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THE HOLMES SCHOOL OF LAW: A PROPOSAL TO REFORM LEGAL EDUCATION THROUGH REALISM

ROBERT RUBINSON*

Abstract: This article proposes the formation of a new law school, the Holmes School of Law. The curriculum of the Holmes School would draw upon legal realism, particularly as articulated by Oliver Wendell Holmes. The proposed curriculum would focus on educating students about “law in fact”—how law is actually experienced. It rejects the idea that legal education should be about reading cases written by judges who not only bring their own biases and cultural understandings to their role, but who also ignore law as experienced, which, in the end, is what law is. This disconnect is especially troubling because virtually all legal education ignores law as experienced by low-income people. The article concludes with responses to anticipated objections to the proposal.

I. MISSION STATEMENT

The mission of a newly established Holmes School of Law is to teach law.¹

II. COURSE DESCRIPTIONS: A SELECTION²

Adjudication: 8 Credits

An examination of different fora where matters are adjudicated. Students will observe where the bulk of adjudication takes place, including the Two Minute Hearing Court to Evict Tenants;³ the Default Judgment Foreclosure

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¹ Like other mission statements, this Mission Statement says nothing. It does, however, have the virtue of brevity.

² The Proposal holds that breaking down a law school curriculum into “subjects” that have purported independence is misleading and a simplification because law is really all about context and interactions. *See infra* notes 61–70 and accompanying text.

³ Consider the degree of process accorded defendants in “Rent” and “Housing” courts of major U.S. cities. On a typical day at Boston’s Housing Court in 2002, 141 of 208 cases on the

Court and the “processes” it employs;⁴ Administrative Court for Prolonged and Fruitless Review of Unjustified Denials of Government Benefits;⁵ the Court for Incarceration through Plea Bargains and Sham Waivers of a Constitutional “Right” to a Jury Trial;⁶ judicial process “adjudicating” the welfare of

docket were set for trial. Trina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL'Y 181, 195 (2003). In these trials, “landlords were represented in 111 cases, [while] tenants were represented in thirteen cases” *Id.* Cook County courts handle about 40,000 eviction cases per year, in which only about ten percent of tenants are represented. *Id.* at 192; see Karen Doran et al., *No Time for Justice: A Study of Chicago's Eviction Court*, LAWYERS' COMM. FOR BETTER HOUS., 11 (Dec. 2003), <http://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf> (noting that the average eviction case lasts only one minute and forty-four seconds). A typical day in Baltimore's “rent court” includes a docket of 1050 cases. *A System in Collapse: Baltimore City Suffers from an Overwhelmingly High Caseload of Tenant Evictions. Hurt in the Process Are Tenants, Landlords, and the City of Baltimore and Its Neighborhoods*, ABELL REP. (Abell Found., Baltimore, Md.), Mar. 2003, at 2. Cases in New York City's Housing Court are “disposed of at an average rate of five to fourteen minutes per case, with many settlements in the range of five minutes or less.” 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (Civ. Ct. 1992); see Jonathan L. Hafetz, *Almost Homeless*, LEGAL AFF., July–Aug. 2002, 11, 12 (noting that more than 300,000 cases are filed in New York City housing courts each year, with each judge, on average, hearing 7000 cases per year). The case of *Williams v. Housing Authority* addresses the illusory nature of such “courts.” 760 A.2d 697, 703–04 (Md. 2000) (finding that a so-called “Rent Court” is an administrative fiction which, despite its geographic separation from other courts, has no distinct legal status or jurisdictional limitation).

⁴ See Ariana Eunjing Cha & Brady Dennis, *Amid Mountain of Paperwork, Shortcuts and Forgeries Mar Foreclosure Process*, WASH. POST, Sept. 23, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206132.html (“The nation's overburdened foreclosure system is riddled with faked documents, forged signatures and lenders who take shortcuts reviewing borrower's files”). A well-publicized example of this “process” is the prevalence of “robo-signing” through which court papers are filed without individualized review by the mortgagee. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L. J. 53, 134–35 (2011). Courts accommodate the influx of cases with “rocket dockets” which, in the spirit of robo-signing, do not present even a façade of due process. Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases*, WALL ST. J., Feb. 18, 2009, at A1, available at <http://online.wsj.com/news/articles/SB123491755140004565> (noting that “rocket dockets” refer to the close to 1000 foreclosure cases heard by Lee County judges in a single day).

⁵ Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 109–12 (2005). For example, in one case, a federal magistrate noted that “it has taken six years for this relatively simple claim to work its way this far through the system, approximately two years of that time having been expended by the Appeals Council [an entity established to “review” denials of benefits by administrative law judges] in deciding that it would not review the claim”. *Id.* at 111 n.60 (quoting *Jacobs v. Barnhart*, No. S-01-2788, slip op. 1 n.1 (D. Md. Oct. 7, 2002)); *Brief History and Current Information about the Appeals Council*, OFFICIAL SOCIAL SECURITY WEBSITE, www.ssa.gov/appeals/about_ac.html (last visited Feb. 18, 2015).

⁶ Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (“Plea bargaining now dominates the day-to-day operation of the American criminal justice system; about ninety-five percent of convictions are obtained by way of a guilty plea.”). Deborah Rhode notes that private lawyers hired to defend indigent defendants have a “standard practice” of “meet 'em, greet 'em, and plead 'em,” and that overwhelmed courts simply could not accommodate lawyers who actually conduct fact investigations and make motions on behalf of their clients. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1793 (2001).

children, as compared to adjudication of matters involving large business entities;⁷ and the inapplicability of “rules of civil procedure” to “summary proceedings” that overwhelmingly impact indigent litigants.⁸ The course may also examine, by way of contrast, fora whose degrees of process and resource allocation vastly exceed the volume of cases they adjudicate, such as federal courts.⁹

The Judicial Opinion: 1/10 Credit

This course, offered during orientation, explores the limited role judicial opinions play in understanding law;¹⁰ the overwhelming correlation between judges’ political and policy affiliations in predicting judicial outcomes;¹¹ how endless citations of precedent and legal analysis in opinions function as an *ex post facto* means to justify foregone conclusions;¹² and judicial opinions as a means for presenting a veneer of rationality and scientific precision.¹³ As part of this course, students will choose a judicial opin-

⁷ Rhode noted that “civil courts take weeks to try a commercial dispute between wealthy businesses but give less than five minutes to decide the future of an abused or neglected child” Rhode, *supra* note 6, at 1793.

⁸ *Lindsey v. Normet*, 405 U.S. 56, 64–65 (1972) (holding that conducting a trial within six days of filing a landlord-tenant case, unless the tenant posts bond, does not violate the Constitution).

⁹ Of nearly one million cases filed in the United States in 2001, less than three percent were in the federal system. See BRIAN J. OSTROM ET AL., CONFERENCE OF STATE COURT ADM’RS, BUREAU OF JUSTICE STATISTICS & NAT’L CTR. FOR STATE COURTS’ COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2002: A NAT’L PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (2003). Furthermore, federal courts marginalize those cases that typically involve low-income litigants, such as petitions for habeas corpus and reviews of denials of Social Security benefits, as necessary evils, and afford them minimal scrutiny. See Rubinson, *supra* note 5, at 107. Instead, federal courts primarily devote their available resources to “high-stakes, ‘bet-the-company’ business cases” Bryant G. Garth, *Tilting the Justice System from ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 941 (2002).

¹⁰ Tracey E. George et al., *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 691 (2011) (questioning whether “pronouncements” in opinions are “in fact an accurate reflection of law as understood in the world . . .” and suggesting that “[w]e can better understand law by moving beyond our court-centric perspective . . .”).

