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# Admit That the Waters Around You Have Grown: Change and Legal Education

Mari J. Matsuda

*University of Hawai'i, William S. Richardson School of Law, mmatsuda@hawaii.edu*

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## Admit That the Waters Around You Have Grown: Change and Legal Education

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Addison C. Harris Lecture

September 25, 2013

MARI J. MATSUDA\*

Young civil rights workers began registering voters in Lowndes County, Alabama, in February 1965. Their work disrupted a century-old bargain between northern and southern elites that allowed the firm hand of Jim Crow to close its grip on the American South. Student Non-Violent Coordinating Committee (SNCC) members are the “New Abolitionists,” as Howard Zinn called them.<sup>1</sup> They wanted to finish the work the Thirteenth Amendment started, ending the badges and incidents of slavery and bringing the descendants of the enslaved to full citizenship. Just as the first reconstruction met burning crosses and lynch mobs, so does this second. The Klan, not needed when Jim Crow was firmly in control, was riding again.

My students read of this period in Taylor Branch’s *At Canaan’s Edge*.<sup>2</sup> Today’s chapter finds a group of organizers, younger than my students, attending a service in a small, isolated Black church in rural Alabama.<sup>3</sup> Suddenly, the church is surrounded by cars. There is no way to exit without running this gantlet of strangers and, given the recent assaults upon civil rights workers, the appearance of Klansmen in the dark of night is a clear promise of violence.<sup>4</sup>

At this point, one of my students says, “All I could think of was, my God, they didn’t even have cell phones.” She realizes this was a ridiculous thought when she adds, “but who would they call?” We already know from the history we have read that the police and the Klan are one and the same, and that the feds are hundreds of miles away debating whether they even want to get involved at all. I empathized with her reaction: “I know, I needed them to have someone to call, too.”

The feeling of desperation one gets from the absence of law: no one to call, no one to enforce the basic rules that restrain one human being from battering another, opened our class discussion to our relationship to the rule of law. Where does law

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1. *See generally* HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (2002) (detailing the work of SNCC and its volunteers in the South).

2. TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965–68*, at 6 (2006) (“Despite ominous notices from Deacon Haynes, Rev. Lorenzo Harrison was keeping his fourth-Sunday commitment when the sound of truck engines roared to a stop outside Mt. Carmel Baptist on February 28, 1965. Panic swept through the congregation even before investigating deacons announced that familiar Klansmen were deployed outside with shotguns and rifles.”).

3. *Id.* at 5–6.

4. *See id.*

come from? Why do we need it? Can it solve the problems we face? What progress did law make in ending racial subordination?

We know that those brave new abolitionists did win significant and lasting changes, and that more than a handful lost their lives in the struggle.

The crisis brought about by bodies standing in harm's way to claim the right to vote, to sit at lunch counters, to end the badges and incidents of slavery, brought forth a great fountain of law. The Voting Rights Act,<sup>5</sup> Title VII,<sup>6</sup> and Title IX,<sup>7</sup> these laws changed everything about what my professional life looks like. These laws meant that my daughter would play basketball in middle school as matter-of-factly as I learned to sew at the same age: this is what girls do. All of this law was born on dark roads in rural towns where courageous acts forced the arc of history to makes its turn.

Crisis created law, temporarily resolving the crisis and setting the stage for the next one—this one.

It is shaking our windows and rattling our walls. It is the cruelties of wealth inequality.<sup>8</sup> It is city-swamping climate change.<sup>9</sup> It is students seeing school loans as a life-long burden.<sup>10</sup> It is hunger. Somewhere in your state, a parent is skipping a

5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

6. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2006)). Title VII of the Civil Rights Act prohibits an employer from discriminating against an employee because of the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

7. Education Amendments Act of 1972, Pub. L. No. 92-318, 86 Stat. 373–75 (codified as amended at 20 U.S.C. §§ 1681–88 (2006)).

8. See generally JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012) (suggesting vast income inequality in the United States imperils democracy and threatens the rule of law).

9. In a study assessing hurricane surge threats to New York City, Lin et al. explain how the warming of the climate is expected to (1) raise global mean sea levels, which may result in a 0.5–1.5 meter sea level rise (SLR) in New York City by the end of the century and (2) increase sea surface temperatures, which will affect the intensity of hurricanes. Consequently, “the combined effect of storm climatology change and SLR will greatly shorten the surge flooding return periods . . . [resulting in] the present NYC 100-yr surge flooding [to potentially] occur every 20 yr [sic] or less.” Ning Lin, Kerry Emanuel, Michael Oppenheimer & Erik Vanmarcke, *Physically-based Assessment of Hurricane Surge Threat Under Climate Change*, 2 NATURE CLIMATE CHANGE 462, 466 (2012), available at <http://hdl.handle.net/1721.1/75773>.

10. Research shows that individuals with Bachelor's degrees can expect to repay their loans in 19.7 years and those with graduate degrees can expect to repay their loans in 23 years. Halahtouryalai, *Backlash: Student Loan Burden Prevents Borrowers from Buying Homes, Cars*, FORBES (June 26, 2013, 7:00 PM), <http://www.forbes.com/sites/halahtouryalai/2013/06/26/backlash-student-loans-keep-borrowers-from-buying-homes-cars/>. Over 60% of the United States' student loan debt belongs to those over thirty-years old and nearly 15% of the debt belongs to those over fifty-years old. *Id.* Because of the crippling effect of student loans, many borrowers are delaying major life decisions, such as buying a home or car, so that they can focus their finances towards repaying their student debt. *Id.* In fact, “[t]he rate of home ownership is 36% less among those currently repaying student debt” than those not repaying student debt. *Id.*

meal in order to make sure a child gets one.<sup>11</sup> It is that actual hunger, and it is the hunger of the soul, as we ask whether there is something about our culture, something beyond easy access to guns, that makes mass murder a regular occurrence.

If you think everything is just fine, I take no offense if you walk out of this Lecture now, for I begin with the premise that we are in crisis, presuming that this premise is widely shared. Where we are likely to diverge is at the next juncture: What is the “way out of here”<sup>12</sup> (sorry, this text succumbs to ’60s allusions, and that is not an accident) and what does law school have to do with it?

This Lecture is prompted, in part, by critics of legal education who have identified its unsustainable and regressive practices. It is not intended, however, as another entry in the future-of-law-schools genre. Rather, it is an attempt to reposition the conversation by putting the law school crisis at the tail of a drowning dog with a bigger problem, and then to see how we fleas on the tail might appropriately respond.

