

Article

What We Teach When We Teach Legal Analysis

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INTRODUCTION

A student enters law school in the fall of 2022, as tumult rages all around her. A pandemic has taken close to 900,000 American lives, disproportionately Black and Brown,¹ laying bare yet again the structural inequities that haunt American society. Protestors filled the streets two years ago, enraged at the murder of a man under the knee of a police officer.² In the aftermath of the 2020 election, a President spread lies about the results and an army of his followers descended on the Capitol in an attempt to stop the peaceful transfer of power.³

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1. See, e.g., Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, KAISER FAM. FOUND. (Aug. 22, 2022), <https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time> [https://perma.cc/9KVW-345F].

2. E.g., Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [https://perma.cc/TRM5-8W3B].

3. E.g., Amber Phillips, *What We Know—and Don't Know—About What Trump Did on Jan. 6*, WASH. POST (June 29, 2022), <https://www.washingtonpost.com/national-security/2022/06/29/trump-january-6-timeline> [https://perma.cc/43Y2-74L8].

The world feels like it is teetering on its axis,⁴ and this student hopes that, armed with her law school education, she can begin to set it right. She can change things for the better.

But her law school classes often seem divorced from this urgent reality. Our new law student learns to identify rules from cases and apply them to new sets of facts, but is rarely asked whether the rule furthers justice, or whether biases are embedded within it, or what the rule *should* be.⁵ She is trained in the tactics of legal reasoning, can see where doctrine might be inconsistent or where an exception might swallow a rule, but cannot explain why a law is good or bad, just or unjust.⁶ She doesn't understand the forces that birthed the law or the imprints those forces have left on its surface.⁷ She is not trained to question the legal system itself.⁸

4. Michael Scherer, Ashley Parker & Tyler Pager, *Historians Privately Warn Biden That America's Democracy Is Teetering*, WASH. POST (Aug. 10, 2022), <https://www.washingtonpost.com/politics/2022/08/10/biden-us-historians-democracy-threat> [<https://perma.cc/MNC9-MNQ9>]; see also Angela P. Harris & James J. Varellas III, *Introduction: Law and Political Economy in a Time of Accelerating Crises*, 1 J.L. & POL. ECON. 1, 1 (2020) ("From the vantage point of mid-2020, it is impossible to avoid the sense that these crises . . . have emerged both suddenly and as the result of problems long in the making. It is also clear that these interlocking crises are accelerating . . .").

5. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 206 (2007) ("[In the first year], law students begin to accept a form of moral reasoning in which context and normativity are read only through the exigencies of legal tests and texts. Social context is unmoored and thinned . . .").

6. See, e.g., *id.*; ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 35 (2014) ("[L]aw schools slight law's moral ideal . . . They do not teach the meaning of the virtue toward which it aspires . . ."); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 3 (1999) (noting that much of the teaching of law is about "rules, doctrine, and particular legal outcomes").

7. See Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990) (exposing "how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written"); WEST, *supra* note 6 ("[L]aw schools . . . teach only a sliver of the legal process . . . [T]hey . . . do not teach [law's] . . . political origin in either democratic or nondemocratic action.").

8. See MERTZ, *supra* note 5, at 208 ("[L]aw schools [should] achieve and teach a more self-conscious understanding of the limitations of legal language for apprehending social phenomena, training students to be wary of the hubris that inheres in law's aspiration of universal translation across so many diverse social realms.").

All this leaves her with the impression that law and legal reasoning are neutral and objective, and her job, as a lawyer, is to read cases, pull out rules or general principles, and sift new facts into those categories.⁹ The relevant question is not how to best move forward, how best to solve the problem posed, but what does the past—the rules and opinions already laid down—tell us about what to do now. And at few (if any) points is she trained to ask: is this the right, best way to do things?¹⁰

This training contributes to a student's sense that law is natural and normal, and "usually OK and just,"¹¹ instead of invigorating her imagination as to law's possibilities and giving her the tools to push for legal change. The result is a collective of elites who have a vested interest in preserving this system

9. See, e.g., William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law—Summary*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING 5 (2007), http://archive.carnegiefoundation.org/publications/pdfs/elibrary/elibrary_pdf_632.pdf [<https://perma.cc/829T-RMTP>] (finding that law schools effectively train students to "think like lawyers," which includes capacities "for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the application and conflicts of legal rules"); Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. ON POVERTY L. & POL'Y 287, 328 (2022) ("[A]fter navigating the first year of law school, many law students classify the lawyer's role as primarily using deductive reasoning to anticipate legal conclusions based upon applicable legal doctrine, not engaging broader principles of justice.").

10. See, e.g., Toussaint, *supra* note 9, at 292–93 ("[T]he objective, apolitical, and so-called 'colorblind' jurisprudential stance can harm law students who . . . often feel silenced in the classroom and unprepared to ask the most urgent question for any rule of law: why?"); WEST, *supra* note 6, at 46 ("[Students'] concerns for social justice become displaced, basically, by a concern for technocratic competency."); see also Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789–90 (2020) (explaining that "[a law student] may begin her education imagining it as an invitation to ask fundamental questions concerning justice and power," but will quickly find that the focus of law school is on "a conversation shaped by the depoliticization and naturalization of market-mediated inequalities").

11. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 215 (1987); see also Wetlaufer, *supra* note 6, at 53 (noting that a common understanding of critical legal schools of thought was that legal language tended to "thing-ify" or "reify" concepts to make them seem "natural" and "given").

they have mastered, who tend to accept things as they are instead of pushing for stark departures from the status quo.¹²

Legal scholars have long taken aim at these methods and pushed for reform. Some of these professors seek to contextualize students' legal training with theoretical perspectives or pedagogical techniques designed to de-reify legal rules and opinions;¹³ others hope to expose students to rhetorical theory and practices—both those of the West and of other cultures—to help students understand that law is constituted by human beings in a particular social and cultural context;¹⁴ still others aim to de-

12. See, e.g., DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 71 (Richard Delgado & Jean Stefancic eds., 2004) (“Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable, and trains them in detail to look and think and act just like all the other lawyers in the system.”).

13. See *id.* at 120–21 (proposing a revised law school curriculum that includes a three semester rules/skills course that covers doctrinal concepts and methods of legal argument, paired with a three-semester “legal decision” course that covers jurisprudence, history, economics, social theory, and political philosophy, among other topics); see also L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201, 237–38 (2020) (arguing that “before graduation students should become comfortable identifying and interrogating two spheres: law’s sources and the socio-cultural contexts in which law operates”); Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 45 (2021) (imagining a law school as a “truly inclusive place committed to neither molding students into lawyer statesmen nor legal gladiators, but simply letting students *become*”); Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter, *Introduction to A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES* 2–3 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) (“[The critical perspectives introduced in the textbook] share an overarching goal: to shine a light on the ways in which civil procedure may privilege—or silence—voices in our courts.”).

14. See Elizabeth Berenguer, Lucy Jewel & Teri McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 206 (2020) (“We should, through critical scholarship and teaching, unmask legal rhetoric’s power and infuse it with alternative modes of generating legal meanings.”); Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 3, 4 (2010) (arguing that introducing students to rhetoric “makes it possible for them to envision their role as lawyers as constructive, effective, and imaginative while grounded in law, language, and persuasive rationality”).

center litigation and lawyering in favor of working alongside social justice movements to achieve change.¹⁵ These strategies disrupt. They aim to expose the bias embedded in legal reasoning, to create a more fair and just system, by critiquing traditional analytical tools and pursuing other methods for achieving legal objectives. This is essential work. Without adopting an outsider's gaze and a disruptor's stance, lawyers using the basic tools of legal analysis tend to replicate what has come before.

But disruption alone is not enough. Such an approach helps students see the problems in law, but gives them little training in how to fix it. This approach can easily lead a young law student to a nihilistic, despairing view, for if all rules "lead us anywhere and nowhere, why have any?"¹⁶

Thus, to be successful, students must be taught not only to disrupt, but also to create. They should learn how to use the traditional tools of legal reasoning to achieve change.¹⁷ This approach accepts the rhetoric, structure, and go-to moves of legal thinking as it exists, acknowledges their failures and weaknesses, and aims to arm students with the skills to work within that system to birth new rules, cement new baselines, and create new approaches to legal problems.

15. See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1652–53 (describing movement lawyering as a "practice in which lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy" (emphasis omitted)); Amna K. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) (describing movement law as "not the study of social movements; rather, it is investigation and analysis *with* social movements").

16. Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 729 (1992); see also Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2245 (1992) (describing an approach to teaching civil rights law other than "simply throwing up our hands in despair or adopting an attitude of self-righteous radical chic").

17. See, e.g., Tully, *supra* note 13, at 237–44 (arguing that students should be taught "transformative legal analysis," which uses analysis of briefs and other materials beyond law's immediate sources to help students become more adept at articulating visions of what the law should be); Berger, *supra* note 14 (arguing that introducing students to rhetoric "makes it possible for them to envision their role as lawyers as constructive, effective, and imaginative while grounded in law, language, and persuasive rationality"); Toussaint, *supra* note 9 (arguing for a pedagogy of "reconstructive ordering," which helps students "consider alternative framings of law that might introduce new legal arguments to frame their client's worldview in the language of the court").

Teaching with both strategies in mind will help the scales drop from students' eyes—they will be clear-eyed about the system's flaws—while still preparing them to operate within it and change it from the inside. As Mari Matsuda once noted,

There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand inside the courtroom and say 'This is a nation of laws, laws recognizing fundamental values of rights, equality, and personhood.' Sometimes . . . there is a need to make both speeches in one day.¹⁸

Students who want to change the world need training in both modes of law practice. This Article shows how legal analysis pedagogy often provides neither, instead training students in more traditional, status-quo-reinforcing forms of legal argument, and charts some paths forward.

I. LEGAL ANALYSIS TEACHING AS IT IS

Let's first look at the legal reasoning skills taught and assessed in the required first-year curriculum. We'll focus here because these are the courses every student is required to take; if, as law schools claim, their main objective is to teach students to "think like lawyers,"¹⁹ that lawyer-thinking must be imparted and tested in these classes.

At nearly every law school in the country, a student in her first year will take some combination of Torts, Contracts, Property, Criminal Law (or Criminal Procedure), Constitutional Law, Civil Procedure, and Legal Writing (also called Legal Method, Legal Practice, Legal Advocacy, etc.). Law schools may vary in the method of presenting these courses or may add an additional

18. Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989).

19. See, e.g., Elena Kagan, *The Harvard Law School Revisited*, 11 GREEN BAG 2D 475, 475 (2008) (reflecting on Harvard's new 1L curriculum and posing as the primary question: "How should a law school go about teaching students to think like lawyers?").

class.²⁰ But all law schools, no matter how innovative, tend to hew closely to the core 1L classes.²¹

Alongside fundamental principles of doctrine, law schools also teach the habit of lawyer-thinking. In many first-year classes, this lawyer-thinking is implicit: the conversation is explicitly about who owns the dead fox in *Pierson v. Post*,²² but it is implicitly about the legal rules and general principles a judge is relying on in reaching that decision, and how those rules and principles might apply to a different case.²³ It is implicitly about when cases are alike and when cases are different, and the parameters of what “treating like cases alike” means.²⁴

The marriage of current decision-making to past rules and past precedents takes two main forms: (1) rule-based reasoning (applying established rules to new cases) and (2) analogical reasoning (treating like cases alike). While any description of what legal reasoning is will certainly risk oversimplification, most law professors would agree that these two forms of reasoning sit at the heart of the habits of lawyer-thought they are teaching and

20. For instance, Georgetown University Law Center has an innovative Curriculum B (or Section 3), where the students are taught doctrine through the lens of legal theory. Torts and Contracts, for example, are taught together as Bargain, Exchange, and Liability, and all students take a seminar on legal theory called Legal Justice that engages with themes that are reinforced in each of the larger classes. *Curriculum B (Section 3)*, GEO. L., <https://curriculum.law.georgetown.edu/jd/curriculum-b-section-3> [<https://perma.cc/SN65-WKCS>]. Other schools, such as Arizona State University Sandra Day O'Connor College of Law, require the Professional Responsibility course in the first year. *JD, Juris Doctor*, ARIZ. ST. UNIV. SANDRA DAY O'CONNOR COLL. OF L., <https://law.asu.edu/degree-programs/jd> [<https://perma.cc/CVJ8-F7NU>].

