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David Sandomierski*

Cultivating Versatility: The Multiple
Foundations of the Law School's
Public Mission

Law schools should aspire to cultivate versatility. To accomplish this goal, the salient features of the law school should reflect three foundational intellectual pillars: a commitment to the rule of law and legal rationality, an emphasis on multiple legal process, and an appreciation for legal pluralism. Complementing these symbolically “vertical” pillars on which the law school’s activity rests are three transversal virtues that operate “horizontally” to brace the foundations. These include a commitment to critique, context, and diversity. Ultimately, legal educators should concern themselves with how they can best prepare their students for a wide range of contributions to society through law.

Les facultés de droit devraient aspirer à cultiver la polyvalence. Pour atteindre cet objectif, les caractéristiques saillantes d’une faculté de droit devraient refléter trois piliers intellectuels fondamentaux : un engagement envers la règle de droit et la rationalité juridique, un accent sur le processus juridique multiple et une appréciation du pluralisme juridique. En complément de ces piliers symboliquement « verticaux » sur lesquels repose l’activité de la faculté de droit, trois vertus transversales opèrent « horizontalement » pour consolider les fondations. Il s’agit de l’engagement envers la critique, le contexte et la diversité. En fin de compte, les éducateurs juridiques devraient se préoccuper de la manière dont ils peuvent préparer au mieux leurs étudiants à un large éventail de contributions à la société par le biais du droit.

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Introduction

The university law school has multiple public missions consistent with its dual identity as a place of scholarly activity and a site for the preparation of future legal professionals. Its scholarly mission includes “car[ing] for the intellectual inheritance of civilized life”¹ and serving society as a “knowledge-seeking critique-generating changemaking” institution.² Yet while the scholarly role is central to the law faculty’s existence, it is not the only mission core to the law school’s identity. This paper argues for another essential mandate of the university law school: to cultivate versatile and engaged citizens capable of contributing to society, through

1. Ernest J Weinrib, “Can Law Survive Legal Education?” (2007) 60:2 Vand L Rev 401 at 425.

2. Harry W Arthurs, *Connecting the Dots: The Life of an Academic Lawyer* (Montreal: McGill-Queen’s University Press, 2019) at 68.

law, in a variety of ways.³ Not only is pursuing this objective an essential responsibility of every university law school, it also provides an organizing logic for designing and operationalizing the law school's institutional structures and activities, and for conceiving its conceptual apparatus. Law schools have a responsibility to respond to this mission by making institutional arrangements and by recognizing the multiple intellectual commitments consistent with this vision.

This article begins by discussing versatility, social contribution and law. I suggest that three core intellectual pillars are needed in order to successfully cultivate versatility in legal education: a commitment to the rule of law and legal rationality, an emphasis on multiple legal process, and an appreciation for legal pluralism. Complementing these symbolically “vertical” pillars on which the law school's activity rests are three transversal virtues that operate “horizontally” to brace the foundations. These include a commitment to critique, context, and diversity. Ultimately, legal educators should concern themselves with how they can best prepare their students for a wide range of contributions to society through law.

1. *Versatility, social contribution, and law*

Law reaches into all corners of society, and legal education therefore has a responsibility to expose its students to the myriad ways in which a legally educated person can contribute to society through law. This, of course, includes the various ways that a lawyer in private practice might advance the aims of a client, whether an individual or a corporate client such as the state, a corporation, a union, a charitable organization, or something else. These more conventional “law-jobs,” which embrace the roles of advocate and counselor,⁴ require a wide range of skills, including argumentation by analogy and drawing relevant distinctions, the prospective and planning functions of the drafter (contractual or legislative), the conciliatory skills of the negotiator or mediator, the ability to interpret statutes and regulations, and an appreciation for the soft governance processes of administrative agencies and other “governments in miniature.”⁵ And, of course, there is

3. I argued in my earlier work that, drawing on the Aristotelian notion of public service, law schools should think of their role as producing “lawyers as citizens.” See David Sandomierski, *Aspiration and Reality in Legal Education* (Toronto: University of Toronto Press, 2020) at 3-39 [Sandomierski, *Aspiration and Reality*].

4. KN Llewellyn, “The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method” (1940) 49:8 Yale LJ 1355.

5. See Blaine Baker, “Character-Building at Multiple Sites of Justice: Administration and Teaching as Texts, Scholarship as Ethical and Political Action” in Richard Janda, Rosalie Jukier & Daniel Jutras, eds, *The Unbounded Level of the Mind: Rod Macdonald's Legal Imagination* (Montreal: McGill-Queen's University Press, 2015) 214 at 217-218; John Willis, “Administrative Decision and the Law: The Canadian Implications of the Franks Report” (1959) 13:1 UTLJ 45 at 47 [Willis, “Administrative

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the habit of mind of the judge or arbitrator, which includes the ability to avoid bias and inhabit the perspective of another.⁶

Beyond these traditional modes of legal practice, there are many ways that law graduates may engage with law. Journalists, for example, scrutinize legal institutions, processes, and policies. Those involved with electoral politics—candidates, volunteers, political staff—seek to reform state laws by mediating policy goals with public support. Those who engage in direct activism not only respond directly to state laws but may themselves constitute their own “re-imagined, alternate legalit[ies].”⁷ The entrepreneur navigates state regulation and industry customs. Teachers, doctors, accountants, investment advisers, real estate agents, and other professionals operate in the context of ethical and regulatory frameworks, engaging with formal state law either directly or in its shadows, and they all also participate in communities that have their own explicit and implicit norms. Religious leaders and adherents abide by and take inspiration from entire non-state legal systems. Each of these activities—and the obviously incomplete nature of this list only reinforces the point that law is immanent in all areas of social and economic life—will be enhanced by a nuanced understanding of the nature of normativity, governance, and processes that a university legal education affords.

Given the breadth of ways in which legal graduates may be called upon to engage with law, law schools should prepare their students for the world by cultivating versatility. This is not to say that *everyone* should develop *every* skill deeply during law school. There is not the capacity, time, or need for every law graduate to be thought of (and trained as) a renaissance person. But law schools should conceive of their mission as modeling versatility, consistent with the ubiquity and variety of law’s presence in society and the diverse ways in which their graduates will engage with it. They should inhabit plural, not singular, models of what it means to think like and work as a lawyer.

Versatility is not, however, an end in itself. The law school’s mission marries versatility with two other concepts. First is the concept of *contribution* to society—an understanding that one applies one’s versatile skills for particular purposes. Law schools should care about the social contribution of their students. This is not to say that they should moralize or preach for particular types of contribution or that they should set up

Decision and the Law”].

6. See Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge MA: Belknap Press, 1993) at 319, 326; Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 127.

7. Wendy A Adams, *Popular Culture and Legal Pluralism* (London, UK: Routledge, 2020) at 8.

implicit or explicit hierarchies of contributions. But they should consider it as core to their mission to help students reflect on, imagine, and prepare for making societal contributions.

This suggestion is reminiscent of an older idea, that legal education should educate students who are both lawyers and citizens who “care about the soundness of the legal order.”⁸ The idea that lawyers should have a commitment to the public good has surfaced in other ways, for example in the idea that the legal professional is an “officer of the court” with the duty to uphold the integrity of the justice system,⁹ or the related idea that the lawyer upholds the integrity of law as participant in the “law’s self-critical commitment to ‘work itself pure.’”¹⁰ Lawyers and legal educators have been called upon to contribute to policy and law reform activities aimed at large-scale social, political, and economic transformations.¹¹ This paper aims to tease out the virtue of versatility by emphasizing the diversity of opportunities for social contribution that come from an intellectually heterogeneous understanding of law.

“Law” is the second—perhaps obvious—qualifier to versatility in the context of the law school. The focus should be on how to make societal contributions *through law*. This confines the law school’s public mission, fitting with its disciplinary focus and making its mission attainable. At the same time, the breadth of law’s reach throughout society and the almost unlimited range of possibilities for engaging with law imposes on law schools the obligation to convey diverse messages about law to students. This paper tries to make this connection clear. I argue that not only do we need to affirm versatility as a core aspiration of legal education, but that the law school’s salient features should be scrutinized to ensure they convey a variety of images of law, commensurate with the diverse opportunities for social contribution through law, and the wide range of skills and attitudes its graduates should have.

8. Kronman, *supra* note 6 at 145.

9. See William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007), ch 4.

10. Weinrib, *supra* note 1 at 416, quoting Lord Mansfield in *Omychund v Barker* (1744), 26 Eng Rep 15, 23 (KB).

11. See Robert W Gordon, “Professors and Policymakers: Yale Law School Faculty in the New Deal and After” in Anthony T Kronman, ed, *History of the Yale Law School* (New Haven, CT: Yale University Press, 2004) 75 at 104; Jerold S Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976) at 217-219; Esther Lucille Brown, *Lawyers, Law Schools and The Public Service* (New York: Russel Sage Foundation, 1948) at 5; Harold D Lasswell & Myres S McDougal, “Legal Education and Public Policy: Professional Training in the Public Interest” (1943) 52:2 Yale LJ 203; Albert James Harno, *Legal Education in the United States* (San Francisco: Bancroft-Whitney, 1953) at 181-182; Walter Gellhorn, “The Law Schools’ Responsibility for Training Public Servants” (1942) 9:3 U Chicago L Rev 469 at 474.

2. *Why is cultivating versatility central to the law school's public mission?*

The law school's responsibility to cultivate versatility emerges from each of its identities: as an academic venue and as a place to prepare future professionals. The liberal arts, and the humanities in particular, have been vaunted for their ability to cultivate the critical thinking necessary for democratic renewal¹² and their crucial role in cultivating the "practical intelligence" necessary to being a free person.¹³ As a faculty within a university whose public mission includes preparing its graduates for life outside of the academy, the law school shares the university's mission of caring about the ways in which its graduates will live, thrive, and participate in the public sphere.

The law school's status as a professional school adds to this mission. University law schools may well resist the claims to produce "practice-ready" lawyers,¹⁴ but no law faculty ignores altogether the reality that many (if not the vast majority) of their graduates will view their legal education as a path to the legal profession. Indeed, narratives of the triumph of the autonomy of university law faculties celebrate the privilege they were afforded to entitle their graduates to qualify for the bar.¹⁵ It would be the exceptional law school that did not acknowledge its close ties to the profession, manifested in curricular offerings such as mandatory legal writing instruction and clinical legal education, co-curricular activities like competitive moots and law clinics, career facilitation through career development offices (and on-campus law firm interviews), a differentiated tuition model distinctive to professional schools, the specialist JD degree,¹⁶ and reliance on the profession for fundraising and sessional teaching.

12. See Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge: Harvard University Press, 1997); Peter MacKinnon, *University Leadership and Public Policy in the Twenty-First Century: A President's Perspective* (Toronto: University of Toronto Press, 2014) at 65; Ronald J Daniels, *What Universities Owe Democracy* (Baltimore: Johns Hopkins University Press, 2021); James E Côté & Anton L Allahar, *Lowering Higher Education: The Rise of Corporate Universities and the Fall of Liberal Education* (Toronto: University of Toronto Press, 2011) at 4.

