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Lawyering Paradoxes: Making Meaning of the Contradictions

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LAWYERING PARADOXES: MAKING MEANING OF THE CONTRADICTIONS

Susan Sturm

ABSTRACT

Effective lawyering requires the ability to manage contradictory yet interdependent practices. In their role as traditionally understood, lawyers must fight, judge, debate, minimize risk, and advance clients' interests. Yet increasingly, lawyers must ALSO collaborate, build trust, innovate, enable effective risk-taking, and hold clients accountable for adhering to societal values. Law students and lawyers alike struggle, often unproductively, to reconcile these tensions. Law schools often address them as a dilemma requiring a choice or overlook the contradictions that interfere with their integration.

This Article argues instead that these seemingly contradictory practices can be brought together through the theory and action of paradox. After identifying the features of these two practices of lawyering—called here *legality* and *proactive lawyering*—the Article sets out five lawyering paradoxes that stem from the opposing yet interdependent features of legalistic and proactive lawyering: paradoxes of thought and discourse; relationship; motivation, mindset, and justice. Next, the Article shows the consequences of legal education's tendency to avoid, sidestep, or downplay these paradoxes. Finally, drawing on existing research and experiences of innovators, the Article identifies three strategies that can enable students and lawyers to construct a dynamic tension between legality and proactive lawyering, and in the process build the potential for transformative learning and meaningful justice.

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*Susan Sturm**

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INTRODUCTION

From the moment I entered law school, and through four decades as a lawyer and then a law professor, I have experienced lawyering as a bundle of contradictions. Crossing the threshold into the legal world in the late 1970s, I found that my dream of paving the way for a new era of social justice ran headlong into the wall of austere tradition. This tension between purpose and precedent replayed daily in the classroom during my law school years. I often found myself frustrated and infuriated by case law and Socratic dialogue, which instructed that “thinking like a lawyer” meant looking backward rather than forward, following authority rather than pursuing innovation, and promoting predictability rather than solving problems. Nonetheless, I absorbed the message that, as lawyers, we would be expected to find solutions for the world’s most intractable problems. Alongside its constraining energy, the role of the lawyer would put me in positions requiring that I “think outside of the box.”

In practice, I continued to grapple with these contradictions. Legal reasoning and adversary process proved simultaneously necessary and limiting, just as collaboration and problem solving got me only so far. As a litigator, I was continually buffeted by the need to fight while cooperating—as part of conducting discovery, orchestrating a trial, or settling a case. As an assistant to a master in a prison case, I witnessed the court’s power to force prison officials to pay attention to inhumane and abusive conditions that they had tolerated without consequence until the court intervened. Yet, the court could not induce the cooperation and commitment necessary for sustainable change; the force of law that put prison reform in the spotlight also triggered backlash and resistance that undercut its power.¹

Now, as a law professor, I experience these contradictions in my scholarship and teaching. In both arenas, I have explored concepts and strategies that move from mindsets of compliance to creative problem solving, from paradigms of gladiators to those of problem solvers.² I have grappled with ways that courts can simultaneously serve as the backstop for enforcing prescriptions against first generation employment discrimination while creating the framework to encourage problem solving to address second generation discrimination.³ I have proposed ways to integrate problem solving approaches with judicial intervention, and yet I remain dissatisfied with the strategies proposed to reconcile or resolve the tensions between informal and collaborative modes of problem solving and more formal and compliance-based approaches. Those contradictions also surface in my current work to build the capacity of judges, clerks, and other employees throughout the court system to engage

¹ See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PENN. L. REV. 805 (1990); Note, “Mastering” Intervention in Prisons, 88 YALE L. J. 1062 (1979).

² See Susan Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE JOURNAL OF GENDER L. & POL’Y 119 (1997)[hereinafter *From Gladiators to Problem Solvers*]; Susan Sturm, *Reframing the Civil Rights Narrative: From Compliance to Collective Impact*, in CIVIL RIGHTS IN THE AMERICAN STORY (Austin Sarat ed. 2014).

³ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

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openly and constructively with race, while also developing a robust compliance process that holds people accountable when they violate anti-discrimination rules.

As a teacher, every year I witness many students struggling with the contradictions that buffeted me as a law student. I teach Civil Procedure alongside courses called *Lawyering for Change* and *Lawyer Leadership: Leading Self, Leading Others, Leading Change*. Each course aims to equip students with capacities fundamental to lawyers' roles in enabling constructive human interaction. Yet, on their face, they seem to require opposing capacities, and to cultivate competing mindsets. Students experienced this disconnect firsthand during an exercise we conduct on the first day of class in *Lawyer Leadership*. We divide students into small groups and ask each group to list the qualities or descriptors that come to mind when they think of the words "law" and "lawyer." We then ask them to do the same with the word "leadership" and "leader." When we come back together, we ask students what they noticed about the "Law/Lawyer compared to the Leadership/Leader" lists generated by each group. Students typically describe lawyers as "competitive," "aggressive," "critical," "adversarial," "hard-working," and "risk-averse." In contrast, the column for leaders contains descriptors such as "creative," "entrepreneurial," "visionary," "inspiring," and "collaborative." It doesn't take long for an observant student to notice that there is virtually no overlap in their "lawyer" and "leader" descriptors.⁴

These tensions have taken on particular urgency in the current political moment. Many are looking to law—and especially the judiciary—as the bulwark against the threat to rule-of-law values facing the United States and the larger world. At the same time, the legitimacy of those same institutions is under attack from the highest levels of government. Scholars and students are faced with the quandary of simultaneously relying on traditional legal institutions, while looking to political mobilization and community organizing that call into question the legitimacy of those core institutions. This requires finding ways to address some of the most vexing challenges facing law schools and the legal profession: How do you find and sustain meaning and imagination in the face of skepticism built into law's methodology? How do you pursue justice through law if the legal system itself is, important respects, unjust? How do you equip law students and lawyers to navigate the competing call of power and purpose?

I have come to realize that lawyers' capacity for impact depends upon making sense of, and being able to forge constructive tension between these oppositional aspects of lawyering. These core roles and practices simultaneously contradict and depend on each other for the legitimacy and effectiveness of both. Lawyers play a key role in designing human interaction so that diverse people can peacefully and effectively govern themselves. They bear responsibility for helping individuals, organizations, and governments structure their affairs so they can live and work together, even when they disagree. They are called upon to be problem solvers and facilitators of human interaction. These informal and facilitative interactions take place in the shadow of background norms and rules developed by lawyers and legal institutions. When conflict erupts and relationships break down, law—through lawyers—enforces rules and enables

⁴ This dichotomy between Law/Lawyer and leadership/Leader characterizes in legal practitioners' conceptions as well. See ROBERT W. CULLEN, *THE LEADING LAWYER: A GUIDE TO PRACTICING LAW AND LEADERSHIP* (2009) (reporting similar non-overlapping descriptors when seasoned lawyers asked to describe lawyering and leadership).

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people to fight without resorting to violence, using adversarial tools to allocate responsibility, impose judgment, and enforce rules. Effective lawyers must both fight and collaborate, judge and build trust, debate and design new institutions, minimize risk and enable effective risk taking, advance clients' values, and hold clients accountable for adhering to societal values.

Progress has been made in incorporating what I call *proactive lawyering* into a curriculum organized around the logic of what I call *legality*. Although many law schools continue to be organized around legality's logic of learning to "think like a lawyer",⁵ in recent years law schools have expanded offerings cultivating proactive lawyering, including clinical legal education, added experiential learning requirements, and introduced interdisciplinary offerings and courses focused on problem solving, deal making, and alternative dispute resolution.⁶ Some doctrinal teachers incorporate critical methodologies into their teaching, and experiment with experiential pedagogy in the conventional law school classroom. Most recently, law schools, including my own, have focused explicit attention on cultivating lawyer-leadership skills.⁷

Notwithstanding these developments, most law schools have yet to come to terms with how to prepare students--and the legal profession--to navigate the tensions between legality and proactive lawyering.⁸ They have tended to avoid, sidestep, or downplay the tendency of legality to crowd out proactive lawyering, and of legal education to undercut efforts to forge a dynamic tension with the transformative potential. The prevailing strategy for promoting the capacity to navigate these opposing aspects of lawyering could be called "add and stir." Much of the literature either explicitly or implicitly assumes that proactive lawyering can be added into the law school curriculum as supplements or complementary competencies. A case in point is a report urging that lawyers "be equipped with a broad range of 'complementary competencies' that supplement and expand the 'core' competencies of legal reasoning and analysis that have been traditionally taught in law school and emphasized in legal practice."⁹

The complementarity argument goes something like this: The current law school curriculum (and the accompanying pedagogy) emphasizing the development of legal analytical skills remains valid, and should remain at the center of the law school curriculum and pedagogy. It is, however, too narrow. It does not adequately equip students to navigate the array of challenges they will face in their multiple roles, to take up the leadership that society calls upon lawyers to exercise, and to do so at a time of increasing volatility, complexity, and urgency.

⁵ See Section I(A), *infra*.

⁶ See Section I(B), *infra*.

⁷ As of March, 2019, more than 50 law schools reported having some type of leadership programming and/or courses. Leah Teague, A Message from the Chair-2019, (Mar. 8, 2019), <https://sectiononleadership.org/2019/03/>, (last visited Aug. 15, 2019).

⁸ There are law schools that have faced this challenge head on as part of their creation, such as CUNY Law School, Northeastern Law School, and more recently, University of California at Irvine. See CUNY LAW SCHOOL, <https://www.law.cuny.edu/about/history/> (last visited Aug. 15, 2019); ABOUT UCILAW, <https://www.law.uci.edu/about/> (last visited Aug. 15, 2019).

⁹ BEN W. HEINEMAN, WILLIAM F. LEE, AND DAVID B. WILKINS, LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY, https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf.

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Proactive lawyering can be added to the prevailing pedagogy to meet these needs because the skills associated with learning leadership are compatible with, or at least not opposed to, those involved in learning how to “think like a lawyer” in the traditional sense of what that means. Proactive lawyering thus can and should simply be added onto learning to operate in lawyers’ more conventional adjudicatory roles.

This simple strategy of complementarity will not, in my view, work. It sidesteps fundamental ways that legal education geared toward cultivating conventional legal skills—“legality” in my sense—necessarily operates in tension with—and sometimes in opposition to—the kind of learning and practice that must take place for lawyers to perform the facilitative and problem solving roles they also occupy. Much of the literature promoting proactive lawyering treats the capacities and mindsets celebrated in the Socratic classroom—judgment, categorization, critique, risk minimization, and reasoning from precedent—as limitations to be overcome or minimized. Perhaps most fundamentally, the notions of justice embraced by legality as opposed to proactive lawyering directly collide, and are often difficult to reconcile.¹⁰ The tendency to downplay these tensions and contradictions—or to throw up one’s hands in the face of them—underappreciates both the necessity and opportunity presented by naming and engaging them. Unless these tensions are addressed, features of legal education operating within the conventional paradigm are likely to marginalize and undercut the efforts to build lawyers’ leadership capacities.

I have come to believe that the concept of paradox holds a key to navigating these contradictory yet linked aspects of lawyering. A paradox is a statement or proposition with positions that are conflicting and yet both are true.¹¹ Paradoxes involve struggle because they call upon mentalities or practices that tend to interfere with each other, even as they depend upon each other. A growing body of organizational and change literature offers insights into both how paradoxes operate and how they can operate virtuously rather than as a vicious cycle.¹² By definition, paradoxes cannot be resolved or eliminated; their self-referential and cycling quality is what makes them a paradox.

In key respects, the paradoxical elements of lawyering are built into law’s structure, role, and practice. At the level of *structure*, formal and informal constitutions (such as contracts) set up law both to provide structures and processes enabling people to interact, cooperate, and make decisions, on the one hand, and to enable people to fight without violence and to abide by decisions that will be backed by force, on the other. Lawyers sit at the cusp of these paradoxical functions.¹³

¹⁰ See Section II(E), *infra*.

¹¹ KENWYN K. SMITH AND DAVID N. BERG, PARADOXES OF GROUP LIFE (1987); PETER ELBOW, EMBRACING CONTRARIES: EXPLORATIONS IN LEARNING AND TEACHING 330 (1986).

¹² See Section IB, *infra*.

¹³ Robert Cover brilliantly portrayed these dualities as a defining feature of law:

Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative - that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.

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These tensions also inhere at the level of *role*. Lawyers are called upon to build, design, enable cooperation and collaboration, “constitute” governments, contracts, relationships, and transactions (in the constitution, in deals, in house, and in alternative dispute resolution), solve problems, and facilitate wise decision-making. They must simultaneously be ready to fight on behalf of clients, to be the stewards of the adversary process, and to discipline the exercise of the violence of the state. These roles are in tension. They are also interdependent. Lawyers cannot conduct a trial without both cooperating and fighting. They cannot steward an effective deal without both minimizing and facilitating risk taking.

Finally, the *practices* required for effective lawyering are themselves paradoxical. Conventional lawyering and leadership will sometimes require competing mindsets, skills, and practices. Lawyers have to judge while they also listen, enable, and empathize. They have to create the conditions for growth and learning, even as they set up the processes to locate or cabin legal responsibility. They have to be in a creative mindset even as they facilitate compliance and reactive risk avoidance.

The tensions that manifest in the relationship between legality and proactive lawyering lie at the heart of what makes lawyers distinctive, necessary, and effective. The most successful and impactful lawyers live in these tensions. The role of law and lawyers fundamentally involves the capacity to combine these contradictory modes of thinking, acting, and interacting. This capacity to hold paradox may be what equips lawyers to exercise truly effective leadership.¹⁴ It matters both for lawyers in more conventional roles, and for those who, over the course of their careers, will occupy formal leadership roles in the public, private, and non-profit sectors.¹⁵ When lawyers without this capacity occupy leadership roles, that deficit may help us understand the spectacular failures that unfold when they get stuck on one side or the other of the paradox. The challenge facing law schools is to figure out how to build that tension—and the capacity to manage it—into their practices and cultures. Law school can have a profound impact on how lawyers approach the paradoxical aspects of their roles. It offers a unique opportunity to forge a dynamic relationship between legality and proactive lawyering.

Robert Cover, *Nomos and Narrative, The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

¹⁴ See ROBERT J. ANDERSON AND WILLIAM A. ADAMS, *MASTERING LEADERSHIP: AN INTEGRATED FRAMEWORK FOR BREAKTHROUGH PERFORMANCE AND EXTRAORDINARY BUSINESS RESULTS* 82 (2016) (“The ability to hold opposites, conflict, tension, and polarity, without avoiding them, over-simplifying them or resorting to quick fixes is the hallmark of leadership.”).

¹⁵ DEBORAH L. RHODE AND AMANDA K. PACKEL, *LEADERSHIP FOR LAWYERS* 3 (2018) (“The most crucial challenges of our times involve issues of leadership and, in the United States, no occupation is more responsible for producing leaders than that of law. The legal profession has supplied a majority of American presidents and, in recent decades, almost half the members of Congress. Although they account for just 0.4 percent of the population, lawyers are well represented at all levels of leadership, as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of corporate, government, and nonprofit organizations.”) Rhode also notes that “Americans place lawyers in leadership positions in much higher percentages than other countries.” DEBORAH L. RHODE, *LAWYERS AS LEADERS* 3 (2013).

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This Article argues for naming legality's dualities, reframing them as paradoxes, embracing those paradoxes as challenging but necessary, and engaging law schools and the legal profession in building capacity to navigate these contradictory yet interdependent requirements. Section I lays out the contrary yet interdependent features of legality and proactive lawyering.. Section II explores what makes those tensions paradoxical. This Section identify five paradoxes of lawyer leadership—dualities that contradict one another, give rise to, and affect how lawyers will experience leadership learning: paradoxes of thought and discourse; relationship; motivation, mindset, and justice. Section III shows the limitations of prevailing strategies for reconciling the contradictions between legality and proactive lawyering. Finally, drawing on action research and the literature of paradox and organizational change, Section IV offers three strategies for enabling law students, law schools, and legal organizations to hold contradictory messages and mindsets, and for using this paradoxical approach to strengthen and deepen leadership capacity in lawyers.