¹¹ One computer model correctly predicted seventy-five percent of Supreme Court outcomes based solely on a limited number of variables, such as “ideological direction . . . of the lower court ruling,” and without reference to the “facts” of the case. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1163, 1167 (2004); see also Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 36 (2001) (noting the importance of, among other things, “policy preferences” and “party identification” in predicting judicial outcomes).

¹² See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897); see also *infra* notes 50–55 and accompanying text.

¹³ Holmes noted that “the logical method and form flatter that longing for certainty and for repose which is in every human mind.” Holmes, *supra* note 12, at 466.

ion of at least sixty pages¹⁴ and draft a full explanation of, and basis for, the decision in three pages or less.¹⁵ NOTE: This course fulfills the legal analysis requirement.

The Supreme Court I: 1/10 Credit

This course examines judicial opinions by the High Court. Topics include the reality that the current Justices have rarely, if ever, represented individual clients in practice;¹⁶ the extraordinary attention lavished by academics and other legal commentators on the Court's hyper-technical arguments and dense thickets of citations and logical forms to justify preexisting conclusions;¹⁷ the ability to predict decisions across a wide range of substantive areas based on a judge's ideology without knowing a single precedent or reading a single brief;¹⁸ an examination of whether the rule that the Supreme Court is the only court in which "Court" must be capitalized at all times is analogous to the capitalization of the names of Supreme Deities.¹⁹

¹⁴ An overwhelmingly large number of opinions fit this criterion, so the instructor will provide a more limited list in order to facilitate students' ability to make a choice. Consider, for example, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (177 pages) or *District of Columbia v. Heller*, 554 U.S. 570 (2008) (153 pages). See Debra Cassens Weiss, *U.S. Supreme Court Sets Record for Longest Opinions Ever*, A.B.A. J. (Nov. 19, 2010, 11:30 AM), http://www.abajournal.com/news/article/u.s._supreme_court_sets_record_for_longest_opinions_ever/.

¹⁵ In a letter to Harold Laski, Holmes recounted, "I have sent round an opinion in which I take three pages to say what should be said in a sentence, but which Brandeis thought ought to be put in solemn form because of its importance." Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 30, 1917) in *HOLMES-LASKI LETTERS* 114 (Mark DeWolfe Howe, ed., 1953). In crafting this assignment, Holmes's statement has been reduced to a ratio: three sentences would equal about forty words, and three pages, assuming the standard of 250 words per page, would equal 750 words. This reduces then to the following arithmetic: $40 \div 750 = 0.053$. Thus, a sixty-page opinion times 0.053 equals 3.18, which, after rounding, would equal three pages. Otherwise, lengthy concurrences and dissents of individual justices who believe that the nuances of their distinct jurisprudence warrant detailed study can be summarized in a sentence or two.

¹⁶ Benjamin H. Barton, *An Empirical Study of Supreme Court Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1150 (2012).

¹⁷ See *infra* notes 50–59 and accompanying text.

¹⁸ Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, WM. & MARY L. SCH. RES. PAPER NO. 09-276 at 1, 77 (2014), abstract available at <http://ssrn.com/abstract=2432111>; Adam Liptak, *The Polarized Court*, N.Y. TIMES, May 10, 2014, at SR1 (quoting Justin Driver, a law professor at the University of Texas, who noted that it is becoming "increasingly difficult to contend with a straight face that constitutional law is not simply politics by other means, and that justices are not merely politicians clad in fine robes").

¹⁹ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 8, at 86 (Columbia Law Review Ass'n et al. eds., 19th ed. 4th prt. 2011).

The Supreme Court II: 8 Credits

This course focuses on the circumstances faced by litigants in selected matters decided by the Court. The topics covered will vary based upon available opportunities for observation or participation, but may include witnessing an execution in order to assess the Court's decisions regarding whether capital punishment is cruel and unusual;²⁰ visiting homeless shelters and soup kitchens to explore the Court's jurisprudence on due process—specifically how it has not been extended to ensure the right to food, shelter, or other means of subsistence;²¹ residing in an urban neighborhood riddled by handgun violence to assess the role that handguns play in contemporary society in contrast to the role of well-regulated militias in rural America in 1791;²² attempting to exercise First Amendment rights as an individual compared with multi-national legal entities that are not human beings and which possess massive aggregations of capital;²³ assessing how the First Amendment promotes the “marketplace of ideas” when entry into the marketplace can only be secured by wealthy individuals who have resources to buy ideas sold in the marketplace.²⁴

Property: 3 Credits

This course examines the impact of property law on the mass of individuals whose property “interests” are as tenants and owners of modest homes at risk of foreclosure or who are homeless and thus do not have one stick, let alone a “bundle” of them.²⁵ Most of the course entails interviewing individu-

²⁰ Judge Alex Kozinski has offered the following reflections on this subject:

Though I've now had a hand in a dozen or more executions, I have never witnessed one I sometimes wonder whether those of us who make life-and-death decisions on a regular basis should not be required to watch as the machinery of death grinds up a human being. I ponder what it says about me that I can, with cool precision, cast votes and write opinions that seal another human being's fate but lack the courage to witness the consequences of my actions.

Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 52.

²¹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (holding that due process guarantee only extends to “affirmative exercise of [State] power”).

²² While most opinions eschew the realities of gun use today, Justice Breyer's dissent in *Heller* offers a rare description of handgun violence, albeit with a statistical cast. 554 U.S. at 681–723.

²³ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 318–19 (2010).

²⁴ David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 190, 200–12 (David Kairys ed., 1998).

²⁵ The metaphor of a “bundle of sticks” or “bundle of rights” is often used to describe legal “rights” in property. Lee Ann Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1978–79 (2012).

als whose homes have been foreclosed,²⁶ who have been evicted,²⁷ or who are homeless, and explores the extent to which low and minimum wage jobs cannot secure livable and affordable housing.²⁸ There will be no more than thirty minutes devoted to government subsidies for mortgage interest, lower tax rates for capital gains, or exploration of the “rights” of owners of parcels of land named Blackacre and Whiteacre.

The Unrepresented Client: 6 Credits

This course will be co-taught by low-income litigants who have claims adjudicated with minimal process and without representation. Topics to be covered: the overwhelmingly high percentage of litigants who are not represented in various proceedings and whose cases constitute the majority of adjudicated matters;²⁹ the instructors’ experience as low-income litigants in the judicial system,³⁰ whether an “adversary system” is truly “adversarial” when there is only one lawyer;³¹ how favoritism impedes the ability of *pro*

²⁶ Arranging such interviews is quite simple given that the supply of foreclosed homes far outstrips the number of law students who will need to complete this assignment. For the degree of “process” accorded such claims, see sources cited *supra* note 3 and accompanying text.

²⁷ See U.S. DEP’T OF HOUS. & URBAN DEV. & U.S. DEP’T OF COMMERCE, H150/09, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009, at 92 (2011) (noting that 169,000 households were evicted in 2009 alone).

²⁸ See generally BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (detailing author’s reflections on living on poverty-level wages).

²⁹ See, e.g., *Williams*, 760 A.2d at 705 n.6 (“[O]ut of a total of 807,000 civil cases filed in District Court Statewide, nearly 570,000 were landlord-tenant cases, but only 21,000 of those landlord-tenant cases (3.7%) were contested . . .” (citing 1998–1999 MD. JUDICIARY ANN. REP., Table DC-4 at 77)). See generally Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyer’s Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79 (1997) (arguing that additional ethical rules should govern negotiations with unrepresented parties). Engler concludes that in such situations, lawyers often mislead and misrepresent the law or facts to *pro se* litigants. *Id.* at 109, 112.