13. See Jean Wilson, "Remedial Metaphor: Pedagogical Frye" (2012) 81:1 University of Toronto Quarterly 111.

14. See Ben Berger et al, "A Submission to the LSUC Dialogue on Licensing: A Response from Some Ontario Law Professors" (2017) [unpublished, copy on file with author]. Some law schools, by contrast, embrace the practice-ready mission. See Lincoln Alexander School of Law, "Career Development," online: <www.ryerson.ca/law/students/career-development/> ("[t]he Lincoln Alexander School of Law's innovative hands-on curriculum provides law students with practice-ready skills across a number of areas of law").

15. See C Ian Kyer & Jerome E Bickenbach, *The Fiercest Debate: Cecil A Wright, the Benchers, and Legal Education in Ontario 1923–1957* (Toronto: The Osgoode Society, 1987).

16. See Jay W Stein, "The Juris Doctor" (1962–1963) 15 J Leg Educ 315; Adrien Habermacher, "La curieuse fascination des juristes pour la médecine : quelques leçons pour la formation et la profession

These epiphenomena aside, the discipline of law is itself tightly connected to legal practice. The common law, for example, develops through the litigation process, in which the arguments of practicing lawyers play an essential role.¹⁷ Law is a field in which abstract concepts are applied and refined through practical experience. The philosophical tradition of pragmatism and its related virtue of practical wisdom are, for some, defining features of the discipline.¹⁸

The concern with practice and the orientation toward the profession imposes on law schools the responsibility to care about the activities that its graduates will be pursuing. At minimum, professional preparation means cultivating a shared way of thinking and speaking—and indeed, “thinking like a lawyer” has long and ubiquitously been recognized as a core function of the law school.¹⁹ Yet if law schools already are committed to cultivating the proto-practice of legal reasoning,²⁰ their nature as a professional school requires more—to not only broaden the ambit of what “thinking like a lawyer” might mean,²¹ but to facilitate reflection on one’s professional identity.²² As a *professional* school, it is essential that the law school provides students with venues to think about, articulate, and in some measure start to operationalize their answers to questions about how their interests, talents, personality, and emerging areas of expertise might best contribute to society.

The goal of cultivating versatility, to equip students to contribute to society through law in a wide variety of ways, is therefore a natural fit with the traditionally recognized twin purposes of the law school as a place for academic learning and professional preparation. This goal ought to

juridiques” (2023) 11 CLEAR/REDAC 21 [forthcoming].

17. Cf. Weinrib, *supra* note 1 (“[t]he task of specifying the character of private law...is rooted in legal practice” at 416).

18. See Kronman, *supra* note 6 at 20, 265-269. See generally Susan Haack, “The Pragmatist Tradition: Lessons for Legal Theorists” (2018) 95:5 Wash L Rev 1049.

19. See Elizabeth Mertz, *The Language of Law School: Learning to “Think Like a Lawyer”* (New York: Oxford University Press, 2007); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009).

20. See Sandomierski, *Aspiration and Reality*, *supra* note 3 at 16-17.

21. See David Kennedy & William W Fisher III, “Introduction” in David Kennedy & William W Fisher III, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006) 1; Audrey Fried, *Learning to Think Like a Lawyer: Solving Ill-Structured Problems* (LLM Thesis, University of Toronto Faculty of Law, 2020), online (pdf): <tspace.library.utoronto.ca/bitstream/1807/103483/3/Fried_Audrey_202011_LLM_thesis.pdf> [perma.cc/YU8H-9SJ8]; Carel Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge, UK: Cambridge University Press, 2014) at 169-171.

22. See Michele M Leering, “Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism” (2017) 95:1 Can Bar Rev 47, online: <cbr.cba.org/index.php/cbr/article/view/4400/4393> [perma.cc/9J2A-37V2].

provide an organizing logic for the law school's structures, activities, and animating concepts.

3. *Foundational commitments and conceptual pillars*

Law schools should reflect deeply on the commitments that underlie their various structures and activities. There may be a temptation to undervalue such reflection and to emphasize the many material factors that constrain and condition the institution's range of activities. These factors, to name only a few, include the markets for lawyers and articling students,²³ rankings,²⁴ regulatory changes,²⁵ and university-level priorities.²⁶ In such a highly structured environment, one might consider the activity of identifying animating concepts and commitments to be one solely of diagnostic or scholarly interest, and not the type of inquiry that leads to operational change.²⁷ However, the law school is not only a creature of its political economy; it is an institution whose actors exercise agency in their choices both about how to operate within felt constraints and about how to potentially expand or transcend these constraints. The high degree of engagement one observes with governance issues, such as curricular changes²⁸ and grading policies²⁹ amongst faculty are two among many

23. Douglas D Ferguson, "The State of Experiential Learning Education in Canadian Law Schools" (2013) 37:1 *Man LJ* 465 at 470.

24. See Wendy Nelson Espeland & Michael Sauder, *Engines of Anxiety: Academic Rankings, Reputation, and Accountability* (New York: Russel Sage Foundation, 2016).

25. Examples that come to mind include the decision to de-regulate tuition fees in Ontario in the mid-1990s, or the decision by the Ontario government to cap tuition fees in 2019. See Glen A Jones, "Ontario Higher Education Reform: 1995–2003: From Modest Modifications to Policy Reform" (2004) 34:3 *Can J Higher Education* 39, DOI: <10.47678/cjhe.v34i3.183466>; Ministry of Training, Colleges and Universities, "Tuition Fee Framework and Ancillary Fee Guidelines: Publicly-Assisted Universities" (2019), online (pdf): *Ministry of Colleges and Universities* <www.tcu.gov.on.ca/pepg/mtcu-university-tuition-framework-guidelines-mar2019-en.pdf> [perma.cc/488V-6HVS]; Hope Mahood, "Ontario extends tuition freeze for next school year" (30 April 2021), online: *The Gazette* <www.westerngazette.ca> [perma.cc/H4BB-2X67].

26. These priorities manifest both implicitly, as in university budget models, and explicitly, as in exhortative documents like strategic plans. See e.g. Western University, *Towards Western at 150: Western University Strategic Plan*, online: <strategicplan.uwo.ca> [perma.cc/2SLT-V3UP] (last visited 23 October 2022).

27. Cf HW Arthurs, "The Political Economy of Canadian Legal Education" (1998) 25:1 *JL & Soc'y* 14, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1947&context=scholarly_works> [perma.cc/FR7F-9PT6].

28. For examples on faculty investment in curricular change, see e.g. Richard Janda, "Traces of Blaine Baker upon McGill's Faculty of Law" in Ian C Pilarczyk, Angela Fernandez & Brian Young, eds, *Law, Life, and the Teaching of Legal History: Essays in Honour of G Blaine Baker* (Montreal: McGill-Queen's University Press, 2022) 84; David Sandomierski, "The Limits of Adjudication in the First-Year Curriculum: The Recurring History of Legal Process at the University of Toronto Faculty of Law" in Ian C Pilarczyk, Angela Fernandez & Brian Young, eds, *Law, Life, and the Teaching of Legal History: Essays in Honour of G Blaine Baker* (Montreal & Kingston: McGill-Queen's University Press, 2022) 415 [Sandomierski, "Limits of Adjudication"].

29. The rapid change to Pass/Fail grading systems at the onset of the Covid-19 pandemic is one

examples of the exercise of agency. If law faculty and students did not perceive their choices to be important and meaningful, we would not observe the level of engagement that we do.

When law students and faculty argue for different curricular and institutional structures they are likely doing so based on commitments about the nature and purpose of the institution. Such commitments might include the desire to maximize graduates' labour market outcomes, to help the strongest students obtain clerkships, to ensure a level playing field, to prioritize mental health, or to advance more systemic aims such as improving access to justice, pursuing social justice, facilitating free enterprise, reinforcing a collective morality, or counteracting discrimination. Sometimes these objectives make their way into the institutional or physical architecture of a place in an explicit way, but even when they do not, they are implicit in most discussions about faculty governance.

My first and most basic argument is that the goal of cultivating versatility—preparing students to contribute to society, through law, in a variety of ways—should become a pervasive commitment in discussions about what law schools do and how they do it.

However, more than simple affirmation is needed for such an ideal to penetrate the law school's identity and activities. To pursue the interrelated goals of societal contribution and versatility, which recognize the many places and ways in which law appears in society (and hence the breadth of opportunities for social contribution through law), law students must be exposed to a range of messages about law. We must reorient not only the *commitment* about the law school's public mission, but the *concepts* that underlie institutional and pedagogical choices.

Describing, let alone prescribing, the underlying conceptual structure of a place as complex and heterogeneous as a law school—with its many courses, faculty members, students, and activities—is a necessarily fraught endeavour. On the descriptive side, one can never capture every conceptual idea to which students are exposed. Prescriptively, one risks excluding too many important considerations. My proposition thus must be taken with the caveat that I do not believe it is possible or advisable to essentialize the ideas to which law students are, or should be, exposed.

example. See David Sandomierski, John Bliss & Tayzia Collesso, "Pass for Some, Fail for Others: Law School Grading Changes in the Early Covid-19 Pandemic" UBC L Rev [forthcoming in 2023]; John Bliss & David Sandomierski, "Learning Without Grade Anxiety: Lessons from the Pass/Fail Grading Experiment in North American JD Programs" (2022) 48:3 Ohio NUL Rev 555.

Nevertheless, it is possible to identify prevailing constellations of concepts that are implicit in the ways that law schools currently work, and to ask whether these are sufficiently broad to constitute a basis for a given objective. My core claim is that in order to successfully cultivate versatility for broad societal contribution, there are a minimum of three core intellectual pillars. One pillar would be too few, and others in addition to these three may be identified. The three pillars I propose draw upon established traditions of legal thought and legal theory. They will be familiar to faculty and students, but have not, perhaps, received emphasis in all law schools consistently, commensurate with their importance in cultivating versatility.

I. *The pillars*

The law school ought to recognize three foundational intellectual pillars of its public mission. Each is a necessary component of an education that aims to model and cultivate a wide variety of ways to contribute to society through law. I hesitate to argue that they are of precisely equal importance, or that they should be pursued to the same extent at all moments in all law schools. But an exposure to each, and an understanding of each as fundamental to the work of cultivating the lawyer as citizen, is essential. The three pillars are: an education in the rule of law; exposure to multiple legal processes; and an appreciation of legal pluralism, encompassing non-state normativity and everyday legality.

1. *Rule of law: An education in the legal discipline, thinking like a lawyer, and the judicial process*

The most well recognized pillar is one that every law school already implicitly adopts to a significant extent. This is the goal of equipping students to “think like lawyers” and to uphold the rule of law by contributing to a rationality that provides justification for the differential treatment of similar cases.