#### I. YOU DON’T NEED A WEATHERMAN<sup>13</sup>

The first person to tell me that my future was endangered by climate change was a fellow law professor, back in 1987.<sup>14</sup> This alarmist statement made by a respected

11. Jean Culver, a mother of two from Scranton, Pennsylvania, receives food stamps from the United States Department of Agriculture (USDA) and still struggles every month to put food on the table. Deborah Feyerick, *Witnesses to Hunger: A Portrait of Food Insecurity in America*, EATOCRACY (Sep. 22, 2011, 2:00 PM), <http://eatocracy.cnn.com/2011/09/22/witnesses-to-hunger-the-faces-of-food-insecurity-in-america/>; *Meet the Real Experts: Jean C.*, CTR. FOR HUNGER-FREE CMTYS., <http://www.centerforhungerfreecommunities.org/our-projects/witnesses-hunger/meet-the-real-experts/jean-c>. To ensure that her children have enough food to eat, she feeds her children first and then eats what is left over. *Id.* Culver is a participant in The Center for Hunger-Free Communities’ Witnesses to Hunger Project. See Ctr. for Hunger-Free Cmtys., *Meet the Real Experts*, WITNESSES TO HUNGER, <http://www.centerforhungerfreecommunities.org/our-projects/witnesses-hunger/meet-the-real-experts/jean-c>. The USDA defines food security as “access at all times to enough food for an active, healthy life.” USDA, FOOD INSECURITY IN HOUSEHOLDS WITH CHILDREN: PREVALENCE, SEVERITY, AND HOUSEHOLD CHARACTERISTICS, 2010–11 1 (2013), *available at* <http://www.ers.usda.gov/ersDownloadHandler.ashx?file=/media/1120651/eib-113.pdf>. Food security “provides an important foundation for good nutrition and health” and, yet, the USDA reports that nearly 21% of households with children (approximately eight million households) were food insecure at some point during the year 2011. *Id.* at 2. In those households, children were often able to maintain normal to near-normal diets and meal patterns, but the adults in the home were often food insecure. *Id.*

12. BOB DYLAN, *All Along the Watchtower*, on JOHN WESLEY HARDING (Columbia Records 1967); THE JIMI HENDRIX EXPERIENCE, *All Along the Watchtower*, on ELECTRIC LADYLAND (Reprise Records 1968) (the definitive interpretation of Bob Dylan’s song).

13. BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1965). Bob Dylan’s song was used in a promotional film clip for DON’T LOOK BACK (Leacock-Pennebaker 1967). The clip is available at <http://www.youtube.com/watch?v=VY4HtQ-XJQE>.

14. Based on author’s recollection of commencement address at the William S. Richardson School of Law in 1987 by Allan F. Smith, who was a professor at the University

and measured thinker put a big flag in the parking lot of the mind, a parking lot now filled with data showing that only his erudite tone was wrong. He should have hollered. The planet is speaking loudly now, as fire, flood, and killer winds come to claim us. While my friends and relations in the non-fact-based world still send me climate-change denial links, the emerging consensus is that we have a world-changing problem on our hands and no plan to avert it.

There is a line on a map that shows how high the water will rise on the island I live on, in our children's lifetimes.<sup>15</sup> The State of Hawai'i has a unique land tenure system, under which buyers have the choice of seeking property in fee simple or seeking comparable property in leasehold.<sup>16</sup> A long-term lease, of say, 100 years, means you own the land for as long as you could possibly hope to live on it, but no one wants to buy "in lease." Realtors speak disdainfully of such property as the choice buyers make only if they can't afford better. Leasehold property, therefore, sells at deep discount.

Property below the global warming water line, which includes the luxury hotels in Waikīkī, is going under water in less than 100 years.<sup>17</sup> A public that grasps the idea that it wants fee simple ownership, not a hundred-year lease, takes the long view in one instance, but chooses denial in the other. If you've lived with teenagers

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of Michigan School of Law. Allan F. Smith, Professor, Univ. of Mich. Sch. of Law, William S. Richardson School of Law Commencement Address (1987).

15. *Sea Level Rise Hawaii: Hawaii's Changing Climate*, SOEST, <http://www.soest.hawaii.edu/coasts/sealevel/>; see also *Sea Level Rise and Coastal Flooding Impacts Viewer*, NOAA COASTAL SERVICES CENTER, <http://www.csc.noaa.gov/digitalcoast/tools/slrviewer> (providing a tool showing the projected sea level rise).

16. See Jason Van Steenywyk, *Why Is Buying Real Estate in Hawaii So Different?*, REAL ESTATE.COM (Apr. 7, 2012), <http://www.realestate.com/advice/hawaii-real-estate-for-sale/>.

17. A recent University of Hawai'i study shows that if greenhouse gas emissions continue to rise, then after 2047, the average temperature will be hotter across most parts of the earth than they had been at those locations between 1860 and 2005, the years for which historical temperature data and reconstructions are available. Justin Gillis, *By 2047, Coldest Years May Be Warmer than Hottest in Past, Scientists Say*, N.Y. TIMES, Oct. 9, 2013, at A10, available at [http://www.nytimes.com/2013/10/10/science/earth/by-2047-coldest-years-will-be-warmer-than-hottest-in-past.html?ref=global-home&\\_r=2&](http://www.nytimes.com/2013/10/10/science/earth/by-2047-coldest-years-will-be-warmer-than-hottest-in-past.html?ref=global-home&_r=2&). Furthermore, some experts believe that climate change will cause accelerated sea level rises here in Hawai'i. See CHIP FLETCHER, UNIV. OF HAW. AT MĀNOA, DEP'T OF GEOLOGY AND GEOPHYSICS, SCH. OF OCEAN AND EARTH SCI. & TECH., HAWAII'S CHANGING CLIMATE: BRIEFING SHEET, 2010 at 3–4 (2010), available at [http://www.soest.hawaii.edu/coasts/publications/ClimateBrief\\_low.pdf](http://www.soest.hawaii.edu/coasts/publications/ClimateBrief_low.pdf); see also Mileka Lincoln, *UH Manoa Professors Say Climate Change Is Real & Here in Hawaii*, HAWAII NEWS NOW (Oct. 1, 2013, 4:09 PM), <http://www.hawaiinewsnow.com/story/23573486/uh-manoa-professors-say-climate-change-is-real-here-in-hawaii>. Over the past century, 60% of beaches on O'ahu eroded and 8% disappeared. Bradley M. Romine, *Historical Shoreline Changes on Beaches of the Hawaiian Islands with Relation to Human Impacts, Sea Level, and Other Influences on Beach Dynamics 1* (May 2013) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa), available at [http://www.soest.hawaii.edu/GG/resources/theses/PHD\\_2013\\_Romine\\_B.pdf](http://www.soest.hawaii.edu/GG/resources/theses/PHD_2013_Romine_B.pdf). Accelerated sea level rise is a serious threat in Hawai'i as beaches in Waikīkī and the south shore of O'ahu are faced with a quickly eroding shoreline that threatens those homes and businesses located there. See Vicki Viotti, *Wetlands in Waikiki*, HONOLULU STAR ADVERTISER (Dec. 8, 2013), <http://www.staradvertiser.com/s?action=login&f=y&id=234866181>.

or toddlers, you've seen this magical thinking. What I want to happen will happen because I need it to happen and what I don't want will go away. My actions have nothing to do with any of this, and your efforts to tell me otherwise are unhelpful. You can't run a planet with this brain. We need grown-ups in charge, and law school may have a contribution to make here.

In addition to climate change, there are two looming, intertwined threats to our well-being that we should feel grabbing at our throats: wealth inequality and global violence.

If you see climate change as a precursor to inequality-exacerbating scarcity and scarcity as a precursor to violence, then we can call these the mutually supporting triplets of crisis: inequality, unsustainability, and war.