³⁰ See Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE 119, 119–21 (Richard L. Abel ed., 1982) (describing the bias of judges in New York City Housing Courts against tenants, the vast majority of whom were unrepresented); MONITORING SUBCOMM., CITY WIDE TASK FORCE ON HOUS. COURT, 5 MINUTE JUSTICE OR “AIN’T NOTHING GOING ON BUT THE RENT!” 65–68 (1986) (detailing New York City Housing Court judges’ interactions with unrepresented tenants); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2011–21 (1999).

³¹ DEBORAH L. RHODE, ACCESS TO JUSTICE 5 (2004) (“In most family, housing, bankruptcy, and small claims courts, the majority of litigants lack legal representation. Yet . . . too little effort has been made to ensure that [the law] is fair or even comprehensible to the average claimant.”). A recent study found that, in a Massachusetts jurisdiction, “two-thirds of the tenants who received full representation were able to stay in their homes, compared with one-third of those who lacked representation.” Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention*, BOS. BAR ASS’N 2 (Mar. 2012), <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>; see also Matthew Desmond, *Op-Ed, Tipping the Scales in Housing Court*, N.Y. TIMES, Nov. 30, 2012 at A35.

se litigants to obtain favorable outcomes;³² self-representation in a variety of settings, such as courts and administrative agencies, in which litigants who know nothing about court practices and processes face judges, lawyers, and clerks who possess intimate knowledge of informal and formal court procedures.³³

Professional Responsibility: 3 Credits

This course explores ethical issues facing the profession. Topics include: the co-option of the norms of “zealous advocacy” to justify over-the-top (and lucrative) representation of legal fictions like corporations;³⁴ how rhetoric about the central role that lawyers play in the administration of justice mask professional self-interest; and³⁵ lawyers’ long history of proclaiming the importance of representing low- and moderate-income litigants while doing nothing about it.³⁶

³² See Engler, *supra* note 30, at 2013 n.122.

³³ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 96, 120 (1974).

³⁴ Critiques of representation of organizations as if they were people or even of viewing them as “things”—what has been called “thingification”—has a long history. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935) (critiquing the “thingification” of corporations and noting that “[n]obody has ever seen a corporation”). The notion that corporations are entitled to zealous representation comparable to criminal defendants perhaps reached its apotheosis when a court analogized *Powell v. Alabama*—a case addressing threats of lynching and guilty verdicts against African-American teenagers by white juries in segregated Alabama—to representing an organization. 287 U.S. 45, 49, 50 (1932); see also *United States v. Rad-O-Lite of Phila., Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (finding that “an accused has no less of a need for effective assistance due to the fact that it is a corporation”).

³⁵ DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 143 (2000) (“Lawyers, no less than grocers, are motivated by their own occupational interests[.] . . . [but w]hat distinguishes the American bar is its ability to present self-regulation as a societal value.”).

³⁶ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 143 (1983) (noting how “[t]hroughout the twentieth century, as judges and lawyers have monotonously conceded, legal institutions have defaulted on their obligation to provide justice to all”). Consider the Preamble of the ABA MODEL RULES OF PROFESSIONAL CONDUCT:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

MODEL RULES OF PROF’L CONDUCT PMBL. (2013). There are, however, no obligations in the Rules for lawyers to do anything about this core “deficiency.” See *id.* R. 6.1 (providing for “voluntary pro bono public service”) (emphasis added).

Constitutional Criminal Procedure: 3 Credits

This course explores the application of the Sixth Amendment to the representation of indigent criminal defendants. The course will briefly touch upon the constitutional provisions pertaining to criminal prosecutions. It will then focus exclusively on plea bargaining and the “procedures” implemented by all criminal courts that cannot accommodate any result other than plea bargaining.³⁷ The course will also survey the overwhelming case-loads of public defenders;³⁸ the characterization of adjudication in the criminal courts as “meet ’em and plead ’em,” “cattle herding,” and “McJustice,”³⁹ and the law of ineffective assistance of counsel, particularly the evolving jurisprudence on whether sleeping lawyers in capital cases have provided effective assistance of counsel.⁴⁰ Other topics: the criminalization of poverty⁴¹ and racialization of criminal prosecutions.⁴²

³⁷ See *supra* note 6 and accompanying text; Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0 (“If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.”). The Supreme Court itself has recognized (or at least a majority of the Supreme Court has recognized) the “simple reality” that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). In fact, the Court quoted with approval the following: “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system: it is the criminal justice system.” *Id.* (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). An empirical study about discovery in criminal cases tellingly reveals that there is no discovery in ninety-two percent of homicide cases and 93.6% of felonies other than homicide. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912–13 (2005).

³⁸ See John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseload*, HUFFINGTON POST, (June 16, 2012, 11:18 AM), www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html (chronicling lives of public defenders who regularly handle 120 clients at a time). Such overwhelming caseloads led to the filing of a class action lawsuit alleging underfunding of a public defender’s office. Michael P. Buffer, *Failed Public Defender Settlement Up for Discussion*, CITIZENS’ VOICE, Feb. 6, 2013, <http://citizensvoice.com/news/failed-public-defender-settlement-up-for-discussion-1.1440258>.

³⁹ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1343 (2012).

⁴⁰ See *Tippins v. Walker*, 77 F.3d 682, 683 (2d Cir. 1996). *Tippins* applied a three step analysis to determine whether a sleeping attorney violates a criminal defendant’s Sixth Amendment right to assistance of counsel: “(1) did counsel sleep for repeated and/or prolonged lapses; (2) was counsel actually unconscious; and (3) were the defendant’s interests at stake while counsel was asleep?” *Burdine v. Johnson*, 66 F. Supp. 2d 854, 863–64 (S.D. Tex. 1999), *aff’d*, 262 F.3d 336 (5th Cir. 2001); see also *Tippins*, 77 F.3d at 687–89. Other jurisdictions exhibit a similarly lax attitude toward sleeping counsel. See *Muniz v. Smith*, 647 F.3d 619, 623–24 (6th Cir. 2011); *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984). For example, the Ninth Circuit held that counsel must sleep for a “substantial portion of his trial” in order for there to be ineffective assistance of counsel. *Javor*, 724 F.2d at 834. The court in *Muniz v. Smith* further elaborated on this developing area of the law. See 647 F.3d at 623–24. The *Muniz* Court found “that Muniz’s attorney was asleep for an undetermined portion of a single cross-examination” but “not asleep for the entire

Law and Commerce: 1 Credit

This course provides an overview of the ways attorneys can generate substantial compensation by representing large organizations. The course will only briefly address the “substantive” areas of law on which such representation typically focuses, such as taxation and business organizations. The course will instead explore why less lucrative areas of legal services, such as representing low-income litigants who otherwise could not afford representation, pay too little to service the debt students incur to afford law school tuition.⁴³

Gender, Race, Socioeconomics, and Intersectionality: 3 Credits

This course explores how individual experience defines one’s interpretation of “law,” while the leading interpreters of “law” maintain that their conclusions are driven by “strict interpretation” and plain meaning of the

cross since he objected near the end of questioning,” and thus Muniz “[could not] establish that his trial counsel was asleep for a substantial portion of his trial.” *Id.* If time permits, the course will explore how these holdings reflect the framers’ intent, which can be discerned in light of the how the Constitutional Convention took place in the oppressive heat of a Philadelphia summer in 1787. Given this weather, the framers no doubt were fatigued, and thus they both experienced and understood the value of sleep while deliberating about the founding document of the nation. For a discussion of Philadelphia weather during the Constitutional Convention, see SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 325–26 (James H. Hutson ed., 1987) (examining historical weather records and finding that the average temperature in Philadelphia in 1787 was 93.8 degrees from June through September).