To call the “rule of law” a basic conceptual pillar is not to suggest that perspectives critical of rule of law discourse are to be avoided or suppressed.³⁰ Nor is it to deny the multitude of ways in which the term “rule of law” may be conceived, or that it might have very different connotations in the areas of public and private law.³¹ But the basic commitment to law

30. See e.g. John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18:4 UTLJ 351 [Willis, “The McRuer Report”]; Peer Zumbansen “The Rule of Law, Legal Pluralism, and Challenges to a Western-centric View: Some Very Preliminary Observations” (2017) *Osgoode Legal Studies Research Paper Series* 193, online: <digitalcommons.osgoode.yorku.ca/olsrps/193/> [perma.cc/AS4K-MFMV].

31. See Paul P Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical

as a distinct discipline, with its distinctive way of reasoning—the very type of reasoning that law school aims to cultivate through its emphasis on the case method and thinking like a lawyer—is tightly connected to a basis for the legitimacy of the imposition of state power according to law. The “rule of law,” as I use that term here, is less concerned with the more specific question of the degree to which government officials are subject to the ordinary law of the land³² as it is with the more macro question of how law’s distinctive rationality can serve as a justification for imposing sanctions in some circumstances and not in others.³³

One participant in a recent empirical study on contract law professors’ attitudes has elucidated this connection:

Part of the rule of law is treating like cases alike—and so, if we’re not treating like cases alike, we’re not just breaking the rule of law—we’re just arbitrarily taking somebody’s house in situation X and not taking somebody’s house in situation Y, to satisfy a judgment when it’s totally arbitrary or ridiculous... It’s very important that the law tries to make sense. As Ernie Weinrib would say, [law] tries to show itself working itself pure... It’s trying to show you there’s...some coherent undertaking that’s involved and we are trying to treat like cases alike and if they don’t appear to be alike, then either they’re wrong, or perhaps you don’t understand they’re alike in a particular way that you can’t realize because you’re not a lawyer yet³⁴

In this understanding of the rule of law, law’s legitimacy depends on a rational means of justifying differential treatment, and law schools contribute to this task by training students to reason in the “particular” way that lawyers do.

In this light we can understand the law school’s signature pedagogy, the case method,³⁵ and its foundational and ubiquitous exercise of teaching students to think like lawyers³⁶ as being grounded in the aspiration to cultivate a distinctive way of reasoning that makes the exercise of state power by the judicial sphere non-arbitrary. This is, arguably, a common

Framework” (1997) 3 Public L 467.

32. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 4th ed (London, UK: MacMillan, 1893) at 177.

33. Cf/Mark D Walters, “Legality as Reason: Dicey, Rand, and the Rule of Law” (2010) 55:3 McGill LJ 563, online: <lawjournal.mcgill.ca/article/legality-as-reason-dicey-rand-and-the-rule-of-law/> [perma.cc/H349-74EM].

34. Quoted in Sandomierski, *Aspiration and Reality*, *supra* note 3 at 221 [emphasis omitted].

35. See Sullivan et al, *supra* note 9.

36. See Mertz, *supra* note 19; Schauer, *supra* note 19. On the surprisingly common way that professors of different theoretical stripes teach legal reasoning, see Sandomierski, *Aspiration and Reality*, *supra* note 3, ch 5.

conceptual pillar of the modern-day law school, one that might account for the remarkable consistency among North American first-year programs.³⁷

Regardless of whether legal educators consciously acknowledge these ideas, or the extent to which legal scholars would consider them consistent with their avowed theoretical commitments,³⁸ my argument is that the aspiration that legal study contribute to understanding the “character” of the legal discipline, allied with the formalist belief in coherence and its value in upholding law’s legitimacy—which I capture using the short hand “rule of law”—are important conceptual underpinnings for the university law school. To the extent that we value the independence of the judicial sphere, society requires a venue in which the distinctive rationality of that sphere can be taught and an appreciation for its importance cultivated.

University law schools are an appropriate place to do so, in part, as Ernest Weinrib argues, because “[u]niversity study...imparts...a sense of the intelligibility of private law as a whole.”³⁹ Scholarly work helps to build understanding of the concepts of coherence and intelligibility, which provide for law’s legitimacy as a distinct discipline. Moreover, the law school’s status as a professional school makes it an even better place to do this than other university venues, like liberal arts or law and society programs. Such programs fulfil their core mandate by subjecting laws, legal institutions, and legal rationality to critical scrutiny⁴⁰; to the

37. The influence of the underlying rule of law commitment might rival other explanations of curricular consistency among law schools. These include path dependence (see e.g. Sandomierski, *Aspiration and Reality*, *supra* note 3, ch 6) and the organizational field theory of isomorphism. On the latter, see Bruce A Kimball & Daniel R Coquillette, *The Intellectual Sword: Harvard Law School, the Second Century* (Cambridge, MA: Belknap Press of Harvard University Press, 2020) at 5 (defining isomorphism as “the process by which institutions in a social domain tend to replicate the organizational structures and policies of the dominant or preeminent institutions” in the context of Harvard Law School’s influence on other US law schools). The authors cite Paul W DiMaggio & Walter W Powell, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields” (1983) 48:2 *American Sociological Rev* 147.

38. Indeed, it is very possible that many, if not most, legal scholars identify with a commitment to legal realism, which rejected the purported objectivity of law. See Joseph William Singer, “Legal Realism Now,” Book Review of *Legal Realism at Yale: 1927–1960* by Laura Kalman, (1988) 76:2 *Cal L Rev* 465. Indeed, in the US, one editor of a set of pedagogical materials that “take doctrine seriously” identifies this as an outlier position. See Daniel Markovits, *Contract Law and Legal Methods* (New York: Foundation Press, 2012). Nevertheless, as I have explored elsewhere, the avowed theoretical commitments of legal scholars do not always correspond with the implicit commitments manifested in approaches to teaching and legal reasoning. See generally Sandomierski, *Aspiration and Reality*, *supra* note 3.

39. Weinrib, *supra* note 1 at 425. I am adopting Weinrib’s general point without committing to his reliance on correlativity. One can argue for the importance of coherence without agreeing on the rationale for it.

40. See David Sandomierski, “Legal Inquiry: A Liberal Arts Experiment in Demystifying Law” (2014) 29:3 *CJLS* 311; Harold J Berman, *On the Teaching of Law in the Liberal Arts Curriculum* (Brooklyn: Foundation Press, 1956).

extent they cultivate “thinking like a lawyer”-type skills, they likely do so incidentally.⁴¹ As professional schools, law schools self-consciously cultivate the shared commitments of legal professionals.⁴² As *the* established venue for forming legal professional identities and competencies, law schools must acknowledge their responsibility for developing an appreciation for the rule of law. They do so both by equipping future legal professionals with a shared capacity for rational deliberation, and by cultivating an appreciation and understanding of the importance of the independence of the judicial branch of government.

By using the period of initiation into the legal discipline and profession as an occasion to reinforce rule-of-law values and practices, law schools contribute to upholding the rule of law. They help ensure that lawyers operating in their professional capacities will be guided and constrained by a shared commitment to the conventions of legal reasoning in their practice, and they also help produce a profession that will advocate for fair processes in governance, including the independence of the judiciary, more generally. By educating a significant number of people per year, law schools generate a critical mass of graduates who themselves become advocates and proselytizers, committed to upholding the rule of law—a cadre of “officers of the court” who are educated to care about the justice system.⁴³ If law schools were to fail to educate future lawyers in this way, legal processes might not operate according to rational justification, and the justice system could fall into disrepair and disrepute. Recent developments in some parts of the world suggest that an independent judiciary—and popular support for one—should not be taken for granted.⁴⁴

For this reason, law schools are justified in providing an education about the judicial sphere, including an emphasis on legal rationality as modeled by published judicial decisions. The more specific attention paid to appellate judicial decisions can be justified as demonstrating particularly acute examples of legal reasoning by legal professionals (judges) who

41. See Stephen Waddams, *Introduction to the Study of Law*, 8th ed (Toronto: Carswell, 2016) at 19, 21, 24.

42. The entire first year functions as an initiation into the shared language and core knowledge base, and upper years provide opportunities for experiential education and lessons in ethics and professionalism.

43. See Kronman, *supra* note 6; Sullivan et al, *supra* note 9.

44. See e.g. Lena von Holt, “Last stop for democracy: on tour with Poland’s rebel judges,” *The Guardian* (20 September 2021), online: <[theguardian.com/world/2021/sep/20/last-stop-for-democracy-on-tour-with-polands-rebel-judges](https://www.theguardian.com/world/2021/sep/20/last-stop-for-democracy-on-tour-with-polands-rebel-judges)> [perma.cc/B5RL-YKDJ]; Flora Garamvolgyi & Jennifer Rankin, “Viktor Orbán’s grip on Hungary’s courts threatens rule of law, warns judge,” *The Guardian* (14 August 2022), online: <[theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge](https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge)> [perma.cc/VWT6-KQSK].

are at or near the apex of the judicial system.⁴⁵ While the pedagogical advantages of the case method may have played an important role in the continued predominance of appellate judicial decisions as a teaching aid, I also believe that an implicit commitment to the rule of law has accounted for its endurance. In any event, the public mission of upholding the rule of law should be acknowledged as a core objective for university law schools, and much of their existing curricular and co-curricular practices⁴⁶ should be understood in that light.

2. *The argument for multiple pillars*

To argue that law schools should uphold the rule of law and understand their activities in this light is hardly controversial. While to a certain extent the empirical claim that law schools are already pursuing this goal might challenge the idea that law professors and students are all “realists now,”⁴⁷ the normative claim that law schools *should* be striving to uphold the rule of law is hardly new.⁴⁸

What is perhaps more ambitious is my claim that upholding the rule of law is not the *only* foundational pillar of the law school’s public mission. As Ernest Weinrib wrote in arguing that university law schools should elucidate the character of private law reasoning as part of upholding the discipline of law, “my focus is on what legal education should necessarily deal with, whatever else it deals with.”⁴⁹ Unlike Weinrib, I argue that law schools must *necessarily* imagine themselves as founded upon *three* distinct foundational pillars. Cultivating distinctive legal reasoning in support of the rule of law is not enough.

The need for multiple sustaining ideas flows naturally from the aspiration to cultivate versatility, which emphasizes the wide range of ways in which law graduates might contribute to society through law. This vision requires plural understandings of at least three things: tasks,

45. Cf Waddams, Preface to the First Edition, reproduced in SM Waddams, *The Law of Contracts*, 6th student ed (Toronto: Canada Law Book, 2010) (“[s]o long as we value rationality in decision making we shall continue to require that like cases should be decided alike and that there should be a rational distinction between cases that are decided differently. I do not believe that these ends can be otherwise realized than by an impartial tribunal giving reasons subject to appeal” at vii-viii).

46. The most prominent example of extracurricular expression of the rule of law objective are competitive moots, but we also see this in student organizations (often faculty sponsored) that advocate for fair and impartial legal processes, such as the Innocence Project or Pro Bono Students Canada.