There are local and global permutations of inequality. Those sounding the law school alarm point out that some of our graduates are still ensconced in the lap of six-figure luxury, while others amass six-figure debt only to meet protracted unemployment after graduation.<sup>18</sup> Worse yet, the loans of the unemployed allegedly subsidize the elites with the six-figure jobs, who often graduate debt free because merit scholarships—more honestly known as bribes—were handed to them in order to add their high LSAT scores to their school's data for ranking purposes.<sup>19</sup>

This version of wealth inequality, our own responsibility and therefore not to be ignored, seems petty in comparison with the bleeding hands of the people who pick our food while living without running water or working toilets, and the grinding violence of that bleeding-hand poverty seems preferable to the active violence and torture faced by our global neighbors living in war zones. As we sit in this clean, well-lit room, secure in the knowledge that there will be breakfast tomorrow, more than one child in our global village will die from violence, from malnutrition, and from preventable disease. Whatever religious, political, or moral tradition you come from, you and I share a sense of horror at this knowledge. That is our starting point: we are human beings with the gift and responsibility of knowledge.

This knowledge is the curse of modernity. We can see beyond the horizon and know what happens to a Syrian refugee, a Chinese factory worker, or a Brazilian favela dweller. We can see how choices we make in our corner interact with lives elsewhere, and we can speculate about how dislocations elsewhere might erupt in ways that disturb our peace. Things don't just fall out of the sky on we-the-unknowing innocents the way an asteroid fell on the dinosaurs. Whether climate change, war, or asteroid, we have knowledge. We can prepare. My plea is that law schools prepare and train our students to make things better, not worse. That huge task falls to us because lawyers, at their best, are professional leaders and problem solvers. They gather facts, assess them critically, deliberate, strategize, and construct paths to good outcomes. They do this for clients; they do this for nations; and, in my utopian vision, they do this for the planet.

18. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (John M. Conley & Lynn Mather eds., 2012) (discussing disparities in law school graduates' salaries).

19. See David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, May 1, 2011, at BU1, available at [http://www.nytimes.com/2011/05/01/business/law-school-grants.html?\\_r=2&src=ISMR\\_AP\\_LO\\_MST\\_FB&pagewanted=all](http://www.nytimes.com/2011/05/01/business/law-school-grants.html?_r=2&src=ISMR_AP_LO_MST_FB&pagewanted=all) (describing the "merit scholarship game").

II. SAID THE JOKER TO THE THIEF<sup>20</sup>

If you visit your state legislature, or mine, or our Congress, you will see a range of capabilities and predilections. Some of our lawmakers work at crafting legislation: they read what they vote on; they consider competing arguments; they take the long view—alert to unanticipated consequences, to the history of prior outcomes, and to the multiple influences that predict future outcomes. Some of our lawmakers do none of that. If you spend any time around the process of law production, you will encounter the joker and the thief—those who lack the minimal attributes of intelligence and work ethic required for the public's trust, those who never ask “what is good for my country,” seeking only narrow self-interest. I was shocked, when I moved to Washington, D.C. and participated in my first congressional hearings, at the level of discourse. I knew I would disagree with much of the content because my political views are outside the mainstream, but I was naive enough to believe that in the halls of Congress people would want to at least appear intelligent and deliberative. C-SPAN was in its early days, and the lack of intellectual rigor in the law-making conversation was news to some of us. As a law professor and as a citizen, I expected more, and as the years progressed, I got less. The old state-crafters of both parties, for whom persuasive oratory, evidence-marshalling debate, and steely-eyed negotiation were required skills, say it's over.

We can and should demand intelligent public deliberation preceding decisions as momentous as going to war or funding the government. A general public disgust with Congress is not limited by party affiliation. A hunger for leadership is palpable amongst us. The support for the improbable candidate and then-Senator Obama in his first presidential candidacy reflected that longing for intelligent leadership. Maybe this outsider, this law professor/community organizer, this erudite orator, this high-IQ book reader who radiates reasonableness, is whom we need to get us out of Washington gridlock. Whatever you think about how that hope played out, you might agree that the hope and yearning were real.

I am going to publically disagree with the President whose intellect and character I still respect, deeply.<sup>21</sup> Three years of law school is barely enough. Two would shortchange our students, and four is not unreasonable. More on this later, but first, let's look at what we mean when we say “lawyer.”

We could mean scrivener, someone who knows the language and craft of legal materials and who can recite and apply the same with dexterity. On the day I became an official, state-sanctioned lawyer, I raised my hand in solemn vow to protect and defend the Constitution. I tell my students, who know me as a vigorous

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20. BOB DYLAN, *supra* note 12.

21. During a townhall-style meeting at Binghamton University, President Barack Obama stated that law school should only be two years instead of three. According to President Obama, “In the first two years, young people are learning in the classroom[.] The third year, they'd be better off clerking or practicing in a firm even if they weren't getting paid that much, but that step alone would reduce the costs for the student.” Peter Lattman, *Obama Says Law School Should Be 2, Not 3 Years*, N.Y. TIMES, Aug. 24, 2013, at B3, available at <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/>.

critic of the law, that I did not hold my other hand with crossed fingers behind my back. I take constitutionalism seriously as a professional and a citizen, and I do not take a scrivener's view of the Constitution. It is a living document that requires a deep commitment to democracy in a changing and challenging world. The lawyer's oath is to keep that commitment when it is easy and when it is hard, never joining "the hopeless sinner who would hurt all mankind just to save his own."<sup>22</sup>

When I was still a law student, a partner from a fancy firm in my hometown said to my class "Law is a profession. If you want to make money go sell insurance, you'll make more, faster." This was the standard insider's line. We are granted a monopoly on the right to practice law, justified by our professionalism. If pressed, the lawyer holding the traditional view will say something about high ethical standards, providing pro bono services to those who can't afford it, and possessing a life of the mind. We are thinkers, not just technicians. When I arrived downtown as a young lawyer, most of the old-timers quoted from literature by heart, collected art, and discussed international affairs with insider asides because of their sense that this is what lawyers did. They were informed and educated citizens who read serious novels and subscribed to periodicals that didn't translate French and Latin phrases. One felt smarter in the company of these folks. In whatever province, however far from the metropole, that's what lawyers sounded like, with the local accent added. I know you had many among the alums of this law school. I wrote a biography of one, Harriet Bouslog, small-town Hoosier and world-changing firebrand.<sup>23</sup>

Let us not overly praise great men. The traditional lawyer as the town's educated elite perpetuated privilege, and often helped to entrench systems—in my hometown, the sugar plantation oligarchy—that were not healthy. But such men also, on occasion, used their position to stand up forthrightly for the right and the good when the silence of acquiescence from other quarters ran thick. Charles Evans Hughes, lawyer to the New York scions, led a game-changing anti-corruption campaign,<sup>24</sup> and Garner Anthony, lawyer to the sugar barons, fought martial law in

22. THE IMPRESSIONS, *People Get Ready, on* PEOPLE GET READY (ABC-Paramount 1965).

23. Mari J. Matsuda, *Harriet Bouslog*, in CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAII 148–71 (Mari J. Matsuda ed., 1992). In 1952, Harriet Bouslog represented the defendants in a criminal conspiracy case brought under the Smith Act. While the case was in progress, she made out-of-court statements criticizing the government's handling of the Smith Act cases. *Id.* at 162–63. Bouslog was subsequently suspended from practicing law because her "speech reflected adversely upon Judge Wiig's impartiality and fairness in the conduct of the Smith Act trial and impugned his judicial integrity." *In re Sawyer*, 360 U.S. 622, 624–25 (1959) (citation omitted). The United States Supreme Court ruled in favor of Bouslog and ordered her reinstatement. *Id.* at 628 ("We conclude that there is no support for any further factual inference than that petitioner was voicing strong criticism of Smith Act cases and the Government's manner of proving them, and that her references to the happenings at the Honolulu trial were illustrative of this, and not a reflection in any wise upon Judge Wiig personally or his conduct of the trial.").