I. DEFINING THE DUALITY

The central argument of this Article is that lawyering entails contradictory yet interdependent features and practices, and that explicit attention to these tensions matters. I have identified two constellations of activities that employ different and, in some respects, opposing logic. Before we can explore the duality's paradoxical nature, we must first define its two sides.

Legality makes up one side of this duality. Although there is considerable disagreement about what "thinking like a lawyer" should mean, legality in the conventional sense has a set of common features. The other side of the duality falls under the umbrella of what I call proactive lawyering. Housed under this rubric include lawyering situations featuring ways of thinking, interacting, and practicing that operate in tension with legality.

Section A identifies and briefly describes three defining attributes of legality: formality, authority, and adversarialism. These pillars of legality's logic also anchor the contradictions built into to legal education and lawyering. Section B first identifies the forms of practice falling under the rubric of "proactive lawyering, and then identifies the features that operate alongside and, in certain respects, in tension with legality in both the law school curriculum and legal practice.

A. *Lawyering's Default Paradigm: Adjudicatory Lawyering and the Rule of Law*

Legality—a synonym for the rule of law—lies at the heart of conventional legal education and of law's claim to legitimacy.¹⁶ Law school initiates students to the legal

¹⁶ I am using "legality" as a descriptive rather than evaluative term, to connote the modes of reasoning and decision making that characterize widely shared features that define what it means to operate under the rule of law. I am in good company in using the term "legality" in this manner *See, e.g.,* Lauren Edelman, *Legality and the Endogeneity of Law*, in *LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK* (Robert A. Kagan et al

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profession by schooling them in a distinctive mode of thinking, relating, and motivating action, which has come to define what it means to “think like a lawyer.” This is conventionally conceived to mean engaging in formal, adversarial modes of argumentation and decision-making, governed by precedent and backed by sanctions.¹⁷ The first year curriculum focuses primarily on teaching students legal reasoning, argumentation, and decision-making as the operating system for the rule of law, which functions as lawyers’ default mode of thinking and acting. For many lawyers and commentators, traditional legal method and analysis “should continue to be at the core of legal education, as well as of any plausible professional licensing regime.”¹⁸

Legality is not limited to adjudication, though the judiciary is the paradigmatic institution generating its features. Often, students are introduced to administrative, legislative, or transactional activity by reading appellate decisions assessing the adequacy of decisions by non-adjudicative institutions, and by applying an adversarial mode of inquiry to analyzing the work of these institutions. Many scholars of administrative decision making, remedies, legislation, and organizations have embraced rule of law values as a pathway to legitimacy, paved by lawyers deploying the processes and analytical tools forged in the judiciary.¹⁹ Organizations operating out of but governed by legal institutions also adopt legality as a way to enhance their legitimacy.²⁰ Legality frames many lawyers’ approaches to representing organizational clients.²¹ It provides the stamp of legitimacy associated with the rule of law.

The literature analyzing what it means to “think like a lawyer”—and how legal education teaches the mastery of adjudicatory lawyering—focuses on three defining features: formality, authority, and adversarialism. These features combine to structure how law students, particularly in their first year, learn to reason, communicate, interact, and orient their learning.²² Together

eds 2002); H.L.A. HART, *THE CONCEPT OF LAW* (1961); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969).

¹⁷ See HEINEMAN, LEE, AND WILKINS, *supra* note XX, at 9; ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER,”* (2007); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009); PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969); Todd D. Rakoff and Martha Minow, *A Case for Another Case Method*, 60 *VAND. L. REV.* 597,608 (2007).

¹⁸ HEINEMAN, LEE, AND WILKINS, *supra* note XX, at 13 (“The special work of law is to identify claims and obligations that merit official validation and enforcement.”). The MacCrate Report, intended to spark curricular reform in legal education, states that “law schools should continue to emphasize the teaching of “legal analysis and reasoning,” and “legal research”. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development - An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap* (Chicago, 1992) [hereinafter MacCrate Report].

¹⁹ MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 149 (2008); Jonathan Gould, *Making Parliamentary Precedent* (unpublished manuscript)(on file with author); Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 *YALE L. J.* 1 (2019).

²⁰ Edelman, *supra* note XX; Sim B. Sitkin and Robert J. Bies, *The Legalistic Organization: Definitions, Dimensions, and Dilemmas*, 4 *ORG. SCI.*, 345 (1993).

²¹ Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 *MD. L. REV.* 255, 259, 273 (1990) (discussing the inadequacy of the partisan role of lawyers in fulfilling the public oriented mission of the profession that justifies the adversary system in the first place).

²² See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007); Bryant Garth and Yves Dezalay, *Law Schools and the Construction of Competence*, 43 *J. LEGAL EDUC.* 469 (1993); Susan

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they operate as “a now canonical practice of legal analysis”,²³ an operating system that orients many students' professional identity as lawyers. These pillars of legality's logic also anchor the contradictions built into to legal education and lawyering.

1. Formality

Formality is one of legality's most visible and defining features. The actors operating within the legal system occupy formal roles that define their authority and structure their relationships (lawyer, client, judge, legislator, administrator etc.). Professional and legal norms dictate how people in different legal positions communicate and relate to each other. For law students, the legal acculturation process begins by experiencing the formality of space, language, relationships, and ways of thinking in the classroom and the law school culture.²⁴ People refer to each other by role (Judge, Professor) and their interactions often take place in venues that structure the form and boundaries of interaction among the participants in the adversary process. The relationships of professor and student, lawyer and client, judge and litigant operate within a ritualized structure with a prescribed form.²⁵ Learning the law involves becoming acculturated to these formal rules and practices.²⁶

Formality also prescribes the prevailing mode of thought for judges, lawyers, and law students. Legal reasoning—reasoning analogically, formally, and from precedent—is “what distinguishes lawyers from other sorts of folk.”²⁷ Legal norms “characteristically satisfy certain formal conditions—such as generality—which are usually taken to be necessary conditions also for justice.”²⁸ Legal reasoning proceeds by identifying the relevant legal categories and placing people's conduct into those categories. In this sense, formality operates as defining feature of “the rule of law”: “to move from a non-legal to a legal mode of governance is to move to a situation where there will be special and explicit concern for treating like cases alike, for universalization, and for proceeding in a rule like manner.”²⁹ Although legal analysis has moved beyond formalism, formality continues to remain alive in legal thought, with its emphasis on predictability, uniformity of treatment, reasoning from precedent, and transparency.³⁰

Sturm and Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *Vanderbilt Law Review* 515 (2007).

²³ ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 36 (1996).

²⁴ MERTZ, *supra* note ; Schauer, *supra* note , Sturm and Guinier, *supra* note .

²⁵ MacCrate Report, *supra* note XX.

²⁶ Mertz documents the socialization process that takes place in the law school classrooms she studied, and the cumulative impact of those interactions on students' view of law and lawyering. *See* MERTZ, *supra* note.

²⁷ SCHAUER, *supra* note, at 1.

²⁸ Jeremy Waldon, *Does Law Promise Justice?* in *LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK* 110 (Robert A. Kagan, Martin Krygier, and Kenneth Winston eds 2002).

²⁹ *Id.*

³⁰ SCHAUER, *supra* note XX, at 24.

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2. Legitimacy grounded in authority

Legality prioritizes rule-based decision-making, precedent, and reliance on authority as the source of law.³¹ “A legal system is known by the existence of authoritative rules.”³² Argumentation and decision making proceed by reasoning from precedent and authority—essentially backward-looking analytical and logical analysis assessing whether the conduct falls within the scope of an authoritative legal rule or principle. Decisions turn on the dictates of written-down rules, applied in new situations. Individual judgment operates under the constraint of precedent. “It is the precedent’s source or status that gives it force, not the soundness of its reasoning nor the belief of the instant court that its outcome was correct.”³³

Law students and lawyers are socialized to value this mode of thought as fundamental to what it means to “think like a lawyer.” Students learn to support their arguments for how a case should turn out with authority and reasoning by analogy to precedent, rather than with what they think is right or just, might improve the situation, or produce a better outcome. This form of reasoning is counter-intuitive; it dictates, “[o]utcomes other than those the decision-maker would otherwise seem to be the best all-things-considered outcome for the case at hand.”³⁴

Authority operates within legality in a second important respect: as a way to enforce compliance with legal norms. A distinguishing feature of law is its relationship to state-sanctioned violence. Legality relies ultimately on the power of the state to enforce norms, and thus to motivate behavior. Legal actors achieve adherence through the imposition of legal requirements, the expression of legal duties to comply with those responsibilities, threats of negative consequences for failing to adhere, and when necessary, coercion. The motivation for adhering to norms is basically extrinsic, in the form of duty, incentives, threats, and coercion.³⁵

Both of these aspects of authority relate to one crucial function of law: as Larry Alexander and Frederick Schauer have written, “an important--perhaps the important--function of law is its ability to settle authoritatively what is to be done.”³⁶ In Philip Selznick’s words, “the special work of law is to identify claims and obligations that merit official validation and enforcement.”³⁷

³¹ *Id.* at 5, EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990).

³² SELZNICK, *supra* note , at 5.

³³ *Id.* at 41.

³⁴ SCHAUER, *supra* note , at 7-8.

³⁵ See Cover, *supra* note XX, at ; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 42 (Gráinne de Búrca & Joanne Scott, Eds. 2006)(“The American legal system stands ready to commit vast resources to the determination and evaluation of past conduct in order to calibrate present reward or punishment to it”); MALCOM K. SPARROW, IMPOSING DUTIES: GOVERNMENT’S CHANGING APPROACH TO COMPLIANCE 1 (1994).

³⁶ Larry Alexander and Frederick Schauer, *supra* note XX.

³⁷ SELZNICK, *supra* note at 5.

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3. Adversarialism

A third defining feature of legality is adversarialism: two opposing sides put their best arguments forward, enabling a neutral decision maker to reach a correct decision based on the merits of those arguments.³⁸ Adversarialism constructs conflict as a contest between competing positions. Each situation has two opposing sides, and the process will produce a winner and a loser. Within the adversary model, lawyers are understood to have a fiduciary duty to advance the interests and improving the situation of one party as against the interests of the opposing party.³⁹ Lawyers' ethical responsibilities to their clients stem from commitment to the adversary system, incarnated in the Model Rules of Professional Responsibility.⁴⁰

From the outset, students learn that the adversary process is the gold standard for the rule of law. In the conventional law school classroom, adversarial conflict provides the underlying framework of interaction, knowledge generation, and problem solving. As presented in most law school classes, law addresses conflict in highly formal settings aimed at determining winners and losers. Problems are converted into binary options, and they are “resolved” by using authority and rigorous analysis to test the strength of those options. Competition functions to establish truth. The adversary process and rank ordering define success as winning that competition—in class, in an argument, in the courtroom, or elsewhere.

The conventional law school classroom mirrors adjudication's adversarial, formal idea of conflict. The professor structures interactions with students by invoking the style of an appellate judge who questions lawyers representing one side or the other to ferret out the weaknesses in their positions and validate winning arguments.⁴¹

The adversary process holds a special place in the prevailing professional and public understanding of what it means to be governed by the rule of law.⁴² Felix Frankfurter's oft-cited quote from *Joint Anti-Fascist Comm. v. McGrath* conveys the essence of the commitment to adversarialism as a hallmark of legality: “No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and

³⁸ For a discussion of the origins and operation adversary process in American Law, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE* (2017); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984). For a summary of critiques, see Carrie Menkel Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

³⁹ *Id.*; Gilson and Mnookin, *supra* note , at 551 (“In the litigation context, the client's preferred position is given shape through the norm of zealous advocacy: the lawyer must vigorously assert the client's interests; the final authority on important issues of strategy rests with the client; and the client may discharge his lawyer at will, but the lawyer has only limited ability to withdraw from representation.”); Geoffrey Hazard, *Lawyer for the Situation*; 38 VAL. U. L. REV. 377, 378 (2004).

⁴⁰ William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, Georgetown Journal of Legal Ethics (2010).

⁴¹ See MERTZ, *supra* note XX; SCHAUER, *supra* note XX.

⁴² See *id.*; sources cited in note XX, *supra*.

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opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.’’⁴³

Legality's defining features—formality, authority, and adversarialism—orient students to the legal profession and shape how many in the legal profession understand what it means to “think like a lawyer.” Legality casts a shadow over non-adjudicatory aspects of lawyering, such as negotiations and client counseling.⁴⁴ These defining features also figure prominently in the popular understanding of law and lawyering.⁴⁵ In conventional pedagogy, jurisprudence, and scholarship, legality is often contrasted with other modes of thought and decision making—politics, personal preferences, bargaining, mediating, organizing, managing—as a way of differentiating law from other modes of decision making, and aspiring to make good on legality's promises of predictability, generality of understanding and application, legitimacy, and order.⁴⁶

Though legality has endured as the default logic in most law schools, it has been the focus of waves of critique by legal scholars, educational reformers, and students.⁴⁷ Legal realists criticized the court-centered and formalistic focus of legality, both in practice and in legal education, and sought to widen or shift the focus to include systematic empirical study, sociological jurisprudence and the legislative realm.⁴⁸ Critical legal scholars, critical race theorists, and feminist theorists have challenged basic assumptions underlying legality—that politics could be separated from law, that law operates neutrally, and that legal doctrine rather than power and ideology dictates judicial outcomes.⁴⁹ Commentators have criticized legality for its disconnection from practice and its failure to prepare students for the full array of competencies required for effective lawyering. Legality conveys an overly narrow idea of lawyers' roles, if it addresses lawyering at all. These critiques have prompted the introduction of courses that extend beyond legality, with features quite different from those called for by legality.

⁴³ 341 U.S. 123, 171-72(1951) (Frankfurter, J., concurring).

⁴⁴ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950 (1979); ROBERT MNOOKIN, SCOTT R. PEPPET, AND ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

⁴⁵ Miriam Webster's definition of law embodies legality's features:

Law is a binding custom or practice of a community; a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a [sanction](#) (as an edict, decree, rescript, order, ordinance, statute, resolution, rule, judicial decision, or usage) made, recognized, or enforced by the controlling authority.

⁴⁶ See UNGER, *supra* note , at 65. Roberto Unger eloquently summarizes this animating idea of contemporary law and legal doctrine “as a binary system of rights of choice and of arrangements withdrawn from choice the better to make the exercise of choice real and effective.” *Id.* at 27.

⁴⁷ I am indebted to Jed Purdy for this way of organizing the critique of legality.

⁴⁸ SEE JEROME FRANK, *COURTS ON TRIAL* 161-62 (1949); Karl Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008). The realist critique is summarized in SCHAUER, *supra* note XX, at 124-34.

⁴⁹ DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (1983); UNGER, *supra*, note XX.

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B. Legality's Duality: Proactive Lawyering

Although legality has maintained its canonical status in legal education, lawyers and academics alike recognize that law and lawyering also entail ways of thinking, relating, and practicing that do not conform to legality's conventions. Though these practices occur in different venues, they share features requiring overlapping competencies and roles that can be cultivated systematically if they are recognized as part of the same field of practice. These lawyering practices also bear a similar relationship to legality: they both conflict with legality's defining features and are integrally linked with legality's operation.