21. Even the advertising for Georgetown's Curriculum B reassures students that they will learn all they need to succeed to excel in the practice of law, “including fundamental principles of property, contract, and tort.” *See Curriculum B (Section 3)*, *supra* note 20.

22. *See Pierson v. Post*, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805) (“The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox, as will sustain an action against Pierson for killing and taking him away?”).

23. *See id.* at 177–78.

24. In some classes, like Legal Method or Legal Writing, this teaching is explicit; legal writing textbooks describe rule-based reasoning and analogical reasoning and give students tools for how to use both methods in written communications. *See* SONYA G. BONNEAU & SUSAN A. MCMAHON, LEGAL WRITING IN CONTEXT 63–82 (2017); CHARLES R. CALLEROS & KIMBERLY Y.W. HOLST, LEGAL METHOD AND WRITING 59–119 (9th ed. 2022).

assessing in the first year.²⁵ And each form of reasoning is also part of the problem, operating to reinforce the status quo, reify existing power structures, and gild the whole enterprise with the veneer of neutrality and objectivity.²⁶

I describe in more detail below the characteristics of each of these forms of reasoning; the following Section will present the critiques lodged against them.

A. RULE-BASED REASONING

Rule-based reasoning is the core concept that law consists of rules that can be applied to new sets of facts and answer legal questions.²⁷ It operates through the application of the syllogism, with the rules serving as the major premises, the facts of the case providing the minor premises, and the legal result acting as the conclusion.²⁸ It is a method of legal problem-solving that elevates rules over other considerations; the goal, in large part, is to either apply rules as they exist or “discover” and apply rules from precedent and from larger principles.²⁹

Here is one example of rule-based reasoning, drawn from the Massachusetts case *White City Shopping Center, LP v. PR Restaurants, LLC*: In a contract dispute, a court had to determine whether a burrito qualified as a “sandwich.”³⁰ The judge turned to a general principle of contract interpretation, that words in a contract are construed according to their “ordinary

25. See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2019) (including chapters on rules and analogies).

26. See *infra* Part II.

27. See, e.g., ROBERT L. HAYMAN JR., NANCY LEVIT & RICHARD DELGADO, JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 157 (2d ed. 2002); SCHAUER, *supra* note 25, at 13 (“Rules actually do occupy a large part of law and legal reasoning. Lawyers frequently consult them, and judges often make decisions by following them.”).

28. See, e.g., Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 309 (2003).

29. See *id.* (“Formalists attempt to resolve disputes by defining the terms of legal rules so as to include or exclude the facts of the case at hand.”); HAYMAN ET AL., *supra* note 27; SCHAUER, *supra* note 25, at 16 (“[C]oncrete rules are designed to serve the background justifications, but it is the rule itself that carries the force of law, and it is the rule itself that ordinarily dictates the legal outcome.”).

30. *White City Shopping Ctr., LP v. PR Rests., LLC*, No. 2006196313, 2006 WL 3292641, at *2 (Mass. Super. Ct. Oct. 31, 2006).

and usual sense.”³¹ He then used a dictionary to find the ordinary meaning of “sandwich,” which described the term as “two thin pieces of bread . . . with a thin layer (as of meat, cheese, or savory mixture) spread between them.”³²

The decision thus followed from the application of the law to fact:

- The ordinary meaning of sandwich requires two thin pieces of bread.
- A burrito does not have two thin pieces of bread.
- Therefore, a burrito is not a sandwich.

This type of structure—moving from rule, to application, to conclusion—forms the beating heart of most legal arguments.³³ It is powerfully compelling because, just as in formal logic, if the premises are true—meaning that both the rule and the specific facts of the case are correct—then the conclusion *must* also be true.³⁴ The framework also offers a clean and structured presentation of complex information, optimally designed to help humans understand and process complicated ideas.³⁵

In addition, this structure provides legal analysis with a sheen of legitimacy and enhances its apolitical reputation; judges are not deciding cases based on their own policy preferences, but on the logical outcome of this law applied to this set of facts.³⁶ Moreover, a rule-based process furthers the legal system’s core values of stability, predictability, and consistency; as

31. *Id.* at *3.

32. *Id.*

33. See, e.g., Ruggero J. Aldisert, Stephen Clowney & Jeremy D. Peterson, *Logic for Law Students: Learn How to Think Like a Lawyer*, 69 U. PITT. L. REV. 1, 1 (2007) (arguing that thinking like a lawyer means “employing logic to construct arguments”); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM’N & RHETORIC: JAWLD 39, 61 (2016) (“The syllogism . . . remains firmly ensconced in legal culture, heralded as the best way to present information.”).

34. See, e.g., KRISTEN KONRAD TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 87–88 (2d ed. 2016) (describing the powerful impact of legal syllogisms).

35. Jewel, *supra* note 33, at 40 (“[A]ncient legal-thought structures have endured for so long because they offer a way to present complex information in a clean and structured way, which is optimal for how humans process information.”).

36. This vision of a neutral and apolitical judiciary was famously illustrated

Justice Brandeis once famously observed, “[I]n most matters it is more important that [the question] be settled than that it be decided right.”³⁷

Much of law school is therefore devoted to helping students perfect these rule-based reasoning skills, to making their arguments at least sound like syllogisms, even if they do not have the same power true syllogisms do.³⁸ The Introduction-Rule-Application-Conclusion, or IRAC, structure of legal argument mimics the syllogism and is the most commonly used way to present legal analysis taught in the first year.³⁹ Much of the Socratic case-dialogue method used in the first-year classes also trains students in rule-based reasoning. Professors and students spend time in class debating rules, abstracting out from specific facts, and determining if the facts fit inside or outside the categories established by the rule (e.g., sandwich or not-sandwich).⁴⁰

Rule-based reasoning is thus a core legal analysis skill, but it alone does not solve every legal question. Rules sometimes conflict, and it is not at all obvious which rule should control a given

by now-Chief Justice John Roberts’s statement at his confirmation hearing: “I have no agenda . . . and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.” *Chief Justice John Roberts Statement—Nomination Process*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [https://perma.cc/E2Z5-VEQP].

37. See SCHAUER, *supra* note 25, at 43 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

38. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 39 (1990) (noting that judges and lawyers “try hard to make [their] reasoning seem as syllogistic as possible”).

39. See Jewel, *supra* note 33, at 59 (calling the IRAC template “nearly universal”); Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report’s Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192, 193 (2009) (“The IRAC framework is the generally accepted way of representing legal analysis.”); Laura P. Graham, *Why-RAC? Revisiting the Traditional Paradigm for Writing About Legal Analysis*, 63 KAN. L. REV. 681, 715 (2015) (noting the “firm entrenchment of IRAC in legal writing pedagogy”); Leslie Patrice Culver, *(Un)Wicked Analytical Frameworks and the Cry for Identity*, 21 NEV. L.J. 655, 670 (2021) (“IRAC’s hallmark feature is arguably the almost scientific method-type model of drafting legal analysis.”).

40. See Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 508 (2007) (“[O]nce trained, law students can pick up almost any situation you bring to them and translate it into legal categories in the same way their professors do.”).

case.⁴¹ Or a rule is ambiguous and its application to a given set of facts is not clear.⁴² Or application of a rule would lead to a grievous wrong or an absurd outcome, and the rule may give way to a broader principle.⁴³ To solve these harder cases, law students often turn to analogical reasoning.

B. ANALOGICAL REASONING

Where a rule alone does not answer a question, analogical reasoning can step in to pair the factual situation with a precedent case. If the similarities are significant enough, then the cases should be decided in the same way. Rule-based reasoning uses legal rules to constrain decision-makers and ensure that all comers are treated alike; analogical reasoning uses similarities to precedent to do the same.

This kind of formal reasoning is unique to the law—some have called it the hallmark of what makes legal reasoning distinct from other forms of reasoning⁴⁴—but it is also characteristic of much of our informal thought processes. If a burrito has a particular shape, a wrap likely does, too, because both foodstuffs use tortillas as their exterior.

This kind of reasoning has a simple structure:

- A has characteristic Y;
- B has characteristic Y;
- A also has characteristic Z;
- Because both A and B have Y, B probably also shares characteristic Z.⁴⁵

41. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) (discussing some of the difficulties in determining whether a rule applies to a case).

42. See, e.g., SCHAUER, *supra* note 25, at 20 (“[R]ules have debatable fringes where there are good arguments on both sides of the question . . .”).

43. See, e.g., *id.* at 29 (describing the tension between the need to adhere to the letter of the law and the need for the law to give way to larger principles and arguing that “it is impossible to conclude . . . that one approach is more dominant than the other”).

44. See, e.g., LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 4 (2005).

45. See RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 93–94 (3d ed. 1997).

For our burrito example, the analogy would be:

- A burrito uses a tortilla;
- A wrap also uses a tortilla;
- A burrito rolls up its fillings;
- Because both burritos and wraps use tortillas, a wrap also rolls up its fillings.

It is easy to see how this process leads to results that are consistent with precedent. It is also easy to see how quickly this form of reasoning can go awry. In our burrito example, for instance, a faulty analogy could be:

- A burrito uses a tortilla;
- A wrap also uses a tortilla;
- Burritos originated in Mexico;
- Because both a burrito and a wrap use a tortilla, a wrap also originates from Mexico.

But tortillas and place of origin are not related; wraps were instead birthed in California. Just because two facts align does not mean that all facts align, and since the analogy above relied on a shared, irrelevant fact (the tortilla) to predict place of origin, the analogy produces an incorrect result. So too in legal analogies. As H.L.A. Hart said, “[U]ntil it is established what resemblances and differences are relevant, ‘Treat like cases alike’ must remain an empty form. To fill it, we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.”⁴⁶

Much of the first year of law school is devoted to filling in this “empty form,” making arguments for or against similarities between cases.⁴⁷ Law professors often use hypotheticals to develop a student’s analogical reasoning skills, proposing new factual scenarios and asking students to use the precedents they’ve read to predict the result in the new situation.⁴⁸ This work requires students to see the similarities and differences between the precedent and the new facts, and asks them to judge whether

46. H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961).

47. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) (noting that analogical reasoning “dominates the first year of law school”).

48. Aldisert et al., *supra* note 33, at 16.

the similarities outweigh the differences and why.⁴⁹ In this way, law schools train students to deploy analogies in argument and use them to answer legal questions not amenable to the syllogism.⁵⁰

II. CRITIQUES OF LEGAL ANALYSIS PEDAGOGY

While this work is necessary—any young lawyer must know how to use and apply legal rules or construct an effective analogy—it also comes with costs. First, this training implicitly presents a view of legal decision-making as rational and objective, rather than suffused with values and personal or political preferences. Second, it freezes students’ imaginations about how to solve problems by indoctrinating them in the way things are rather than helping them imagine the way things could be. Third, it sidelines considerations about justice or morality. Fourth, it provides little, if any, training for students to pursue fundamental change or achieve a more just world.

A. THE RATIONALITY AND NEUTRALITY PROBLEM

The traditional method of legal analysis, the case method—meaning studying cases to derive rules and apply them to new sets of facts—was birthed by Christopher Columbus Langdell at Harvard Law School in the 1870s.⁵¹ The goal of the pedagogy was to approach law as a “science,” which, at that time, meant

49. *Id.* at 18 (“A proper analogy should identify the respects in which the compared cases, or fact scenarios, resemble one another and the respects in which they differ. What matters is relevancy—whether the compared traits resemble, or differ from, one another in relevant respects.”); *see also, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 31 (1985) (“The third step for analogical reasoning is determining whether the factual similarities or the differences between the two situations are more important under the circumstances.”); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949) (describing the basic pattern of legal reasoning as a “reasoning from case to case”).

50. Aldisert et al., *supra* note 33, at 20.

51. *E.g.*, Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518–20, 526–27 (1991). Although there is some disagreement as to whether Langdell was the first to use the case method, he did the most to popularize it and make it the default law school pedagogy we see today. *Id.* at 520–22.