47. Singer, *supra* note 38.

48. See Alice Woolley, “Law Schools’ Dirty Little Secret” *Slaw* (26 April 2018), online: <www.slaw.ca> [perma.cc/8XVD-JSJV]; John E Cribbert, “Legal Education and the Rule of Law” (1974) 60:11 ABA J 1363 at 1363-1364, 1366; Paul Burgess, “The Rule of Law: Beyond Contestedness” (2017) 8:3 Intl J Legal & Political Thought 480 at 481, n 4; *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at paras 19-20.

49. Weinrib, *supra* note 1 at 406.

sites, and normative orders. Each law student should emerge from their studies with an understanding of the diverse tasks that lawyers do—and the emphasis placed on these various tasks and their underlying ideas should be approximately equal. Similarly, law students should understand that law surfaces in many different places in society, engaging a diverse array of processes. Law is not only found in the courtroom—and so we shouldn't study only the work of judges and litigators. And finally, law schools should recognize that they are places to study not only state-based law, but the phenomenon of normativity itself. Legal graduates have much to contribute to non-state normative orders. Law schools must recognize this and integrate this perspective of legal pluralism into the core of their mission, so that their graduates can envision themselves contributing to the many instances in society where human beings interact with rules and processes.

The current core activity of educating students to think like lawyers by immersing them in judicial rationality serves the goal of upholding the rule of law incredibly well. However, it has its shortcomings. It has the tendency, to quote Rod Macdonald, to convey the ideas that “all law happens in courts, [that] the adversarial, adjudicative processes of the common law are the best, if not the only, way for a legal system to operate, [that] all other societal decision-making agencies, including legislatures, perform a minor role in the...legal system, [and that] the lawyer's principal preoccupation is with reading and analysing cases and preparing for court.”⁵⁰ The emphasis on appellate judgments can also obscure the important fact-finding process, with its human and interpretive elements.⁵¹ It can encourage a “pathological” understanding of business and contractual practices by focusing on disputes⁵² and give short shrift to alternative dispute resolution processes.⁵³ It also gives a false sense of the importance of doctrinal law, seeming to take for granted its relevance to the ordering of human affairs—when empirical studies have revealed

50. Roderick A Macdonald, Book Review of *The Introduction to the Study of Law* by SM Waddams, (1981) 31 UTLJ 436 at 445.

51. See Geoffrey Samuel, *Rethinking Legal Reasoning* (Cheltenham, UK: Edward Elgar Publishing, 2018) at 144, 147, 150; Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor YB Access Just 55 at 61, 74, 85; Jonathan L Black-Branch, “Modern Legal Education: Towards Practice-Ready Attitude, Attributes and Professionalism” (2016) 39:1 Man LJ i at xiii.

52. Angela Swan, Nicolas C Bala & Jakub Adamski, *Contracts: Cases, Notes and Materials*, 10th ed (Toronto: LexisNexis, 2020) at para 1.41.

53. Consider the curricular debates at the University of Toronto in the 1990s, which sought to expand treatment of civil procedure to alternative dispute resolution mechanisms. See Sandomierski, “Limits of Adjudication,” *supra* note 28.

how little impact doctrinal law may actually have in some areas.⁵⁴ By subsuming “law” into the law of the judicial sphere, the conventional emphasis on appellate decisions also implicitly conveys the idea that all law is the law of the state.⁵⁵

These shortcomings mean that the range of opportunities for contribution through law that the rule-of-law bundle of ideas communicates is incomplete and unduly narrow. If what were excluded from this dominant vision were marginal or idiosyncratic, the problems with insisting on a singular “rule of law” core would be negligible. However, what the rule-of-law/appellate-judicial-opinion/case-law/thinking-like-a-lawyer axis excludes is hardly marginal. Most lawyers do not step into a courtroom: the role of the solicitor, with the associated activities of planning and drafting, is much more common.⁵⁶ The entire field of social planning through legislation demands other skills not included in “thinking like a lawyer”—policy analysis, planning, and drafting, not to mention an understanding of the democratic process, which the legislator and legislative drafter alike ultimately serve. Lawyers who facilitate commercial dealings, however much they may bargain or operate in the “shadow” of the law,⁵⁷ need to develop skills, knowledge bases, and relationships tailored to the customs of their industries. Indeed, the lawyer who places too much emphasis on “issue spotting” over the “problem solving” mode of the counselor may be perceived to be a barrier to serving their clients’ goals.⁵⁸ The shortcomings of the hegemony of adjudication are self-evident when we consider the many law graduates who do not go on to the formal practice of law, but who nevertheless engage with law in their professional work.

54. Stewart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study” (1963) 28:1 *American Sociological Rev* 55.

55. The focus on state law is what Macdonald and others have called centralism. For his pluralist theory challenging monism (there is one source of law), centralism (law flows from the state), positivism (there is a dividing line between law and non-law), prescriptivism (law is a unilateral imposition by law makers onto legal subjects), and even chirographism (all law is in written form), see Roderick A Macdonald, “Custom Made—For a Non-Chirographic Critical Legal Pluralism” (2011) 26:2 *CJLS* 301.

56. Cf JB Milner, *Cases and Materials on Contracts* (Toronto: University of Toronto Press, 1963) at xi.

57. Robert H Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88:5 *Yale LJ* 950, online: <openyls.law.yale.edu/bitstream/20.500.13051/15889/2/47_88YaleLJ950_April1979_.pdf> [perma.cc/YK8V-LY9F].

58. See Guillaume Lagenière, “Beyond the Textbook: Assessing the Value of Scholarship in Undergraduate Legal Education” (2017) 48:2 *Ottawa L Rev* 391 at 394-395; Carel Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge, UK: Cambridge University Press, 2014) at 169, 170-171; Douglas D Ferguson, “The State of Experiential Learning Education in Canadian Law Schools” (2013) 37:1 *Man LJ* 465 at 468-469.

Given the breadth and social importance of these other ways of contributing to society through law, the law school should recognize other foundational pillars that in turn inform curricular offerings, the classroom experience, the content of material to which students are exposed, co-curricular opportunities, and the “hidden curriculum”—the implicit messages conveyed to students about their professional futures.

3. *Multiple legal processes and their associated skills and capacities*

The primary shortcoming of contemporary legal education, in terms of its ability to cultivate versatile graduates, is its emphasis on the judicial process, its related skill of thinking like a lawyer, and related rule-of-law ideas *at the expense* of other legal processes and their associated skills, capacities, and values. By positing the need to expose students to multiple legal processes as a pillar of the law school’s conceptual structure, I am suggesting that approximately equal emphasis of the different legal processes become a core commitment of the law school. Law schools should expose their students—especially those in first year—to a range of different legal processes in a way that does not disclose a bias towards any one of them.

This is by no means an original argument. In the late 1940s, the legal philosopher Lon Fuller argued for exactly this. He did so in an influential curricular review report at the Harvard Law School in 1947, in which he critiqued legal education for “center[ing] on the process by which appellate cases are decided rather than on the problems of planning and strategy,” for not “sufficiently emphasize[ing] problems of draftsmanship,” and for placing a “disproportionate emphasis on private law, to the neglect of administrative and public law.”⁵⁹ In 1948, he wrote an article-length treatment on the theme, arguing strenuously that law schools should give equal emphasis to legislative and adjudicative process.⁶⁰ These arguments were made in the context of the expanding administrative state following the New Deal, which created a new role for lawyers in serving the public.⁶¹ In law schools, pedagogical experiments arose to put into effect these views. Most prominently, the *Legal Process* teaching materials written by Henry Hart & Albert Sacks at Harvard Law School in the early 1950s aimed

59. Preliminary Statement of the Committee on Legal Education of the Harvard Law School, 1 March 1947, Lon Fuller, Chair (on file with author; available at the Harvard Law Library) at iv-v.

60. Lon L Fuller, “What the Law Schools Can Contribute to the Making of Lawyers” (1948) 1:2 J Leg Educ 189.

61. See Robert W Gordon, “Professors and Policymakers: Yale Law School Faculty in the New Deal and After” in Anthony T Kronman, ed, *History of the Yale Law School* (New Haven, CT: Yale University Press, 2004) at 85, 104; Jerold S Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976) at 217-219.

to cultivate agile lawyers able to understand how different legal processes were suited to different social problems.⁶² At Minnesota and Dalhousie, Horace Read worked to expose students to legislative processes, though course materials and a Legislative Research Centre.⁶³

Despite the considerable intellectual effort invested into this idea, it is fair to say that the aspiration to provide students with equal emphasis on legislative and judicial processes—and thereby to cultivate skills of legal analysis, planning, strategy, and drafting—never fully took off. At the University of Toronto, for example, the efforts by James Milner, an acolyte of Fuller, failed to materialize despite two decades of attempts to argue for righting the balance of multiple legal processes.⁶⁴ At Toronto, the *Legal Process* materials were taught (with relatively low enrolments) until the late 1980s in an upper year course, but the recurring attempts to expose first-year students to legislative and administrative processes through various curricular initiatives from the early 1970s to recent times, floundered.⁶⁵ At Dalhousie, Read’s Legislative Research Centre at Dalhousie “petered out” in the early 1960s.⁶⁶

The recurring aspiration to de-centre adjudication from the law curriculum, and the recurring failure to truly penetrate the dominant paradigm of private law taught through appellate cases in the first year, together highlight the need to consider the aim as core to law school’s ability to pursue their public mission. The two branches of government that remain minimally served by the first-year curriculum—the legislature and the executive—remain essential to our constitutional structure. Indeed, their separateness and equality continue to feature in Westminster Parliamentary traditions and in US constitutionalism.⁶⁷ When considering the law school’s public mission, it seems patently obvious that it should educate its students about the three branches of government and the various

62. See William N Eskridge Jr & Philip P Frickey, “An Historical and Critical Introduction to *The Legal Process*” in Henry M Hart Jr & Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Westbury, NY: Foundation Press, 1994). See also Kent Roach, “What’s New and Old About the Legal Process” (1997) 47:3 UTLJ 363 (“[t]he most striking feature of *The Legal Process* is its breadth and expansive understanding of the different skills that lawyers will require to serve their public and private clients” at 368).

63. See Horace E Read & John W MacDonald, *Cases and Other Materials on Legislation* (Brooklyn: Foundation Press, 1948). On the Legislative Research Centre at Dalhousie (where Read moved to become dean), see John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) at 177-178 [Willis, *History of Dalhousie Law School*].

64. David Sandomierski, “Catalytic Agents? Lon Fuller, James Milner and the Lawyer as Social Architect, 1950–1969” (2021) 71 UTLJ 91, DOI: <10.3138/utlj-2020-0003>.

65. Sandomierski, “Limits of Adjudication,” *supra* note 28.

66. Willis, *History of Dalhousie Law School*, *supra* note 63 at 178.

67. See e.g. David Schneiderman, *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (Toronto: University of Toronto Press, 2015).

ways in which state power is legitimately exercised. It should highlight the distinctive modes in which lawyers engage with each of these branches and, reflecting their equal importance in government, should provide a relatively equal emphasis on each.