This Article uses the term "proactive lawyering" as the umbrella for the full range of lawyering activities that involve taking the steps needed to meet needs, address problems, and achieve goals.⁵⁰ Proactive means "acting in anticipation of future problems, needs, or changes." I also use "proactive" as an acronym, to convey the range of roles and practices that lawyers engage in that share these features:

P	R	O	A	C	T	I	V	E
Problem solver	Researcher Reflective practitioner	Observer	Advisor	Counselor Capacity builder Change agent	Translator Transaction engineer	Intermediary Institutional designer Information integrator	Values maximizer	Enabler Educator Ethicist

This section first catalogues the domains that regularly employ proactive lawyering. It then identifies three features that characterize proactive lawyering: informality, a focus on efficacy, and collaboration.

1. A map of proactive lawyering domains

Proactive lawyering currently operates in a variety of domains falling both within and beyond conventional legal practice.

⁵⁰ Other options that have been proposed as an umbrella term include problem solving, holistic lawyering, professionalism, lawyer leadership. For a discussion of the limitations of these alternatives and relationship of proactive lawyering to lawyer leadership, see Susan Sturm, *Leadership by Any Other Name* (work in progress).

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a. Policy analysis built into legal decision making

Even within legal doctrinal analysis, modes of thinking beyond conventionally defined legality come into play. As legal theorists and critics have noted, classic legal reasoning (meaning using logic, analysis, analogy, and precedent to decide cases) cannot actually resolve cases where the legal rule is ambiguous, the situation is complex, and competing policies dictate different outcomes. Where there is no clear rule or applicable precedent, courts and lawyers must grapple with competing values.⁵¹ Some mode of decision-making beyond logic and analogy is needed to select among these competing values.⁵²

Commentators and critics have pointed out contradictions between conventional legal reasoning and the methodology needed to grapple effectively with conflicting values and policies in the context of judicial decision making.⁵³ At a more basic level, law in the more formal sense takes on its meaning through communal narratives, even as though norms are nurtured outside law and may be undermined by official legal rules and the processes that enforce them.⁵⁴

b. Aspects of adjudication requiring practices beyond legality

Although legality structures the logic of analysis and decision making in adjudication, the processes required for adjudication to occur, as well as for giving force to resulting judgments, cannot proceed only through legality. They require more collaborative, informal, and facilitative modes of thought, interaction, and practice. Interactions with the client leading up to litigation involve advising, counseling, and fact gathering.⁵⁵ Discovery and trial preparation also contemplates non-adversarial, forward-looking interactions with opposing counsel, experts, and potential witnesses. Indeed, the Federal Rules of Civil Procedure demand that lawyers work together at every critical juncture of litigation.⁵⁶ The rules, along with mutual self-interest, also yield incentives and processes to induce settlement.⁵⁷ Indeed, most cases settle, meaning that even for litigators, lawyers will spend much of their time involved in informal interactions aimed at achieving effective resolution, which in turn requires cooperation with client and adversary.⁵⁸ Remedies, particularly injunctive remedies, also call upon courts and lawyers to construct forward-looking solutions that can effectively address legal violations.⁵⁹

⁵¹ UNGAR, *supra* note XX; Dorf, *supra* note XX.

⁵² See ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 10-11* (2005) (quoted in Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash* 42 HARV. CIV. R. CIV. LIB. L. REV. 373 (2007)).

⁵³ UNGER, *supra* note , at 42.

⁵⁴ Cover, *supra* note XX; Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J, 1860, 1866 (1987).

⁵⁵ DAVID A. BINDER, *LAWYERS AS COUNSELORS* (1991).

⁵⁶ See, e.g. F.R.C.P. Rules 16, 26, 37, 68.

⁵⁷ Gilson and Mnookin, at 516.

⁵⁸ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. OF EMPIRICAL LEGAL STUD. 459–570 (2004).

⁵⁹ Susan Sturm, *A Normative Theory of Public Law Remedies*; Joanne Scott and Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 Colum. J. European L. (2007).

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c. Non-legalistic judicial arenas

A panoply of judicial arenas—some old and some new—operate with a logic that emphasizes problem solving and conflict resolution, and do not conform in significant respects to the pillars of legality envisioned by the first-year curriculum. Family court,⁶⁰ juvenile court, problem solving courts⁶¹ (such as drug courts and homelessness courts), and bankruptcy courts all depart significantly from legality's modus operandi.⁶² They use informal processes. Their focus is on problem solving and remediation. Their method relies heavily on collaboration and strives to minimize adversarialism. In addition, many litigants proceed pro se; many court systems have adapted their roles and practices to adapt to this reality, often in ways that do not hew closely to the demands of legality.⁶³

d. Non-adjudicative legal practice

Alongside their roles in processing adversary conflict, law and lawyers are called upon to structure and facilitate human interactions enabling individuals, groups, communities, and polities to achieve shared goals, produce value, and solve problems. Many aspects of legal practice operate outside of the confines of the legality framework, and require different mindsets, competencies, and practices. Alternative dispute resolution takes place both in the shadow of the law and outside the formal legal system.⁶⁴ Mediation and negotiation are a mainstay of legal practice. These processes and practices come into play both as an explicit form of conflict resolution and in the process of everyday interactions with clients, collaborators, and adversaries.

Lawyers also are engaged in problem solving as a crucial aspect of their counseling, facilitation, advising, and intermediary roles.⁶⁵ They help clients, organizations, communities,

Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1055 (2004).

⁶⁰ ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 52-54 (1992).

⁶¹ Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Judith Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851 (1997).

⁶² Amy J. Cohen, *Family, the Market, and ADR*, 2011 J. DISP. RESOL 91, 100-101 (2011).

⁶³ Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the New Civil Courts*, 2018 WISC. L. REV. 249 (2018).

⁶⁴ See, e.g., CARRIE J. MENKEL-MEADOW, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2005); MNOOKIN, PEPPET, AND TULUMELLO, *supra* note XX; THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 616 (Andrea Kupfer Schneider and Christopher Honeyman, eds. 2006).

⁶⁵ PAUL BREST AND LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* (2010); Carrie Menkel-meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and NonPartisanship in Lawyering*, 72 TEMP. L. REV. 785, 793-94 (1999); Sturm, *supra* note XX, at XX.

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and systems address problems in the classic sense (an issue that requires resolution) as well as problems in the sense of something that has gone awry and requires remediation.

Transactional lawyering and lawyers representing organizations certainly employ legality as part of their practice, but their roles and relationships are much more facilitative and oriented toward enabling clients to achieve their aims.⁶⁶ They add value by sharing non-legal knowledge, facilitating collaboration, serving as intermediaries, building trust, problem solving, and designing systems of mutual accountability and problem solving. All of these aspects of transactional lawyering call for informal, constructive, integrative, and forward-looking modes of thinking, relating, and motivating practice. Lawyers representing organizations (both for-profit and non-profit) operate both inside and outside the legality frame, using mindsets and strategies focused on enabling the organization to achieve its goals while minimizing legal risk.⁶⁷

Human rights practice is another area that calls upon lawyers to play roles beyond legality. Core human rights practices call for changing norms and practices through political mobilization and building the capacity of directly affected communities to advocate on their own behalf.⁶⁸ Human rights practice thus rests upon multidimensional lawyering, using informal norms, building alliances, marshaling public opinion, building the capacity of directly affected communities to advocate on their own behalf, and marshaling informal incentives and tools to hold individuals, corporations, and governments accountable, realize rights, and advance change.

Movement lawyering and social change lawyering increasingly involves these multi-dimensional strategies and roles, operating alongside side law reform and litigation strategies.⁶⁹ Although litigation continues to play a central role in social change work, lawyers and legal scholars utilize an array of methods, with litigation embedded in a broader theory of change aimed at having impact.

e. New forms and institutions of legal decision making

Finally, law and lawyering practices and roles are adapting to the demands of highly complex, uncertain, and troubled times by forging new forms that can accommodate volatility, complexity, and uncertainty. These forms recognize the limits of conventional legality as a way to address complex problems, and emphasize the development of institutional architecture that supports collaboration, peer-to-peer learning, experimentation, and adaptability. Legality's limits

⁶⁶ Gilson and Mnookin, *supra*.

⁶⁷ See BJARNE P. TELLMANN, BUILDING AND OUTSTANDING LEGAL TEAM: BATTLE TESTED STRATEGIES FROM A GENERAL COUNSEL 254-68 (2017).

⁶⁸ JO BECKER, CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE (2013); TRICIA CORNELL, KATE KELSCH, NICOLE PALASZ, NEW TACTICS IN HUMAN RIGHTS (2004).

⁶⁹ Suzanne Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 Colum. J. Gender & L. 1, 7 (2015); Austin, Chu, and Liebman, *supra* note XX.

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have also prompted some scholars to call for an expansion of what we mean by legality to include institutional reimagination and redesign.⁷⁰

Some of this work focuses on expanding or rethinking the role of the judiciary, to operate in dynamic relationship with other institutional actors that develop effective modes of problem solving and innovation.⁷¹ Some focuses on linking informal dispute resolution and problem solving with the process of generating public norms.⁷² Some focuses on constructing and linking intermediary institutions and “organizational catalysts” that will spur on going learning, mutual accountability, and adaptive norms.⁷³ These new forms, emerging in both theory and practice, call for more collaborative, creative, and learning-focused modes of law and lawyering.

2. Proactive lawyering's defining features

The lawyering practices discussed in the previous section share important attributes. They are all aimed at enabling individuals, groups, and institutions to achieve their goals and aspirations in a world shaped but not fully defined by law.

This section describes three key features of proactive lawyering practices and roles: (1) informality, (2) legitimacy grounded in efficacy, and (3) collaboration. Each of these modes of practice operates in tension with a core feature of legality.

a. Informality

Proactive lawyering contrasts with legality in its emphasis on informality. It does not proceed according to fixed roles and rules. Roles are defined functionally rather than formally. These processes call for flexibility and adaptability in both roles and mode of thinking, and the capacity to tailor the mode of reasoning and relationship to the demands of the situation. Stakeholders participate directly rather than only through an intermediary. These modes of thought and action emphasize adaptability rather than adherence to established procedure. The modes of interaction are designed to encourage relationships that foster trust and connection. Whereas legality calls for prescribed modes of interaction and relationships defined by roles, non-legalistic processes rely on effective communication, experimentation, and interactions that

⁷⁰ See, e.g., Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Minow and Rakoff, *supra* note XX.

⁷¹ See Charles F. Sabel and William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1055 (2004); Joanne Scott and Susan Sturm, *Courts as Catalysts; Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUROPEAN L. (2007).

⁷² Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 523 (2008); Susan Sturm and Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP.RESOL. 1.

⁷³ Grainne De Burca and Joanne Scott, *Introduction: New Governance, Law, and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 2-3 (Grainne de Burca and Joanne Scott, ed. 2006); Susan Sturm, *The Architecture of Inclusion, Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 287 (2006).

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build understanding, learning, and capacity to work together. Participation is defined not by formal status (party, attorney of record, judge) but by the stake an individual might have in addressing an issue and their power to affect the desired outcome (either positively or negatively). Structure serves the role of facilitating purposeful and effective informal interaction rather than prescribing the modes of interaction and decision-making.

b. Legitimacy grounded in efficacy

Proactive lawyering strives for efficacy—the ability to produce a desired or intended result, to enable problem solving and the achievement of goals. The gaze is forward looking rather than backward looking, and focused on impact rather than predictability.⁷⁴ Problem solving is integral to integral to proactive lawyering;⁷⁵ it requires facilitating a process of understanding, specifying, diagnosing, and seeking to achieve the desired state.⁷⁶ This role corresponds to Robert Cover's capacious definition of law as the relationship between the “is”, the “ought” and the “what might be.”⁷⁷

Proactive lawyering's inquiry is exploratory rather than adjudicative: how can the lawyer or decision maker facilitate the achievement of goals and the furtherance of purposes? What will it take to effectuate the desired outcome? What actually will work to address the problem, rather than what category or legal significance does this problem involve?⁷⁸ This mode of engagement relies on creativity, innovation, imagination, and the strategic use of information to craft effective solutions and resolutions that satisfy the participants and meet the demands of the situation.⁷⁹ Power stems not from authority and the capacity to enlist coercion, but instead from influence, persuasiveness, and demonstrated capacity to achieve desired outcomes.⁸⁰ Globalization, technology, and complexity have amplified the importance of this focus on efficacy.⁸¹

c. Collaboration

⁷⁴ Simon, *supra* note XX, at .

⁷⁵ Problem solving is the first skill identified in the MacCrate Report setting out key lawyering competencies. MacCrate Report, *supra* note XX.

⁷⁶ Paul Brest and Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 *TEMPLE L. REV.* 811, 812 (1999).

⁷⁷ Cover, *supra* note .

⁷⁸ Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *U.C.L.A. L. REV.* 754 (1984).

⁷⁹ MacCrate Report, *supra* note XX, at 152.

⁸⁰ See IAN AYRES AND JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 110-116 (1992);

⁸¹ See KIMBERLY AUSTIN, ELIZABETH CHU, AND JAMES LIEBMAN, *RE-ENVISIONING PROFESSIONAL EDUCATION* (2017). Available at

https://cpri.law.columbia.edu/sites/default/files/content/docs/reenvisioning_professional_education_03142017_white_paper_1.pdf, (last visited on August 15, 2019).

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Proactive lawyering prioritizes collaboration. Its success depends on enabling people affected by, interested in, and responsible for an issue to work together, even across competing interests and opposing positions.⁸² Processes like learning from failure, deliberation, experimentation, design thinking, problem solving, and innovation get their power from bringing diverse perspectives together to learn with and from each other. They call for engaging with difference not as a way to evaluate the merits of each, but instead to enable effective learning from peers, adversaries, and outsiders, and interacting that enables creative solutions and effective implementation. Trust is a necessary lubricant of these interactions.⁸³

These three features of proactive lawyering described above form a logic that operates in tension with that of legality. Legality's dualities are summarized below:

Adjudicatory Lawyering	Proactive Lawyering
Formality	Informality
Authority	Efficacy
Adversarialism	Collaboration

II. WHAT MAKES LAWYERING PARADOXICAL?

Law and lawyering call for both adjudicatory and proactive lawyering, as exhibited by the previous section. Yet, these opposite modes of thought, interaction, and experience sometimes operate at cross-purposes, and even contradict each other. These opposing mindsets

⁸² See Cohen, *supra* note XX; Heineman, Lee, and Wilkins, *supra* note, at 15 (“We need lawyers who are not just strong individual contributors but who have the ability to work cooperatively and constructively in groups or on teams that are increasingly diverse and multidisciplinary—and who can lead these teams effectively.”)

⁸³ Amy Cohen’s description of juvenile and family courts identifies informality, conciliation, and anti-adversarialism as characteristics enabling these courts to provide “social justice” in contrast to “legal justice.” provides an example of the contrast between legality and proactive law and lawyering. Amy J. Cohen, *Family, the Market, and ADR*, 2011 J. DISP. RESOL 91, 100-101 (2011).

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and practices are nonetheless interdependent and mutually constitutive. In short, they are paradoxical.

Although students and scholars alike have observed the tensions built into lawyering,⁸⁴ the significance of their paradoxical nature has been largely overlooked. A burgeoning literature demonstrates that paradoxes operate as a particular form of duality that affect how those tensions are experienced and whether they will undermine or facilitate the pursuit of both sides of the duality.⁸⁵ The paradox lens thus offers a conceptual tool for engaging productively with the tensions between legality and proactive lawyering, paving the way for the practical strategies set out in Parts III and IV.

Before exploring the five lawyering paradoxes built into lawyering, we need greater clarity about paradox's meaning.⁸⁶ In the legal and scholarly literature about lawyering, the term "paradox" is often used interchangeably with other terms conveying the idea of tensions and oppositions.⁸⁷ I am calling attention, however, to the importance of differentiating paradoxes from dilemmas.⁸⁸ A dilemma is a necessary choice between mutually exclusive alternatives, each with advantages and disadvantages.⁸⁹ Bernard Williams uses the example of a person who is both lazy and thirsty, who is seated comfortably and the drinks are elsewhere.⁹⁰ Unlike a dilemma, a paradox involves choices that are contradictory but interdependent rather than mutually exclusive. Paradoxes cannot be resolved; the contradictory elements are built into the situation. This self-referential and cycling quality is what constitutes a paradox.