“developing a taxonomy for things and then applying that system to generate new knowledge about the world.”⁵² Langdell envisioned law as composed of limited, general principles, which could be discovered through close examination of appellate opinions and arrangement of those cases’ holdings.⁵³ The law school classroom, where Socratic dialogue about the cases took place, was akin to a chemistry student’s lab classes, the place where students would undertake this discovery for themselves.⁵⁴ Once discovered, those principles could then be applied syllogistically to resolve any legal question.⁵⁵

This concept that law was a science, that it was a neutral, logical, and apolitical force, was almost immediately lambasted as untrue and woefully out of touch with reality. Oliver Wendell Holmes, Jr. took a pickaxe to the wall of logic early on, noting in 1897 that “the danger . . . [is] the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”⁵⁶ Judges who are performing the logic ritual “leave the very ground and foundation of judgments inarticulate,” making decisions seem based in “logic” when they were actually grounded in something else altogether.⁵⁷

The scholars from the American Legal Realism school who followed in Holmes’s footsteps gave even more granularity to this

52. Jewel, *supra* note 33, at 47; see also Weaver, *supra* note 51, at 528–29 (quoting CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871)) (“Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.”).

53. See Nancy Cook, *Law as Science: Revisiting Langdell’s Paradigm in the 21st Century*, 88 N.D. L. REV. 21, 30–31 (2012).

54. See *id.* at 31–32.

55. See, e.g., Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983) (“When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.”).

56. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

57. *Id.* at 467; see also Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master’s Tools*, 13 CONN. PUB. INT. L.J. 43, 45–46 (2013) (“What we mean by ‘law’ is not a matter of some seemingly preordained logical structure—this one or any other. Rather, it is a matter of human choice, and as with all matters of human choice, it is driven by contested values, frames, power, and politics.”).

critique, showing exactly how legal analysis was suffused with the opportunity for morality, politics, bias, or other non-law justifications to become “the ground and foundation of judgments.”⁵⁸ While Realists obviously differed significantly in their specific interests, arguments, and conclusions, most of them questioned whether abstract principles could decide cases and showed that precedent often did not provide specific rules that could govern other fact situations.⁵⁹

The Realists provided three different bases for this claim that rules and precedents do not decide cases. First, many rules were simply too vague to be outcome-determinative.⁶⁰ Second, because rules were so general, decision-makers had to turn to other sources, such as analogies, dictionaries, or other persuasive authorities, to reach a decision, and they were free to pick whichever source best suited their outcome.⁶¹ And third, because rules and precedents could not determine outcomes, opinions

58. Holmes, *supra* note 56; see also Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009) (“Realism refers to an awareness of the flaws, limitations, and openness of law—an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases.”).

59. See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 469–70 (1988) (laying out multiple reasons why legal rules often fail to be applicable to other cases); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (noting that one of the common points of departure for Realists is “a distrust of the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions”). For a particularly potent example of this critique of legal argument, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (“The law is not a science but a practical activity.”).

60. Singer, *supra* note 59, at 470; see also Llewellyn, *supra* note 59 (describing a shared Realist “belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past”); Cohen, *supra* note 59, at 823 (“Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow.”).

61. See Singer, *supra* note 59, at 470; see also John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 23 (1924) (“[W]e generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.”); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, in AMERICAN LEGAL REALISM 195, 196 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (arguing that as judges reach their conclusions “several categories struggle in their minds for the privilege of framing the situation before them”).

that seemed to be doing the work of applying law to facts to reach conclusions were instead providing window-dressing for decisions reached on some unspoken grounds.⁶²

The is-a-burrito-a-sandwich case mentioned above illustrates each of these critiques in a rules-based reasoning context. First, the overarching rule of that case—that the unambiguous terms of a contract must be read in their ordinary, usual sense—constrains the judge somewhat, but it does little work in answering the specific burrito question. For instance, nearly all would agree that calling an airplane a “sandwich” falls outside the term’s ordinary, usual sense. But in any relatively hard case, a case in which there is more than one plausible argument, “ordinary, usual sense” provides no answer. Fiery online debates have erupted over whether a hot dog is a sandwich, with different individuals finding different criteria (bread, filling, history, context, legal rules, gut feeling) to be determinative.⁶³ Likewise, logic provides us with no way to determine whether a burrito qualifies as a sandwich in the “ordinary, usual” sense. The rule itself does not definitively answer the question one way or the other and leaves the space for the judge’s instincts, his gut sense about what is a sandwich and what is not, to determine the outcome.

In filling in this gap between rule and conclusion, the judge turns to a dictionary definition of sandwich as requiring two thin pieces of bread, with a thin layer spread between them.⁶⁴ But here he runs afoul of the Realist’s second critique, the choice-of-justification critique. The judge gives no reason for the definition he chose and acknowledges that the parties to the case had submitted many different definitions and “expert affidavits.”⁶⁵

Even more disturbingly, the dictionary the judge uses contains an alternate definition that is a far more expansive understanding of sandwich: “food consisting of a filling placed upon one slice or between two or more slices of a variety of bread or

62. See Singer, *supra* note 59, at 470; see also Cohen, *supra* note 59 (“[T]he traditional language of argument and opinion neither explains nor justifies court decisions.”); Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907, 910 (1933) (“[A]n opinion is not a decision.”).

63. See, e.g., Kelly Vaughan, *Is a Hot Dog a Sandwich?: The Food52 Editorial Team Weighs In*, FOOD 52 (July 2, 2021), <https://food52.com/blog/26365-are-hot-dogs-sandwiches> [<https://perma.cc/9Z9S-KPPK>].

64. *White City Shopping Ctr., LP v. PR Rests., LLC*, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Super. Ct. Oct. 31, 2006).

65. *Id.* at *3 n.3.

something that takes the place of bread.”⁶⁶ That second definition—Merriam-Webster’s 1.b paired with the 1.a of “two slices of bread usually buttered with a thin layer . . . spread between them”⁶⁷—easily could encompass a burrito, which consists of filling placed upon one slice of something bread-like, i.e., a tortilla. But even if the judge ultimately found that this definition, too, excluded burritos, it is a far closer question, and the judge, in his opinion, gives no indication that this alternate, potentially applicable definition exists.

The *White City* opinion also demonstrates the third Realist critique, that opinions do not capture the full grounds for decisions. The judge supports the exclusion of burritos from the category of sandwich not just with the dictionary definition, but also fills the gap between the “ordinary and usual” meaning rule and its conclusion with “common sense.”⁶⁸ Relying on such an intuitive leap, with the judge more or less announcing that it’s his gut feeling that burritos are not sandwiches, supports the conclusion that the overall rule, and even the dictionary definition, are not driving the result. Instead, the judge’s intuition about burritos as not-sandwiches likely came first, followed by the legal justifications for that decision. But the opinion makes it seem as though the outcome is based on the “usual meaning” of sandwich applied logically and neutrally to the facts of the case.

This use of common sense as a justification for the decision raises thorny questions about the role of bias in the outcome. The question of whether burritos are sandwiches is one tinged with ethnicity, with sandwiches perceived as being either “European” or neutral and burritos classed as “Mexican.”⁶⁹ Resorting to “common sense” in such a case invites bias into the decision, but covers it with the sheen of logic and neutrality.

Finally, considering a hypothetical new is-this-a-sandwich case reveals that the boundaries of analogical reasoning are nearly as fluid as those of rule-based reasoning. Assume that a new store wants to open at White City Shopping Center, and this store sells wraps. A new judge looks to the *White City* case to

66. *Sandwich*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2002).

67. *Id.*

68. *White City*, 2006 WL 3292641, at *3.

69. Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1, 9 (2008) (arguing that burritos are perceived as Mexican, while sandwiches are perceived as race-neutral).

assess whether the contract term “sandwiches” includes wraps. Is a wrap so similar to a burrito that it, too, is a not-sandwich?

The analogy could proceed like this: A burrito uses a tortilla as its exterior. A wrap does, too. Therefore, these two items are alike in this important way and should be treated the same.

Or it could go like this: A burrito has neither the exterior nor the interior of a traditional sandwich because it has neither bread nor traditional “sandwich” fillings. But a wrap uses traditional “sandwich” fillings like turkey, ham, and cheese. Therefore, burritos and wraps are so different that they should not be treated alike.

There is no principled way to decide between these two approaches. A judge would likely rely on his gut instinct as to which analogy is more compelling. But then he is relying on a value judgment, a bias, something other than just “the law” in reaching the outcome, all while camouflaging the decision as the necessary product of the analogy.

The *White City* case provides just one example of the perils of formalism, but much of the legal analysis students consume and produce in their first year of law school—whether in opinions, briefs, as part of the classroom conversation, or on exams—contains the same rhetorical feints.⁷⁰ Yet this work is rarely accompanied by a sustained, consistent Realist lens. Socratic discussion may occasionally reveal a rule’s indeterminacies, divert into policy analysis, or explore critiques of the judge’s reasoning, but these conversations tend to float around the edges of the “legal” work being done.⁷¹ Students are assessed on their mastery of doctrine and legal analysis, their ability to derive rules and apply them, to explain why the rules lead to an outcome, to draw similarities and differences between cases. They usually earn few points on exams for their Realist insights into where the

70. As Sherri Keene and I have argued elsewhere, the neutrality myth is also perpetuated by students’ first-year diet of reading judicial opinions, which themselves are fundamentally grounded in rule-based and analogical reasoning. See Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 75–76 (2022); see also WEST, *supra* note 6, at 184 (“If a school’s required curriculum reflects its views of what a lawyer is or should be, then our required [1L] curriculum, with its focus on the common law and appellate opinions, and its juriscentric orientation, suggests nothing so much as a continuing loyalty to Langdellian jurisprudence . . .”).

71. See MERTZ, *supra* note 5.

gaps in the law are, or the different methods judges have to fill them.⁷²

As Elizabeth Mertz noted in her groundbreaking study of law school classrooms, once students are trained in these modes of legal analysis, they devour everything: “[t]here is no event, no corner of society, it seems, that cannot be translated into legal categories.”⁷³ Yet the method of reasoning itself remains closed to critique: “[d]iscerning the limits of this translation . . . is quite difficult from within this incredibly catholic, almost omnivorous system.”⁷⁴ Pair a closed system with a lack of training in constant questioning of the system and the result is a faith in the capacity of legal analysis to answer all questions neutrally, fairly, and definitively.

Moreover, the American legal culture in which many students are steeped even before they come to law school clings to a vision of judging as a neutral, objective process, nothing more than calling “balls and strikes.”⁷⁵ Judges have a vested interest in presenting the system this way in their opinions, as much of the legitimacy of their decisions rests on the fiction that those decisions are the product of logic, not politics or values or breakfast-meals.⁷⁶ Yet a law student’s first-year classes often do little to disabuse her of this notion, and instead implicitly reinforce it.

B. THE FROZEN IMAGINATION PROBLEM

Not only does this legal reasoning training place a veneer of logical neutrality on a system filled with moral, political, and policy-based choices, but it also tends to deaden a student’s imagination as to what is possible. The continuous practice of legal analysis, of identifying and applying rules, of determining the boundaries of likeness between cases, gives a legitimacy to the

72. See SCHAUER, *supra* note 25, at 145 (“[A]ny student who thinks that a strong Realist perspective will be rewarded on law school examinations is in for a nasty shock.”).

73. Mertz, *supra* note 40, at 507.

74. *Id.* at 508.

75. See *supra* note 36 and accompanying text.

76. See *supra* note 36 and accompanying text; cf. William W. Fisher III, Morton J. Horwitz & Thomas A. Reed, *Introduction to AMERICAN LEGAL REALISM*, *supra* note 61, at xiv (“The Realist credo is often caricatured as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast . . . [b]ut most of their writings on the character of adjudication and on other issues were vastly more sophisticated . . .”).

existing legal ordering of the world that drowns out alternatives.⁷⁷ Students become mired in the technicalities of legal categories rather than considering a wholesale shift in foundational legal principles.

Without pairing the rituals of legal reasoning with a sustained critique of that process, students develop a sense that things are the way they are and a fear that to change them may just make it all worse.⁷⁸ Moreover, this work, day in and day out, helps to structure students' perceptions of reality "so as to systematically exclude or repress alternate visions of social life, both as it is and as it might be."⁷⁹

To the Langdellians, this was a feature, not a bug. Students were inculcated in a closed system that provided legal answers in an objective, just way, as the sciences did. The job of a lawyer was to master that system, operate within it, and learn how to uncover the general principles that led to answers.⁸⁰ The job of a lawyer was not to disrupt that system or question the results it reached.