This seems like relatively low-hanging fruit, but it has been persistently difficult to pluck. What is needed is not a superficial teaching of the three branches of government, which could (and should) be done much earlier in the education system, but rather an appreciation for the underlying attitudes, skills, and range of activities related to the legislative and executive branches. The recommended emphasis is on *processes*, not branches. A process implies an activity, an action that can be incorporated into one's professional functions or vocation: a verb rather than a noun. Educating law students about processes invites them to think about the actions they will take as contributing members of society. Teaching passively about what an institution *is* promotes considering it from a distance, almost as an anthropologist separates themselves from the matter studied.

The current curriculum encourages students to inhabit the mind of the judge, to perform legal reasoning, and to demonstrate mastery by answering hypothetical fact patterns. The law student is consistently required to engage with the adjudicative process. In so doing, students develop skills, a habit of mind, an appreciation for the role of the judge, and the confidence to make judicial critiques. Law schools should do the same for the administrative and legislative processes.

Curricular offerings exist, but compared with the education in adjudication, they are episodic and marginal. Obligatory courses in administrative law often emphasize judicial review of administrative action, not the “worms-eye” view of administrative agencies that permit an empathetic and immersive understanding of their functioning and functions.⁶⁸ Statute-based courses like secured transactions, consumer protection, and taxation are encountered later in law school, *after* the intensive, shared experience of professional role formation and are usually elective. If there is a first-year course that does something decidedly different than focus on appellate case law, such as a “foundations” or “perspectives” course, it is often perceived by students as unimportant.⁶⁹ Statutory interpretation in the first-year curriculum is often an afterthought or a forethought, an amuse-bouche compared with the main course of

68. See Baker, *supra* note 5 at 217-218.

69. As Angela Fernandez has attested to in the context of the Legal Process course at the University of Toronto. See Sandomierski, “Limits of Adjudication,” *supra* note 28.

Contracts, Property, and Torts, which form the undisputed core nearly everywhere.⁷⁰

For those who believe that cultivating the disciplinary competences of law is *the* singular most important thing, the outsized emphasis on private law, with its “distinctive kind of normative ordering”⁷¹ is a good thing. Such views accept uncritically the idea that “private law, as the enduring bedrock of legal education, is a primary vehicle for the transmission of conceptions of legal understanding.”⁷² Yet surely, when one considers the vast areas of social life affected by state law, including the widespread regulation of almost every aspect of our economy and associational structures, one would want the “conceptions of legal understanding” conveyed to future lawyers to extend beyond the content and modes of private law. Indeed, when one considers the historical failure of attempts to correct the balance of emphasis of multiple legal processes in the first-year curriculum, one can’t but help think that the culprit is the implicit idea that there is *one* core commitment to “conceptions of legal understanding”—the rule-of-law idea articulated above.

Legislative and administrative processes engage with other conceptions of legal understanding. Legislation puts into operation values and priorities that are the product of democratic processes, often for redistributive purposes.⁷³ The process through which legislation is developed engages a complicated mix of inputs, including policy ideas (generated “purely” from research, or perhaps less purely), lobbying efforts, citizen-driven advocacy, community consultation, partisan political interests, technical drafting, and parliamentary amendments.⁷⁴ Understanding how private actors and public bodies act in the context of this legislation, whether in a mode of compliance or in pursuit of a statutory mandate, in turn requires a

70. Deliberate departures from this model, like the Curriculum B at Georgetown, are exceptions that prove the rule. Indeed, at the University of Toronto, the idea that Contracts, Property and Tort would “bury alive” a first-year introductory course in Legislative and Administrative Processes was borne out. See Sandomierski, *ibid.*

71. Weinrib, *supra* note 1 at 413.

72. *Ibid* at 405.

73. A sinister interpretation can therefore be made of rule-of-law discourse that seeks to assert the primacy of the judiciary over the legislative: one of ideological combat. See e.g. John Willis, “The McRuer Report,” *supra* note 30.

74. The messiness of the process is captured by the aphorism “making legislation is like making sausages: you don’t want to see how it is done.” The aphorism is commonly attributed to Otto Von Bismarck but thought to be apocryphal. While the phrase was not attributed to Von Bismarck until the 1930s, John Godfrey Saxe was quoted in the *Daily Cleveland Herald* in 1869 as saying “Laws, like sausages, cease to inspire respect in proportion as we know how they are made.” See Fred R Shapiro “The Way We Live Now: On Language; Familiar words from unfamiliar speakers,” *The New York Times Magazine* (27 July 2008) at 16, online: <link.gale.com/apps/doc/A193491367/LitRC?u=lond95336&sid=bookmark-LitRC&xid=ff5d6d9d> [perma.cc/7B2W-XXMD].

whole set of understandings, encompassing not only statutory interpretation techniques but also contextual understanding of the legislated field. The delegation of executive authority to administrative agencies similarly can involve complex infrastructure and internal processes, rivalling its own “government in miniature.”⁷⁵ Understanding how to navigate the norms, precedents, and processes of any given agency requires understanding both the substance of legislation and the process through which a statutory mandate gets translated into real life. Lawyers play an important role in helping their clients understand this translation. In helping to navigate this complexity, they can be thought of as “officers of the legislature” and “officers of the executive.”

Law students, however, would be forgiven for thinking the role of lawyers with respect to executive and legislative processes is much narrower than it is. Judicial review of administrative action, the focus of most administrative law courses, is primarily concerned with the appropriate boundaries of authority of the executive. Courses that give students an exposure to the on-the-ground view of administrative agencies—that explore their internal functioning, their complex relationships with their founding legislation, their internal norms, and the varied interactions between citizens, lobbyists, and other stakeholders, are exceptional.⁷⁶ The explicit exposure to legislation as a legal process is often done in the context of a statutory interpretation course. In such courses we may see an intense engagement with themes of legislative purpose, the process of adjudication, and the contingency of formulaic maxims; however, these are electives not taken by all students and even in some cases are narrowly restricted to judicial techniques.⁷⁷ Beyond these courses, rarely are students asked to place themselves in the shoes of a policy maker who has to confront a social problem and design solutions, selecting from among a menu of facilitative, prohibitory, exhortative, redistributive, and framework-building strategies, all of which can be accomplished through legislation. For all the judicial rhetoric about “purposive” interpretation

75. Willis, “Administrative Decision and the Law,” *supra* note 5.

76. See e.g. Baker, *supra* note 5. See also Robert W Gordon, “The Geologic Strata of the Law School Curriculum” (2007) 60:2 Vand L Rev 339 (“[t]he case method was just not suited to teaching about statutes or administrative agency actions (except as these might appear piecemeal in a case)” at 349).

77. Thus, even realist critiques of statutory interpretation tend to highlight how judges can find countervailing maxims to support their desired outcomes. See John Willis, “Statutory Interpretation in a Nutshell” (1938) 16:1 Can Bar Rev 1, online: <cbr.cba.org/index.php/cbr/article/view/561/561> [perma.cc/LXD3-WMY9]; Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology” (1986) 36:4 J Leg Educ 518; Randal NM Graham, “What Judges Want: Judicial Self-Interest and Statutory Interpretation” (2009) 30:1 Stat L Rev 38.

to which students are exposed,⁷⁸ students seldom have to think about how legislators go about attempting to achieve their purposes. They spend much more time reading about how judges interpret legislative purposes in the judicial exercise of discretion.⁷⁹

Cultivating an exposure to multiple legal processes would help students better understand the perspective of the legislator or administrative agent. These processes would also expose students to a wider range of tasks that lawyers perform, whether as working for state officials or for clients who have to engage with administrative agents and comply with legislation and regulations. A closer exposure to these processes would equip students to be more informed and nuanced critics. And perhaps most crucially for the aspiration to cultivate versatility, by being meaningfully exposed to these processes—rather than viewing these other branches of government through the judicial attitude and function—students would see various distinctive ways of serving society through engagement with law. Their developing sense of what it means to think and work like a lawyer would be informed by an unbiased sense of the activities of multiple branches of government and the profoundly different mindset that engaging with each process demands.

4. *Legal pluralism: An education in different sites and modes of normativity*

The immersion in the judicial sphere that the rule-of-law paradigm provides and the exposure to legislative and administrative processes proposed above will help students develop a toolkit of ways to contribute to society by engaging with state law. This multi-partite immersion is an essential function of any law school, but it is not sufficient. In order to comprehensively model and cultivate versatility, law schools need also to provide an education in non-state-based normativity: the operation of rules, processes, and principles of legality as applied to formal, informal, and everyday contexts.⁸⁰ This exposure is necessary for at least two basic

78. The living tree doctrine in Canadian constitutionalism being, perhaps, the most famous in a first-year course. See *Edwards v Canada (Attorney General)*, [1930] 1 DLR 98, AC 124. For a judicial statement of the “modern” approach to statutory interpretation, see *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27, 154 DLR (4th) 193.

79. A first-year student would thus be much more likely to be familiar with the judicial “institutional competence” gambit—a judge’s decision not to intervene out of deference to a future legislator—than to gain an exposure to the process by which policies are translated into legislation. See Duncan Kennedy, “Form and Substance in Private Law Adjudication” (1976) 89:8 Harv L Rev 1685 at 1752-1753 [Kennedy, “Form and Substance”].

80. See Roderick A Macdonald, “Here, There...and Everywhere: Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden” in Nicholas Kasirer & Lynne Castonguay, eds, *Étudier et enseigner le droit: hier, aujourd’hui et demain : études offertes à Jacques Vanderlinden* (Cowansville, QC: Yvon Blains, 2006) [Macdonald, “Here, There”]; Roderick Alexander Macdonald, *Lessons of Everyday Law*

reasons. First, the work of many lawyers requires an understanding of non-state-based normative orders. Second, many law graduates contribute to society not as practicing lawyers but in other ways. These graduates should be primed to recognize and navigate the normative dimensions of these other contexts and to see their legal training as useful for doing so.

The importance of non-state-based normativity can be well observed in and explained via the field of contracts. Well over half a century ago, socio-legal scholars demonstrated the importance—to practicing lawyers—of understanding the internal norms of a given industry. Stewart Macaulay’s “Non-Contractual Relations in Business” studied the manufacturing sector in 1950s Wisconsin to demonstrate how the preservation of business relationships, with associated codes and customs, impacted executive behaviour in contracting more than doctrinal law did; the desire to avoid litigation and preserve business relations was observed to be paramount.⁸¹ Subsequent studies expanded on these themes, emphasizing the internal normative practices of other industries.⁸² This type of work, in Robert Gordon’s words, illustrates “a variety...of networks, ‘semi-autonomous social fields,’ and private governments; all of them lawmakers in the sense of generating norms and rules and imposing sanctions on those subject to them, creating a de facto society of ‘legal pluralism.’”⁸³

An education that emphasizes doctrinal law without helping students understand the many other sources of law that actually affect behaviour would disserve future lawyers by depriving them of the opportunity to cultivate a wide range of skills that support the contracting process. If lawyers are to help serve their clients’ interests, they must understand the normative context in which their clients are operating, which go well beyond state law. As one participant in a recent empirical study on legal education said, “contract is a dynamic and forward-looking mode of social ordering, and...therefore it’s a course about lawyers’ involvement in the construction of little legal systems.”⁸⁴ This involvement requires skills like negotiation and exercising judgment in deciding “how much to say when and where, determining how many of a client’s instructions should be acted upon, and...*maybe*, having to convert a deliberately ambiguous

(Montreal, McGill-Queen’s University Press, 2002).