Peter Elbow, a scholar of teaching and learning, an example illustrating the concept of paradox in the context of teaching and learning: "students seldom learn well unless they *give in*

⁸⁴ See, e.g., CULLEN, *supra*, PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS* (2003) (describing paradoxes in legal education, identifying practices at cross-purposes, and holding out little hope for significant change); DEBORAH RHODE, *LAWYERS AS LEADERS* 5 (2013); Larry Richard, *Leadership Competencies in Law*, in *LAW AND LEADERSHIP* (2013).

⁸⁵ See ELBOW, *supra* note ; Moshe Farjoun, *Beyond Dualism: Stability and Change as a Duality*. 35 *Acad. Mgt. Rev.* (AMR) 202-225. (2010); LINDA HILL, *COLLECTIVE GENIUS: THE ART AND PRACTICE OF LEADING INNOVATION* (2014); BARRY JOHNSON, *POLARITY MANAGEMENT: IDENTIFYING AND MANAGING UNSOLVABLE PROBLEMS* viii (2014); Charles A. O'Reilly and Michael L. Tushman, *Ambidexterity as a Dynamic Capability: Resolving The Innovator's Dilemma*, 28 *ORG. BEHAV.* 185 (2008); SMITH AND BERG, *supra* note XX; Wendy K. Smith and Marianne W. Lewis, *Toward a Theory of Paradox: A Dynamic Equilibrium Model of Organizing*, 36 *ACAD. OF MGMT. REV.* 381 (2011).

⁸⁶ Scholars and commentators have sometimes used other language to described a similar phenomenon, including "polarities", JOHNSON, *supra* note , at viii; "dualities," Farjoun, *supra* note , at 205; contraries, ELBOW, *supra* note XX, at 3; and dialectics. *Id.* at 240.

⁸⁷ See, e.g., RHODE, *supra*, note XX; MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1993); CUMMINGS, *supra* note XX.

⁸⁸ Merriam Webster, <https://www.merriam-webster.com/dictionary/paradox> (last visited Feb. 10, 2019).

⁸⁹ Caroline Christof, *The Possibility of Moral Paradox*, 2 *Polymath* 40 (2012) ("[I]n a moral dilemma, a person is forced to choose one obligation over another and to elect the best course of action.").

⁹⁰ Bernard A. Williams and W.F. Atkinson, *Ethical Consistency*, 39 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY SUPPLEMENTARY VOLUMES* 103, 104 (1965).

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or submit to teachers. Yet, they seldom learn well unless they *resist* or even reject their teachers.”⁹¹

How people think about paradoxes actually affects how they experience them. Paradox scholars have explored the dynamics of paradoxes as well as the behaviors that determine whether paradox produces cycling back and forth between opposing alternatives—that is, “stuckness” or constructive struggle.⁹² One of the most influential sources on the meaning and operation of paradoxes, written by Kenwyn Smith and David Berg, focuses on the paradoxes of group life.⁹³ Smith and Berg observe that groups become strong and resourceful only if the individuality of their members is expressed.⁹⁴ Individual expression, however, sparks group conflict—that is, conflict capable of fostering novel understandings and disrupting group decision-making and performance.⁹⁵ Each method of disposing of the conflict gives rise to a new set of tensions; the attempt to unravel these contradictory forces creates a circular process that is paralyzing to groups.⁹⁶

The first step in putting the paradox concept to work is to name the recurring paradoxes facing lawyers, and what makes them both conflicting and interdependent—that is, paradoxical. Drawing on the scholarly literature, teaching experience, and field research, I have identified five lawyering paradoxes that stem from the opposing yet interdependent features of legalistic and proactive lawyering: paradoxes of thought and discourse; relationship; motivation, mindset, and justice.

A. Thought and Discourse Paradoxes: Methodological Skepticism v. Methodological Possibility

The modes of thought characterizing legality as compared to proactive lawyering could be thought of as two competing methodologies.⁹⁷ Legality (or adjudicatory lawyering) employs a methodology of skepticism, emphasizing critical thinking, logic, categorization, argumentation, vigilance, detachment, evaluation, and judgment.⁹⁸ Proactive lawyering employs a methodology

⁹¹ ELBOW, *supra* note , at 65. This “authority paradox” has particular salience to lawyering, and is explored more fully in Section, *infra*.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Charles Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy.* 46 HUMAN RELATIONS 1133 (1993).

⁹⁶ *Id.* at 14.

⁹⁷ This discussion of competing methodologies is inspired by Elbow’s articulation of competing methodologies he detected in the context of teaching and learning. He defines “methodological doubt as “the systematic, disciplined, and conscious attempt to criticize everything no matter how compelling it might seem—to find flaws or contradictions we might miss” and methodological belief as “the equally systematic, disciplined and conscious attempt to believe everything no matter how unlikely or repellent it might seem—to find virtues and strengths we might otherwise miss. Both derive their power from the very fact that they are methodological.” ELBOW, *supra* note XX, at 257.

⁹⁸ A methodology of skepticism thus prioritizes what Kahneman calls System 2 thinking: effort, sustained attention, reasoning, and slow thinking required to “construct thought in an orderly series of steps” through criticism, caution, making comparisons, planning, exercising choice and “checking the validity of a complex logical argument.” KAHNEMAN, *supra* note , at 21, 22.

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of possibility, emphasizing creativity, intuition, seeing patterns, learning from difference, innovation, empathy, experimentation, openness, and synthesis.⁹⁹ The methodologies of skepticism and possibility thus pull in different directions in their thought processes, aims, emotional valence, and role expectations.¹⁰⁰

The forms of reasoning that are particularly concentrated in legality's mode of argument and decision making are logical, analytical, categorical, and backward looking.¹⁰¹ Legality adopts a critical and skeptical stance in thought, discourse, and decision-making. As a popular text on legal reasoning and writing observes:

Your documents will be read by judges and supervising lawyers who must make decisions based on what you have written. They don't read out of general curiosity. They are decisional readers and need you to be a decisional writer . . . Your readers are skeptical by nature and for good reason. Skepticism helps them make better decisions. Their job is to look for weaknesses in your analysis. If they find any, your writing is not helpful to them, and they will react negatively to it. But if your readers can't find any weaknesses, they will rely on you, respect you as a professional, and be grateful for your guidance.¹⁰²

Legality requires careful thinkers who are "alert, intellectually active, less willing to be satisfied with superficially attractive answers, and more skeptical about their intuitions".¹⁰³ The discipline of analysis and interpretation holds legal thinkers to institutionally authorized forms of reasoning that respects institutional roles and rules.¹⁰⁴

Legality also explicitly invites—indeed, requires—judgment and evaluation. Adjudicatory lawyering harnesses ceremonial contest—using dialogue to get ideas or propositions to wrestle with one another so as to expose contradictions in what had been assumed.¹⁰⁵ It proceeds by placing conduct and people into categories and attaching judgment to those categories. Legal inquiry determines fault. Decision-making involves isolating cause and allocating responsibility to one side as opposed to another. It casts parties as opposing and invites

⁹⁹ A methodology of possibility draws on what Kahneman calls System 1 thinking. Those characteristics include generating impressions, feelings, and inclinations, suppresses doubt, cognitive ease, and associative thinking. *Id.* at 51-52."

¹⁰⁰ Duncan Kennedy's pathbreaking work also informs this typology. Kennedy juxtaposes the hermeneutic of suspicion vs. hermeneutic of restoration. Duncan Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary Legal Thought* 19; Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary Legal Thought*, 25 L. AND CRITIQUE 91 (2014). For a discussion of the mechanisms that account for the oppositional character of these modes of thought, see Kahneman, *supra*, BARBARA L. FREDRICKSON, POSITIVITY (2009); TERESA AMABILE AND STEVEN KRAMER, THE PROGRESS PRINCIPLE: USING SMALL WINS TO IGNITE JOY, ENGAGEMENT, AND CREATIVITY AT WORK 31 (2011).

¹⁰¹ See Section IA, *supra*.

¹⁰² RICHARD K. NEUMANN, ELLIE MARGOLIS, AND KATHRYN M. STANCHI, LEGAL REASONING AND LEGAL WRITING (8th ed. 2017).

¹⁰³ This mode of thinking corresponds to what Daniel Kahneman calls System 2 thinking. DANIEL KAHNEMAN, THINKING FAST AND SLOW 46 (2011).

¹⁰⁴ Michele DeStefano & Guenther Dobrauz, *New Suits Appetite for Disruption in the Legal World* (2019) available at <file:///Users/susansturm/Downloads/SSRN-id3411020.pdf>.

¹⁰⁵ This aspect of methodological skepticism is not unique to legal analysis, see ELBOW, *supra* note , at 262, but conventional legal analysis privileges this mode of thought.

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each party to focus on the weaknesses of the other side's position. It proceeds by narrowing the areas of dispute and reaching a clear, singular, and unequivocal outcome. This mode of thought undergirds legality's relationship to rule-of-law values. It disciplines the exercise of power, cabins discretion, and clothes legal decision-making with the imprimatur of principles over personal biases.¹⁰⁶

Rules, precedent, and authority serve to justify the use of force to back up legal decisions.¹⁰⁷ Robert Cover's path-breaking work illuminated this relationship between violence and law's legitimation: "Beginning with broad interpretive categories such as 'blame' or 'punishment,' meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence."¹⁰⁸ Legality thus allows decision makers to justify imposing decisions with serious consequences, including violence.¹⁰⁹

Proactive lawyering depends, in contrast, on contextual, forward looking and creative thinking.¹¹⁰ This mode of thought is sometimes called lateral thinking; "moving beyond purely linear, analytical thought; and shifting mental paradigms."¹¹¹ Proactive lawyering prizes innovation, unlike legality, which privileges authority over efficacy.¹¹²

Legality's skepticism cuts against the more imaginative and improvisational form of thinking integral to problem solving, brainstorming, and design thinking:

Though lawyers tend to make a sport out of shooting down ideas as quickly and thoroughly as possible—whether it's because 'they've been tried before,' an instinct says that 'it won't work', or otherwise. But the designer's mindset pushes us to explore and test ambitious ideas before trashing them We've been trained as lawyers to poke holes and give critiques, but often that stops us from creating new things or supporting others who are doing so."¹¹³

Many of the texts used to develop proactive lawyering capacities discourage comparing, categorizing, and assigning responsibility, all of which are integral to formal, authority-based thinking.¹¹⁴ Design thinking, problem solving, and facilitating difficult conversations explicitly

¹⁰⁶ See Section XX, *supra*.

¹⁰⁷ See Section , *supra*.

¹⁰⁸ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. (1986). Available at: <https://digitalcommons.law.yale.edu/ylj/vol95/iss8/7>

¹⁰⁹ "Beginning with broad interpretive categories such as "blame" or "punishment," meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence." Cover, *supra* note XX, at 7.

¹¹⁰ See Section IB, *supra*. Metaphor and narrative featuring prominently in the methodology of possibility. See ELBOW, *supra* note XX; Menkel-Meadow, *supra* note XX.

¹¹¹ Blasi, *supra* note XX, at .

¹¹² *Id.*

¹¹³ Hagen, *supra* note , at <http://www.lawbydesign.co/en/design-mindsets/>.

¹¹⁴ This pattern surfaces in the literature on design thinking, *see, e.g.*, MICHELE DESTEFANO, LEGAL UPHEAVAL (2018); Margaret Hagen, Law By Design, available at <http://www.lawbydesign.co/en/home/>; Amanda Perry-Kessaris, *Legal Design for Practice, Activism, Policy and Research*, forthcoming J. L. & SOC'Y (Summer 2019), available at <https://ssrn.com/abstract=3295671>, empathetic listening, *see, e.g.*, ; MARSHALL ROSENBERG,

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discourage the critical and backward-looking mode of thought that is the hallmark of legality. Rather than assigning fault or responsibility, the modes of thought associated with proactive lawyering promote mapping joint contributions,¹¹⁵ understanding root causes, and generating multiple and even conflicting approaches to a problem. The goal of proactive lawyering goal is to understand what actually happened so we can improve how we work together in the future.”¹¹⁶ Predictability is not possible or even desired.¹¹⁷

Innovation has been identified as a crucial competency and practices by design thinkers, experimentalists, and transactional lawyers. Proactive lawyering calls for expanding options, understanding connections, intuition, and legal imagination, a form of thinking that enables its practitioners to produce a more robust definition of the problem at hand, and a more plural version of possible solutions. Legal imagination involves “the ability to generate the multiple characterizations, multiple versions, multiple pathways, multiple solutions” to which students then apply “very well honed analytic skills.”¹¹⁸

This mode of thought contrasts with the requirements of legality. The literature explicitly counsels the opposite approach of *not* judging, *not* blaming, *not* comparing or categorizing, and *not* assigning responsibility. In *Difficult Conversations: How to Discuss What Matters Most*, a book widely used in negotiations classes and in training lawyers, the authors designate the “blame frame” as an error that will get in the way of handling a difficult conversation. Proving we are right gets in the way of “understanding the perceptions, interpretations, and values of both sides.”¹¹⁹ The goal is to move away from judging the truth of each party’s position, establishing who is right and who is wrong, or allocating blame. Talking about fault “produces disagreement, denial, and little learning. It evokes fears of punishment and insists on an either/or answer,” (the essence of adversarial process). Blame and responsibility “distract us from exploring why things went wrong and how we might correct them going forward.” Instead, the methodology of possibility calls for systematic effort to see and experience the ideas of others as the speaker does, to listen with appreciation. This mode of inquiry “forces us to enter into unfamiliar or threatening ideas instead of just arguing against them without experiencing them or feeling their force.”¹²⁰

These differing modes of thought deploy different default modes of communication. Legality proceeds through argumentation and advocacy. The form of communication also

NONVIOLENT COMMUNICATION (2015); interacting across difference, *see e.g.*, CAROLYN GROSE AND MARGARET JOHNSON, LAWYERS’ CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 56-62; and having difficult conversations, *see, e.g.*, DOUGLAS STONE, BRUCE PATTON, AND SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (2010).

¹¹⁵ STONE, PATTON, AND HEEN, *supra* note , at 78-79.

¹¹⁶ *Id.* at 60.

¹¹⁷ TIM BROWN, CHANGE BY DESIGN 17 (2009).

¹¹⁸ Rakoff & Minow, *supra* note 1, at x.

¹¹⁹ *Id.* at 10.

¹²⁰ ELBOW, *supra* note , at 263. This mode of thought asks, “not what are your arguments in support of a [silly] belief,” but instead “Give me the vision in your head. You are having an experience I don’t have. Help me to have it.” The emphasis is not on trying to construct or defend an argument but rather to transmit an experience, or enlarge a vision. This mode of thought asks, “not what are your arguments in support of a [silly] belief,” but instead “Give me the vision in your head. You are having an experience I don’t have. Help me to have it.” *Id.* at 261.

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reflects law's formality. Dialogue within legal interactions has an instrumental purpose. It produces the facts and law needed to advocate, persuade, and decide. Clients and witnesses—those who directly experience the interactions giving rise to the facts—supply that information to the formal actors who turn those experiences into facts that become the focus of analysis. The focus of attention is on questions such as: What rule or principle applies to this situation? What category does this situation fit into? How does this situation or actor compare to other situations that have previously been decided? What are the problems with this argument? What have other courts or authoritative sources previously decided and with what reasoning?