⁴¹ Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009). See generally Richard Delgado, “Rotten Social Background:” *Should the Criminal Law Recognize a Defense of Severe Environment Deprivation?*, 3 LAW & INEQ. 9 (1985) (arguing for recognition of a “rotten social background” defense to criminal responsibility); Richard Delgado, *The Wretched of the Earth*, 2 ALA. C. R. & C.L. L. REV. 1 (2011) (discussing what the refusal to recognize a rotten social background defense means for society); Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998) (examining the impact of race, gender, and age in criminal sentencing).

⁴² See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272, 1281–95 (2004). Approximately one-third of African-American men in their twenties are being supervised by a branch of criminal justice system. *Id.* at 1272.

⁴³ For 2014, the median entry level salary at a legal services organization was \$44,600, while the starting salary at a large private firm in a city was \$160,000. *Jobs & JDs—Class of 2013 Selected Findings*, NAT’L ASS’N FOR LAW PLACEMENT (Aug. 2014), <http://www.nalp.org/uploads/Classof2013SelectedFindings.pdf>. As noted by James Leipold, Executive Director of the National Association of Law Placement, “public interest and public sector salaries have just kept pace with inflation” while “the cost of legal education and the average amount of law student loan debt have both risen at a much higher pace,” thus creating “significant economic disincentives . . . as law students consider whether or not to pursue public interest law careers.” Press Release, Nat’l Ass’n for Law Placement, New Public Interest and Public Sector Salary Figures from NALP Show Little Growth Since 2004 (Oct. 18, 2012), http://www.nalp.org/2012_public_salaries.

“law.”⁴⁴ The course is supplemented by work from social psychologists who have demonstrated how humans assume that their life circumstances are the same as everyone else’s, and how affluent individuals are certain that their own affluence is due to merit and not privilege or luck.⁴⁵

Legal Education: 3 Credits

An exploration of how legal education, with the exception of the Holmes School of Law, has nothing to do with law.⁴⁶ This course will focus on the usefulness of pre-digested hypotheticals when no client has ever presented an attorney with a fact pattern or “Statement of Facts”; assessing whether the “case method” reflects the realities of adjudication, especially where freedom and safety are at stake, such as in criminal prosecution and child abuse and neglect proceedings,⁴⁷ and the misleading perception that elite law schools produce more “competent” practitioners.⁴⁸

This Proposal, having set forth a Mission Statement in Part I and a course catalogue in Part II, will now elaborate on the Proposal’s underlying basis. As Part III explains, Oliver Wendell Holmes rejected the idea that logic—the purported core of conventional legal analysis—constitutes law. This is a “dangerous idea” because it subverts the norms of legal education and judicial decision making. Part IV contrasts the pedagogy of the Holmes School with traditional legal education in light of Holmes’s dangerous idea. Part V examines the educational methodology of the Holmes School. Part VI identifies, and counters, the most obvious objections to this Proposal.

⁴⁴ Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012, available at <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

⁴⁵ See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel L. Kahneman et al. eds., 1982); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 19–20, 231 (1980). For a summary of relevant literature in this area, see Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 28 (1996). A pithier quote expresses the same idea: the affluent “[were] born on third base and think[] [they] hit a triple.” For a linguistic analysis of this well-known phrase, see SEANA COULSON, SEMANTIC LEAPS: FRAME-SHIFTING AND CONCEPTUAL BLENDING IN MEANING CONSTRUCTION 172 (2001).

⁴⁶ See *infra* notes 51–70 and accompanying text.

⁴⁷ See *supra* notes 3–10 and accompanying text.

⁴⁸ William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, 98 A.B.A.J. 36, 37 (2012).

III. INTELLECTUAL FOUNDATIONS: HOLMES'S DANGEROUS IDEA⁴⁹

The founding principles of the Holmes School of Law are drawn from ideas articulated by Oliver Wendell Holmes and other legal realists who wrote primarily in the early twentieth century.⁵⁰ Holmes challenged the logical foundation of “law” and, by extension, traditional legal education.⁵¹ He argued that judicial decisions are not, and could not be, products of logic, but rather products of submerged judgments and policy preferences.⁵² Although legal scholars still hold Holmes in high esteem,⁵³ the full consequences of his ideas remain too *outré* for mainstream conceptions of law.⁵⁴

Holmes's famous essay *The Path of the Law* captures the essence of his critique:

The language of judicial decision is mainly the language of logic . . . [b]ut certainty generally is illusion Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form [Such a conclusion, however,] is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measure-

⁴⁹ The phrase “dangerous idea” comes from DANIEL C. DENNETT, *DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE* 18 (1995).

⁵⁰ For a collection of seminal writings from the realist school, see generally AMERICAN LEGAL REALISM (William W. Fisher, III et al. eds., 1993).

⁵¹ See Holmes, *supra* note 12, at 465–66.

⁵² See *id.*

⁵³ See Richard A. Posner, *Introduction*, *THE ESSENTIAL HOLMES*, at ix (Richard A. Posner ed., 1992) (describing Holmes as “the most illustrious figure in the history of American law” and “a major figure in American intellectual and cultural history generally”). For recent applications of the realist critique, see generally George et al., *supra* note 10; Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008). Legal realism also laid the foundation for feminist jurisprudence and critical race theory. See Martha Albertson Fineman, *Gender and the Law: Feminist Legal Theory's Role in the New Legal Realism*, 2005 WIS. L. REV. 405, 409, 430–31; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (proposing a cultural meaning test to assess how judges' and society's unconscious racism obscures the role racism plays in the development of law).

⁵⁴ When he was ninety-one years old, Holmes himself reflected that his ideas were merely his “old chestnuts” that remained unrealized. Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Apr. 21, 1932), in *THE ESSENTIAL HOLMES*, *supra* note 53, at 21.

ment, and therefore not capable of founding exact logical conclusions.⁵⁵

The following Chinese proverb echoes Holmes's sentiment: "A judge decides for ten reasons/nine of which nobody knows."⁵⁶

Succeeding realists explored the extraordinary technical skill brought to bear in efforts to present conclusions in logical dress. Felix Cohen, for example, satirizes a formalist "heaven" in which he describes a

dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.⁵⁷

The image of the "dialectic-hydraulic-interpretive press" illustrates how any judgment can be presented in logical form.⁵⁸ Hairs can be split in numerous ways. The splitting might seem "objective" or "true" but, according to Holmes, the splitting is a means to justify a conclusion rather than a means to reach a conclusion.⁵⁹

In place of its traditional definition, Holmes offered an alternative view of law.⁶⁰ According to Holmes, law is "[t]he prophecies of what the courts will do in fact, and nothing more . . ." ⁶¹ "Courts in fact" are what courts do *in fact*; they are situated within a factual matrix.⁶² Moreover, facts are textured and variegated, having little to do with the misleadingly

⁵⁵ Holmes, *supra* note 12, at 465–66. Holmes reiterated his rejection of logical form by writing that "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." OLIVER WENDELL HOLMES, *THE COMMON LAW I* (Boston, Little, Brown & Co. 44th Publ'g 1951).

⁵⁶ See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225 (1989) (quoting W.S. MERWIN, *ASIAN FIGURES* 65 (1973)).

⁵⁷ Cohen, *supra* note 34, at 809.

⁵⁸ See *id.*; Holmes, *supra* note 12, at 465–66.

⁵⁹ See Holmes, *supra* note 12, at 465–66.

⁶⁰ To clarify, the Proposal will designate the right conception, that is, what the Holmes School will teach, as law without quotation marks, and designate the wrong conception, that is, what every other law school teaches (or, rather, what every other "law" school teaches), as "law."

⁶¹ Holmes, *supra* note 12, at 461.