81. Macaulay, *supra* note 54.

82. See e.g. Jean-Guy Belley, “L’entreprise, l’approvisionnement et le droit. Vers un théorie pluraliste du contrat” (1991) 32:2 *Cahiers de Droit* 253.

83. Robert W Gordon, “Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction” in Jean Braucher, John Kidwell & William C Whitford, eds, *Revisiting the Contract Law Scholarship of Stewart Macaulay* (Portland, OR: Hart, 2013) 49 at 63.

84. Quoted in Sandomierski, *Aspiration and Reality*, *supra* note 3 at 166.

or informal arrangement into codified form.”⁸⁵ These skills are in addition to the activities involved in drafting—a purposive, planning, and strategic exercise that resembles elements of the legislative process.⁸⁶ An emphasis in a first-year contracts class on primarily doctrinal rules of contract law does little to cultivate these skills and habits.

Yet understanding the phenomenon of contracting goes beyond the task of helping a client participate as a private lawmaker. As Ian Macneil has written, the process of contract must grapple not only with the promissory context but with the wide range of “non-promissory exchange projectors” that condition and determine contractual relations. These include “command, status, social role, kinship, bureaucratic patterns, religious obligation, habit and other internalizations,” as well as expectations that exchange will occur in certain patterns because of dependence on ongoing exchange relations.⁸⁷ Each of these influences on future exchange can be thought of as normative in its own right. With the exception of command (the imposition of state authority), all represent law derived from associational activity, a process that creates law “as fully as does the judge.”⁸⁸ To thoroughly understand, and therefore serve, the contract process, lawyers should be trained to identify this wide range of “jurisgenerative” activity.⁸⁹

While the contract process is a paradigmatic example of how non-state normative orders are relevant to the practicing lawyer, the point is just as valid in other areas. Family lawyers must mediate the living stories of their clients through the state system, which amounts to a convergence of family norms and state norms; when religious norms are involved, as in marriage and divorce, there is yet another factor at play.⁹⁰ A real estate lawyer who fails to attend to community standards and neighbourly relations would disserve a client seeking a sensitive zoning amendment. In a criminal law context, understanding the tacit conventions between prosecutors, judges, and defense attorneys in the plea bargaining system

85. Quoted in *ibid* (same participant as quoted *ibid*) [emphasis added].

86. Lon Fuller describes contract as a type of legislative process in “What the Law Schools Can Contribute to the Making of Lawyers,” *supra* note 60 at 193.

87. Ian R Macneil, “The Many Futures of Contracts” (1974) 47:3 S Cal L Rev 691 at 715.

88. Robert M Cover, “Foreword: *Nomos* and Narrative” (1983) 97:1 Harv L Rev 4 at 28.

89. *Ibid* at 25. On the jurisgenerative capacity of legal agents, see Roderick A Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57:4 Northern Ireland LQ 610.

90. The amendments to the Canadian *Divorce Act* to “facilitate religious divorce and remarriage for Jewish couples” is one example. See Martha Bailey & Nicholas Bala, “Canada: Abortion, Divorce and Poverty, and Recognition of Nontraditional Families” (1991) 30:2 J Fam L 279 at 286.

is as, if not more, important than the criminal law on the books.⁹¹ As one participant in the same study referred to above has said:

[I]f you speak to a client in a particular business environment or particular cultural environment or family environment, you quickly become conscious of all of the stuff that constrain their actions which doesn't actually flow from law. It flows from different kinds of pressures, normative or otherwise. And so when people say, "I learned more in [the first three months at a law firm] than I learned in law school," actually what they're saying is, "I wish I'd understood earlier on that there was this connection that needed to be made in order to be effective problem-solvers. I needed to modulate my understanding of legal norms to fit with the environment."⁹²

Becoming an effective problem solver—one who is able to help their clients advance their interests, through engagement with a range of normative influences—is a key element of versatility. As the participant quoted immediately above says, the ability to recognize and navigate multiple normative systems might just be the "first and most important value" a law school should pursue.⁹³

This commitment flows from the belief that state laws do not take priority over other norms, either in their status as law or in the impact they have on human behaviour. If a law school is to be a place where students study and explore the human capacity to organize society according to rules, a law school should not prioritize state norms over non-state norms.⁹⁴ Or, at the very least, it should consider an education in non-state norms to be a foundational and core part of its mandate.

This imperative is even more acute when we conceive of the mission of the law school as educating graduates who will be making contributions to society in a wide range of sectors and ways—ways that include but transcend activities undertaken in the licensed practice of law. Participation in non-profit organizations, commerce, the arts, journalism, politics, education, childcare, sports—indeed all daily life—engages with an overlapping series of normative orders. Law students should be trained, in the words of the participant quoted above, to recognize and navigate these norms, and also to reflect on the distinctive contributions they can make by virtue of their specialized training.

91. See Albert W Alschuler, "The Prosecutor's Role in Plea Bargaining" (1968) 36:1 U Chicago L Rev 50; Albert W Alschuler, "The Defense Attorney's Role in Plea Bargaining" (1975) 84:6 Yale LJ 1179, online: <openyls.law.yale.edu> [perma.cc/U2FD-AU7U].

92. Quoted in Sandomierski, *Aspiration and Reality*, *supra* note 3 at 166-167.

93. *Ibid.*

94. *Cf* Cover, *supra* note 88; Macdonald & Sandomierski, *supra* note 89.

Law graduates who *are* well equipped to serve non-state normative processes employ that skill in two directions: they can help ensure that the processes and systems themselves are better (fairer, impartial, efficient, appropriately tailored to different policies, etc.), and they can help other people recognize and navigate these norms in pursuit of their own, and collective, interests. If lawyers are “officers” of the court (and the legislature, and the executive), they are also stewards of the human enterprise of “symbolizing human interaction as being governed by rules.”⁹⁵ This more radical understanding of law’s ubiquitous and plural presence throughout society is as much a part of the “intellectual inheritance of civilized life” as judge-made law is, and is every bit as worthy of the legal scholar’s care.⁹⁶

Accordingly, law schools should consider themselves to be places where students can better understand the phenomenon of normativity broadly writ. This should be, in part, an education of specificity—a study of the particular ways and places in which humans organize themselves according to rules. But it should also aspire to provide an education in universality, by elucidating the common tensions, challenges, demands, values, and principles encountered across normative orders—the principles of legality that transcend all areas of human activity. Together, a focus on the particular and universal will cultivate students’ ability to recognize normativity in diverse sectors of society and to develop their own toolkit to apply broadly.

An exposure to legal pluralism is thus a necessary feature of a law school that endeavours to prepare its students for the widest possible range of “legal” contributions. To fulfil their public mission, law schools must not only prepare students to inhabit the bounded rationality of the judicial mind and to engage with legislative and administrative processes. They must also empower students to see themselves as scholars and stewards of law as a human endeavour, to see law, and their own potential contributions through law, everywhere. Anything else would unduly circumscribe what it means to make a contribution to society through law.

5. *Bringing the pillars together*

An institutional theory based on multiple foundational conceptual pillars takes inspiration from the observation that law professors may hold commitments that can seem contradictory. As explored in the empirical study quoted above, many contract law professors in Canada claim to be committed to realist and critical theories of law, yet demonstrate, in their

95. Macdonald, “Here, There,” *supra* note 80. See also Macdonald & Sandomierski, *supra* note 89 at 616, n 19.

96. Weinrib, *supra* note 1 at 425.

teaching and in their descriptions of legal reasoning, a deep and implicit commitment to formalism. One professor in the study claimed to be partial to *both* Rod Macdonald's critical legal pluralism and Ernest Weinrib's theory of corrective justice.⁹⁷ Such a co-existence of commitments does not indicate hypocrisy or reveal an incoherence to be eradicated, but rather indicates that there are many and varied influences on our legal consciousness. We may believe something for some purposes and another for other purposes. This is part of being human.⁹⁸

If simultaneous commitment to contradictory beliefs is to be embraced at the individual level, it should be even more so at the institutional level. The law school is a place where diverse ideas *should* meet. Not only is it a place of encounter for faculty members with differing research agendas and beliefs, it is a place that serves the public good by educating a wide variety of people with different learning styles, commitments, talents, personalities, and professional aspirations. In such an intellectually heterogeneous institution whose responsibility is to ultimately serve the public, it would be inappropriate to insist on a unitary goal or set of ideas.

For this reason, the fact that legal formalism, Legal Process ideas, and sociological or critical legal pluralism may not be philosophically reconcilable concepts is beside the point. The law school, and its activities, is not like a corpus of legal doctrine: its legitimacy does not depend on internal coherence. Instead, the law school is a place of learning that serves all of society through its public mission of preparing its graduates to make contributions through law. The diversity of its students, faculty, and its graduates' trajectories means that it must be a place whose foundations are intellectually plural.

Accordingly, in designing the law school's activities and structures, the goal should not be to ensure that every feature of the law school is consistent with each of the three foundational pillars. This would be an exercise doomed to fail, since almost by definition manifestations of one pillar could contradict the philosophical principles of another. I am not even proposing a systematic or programmatic attempt to translate each of the foundational pillars into action in a way that insists rigidly on equal representation or that each feature of the law school purely translates any one pillar. The fastidious process of "curricular mapping" that one might

97. See Sandomierski, *Aspiration and Reality*, *supra* note 3, ch 5 (on the general point); *ibid* at 297 (detailing the simultaneous commitment to Macdonald and Weinrib).

98. Cf. Walt Whitman, *Song of Myself*, 51 ("Do I contradict myself?! Very well then I contradict myself./ (I am large, I contain multitudes)").

engage with in the context of a program review is not in the spirit of what I am suggesting.

Instead, the relationship between the law school's foundational pillars should be one of reflection and inspiration: legal educators should scrutinize their existing activities and structures to interpret what foundational ideas they manifest. To the extent that any one of the pillars is disproportionately underserved, they should seek to remedy the balance. During the frequent discussions about developments in the law school, participants should seek to identify their underlying commitments and be prompted to take inspiration from these foundational principles.

For example, a review of a law school's participation in external competitions might ask: how many of these competitions privilege the adjudication process?⁹⁹ Can alternative competitions be imagined that invite students to engage with legislative and administrative processes? Or ones that emphasize prospective planning skills? Legislative reform? Problem solving? What about competitions that require collaborations with students from other disciplines, or with partners outside the university, that might invite students to think about how formal law interacts with other fields? Similarly, a review of the law school's clerking program might ask: are there other high-profile opportunities post-graduation that the law school can champion that expose students to other institutions and processes?¹⁰⁰ Might law schools do an audit of the high-profile speakers and ask how many of these are judges, and how many come from other sectors? Simply asking these questions might help increase awareness of the implicit messages the law school is conveying about the range of ways of contributing to society through law, and it might very well spur ideas about how to broaden these messages.