This mode of communication invites a specific kind of internal listening (referred to by one prominent leadership reference as “level 1 listening”): “The spotlight is on the lawyer’s thoughts and judgments, and conclusions. Listening serves to get the information needed to decide how to use or act on what you learn.”¹²¹ The focus of awareness is on the relationship of the facts to relevant legal categories. The thought process proceeds by comparing the situation at hand to other situations to determine their legal significance. The purpose of this analysis is evaluation and judgment. The structure, timing, and purpose of interactions flow from the aim of evaluating and judging for the purposes of producing a decision. The personal stories underlying the facts presented in legal decisions matter only in so far as they relate to the relevant legal categories.¹²²

For interactions aimed at having building a relationship, difficult conversations, designing innovative solutions, or solving problems, however, “arguing may seem natural, even reasonable. But it is not helpful. . . [It] “interferes with the ability to learn how the other person sees the world.”¹²³ In contrast, the practices of proactive lawyering invite “a move from certainty to curiosity, from debate to exploration, from simplicity to complexity.”¹²⁴ This stance of curiosity is embraced in design thinking, conflict resolution, coaching, systems thinking, and problem solving. The purpose of inquiry is understanding, integrating, and making sense of differing perspectives. The focus is on understanding. Communication adopts a both/and, rather than a yes/but stance. Even if you are convinced you are right, the conversation is not about establishing who’s right. The focus is on working out a way to connect that will enable you to move forward.

The methodology of possibility thus calls for a different kind of listening and inquiry. The idea is not to categorize but instead to understand, learn, and see the possibility for two stories that conflict and still coexist. Kinsey-House refers to this as level 2 (dialogue) and level 3 (global listening).¹²⁵ Design thinking shares this focus on communicating to learn about and engage intended beneficiaries: “to deliver to them something that will be useful and usable to them, first you need to understand them. This means caring deeply about their needs, their values

¹²¹ KIMSEY-HOUSE et al, *supra* note, at 33.

¹²² MERTZ, *supra*, note, at 9 (“When handed a case to read, you now automatically check to see what the court did in reaching its decision. Poignant, glaring, pitiful stories of human drama and misery begin to sail easily past you, as you take them expertly in hand and dissect them for the “relevant” facts.”)

¹²³ STONE, PATTON, AND HEEN, *supra* note, at 26, 29.

¹²⁴ *Id.* at 37.

¹²⁵ See KINSEY-HOUSE, *supra* note XX.

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and their behavior.”¹²⁶ Rather than engaging in arguments and counter arguments, this approach invites questions such as: “what’s interesting or helpful about the view? What are some of the intriguing features that others might not have noticed? What would you notice if you believed this view? If it were true? In what senses or under what conditions might this idea be true?”¹²⁷

The aims of adjudicatory as compared to proactive modes of thought pull in different directions. Legality aims to produce a single, certain right answer, a singularity of meaning that will decide a particular conflict. Its aim is to narrow the scope of dispute, and settle on a single answer that disposes of the conflict. Proactive lawyering, at least at some stage of the process, generates multiple possibilities.¹²⁸

The emotional valence associated with the methodology of skepticism (critique and analysis) also conflicts with the emotions associated with methodology of possibility (creativity and imagination). There is growing evidence that:

Good mood, intuition, creativity, gullibility, and increased reliance on System 1 form a cluster. At the other pole, sadness, vigilance, suspicion, an analytic approach, and increased effort also go together. A happy mood loosens the control of System 2 over performance: when in a good mood, people become more intuitive and more creative but also less vigilant and more prone to logical errors. Cognitive ease is both a cause and a consequence of a pleasant feeling. ¹²⁹

Recent research has revealed that emotions can have both positive and negative effects on a range of work behaviors, including creativity, decision making, and negotiations.¹³⁰ For example, positive feelings can lead to greater flexibility in problem solving and negotiations.¹³¹ By contrast, negative emotions narrow and restrict the social and cognitive environment; at the same time, they facilitate careful and unbiased judgment.¹³²

Notwithstanding their tensions, these two modes of thought depend upon each other for their successful realization, and even give rise to their opposite twin even as they resist that call. Judgment and evaluation require the input of accurate and reliable information that can only be obtained through forms of inquiry that do not prejudge or evaluate, and that employ empathy, appreciate listening, and learning.¹³³ Clear rules and boundaries can, under certain conditions, actually enable creativity. Linear and logical analysis alone cannot reach a resolution in situations of ambiguity and competing values, at least if it is to proceed with integrity and

¹²⁶ BROWN, *supra* note.

¹²⁷ ELBOW, *supra* at 275.

¹²⁸ Both use analogy, but for different and, in some respects, conflicting purposes.

¹²⁹ ELBOW, *supra* note XX, at 69.

¹³⁰ AMABILE KRAMER, *supra* note XX, at 31.

¹³¹ Barbara Fredrickson provides research associating positive emotions—such as joy, amusement and interest—with broadening perspectives; they build social and intellectual resources. FREDRICKSON, *supra* note XX.

¹³² KAHNEMAN, *supra* note XX, at 69.

¹³³ BINDER, BERGMAN, TREMBLAY, AND WEINSTEIN, *supra* note , at 1-4; MacCrate Report at 151-152.

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legitimacy. Critical legal theorists are joined by legal process adherents in noting the interdependence of legality and purpose:

The demands of inner morality of the law are affirmative in nature: make the law known, make it coherent and clear, see that your decisions as an official are guided by it etc. To meet these demands human energy must be directed toward specific kinds of achievement, and not merely warned away from harmful acts.”¹³⁴

Critical legal scholars, legal process scholars, and pragmatic lawyers alike have recognized the necessity of generating (and then choosing between) multiple plausible ways of proceeding or prioritizing of values, which in turn calls for the methodology of possibility, even as part of adjudicatory decision making. Roberto Unger also shows how conventional legal analysis leads to discovering the limits of that legal analysis and the dependence on more proactive and imaginative modes of thought:

When we begin to explore ways of ensuring the practical conditions for the effective enjoyment of rights, we discover at every turn that there are alternative plausible ways of defining these conditions, and then of satisfying them once they have been defined. For every such conception, there are different plausible strategies to fulfill the specified conditions Thus, a method designed to vindicate conceptual unity and institutional necessity revealed unimagined diversity and opportunity in established law.¹³⁵

The multiplicity of possibilities generates a need for resolution, either to enable progress toward a goal or to resolve conflicts.

The paradoxical relationship also cuts in the opposite direction: the methodology of possibility requires engagement with the methodology of skepticism to succeed. Negative feedback and critique are crucial to learning and improvement, even as it discourages the disclosures necessary to enable that critique to happen. Intuition and creativity are susceptible to bias, which requires methodology of skepticism as a form of accountability.¹³⁶ Design thinking, innovation, and problem solving require boundaries to enable creativity, as well as ways to deal with conflict that cannot be resolved through dialogue. Researchers have documented the critical role of boundaries, limits, and rules in setting the conditions that enable creativity.¹³⁷ Indeed, design thinking makes explicit the need for both types of thinking by calling first for flaring—the generation of ideas without critique and then for funneling—critical analysis of those ideas (even as it generally fails to address the tensions between them).¹³⁸

Thought and discourse paradoxes are built into law at the level of the meaning, structure and operation of law. Law operates through the simultaneous operation of practices and precepts that create the possibility for creative and cooperative action, while also affording the vehicle for

¹³⁴ LON FULLER, *THE MORALITY OF LAW* 42 (1964).

¹³⁵ UNGER, *supra* note, at 28-29, 42.

¹³⁶ Chris Guthrie, Jeffrey J. Rachlinsky & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1 2007-2008,

¹³⁷ See O'Reilly and Tushman, *supra* note , at ; ELBOW, *supra* note XX; KAHNEMAN, *supra* note XX.

¹³⁸ Hagen, *supra* note XX; Perry-Kessaris, *supra* note XX.

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preventing destructive conflict by imposing general norms backed by the force of the state. This role contradiction has been identified both by jurists committed to legal decision making as the basis for law's legitimacy and by critical legal theorists who have located this contradiction in legal rationality's failure to acknowledge the ideological and institutional commitments underlying conventional legal decision making.¹³⁹

Lawyers operating within conventional legal thought are called upon both to accept the constraints of conventional legal analysis even when those constraints operate against problem solving, while they are also called upon to find ways to solve the problems that bring clients to them. As problems increase in complexity and the limits of rule-based solutions become more evident, lawyers operating in both the public and private sectors occupy positions that call for creativity alongside critique.¹⁴⁰

Thus, although conventional 1L curriculum and jurisprudence equate "thinking like a lawyer" with the thought processes of legality, lawyering actually involves a broader and sometimes conflicting array of thought processes that depend upon each other for their effective operation.¹⁴¹

B. Relationship Paradoxes: Strategic vs. Trust-based

Legality and proactive lawyering promote different and sometimes conflicting practices and assumptions related to building and conducting relationships. Within the framework of legality, as rehearsed in the conventional law school classroom and the formal legal system, formal roles define the contours and purpose of relationships. Students are invited to step into the shoes of various legal personae, and the relationships they develop both in the class and with the roles they play reflect the characters and settings defined by the "distinctively legal drama."¹⁴² Relationships are instrumental, defined by formal roles and legal interests. Selves are conceived and relevant characteristics defined by their relationship to the legal problem. Elizabeth Mertz documents this pattern of identity formation in the first year classroom:

As people in the cases become parties (i.e. strategic actors on either side of the legal argument), they are stripped of social position and specific context, located in geography of legal discourse and authority. Their gender, race, class, occupational, and other identities become secondary to their ability to argue that they have met various aspects of legal texts. These contextual factors do sometimes become salient to the discussions, but only as ammunition in just this way.¹⁴³

¹³⁹ See Kennedy, *supra* note XX; UNGER, *supra* note XX.

¹⁴⁰ Raymond H Brescia, *Creative Lawyering for Social Change*, 35 Georgia State U.L. Rev. 529 (2019).

¹⁴¹ Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* 6 HARV. NEGOT. L. REV. 97, 103 (2001) ("The creative legal problem solver, then, must learn to navigate within the seas of optimistic creativity, the swells of dynamic interaction with others (client and other counsel and parties) and the oceans of realistic legal possibility.")

¹⁴² MERTZ, *supra* note , at 97.

¹⁴³ *Id.* at 131.

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Classroom discourse “models a split between the selves with which [they] approach problems: there is the personal opinion, which [they] hold in abeyance and over which they exercise control, and there is the professional response, which is “agnostic” and whose primary goal is honing the students’ discursive power.”¹⁴⁴ Students are encouraged “to adopt a new, more distanced attitude toward morality and emotion.” Their effectiveness turns on their ability to strategize and make arguments, and to channel discomfort or emotion into “arguments”.¹⁴⁵ Relationships also have an instrumental character to them, defined by the purpose of the interaction. Dialogue is both central and scripted, with the lawyer and the judge setting the terms, flow, and areas of inquiry. Lawyer/client relationships (and currency of time for measuring value) set clear boundaries on the form, purpose, and scope of interactions, both between the lawyer and the client and among adversaries. Students learn to see and be able to argue both sides of an argument, and to see the strengths and weaknesses of their own argument from the perspective of the other side.

Legality’s ideal is “blind justice”—dispassionate application of rules to objectively determined facts, with decisions governed by reason rather than politics or emotion. Legality operates to maintain distance and minimize vulnerability and expression of emotion.¹⁴⁶ Emotional distancing enables lawyers and judges to exercise their roles requiring them to witness and even cause human pain, and thus both cope and escape responsibility:

The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers.¹⁴⁷

Conflict is managed indirectly by intermediaries, with the emphasis on producing a result that is favorable to the client or that warrants respect and adherence, rather than achieving understanding or reshaping the nature of the relationship among the parties. Those with the direct stake in the outcome of the legal context rely on representatives to speak on their behalf. Trust and legitimacy come from fulfillment of role expectations, the ability to rely on the predictability and accountability built into the formal relationship and transparency of the legal process. Within the legal process, groups who lack power and access outside of the legal system have a formal opportunity to interact and be heard.¹⁴⁸ Conflict is managed through ritualized processes and representation, rather than by direct engagement of the stakeholders. Emotions are to be managed rather than worked through.¹⁴⁹

¹⁴⁴ *Id.* at 122.

¹⁴⁵ *Id.* at 101.

¹⁴⁶ Oliver Goodenough, *Institutions, Emotions and Law: A Goldilocks Problem for Mechanism Design*, 33 VERMONT L.R. 395 (2009).

¹⁴⁷ ROBERT COVER, JUSTICE ACCUSED 201 (1975).

¹⁴⁸ Minow, *supra* note , at 1912.

¹⁴⁹ See Ronald J. Gilson and Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994).

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Proactive lawyering, in contrast, prioritizes building relationships of trust that enable people to work together, disclose sensitive information, share perspectives, and have difficult conversations. The development of mutual trust is key to lawyers' counseling and advising roles, as well as to structuring productive interactions that can achieve mutual aims.¹⁵⁰ Mobilizing people to achieve a common goal requires cultivating informal relationships in which people seek to connect, engage openly with emotions and needs, develop empathy, and build trust. New governance and negotiation "share methodological and normative commitments to purposive human development, to an expansive imagination of human possibilities, to the idea that these possibilities are expansive because human desires are dynamic and produced through social interaction."¹⁵¹ Design thinking asks lawyers to develop mutual relationships where stakeholders speak in the first person and share their interests and needs:

Being user-centered means **Being Participatory**, looping in stakeholders into your process. You can have the people you're working with join you in trying to create new solutions. Rather than you playing the all-powerful expert who will solve their problems for them, the participatory approach means deferring to your users and other experts at key moments. The **users' voices should drive your work.**¹⁵²

Effective collaboration calls for authenticity, connection, credibility, and empathy.¹⁵³ Proactive lawyering treats emotion as a driver of self-awareness, creativity, inspiration, and understanding. It calls for the willingness to take risks, which in turn both requires and builds relational trust. This calls for engaging with your own emotions and those of others, understanding your own and others needs, seeing how aspects of experience beyond reason and rationality affect the way we think and act, and learning how to "have your feelings or they will have you."¹⁵⁴

In contrast with legality's de-emphasis on identity, client-centered lawyering encourages embracing cultural differences rather than fearing for their impact.¹⁵⁵ Proactive lawyering generally highlights the role of developing empathy, which is a different kind of perspective taking than seeing both sides of an argument. Empathy involves "shifting from how you seem on the inside to my imagining of what it feels like to be you on the inside, wrapped in your skin, with your set of experiences and background, and looking out from the world from your eyes."¹⁵⁶ Empathy operates alongside reflective practice as a crucial mode of inquiry and understanding for proactive lawyers.¹⁵⁷ Both enable lawyers to uncover ways in which their own views and

¹⁵⁰ Charles Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*. 46 HUMAN RELATIONS, 1133 (1992) (defining trust as "the mutual confidence that no party to an exchange will exploit the other's vulnerability"); Claire Hill and Erin O'Hara O'Connell, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717 (2006).

¹⁵¹ Cohen, *supra*, note , at 517.

¹⁵² Hagen, *supra* note , at <http://www.lawbydesign.co/en/design-mindsets/#criticism>.

¹⁵³ BILL GEORGE, PETER SIMS, ANDREW N. MCLEAN, AND DIANA MAYER, AUTHENTIC LEADERSHIP 4 (2018).

¹⁵⁴ STONE, PATTON, AND HEEN, *supra*, at; ROSENBERG, ANDERSON AND ADAMS, *supra*; DEBORAH L. RHODE AND AMANDA K. PACKEL, LEADERSHIP FOR LAWYERS 30 (2018); MNOOKIN, PEPPET, AND TULUMELLO, *supra*.