The Realists also generally did not see the system itself as problematic; instead, they revealed its open-endedness and looked for some more systematic way to predict how decision-makers reach conclusions.⁸¹ Thus, while the Realists critiqued legal analysis as indeterminate, their solution for this was not to dismantle legal reasoning altogether, but to reorient it away from neutrality and objectivity towards a tool expressly aimed at improving society.⁸²

77. Gordon, *supra* note 11, at 198 ("[A] central tenet of [Critical Legal Studies] work has been that the ordinary discourses of law . . . all *contribute* to cementing this feeling, at once despairing and complacent, that things must be the way they are . . .").

78. *Id.*

79. *Id.* at 200; *see also* Berenguer et al., *supra* note 14, at 219 (noting that, after their law school training, students feel as though "[t]he notion that law *can* be questioned seems radical, foreign, and wrong").

80. *See* WEST, *supra* note 6, at 30.

81. *See* Llewellyn, *supra* note 59, at 1242 ("Close study of particular unpredictables may lessen unpredictability. It may increase the value of what remains. It certainly makes clearer what the present situation is."); Tamanaha, *supra* note 58, at 767 ("[T]heir position is easily misunderstood if their target is not kept in mind: they were attacking the notion that judging merely entailed the logical application of legal rules and principles. Their refutation of this view . . . did not mean that they embraced its polar opposite, the notion that legal rules and principles do not have a significant role in judges' decisions.").

82. *See, e.g.*, Eugene V. Rostow, *American Legal Realism and the Sense of*

The Critical Legal Studies, or CLS, movement questioned the effect of using legal reasoning at all.⁸³ In the CLS view, legal reasoning reified the existing order and contributed to a feeling “at once despairing and complacent” that things are the way they are and cannot be changed.⁸⁴ Legal discourse itself “constantly, subtly, almost unconsciously, keeps privileging one possible set of regulatory policies—one view of the world—as natural, normal, rational, free, efficient, and *usually* OK and just.”⁸⁵

The *White City* case once again illustrates the problem. The judge in that case turned to general contract principles in resolving the burrito problem.⁸⁶ The term “sandwich” was unambiguous and thus could be given its “ordinary meaning.”⁸⁷ That “ordinary meaning” required a foodstuff with two *thin* pieces of bread, *usually buttered* (!), with a *thin* savory mixture between them.⁸⁸

the Profession, 34 ROCKY MTN. L. REV. 123, 131 (1962) (“What they were trying to achieve was an awareness of the relationship between rules and policy, viewing law as an instrument for social action in a ‘society constantly in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve.”); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 487 (1924) (“This view does not lead to the discarding of all principles and rules, but quite the contrary. It demands them as tools with which to work . . .”).

83. Wetlaufer, *supra* note 6, at 53 (noting that most CLS theorists believed that reification of legal concepts like rights and property “cause us to take them for granted and see them as ‘natural’ and ‘given’”); *see also* Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991) (“[CLS scholars] saw law as a form of human activity in which political conflicts were worked out in ways that contributed to the stability of the social order (‘legitimation’) in part by constituting personality and social institutions in ways that came to seem natural.”). Of course, these were not the only beliefs held by the CLS school of thought. As Mark Tushnet put it, most CLS scholars believed “three propositions about law: that it is in some interesting sense indeterminate; that it can be understood in some interesting way by paying attention to the context in which legal decisions are made; and that in some interesting sense law is politics.” *Id.* at 1518.

84. Gordon, *supra* note 11, at 198; *see also* Peter Gabel, *Reification in Legal Reasoning*, 3 RSCH. L. & SOCIO. 25, 25 (1980) (“Legal reasoning is an inherently repressive form of interpretive thought which limits our comprehension of the social world and its possibilities.”).

85. Gordon, *supra* note 11.

86. *See supra* note 31 and accompanying text.

87. *White City Shopping Ctr., LP v. PR Rests., LLC*, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Super. Ct. Oct. 31, 2006).

88. *Id.*

The judge did not look beneath the hood of this somewhat-bizarre sandwich definition and assess whether it actually matched the common understanding of “sandwich.” Few people I know like their turkey sandwiches with butter, or prefer thin slices of bread to thick ones, or like a measly, thin filling over a sandwich overflowing with lunchmeats and toppings.

But students often accept problematic rules such as the sandwich definition without question because the focus of their training is on identifying, synthesizing, and applying rules, not imagining alternatives to those rules. I’ve used this case as an introduction to rule-based and analogical reasoning for many years, and often I, too, simply ignored the underbelly of the sandwich definition, instead asking students to identify the meaning of sandwich held out by the case and apply it to new sandwich hypotheticals.

One year, I began to ask students whether this was a “good” sandwich rule, and what a better sandwich rule might be. I was met with blank stares. A student raised his hand and asked, “Why does that matter?” At this point in their first year of legal education, after only a few weeks of class, the question of whether a rule is good or bad seemed irrelevant; asking them to think of alternatives that better captured their notions of “sandwich” was well outside the usual classroom discourse. Students had been steeped in the process of legal analysis, which rewards repetition and application of old ideas, rather than the invention of new ones.

This was the classroom manifestation of the critique made by critical scholars, that going through the process of legal analysis makes what *is* seem inevitable and correct, even if it is hugely problematic, and that sense of inevitability and correctness makes it difficult to see the flaws or imagine an alternate regime. Instead, the work of legal analysis tends to “replicate pre-existing ideas, thoughts, and approaches” rather than interrogate those ideas or imagine novel ones.⁸⁹

89. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 217 (1989). Delgado and Stefancic placed blame for this tendency on the channeling effect of current legal categorization schemes in legal research but acknowledged that it is the substance of the law itself that is also hemming in legal argument: “[p]reexisting legal thought thus replicates itself.” *Id.* at 222.

C. THE JUSTICE PROBLEM

The invisibility of alternatives—the freezing-the-imagination problem—has a particularly nasty side effect: it can make existing power imbalances, bias, or injustice embedded within the law invisible.⁹⁰ Students trained in putting facts in this legal category or that, sandwich or not, contract breach or not, are rarely asked to assess the rule’s normative value.⁹¹ What are the values embedded in this rule? Whom does it advantage? Whom does it disadvantage? Is that the right call? Why?

Without that assessment, students rarely see how the latticework of legal rules can incorporate injustice and bias in hidden ways.⁹² They also fail to see the law as a power-distributing mechanism. This is a problem; every law gives power to some parties and takes it away from others, and those power dynamics often advantage the already-powerful and harm the already-marginalized.⁹³

To CLS and other critical theorists, such as critical race and feminist legal scholars and law and political economy scholars, it is not just the emptiness of the legal form, the fact that rules do not lead inextricably to conclusions, that is a problem. It is also that even the rules we do have, the limits we have placed on the enterprise of legal argument, contain within them the seeds of support for the powerful classes.⁹⁴ In this view, rules and precedents do little more than “translate[] into legal categories the

90. See Jewel, *supra* note 33, at 49–50 (“The invisibility of [legal] infrastructure can obscure the fact that categories can valorize one point of view but silence another.”).

91. See Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 367 (2015) (“We are not practiced in engaging theories of justice, the politics of law, or lawmaking beyond the courts, and we do not give students—or, arguably, ourselves—the space to express full moral agency. We must exercise our capacity for justice-based inquiries, and generate space for students to cultivate this more creative capacity.”).

92. See *supra* Part II.A.

93. See, e.g., Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353, 355 (1992) (“Legal questions, no matter how technical, are really about giving benefits to some people or taking them away from others.”).

94. See, e.g., Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 901 (“From the perspective of critical race theory, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of this, not accidentally. Conversely, the law simultaneously and systematically privileges subjects who are white.”); Harris & Varellas, *supra* note 4, at 10 (describing two claims that

abiding structure of ordinary political and economic activity.”⁹⁵ Thus, not only was legal reasoning a fig leaf for moral or political decision-making, but the rules themselves, such as they were, operated to calcify pre-existing power structures, to cement understandings of the world and society in ways that make them seem unquestionable and beyond public scrutiny.⁹⁶ Such rules put a thumb on the scale for the already-powerful by, for example, privileging “freedom of contract” principles for the enforcement of contracts with burdensome, exploitative terms for employees.⁹⁷

The analysis in *White City* again provides an example of using the formal structure of legal reasoning to elide these questions and hide these assumptions. The judge in that case accepted the rules handed down to him from precedents and the dictionary.⁹⁸ He did not question the values embedded in these rules or ask whom the rules advantaged. He did not see the potential bias lurking in a dictionary definition that promoted a Western-centric vision of what a sandwich consists of.⁹⁹

Instead, the judge noted that the dictionary and common sense had led him to the inevitable conclusion that burritos are

are central to the Law and Political Economy project: (1) “law is central to the creation and maintenance of structural inequalities in the state and the market,” and (2) “class’ power is inextricably connected to the development of racial and gender hierarchies, as well as to other systems of unequal power and privilege”) (emphasis omitted).

95. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 573 (1983).

96. David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 249 (1984) (“[The law] supposedly requires certain results that are beyond human questioning and not done by any human agency. In this way, [it] legitimates the removal of many crucial social issues from public involvement or scrutiny”); Wetlaufer, *supra* note 6, at 55 (“[P]roponents of contemporary critical theory seek to demonstrate the constructedness and the contingency of those settled understandings that hold in place, or perhaps that simply *are*, the existing order.”).

97. Gordon, *supra* note 11, at 199 (noting that legal rules tend to “express the interests and the perspectives of the powerful people who use them”). CLS theorists made similar points for other doctrinal areas. For example, David Kairys argued that courts could adopt a lien theory to impose costs on a corporation that moved a manufacturing plant, but choose not to. Kairys, *supra* note 96, at 259 (“[Courts] refuse to [adopt the lien theory] because of the existing social context, because of power relationships in society, and because of the way people think about the world.”).

98. *White City Shopping Ctr., LP v. PR Rests., LLC*, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Super. Ct. Oct. 31, 2006).

99. See *supra* note 69 and accompanying text.

not sandwiches.¹⁰⁰ Judging by public commentary, most people agreed.¹⁰¹ And yet, this unexamined assumption promoted the understanding of the dominant group and “eviscerate[d] the experience of many.”¹⁰²

While it may seem silly to focus on the bias or “injustice” inherent in a sandwich decision, the uncritical process used in that case reflects the same legal analysis mode that often sidelines questions of bias or justice.¹⁰³ Laws that appear neutral on their face often have disproportionate impacts on marginalized communities, a truism revealed by the pandemic.¹⁰⁴ As Dorothy Brown wrote in her introduction to an *Emory Law Journal* special issue on systemic racism: “[The] pandemic . . . revealed the structural racism present in virtually every area of our lives: who could work from home; who was an essential worker; who had access to the Paycheck Protection Program; who had to depend on public transportation; who was subject to stricter enforcement of mask restrictions; and more recently, which Americans were getting access to the vaccine.”¹⁰⁵

Once-in-a-generation events like the pandemic can reveal these structural fault lines. But pandemics fade, normalcy returns, and legal discourse can again become an opium of the lawyer-class.¹⁰⁶ To make the injustice and bias embedded in law visible, that discourse must be interrogated, early and often.

100. *White City*, 2006 WL 3292641, at *3.

101. Florestal, *supra* note 69, at 35.

102. *Id.* at 58.

103. See, e.g., WEST, *supra* note 6, at 63 (“[A]ll of this privatization of justice—[such as] the movement in contract away from equitable constraints on terms . . . takes a toll, in the academy: if justice is not a constraint on the substance of law, and if law schools exist to teach law, then it is no surprise that justice plays a diminished role in the classroom . . .”).

104. See generally, e.g., DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2021) (revealing the ways tax and retirement laws disadvantage communities of color); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1424 (2016) (revealing how criminal laws are designed to target Black and Brown individuals; “it is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law”).

105. Dorothy A. Brown, Introduction, *Special Issue: Systemic Racism in the Law & Anti-Racist Solutions*, 70 EMORY L.J. 1413, 1413–14 (2021).