⁶² The notion of law being "in" something evokes a "container metaphor." See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 92 (1980). This metaphor extends to the way in which people critique arguments: "Your argument doesn't have much *content*. That argument *has holes in it* . . . I'm tired of your *empty* arguments. You won't *find* that idea in his argument. That conclusion *falls out of* my argument. Your argument *won't hold water* . . ." *Id.*

stripped down “statement of facts” in judicial opinions, which are tellingly situated as an introduction to the main event—the interpretation of “law.”

Holmes further identifies what is not law.⁶³ Law is not the law of contracts, criminal law, property law, or family law. Law is not treatises; and contrary to what children learn in grammar school, law is not what the legislative branch legislates, the executive branch executes, or the judicial branch judges.⁶⁴ Law is not appellate opinions, despite being subject to laser-like scrutiny.⁶⁵ An opinion alone, without the facts that gave rise to the decision, is thus “hopelessly oversimplified.”⁶⁶ All of these things collectively are what Richard Posner has called “law’s traditional preoccupations,”⁶⁷ which are, not coincidentally, the “traditional preoccupations” of legal education.⁶⁸

For Holmes, law is the lived experience of a civil defendant in a debt collection case, or a criminal defendant facing drug charges, or a tenant seeking to avoid eviction, or a mother seeking to retain custody of her child. These, for sure, fall superficially into the respective laws of contracts, criminal law, property law, and family law. But the “law”—rules, procedures, cases—that “define” these areas do not tell us much.⁶⁹ Or, at least, they tell us much less than an inside-out perspective with “law” as merely one piece of the picture—and a pretty unimportant one at that.⁷⁰

Law also pervades lives in ways that have nothing to do with courts or adjudication. For example, masses of forms, legal regulations, interviews, and hours of waiting in line confront low-income people at every turn.⁷¹ For those who live in poverty, Stephen Wexler characterizes law as a persistent intrusion in, if not an integral element of, their lives:

⁶³ HOLMES, *supra* note 55, at 1.

⁶⁴ Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 248 (2009) (“education has to start at the earliest levels by teaching school children at a young age about the doctrine of separation of powers and the rule of law”). As the premise of the Holmes School demonstrates, children should also learn “at a young age” about the limitations of the “rule of law.”

⁶⁵ Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 910 (1933).

⁶⁶ *Id.* at 912–13.

⁶⁷ Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235, 248 (Morris Dickstein ed., 1998).

⁶⁸ *See infra* notes 84–86 and accompanying text.

⁶⁹ *See* Posner, *supra* note 67, at 248.

⁷⁰ *See id.* Instead, Holmes argues that “[t]he life of the law has not been logic: it has been experience.” HOLMES, *supra* note 55, at 1. According to one commentator, Holmes’s concept of “experience” includes “everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices . . .” LOUIS MENAND, *THE METAPHYSICAL CLUB* 341–42 (2001).

⁷¹ *See* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1049–50 (1970).

Poor people do not have legal problems like those of the private plaintiffs and defendants in law school casebooks Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms [P]oor people are always bumping into sharp legal things.⁷²

These experiences are law.

Getting a handle on this Holmesian view of law is no easy task, as Holmes himself seemed to recognize. Louis Brandeis suggested to Holmes that he study “some domain of fact” such as “the textile industries in Massachusetts and after reading the reports sufficiently . . . ,” he should “go to Lawrence and get a human notion of how it really is.”⁷³ By Brandeis’s estimation, Lawrence, Massachusetts—the site of a massive textile industry in which a largely female, poor, immigrant population worked and lived in deplorable conditions and conducted a strike of historic significance to the labor movement—was a good place to go to capture the lived experience that constitutes law.⁷⁴ Holmes’s ambivalence about taking the trip, however,

⁷² *Id.* In contrast, indignities affecting the non-poor generate attention and sometimes outrage. The injustice of speed cameras, for example, has triggered a constitutional challenge. See *Mendenhall v. City of Akron*, 374 F. App’x 598, 599 (6th Cir. 2010). The horrors of airline delays, another plague of the non-poor, have also prompted legislative action through what is officially known as the “Tarmac Delay Rule.” Jennifer Henry & Mary Gardner, *The New Tarmac Delay Rule and the Volcanic Ash Cloud over European Air Space: One Year Later*, 76 J. AIR L. & COM. 633, 634–50 (2011). Notably, the wretched service of most urban bus lines generates little outrage even though such service leads to far more serious consequences than air travel inconveniences or traffic tickets. See TODD LITMAN, VICTORIA TRANSP. POLICY INST., LESSONS FROM KATRINA AND RITA: WHAT MAJOR DISASTERS CAN TEACH TRANSPORTATION PLANNERS 6 (2006) (noting that, in “most North American cities,” the “service quality” of public transportation is “minimal,” leading to “a huge difference in convenience, comfort and safety between motorists and non-motorists (and therefore between wealthy and poor . . .) . . .”). For instance, poor public transportation affects a person’s ability to adapt to the unpredictable schedules of many low-wage jobs, to manage childcare, and to transport children to school. No effort has been made to codify a “bus passenger bill of rights” for delays, mechanical breakdowns, or lack of safety despite the pervasiveness of these problems. Reliance on public transportation can also have tragic consequences. See *id.* After Hurricane Katrina, the New Orleans mass transit system automatically transported stranded residents—virtually all of whom were low-income—to the New Orleans Superdome where they had no choice but to live in the chaos, danger, and squalor to be found there. *Id.* at 3.

⁷³ Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (May 26, 1919) in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 13–14 (Mark DeWolfe Howe ed., 1942) [hereinafter 2 HOLMES-POLLOCK LETTERS].

⁷⁴ See *id.* Lawrence was the site of a strike popularly known as the “Bread and Roses Strike”—an important event in the history of the American labor movement. See WILLIAM CAHN, LAWRENCE 1912: THE BREAD AND ROSES STRIKE 1 (Esther Cohen ed., 1980); 4 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 306–28 (1965). Brandeis’s sugges-

was palpable: the trip “would be good for . . . the performance of my duties” but would be a “bore.”⁷⁵

Subsequent realists expanded upon Holmes’s dangerous idea. Karl N. Llewellyn emphasized the contingencies of real life that affect a litigant’s ability to recover under a rule of “law.”⁷⁶ For example, in describing the “law” that governs a party’s “right” to demand performance under a contract, Llewellyn explained that

if the other party does not perform as agreed, you can sue, and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for the delay.⁷⁷

In a different vein, Felix Cohen drew upon Holmes’s conception of law as a social act.⁷⁸ For instance, Cohen argued that judicial opinions are based on human activity rather than the development of precedent, and noted that a judicial decision “is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.”⁷⁹

In the end, then, the fundamental premise of “realism,” and, by extension, of the Holmes School of Law, is that law is about how the mass of people live in the world.⁸⁰ Conventional law school curricula do not define law in this way, and this is to maintain legitimacy as an “objective” analysis driven by the rigorous application of logic.⁸¹ Such realities of law are too messy and too subversive of popular conceptions of “the rule of law” to comport with law schools’ focus on logic.⁸² The Holmes School of Law

tion contained particular bite given that Lawrence is less than thirty miles from Boston, where Holmes grew up, and thus would require minimal effort on Holmes’s part to see “how it really is.”

⁷⁵ 2 HOLMES-POLLOCK LETTERS, *supra* note 73, at 13–14.

⁷⁶ See Cohen, *supra* note 34, at 843; Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437–38 (1930).

⁷⁷ Llewellyn, *supra* note 76, at 437–38.

⁷⁸ See Cohen, *supra* note 34, at 843.

⁷⁹ *Id.* at 843.

⁸⁰ See *supra* notes 69–72 and accompanying text.