¹⁵⁵ BINDER et al, *supra* note , at 6; GROSE AND JOHNSON, *supra* note XX, at 37-43 (2017).

¹⁵⁶ STONE, PATTON, & HEEN, *supra* note, at 184.

¹⁵⁷ GROSE AND JOHNSON, *supra* note , at ; MacCrate Report, *supra* note , at 66.

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assumptions color the kind of advice they offer, assess facts, and prioritize values.¹⁵⁸ “Emotion, a potential barrier to problem solving, when carefully understood and revealed is vulnerable to a set of strategies designed to enhance productive self-expression.”¹⁵⁹ Value differences are engaged directly and become the focus of negotiation and problem solving.¹⁶⁰

Collaboration and team building also call upon lawyers to building informal relationships that enable trust building:¹⁶¹

Even in highly stressful situations such as litigation, [lawyers] develop a working relationship whenever possible, including with their clients and even with opposing counsel and parties. They take a collaborative, noncompetitive approach to many situations, are good at listening and are open to new ideas. [They] gather vital information through conversation, dialogue, questions, and interaction. They thoroughly vet their ideas with their colleagues, learn from their adversaries, and collaborate whenever possible. Through inquiry and collaboration, they develop their own emotional insights and inspire the same awareness and capacities in their team members.¹⁶²

Proactive lawyering aims to build the capacity of stakeholders, parties, communities, and organizations to organize, deliberate, work together, solve problems, and pursue common goals.¹⁶³ Collaboration and relationship building are also important to learning, staying engaged, being able to work effectively in groups, and fulfilling group related functions successfully, including those related to legality.¹⁶⁴ Technology, globalization, complexity, and market forces are forcing private practitioners and public interest lawyers toward collaboration.¹⁶⁵

Adam Kahane, a prominent conflict resolution documents the conventional understanding of collaboration to push adversarialism and conflict into the shadows, and to proceed as if “we can problem-solve our way into the future.” He shows the paradoxical relationship between conflict and collaboration—the risk of unconstrained engaging. “Conventional collaboration focuses on engaging, and that does not make room for asserting, so it becomes ossified and brittle; it settles

¹⁵⁸ GROSE AND JOHNSON, *supra* note , at 54-55 (discussing the importance of cross-cultural communication in lawyering).

¹⁵⁹ Cohen, *supra* note , at 525.

¹⁶⁰ See, e.g., Michael Dort, Legal Indeterminacy and Institutional Design, 78 NYU L. Rev. 875, 975 (2003)(practical deliberation. . . can work around value differences, and in the long run, even change them.”).

¹⁶¹ Heidi Gardner, *Effective Teamwork and Collaboration*, in MANAGING TALENT FOR SUCCESS: TALENT DEVELOPMENT IN LAW FIRMS: 145–159 (R. Normand-Hochman ed., 2013); Liebman et al, *supra* note, at

¹⁶² ROBERT CULLEN, *supra*, note, at 11.

¹⁶³ See, e.g. Michael Grinthal, *Power With: Practice Models For Social Justice Lawyering*, Charles Sabel, *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning, and Accountability*, quoted in Cohen, *supra* note , at 528 (innovations “such as benchmarking, simultaneous engineering, continuous monitoring, error detection and root cause analysis” make it possible to devolve decision making control to “civil society actors” in ways that promote “social learning about the effective pursuit of the broad imprecise goals”).

¹⁶⁴ DWECK, *supra*, Sturm and Guinier, *supra*, Edmunson, *supra*.

¹⁶⁵ Gardner, *supra* note XX.

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into a stupor and gets stuck . . . If we embrace harmonious engagement and reject discordant asserting, we will end up suffocating the social system we are working with.”¹⁶⁶

Legality and proactive lawyering thus promote opposite and, in some respects, conflicting approaches to relationships. Elizabeth Mertz summarizes the double edge character of this legal mediation of relationships:

On one hand, the approach to legal reading found in law school classrooms offers students a potentially liberating opportunity to step into an impersonal, abstract, and objective approach to human conflict. On the other hand, erasing (or marginalizing) many of the concrete social and contextual features of these conflicts can direct attention away from grounded moral understandings, which some critics believe are crucial to achieving justice.

The tensions also work in the other direction. The distancing and detachment required by formality and adversarialism undercuts the trust building and interpersonal responsibility that is necessary to effective implementation of norms.¹⁶⁷ William Simon illustrates this dynamic in his article on the impact of legalization on the welfare system:

While the formalization of AFDC rules and procedures “seem[s] to have reduced the claimant’s experience of oppressive and punitive moralism, of invasion of privacy, and of dependence on idiosyncratic personal favor . . . [it] also [has] reduced their experience of trust and personal care and [has] increased their experience of bewilderment and opacity.”¹⁶⁸

Formality also hides from view “the contextual and human factors that influence how people observe and interpret facts.”¹⁶⁹

Robert Cover conveys the irresolvable tension between proactive lawyering’s organic norm communities and the relationship underlying legality. Legality’s relationship to state power and violence destroys the normative ties between judge and those before the court, as well as those attached to the court’s power:¹⁷⁰

As long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organization of violence in making

¹⁶⁶ ADAM KAHANE, COLLABORATING WITH THE ENEMY: HOW TO WORK WITH PEOPLE YOU DON’T AGREE WITH OR LIKE OR TRUST 55, 65 (2017).

¹⁶⁷ Massaro, *supra* note ; Charles Sabel, Studied Trust, Tyler and Bies, Macaulay (1963), Scott, Sabel. Sim B. Sitkin and Robert J. Bies, *The Legalistic Organization: Definitions, Dimensions, and Dilemmas*, 4 ORGANIZATION SCIENCE 345 (1993).

¹⁶⁸ Quoted in Massaro, *supra* note XX, at

¹⁶⁹ Bartholet, *supra* note XX, at .

¹⁷⁰ Cover, *supra* note ; Minow, *supra* note XX; KISSAM, *supra* note , at 96.

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their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.¹⁷¹

Yet, both types of relationships are necessary for effective lawyering; law students and lawyers must learn to navigate this tension between relationships premised on strategic interaction and relationships oriented around building trust. Adversaries who cannot cooperate are less effective in making deals and settling cases.¹⁷² Effective learning in law school depends upon being able both to operate in formal public settings and to build authentic relationships, take the risk of being wrong, and ask for help when you need it. Lawyers cannot obtain the information needed to build a case or design a deal without building a relationship of trust, which requires building empathetic relationships with clients, with whom they also have a formal and bounded professional relationship defined by instrumental aims. Litigation both invites mutual cooperation to avoid the limitations of solutions derived through adversary process and creates conditions that make cooperation difficult and even risky.¹⁷³ Effective lawyering requires both relationships of trust and the capacity to detach, assert positions, and fight when necessary.¹⁷⁴

C. *Motivation Paradoxes: Extrinsic vs. Intrinsic Motivation*

Legality and proactive lawyering take contrary approaches to motivating behavior. Within legality's logic, the motivation for adhering to norms is basically extrinsic, in the form of duty, incentives, threats, and coercion.¹⁷⁵ Legality takes a compliance orientation and ultimately relies on force, or the power of the state to enforce norms and motivate behavior. Legal actors achieve adherence through the imposition of legal requirements, the expression of legal duties to comply with those responsibilities, threats of negative consequences for failing to adhere, and when necessary, coercion.

Proactive lawyering, in contrast, emphasizes the importance of using persuasion, learning, creation of shared purpose, inspiration, and participation as ways to motivate behavioral change. These strategies deploy intrinsic motivation. Intrinsic motivation is "doing work because it is interesting, enjoyable, satisfying, engaging, or personally challenging,"¹⁷⁶ while extrinsic motivation is the desire for a "separable outcome," such as a reward or avoidance of a penalty.¹⁷⁷ Interpersonal commitments are characterized by reciprocal acknowledgment. Proactive lawyering's broader roles call for a different relationship to values and purpose, and

¹⁷¹ Cover, *supra* note (Violence and the Word), at 1629.

¹⁷² Gilson and Mnookin, *supra* note .

¹⁷³ *Id.* at 521 ("In litigation, where even cooperative behavior occurs in the context of a competitive environment, the risk of misunderstanding an opponent's move is significant.")

¹⁷⁴ KAHANE, *supra* note XX, at 31; Goldberg, *supra* note .

¹⁷⁵ Extrinsic motivation is the grasp of what needs to be done and the drive to do it in order to get something else. AMABILE, *supra* note , at 34

¹⁷⁶ *Id.* at 34.

¹⁷⁷ *Id.*

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highlights the importance of self-awareness, connecting to values, acting consistently with purpose, practicing one's values and principles.¹⁷⁸

This tension between intrinsic and extrinsic motivations also plays out in the incentive structures shaping law students' and lawyers' choices. Many law students came to law school out of genuine and intrinsic interest in the law and a desire to advance deeply held public values and positive social change, but experience the pull of extrinsic motivations (grades, prestige, money) coming from law school and the legal profession.¹⁷⁹ A study of students at Yale Law School documents this tension between prestige and purpose that many students experience when they arrive at law school.¹⁸⁰ A similar tension operates in private practice as well.¹⁸¹

The tension between intrinsic and extrinsic ways of motivating behavior is well documented in legal, psychological, and economic literature. Scholars have shown that extrinsic motivation in the form of punishment, threat, carrots, and sticks, can crowd out intrinsic motivation, which is necessary for changes in behavior required for compliance with those norms.¹⁸² "If extrinsic motivators are extremely strong and salient, they can undermine intrinsic motivation: when this happens, creativity can suffer."¹⁸³ The reliance on extrinsic motivations that coerce or induce compliance through threat of sanctions can undermine the acceptance of the court's legitimacy, the willingness to take risks and assume responsibility.¹⁸⁴

Katherine Bartlett summarized these tensions in an article analyzing the impact of law on norm internalization related to implicit discrimination.¹⁸⁵ On one hand, law provokes compliance by "symbolizing a consensus" that may challenge people to think critically about and perhaps revise their thoughts. It may reinforce a self-identity consistent with complying with the law, and educate others on what it means to be a good person. On the other hand, coercion may provoke resistance when people feel a law is unfair, or when it insults their sense of identity or autonomy. Law may also be in a more fundamental tension with internal motivation: it may crowd out

¹⁷⁸ Lee & Wilkins, *supra*, at ; MacCrate Report, *supra* note ; MNOOKIN, PEPPET, AND TULUMELLO, *supra*. RHODE, *supra* note , at .

¹⁷⁹ See John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift in Law School*; Mertz, *supra* note; Sturm and Guinier, *supra* Pete Davis, *Our Bicentennial Crisis*, available at <http://hlrecord.org/wp-content/uploads/2017/10/OurBicentennialCrisis.pdf>.

¹⁸⁰ Susan Sturm and Kinga Makovi, *Full Participation in the Yale Law Journal* (2015), available at: https://www.yalelawjournal.org/files/FullParticipationintheYaleLawJournal_otc6qdnr.pdf. See also sources cited at note , *supra*.

¹⁸¹ See Scott L. Cummings, *Introduction: What Good Are Lawyers?*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 1-2 (Scott L. Cummings ed. 2011).

¹⁸² Kristin Underhill has provided a useful analysis of the distinction between intrinsic and extrinsic motivations Kristin Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 *YALE J. REG.* 213 (2016).

¹⁸³ AMABILE, *supra* note XX, at 35.

¹⁸⁴ The economic and psychological literature documents "how incentives may have counterintuitive and counterproductive effects on human behavior." *Id.* See also Ayres and Braithwaite, *supra* note XX, at 25.

¹⁸⁵ Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation In Reducing Implicit Workplace Discrimination*, 95 *VA. L. REV.* 1893 (2009)

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people's sense of responsibility to do the right thing in the absence of a coercive rule backed by a sanction.¹⁸⁶

This analysis corresponds to the literature's approach to motivating behavior. One text aimed at promoting empathetic interaction puts it this way: "When we submit to doing something solely for the purpose of avoiding punishment, our attention is distracted from the value of the action itself. Instead, we are focused on the consequences of what might happen if we fail to take that action."¹⁸⁷ This leads to "diminished goodwill on the part of those who comply with our values out of a sense of either external or internal coercion."¹⁸⁸

Robert Cover's work places this tension between extrinsic and intrinsic motivation in the context of a fundamental and unavoidable tension built into the meaning and structure and operation of law. Law works through the simultaneous operation of practices and precepts that create the possibility for creative and cooperative action, while also affording the vehicle for preventing destructive conflict by imposing general norms backed by the force of the state. This produces an irreconcilable tension between law's role in fostering and promoting creative and organic norm communities (which generate conflict among those communities) and its role in using violence to enforce order-preserving norms (which undercuts those norm communities).¹⁸⁹

Yet, this tension between intrinsic and extrinsic motivation is built into the educational enterprise (not only law school), lawyers' roles, and the legal system. Although the prevailing culture in many law schools skews that tension in favor of extrinsic motivations, adult educational theory demonstrates the necessity of both investing in students' growth and assessing their performance.¹⁹⁰ Likewise, part of law's value lies in its simultaneous proximity to power and its responsibility for enhancing value and values.

D. Mindset Paradoxes: Fixed vs. Growth Mindset

These differing constellations of thinking, communicating, and relating, combine to produce competing mindsets with different and in ways competing orientations to conflict, failure, and risk. Within the frame of legality, conflict serves to define issues that have to be resolved, and to juxtapose competing views of the facts and law, thus presenting a third party with the strongest articulation of each side. The conflict resolution process enables an impartial and detached third party to decide which side wins the conflict. Conflict is a contest, with a winner and loser. The role of the legal process is to reduce or resolve conflict. The judicial

¹⁸⁶ *Id.* at 1937.

¹⁸⁷ ROSENBERG, *supra*, at 188.

¹⁸⁸ *Id.* At 15-16.

¹⁸⁹ Cover, *supra* note XX, at ("The conclusion emanating from this state of affairs is simple and very disturbing: there is a radical dichotomy between the social organization of law as power and the organization of law as meaning.").

¹⁹⁰ See ELBOW, *supra* note XX, at . Bonita London, Geraldine Downey, and Shauna Mace, *Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change*, 60 VAND. L. REV. 455 (2007).

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system (or its equivalent when mimicked in other settings) is justified as operating as a theater of competition to displace and defuse violent conflict and increase the legitimacy of decision making.¹⁹¹

Within the frame of proactive lawyering, conflict is a function of inevitable difference, and a normal part of human interaction. The orientation to conflict is to find a way to understand where it stems from, whether there are points of connection that would enable people to work together in the face of that conflict. Conflict thus invites engagement, exploration of the underlying source of the difference, and a way of acknowledging the feelings, needs, and requests of each participant in the conflict.

Competing approaches to failure also exemplifies the tension between adjudicatory and proactive logic. In the context of the adversary process, mistakes and failures matter in so far as they cross a legal line and make that behavior susceptible to a finding of fault. Thus, fault and mistakes are either a basis for entitlement to relief or for exposure to judgment. Failure means losing. Thinking and analysis focuses on whether wrongful behavior occurred, if so whether it could be adjudged unlawful. Mistakes are to be minimized or avoided because they cause actionable harm or give rise to liabilities, or adjudged wrongful if they occur. For a law student, making a mistake on a cold call in class means not “getting it”.¹⁹²

In the context of proactive lawyering, failure plays a very different role. Failure operates as the driver of learning and growth. The important question is not whether the behavior violated a norm, but rather, *how can the relevant participants learn and change from the failures and mistakes?* The motto of design thinking is “fail early to succeed sooner.”¹⁹³ The process of building effective teams and collaboration requires building conditions of psychological and identity safety.¹⁹⁴ The hallmark of psychological safety is being able to make mistakes without fear that you will be labeled or judged as a result. The driver of improvement in new governance is the identification of failures at the moment they occur by those closest to the problem.¹⁹⁵

These different approaches to failure give rise to different orientations to risk, particularly under conditions of uncertainty. Legality invites treating legal risk as something to be minimized or avoided. It's risky to ask questions when you don't know the answer or to act in the face of legal uncertainty. Playing it safe means not taking actions that could invite litigation or judgment. In contrast, proactive lawyering treats risk as a necessary part of learning, growth, and innovation.¹⁹⁶

¹⁹¹ See Edelman, *supra* note XX,

¹⁹² Sturm and Guinier, *supra* note XX.