24. Mari J. Matsuda, *Hughes, Charles Evans*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 478, 479 (Kermit L. Hall et al. eds., 2d ed. 2005) ("Hughes became a nationally known figure in the muckraking, trustbusting age as a result of his role as the studious head of the New York 'gas inquiry.' His independence, diligence, and capacity for sorting through the endless financial tangle of ratemaking and pricegouging

Hawai'i during World War II.<sup>25</sup> The tradition of straight up corporate lawyers, whose day job was helping the rich amass and retain capital, taking up lonely cudgels to uphold the rule of law simply because it was the right thing to do and they had the status and the brains to do it, is a professional legacy of "lawyer" I proudly share. Indeed, as the war on terror brings us profligate government surveillance and threats to habeas corpus, I await the contemporary equivalent of those earlier crusaders. These are ABA issues, not just ACLU issues. The contemporary equivalent of the top hat and tails crowd should bellow forth outrage at the diminishment of core constitutional values, and litigate like lions challenged in their own den.

The fact that no such crusader emerges tells us something about the triumph of the market-driven technocrat bar. It's no longer ego, accomplishment, prestige, and power. It's eat what you kill, and partners in the grand old firms quietly tell me it's not fun anymore; they wouldn't want their children doing this work.

Given the crisis—which threatens the survival of capitalism as well as the well-being of the collective—we need to revive the notion of lawyer as professional problem solver, social critic, leader, and thinker. "Lawyer" is the person you call when a problem is too big to handle yourself. In my locked heart I keep a short list of people I would call in true crisis—you pick the bad movie plot: a kidnapped child, a false accusation of criminality, or the one I can't get out of my mind as one immersed in the last century, the knock on the door when the fascists come to get you for something you said or wrote. My "in case of emergency, call" list comprises mostly lawyers. Not because those are the only friends I have, but because they have the skill set to confront the big problems. This short list comprises folks who are extremely smart, deeply charming, viciously tenacious, infallibly loyal, wickedly strategic, and widely experienced. I've seen them take on giants and win, with glee. They are whom I would call in a moment of deep desperation, faced with a life-shattering problem. In my more mundane and actual life, I have had to call a lawyer around those classic issues—divorce, wills, or a neighbor's complaint about an encroaching fence. In each of these, a problem that was big to me but small to the universe was handed over to wise people who treated my problem as their own. Whatever I paid, it was worth it. I gave my problem to someone else and they solved it. I wish all my problems were legal problems. It was so easy and so full of grace—that moment when the lawyer looked me in the eye and said, "It's going to be just fine, this is what I'm going to do for you, it's my problem now."

From thinking about the small grace of paying a lawyer to solve a problem and the large grace of knowing a lawyer to call when one's life is on the line, let us ratchet up to the biggest problems of all. We live on an irreversibly globalized planet. Every person in the less-developed world wants a car and a refrigerator

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won him a following in the press and the public. He next took on an investigation of corruption in the insurance industry. Hughes's reputation as an independent-minded Republican led to his election as governor of New York in 1906.").

25. See Garner Anthony, *Martial Law in Hawaii*, 30 CALIF. L. REV. 371 (1942); see also Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half Century Retrospect on Martial Law in Hawai'i, 1941–1946*, 19 U. HAW. L. REV. 477, 535 (1997) ("The publication of Anthony's May 1942 article and its circulation in Hawai'i gave increased visibility to the issue of the legality of martial law and military governance generally.").

someday, and they can't all get a car and a refrigerator without sending us into climate oblivion. We who have two cars, and in many cases two refrigerators, are in no position to tell the rest of the world they can't have any. This is just one simple matrix of our crisis. The threats we face—from war to climate change—do not stay within borders, and as of yet we have no effective mechanism to create global solutions to global problems.

There is one model that has worked, weakly, for two hundred years. It is the American constitutional experiment, including federalism, democracy, and the rule of law. We are the most diverse nation on the planet, comprising a range of race, religion, culture, worldview, belief, and practice more radically divergent than that of any polity that has heretofore risen to ascendancy in the history of all the world. We are the proof that people as different as night and day can commit to one set of governing processes and follow them—with big, bloody detours—to create a semblance of stability and prosperity. I, a vocal critic of the ways in which we have gotten it wrong, am also deeply grateful for what we have gotten right and all the blessings I have reaped as a result.

The general belief that there are too many lawyers, too many laws, and too much litigation—the American exceptionalism of an overly-legalized life—fails to understand that law comes from human hand. This is the great insight I learned from Willard Hurst,<sup>26</sup> Lawrence Friedman,<sup>27</sup> and, yes, from Oliver Wendell Holmes. Excess law did not fall upon Americans as victims of the lawyers' full-employment conspiracy. We have all this legalism because people desired it, sought it, made it, used it, demanded it, shaped it, and sued when they were wronged. It is a much better option than the alternative of private violence, and really our only option if we don't want to cede decision making to the nonexistent benign dictator. I once studied early use of the courts by Native Hawaiians in the early days of American colonialism. I started out hypothesizing that I would find a tale of law imposed on bewildered newcomers to the notion of judicial adjudication, instead I found active and aggressive embrace of the law by a newly litigious people whose indigenous norm enforcement processes were decimated by the tragic disruption of their nation.<sup>28</sup>

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26. See JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915* (1964) (documenting the relationship of the lumber industry and development of law in Wisconsin); see also Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 *LAW & HIST. REV.* 1 (2000) (discussing Hurst's early intellectual development and his understanding of the relationship between history, economy, and administrative law).

27. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005) (providing the first comprehensive history of American law to discuss the relationship between economic and social life and the life produced therefrom).

28. Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 1844–1845: A Case Study of the Rise of Legal Consciousness*, 32 *AM. J. LEGAL HIST.* 16, 40–41 (1988) (“The nineteenth-century emergence of Western legal consciousness in Hawaii is evident in the day-to-day activity of Hawaii's commoner courts. The ordinary Hawaiian, sometimes viewed as the passive victim of outside forces, was in fact an active and creative participant in the changing culture of the islands.” (citation omitted)).

Law is a tool; people choose it when they need it. It was our nation's instrument of development and the commons at which we gathered to decide whom we would be. From *Plessy*<sup>29</sup> to *Brown*,<sup>30</sup> from *Marbury*<sup>31</sup> to *Bush v. Gore*,<sup>32</sup> our drama of nation making takes place on a legal stage because we have no other shared stage of belief, culture, or creed. You don't need law if everyone is following the same social code. You don't need law if the fear of the gods stops every transgression from fishing out of season to murder. But we do not share the same belief or code. And neither does the planet. Law—or the promise of it—thus becomes inextricably linked to global problem solving.

Law, like double entry bookkeeping, rose along with capitalism. Merchants left their own village, where cheating resulted in social death, and encountered new opportunities for deal making. New ways of preventing cheating and enforcing norms allowed trade to expand beyond the village. You know the rest of the story—it's distilled in the UCC, and we teach it in every law school in the country. Even in Louisiana.<sup>33</sup>

Marx called law superstructure, the ideological product reflecting the material reality of economic relations.<sup>34</sup> He did not discount the power of superstructure, he just wanted us to see the material base and see the harm of subordinating relationships of capital to labor.