106. Cf. Karl Marx, *Contribution to the Critique of Hegel’s Philosophy of Law: Introduction* to 3 KARL MARX AND FREDERICK ENGELS: COLLECTED WORKS (MARX AND ENGELS: 1843–44), at 175 (Lawrence & Wishart 1975) (“[Religion] is the *opium* of the people.”); ERNEST HEMINGWAY, *The Gambler, the*

D. THE CREATIVE MUSCLE ATROPHY PROBLEM

Even if a student has enough of a critical bent to see the assumptions and injustices buried in the rules, is enough of a cynic to not be swayed by romantic notions of law as being a rational and objective path to conclusions, and is enough of an idealist to hold on to a vision of what a more just, fairer society would look like, law school pedagogy places yet one more stumbling block in her way: it trains her to look to the past, to marry her arguments with things that have come before, but does not develop her skills as a change agent. In other words, legal analysis pedagogy is, at its heart, deeply conservative and reinforces the status quo, and students are rarely taught how to instead make deep, radical, creative change of the kind today's world seems to require. The last three critiques focused on how law schools often do not train students to see the flaws in the law as it exists. This critique instead shows how law schools fail to arm students with the skills to make law better; it does not strengthen their creative muscles.

In large part, this blind spot in legal training is because the two basic legal reasoning strategies taught and tested in the first year—rules-based reasoning and analogical reasoning—are consistently backward-looking. The resolution to a problem depends not on a theory of justice, economics, or societal well-being; the first, and often only, question, is what have past decision-makers (judges, legislators, etc.) told us about what to do now?

This marriage of solving current problems by tying them to past resolutions of different problems (e.g., treat like cases alike) is unique to law.¹⁰⁷ Science, for example, consistently questions its past findings and, through the scientific process, tests and retests hypotheses to determine whether they are still accurate. Law, usually, does nothing of the sort. The core of an effective legal argument is tying this result to an established rule or past result. It is enough to say that this case should be decided in favor of the plaintiff because this similar case was decided in favor of the plaintiff.¹⁰⁸ Law schools are thus incentivized to teach

Nun, and the Radio, in THE SNOWS OF KILIMANJARO AND OTHER STORIES (1961) (“Revolution, Mr. Frazer thought, is no opium. Revolution is a catharsis The opiums are for before and after.”).

107. *E.g.*, SCHAUER, *supra* note 25, at 36 (“Unlike most forms of policy-making, . . . legal decision-making is preoccupied with looking over its shoulder.”).

108. *See* WEST, *supra* note 6, at 86 (“The tendency is strong to cast arguments regarding what [the] law should be in terms of what [the] law already is,

students in this way, to train practice-ready lawyers who can make arguments that sound “legal,” that are grounded in legal authorities and closely tied to law-as-it-is rather than law as-it-should-be.¹⁰⁹

But this consistent nod to the law as-it-is atrophies students’ abilities to argue for law as-it-should-be, especially when the strategies for achieving law as-it-should-be may be radically different from maintaining law as it exists.¹¹⁰ For instance, a law class focused on the *White City* case would usually pull out general contract principles, the sandwich definition, and the holding that a burrito was not a sandwich, then use a series of hypotheticals—hot dogs, wraps, open-faced sandwiches, etc.—to show how the rule might be applied to different circumstances.¹¹¹ It could point out some failings of the sandwich definition and use policy arguments to show how the rule shouldn’t apply in different scenarios.¹¹² It might even ask students what a new, better sandwich rule would look like.

But law school rarely gives students training in tactics for bringing that new rule into being. It generally doesn’t give students tools for breaking free from old categories and modes of thought.¹¹³ It doesn’t give students practice in making novel arguments to courts, perhaps using sources outside of traditional

not only because that is more comfortable terrain professionally and even perhaps emotionally, but also because it is closer to the form of appellate brief writing that is still the prototype of legal argumentation.”); see also POSNER, *supra* note 38, at 86–89 (noting reasoning by analogy is at the heart of legal reasoning, but arguing “the fact that ten cases have been decided one way does not prove the next case, which is bound not to be identical in every respect to any of the previous ones, should be decided the same way too”).

109. See WEST, *supra* note 6, at 86.

110. See Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021), <https://inquest.org/making-penal-bureaucrats> [<https://perma.cc/3SPG-2WBK>] (“[L]egal education is unlikely to provide students with the kind of social justice-oriented training that some are demanding.”).

111. See Kairys, *supra* note 96, at 243–44 (describing two branches of legal reasoning as taught in law schools: “Doctrinal analysis is supposedly the ‘hard stuff’ of logically analyzing rules and principles and arriving at a required, particular result. When those rules or principles do not lead to a particular result, courts, lawyers, and law teachers resort to policy analysis to fill the void.”).

112. See *id.*

113. See Delgado & Stefancic, *supra* note 89, at 225 (describing the legal indexing system taught in law school research classes as a barrier to legal transformation that encourages “an unconscious self-censorship of the mind that is difficult to elude, indeed even to recognize”); Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 423 (2021) (“[T]hinking like a lawyer’

legal authority.¹¹⁴ It doesn't ask students to explore the limits of what courts can do or think through how to solve problems by turning to legislative, regulatory, or grassroots solutions instead.¹¹⁵ Which is not to say it is never done—clinical education, in particular, has done creative work in helping students bring a critical lens into their skill sets.¹¹⁶ But it is work that is rarely performed, and almost never assessed, in the first year, when students are developing their understanding of what legal reasoning is and how they should use it.¹¹⁷

By training students in this way, law schools are implicitly telling them to respect the boundaries, to prioritize consistency

is often *not* understood as a cultural form of thinking that can rest on unproven assumptions, has its own biases, and in some instances, disregards other forms of reasoning and information that might help resolve legal problems.”)

114. See Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 107 (2018) (noting that the predominance of a hierarchy model for legal authority misrepresents how optional authority is used by legal authors and “particularly disadvantages law students, law clerks, and other new lawyers, leaving them to discover on their own how to use authority in practice”).

115. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 600 (2007) (“When what is at issue is whether an appellate bench correctly decided a case, or how its decision fits into the general fabric of appellate decisions, self-evidently we have already decided that the paradigmatic institutional setting for thinking about a legal problem is the appellate court.”); see also Lawrence, *supra* note 16, at 2243 (describing a pedagogical approach that encouraged students to “find a way to . . . think more expansively about what it means to be a civil rights lawyer. It was fairly obvious that if the courts were becoming less receptive to legal arguments that advanced the cause of civil rights, we should look for other venues in which to press our case”).

116. See Goldfarb, *supra* note 16, at 720 (“[C]linical education helps to establish conditions essential for understanding and reforming legal practice and the legal system.”); Laila L. Hlass & Lindsay M. Harris, *Critical Interviewing*, 2021 UTAH L. REV. 683, 684 (describing the pedagogy of “critical interviewing,” which uses “an intersectional lens to collaborate with clients, communities, interviewing partners, and interpreters, with an eye toward interrogating privilege differentials in these relationships and accounting for existing historical and structural biases”); Wendy A. Bach & Sameer M. Ashar, *Critical Theory and Clinical Stance*, 26 CLINICAL L. REV. 81, 92 (2019) (“[A clinician’s] job, most days, is to act and to react. So we wield theory when it is accurate and we revise it when it is not, but in either case we wield it for our clients and for ourselves.”); Norrinda Brown Hayat, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 CLINICAL L. REV. 149, 158–59 (2021) (describing how to use tenets of critical race theory in clinical pedagogy “to help our students better understand how race operates in the law”).

117. See *supra* Part I (discussing foundational legal reasoning skills taught as part of the 1L curriculum).

within doctrine, to learn how to preserve the status quo. Students are not trained in making arguments that push the limits of the law, that incorporate different methods and different worldviews, that ask different questions than those allowed for by the law as it exists.

III. LEGAL ANALYSIS TEACHING AS IT COULD BE

Let's return for a moment to our first-year law student. She has enrolled in a different law school, one that has taken these critiques seriously and shifted its first-year curriculum in an explicit attempt to incubate a change agent mindset in its students. Duncan Kennedy called for such a curriculum, arguing that "[w]hat is needed is to think about law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing."¹¹⁸ What might such a curriculum look like?

Two different visions for reform have emerged in response. The first disrupts. This approach adopts an outsider's stance and interrogates law and legal discourse as it exists. It asks students to question the law, question the systems, and see where things need mending. It is the type of practice that stands outside the courthouse doors, protesting that the procedure is a farce, that we need radical change to ever achieve justice.¹¹⁹

The second approach creates. This skills-based teaching trains students in using the tools of legal analysis to bring change about. This is the practice that stands inside the courthouse and argues for an outcome based on principles of equality and justice.¹²⁰

This Article argues that both models need to be incorporated into law school pedagogy—especially within the first year and especially on exams—for law schools to evolve from defenders of the status quo into incubators of change agents. But, at the same time, traditional legal analysis teaching should not be abandoned. It should instead be surrounded with and enhanced by these alternatives. The first section below shows why we need to keep traditional legal analysis pedagogy in some form, and the second and third sections argue for also teaching students how to disrupt and how to create.

118. KENNEDY, *supra* note 12, at 42.

119. See Matsuda, *supra* note 18.

120. *Id.*

A. THE VALUE OF LEGAL ANALYSIS PEDAGOGY

One reaction to these criticisms of traditional legal reasoning may be to burn it all down and start over. If legal reasoning is so harmful, has such status-quo-reinforcing effects, then why do we continue to teach it at all?

Two reasons: (1) law schools have an obligation to produce practice-ready lawyers, not just critics of the legal system, and (2) traditional legal reasoning, despite all its flaws, does reinforce core values that are worth sustaining.

1. Practice-Readiness

A law school that does not train its students in how to operate within the legal system—how to engage in the recognized forms of legal discourse and use established methods of legal reasoning—has failed them. Law schools are already roundly criticized for not graduating students ready to hit the ground running—producing first-year lawyers who cannot negotiate or research well, who don't know how to parse local court rules or write a demand letter, or who have too much training in the abstract and not enough in on-the-ground experience.¹²¹ The ABA, responding to these critiques, requires all law students to graduate with six credits of experiential education.¹²²

In addition, any lawyer, even the most radical, has the benefit of being an institutional insider. She is ineffective if she washes her hands of the system and proposes to burn it all down.¹²³ Instead, as Daniel Farbman described abolitionist lawyers in the age of slavery, she is most of use if she becomes a “vector[] for bringing radical and transformative arguments fueled by a transformative . . . imagination into legal spaces.”¹²⁴

121. See, e.g., Sullivan et al., *supra* note 9, at 6 (“[L]egal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.”).

122. *ABA Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. Standard 303(a)(3) (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/2022-2023-standards-and-rules-of-procedure.pdf [https://perma.cc/PRZ6-22U6].

123. Daniel Farbman, *A Commons in the Master's House*, 90 *FORDHAM L. REV.* 2061, 2074 (2021).

124. *Id.*

To do that work well requires knowing those spaces and how to persuade those who operate within them.

Thus, for a law school to abandon teaching legal reasoning skills, which are inarguably at the core of much of legal practice, is counterproductive. Law schools will never graduate critics who can throw punches from the sidelines, but are fully unequipped to step into the ring. Nearly every reform proposal recognizes that core legal reasoning skills will stay a part of legal education for the foreseeable future, as they should.¹²⁵

But to acknowledge this reality need not result in throwing up our hands and resigning ourselves to the pedagogy of legal reasoning as it has been taught for the past century. Much of the damage wrought by traditional legal reasoning can be mitigated, or even reversed, by viewing the techniques with a critical lens and prodding the techniques for the soft spots where they can be used to accomplish change, rather than thwart it.

2. Benefits of Traditional Legal Reasoning

Moreover, even if we could abandon traditional legal reasoning altogether, we shouldn't want to. Despite its many flaws, rule-based and analogical reasoning are the methods by which we reinforce basic, related values of American government: (1) predictability, (2) fairness, and (3) stability.¹²⁶

First, having a rule-based system is predictable. We know what the rules are and what is expected of us; we can predict how a court would decide a given case. As Frederick Schauer noted, "[t]he ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown."¹²⁷

This characteristic of rules and precedent is most helpful in easy cases. We know not to drive into the park because of the sign banning motor vehicles from entry, so we park on the street and walk into the park with our picnic. It is more difficult to assess whether we can take an electric bicycle or motorized wheelchair into the park, and these are the cases that often end up in

125. See, e.g., Berenguer et al., *supra* note 14 ("We must train our students to work in this legal universe, to be successful practicing attorneys, but to also think outside of it to ethically and successfully challenge its existing boundaries.").