¹⁹³ TIM BROWN, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION 4 (2009).

¹⁹⁴ Amy C. Edmunson, *Psychological safety and learning behavior in work teams*, 44 ADMIN. SCI. Q., 350 (1999) Valerie Purdy-Vaughns, Claude Steele, C. M., Davies, P. G., Ditlmann, R., & Crosby, J. R. *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*. 94 J. PERSONALITY AND SOC.PSYCH. 615 (2008).

¹⁹⁵ Simon, *supra* note XX, at 47.

¹⁹⁶ See DESTEFANO, *supra* note .

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Legality and proactive lawyering have diametrically opposing reactions to uncertainty. Legality treats uncertainty as something to be reduced and managed, and its unavailability produces pessimism about law's capacity to address the issue. Proactive lawyering (such as experimentalism, design thinking, deal making, and negotiations) takes a contrary view:

This incompleteness of facts, circumstances, priorities, and normative benchmarks is not necessarily a challenge to overcome or even a source of conceptual trouble. To the contrary, it provides the basis for great optimism. It is precisely because interests and priorities are multiple and shifting rather than fixed and known to parties in advance of dialogue, that there are vast opportunities for individuals to innovate, collaborate, and solve very hard problems.¹⁹⁷

Legality's approach to failure, risk, and conflict coalesce into a mindset or orientation that corresponds what Carol Dweck has called a fixed mindset.¹⁹⁸ A fixed mindset equates success and failure with people's abilities, which are fixed. Success or failure defines who you are. Law's focus invites a fixed mindset by putting people in categories based on their past behavior and assigning meaning to that person based on those categories. Failure is equated with being wrong (or at least being found wrong), and thus with losing. Failure is therefore something to be avoided.

Individuals with a fixed mindset emphasize compliance, control, and satisfying expectations—all of which form an important (and desired) part of law school and legality. Martin Seligman has noted the zero-sum character of adversary process as a root of the mindset paradox:

One of the triggers for combating demoralization involves the avoidance of zero-sum situations. In law, such situations seem inevitable; they lie at the heart of our adversarial system of justice. If we accept that the adversary model embraces important social values, displacing it may not be in our interest. If so, some degree of lawyer unhappiness may be unavoidable if we are to achieve societal goals. This raises the ironic possibility that lawyers can be made happier only at public expense.¹⁹⁹

Studies have associated law students with a pessimistic explanatory style: "a tendency to interpret the causes of negative events in stable, global and internal ways: "It's going to last forever; it's going to undermine everything; it's my own fault". Under this definition, the pessimist will view bad events as unchangeable. The optimist, in contrast, sees setbacks as temporary."²⁰⁰

Proactive lawyering both demands and cultivates a growth mindset. Design thinking, experimentalism, mediation and negotiation, and problem-solving courts all emphasize the importance of learning and growth, the role of failure as a driver of growth and change, and the

¹⁹⁷ Cohen, *supra* note XX.

¹⁹⁸ DWECK, *supra* note XX, at 6. See KATHRYN M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL 109 (2018).

¹⁹⁹ Seligman, *supra* note XX.

²⁰⁰ Rosen, *supra* note XX.

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importance of creating environments and relationships that enable people to take risks, try out new ideas, and share what they don't know.

As Ben Heineman has noted, success and thriving in both law school and the legal profession actually requires both mindsets:

We need lawyers who, in making recommendations or decisions, are capable of assessing all dimensions of risk but who are not risk-averse. Taking well-considered chances is not a quality of mind customarily associated with lawyers but is often vital to innovation and change in the public and private sectors.²⁰¹

A growth mindset also enables law students to navigate the inevitable stresses and setbacks that students experience while they learn to “think like a lawyer.”

Yet, laws' connection to judgment necessitates operating within the fixed mindset. When learning and growth fails to produce a resolution, law and lawyers step in to impose one, using processes premised on a fixed mindset. That aspect of lawyering fulfills a core function of the rule of law, as well as a paradoxical relationship with proactive lawyering's call for imagination, creativity, and learning from failure.

E. Justice Paradoxes: Formal vs. Substantive Justice

Finally, legality and proactive lawyering deploy conflicting yet intertwined conceptions of justice. There are three aspects to the justice paradox, all of which connect to legality's relationship to power. The first stems from legality's reliance on the instruments of the state as the way to advance justice. Legality works within state-baked legal processes to advance norms. The legitimacy of law's operation and lawyers' roles derives from their operation within a system that disciplines the exercise of power. Formality, authority, and adversarialism occupy a central place in the narrative of law's claim to justice, at least as an indispensable means of pursuing substantive justice.²⁰² As Unger has described this characteristic of legality:

A system of rules is formal insofar as it allows its . . . interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules . . . Everything will depend on where one draws the line between the factors of decision that are intrinsic to the system, and therefore worthy of consideration, and those that are not.²⁰³

Law thus operates as self-referential system. It cannot promise substantive justice “in a community whose members disagree with one another about what substantive justice amounts

²⁰¹ HEINEMAN, LEE, AND WILKINS, at 15.

²⁰² Waldron, *supra* note XX, at 117.

²⁰³ R. UNGER, *LAW IN MODERN SOCIETY* 204 (1976).

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to.” In imposing formal justice, it will necessarily collide with and destroy the norms of a subgroup whose values conflict with those upheld through legality.²⁰⁴

Those instruments of legality are themselves unjust in significant ways, which leads to the second aspect of the justice paradox. Substantive injustice is baked into the legal system itself. Those injustices inhere in the origins of constitution upholding slavery, the rules set up so that the “haves come out ahead,” and the starkly unequal access to justice pervading our legal system. The methodology of legality is itself not neutral. Legal realists, critical theorists, critical race theorists, and feminist scholars have identified this contradiction between formal justice and justice as lived experience in the world as it actually operates.²⁰⁵

Methods shape substance also through the hidden biases they contain. The method of distinguishing law from considerations of policy, likewise, reinforces existing power structures and masks exclusions or perspectives ignored by that law . . . A strong view of precedent in legal method, for example, protects the status quo over the interests of those seeking recognition of new rights.”²⁰⁶

This contradiction exemplifies “the internal instability characteristic of programmatic positions in contemporary law and politics: the conflict between the commitment to defining ideals and the acquiescence in the arrangements that frustrate the realization of those ideals or impoverish their meaning.”²⁰⁷ The challenge, then, is to figure out “how to maintain a normative commitment to the rule of law when we can foresee that this commitment will everywhere be betrayed by the actions of the very positive legal institutions charged with implementing the rule of law.”²⁰⁸

Although the crisis of legitimacy in the Trump era is recent, the paradox is at least as old as the Constitution. Robert Cover documented the tension between positive and moral justice faced by judges charged with enforcing the law of slavery.²⁰⁹ Martin Luther King powerfully communicated this dual character of law's justice in the Letter from the City of Birmingham Jail.²¹⁰ King explicitly called “paradoxical” that a group that so diligently urges obedience to the laws outlawing segregation would consciously break the law. He proclaimed the injustice of a formal laws that “degrade human personality.”

²⁰⁴ Robert Post identified the inevitability of normative contradictions “because political action in modernity always aims at the creation of institutions, and institutions must function according to the rule of law if they are to act fairly and effectively.” Robert Post, *Leadership in Law Schools*, AALS SECTION NEWSLETTER, (2019), available at <https://sectiononleadership.org/2019/03/08/leadership-in-law-schools/> .

²⁰⁵ Amna A. Akbar in *Toward a Radical Imagination of Law* describes “a central dilemma of liberal law reform projects, caught between a commitment to the rule of law and status quo arrangements on the one hand, and the desire for substantive justice and social, economic, and political transformation on the other.”

²⁰⁶ Bartlett, *supra* note at 845

²⁰⁷ UNGER *supra* at 129.

²⁰⁸ Robert Post, *Leadership in Law Schools*, AALS SECTION NEWSLETTER, (2019), available at <https://sectiononleadership.org/2019/03/08/leadership-in-law-schools/> .

²⁰⁹ COVER, *supra* note .

²¹⁰ Martin Luther King, *Letter from City of Birmingham Jail* (1963), available at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

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An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.

The judicialization of rights has the potential both to inscribe inequality into law and “to amplify conflict and focus attention on it,” and to “transform physical conflict into verbal disputes” and “give public voice and force to people previously ignored, to make conflict audible and unavoidable.”²¹¹

Yet, these two conceptions of justice are inextricably linked, even as they are contradictory. King also depicted the dual edge character of formal law's relationship to substantive justice:

[L]aw and order exist for the purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress. . . Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.²¹²

King sought justice in both senses of the word. It is only by stepping outside of law to shine a light on law's injustice that the law can claim both to be justice and to advance justice. To advance justice in the world requires stepping outside of legality and as currently defined by law and legal institutions, both to pursue justice outside law and to move legal institutions closer to a sense of justice as it is actually experienced.

The third dimension of the justice paradox relates to the contradiction between law as a system of values and law as a value proposition.²¹³ The profession operates as both, and law schools similarly embody this tension between purpose and prestige. Here too, the relationship turns out to be paradoxical. Law's appeal—to future lawyers, clients, and change agents—resides in part in its proximity to power and resources; yet that relationship invites cooptation and acquiescence in the status quo at the expense of one's fulfillment.

F. The Interdependence of Adjudicatory and Proactive Lawyering

Thus, legality and proactive lawyering operate in tension with each other, sometimes to the point of directly contradicting or displacing one another. The contradictory elements of legalization and adaptive leadership are built into the definition and operation of law. One element demands and gives rise to the other. A person cannot effectively practice legality

²¹¹ Minow, *supra* note XX, at 1873, 1881.

²¹² Martin Luther King, *Letter from City of Birmingham Jail* (1963), available at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

²¹³ Cummings, *supra* note XX; Samuel Moyne, *Law Schools Are Bad For Democracy*, CHRONICLE OF HIGHER ED., (2018), available at <https://www.chronicle.com/article/Law-Schools-Are-Bad-for/245334>.

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without also engaging the practices associated with proactive lawyering, but the practices of legality conflict in significant ways with those required for adaptive leadership. This self-referential and cycling quality is what makes lawyering paradoxical. The contradictory options are interrelated such that the tension will inevitably resurface.²¹⁴

How law students and lawyers manage these contradictions will make a big difference to their effectiveness as lawyers, their fulfillment, and their connection to advancing justice. The next section explores the limits of conventional approaches to navigate this tension.

III. THE PERILS OF PARADOX AVOIDANCE

The ability to thrive in law school and in the legal profession—and to pursue lawyers' responsibility to advance justice—turns in no small measure on how students and lawyers fare in navigating the lawyering paradoxes described in the previous section. Yet for the most part, students are left to their own devices to understand and manage these tensions. Law schools generally pay little attention to this paradoxical dynamic, its impact on law students, or its implications for responding to the clarion call for change. Notwithstanding the growing focus on proactive lawyering, many students and lawyers continue find themselves buffeted by the demands of legality and proactive lawyering.

The question for legal education and the legal profession is whether these lawyering paradoxes will be experienced as counter-productive—producing vicious cycles, disengagement, and dysfunction—or dynamic—fueling learning, transformation, and the capacity to navigate complexity. That difference depends at least in part on how individuals, contexts, and cultures construct the relationship between legality and proactive lawyering.

Since attending law school, I have been observing how legal academics, law students, and the legal profession (including myself in each of these roles) navigate the tensions between legality and proactive lawyering. I have been tracking the strategies and the impact informally, by observing how students experience law school, and more systematically by examining scholarship about legal education, conducting qualitative research about law students and lawyers, and analyzing students' blog posts about their law school experience.²¹⁵

The three approaches to the tensions between legality and proactive lawyering resemble common approaches to paradox; they try to escape, resolve, or sidestep the lawyering paradoxes identified in the previous section. Research on lawyering seen through the lens of the paradox literature suggests that, though these strategies are understandable,

²¹⁴ Smith and Lewis, *supra* note, at 387.

²¹⁵ See Sturm and Makovi, *supra* note ; Sturm & Guinier, *supra* note ; Susan Sturm and Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515 (2003); *From Gladiators to Problem Solvers*, *supra* note XX. I have also coded the blog posts from Lawyering for Change, and identified patterns emerging from those posts. In both Lawyer Leadership and Lawyering for Change, students post blogs on a weekly basis, inviting reflection about their experience of law and law school, along with their developing theories of change.

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they are counter-productive as ways to equip lawyers and the law to engage in both adjudicatory and proactive lawyering. None work to reconcile the lawyering paradoxes, or to address the ways that these logics compete and sometimes undermine each other's effectiveness. Paradoxes cannot be avoided or resolved, although they can be managed. They involve a "struggle of opposites, with each method of disposing of the conflict giving rise to a new set of tensions."²¹⁶ When the situation fails to "hold" these contradictions and works instead to deny, avoid, or resolve them, or to have them carried by a subset of the community, then "the preconditions for 'stuckness' are created."²¹⁷ They give rise to counterproductive dynamics that breed cynicism, polarization, disengagement, and dysfunction.²¹⁸

This section discusses three problematic approaches to lawyering paradoxes: (a) crowding out modes of thought in tension with legality, (b) inviting premature or problematic resolution of ambivalence and contradictions, and (c) contributing to cynicism about law's relationship to justice.

A. *Crowding out proactive lawyering*

Problems emerge when legality (like one side of any paradox) "tries to hog the whole bed."²¹⁹ Although clinical legal education and experiential learning opportunities have increased,²²⁰ the culture and currency of many law schools remains focused on mastering legality.²²¹ In many law schools, the formative first year focuses almost exclusively on learning legality. Adjudication remains the default mode of inquiry and practice, and court decisions form the backbone of many upper level classes. Most casebooks proceed within the logic of legality. For many law students, most of their courses emphasize doctrinal analysis. Legality's modes of thought, motivations, and discourse often dictate how students learn the law even in courses focused on non-adjudicatory settings, such as legislation and transactional lawyering.²²² Non-adjudicatory modes of thought and practice are referred to as "alternative dispute resolution." Learning to "think like a lawyer" prototypically refers to conventional legal reasoning in adjudicatory settings.²²³ The default mode of assessment in law school (and on the bar exam) prioritizes issue spotting, legal reasoning, and legal writing.²²⁴ Many law schools grade on a curve, which heightens students' competitiveness

²¹⁶ *Id.*

²¹⁷ SMITH AND BERG, *supra* note, at 15.

²¹⁸ *Id.* at 208.

²¹⁹ ELBOW, *supra* note, at 258.

²²⁰ *See* Section IV, *infra*.

²²¹ The McCrate report, based on a systematic study of legal education, observed that, many law schools prioritize legal reasoning skills, and fail to devote attention to proactive lawyering. *See* MacCrate Report, *supra* note XX.

²²² Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1564, 1569-71 (1988); Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyers as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157 n.10 (1990).

²²³ Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 325 (1995).