⁸¹ See *supra* notes 51–68 and accompanying text; see also *infra* notes 84–86 and accompanying text.

⁸² For instance, the father of modern law school pedagogy, Christopher Columbus Langdell, argued that, to improve legal education, it was “indispensable to establish at least two things: first, that law is a science; secondly, that all the available materials of that science are contained in

thus seeks to determine (1) what law *is* in all its messiness, social contexts, and assumptions—its reality “on the ground,” and (2) what law *is* to the vast majority of litigants who have few or no resources.

IV. THE PEDAGOGY OF THE HOLMES SCHOOL

The Holmes School of Law builds upon critiques of “law” and legal education that extend back over a century.⁸³ This Proposal examines how the Holmes School’s curriculum fits into prior critiques of legal education, how its premises differ from other calls for reform, and how it will implement its signature pedagogy to achieve its goals.

A. Langdellian Science and Logic vs. Clinical Education and “Practical Knowledge”

Well over one hundred years ago, Christopher Columbus Langdell developed the “case method”—the law school pedagogy that has remained the bedrock of legal education ever since.⁸⁴ The case method assumes that cases are the lifeblood of “law,” and that “thinking like a lawyer” entails developing or “synthesizing” rules from cases to produce certain results.⁸⁵ As any first year law student knows, the case method is the primary—if not the exclusive—vehicle for learning what “law” is.⁸⁶

printed books.” Christopher C. Langdell, *Address at the Commemoration of the 250th Anniversary of the Founding of Harvard College* (Nov. 5, 1886), in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 85 (1887).

⁸³ See, e.g., Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 50, 50 (2002); Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 91–92 (2001). By far the most influential studies of legal education are contained in two sources. The first was issued in 1992 and is universally known as the “MacCrate Report.” AM. BAR ASS’N TASK FORCE ON LAW SCHS. & THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT]. The second, issued in 1997, is the study popularly known as the “Carnegie Report.” WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]. A third is ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

⁸⁴ ROBERT STEVENS, LAW SCHOOL 52–53 (1983); Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 2–3 (2000). One article has characterized Langdell as a “straw man” for simplistic (if not simple-minded) formalism. Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 551–52 (2010). Whether Langdell was fully responsible for the formalist curriculum so characteristic of law school is, for purposes this Proposal, not important. What is important is that these norms remain the foundation of legal education as it exists today.

⁸⁵ See Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. LEGAL EDUC. 245, 246 (2011) (discussing “principles of rule synthesis” from appellate opinions).

⁸⁶ This footnote is inserted solely for the sake of appearances. Any informed reader does not need support for this proposition.

Jerome Frank offered an early and still idiosyncratic critique of the case method by attacking the very idea that the “case” method deals with “cases.”⁸⁷ Frank observed that students do not study cases; rather “[t]heir attention is restricted to judicial *opinions*. *But an opinion is not a decision.*”⁸⁸ The case method, according to Frank, is really the opinion method.⁸⁹ An “opinion” says nothing about decision making or why a judge reached a particular decision.⁹⁰ The case method fails for many reasons: (1) it “disclos[es] merely a fractional part of how decisions come into being;” (2) it encourages within a lawyer and law student “a treacherously false sense of certainty in advising clients;” (3) it “is hopelessly oversimplified;” and (4) it fails to take into account “the slippery character of ‘the facts’ of a case.”⁹¹

A more widely articulated critique not only rejects the value of examining cases, opinions, and decisions, but rather advocates for focusing on “practice.”⁹² This critique leads directly into the motivation behind the clinical education movement.⁹³

Professors and practitioners have consistently advocated for clinical education since the nineteenth century.⁹⁴ Consider the following selection of quotations:

Professor Blewett Lee of Harvard Law School in 1896:

It is odd if our profession is the only one in which students cannot have a practical training before they enter their life-work [M]ost law students still go forth upon a long suffering public having only read books and disputed over them. The evil of this condition cannot be remedied by any half measures, or cheap devices or cheap men. To give practical instruction in law work will require immense intellectual labor, and the finest quality of teaching—but let us not say it is impossible because we have never done it⁹⁵

⁸⁷ See Frank, *supra* note 65, at 910.

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ See *supra* notes 52–66 and accompanying text.

⁹¹ See Frank, *supra* note 65, at 911, 913, 919.

⁹² See Barry et al., *supra* note 84, at 6–7.

⁹³ For an overview of the history of clinical education, see generally Barry et al., *supra* note 84.

⁹⁴ One could make a plausible argument that apprenticeship—the foundation of legal education in the United States before states began requiring law school graduation for bar admittance—is itself clinical legal education, but, in practice, these apprenticeships were ad hoc affairs and certainly had no systematic pedagogy—a defining characteristic of clinical education. See *infra* notes 95–97 and accompanying text.

⁹⁵ Blewett Lee, *Teaching Practice in Law Schools*, 19 ANN. REP. A.B.A. 507, 518 (1896).

William V. Rowe in 1917:

[A] knowledge of practice can be acquired *only by practicing* It is folly to waste time in the effort to teach practice in the classroom in the customary manner [The] familiar idea of the clinic, to be adapted to the teaching of law, by bringing the law office, with this “direct atmosphere of daily professional life,” to the law school and the student . . . [would fill] . . . this needless and dangerous gap in legal training.”⁹⁶

Jerome Frank in 1933 in an article entitled *Why Not a Clinical Law School?*:

[A] considerable part of the teaching staff of a law school should consist of lawyers who already had varied experience in practice What is intended is that, almost at the beginning of and during his law-school days, the student should learn the very limited (although real) importance of the actual legal world of so-called substantive law and of so-called legal rules and principles. He should learn that “legal rights” and “duties” mean merely what may some day happen at the end of specific lawsuits He should learn that judges are fallible human beings and that legal rights often depend on the unpredictable reactions of those fallible human beings to a multitude of stimuli⁹⁷

Despite these longstanding critiques, clinical education only came into its own in the 1960s, when it “solidified . . . its foothold in the academy.”⁹⁸ Depending on the institution, however, many issues continue to bedevil clinical education. Such issues include law schools’ willingness to develop or maintain a “clinical program” with limited resources, the status and job security of clinical faculty (if, indeed, they are even called “faculty”), and the condescension of teachers of “doctrinal courses” who contend that clinics merely teach “skills,” not “theory” or “doctrine,” which require greater intelligence and sophistication.⁹⁹

⁹⁶ William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 595–96 (1917).

⁹⁷ Frank, *supra* note 65, at 917, 919.

⁹⁸ Barry et al., *supra* note 84, at 12.

⁹⁹ See *supra* notes 84–98 and accompanying text. Other battles are, for the most part, won. Clinicians have had their own law journal—the Clinical Law Review—since 1994, and so-called “clinical scholarship” appears regularly in student-edited journals. See CLINICAL L. REV., <http://searchworks.stanford.edu/view/6307454> (last visited Jan. 3, 2015) (noting beginning date in 1994); see, e.g., Frank, *supra* note 65; Rowe, *supra* note 96.