I agree with Marx's critique of the alienation of labor. I agree that law is superstructural. I diverge in the emphasis I put on a corollary of that insight: law is a useful superstructure that can create significant humanizing effects. It is a location of struggle, just as the factory is a location of struggle in the material world, and at that location important contradictions can resolve into useful victories for subordinated people. In non-theoretical language, what happens in legal fights matters and can make all of our lives significantly better or worse.

In a world without unifying social norms we will turn to law to mediate and resolve our crises, or we will turn to guns. Since guns now include weapons of mass destruction, it is clear that law is the safer arena of struggle. Lawyers are the champions we will send forth to represent us in that arena. We need good ones.

A good lawyer is someone who can think critically to solve problems, creating legal structures that allow human beings to grow and thrive together. At best, the ability to understand and create these structures comes with the ability to deploy them strategically and to promote them actively. That is, a good lawyer doesn't just build a better legal mousetrap. The good lawyer understands the political and social world and can get everyone on board to use the new mousetrap properly and enthusiastically, until the threat of bubonic plague is run into the ground. The plague metaphor comes quickly to mind because one of the significant threats to our well-being is global plagues—bird flu, HIV, resistant TB—that will happily

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29. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

30. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

31. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

32. 531 U.S. 98 (2000).

33. In 1990, Louisiana was the last state to adopt the U.C.C. James A. Stuckey, *Louisiana's Non-Uniform Variations in U.C.C. Chapter 9*, 62 LA. L. REV. 793, 795 (2002).

34. See generally KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (1859) (discussing base and superstructure).

hop borders. There is nothing we can do to protect ourselves if we ignore the poverty, illiteracy, and absence of health care that is incubating global plagues in places beyond our sovereign command. Doctors and epidemiologists will figure out the cures and preventions, but the implementation of the systems they invent will require globally adept lawyers, devising border-crossing cooperation and enforcement mechanisms.

Some of my best students never practice law. They go straight into organizational and transactional work aimed at global problem solving. The one who put on a play in law school is doing human rights work in Latin America. The one who talked her way into locked housing projects to organize tenants in D.C. is organizing undocumented youth in New York City. The one who mentored teens in a high poverty high school is now running a woman's self-help center in Louisville.<sup>35</sup> I know law graduates who are running public health programs, immigrant worker centers, storefront medical-legal partnerships, grant-making programs, environmental advocacy groups, and change-making arts and education programs of all kinds. I once taught a large and lively class in anti-subordination theory that only one white male student ventured into. He said barely a word all semester. Twenty years later he was running a school in a juvenile prison performing the daily miracle of teaching the children who others see as lost causes.<sup>36</sup> None of these lawyers are doing the JD-required traditional practice we think of as "lawyering," but every one of them is using the lawyer's skill set to do vital work. They raise the money; work around regulations; persuade strategic allies; and manipulate rules, principles, rhetoric, and law to meet the needs of the people they serve. They hire, train, supervise, and deploy experts—including lawyers. These "non-JD-required" change agents are among the best lawyers I know.

If the problems we face are unprecedented in their urgency and global scale, we need problem solvers of the highest order. Training the cadre that will save our planet might seem like an outsized ambition, but we cannot turn from it.

As our nation debated whether to bomb Syria, one of the strongest arguments was "there is no one else."<sup>37</sup> If there was a serious breach of international law, we,

35. The organizations where these former students are working are Jesuit Refugee Service/USA, Raise Our Story, and Women in Transition. *See* JESUIT REFUGEE SERVICE/USA, <http://jrsusa.org/>; RAISE OUR STORY, <http://raiseourstory.tumblr.com/>; WOMEN IN TRANSITION, <http://www.witky.org>.

36. This student is now working at The New Beginnings Youth Development Center, a part of See Forever Foundation at Maya Angelou Schools. *See* SEE FOREVER FOUNDATION MAYA ANGELOU SCHOOLS, <http://www.seeforever.org>.

37. *Text of Obama's Speech at the U.N.*, N.Y. TIMES (Sep. 24, 2013), <http://www.nytimes.com/2013/09/25/us/politics/text-of-obamas-speech-at-the-un.html>

?pagewanted=all. In a speech addressing the United Nations General Assembly, President Obama explained his position on U.S. intervention in the Muslim World:

Indeed, as the recent debate within the United States over Syria clearly showed, the danger for the world is not an America that is eager to immerse itself in the affairs of other countries, or take on every problem in the region as its own. The danger for the world is that the United States . . . may disengage, creating a vacuum of leadership that no other nation is ready to fill. I believe that would be a mistake.

*Id.*

as the strongest military power on the planet, had to respond, some argued, if no one else would. We are indeed the only ones capable if measured by economic and military might. We are, for now, at the top of the heap both in our ability to create problems and our ability to solve them. Our choices are consequential, our actions and inactions capable of leaving a giant's footprint. The world needs that giant to act wisely.

What could this possibly have to do with a state law school, like yours, or mine, charged largely with training lawyers for local practice? The obvious answer is that in a federal system states have inordinate power over the giant, as evidenced by the recurrent blackmail over the federal budget. Another answer is that our graduates, who form the educated elites of our states, are the influencers and thinkers charged with upholding constitutional values and discerning the correct response to international crises on the local level. Their abilities, including the ability to see the connection between local and global realities, are part of the web that will make things worse or better. We have to act on climate change now. There is no second chance. Local interests—producer states and consumer states alike—are tied to global stakes. Fossil fuel dependency is not a concept; it's a reality with many consequences, from local jobs to wars over the coming scarcity that will take sons and daughters from all of us. I have fellow alums and family in my hometown who have buried their children who served this nation in our recent wars. We asked for blood and treasure. Did we ask wisely? Critical thinkers in each town and hamlet are the ones who have to bring wisdom and skill to the table when lives hang in the balance.

### III. TEACH YOUR CHILDREN WELL<sup>38</sup>

If I am right, and lawyers are often the strategists and opinion leaders who make choices that shape our lives indelibly, the next question is: what should we teach these lawyers and how should we teach it?

The magnitude of the problem suggests the scope of the education required. It is a huge, multidimensional problem. For simplicity's sake, here is the diagram.

#### *A. The Problem*

Scarcity, economic stagnation, and misallocation of resources complicated by climate change, along with rapidly growing inequality and concentration of wealth and power in the hands of a few exacerbate instability and violence in a global context in which there are few shared norms, processes of dispute resolution, or widely shared traditions of mutual care and respect. This results in war, poverty, disease, failed states, and democracy movements devolving into violent chaos when the transition to democracy is complicated by legacies of colonialism and the simple reality that democracy is as hard to implement as it is easy to long for.

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38. CROSBY, STILLS, NASH & YOUNG, *Teach Your Children*, on DÉJÀ VU (Atlantic Records 1970).

### B. The Solution

There is no simple solution to a crisis of this proportion, but we do know a lot about what hasn't worked so far. At a minimum, it requires ramped up diplomacy and immediate international cooperation to mend global warming, reduce poverty, and resolve disputes without violence.

### C. The Skills and Knowledge Required

We know that this work is complicated and that parochial approaches are inadequate for problems of global proportion. Military strategists talk of the folly of fighting the "last war." Legal and public policy strategists, similarly, will have to maintain flexible, creative, open, multi-varied toolkits. The strategic generalist is best positioned to guide us through the future unknown.

