examine placing community and client above self-aggrandizement and advancement are the core values that I took from the Graduate Fellow Program. What I now see was of most value in my career was what I learned from my collaborations with my mentors in teaching and critique, and from my fellow Grad Fellows, in our discussions with each other about teaching, law, and practice. I feel like I discovered and “caught” my fundamental enthusiasm for both teaching and practice during my time at Temple. It was in the joy of learning-by-doing, followed by reflection, which was the heart of clinical teaching, that we all could develop the “habits of the heart” for lawyering.

I think then that I am feeling more than nostalgia, with the ending of the Temple Graduate program. It provided me with a mission and a sense of calling. Here is hoping that someday, some law school, will again provide prospective law school teachers the opportunities the Temple Program provided us, as we started our careers in law teaching. Thank you, Temple University College of Law’s LLM program!