Clinical legal education has nevertheless been remarkably successful in establishing the importance of teaching lawyers how to practice.¹⁰⁰

B. The Ensuing Debate: Theory and Practice and Why It Is Beside the Point

There is a longstanding tension between “theory” and “practice,” “doctrinal” and “clinical.” The “Carnegie Report”¹⁰¹—a recent assessment of legal education—characterizes the debate as a “conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.”¹⁰² Studies of legal education, including the “MacCrate Report”¹⁰³ and the Carnegie Report, attempt to resolve the tension between conceptions of law school as a professional school teaching students how to be lawyers, and as an “academic institution” devoted to scientific and “theoretical” inquiry about law.¹⁰⁴ These efforts see both views as complementary, and propose integrating them to create more comprehensive legal education. For example, the authors of the Carnegie Report frame their project as “seek[ing] to unite the two sides of legal knowledge: formal knowledge and experience of practice.”¹⁰⁵ The goal of legal education thus should be “to bring the teaching and learning of legal doctrine into more fruitful dialogue with the pedagogies of practice” and “to bridge the gap between analytical and practical [legal] knowledge.”¹⁰⁶

The Holmes School of Law, in contrast, would reject the purported dichotomy between the “theoretical” and “practical.” They are not, as the Carnegie Report frames it, “two sides of legal knowledge;” they do not describe

¹⁰⁰ The American Bar Association’s Standard 303 of its Standards and Rules of Procedure for Approval of Law Schools—the basis for law school accreditation—requires that a law school offer “substantial opportunities for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities.” SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, 2014-2015 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 303(b)(1)–(2) (2014–2015), http://www.americanbar.org/groups/legal_education/resources/standards.html.

¹⁰¹ CARNEGIE REPORT, *supra* note 83, at 3.

¹⁰² *Id.* at 8.

¹⁰³ See *supra* note 83 and accompanying text. The Carnegie Foundation also funded a much earlier assessment of legal education called the “Reed Report.” ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW—HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA, at xiv–xviii (1921). The crux of the Reed Report’s conception of legal education is familiar: “general education, theoretical knowledge of the law, and practical skills training.” Barry et al., *supra* note 84, at 7.

¹⁰⁴ The Carnegie Report does an excellent job tracing the origins of this tension. See CARNEGIE REPORT, *supra* note 83, at 4–8.

¹⁰⁵ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW SUMMARY 8 (2007) [hereinafter CARNEGIE REPORT SUMMARY].

¹⁰⁶ CARNEGIE REPORT, *supra* note 83, at 12; CARNEGIE REPORT SUMMARY, *supra* note 105, at 8.

collectively or separately what law *is*.¹⁰⁷ Rather, the Holmes School would examine what happens when people encounter rules (regulatory, statutory, or constitutional), procedures (whether formal or informal¹⁰⁸), court forms, clerks, social workers, and lawyers,¹⁰⁹ and explores legal claims that are not asserted because potential litigants do not know they have them.¹¹⁰ What exactly are “practical skills” and “theory” when neither has meaning in actual experience;¹¹¹ when “process” accorded litigants is wildly divergent and, at times, chaotic and virtually non-existent;¹¹² when any “theory” is, in the end, based on personal experience, which likely has nothing to do with “on the ground” interactions with law?¹¹³ Answering these questions, or recognizing that these questions are worth asking, or, even admitting that these questions exist, is a core goal of the Holmes School of Law.

¹⁰⁷ CARNEGIE REPORT, *supra* note 83, at 12; *see supra* notes 60–70 and accompanying text.

¹⁰⁸ For instance, one court in Maryland—called “Rent Court”—was created by administrative fiat, and imposed faux “jurisdictional limitations” with no legislative basis. *See Williams v. Hous. Auth.*, 760 A.2d 697, 698, 700, 703 (Md. 2000) (noting that the district court dismissed low-income tenant’s action on the grounds that “rent division” lacked jurisdiction, even though there is no separate “rent division” in Baltimore City). Low-income litigants must also contend with the vagaries of clerks who might or might not adhere to procedural rules, which, in turn, may preclude such litigants from pursuing claims that they probably did not know they had in the first place because they did not have lawyers. *See supra* notes 31–33 and accompanying text. Finally, low-income litigants are often relegated to “pleadings” of the “check the box” variety, which is one way courts manage to dispose of hundreds of thousands of cases. *See supra* notes 3–9 and accompanying text. It is notable that courts deploy, or are forced to deploy, such administrative conveniences when safety and shelter is at risk as opposed to conflicts involving large entities, which warrant a far greater allocation of judicial resources. *See supra* notes 3–9 and accompanying text.

¹⁰⁹ Note that lawyers are stuck in the middle of a long list. The reason for this is that most litigants don’t have lawyers. Their interactions with law are more often with clerks, social workers, or public assistance caseworkers than with lawyers. *See supra* notes 29–33 and accompanying text.

¹¹⁰ Law schools and legal scholars rarely (if ever) address the issue of proto-claims that do not reach the level of recognized claims. A rare example is William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 631 (1980–1981). As in a Sherlock Holmes story, where the most significant clue was a dog that did *not* bark in the night, what is not claimed is as important as what is, especially when what is not claimed is often attributable to an inability to afford representation. *See SIR ARTHUR CONAN DOYLE, Silver Blaze, in THE MEMOIRS OF SHERLOCK HOLMES* (John Murray & Jonathan Cape 1974) (1893).

¹¹¹ According to the drafters of the Carnegie Report, “legal analysis is the prior condition for practice because it supplies the essential background assumptions and rules for engaging with the world through the medium of the law.” CARNEGIE REPORT, *supra* note 83, at 13. This formulation, however, has it exactly backwards: the world itself furnishes the essential background assumptions for application of legal analysis.

¹¹² *See supra* notes 3–9 and accompanying text.

¹¹³ *See supra* notes 52–59 and accompanying text.

V. LAW IN THE HOLMES SCHOOL

So if law were to be considered “law in fact,” what would law school look like? It would largely entail examining the experience of litigants who are represented, litigants who are not represented, and litigants who are represented but have lawyers with overwhelming caseloads, who are poorly prepared, or who are just not very good. If law schools studied “law in fact,” they would undertake to understand how many claims are not claimed because the claimants do not have the knowledge or resources to claim them.¹¹⁴ The study of “law in fact” would also examine geographic differences among urban and rural courts, differences based on “jurisdiction”—such as among federal courts, state courts, family courts, small claims courts, and “rent courts,” differences among governmental yet non-judicial fora such as administrative tribunals, and differences among extra-judicial or non-judicial processes such as arbitration and mediation. It would compare appellate courts with trial courts. More generally, the study of “law in fact” would look at the law’s impact or non-impact on actual human beings.

By jettisoning traditional law school pedagogy, the Holmes School takes Holmes’s dangerous idea to its logical conclusion which, in turn, leads to what Daniel Dennett has called, in a different context, “universal acid:”

Universal acid is a liquid so corrosive that it will eat through *anything!* It dissolves glass bottles and stainless-steel canisters as readily as paper bags. What would happen if you somehow came upon or created a dollop of universal acid? Would the whole planet eventually be destroyed? What would it leave in its wake? [I]t eats through just about every traditional concept, and leaves in its wake a revolutionized world-view, with most of the old landmarks still recognizable, but transformed in fundamental ways.¹¹⁵

Holmes’s “universal acid” would, if applied or even taken seriously, “eat through” settled notions of “law.” Holmes’s dangerous idea is more than a “paradigm shift.”¹¹⁶ It does not shift traditional legal tenets; it eliminates them. The Holmes School insists on studying “law in context.” Given

¹¹⁴ See *supra* note 110 and accompanying text.

¹¹⁵ Dennett, *supra* note 49, at 63. Holmes employed a related metaphor—“cynical acid”—to refer to the impact of his ideas. See Holmes, *supra* note 12, at 461–62. “Universal acid” more accurately captures Holmes’s ideas, however, because (to continue the metaphor) it corrodes *through* everything. Felix Cohen, however, referred to “cynical acid” as “Holmes’ suggestive phrase.” Cohen, *supra* note 34, at 830.

¹¹⁶ See THOMAS S. KUHN, 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 42–51, (1970) (introducing the concept of a paradigm shift).

that every context is unique, and that context *only* resides in fluidity and messiness, there is never a point of rest; no set of bedrock principles are transferable *across* contexts.