The pillars are also a useful heuristic for approaching some of the more systemic features of the law school. This should certainly include curricular review.¹⁰¹ A glance at the first-year curriculum patently shows that one of the three pillars (the rule of law) is by far more present than the other two: this suggests the need not simply for tinkering around the

99. The answer is, probably most. The vast majority of external competitions at law schools are moot court exercises that invite students to prepare written and oral advocacy for an appellate court.

100. See e.g. the Canadian Parliamentary Internship Program, where interns work with two MPs in a non-partisan fashion to learn about the legislative process and Parliamentary tradition. See <pip-ppsp.org> [perma.cc/S2UF-9RCL]. The Advanced Policy Analyst Program in the Federal Government is one example of a high-prestige effort to recruit graduate students to the public service. See <cspcs-efpc.gc.ca/catalogue/programs/apap-eng.aspx> [perma.cc/Z85A-WYEA].

101. On curricular reform as "the law school's primary heuristic device," see Roderick A Macdonald, "Curricular Development in the 1980s: A Perspective" (1982) 32:4 J Leg Ed 569.

edges, but bold and deep curricular reform.¹⁰² Opportunities within the curriculum that self-consciously encourage students to reflect on their identities as a legal thinker and professional contributor could also help.¹⁰³

There are other features of the law school that could stand to be expanded or championed. This could include career development offices, whose mandate and resourcing could be reviewed to not only provide greater emphasis on “alternative” careers (indeed, the term “alternative,” with its assumption of what is “normal,” could be queried), but to self-consciously cultivate reflection on the range of skills and professional self-conception that law students are developing during their time at law school.¹⁰⁴ Explicit thought could be given to the centrality of clinical and experiential legal education: while some schools identify this as core to their mission, others may relegate clinics or communicate the message that clinical education is second-tier.¹⁰⁵ The built form of law schools can be scrutinized for its implicit messages,¹⁰⁶ especially since we seem to be in the second act of a golden age in new law school buildings.¹⁰⁷

This is not the place to mount a comprehensive catalogue of all the features of the law school, but my main point is that the many initiatives,

102. It is beyond the scope of this paper to attempt to crack this nut. For an account of some laudable, if unsuccessful efforts at the University of Toronto, see Sandomierski, “The Limits of Adjudication,” *supra* note 28.

103. A course at Western Law, Legal Theory and Professional Practice, aims to do exactly this.

104. Would a “Centre for Vocational Discovery” convey a different scope of ambition for helping law students envision how they might contribute to society through law than a “Career Development Office”?

105. See Lorne Sossin, “Experience the Future of Legal Education” (2014) 51:4 *Alta L Rev* 849, DOI: <10.29173/alr41> (one law dean positing experiential legal education as core to the law school’s activities); Todd A Berger, “Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for ‘Practice Ready’ Graduates Will Impact the Faculty Status of Clinical Law Professors” (2013) 43 *Wash UJL & Pol’y* 129 (describing the differential status afforded to academic and clinical faculty).

106. On the social meaning encoded in the physical environments of schools and the classroom’s roles in acculturation, see Amos Rapoport, *The Meaning of the Built Environment: A Nonverbal Communication Approach* (Tucson: University of Arizona Press, 1990) at 67-68. Surprisingly, the literature on the architecture of law schools seems not to have explored the implicit messages relating to law, professionalism, and learning conveyed by law school buildings. For two leading examples of the extant literature, see Robert H Jerry II, “A Brief Exploration of Space: Some Observations on Law School Architecture” (2004) 36:1 *U Tol L Rev* 85; John D Edwards, “Planning and Constructing Law School Buildings: Ten Basic Guidelines” (1998) 90:3 *Law Libr J* 423.

107. In Ontario, law faculties at the University of Windsor and the University of Toronto, as well as Osgoode Hall Law School, have all had new major buildings or renovations in recent memory. The Lincoln Alexander School of Law at Toronto Metropolitan University will soon be embarking on a new building project. In the US, Harvard recently completed a \$300-million renovation following intense curricular review, and major projects are in process at Texas A&M University School of Law, the University of Cincinnati, the University of Houston and Washburn University School of Law. On the first act of the golden age, see Carol Meyer Bratton & Betty W Taylor, “Law School Construction Since 1940 – An Annotated Bibliography” (1968) 61:2 *Law Libr J* 120.

activities, and debates within it can be understood as manifestations of ideas and commitments just below the surface. The failure to recognize this allows conventional and prevailing ideas to continue relatively unquestioned, and to gain momentum and influence in large part due to path dependence. Abandoning the development of the law school to inertial forces risks reinforcing an unduly narrow vision of what it means to be a thinking and working lawyer. This risks squandering the incredible investment in human potential that society continues to invest into its university law schools.

Of course, graduates will go on to all fields of society, and many students educated in the adjudicative paradigm who eventually discover that it isn't for them will find their own path out of it—such is the privilege of the societal mobility afforded many (but certainly not all)¹⁰⁸ law graduates. However, wouldn't it be better for *all* students to see themselves, and their own distinctive contributions, reflected in the law as it is presented to them from the very beginning of their law careers? This is what cultivating versatility promises: enabling as many students as possible to see a wide range of possibilities for contribution as they begin to acculturate into the community of the legally educated. Right from the very beginning of their journey, they should be exposed to the breadth of law's reach in society and the commensurate breadth of opportunity for contributions. Otherwise, we risk alienating students from their true calling, and depriving society of their full talents and contributions.

II. *Bracing the pillars: critique, context, and diversity*

I opened this paper by contrasting the academic mission of the university law school with its mission of cultivating versatile graduates empowered to contribute to society through law. Such a distinction was, in a way, a heuristic for illustrating that the institution has multiple public missions that it can be helpful to disaggregate. In reality, however, the academic nature of the university law school cannot be separated from its role in preparing graduates to contribute to society. The methods and values of

108. On the differential experiences and opportunities afforded students from different cultural and socioeconomic backgrounds, see Robert Granfield, "Making It By Faking It: Working-Class Students in an Elite Academic Environment" (1991) 20:3 J Contemporary Ethnography 331; Lucille A Jewel, "Merit and Mobility: A Progressive View of Class, Culture and the Law" (2012) 43:2 U Mem Law Review 239; Lucille A Jewel, "Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy" (2008) 56:4 Buff L Rev 1155; Tracey Lindberg, "Engaging Indigenous Legal Knowledge in Canadian Legal Institutions: Four Stories, Four Teachings, Four Tips, and Four Lessons about Indigenous Peoples in the Legal Academy" (2019) 50:3 Ottawa L Rev 119, online: <rd0-olr.org/engaging-indigenous-legal-knowledge-in-canadian-legal-institutions-four-stories-four-teachings-four-tips-and-four-lessons-about-indigenous-peoples-in-the-legal-academy> [perma.cc/YMB5-QUDF].

the university are essential, in law schools, for *cultivating* versatility. I focus in this section on three essential values that any law school should incorporate in pursuing its missions. To continue with the architectural metaphor, these values brace the pillars horizontally, reinforcing them where they intersect and ensuring an overall solid foundation. And while they are values endemic to the university environment, they are also integral to the *legal* academy. These horizontal, cross-cutting foundations include (1) a commitment to critical strategies, including deconstruction, (2) a valorization of context, and (3) an affirmation of the value of diversity.

1. *Critique, context, and the legacy of legal realism*

One reasonable question that could be raised about the three foundational concepts I have described above as pillars is: where is legal realism? As Laura Kalman writes, it has “become a truism to refer to [the statement ‘We are all legal realists now’] as a truism.”¹⁰⁹ How could any theory of the law school’s foundational concepts ignore the intellectual movement that has arguably impacted the North American legal academy the most over the past century and a half, with its origins in Oliver Wendel Holmes’ writings, its explosion in the 1930s, and its intellectual heirs of law and economics and critical legal studies?

One answer is that the sceptical approach of legal realism, the empirical focus of law and economics, and the deconstructivist methodologies of critical legal studies are foundational in a different way, because they provide analytical methods for questioning the relationship between law and society. Their projects are essentially critical: taking apart the presuppositions that law is a coherent whole or that institutional competence reflects a good faith attempt to allocate responsibility to the “most appropriate” forum. Instead, these schools make the critical move of not taking legal reasoning or institutional manifestations at face value—by asking “what is really going on underneath.”

For the early realists, the “real” determinants of legal decisions were the personal preferences, politics, or psychology of the decision-makers; for law-and-economics scholars, the underlying explanation lay in the concept of efficiency; for the crits, all law is politics, and a scrutiny of ideological combat was the dominant method of analysis.¹¹⁰ These intellectual developments certainly contributed to a new understanding

109. Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986) at 229. Cf. Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009) at 144–145.

110. For a detailed summary in the context of contract scholarship, see Sandomierski, *Aspiration and Reality*, *supra* note 3, ch 2.

of law, but they are perhaps more important for what they did for legal reasoning—their methods added to law students’ “toolkits” a range of analytical strategies for understanding, critiquing, and reforming doctrine and legal institutions.¹¹¹ For this reason, perhaps, these schools have been identified as relevant more for their contribution to legal *thought* than to legal *theory*.¹¹² They offer two virtues that are distinctive to both post-classical legal understandings and to the general scholarly enterprise: critique and context.

a. *Critique*

Helping students develop a critical understanding of their world is a core function of university education. Northrop Frye put it well when he wrote that, like bad swimmers, we are all “gasping and spluttering out clichés of a partisanship that we do not wholly understand,” while the intellect and imagination fostered by education provides “the air which is more natural for us to breathe.”¹¹³ Critical thinking and more granular projects of deconstruction¹¹⁴ are an important part of university legal education as they scrutinize not just laws and institutions, but also the underlying conceptual apparatus. University law schools have an obligation to cultivate the capacity to ask what is going on under the surface, to bring to consciousness underlying explanations and contradictions, and to identify the “real” effects of law—discriminatory, distributional, or otherwise.

In doing so, however, they also contribute to developing graduates capable of contributing to society. A critical education is also a practical education, in the broadest sense of the term—again, to paraphrase Frye, critical thinking produces “practical intelligence.”¹¹⁵ For crits, critical legal pedagogy “empower[s] students” to “unearth and challenge law’s dominant ideas about society, justice, and human possibility and to infuse legal rules and practices with emancipatory and egalitarian content,” and “train[s] them to argue professionally and respectably for the utopian

111. Kennedy & Fisher, *supra* note 21 at 3.

112. *Cf. ibid.*, and their distinction between legal thought and legal theory.

113. Northrop Frye, *On Education* (Markham: Fitzhenry & Whiteside, 1988) at 89.

114. See e.g. Clare Dalton, “An Essay in the Deconstruction of Contract” (1985) 94:5 Yale LJ 997, online: <openyls.law.yale.edu> [perma.cc/SD2B-QEQU] (reversing the hierarchy of poles in purported dualities of contract doctrine). For a broader review of “critical moves,” see Jorge L Esquirol, “Making the Critical Moves: a Top Ten in Progressive Legal Scholarship” (2021) 92:4 U Colo L Rev 1079.