Here, I venture a statement of what an education would look like that would meet these criteria. First, I do find invaluable the traditional lawyer skills of rhetoric and manipulation of legal materials: case analysis and argument from analogy, statutory interpretation, and advocacy with precision and anticipation of counterarguments. All of us who teach in the first year using the Socratic method have watched the small miracle of students coming in making muddy, overgeneralized, marginally-relevant, randomly-focused arguments in September, shocked out of that sloppiness by December. Duncan Kennedy summed up this traditional skill set aptly in *Legal Education and the Reproduction of Hierarchy*.<sup>39</sup>

Lawyering skills also include the clinical: how to interview and advise clients, how to take a typical case through its life course in the existing legal system, with the oratory, fact assessment, document management, and strategizing required. The most important and universally useful clinical skills are those of negotiation. Many lawyers will never argue a case before a judge or conduct a deposition. All lawyers, and all problem solvers, negotiate.

Beyond the traditional package, the strategic generalist must have a radically interdisciplinary toolkit. This does not mean becoming an expert in, say, coding or philosophy. It means knowing enough to ask useful questions, call in experts, and identify the knowledge paths that require exploration. A good strategist assesses available resources: What do I know? What do I not know? What do I need to know? General knowledge is the platform that allows this assessment. In broad terms, a good lawyer must know how to collect and evaluate data; must have working knowledge of how science, statistics, and technology work in the world;

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39. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 595 (1982) ("[Law students] learn to retain large numbers of rules organized into categorical systems . . . . They learn 'issue spotting,' which means identifying the ways in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases, so they will apply beyond their intuitive scope, and narrow holdings for cases, so they won't apply where it first seemed they would. And they learn a list of balanced, formulaic pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation in spite of a gap, conflict, or ambiguity or that a given case should be extended or narrowed.").

must understand the environment of power—from finance to foreign policy—must consider psychology and the complexities of human minds and motivations; and most of all, must embrace the humanities.

One of the pieces that most stays with my students from my class in Peacemaking is *Victims of Groupthink*, a work describing the run-up to the Cuban Missile Crisis.<sup>40</sup> They are captivated by a story of people they identify with, the highly educated best and the brightest, who make horrifically wrong decisions because of the psychology of group decision making. When they are sitting in a room making decisions that could radically change the course of history, they promise me, without my prompting, they will remember to seek out and hear the dissenting view. Whether from Shakespeare, Chinua Achebe, or a narrative history of the Cuban Missile Crisis, there is one piece of writing out there that becomes the lifelong hubris killer. The more power our students hope to obtain, the more important it is that they carry that one piece with them out into the world.

Knowledge of history, economics, empirical/social science methodology, literature, science/technology, statistics, comparative theology, geography, anthropology, political theory, moral philosophy, and social change/anti-subordination theory are all useful for lawyers of this century. I find my student's education particularly lacking in political economy. I might call a particular approach "Keynesian" and see in my student's notes a wide range of spellings. Many are spelling Keynes with a C, as in Cain and Abel. And even economics majors often know little of the epistemological critiques and intellectual history relevant to their field, not to mention never having read Marx, Engels, Hegel, or even Adam Smith in full text. Much of the "future of law schools" fuming—especially in the less thoughtful fora of blogs, chats, and tweets—belittles the teaching of humanities in law schools. Frivolous electives, "law and basket weaving,"<sup>41</sup> or elite pastimes of overindulged dilettante professors are the kinds of characterizations out there.

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40. Irving Janis, *Victims of Groupthink*, in APPROACHES TO PEACE: A READER IN PEACE STUDIES 31, 32 (David P. Barash ed., 2d ed. 2010) ("[G]roupthink refers to a deterioration of mental efficiency, reality testing, and moral judgment that results from in-group pressures.").

41. Criminal defense lawyer Scott Greenfield criticizes so-called "Law and Basket Weaving" interdisciplinary law courses. Scott H. Greenfield, *Interdisciplinary, or Why We Can't Have Nice Things*, SIMPLE JUST.: A CRIM. DEF. BLOG (Apr. 8, 2012), <http://blog.simplejustice.us/2012/04/08/interdisciplinary-or-why-we-cant-have-nice-things/>. Greenfield's sentiments are shared by Supreme Court Justice Antonin Scalia, as he also made disparaging comments about elective courses and how they "allow students to slack off and miss the 'austere pleasures of doctrinal courses.'" Rebecca Baird-Remba, *Justice Scalia Bemoans the Existence of 'Law and Feminism' Classes*, BUS. INSIDER (Mar. 25, 2013, 12:12 PM), <http://www.businessinsider.com/scalia-calls-legal-education-a-failure-2013-3>; Erin Fuchs, *Scalia Gave Wyoming Law Students His 'Single Best Piece of Advice'*, BUS. INSIDER (Oct. 30, 2012, 1:12 PM), <http://www.businessinsider.com/scalias-advice-for-law-students-2012-10>. My artist friends note the elitist, ableist sneer in the usage of "basket weaving" as an insult, the origin of which is the belittlement of patients in sheltered workshops. See Jennifer Laws, *Crackpots and Basket-Cases: A History of Therapeutic Work and Occupation*, HIST. HUM. SCI., Apr. 2011, at 65, 74–75 (2011) ("Basket-weaving—traditionally a respected skill—became the stigmatised pursuit of asylum inmates. The derogatory term 'basket-case', used originally in the First World War to describe quadruple

I am trying hard to avoid defensive self-justification. I teach classes derided in print by commentators who have looked only at the course titles and not at the content. These include Feminist Legal Theory; Peacemaking; and Organizing for Social Change: Anti-subordination Theory and Practice.

I am tempted to defend these classes in practical terms. I have participated in class action settlements where hundreds of millions were on the table because idle middle managers lacked basic introductory work in critical race theory and women's studies.<sup>42</sup> These cases are in the reporters.<sup>43</sup> Talk to the CEOs, as I have, who say quite frankly that learning before litigation is preferable to learning after. The ones at the top know that the kind of intercultural knowledge and deep understanding of the persistence of racism, sexism, and homophobia in our culture that critical theorists grapple with is exactly what they need to know more about. Our goals differ, but wide-ranging inquiry into difference and subordination is a shared path. For me, the goal is fairness. For them, it's risk management, market share, and extracting shareholder value in places radically different from home. They know close-minded monoculturals are not good at this. I guarantee you they have anthropologists on call right now, exploring the ways in which changing attitudes toward gay marriage will open business opportunities.

The justification of the bottom line, however, is not what ultimately defends bringing humanistic, anti-subordination teaching to the center of the curriculum. As

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amputees who were carried home on 'basket' stretchers, found a new target amidst the basket-weavers of [occupation therapy]—in time coming to signify 'hopeless cases' and 'crazies' more generally." (citation omitted)). Before using "basket weaving" as a pejorative, one might consider the connection between basket weaving as an art form and theories of law and justice. See, e.g., *Crocheted Wire Sculpture*, RUTH ASAWA, <http://www.ruthasawa.com/crochetwire.html>; *Sweat (2013)*, GAYE CHAN, <http://www.gayechan.com/projects-gallery/sweat/sweat.html>.