126. See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987) (casting these as the primary arguments for precedent, but also noting arguments of judicial efficiency and legitimation).

127. *Id.* at 597.

our courts and in law school casebooks. But easy disposal of easy cases has value; it helps us know what to do to stay within the limits and to not have the power of the state brought down upon us.

Similarly, the demand that we treat like cases alike is a worthwhile value because it aims to ensure fairness.¹²⁸ Without *stare decisis*, judges could decide cases on the exact same facts differently, for no justifiable reason at all, and perhaps simply because they did not like one of the parties, or the way they looked, or the color of their skin.¹²⁹ Such differential treatment “offends basic norms of equality and integrity both”: equality because people are being treated differently in an “easily recognizable sense” and integrity because it displays a lack of consistency in applying rules, a weakness that would be described as a character flaw if a person demonstrated the same quality.¹³⁰

Stare decisis at least promises that decision-makers will rest their decisions on legal principles alone, and differently situated parties—especially when differently situated based on class, gender, or race—will receive the same treatment under the law. Moreover, it recognizes basic values of human decency because it guards against “an unthinking tendency to stratify human worth,” to rule against someone because “we just do not like them.”¹³¹

Finally, the core value of stability and rule of law, which overlaps considerably with both predictability and fairness, helps our society avoid shocks to the system.¹³² The belief that decision-makers fairly hear disputes and those disputes can be resolved encourages individuals to channel disagreements into the judicial and legislative realms. Sudden, frequent shifts in

128. WEST, *supra* note 6, at 50–52.

129. *Id.* at 52 (“[H]orizontal equity is an . . . important reason to treat similar cases similarly; to do otherwise is to treat some who are similarly situated worse than those to whom they otherwise compare, for no justifiable reason.”).

130. *Id.*

131. *Id.* at 53.

132. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1181 (2006) (noting that some constitutional precedents were so deeply embedded in the national fabric that they would cause chaos if overturned: “Overruling these doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid . . .”); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (noting that eliminating *stare decisis* “would undermine the rule of law” because the Constitution would become “nothing more than what five Justices say it is”).

those realms, especially shifts that do not seem grounded in valid reasons, raise questions about the legitimacy of the system itself.¹³³

For example, a judge or Supreme Court who did not feel constrained by law could have granted former President Trump's wish to overturn the results of the 2020 election by fiat. The constraints that rules and precedents placed on judges made such an outcome unthinkable. A system that did not value at least the idea of the rule of law, that allowed decision-makers to pronounce their own preferred outcomes without any justification, could have resulted in a very different outcome in those court cases.

Although it's an open question whether these values are actually made real—whether differently situated individuals are treated the same, whether we can predict what decision-makers will do in hard cases, or whether decision-makers value stability over doing what they see as the right thing—they are admirable values and well worth defending. But to actually realize these values, students need to also embrace the disruption and creation reform mindsets laid out in more detail below.

B. DISRUPTION

While few, if any, reformers advocate abandoning traditional legal reasoning pedagogy altogether, largely for the practical and substantive reasons outlined above, some proposals have aimed to minimize the sway such reasoning holds over American legal discourse by interrogating that form of reasoning with critical theory, alternate rhetorical approaches, or new tactics. The vision here is to disrupt some of the assumptions that attach to legal reasoning—that it is the only method of thinking like a lawyer, or that it is a neutral and rational approach to solving legal problems—by revealing the inconsistencies at its heart and presenting other methods of legal argument or achieving change. I focus on a few of those strategies below, then provide some practical suggestions for incorporating these perspectives into legal analysis pedagogy.

133. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (“There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith.”).

1. Previous Approaches

The primary way law schools, until now, have interrogated the pedagogy of legal reasoning is by marrying it with legal theory. But this interrogation is rare, especially in the first year, and even when it occurs, it is rarely consistent and rarely tested on exams.¹³⁴ Yet, without these tools, students may remain blind to the power dynamics or bias embedded in a rule.¹³⁵

By instead explicitly teaching students Realism and critical theory, or by using those concepts to reorient the core teaching of their classes, law professors can open students' minds to new possibilities.¹³⁶ Law is no longer the received wisdom, sitting there to be found in books. It is just one possible way to structure the world, and is always open to the interrogation of its assumptions.

This goal of exposing students to critical thought early in their law school experience can be accomplished in a variety of ways. Some scholars have argued that core 1L classes should incorporate study of critical legal theories,¹³⁷ others have centered critical methods of legal analysis in their courses,¹³⁸ and still others have revamped individual courses by challenging the central tenets of the doctrine. For example, K-Sue Park has argued for a perspective on Property that centralizes colonization and en-

134. See Akbar, *supra* note 91, at 368 (“We leave critical theory, the relationship of law to inequality, and social movements to seminars or clinics. These decisions about what or how we teach are not neutral, objective, or apolitical. They are decidedly political, and they have consequences for the shape of the profession and law.”). Notable exceptions to this include Georgetown’s Curriculum B, where students take a slate of 1L courses that have been reconstructed to place theoretical, critical concepts front and center. See *supra* note 20 and accompanying text.

135. See, e.g., Matasar, *supra* note 93.

136. See Touissant, *supra* note 9, at 316–17 (arguing for a pedagogy of “deconstructive framing” that uses theory to encourage students to “explore how law can perpetuate systems of subordination and frustrate democratic citizenship”).

137. For example, Kathy Stanchi has argued powerfully that students should learn critical legal theory in their first year and that it should be incorporated into their legal writing courses. Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 55–56 (1998).

138. See, e.g., Tully, *supra* note 13, at 237–52 (arguing for a shift to “transformative legal analysis” that interrogates law’s sources and contexts).

slavement as core to our understanding of baseline property doctrine.¹³⁹ Alice Ristroph hopes to revamp the Criminal Law course by shifting focus from the heinous crimes that currently populate coursebooks to the more mundane low-level crimes that fuel mass incarceration.¹⁴⁰

A rhetorical disruption approach can also do this work of problematizing the legal reasoning pedagogy so many students imbibe. For example, pairing traditional legal reasoning approaches with alternative universes—either from other rhetorical approaches or from fictional renderings of past Supreme Court decisions—reveals traditional legal reasoning as one of many ways to construct meaning and find answers.

In their piece *Gut Renovations*, Elizabeth Berenguer, Lucy Jewel, and Teri McMurtry-Chubb argue that exposing students to rhetoric from non-Western cultures—such as Latinx or Asian diaspora rhetoric—can both reveal the inegalitarianism inherent in Western forms of legal reasoning and give students alternative practices to replace it.¹⁴¹ The pedagogy of traditional legal reasoning, they argue, “discourage[s] students from questioning the correctness of the rule of law.”¹⁴² Rather, students should be equipped with “the ability to identify harmful systems” and the “skills to ethically deconstruct and remodel or replace them in favor of more just and equitable outcomes.”¹⁴³ Rhetoric from outside of the Western canon can accomplish these goals by “help[ing] to create alternate conversations, oppositional discourse, to Western discourses of privilege and power.”¹⁴⁴

139. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1137 (2022) (arguing that legal scholars and law school textbooks should “take account of the histories of conquest and slavery in our understanding of property law, and how doing so alters our understanding of the principles for which various topics stand”); see also Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1025 (2022) (arguing for a shift to “dispossession” as the central tenet of the property law course).

140. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1664–67 (2020); see also Ossei-Owusu, *supra* note 113, at 415 (“[C]riminal legal education plays a role in our penal status quo by way of its poor treatment of issues tied to race, gender, and poverty.”).

141. Berenguer et al., *supra* note 14, at 216 (“[O]ur thesis is that we should and must critique the inegalitarian and racist roots of traditional legal rhetoric and strive to infuse it—and sometimes replace it—with alternative rhetorical practices.”).

142. *Id.* at 218.

143. *Id.*

144. *Id.* at 223.

In a similar approach, Linda Berger, Bridget Crawford, and Kathy Stanichi spearheaded the U.S. Feminist Judgments Project, which asks authors to rewrite key judicial decisions from a feminist perspective.¹⁴⁵ Authors take the same facts and precedents, but explicitly bring into account the perspectives of groups historically marginalized by law.¹⁴⁶ The goal is to show that the perspective of the judge matters, “that United States jurisprudence is not objective or neutral, but rather deeply influenced by the perspectives of those who are appointed to interpret it.”¹⁴⁷ At the same time, these alternate opinions disrupt the sense that outcomes were inevitable and reveal the rhetorical feints judges master to make them seem that way.

These lenses provide a different, deeper perspective, allowing students to see laws as possibly flawed, but fixable, to see laws not as neutral but as outgrowths of a society tilted toward the powerful. With this view, they can be empowered to make change.

2. Disruption and Legal Analysis Pedagogy

The disruption mindset helps students to see that law is not neutral and objective. They know that a rule is often a value judgment, a political judgment, and they’ve begun to question whether other rules would advance different, better values. The approaches above do that work, but often require fundamental curricular shifts, either by creating new classes or shifting the focus of classes wholesale.

But this work can also be done within traditional legal analysis pedagogy in a first-year class, simply by demonstrating the choices that lie behind a judicial opinion. By presenting an opinion in isolation as “the law,” professors imply that it is unquestioned and correct, the only possible result of applying this rule to the series of facts. By contextualizing a case, grounding it in

145. *U.S. Feminist Judgments Project*, UNIV. NEV. LAS VEGAS, <https://law.unlv.edu/us-feminist-judgments> [<https://perma.cc/4JWJ-VET6>]. The project now includes volumes on Tax, Trusts and Estates, Family Law, Reproductive Justice, Torts, and Employment Discrimination. *U.S. Feminist Judgments Project: Series Projects*, UNIV. NEV. LAS VEGAS, <https://law.unlv.edu/us-feminist-judgments/series-projects> [<https://perma.cc/XKQ8-89N6>]. A similar project rewrites opinions from a critical race perspective. See generally CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (Bennett Capers, Devon W. Carbado, R.A. Lenhardt, & Angela Onwuachi-Willig eds., 2022).

146. *U.S. Feminist Judgments Project*, *supra* note 145.

147. *Id.*

the facts and legal arguments the judge was faced with, the society he or she was embedded in, the political or theoretical tradition he or she embraced, or the power differentials between the parties, the students could see the compromises and choices the judge made along the way.¹⁴⁸ They could see that the boundaries of judicial decision-making and what judges take into consideration can vary wildly from the rules-and-facts model.¹⁴⁹

Something as simple as asking students to read the competing briefs from the case makes clear that even the facts of a case are often much messier than depicted in the opinion. And when students see the strength of the competing arguments, they often develop doubts as to whether the opinion should be as certain as it appears.¹⁵⁰ As L. Danielle Tully has argued, providing students with this kind of context allows them to become “archaeologists of the lawyering process, more adept at determining what the law is, and at articulating visions of what the law could or even should be.”¹⁵¹

Another option is to simply ask students to assess the value of the rule. This can be done by asking a few simple questions, such as: (1) Whom does the rule advantage?; (2) Whom does it disadvantage?; and (3) Does this strike the right balance? Why/why not?¹⁵²

This kind of analysis asks students to see the ways in which legal categories and legal reasoning structures have permeated their thinking, to allow them to see that law reinforces some regimes and disadvantages others. And with enough examples like this, students can realize that “every act of . . . enforcement involves putting force behind one particular regime . . . versus competing regimes that could be enforced instead.”¹⁵³

Law professors certainly ask these questions sometimes, of some opinions and some rules. The key is instead to ask these

148. See Akbar, *supra* note 91, at 370 (arguing that law teachers should investigate with their students “the political contexts in which significant judicial opinions emerge[d]” to “move beyond an imagination of law limited to appellate opinions and litigators”).

149. See, e.g., Keene & McMahon, *supra* note 70; Tully, *supra* note 13.

150. See Keene & McMahon, *supra* note 70, at 82–85.

151. Tully, *supra* note 13, at 244.

152. See Akbar, *supra* note 91; WEST, *supra* note 6, at 90 (“[I]ndividual faculty members could simply invite the discussion, in the classroom, of the substantive justice of whatever piece of law is under review [Students] might come away from such discussions aware of at least the possibility that law . . . might nevertheless be unjust.”).