115. Wilson, *supra* note 13 at 119. See especially Northrop Frye, “The Changing Pace in Canadian Education” in Jean O’Grady & Goldwin French, eds, *Northrop Frye’s Writings on Education*, vol 7 (Toronto: University of Toronto Press, 2000) 166 (“[i]t is not the humanist’s inability to read a textbook in physics or the physicist’s inability to read a textbook in literary criticism. What is important is the inability of both of them to read the morning paper with the kind of insight which is demanded of the practical intelligence” at 173).

and the possible.”¹¹⁶ A principal mode of law and economics scholarship is to offer policy prescriptions in order to maximize welfare through overarching lens of efficiency.¹¹⁷ Both of these neo-realist schools, while being intellectually rigorous, are also oriented toward making tangible societal impacts.

It is also crucial that law schools, while providing an exposure to the “pillars” of the rule of law, multiple legal processes, and legal pluralism, also provide opportunities to critique those constructs. Literature that highlights the ideological commitments of rule-of law-discourse¹¹⁸ or the political implications of the “institutional competence gambit” in adjudication,¹¹⁹ or that critically assesses (or attacks) legal pluralism¹²⁰ would therefore be essential to helping students realize that the foundational ideas to which they are exposed are to be not revered unconditionally but critically engaged with. Students need to make up their own minds about the most important features of law in the process of cultivating their own personal profile of legal thought and professional identity.

b. *Context*

A second feature of realist and post-realist scholarship is an emphasis on context—not only the context of the legal decision-maker, but of the social milieu in which disputes, legislative developments, and legal relations occur. Law schools should encourage their students to care about this social context. For one thing, it helps provide a deeper understanding of the legal phenomena studied. Case-in-context studies, for example, complicate the stories around “leading” cases and help students understand the range of factors that led to a case being litigated in the first place.¹²¹ Cultivating this

116. Karl Klare, “Teaching *Local 1330*—Reflections on Critical Legal Pedagogy” (2011) 7 Unbound: Harvard J Leg Left 58 at 77-8, online: <legalleleft.org> [perma.cc/W7FF-WUTR].

117. See especially Richard A Posner, *The Economics of Justice* (Cambridge, MA: Harvard University Press, 1981), ch 4 (“The Ethical and Political Basis of Wealth Maximization”). For a discussion of welfare maximization favoured over fairness arguments, see Louis Kaplow & Steven Shavell, *Fairness vs Welfare* (Cambridge, MA: Harvard University Press, 2006). On efficiency and welfare maximization in relation to government transition policies, see Michael Trebilcock, *Dealing with Losers: The Political Economy of Policy Transitions* (Oxford: Oxford University Press, 2014), ch 2 (“Framing the Issues: Normative Discourses, Political Imperatives”).

118. See e.g. Willis, “The McRuer Report,” *supra* note 30 and other references in that footnote.

119. Kennedy, “Form and Substance,” *supra* note 79 at 1710-1720.

120. See e.g. Simon Roberts, “Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain” (1998) 30:42 J Leg Pluralism & Unofficial L 95; Brian Z Tamanaha, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism” (1993) 20:2 J Law & Soc’y 192.

121. See e.g. AW Brian Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press and Oxford University Press, 1995) at 8-12; Richard Danzig, *The Capability Problem in Contract Law: Further Readings on Well-Known Cases* (Mineola, NY: Foundation Press, 1978); Charles Mitchell & Paul Mitchell, *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing, 2008). See also the *Landmark Cases in Canadian Law* series from UBC Press, which began in 2019 and has eight books

broader understanding will help make more effective lawyers and better critics of law.

A focus on context as a pervasive and ubiquitous feature of law will also stimulate broader reflections on graduates' range of possible contributions through law. A focus on context builds understanding not only about *law* but about *society*—and its pressing demands. Law schools should not only open opportunities for students to contribute in pre-identified ways, but should help graduates identify opportunities for contribution—and this requires the ability to identify a social need. Law schools therefore should not only seek to contextualize the legal materials they study, but also to provide converse opportunities to think about how law, and how skills and capacities developed through studying law, can help address the needs of society today and the future.

2. Diversity

Finally, none of the above objectives will be fully met without a thoroughgoing commitment to a diversity of perspectives, backgrounds, and ideas—including an understanding of the present and historical barriers to inclusion that have been perpetuated by legal education.

Diversity is both a recent and longstanding normative commitment in law schools and has supported ameliorative initiatives in student and faculty recruitment and attempts to incorporate “outsider” perspectives into the legal education curriculum.¹²² These attempts have historically been justified on three grounds: to support institutional demands to “demonstrate diversity competence,” to “ensure broad and representative access to the profession as a gateway to positions of influence in politics and society,” and to bolster the legal profession’s legitimacy by ensuring it is representative of the society in which it operates.¹²³ These justifications, while important, are ultimately “thin,” writes Faisal Bhabha, who argues for a normative conception of “diversity of equality.” Drawing on the accounts of critical race scholars Kimberlé Crenshaw, Patricia Williams, and Mari Matsuda,¹²⁴ Bhabha argues that such a program would seek to remedy

published to date.

122. For an excellent summary of historical attempts to remedy diversity and the underlying conceptual models these efforts reveal, see Faisal Bhabha, “Towards a Pedagogy of Diversity in Legal Education” (2014) 52:1 Osgoode Hall LJ 59.

123. *Ibid* at 68-69.

124. Bhabha cites, among others, Kimberlé Williams Crenshaw, “Toward a Race-Conscious Pedagogy in Legal Education” (1989) 11:1 Nat’l Black LJ 1; Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991) at 5, 10, 56; Mari Matsuda, “Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground” (1988) 11:1 Harv Women’s LJ 1.

historical exclusion and “strip back layers of historical understandings of the law and lawyering in order to expose the foundations of exclusion.”¹²⁵

The historical and inherited deficiencies of legal education to adequately include women and racialized people—and others—provides a strong normative position on its own for justifying a focus on diversity as a foundational commitment. Its importance therefore cuts across all elements of the law school’s activities. It also, in the metaphorically “horizontal” logic of this paper, intersects with the foundational pillars as well. Not only can a critical race perspective provide an important ground for critiquing legal reasoning—its emphasis on “perspectiveless” can cause “intense alienation” of racialized students, for example¹²⁶—an appreciation of diversity can also bolster the quality of legal reasoning. Notable leading judicial figures have made precisely this claim, referring to the benefits to *legal reasoning* that perspectives based on gender, race, and intersectional identities bring.¹²⁷ Diversity therefore enhances the legitimacy of the legal system not only through increasing representation, but by enhancing the quality of legal reasoning itself. Similarly, in the realm of designing solutions for multi-factorial problems, often the domain of legislative or administrative action, it has been shown empirically that diversity, in the sense of cognitive differences, leads to better outcomes.¹²⁸ Legal pluralism, as a “tool for understanding overlapping and sometimes conflicting normative systems,” also “helps confront the pressures of diversity.”¹²⁹

Conclusion

The ideas proposed as foundational in this essay are by no means unfamiliar to most legal educators. Nor are they the only possibilities. Indeed, in the

125. Bhabha, *supra* note 122 at 72.

126. Crenshaw, *supra* note 124 at 3.

127. On the value of United States Supreme Court justices looking to life experience when forming decisions, see Laura A Hernandez, “When the Wise Latina Judge Meets a Living Constitution—Why It Is a Matter of Perspective” (2011) 17 *Tex Hispanic JL & Pol’y* 53 at 96 (“[w]ise judges do use their life experiences in reaching judicial decisions. This fact is neither troubling nor problematic. Indeed, when a judge lacks perspective, the soundness of the legal decision invariably suffers—either through the backwards looking lens of history or in the guise of immediate Congressional action” at 96). For a reflection on different responses to sexual assault laws from law students of different genders, see Beverley McLachlin, *Truth Be Told* (Toronto: Simon & Schuster, 2019) at 227-236. On the benefits to legal thought and law schools derived from exposing students to Indigenous legal traditions, see John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019) (“[I]like a few grains of yeast in the preparation of bread, the addition of Indigenous law’s methodologies may positively lift the entire institution” at 160).

128. See Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton: Princeton University Press, 2008) at 7 (unpacking diversity to include different perspectives, interpretations, heuristics, and predictive models).

129. Bhabha, *supra* note 122 at 73.

spirit of encouraging each law school to reflect on its own *distinctive* contribution to society, it may be desirable for some law schools to strive to articulate additional concepts on which they believe their core functions should be founded.¹³⁰ But at a minimum, I believe that any law school that imagines itself as performing the public function of preparing its graduates to contribute to society through law—which, I argue, should be every university law school—must take seriously its obligation to cultivate a dedication to the rule of law through immersion in the judicial process, to prepare its graduates to engage intimately with legislative and administrative processes, and to equip them to recognize and navigate multiple normative orders. And it should do so through a commitment to critical thinking, an appreciation for broader social context, and an embrace of diversity. Together, these commitments will ensure that the institution is guided by the aspiration to educate graduates capable of identifying and contributing to the world’s pressing and existential problems—of which, today, there is no lack.¹³¹

130. This argument, in favour of mission differentiation of law schools, surfaced in the 1983 Arthurs Report: Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply & Services, 1983). To an extent, this call has been heeded, as one can find in Canadian legal education institutions with distinctive missions. Candidates that come to mind include the pursuit of social justice (as observed at Lincoln Alexander School of Law and the University of Windsor Faculty of Law), public service (for example, the “Weldon Tradition” at the Schulich School of Law at Dalhousie University), and transsystemic study (McGill Faculty of Law; the JD/JID program at the University of Victoria). The intended focus of Trinity Western University’s law school was to integrate the university’s Christian worldview into the law school curriculum (see Submission from Eugene Meehan & Marie-France Major to Law Society of Upper Canada, “Written Submission for the Consideration of Convocation in Relation to the Matter of the Accreditation of the TWU School of Law” (13 October 2013) at 18, online (pdf): <lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/t/trinitywesternuniversitysubmissiontolsucwithappendices.pdf> [perma.cc/JF8E-DQ2U]), reflecting a more prevalent tradition in the US to integrate religious or moral values (see e.g. Notre Dame, which is “informed and inspired by faith.” See <law.nd.edu> [perma.cc/6W6F-MQEW]).

131. On the engagement of lawyers and other social and political thinkers with issues of existential crisis, see Toby Ord, *The Precipice: Existential Risk and the Future of Humanity* (New York: Hachette, 2020); Richard A Posner, *Catastrophe: Risk and Response* (Oxford: Oxford University Press, 2004); Andrew Leigh, *What’s the Worst That Could Happen? Existential Risk and Extreme Politics* (Cambridge, MA: MIT Press, 2021); Joshua Schuster & Derek Woods, *Calamity Theory: Three Critiques of Existential Risk* (Minneapolis: University of Minnesota Press, 2021); Anthony Giddens, “Risk and Responsibility” (1999) 62:1 Mod L Rev 1; Nick Bostrom, “Existential Risk Prevention as Global Priority” (2013) 4:1 Global Policy 15.