42. Mari Matsuda served on the Texaco Equality and Fairness Task Force, established as part of the \$176 million settlement reached in 1996 on an anti-discrimination suit. Press Release, Texaco, Texaco Announces Membership of Equality and Fairness Task Force (Jun. 23, 1997), available at [http://www.texaco.com/sitelets/diversity/press/pr6\\_23.html](http://www.texaco.com/sitelets/diversity/press/pr6_23.html); Press Release, Texaco, Texaco Announces Settlement in Class Action (Nov. 15, 1996), available at [http://www.texaco.com/sitelets/diversity/press/pr11\\_15.html](http://www.texaco.com/sitelets/diversity/press/pr11_15.html); see also *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 186 (S.D.N.Y. 1997); *Judge Defers Ruling on Texaco Settlement*, N.Y. TIMES (Mar. 19, 1997), <http://www.nytimes.com/1997/03/19/business/judge-defers-ruling-on-texaco-settlement.html>.

43. After the Texaco settlement, Coca-Cola and Merrill Lynch were among the several major corporations involved in large settlements on discrimination class action suits. In 2000, Coca-Cola and the plaintiffs of a racial discrimination suit reached a settlement of \$192.5 million. *Soft Drink Maker Agrees to Pay \$192.5M to Settle Racial Discrimination Lawsuit*, CNN MONEY (Nov. 16, 2000, 4:52 PM), <http://money.cnn.com/2000/11/16/companies/coke>; see also *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001). In 2013, Merrill Lynch agreed to settle a racial discrimination suit for \$160 million. Chris Isidore, *Merrill Agrees to \$160M Racial Bias Settlement*, CNN MONEY (Sept. 24, 2013, 5:00 AM), <http://money.cnn.com/2013/08/28/news/companies/merrill-lynch-settlement/>; see also *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (reversing the district court's decision to deny certification to a class of African-American employees who had been allegedly subject to racial discrimination).

Stephanie Wildman has argued, it's justice, and the way in which justice both defines and is defined by human thriving.<sup>44</sup>

A primary muscle that atrophied in these recent decades of overwhelmed capitulation to the status quo is the capacity for utopian visioning. When I ask my students to visualize a just world and the specifics of it, they start with small things. Big things, like "free quality childcare on demand," which feminists of the '70s could roll off within five seconds of being asked "what do women want?" do not come easily to my students. They hear the objections before they can articulate the visions.

"What about an immediate bailout from student debt as part of the stimulus package?" I ask.

"Well, we couldn't get that; people will say we signed a contract."

"GM signed a contract. The banks signed a contract. They got a bailout."

"Gee, I never thought of that."

"Why shouldn't we pay you to go to law school? Aren't you going to pay us back in future revenue generation?"

"But people would never want their taxes used to make my education free."

Run the numbers, I tell them, education generates revenue.<sup>45</sup> What if you and they are not seen as separate people? Is there room to imagine all of us contributing and benefitting from investment in education? The biggest economic growth of our lifetimes came from intellectual capital. The places where the new, tech-driven economy took off clustered around great universities. Bill Gates went to a well-funded high school. He was interested in these new gadgets called computers, and the school said, "Fine, see what you can learn about them. It didn't say here is our standardized test, here are our rubrics, stick to that scripted curriculum." Children broadly educated and empowered to pursue knowledge on their own engine are our best chance at future economic growth.

My students' small vision changes with the interjection of a few examples from the wider world beyond the law school. Soon they are outpacing me with the range of their ideas. The technique of getting big, audacious ideas on the table before tearing them down is important, as is the next step: evaluating ideas using critical thinking skills.

What are the things that can go wrong with a utopian plan? Again, history and literature, revolutions and dystopias, dreams built and shattered help frame our thinking. I once taught the novel *Burger's Daughter*,<sup>46</sup> in *Organizing for Social Change*. This book leaves no character unexamined as they choose either complicity with or struggle against Apartheid. Burger, the revolutionary parent,

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44. See Stephanie M. Wildman, *Democracy and Social Justice: Founding Centers for Social Justice in Law Schools*, 55 J. LEGAL EDUC. 252, 252 (2005) ("Protecting democracy by combating inequality is the task of social justice lawyers.").

45. See Sumner La Croix, *The Economy*, in *THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE* 23, 25 (Craig Howes & Jonathan Kay Kamakawiwo'ole Osorio eds., 2010) ("[I]ncreases in the quality and quantity of an average worker's K-12 education should, if the employer provides a set of clear incentives to the worker, increase output per hour of an average worker, raise worker wages, and in the aggregate contribute to economic growth.").

46. NADINE GORDIMER, *BURGER'S DAUGHTER* (1979).

makes the questionable choice to put the movement before self and family. Accepting the status quo, however, is a poisonous option.

“[T]o eat without hunger, mate without desire.”<sup>47</sup> Nadine Gordimer’s description of anesthetized bourgeois existence under apartheid was such a strong portrayal of what subordination does to the subordinator that every single student in the class underlined the passage. I can quote it to this day without returning to the text because of the way it grabbed my students’ attention. A great novel does that. We were not reading fiction for fun, but rather to understand the challenges of human life on this planet and to ask what we would do when faced with the choice of action or complicity.

Let me make this clear: I do not think every student needs to take Law and Literature, and, although I consider Nadine Gordimer essential reading, I have only taught this book once. The point is not to create a laundry list of required reading or a fixed course of study, but rather to cultivate a habit of the mind that says close, critical reading of books in many disciplines is part of your ongoing obligation to make sense of the complex world in which you do your work. I am not among the critics deeply dissatisfied with the current system, under which required courses cover the core doctrinal knowledge and skills of legal analysis, and a range of electives takes all our students beyond that, in paths that allow for idiosyncratic choice. It is the professors’ job to make sure that these courses are rich with content useful to lawyers as leaders and change agents. It is our job to hold one another to standards of rigor in pedagogy and vitality in content. It is also our job to make suggestions about what one might take. One public advocate used to say, “take all the hardcore business courses—advanced securities regulation, corporate taxation—so you understand how money operates.” I tell my students, “follow your passion and take classes from the professors who incite your mind.” I also say, “Be sure to talk to someone else on the faculty who thinks you should focus on bar courses.” Get a range of advice. If we can come to consensus on a good balance of these paths, it does make sense to institutionalize it by expanding the fixed trajectory. Good luck on consensus, however.

Here are a few I would vote for: every lawyer should know how to read a financial statement, how to converse in at least one language other than English, how to respond to the basics of anti-subordination theory, including the all-important epistemological incursions into the fact-value distinction made by feminist theory and critical race theory. Every lawyer should understand what the Federal Reserve Board does, should take a course in negotiations, and should memorize at least one poem by heart. Every lawyer should do work—whether pro bono, straight-up charity, religious proselytizing in the prisons, community organizing, or structural class action litigation—that gives them a direct view into the actual lives of our neighbors who are underhoused, underemployed, and underlawyered.

Whether you follow my list or some other, doing a good job of it will take more than two years. This is exacerbated by the fact that pressures on K–12 and undergraduate education to respond to market pressures, and misguided notions of standardization means that fewer of our students come with broad exposure to

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47. *Id.* at 117.

social science and the humanities.<sup>48</sup> I regularly encounter students who were never, not once, required to write an in-depth paper reflecting original research and thesis formation, or required to do a close reading of an entire book followed by a discussion and defense of their reading.