153. Gordon, *supra* note 11.

questions constantly, even of rules that are “good,” even of rules that appear boringly neutral, even of rules the professor agrees with. In addition, this kind of work should be tested on exams. Students could be given excerpts from an opinion, along with competing briefs, and asked to draft a section of a dissent or concurrence that addresses arguments ignored in the opinion. Or they can be given a new rule and asked the same questions above—whom the rule advantages and whether it strikes the right balance.

The goal should not be just to work with students to understand the contours of rules, their ins and outs, but also to interrogate their value. Students might come to see that many rules are valuable and worth preserving. But students need to practice consistently undertaking that questioning for themselves rather than simply accepting the rules they have been handed.

By constantly doing this kind of analytical work in class and testing students on it, professors can disrupt students’ ideas of rules as fixed and impermeable, and instead can reveal the value judgments that underlie the rule. Students get in the mental habit of seeing rules as exercises in power distribution, rather than neutral and objective statements of principle. They practice not accepting rules as they are, but imagining what they could be.

C. CREATION

Once the scales fall away from students’ eyes and legal reasoning is not imbued with a sense of inevitability or rightness, what comes next? Disruption could lead to a wholesale restructuring of the legal system, a radical reimagining of what law could be. Yet this kind of large-scale reform work can be slow and painstaking; it often engenders a backlash from those who prefer (and benefit from) the status quo. It also does not help students create a new legal order. They know what’s wrong with the old ways, but they don’t have the skills to make it right.

For these reasons, disruption alone is rarely successful. Instead, it should be paired with training in creation, particularly in creative reasoning, giving students the skills to craft new rules and argue for their adoption. This approach operates within the boundaries of traditional legal reasoning precepts, but aims to use the flexibility inherent in those structures to change law, move it forward, and make it more just.

This is a difficult task; we have just encouraged students to stand outside the courthouse and call the procedure a farce, but

now we must guide them back into the courtroom and help them make use of the legal tools that have often led to injustice and bias. But we can show students how that outcome—the injustice and bias that has been baked into the system—was not inevitable, but a series of choices. And we can give them practice in arguing for new outcomes in the future. For if the Realists were right and rules do not determine outcomes, then students can use that indeterminacy to argue for different results.¹⁵⁴

1. Previous Approaches

Scholars have proposed pedagogical approaches before that ask students to create instead of replicate, envisioning courses that are forward-looking or problem-based. These classes embrace a more “open-ended presentation of the world” and shift the course’s focus from “rewind” to “play,” asking students to tackle problems with multiple dimensions rather than limiting themselves to applying rules and analogies from precedent.¹⁵⁵ For example, Martha Minow and Todd Rakoff pioneered a problem-solving course in Harvard’s 1L curriculum, which gives students a case file and asks them to chart their own path forward, with numerous possible solutions available. The goal is to eliminate some of the guardrails from the teaching of legal analysis using appellate opinions: “The problems ought not to be situated in one doctrinal area, but should present opportunities for mental maneuvering around the legal universe. Teaching should emphasize generating alternative solutions as well as appropriate grounds for choosing among them. And criteria for resolution should include legal, normative, and practical considerations.”¹⁵⁶ Such a class looks forwards, not backwards, and asks students to navigate the unknown rather than decipher what has already occurred.¹⁵⁷

154. Benjamin Cardozo came to a similar conclusion about the creation inherent in judging, noting, “I have grown to see that the process in its highest reaches is not discovery, but creation.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921).

155. For example, Northeastern University School of Law’s 1L course, *Legal Skills in Social Context*, has students apply their legal writing skills to a “real-life social justice project for a selected client organization.” *Legal Skills in Social Context*, NE. UNIV. SCH. L., <https://law.northeastern.edu/academics/programs/jd/first-year-curriculum> [<https://perma.cc/VU7K-BMB4>]; see also Rakoff & Minow, *supra* note 115, at 602–03.

156. *Id.* at 604.

157. *Id.* at 602–03 (arguing that professors need to present to students a

The benefit of such a course is that it opens up students' thinking at exactly the time they are learning how to navigate law for the first time. Students are exposed to a wider range of tools and experiences than those provided by the traditional legal analysis pedagogy: "[I]f we do not make the effort to challenge students in this way, students will learn to think of the legal system as only so many rooms, so many pieces of furniture, that they can never reorder."¹⁵⁸ But the danger of confining such an approach to one class is that the bulk of students' first year still takes place with one type of source material—appellate opinions—and one type of legal analysis pedagogy. Students may not see the connection between the creativity required in this course and the reasoning work they do in Torts or Property.

Upper-level courses also have often embraced creative pedagogies. For example, Charles R. Lawrence III created a simulation in his civil rights course that had students work as lawyers for a specific interest group or constituency within a community of color, such as the Congressional Black Caucus or the Mexican American Legal Defense and Education Fund.¹⁵⁹ Students then developed a proposed long-term strategy to help the group achieve beneficial change.¹⁶⁰ One goal of the simulation: to broaden students' perspectives on how someone with legal skills could contribute to social change and legal reform.¹⁶¹

Movement Lawyering clinics and courses embrace a similar pedagogy that collaborates with social justice movements with the express goal of "build[ing] power" to achieve lasting social change through both legal and political means.¹⁶² Its practitioners require knowledge of not only the typical legal argument tactics taught in the first year, but also other modes of advocacy—"policy reform, transactional work, organizing support, media relations, and community education"—with the goal not necessarily of winning cases, but of "maximiz[ing] political pressure and transform[ing] public opinion."¹⁶³

And clinics, Movement Lawyering or otherwise, have been the bastion of creative reasoning, immersing students in real

more "open-ended presentation of the world" and ask students to "walk on-ward").

158. *Id.* at 607.

159. Lawrence, *supra* note 16, at 2244 & n.28.

160. *Id.* at 2244 n.29.

161. *Id.* at 2245.

162. Cummings, *supra* note 15, at 1653.

163. *Id.* at 1696.

problems posed by clients and requiring them to find solutions. Students in clinics both experience the indeterminacy of law in action—witnessing how decisionmakers can reach results that seem contrary to the rules—and need to make arguments to a decisionmaker in the face of that indeterminacy, often reaching for creative, context-driven solutions that draw on “the dynamics of law and lawyering.”¹⁶⁴

But clinics and seminars are usually offered in the second and third years of a student’s legal education, and they generally are optional. Only students who choose to take these kinds of courses reap the creative benefits. Moreover, clinics in particular can be hemmed in by client needs; the best solution to a problem posed by a client may be arguing for the law to apply exactly as it has previously rather than exercising a student’s creative muscles.

Thus, in addition to these upper-level courses, law schools should incorporate creative reasoning skills into the traditional first year classes so that every student has the opportunity to build that expertise.

2. Creative Reasoning and Legal Analysis Pedagogy

Law schools do not need to rely on new courses or clinics alone to give students practice in creative thinking. Instead, alongside lessons in disruption, any course that uses legal analysis skills could also teach creative reasoning. This work asks students not just to identify rules and apply them, or even to deconstruct or critique opinions, but to *create* something new. Such an approach would ask students to look ahead instead of behind and give them practice in crafting new rules and constructing arguments for bringing those new rules into being.

One example of an exercise that does this work: ask students to first develop a new rule, then support that rule with appeals to traditional legal reasoning tools.¹⁶⁵ Let’s return to *White City* for an example of how this could be done. After deconstructing the sandwich rule, showing its infirmities and possible biases, a professor could ask students what they think the sandwich rule *should* be, and why.

164. Goldfarb, *supra* note 16, at 732.

165. Credit for this general idea goes to my former colleague Rima Sirota, who presented on a similar exercise at the Legal Writing Institute Biennial Conference in 2022.

One group of students might focus on the exterior of a sandwich as the baseline; another the type of fillings employed.¹⁶⁶ One group might look to whether the food is eaten at lunchtime; another may analyze the kinds of foods sold at places that label themselves sandwich shops or delis; still another may look to the cultural history of sandwiches to determine what qualifies.¹⁶⁷ This gives students practice in thinking through a rule from the ground-up, assessing what it is important for the rule to capture and how the rule should capture it. The professor can probe students' justifications for why one sandwich rule is better than another, sharpening their thinking by asking them to respond to critiques of their rules.

This kind of work might be somewhat silly (and, frankly, cliché) when the question is about sandwiches. But this same creative process can be applied to any rule. Students could be asked about what the rule should be for qualification for unemployment benefits or when police are allowed to pull over a car.¹⁶⁸ Going through that process requires students to identify what the rule should accomplish, and why, and how. It frees students from relying solely on how others have assessed the problem and allows them to think of it anew.

But we are lawyers, and lawyers accomplish little if they only convince themselves of the rightness of a rule. They also need to convince others—judges, legislators, regulators—to enact the rules they have proposed. Thus, once students have settled on a new rule, professors can ask students to find support for that rule, starting with the traditional tools of legal authority, precedents and statutes. In the past, I have given my students both real and fictional cases and asked them to mine those authorities for support. Through this process, they see how they can use cases and statutes to argue for new rules. It's no longer

166. See, e.g., @matttomic, *The Sandwich Alignment Chart*, TWITTER (May 1, 2017), <https://twitter.com/matttomic/status/859117370455060481> [<https://perma.cc/B47V-XWPU>] (classifying various items on a scale from “purist” to “rebel,” based on structure and ingredients); THE CUBE RULE, <https://cuberule.com> [<https://perma.cc/2UK9-8BAM>] (classifying foodstuffs solely by their “structural starches”).

167. See Alexander Park, *Constructing the Sandwich*, MINN. L. REV.: DE NOVO (Feb. 22, 2019), <https://minnesotalawreview.org/2019/02/22/constructing-the-sandwich> [<https://perma.cc/B92A-U2T4>] (proposing a new sandwich rule which combined “similarities between existing legal definitions with ‘common sense’”).

168. See Orin Kerr, *Line-Drawing*, 70 J. LEGAL EDUC. 162, 163–64 (2020) (describing an exercise where groups of people are asked those questions).

about finding the rule that pre-exists and needs to be unearthed from the cases; instead, it's about cobbling together support for their vision of what law could be.

Sometimes, students cannot find support for their preferred rule from the legal authorities. That can open up a conversation about more creative ways of shifting law forward. How can we exploit the flexibility in legal rules to argue for shifts into new directions? How do we pry open that closed loop that is law and argue for consideration of other pieces of evidence? Students could look to examples of opinions where judges relied on sources other than caselaw (Justice Sotomayor's dissent in *Utah v. Strieff* comes to mind, where she cites to sources as varied as the Department of Justice's report on policing in Ferguson and W.E.B. DuBois, James Baldwin, and Ta-Nehisi Coates¹⁶⁹) for examples of decision-makers relying on more than just law in their crafting of rules.¹⁷⁰ They could also look to examples of written advocacy such as the Brandeis brief (which marshaled social science evidence to argue in favor of the constitutionality of a law limiting working hours) to see attorneys using non-legal authorities in support of arguments.¹⁷¹

We can also discuss different paths for moving law forward beyond litigation. Students can see not just the creative potential of a litigation approach, but also its limits, and they can gain practice in looking to alternative avenues (legislation, regulation, or grassroots organizing) as other levers they can push to achieve change.

This approach—asking students what the rule should be and giving them practice in arguing for it—accomplishes several goals. *First*, it gives them a blank canvas on which to paint. They practice imagining a different world than the currently existing one, which will make them more adept at doing that same work when they become lawyers.

169. 579 U.S. 232, 250, 254 (2016) (Sotomayor, J., dissenting).

170. Amy Griffin has argued that judges and lawyers are more often relying on “nonbinding” authority, i.e., authority that legal decisionmakers are not required to follow. Griffin, *supra* note 114, at 54 (“[S]ources now used regularly in legal analysis fall well outside the strictly defined universe of legal sources lawyers once relied upon.”); *see also* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934 (2008).

171. The term “Brandeis brief” is named after then-advocate Louis D. Brandeis, the future Associate Justice of the United States Supreme Court, in the case of *Muller v. Oregon*, 208 U.S. 412 (1908). *See* Brief for the Defendant in Error, *excerpted in* AMERICAN LEGAL REALISM, *supra* note 61, at 237–41.