A rare example of a realist who accepted the challenge of implementing this worldview was Felix Cohen in *Transcendental Nonsense and the Functional Approach*.¹¹⁷ Cohen does take Holmes seriously, noting that Holmes offered a “basis for the redefinition of every legal concept”¹¹⁸ Cohen undertook to see, learn about, and teach law through a Holmesian lens. He defined jurisprudence as a study of human behavior.¹¹⁹ According to Cohen,

Law is a social process, a complex of human activities, and an adequate legal science must deal with human activity, with cause and effect, with the past and the future Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior.¹²⁰

Cohen, however, continued to grasp at the rational and the systematic. Attempting to gain traction in a Holmesian world, Cohen summoned the scientific method in the context of the social sciences of sociology, economics, and psychology.¹²¹ He sought to maintain the legitimacy of law through science, albeit with a Holmesian twist.

Although Cohen’s efforts are valiant, his method fails because, as Anthony Amsterdam has noted, “no system of concepts . . . are as numerous, variegated, and nuanced as the circumstances which bring the system into play.”¹²² Cohen thus falls into the trap of imposing a system through science that shapes and defines what “law” is, and, in so doing, loses its focus on reality. Cohen replaces one set of “simplifications” with another.¹²³ In Cohen’s conception, the “universal acid” is not universal after all.

¹¹⁷ See Cohen, *supra* note 34, at 821–22.

¹¹⁸ *Id.* at 828.

¹¹⁹ *Id.* at 845.

¹²⁰ *Id.* at 844–45.

¹²¹ *Id.* at 821, 824, 830.

¹²² Letter from Anthony G. Amsterdam to author (October 20, 1996) (on file with the author). For a perceptive interdisciplinary study that explores how “ordering systems” recreate the world in their own image, see generally JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

¹²³ Stanley Fish similarly challenged the idea of “critical self-consciousness”—the notion that critical theory reaches a “real” perspective that succeeds (to some degree) in capturing “reality.” STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 436–57 (1989). Fish notes that all “perspectives”—including “critical” ones—are never as nuanced as the circumstances that bring them into play. *Id.* at 436.

In contrast, the Holmes School curriculum and pedagogy does not aspire to be particularly scientific or systematic. It requires the minimization of “concepts” and systematic ways of thinking that shape and mislead. Rather, the signature pedagogy of the Holmes School is experiential. It encourages lawyers and law students to go and see places, to grapple with context, confront and recognize contradictions. It promotes “get[ting] somewhere with the matter at hand” by suspecting that “you are not quite getting it right.”¹²⁴ It means going to Lawrence, Massachusetts to see how things really are.¹²⁵

So how to get students to Lawrence, Massachusetts? By going there, of course. Going there, however, can happen in many ways. It can be going someplace physically. It can be going someplace through narratives, especially from people who have experienced the place.¹²⁶ It can also be going someplace through art—visual, written, or oral. “Going” implies a movement unmediated by “law” in order to see what law really means in context.

VI. LIKELY OBJECTIONS AND RESPONSES

No doubt many would disagree with the principles of the Holmes School. The following anticipates two of the foreseeable objections, with responses.

For some critics, the Proposal merely seeks to indoctrinate students to a leftist agenda that is anathema to a neutral institution of higher learning. They would argue that the name of the school should really be the “Marx School for Undermining the Free Market for Legal Services and Indoctrinating Students in So-Called ‘Social Justice,’ which Is Really Code for Socialism.”

This argument, however, misses the point. The principles forming the basis of the Proposed Holmes School are descriptive. The extensive footnotes that accompany much of this Proposal, especially the course descriptions, merely describe what law is to the vast majority of Americans.¹²⁷ Indeed, it is the “conventional” law school curriculum that embodies fundamental political and ideological premises. First year classes omit any reference to what the vast majority of Americans experience as law, which reveals law schools’ assumptions concerning what is or is not worth know-

¹²⁴ See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 29 (1973).

¹²⁵ See *supra* notes 73–74 and accompanying text.

¹²⁶ See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 *TEX. L. REV.* 1929, 1931, 1934 (1991) (arguing that judges should consider narratives written by and about members of oppressed and marginalized groups in order to more deeply understand their lives).

¹²⁷ It is worth noting that the Proposal does not cite Karl Marx.

ing.¹²⁸ Its premises, however, are masked by a veneer of “rigor,” “logic,” and “thinking like a lawyer,” which effectively keeps its biases well hidden.

Further, Holmes—the school’s namesake and originator of many of its premises—was no radical. To the contrary, he evidenced “hostility to most social reform”¹²⁹ His greatest enthusiasm for a particular social policy was for eugenics—the forced sterilization of, as he put it, degenerates and imbeciles.¹³⁰ While Holmes’s appalling view of Social Darwinism is happily beyond the pale for virtually everyone, judges identified as “conservatives” would nevertheless find many things to like in the curriculum of the Holmes School.¹³¹

Finally, the rhetoric of the profession has acknowledged and excoriated time and time again the profound deficiencies in the average citizen’s access to justice.¹³² This endless repetition, despite sounding grand, has had pernicious consequences; it has transformed an immediate crisis into an ongoing “problem” calling for an eventual solution. This is a crisis, however, that violates or, at best, risks basic human rights to subsistence, shelter, and raising children.¹³³ The Holmes School reintroduces the centrality and immediacy of this crisis that individuals of all political stripes recognize exists.

¹²⁸ See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 55–58 (David Kairys ed., 1998).

¹²⁹ Posner, *supra* note 53, at xxviii.

¹³⁰ See *Buck v. Bell*, 264 U.S. 200, 207 (1927). The case includes Holmes’s infamous praise of the eugenics movement:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Id.

¹³¹ Consider Judge Alex Kozinski, whose ideas have been cited previously in this article. See *supra* note 20 and accompanying text. Similarly, Richard Posner’s conceptions of “pragmatism” reflect a great deal of the core of the Holmes School curriculum. See Posner, *supra* note 67, at 240. Judge Posner has advocated for viewing the “facts” of legal formalism much more broadly to include social science. See *id.* For example, in considering the “enforceability of contracts of surrogate motherhood,” Posner would consider the degree to which surrogate mothers “experience intense regret” and “whether contracts of surrogate motherhood are typically or frequently exploitive in the sense that the surrogate mother is a poor woman who enters into the contract out of desperation.” *Id.*

¹³² See *supra* note 36 and accompanying text.

¹³³ See AUERBACH, *supra* note 36, at 143–44. Sadly almost a century ago, one commentator noted “the righteous complaint that the liberty and rights of the mass of the people are now crushed and lost beneath the weight of the system.” Rowe, *supra* note 96, at 592; see also Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 574 (1983) (noting that “[t]he blunt, inexcusable fact . . . that this nation . . . cannot manage to protect the rights of most of its citizens” “has become so familiar that it evokes little concern from most of those who spend their lives in the profession”).

Second, critics will argue that the Proposal is “holier than thou.” This may be a fair critique. The Proposal however, is certainly no holier than traditional references to the “High Court,” “sanctity” of law, and “prayer for relief.”¹³⁴

CONCLUSION

This Proposal makes sober good sense and offers as close a reflection of the world of law as it is, and, sadly, how it will likely be in the future. For this reason, it will never fully see the light of day. Even if not, however, it reflects the reality of law. Surely the reality of law has a place in legal education, even if it is only a single trip to Lawrence, Massachusetts.

¹³⁴ See AUERBACH, *supra* note 36, at 142–43 (discussing the legal system’s embrace of majestic symbolism to promote its own legitimacy).