#### IV. THEM THAT'S GOT SHALL GET<sup>49</sup>

We are entering a new cycle in American history, in which we can revive the notion of the common good. Rather than looming unemployment for our graduates, I see growing demand for lawyers willing to serve the least advantaged and rebuild our nation—from crumbling infrastructure to failing schools. These are social problems, shored up by legal absences. I remember a time when we fought a war on poverty. It is a myth that we lost that war. In fact, we were winning it by pulling thousands of children out of hopelessness and attacking legal structures that allowed slum lording and exploitation of the poor. The reason the lawyers affiliated with outfits like California Rural Assistance, the Office of Economic Opportunity (OEO), and legal services were attacked was that they took seriously the ethical obligation to represent poor and working people zealously. They were altering power relationships in ways that threatened the status quo.

We now understand that the status quo of growing poverty is not good for any of us. If you talk to state court judges, they will tell you that they see many underlawyered cases and a crisis in access to justice for the least advantaged. We in the law school world have an obligation not only to train lawyers to fill this gap, but also to demand a new war on poverty that will invest in hiring our graduates to restore the health of the polity. We know that there are violence victims who need temporary restraining orders, families facing eviction in the coldest months, and a long line of unrepresented workers with legitimate contract complaints, turned away from legal redress because they cannot afford a lawyer. We know our students are waiting for meaningful employment. What is missing is the concept of investment in the public good that would solve two problems at once: unemployment of our able young lawyers and the desperate need for legal services. Properly trained, young lawyers would understand that they are not white knights. Their job is to work with and empower their clients. The old OEO model of “maximum feasible participation” of the poor in devising strategies to end poverty is yet another thing our students know nothing about. It is a mantra I remember all these years later because adults doing that work repeated it in the strategic conversations I overheard as a dragged-along kid when my mother was a Head Start trainer canvassing housing projects on the weekend. This is the history of dynamic, visionary public policy formation that we must reclaim for our students in order to prepare them for the new war on poverty.

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48. Randi Weingarten, President, Am. Fed'n of Teachers, Making Common Core Standards Work Before Making Them Count (Apr. 30, 2013), available at <http://www.aft.org/newspubs/press/weingarten043013.cfm> (urging for education that prepares students “to compete—not on the basis of their test-taking skills, but on their ability to solve problems, analyze and apply knowledge, and work with others”).

49. BILLIE HOLIDAY, *God Bless the Child*, on GOD BLESS THE CHILD (Okeh 1942).

The charge that a broadly interdisciplinary legal education is elitist and frivolous, maybe good for the East Coast elite, but useless in the provinces, is particularly offensive to me because I went to the law school farthest away from the metropole. The Richardson School of Law celebrates its fortieth anniversary this year. When I attended it was tiny, new, and experimental. An offshore committee of visionaries wrote a curriculum of the sort that only arises when you start a school from scratch in the middle of '70s ferment, with no established stakeholders, students, or faculty around to object.<sup>50</sup> They included required courses in social science and empirical methods, and infused “law and” throughout the curriculum. A live-client clinic was a required course, and regular lectures from practicing lawyers and lawmakers blended the actual with the theoretical. My entire class spent at least one night in the first year riding shotgun in a police cruiser. We read law and economics and literary case studies in Torts; law and psychiatry in Criminal Law; as well as jury studies and Brandeis briefs in Factual Inquiry. A case study on public health and agency capture by the asbestos industry enraged one young student so greatly that he could not let go of the gnawing sense of injustice left stirring in his gut. He became our state’s first and best asbestos litigator, and recently funded an endowed chair in the name of our torts professor.<sup>51</sup> I believe our wildly experimental and interdisciplinary legal education made us better lawyers, better thinkers, and better citizens. As our school became more established the radically interdisciplinary curriculum faded. It would be an uphill battle to re-implement it today.

The fiscal problems identified by Tamanaha<sup>52</sup> and others are real, but they are not a reason to close the door on legal education, richly defined as providing the skills and knowledge required to create the leaders/generalists capable of making the decisions that will either take our country successfully through this century or run it into the ground. The fiscal crisis we face now is a created product, not an Old Testament curse. We, lawyers, did this. Our choices of where to deploy and not to deploy law are largely the cause of the runaway banking crisis that took down our economy and brought us to stagnation. Before the speculation there was actual growth based on the new knowledge industries that showed then, and still show—if we look past the current crisis—potential to remake life and work for the better. Slimmed down, market-driven legal education is not what will prepare lawyers to see beyond the current crisis to the means of remaking and preparing for sustainable prosperity. Keynes is not spelled with a C, but change is.

Studying history, all the way back to its known beginnings, makes the big C, for change, the master rule. Beautiful civilizations rose and fell in the verdant river valleys of Mesopotamia, our own precious and young nation has stumbled mightily

50. Richard S. Miller, *The Creation of a “Policy-Oriented” Curriculum, in HAWAII’S LAW SCHOOL: REALIZING THE DREAM (1973–2013)* (forthcoming).

51. In 2008, Gary Galiher and other alumni of the William S. Richardson School of Law established an endowment fund in the name of Richard S. Miller. *Richard S. Miller Endowment Fund Established*, ALUMNI NEWSLETTER (William S. Richardson Sch. of Law Alumni Ass’n, Honolulu, H.I.), Oct. 2008, at 3, available at <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/newsletters/20826/AlumniOct2008.pdf>.

52. See TAMANAHA, *supra* note 18, at 107–25.

more than once, and is falling fast as we watch. This is not the end of history. Looking back we can look forward to crisis met, crisis averted.

Somewhere in my hometown, an estate-planning lawyer is advising a small business owner on transition. “Yes, you could monetize today, but this is not a great time to sell; let’s see what the options are and how you feel about them. Let me tell you how another client of mine felt after she sold her business.” Across the ocean, the managing partner of Blue Chip Firm is watching the bottom line and deciding to lay off associates today, sickened at the human costs of this decision. Contingency planning requires that same partner to have a rapid deployment hiring strategy in the event of recovery, knowing that to beat the competition, “rapid” means “before you are even sure it’s time.” Elsewhere, a graduate of an elite three-year law school sits in the oval office discussing the way out of fiscal crisis. If his team makes the right choices, and finds the right language and political strategy to deploy those choices effectively, then the law firm’s contingency plan for hiring will go into play tomorrow, and the hometown business owner would have been right to hold on for another year.

A third year of law school spent in apprenticeship learning how to take a deposition is not what prepares any of these three lawyers to advise clients and act wisely in uncertain times. History, psychology, economics, politics, and immersive understanding of debates over the human, the just, and the good are the required preparation. It’s a lot to ask of law school, but as I watch with pride I see our graduates successfully deploying a multi-layered tool kit.

I opened this Lecture with a scene from a history text that gripped my students. The students, emotionally, and the long-ago Lowndes County congregation encircled by nightriders, did not exit that scene easily. The stark reality of law’s absence, of times in history when law disappeared and we were left to the vagaries of private violence or private mercy, as the fates allowed, are so hard to think about that we turn away.

We are the lawyers. We are the ones charged with bringing law where it is needed to avert harm and to bring prosperity. We are the ones charged with making law get out of the way—to allow needed innovation, and to allow human expression. There are places where the law itself commands us to “make no law.” I speak in a shorthand that encompasses deep complexity and the history of humankind’s quest for freedom. You get it, because you are lawyers. And that, I say with measured pride, is no small thing.