Critical race theorists and those who practice “outsider” jurisprudence have embraced similar strategies for imagining and creating a new legal order. For example, Richard Delgado and others argued for using “counterstories,” narratives told from the perspective of marginalized groups that challenge the dominant wisdom about the way things are, to help students imagine a different legal order.¹⁷² “Counterstories . . . can open new windows into reality, showing us that there are possibilities for life other than the ones we live Their graphic quality can stir imagination in ways in which more conventional discourse cannot.”¹⁷³

Just as with the proposal above for creative reasoning, counter-storytelling does not displace traditional legal analysis.¹⁷⁴ Instead, it reveals the mindsets and frameworks that actually account for decisions, decisions which are then framed as the natural result of deduction or analogy, and supports new results based on new stories.¹⁷⁵ Creative reasoning does similar work, giving students practice with infusing the tools of legal analysis with outsider perspectives or justice-inflected concerns. Both are acts of creation, of imagining a new world and using legal tools to bring it into being.

Second, asking students to support the rule with authority forces them to gain practice in using sources to support a new rule. This work is helpful in two dimensions. It helps students

172. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989); see also Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 767 (1995) (arguing that advocates should move away from “sterile” pleadings and instead draft more like journalists and historians in order to integrate the client’s identity, lived experience, and the root causes of systemic injustice); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) (arguing that personal narratives are a new epistemological source for analyzing experience, history, culture, and intellectual tradition of people of color); Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 982 (1991) (noting that a shared premise of feminist narrative theorists is that “describing events or activities ‘from the inside’—that is, from the perspective of a person going through them—conveys a unique vividness of detail that can be instructive to decisionmakers”).

173. Delgado, *supra* note 172, at 2414–15.

174. See Edwards, *supra* note 57, at 67 (“Outsider stories do not oppose the tools of traditional legal analysis. Rather, outsider stories oppose *the dominant group’s hidden foundational master stories*—the cultural stories that actually account for the decision, which is then rationalized and justified by use of authority, analogy, and policy.”).

175. *Id.*

better understand how they can use the flexibility of precedent to support new rules.¹⁷⁶ Young attorneys often parrot what cases say in applying those precedents to new situations, but the work of supporting a new rule instead requires students to look deeper, to see how a case's facts, holding, or reasoning could support a completely different articulation of the law.¹⁷⁷

It also helps students break free from the handcuffs of the hierarchy of legal authorities and gives them practice in using different forms of support.¹⁷⁸ Case law alone likely will not get law from what it is to what it should be, but other authorities—empirical studies, history, personal stories, or current events—can help convince decision-makers to embrace a new path.¹⁷⁹ Lawyers have been hesitant to embrace this kind of argument, even though “there is no good reason not to”¹⁸⁰; introducing these tools while in law school would help more advocates bring them into practice.

Third, this practice also helps students to see the limits of what can be achieved through litigation. Rules do have boundaries beyond which they cannot be stretched; airplanes cannot

176. See Llewellyn, *supra* note 59, at 1252–53 (“[T]he standard authoritative techniques of dealing with precedent range from limiting the case to its narrowest issue on facts and procedure, and even searching the record for a hidden distinguishing fact, all the way to giving it the widest meaning the rule expressed will allow.”).

177. See *id.* at 1253 (“*The growth of the past has been achieved by ‘standing on’ the decided cases; rarely by overturning them. Let this be recognized, and precedent is clearly seen to be a way of change as well as a way of refusing to change.*”); see also KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 6 (2008) (“[J]udges think that they must follow rules, and people highly approve of that thinking. So that the getting of the judge to do a thing is in considerable measure the art of finding what rules are available to urge upon him, and of how to urge them to accomplish your result.”).

178. Griffin, *supra* note 114, at 57 (“A more nuanced understanding of authority is valuable perhaps most obviously for law students, who are most likely to be misled by the conventional model of authority.”). Even lawyers could use more practice with this skill. See Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 198–99 (2000) (describing both empirical and anecdotal evidence that shows “lawyers do not make effective use of non-legal materials in support of policy arguments in briefs”).

179. See Margolis, *supra* note 178, at 198 (“In determining what the law should be, judges must often look beyond the traditional sources of legal authority . . . [T]he court may need information similar to the information generally available to the legislature in enacting a statute.”).

180. See *id.* at 203.

qualify as sandwiches. But what to do if those boundaries themselves are cementing injustice and bias? Students can see that there are alternatives beyond the litigation posture and that their talents as lawyers could also be brought to bear in these other arenas.

Moving students' worldview to encompass the full playing field of law, rather than the limited lens of appellate litigation, has two advantages. First, it helps to fend off hopelessness. When law students seeking to advance justice realize that litigation might not provide a solution, after their classes in the first year relentlessly focused on litigation, it feels to them like there is no path forward, like law holds no solutions for the problems they came to law school to fix. Opening up their worldview to the full panoply of contexts in which lawyers can operate helps them keep alive the hope that change is possible.¹⁸¹

It also makes students better lawyers, even if they do not go on to become change agents. Civil rights attorneys certainly need to know how to operate the levers of policy and power to achieve better outcomes.¹⁸² But the best corporate or white-shoe lawyers know how to do that, too, in order to achieve better results for their clients.¹⁸³ Mari Matsuda described how skilled lawyers can

181. Movement Lawyering and Critical Race theorists have both embraced alternative models for change because litigation can be a quite limited—and sometimes counterproductive—approach for those seeking to bring a more just world into being. See Akbar, *supra* note 91, at 372 (“Working directly with movement actors and affected communities would give students an opportunity to practice assuming the role of lawyer, to appreciate the breadth of stakeholders in lawmaking, to see the law in action through other lenses, and to make connections between law and marginalization.”); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743, 785 (1994) (describing a “reconstruction jurisprudence” that embraced both “a commitment to building intellectual structures that are strong, complex, capacious, and sound, and a knowledge that reason and logic alone will never end racism, that words alone can never break down the barrier between ourselves and those we set out to persuade”).

182. See Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1533 (2013) (“[P]reparing the next generation of civil rights lawyers—of all races—requires that we teach such aspiring lawyers how to win the battle of rhetoric and politics as much as we teach them how to read, analyze, and apply the law . . . They must be as immersed in the language of public policy and political advocacy as they are in understanding and applying the law.”).

183. See Matsuda, *supra* note 18, at 9 (“[T]he best lawyers . . . are the ones who are able to detach law and to see it as a system that makes sense only from

use different “consciousnesses” to understand the bigger picture: “A good corporate lawyer can argue within the language and policy of anti-trust law, modify that argument to suit a Reagan-era judge, and then advise a client that the outcome may well turn on some event in Geneva wholly irrelevant to the legal doctrine.”¹⁸⁴ A lawyer with creative reasoning skills can similarly move beyond the blinders of a litigation stance and see how other avenues may be better options for bringing her new vision into being.

D. OBJECTIONS TO TEACHING DISRUPTION AND CREATION

With these rewards of the disruption and creation approaches comes certain risks. First, professors open themselves up to charges that they are being political and value-laden in the classroom. Second, opening up the boundaries of legal discourse could invite students with racist, sexist, or otherwise objectionable views to incorporate those values into their visions for a new legal ordering. Third, critics could charge that this kind of reform isn’t doing much, that it leaves the boundaries of current legal discourse intact, and that a better approach would be to prepare students to fight the system instead of operate within it.

As to the first concern, it might actually be true that this form of teaching brings politics and values into a legal classroom; we are, after all, asking students what the right, best, most just rule would be, which is a value-laden question. But that assumes politics was not there before, that the choice of what and how to teach is not *always* political.¹⁸⁵ Privileging the neutral and objective view of law is itself a value-based decision that reinforces the status quo.¹⁸⁶ The disruption and creation versions of teaching don’t pretend otherwise.

Moreover, even if a student’s most cherished value is that she wants to become a wealthy attorney serving corporate interests, this manner of teaching will help her, too. The disruption and creation approaches give students a more layered understanding of how the legal world actually works and what lawyers can do to achieve results. The best attorneys in any field can craft new legal rules that benefit their clients as well as work

a particular viewpoint. Those lawyers can operate within that view, and then shift out of it for purposes of critique, analysis, and strategy.”).

184. *Id.*

185. See Akbar, *supra* note 91, at 368.

186. *Id.*

different levers outside of litigation to achieve the same. The current law school required curriculum provides little practice in these skill sets.¹⁸⁷

On to the second concern, that a student will bring harmful views into the classroom. Here's a hypothetical example: when asked to craft an unemployment benefits rule like in the example above, a student argues for a rule that denies benefits to women because they belong at home, not in the workforce, and they should not be incentivized by the government to work. When asked what support he has for the justification, the student responds that it is his lived experience that women's gentle and compassionate nature leaves them better suited to household tasks and child-rearing than working. How should a professor respond to such an obviously sexist rule, or other rules that might be similarly out of bounds?

Two suggestions. First, this is where training in traditional legal reasoning—which, remember, has not been abandoned—can be helpful. Professors can use the Socratic method to point out unwarranted assumptions baked into the rule, just as they would with a student making a similar comment in a class more focused on traditional legal analysis. The professor could also point the student to the weight of the legal authorities that would prohibit such an approach. Noting the constitutional provisions, rules, and cases that would make such a rule unlawful puts the onus on the student to show why those positions are wrong. Second, asking the student to provide support for his rule and persuade others of its value (as the second step of creative reasoning would require) would also be difficult and could help the student see the unfounded assumptions in their thinking. Simply going through the process and being unable to marshal enough support for this kind of rule to convince others might itself be a valuable learning process.

And even if both of these methods fail and the student holds fast to his rule as the right one, little has likely been lost because that same mindset would also permeate the student's analysis using traditional legal reasoning. Because rules themselves are indeterminate, the student would likely be able to argue for denial of benefits to women by masking the arguments in a more neutral syllogistic or analogical frame. At least when asked to craft a rule, the values that led to the rule likely cannot be

187. See Matsuda, *supra* note 18, at 8–9 (“[T]he mediocre law students are the ones who are still trying to make it all make sense . . . trying to understand law as necessary, logical, and co-extensive with reality.”).

shielded in the same way. Fellow students and professors who may feel unsettled by discriminatory analysis dressed up as neutrality may be able to more easily recognize biased intent in this kind of exercise and call it out as such.

Finally, the critique that reform is not the answer, that a complete dismantling of the system we have is a better approach, certainly has some merit.¹⁸⁸ Maybe the master's tools can never dismantle the master's house.¹⁸⁹

But the tear-it-all-down-and-rebuild approach has not yielded much in the way of concrete results and instead has often ignited fiery backlashes against those critiquing the system.¹⁹⁰ And a practically-oriented approach—sending students into this world with both traditional reasoning skills and a new toolkit for understanding and creating law—may enable them to actually foment change. At the very least, given the fierce urgency of the challenges our students face, it seems worth it to make these perhaps small changes in the short term, and, if enough law schools do this work, and if more students trained in this way take on decision-making roles as judges, legislators, and regulators, it could seed larger changes to come.

CONCLUSION

Legal analysis pedagogy effectively teaches students the rule-based and analogical reasoning skills that are necessary for a successful career. But making this the only pedagogy imposes costs that law schools often fail to recognize. Students are armed to operate within the world as it is, but have little experience imagining a new world and little practice in how to bring it into being.

Surrounding the traditional legal analysis pedagogy with training in both disruption and creation accomplishes two goals: First, this approach disrupts students' sense that law is neutral and "usually OK."¹⁹¹ They see instead that rules and analogies rest on value judgments that, if made outside of the legal arena,

188. For at least one example of this shade of critique, see KENNEDY, *supra* note 12, at 105 (noting that the strategy of organizing to oppose hierarchy in law school "is based on the idea that reformism is in fact a hopeless endeavor").

189. See generally AUDRE LORDE, *THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE* (2018).

190. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (arguing that law teachers who "profess that legal principle does not matter [have] an ethical duty to depart the law school").

191. See Gordon, *supra* note 11.

would be highly debatable. Second, students gain practice in envisioning new rules and arguing for their adoption. They build the creative reasoning muscle that is the hallmark of change agents and skilled lawyers alike.

Both of these methods are necessary. Without disruption, students will continue to feel the numbing effect of legal discourse and will have a hard time imagining how things could be different. Without creation, students may see that change is necessary but have no ability to bring it about. By supplementing our teaching with these methods, we law teachers can try to help students fix what is wrong with the world, instead of pretending that nothing is wrong at all.