²²⁴ *Id.*

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and preoccupation with performance over learning.²²⁵ Researchers have also documented the lasting impact of this equation of lawyering with legality on how people think about themselves as lawyers.²²⁶

Law schools' focus on legality at legal education's defining moments affects the way many law students and lawyers think and feel about the competencies and practices related to proactive lawyering.²²⁷ Legality's emphasis on the methodology of skepticism reinforces the general tendency to value critical thought over creativity and imagination.²²⁸ This tendency—to remember negatives over positives, to value criticism over appreciative inquiry, to listen with an ear toward refuting rather than understanding—exists in any discipline defined by critical and logical thinking.²²⁹ Many students infer from the pervasiveness of methodological skepticism, particularly in the first year when they are forming their identities as lawyers, the idea that other modes of thinking do not count as part of thinking like a lawyer.²³⁰ Conventional legal reasoning treats politics, emotion, and intuition as a departure from logical and rational inquiry, which threatens the legitimacy of legal decision-making.²³¹

Methodological skepticism becomes self-referential—“the mirror through which it judges what it is like;” it negates the value of what cannot be understood through that logic.²³² The emphasis on “thinking like a lawyer” (narrowly defined) leads many students to devalue or marginalize modes of thought that fall outside legality. Many students report experiencing a dampening of their engagement with creative or imaginative thinking and practice. One student in lawyering for change reported:

Coming into law school, I was really interested in trying to be creative in my approach the law and took an expansive view of lawyering; however, I actually arrived in the law school environment, that expansive view quickly narrowed down to accepting what people told me about law school and being a lawyer and just keeping my head down and getting my work done.²³³

²²⁵ See London, *supra* note XX.

²²⁶ *Id.*; MERTZ, *supra* note XX; UNGER, *supra* note XX.

²²⁷ Rakoff and Minow, *supra* note, (“The template for legal thinking established in the first year of law school has real staying power”). Sturm & Guinier, *supra* note , at 96 (“The structure of courses in the first semester . . . conveys the impression that appellate litigation and corporate practice constitute law’s core, and that law emerges when judicial actors interpret the arguments of lawyers, the policies of legislators, or the decision of administrators.”)

²²⁸ See PHILIP C. KISSAM, THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS 6-7; Sturm and Guinier, *id.*

²²⁹ Elbow, *supra* note .

²³⁰ Lesnick, *supra* note , at 1159.

²³¹ KISSAM, *supra* note

²³² See SMITH AND BERG, *supra* note , at 49-50.

²³³ Claire MacLanahan.

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Another noted that “I am rewarded for how well I can extract rule of law from cases and apply it to a new set of facts. So, after last semester's exams, I have devoted more energy just practicing technical method of rule → facts → application.”²³⁴

This self-referential pattern can lead students (and faculty) to downplay or abandon creative, non-linear modes of thought, even when they had experience prior to law school with these methodologies.²³⁵ For some this led them to doubt the relevance of abilities that enabled them to succeed prior to law school, many of which fall under the umbrella of proactive lawyering. Some students interpret learning to think like a lawyer to mean setting aside or unlearning other modes of thought, as part of becoming a lawyer.

I find it interesting just how much this mode of processing seeps into everything we do. In many ways, it causes problems we become unused to solving, since the roles we are thrown into often call for forward thinking, innovative solutions but our practiced mode of analysis is backward looking and self-contained.²³⁶

The methodology of skepticism, with its focus on adjudication and its essentially critical stance, thus tends to crowd out the imaginative, forward looking methodologies associated with proactive lawyering.²³⁷ “The greatest imaginative cost of the canonical style of legal reasoning is negative: it fills up the imaginative space in which another way of thinking might take root, and it does so in the crucial testing ground on which authoritative ideals meet practical realities.”²³⁸

Students and researchers also report a shift in the way students listen to each other. They describe themselves as more likely to listen instrumentally and with the relevant legal categories in mind, which draws them away from “the norms and conventions that many members of our society, including future clients, use to solve conflicts and moral dilemmas.”²³⁹ This decontextualization encourages students to treat people as characters in a legal drama. They listen for how they can use or refute what they are hearing, and report finding it more difficult to listen with the goal of understanding, empathizing, or appreciating the perspective and experience of others. They also are more likely to speak to demonstrate their proficiency, prove their point, or win an argument. Researchers have documented—and many students reported—reluctance to ask questions solely out of curiosity or to take the risk of appearing uncertain or, even worse, not understanding.

Research conducted on practicing lawyers shows that the mindset and methodology of competition and skepticism invited by legality coalesces into a culture and way of being for

²³⁴ Seofin Park.

²³⁵ One law student observed: The “softer” leadership skills that I have been learning and building for the past few years working, but also prior to that in undergrad, seem less relevant for law school success. (The fact that my first inclination was to refer to leadership skills as “soft” even though we have learned about concrete methods and processes to improve our leadership capacity exemplifies the ways in which this paradox is playing out in my education.)” CB.

²³⁶ K.J. [insert name], [insert title of blog post], Lawyer Leadership Course Blog (Insert date)..

²³⁷ *Id.* One advice book, based on interviews and surveys of law students, exhorts law students to understand that “you are being trained as a technician, not an innovator.” YOUNG, *supra* note XX, at 32.

²³⁸ UNGER, *supra* note , at 106.

²³⁹ MERTZ, *supra* note , at 99.

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many lawyers. Although there is evidence of a “lawyer personality” that is “distinguished by an ethic of justice rather than an ethic of care,” predisposed to be skeptical, or to see the glass as half empty rather than half full,²⁴⁰ there is also evidence that these tendencies are engendered at least in part by legal education,²⁴¹ as well as by the prevailing legal culture in which one practices.²⁴²

Students in Lawyer Leadership and Lawyering for Change have commented extensively on the significance of the mindset they associate with law and law school for their learning and role definition. They describe coming in with an orientation of exploration, learning, and risk taking, and confronting experiences in and out of the classroom that undercut their orientation toward growth and learning from failure. This fosters a tendency to avoid asking questions if they are uncertain or confused, and to treat performance in law school, and particularly failure, as defining of their ability. This pattern tracks findings of more systematic empirical studies of law student experience.²⁴³

The predominance of legality's mindset, motivations, and relationships thus cultivates a collective fixed mindset—a marked departure from how many law students describe their mindset as undergraduates or in pre-law school employment. Research also documents that that women, people of color, and first generation students may experience this dynamic with particular intensity.²⁴⁴

The choice to prioritize legality over proactive lawyering—clearest in the first year of law school—carries over to how many students experience themselves throughout law school and their legal careers. There is evidence that crowding out proactive lawyering may play a contributing role in the widespread dissatisfaction and unhappiness that many law students and lawyers experience.²⁴⁵ How many times have you heard a practitioner say, “I am a recovering lawyer,” as if lawyering were a disease? Or describe having left the practice of law, when they continue to play roles that fall squarely under the umbrella of proactive lawyering? In an article

²⁴⁰ Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, 29 *Legal Mgt* 1 (2002). It is worth noting that Richard's findings are based on studies primarily of partners in large private firms and corporate law departments.

²⁴¹ See Lawrence S. Krieger and Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefining Professional Success*, 83 *Geo. Wash. L. Rev.* 554 (2015); Robert Eli Rosen, Christine E. Parker, and Viveke Lehmann Nielson, *The Framing Effects of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs*, 40 *FORDHAM URB. L. J.* 297 (2012).

²⁴² See Gilson and Mnookin, *supra* note , at

²⁴³ Bonita London, Geraldine Downey, and Shauna Mace, *Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change*, 60 *VAND. L. REV.* 455 (2007).

²⁴⁴ See Lani Guinier and Michelle Fine, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); London, Downey, and Mace, *supra* note , at ; Elena Rodriguez, *Student Thriving at Columbia Law School: An Asset-Based Study of Climate for Student Engagement and Support* (2016)(unpublished paper); Sturm, *supra* note .

²⁴⁵ See Martin E.P. Seligman, Paul R. Verkuil, and Terry H. Kang, *Why Lawyers Are Unhappy*, 23 *CARDOZO L. REV.* (2001); Kennon M. Sheldon & Lawrence Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 *BEHAV SCI & L.* 261 (2004); Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 *VAND. L. REV.* 871 (1999).

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written in 1990, Howard Lesnick summarized the impact of the partial quality of the truth reflected by legality and the pyramiding of its mutually reinforcing assertions:

Taken as a whole, they systematically discourage students (and faculty as well) from inquiring into unspoken premises, whether about the legal system, the larger social order, or the role of lawyers; they inhibit the experience of choice, of human responsibility for the social constructs that we call the law and the legal profession; they are—among other, perhaps more serious vices—profoundly anti-intellectual.²⁴⁶

By “hogging the bed,” legality crowds out the practice and legitimacy of proactive lawyering, shapes the choices students make about their courses and careers, and leads people to pathologize lawyering. It leads some law students to disengage from law school and leave the law when they conclude that the most important aspects of themselves are not part of being a lawyer.²⁴⁷

B. Inviting premature or problematic resolution of ambivalence and contradictions

The prevailing strategy for introducing proactive lawyering to law schools that have prioritized legality could be called “add and stir.” Many law schools now supplement their core curriculum with a menu of discrete offerings that provide students with the opportunity to learn various proactive lawyering skills and practices, usually starting in the second year. Proactive lawyering competencies such as negotiation, listening, problem solving, collaboration, and persuasive communication receive attention in a variety of courses ranging from alternative dispute resolution to human rights, to problem solving and transactional lawyering, alongside legal clinics. In the last twenty years, law schools have increased offerings such as clinics, externships, human rights programs, alternative dispute resolution, problem solving, and transactional lawyering. Some law schools have introduced required courses that expose law students to proactive lawyering practices and methodologies. Design thinking has entered the law school space and is an increasing focus of pedagogical and scholarly attention. Law schools have recently shown interest in leadership learning, which emphasizes many of the competencies required for proactive lawyering.²⁴⁸

This approach of supplementing legality with proactive lawyering resembles what paradox scholars call “splitting.”²⁴⁹ This strategy assigns responsibility for a less valued activity to a separate and lower status domain. Proactive lawyering pedagogy often occurs in distinct realms, apart from mainstream law school offerings focused on legality and with little opportunity to

²⁴⁶ Lesnick, *supra* note , at 1182.

²⁴⁷ See Schiltz, *supra* note XX. The ABA has recently recognized the urgency of addressing the issue of lawyers' wellbeing. See National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (August 2017), available at <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> (last visited August 16, 2019).

²⁴⁸ See note XX, *supra*.

²⁴⁹ Smith and Berg, *supra* note XX, at 68.

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integrate these experiences. Different people occupy the spaces focused on legality and proactive lawyering—often with different status, physical locations, and communities of practice. These two modes of thought and practice remain largely separate, often with non-lawyers, specialized clinical faculty, adjunct faculty, or administrators focusing on cultivating proactive lawyering skills, while faculty teaching the mainstream conventional law classes maintain their pedagogy oriented around teaching and critiquing legality. This approach of assigning separate spheres for legality and proactive lawyering also occurs in practice groups and judicial systems.²⁵⁰

For many students, courses emphasizing proactive lawyering comprise a small part of their overall law school experience. As of August 2014, the American Bar Association requires law students to take 6 credits of experiential learning as part of their course of study, out of a total of 84 credits required for graduation—7 percent of their total education.²⁵¹ Although some law professors have begun experimenting with integrating forms of proactive lawyering into conventional pedagogy, many non-clinical faculty members continue to organize their courses around casebooks that prioritize learning legal reasoning and parsing appellate decisions as the primary text for learning the law.²⁵²

Problems arise from segregating, overlooking or underappreciating the tensions between proactive lawyering and the powerful pull of legality. The siloed and lower status nature of proactive lawyering makes it difficult for students to experience proactive lawyering as a coherent methodology with its own rigor and practices extending beyond a particular course or content area. Students struggle to make sense of the conflicting medium and messages promoted in different quarters of the legal academy and the profession. The tension and ambivalence produced by the lawyering paradoxes pervade the law school experience (and carry over into practice).²⁵³ Unless they are addressed directly, these paradoxes are likely to invite familiar (and counter-productive) patterns to escape the ambiguity, discomfort and uncertainty that accompany living in the tension.²⁵⁴

Faculty might unwittingly contribute to this counter-productive cycling, by introducing methodologies of possibility alongside legality, without making explicit the assumptions and practices of either, discussing the impact of one on the other, or equipping students to navigate the contradictions they experience. They might teach the competencies associated with proactive lawyering without relating them to law or lawyering. Design thinking, mediation, experimentalism, or entrepreneurship may proceed legality as problematic or irrelevant, and fail to engage with legality's continuing role (like it or not).

²⁵⁰ See Gardner, *supra* note XX.

²⁵¹ American Bar Association Section of Legal Education and Admissions to the Bar, Revised Standards for Approval of Law Schools, Standard § 303(a)(3)(Aug. 2014), available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf.

²⁵² HEINEMAN, LEE, AND WILKINS, *supra* note XX.

²⁵³ See, e.g., Cummings, *supra* note ; Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 *U. Ill. L. Rev.* 739 (1998); Note, *The Paradox of Prosecution*, 142 *HARV. L. REV.* 748 (2018).

²⁵⁴ See Kahane, *supra* note; SMITH AND LEWIS, *supra* note XX.

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For example, business school courses sometimes proceed in the law school with the same materials and pedagogy used in business schools. Business school cases used in law schools were developed for the corporate setting, and do not address the situations lawyers face, or how proactive lawyering practices relate to conventional lawyering roles. Design thinking instructs students to cooperate and to place critique aside, often without accounting for tensions and barriers erected by methodological skepticism.²⁵⁵ Materials used in law school classes (including my own) to cultivate leadership and build the capacity for difficult conversations contain blanket critique of evaluation, comparisons, and judgment, without situating those critiques in lawyers' responsibility for engaging in these practices as part of their roles. They may shy away from grappling with how proactive lawyering will be affected by its adjudicatory twin or denigrate the skills that legality requires."²⁵⁶

Students may try to split their experience, by moving back and forth between the more conventional law school activities and those that emphasize proactive lawyering. Some can navigate this seesaw between proactive lawyering and legality without losing one or the other. Research and experience show, however, that many students are deeply ambivalent about the law, their relationship to it, and the pathway to their success and striving. Law school does little to provide them with the tools to sustain their ambivalence, which is itself both painful and difficult to sustain. Many studies document students' ambivalent relationship to power, adversarialism, prestige, and social justice.²⁵⁷ Students report feeling torn by the competing pressures and mixed messages they experience in law school. In the absence of strategies and supports enabling them to live with and make sense of these contradictions, the ambivalent group is inclined choose one over the other, often before they are ready to make such a decision. Evidence suggests that this rush to resolution happens quite early in students law school career.

Scholarly work, including my own, exhibits this same tendency to sidestep the paradoxical relationship between legality and proactive lawyering. They have proposed hybrids or substitutes for conventional legality, without adequately addressing the ongoing tension between adjudicatory and proactive lawyering built into the court's role as an intermediary and lawyers' involvement in intermediation. My work on second generation discrimination, for example, simply cast the court in the role of catalyst and problem solver, without addressing how legality's approach to motivation and justice might limit courts' capacity to serve as an effective intermediary. After acknowledging critics' worries about cosmetic compliance and cooptation,²⁵⁸ I downplayed the prevalence of these problems without confronting their roots in paradox, much less strategizing about how to navigate those dualities.²⁵⁹

Other new governance scholars have shared this tendency to overlook or underappreciate how legality's methodology will continue to affect the way new forms of problem solving

²⁵⁵ SEE MARGARET HAGAN, *DESIGN THINKING AND LAW: A PERFECT MATCH*, THE INNOVATION ISSUE, JANUARY 2014.\

²⁵⁶ ROSENBERG, *supra* at .

²⁵⁷ See Bliss, Guinier, Fine, and Bailin, *supra* note ; Lesnick, *supra* note ; Mertz, *supra* note *passim*; Sturm and Makovi, *supra* note , at

²⁵⁸ See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Douglas NeJaime, *When New Governance Fails*, 70 OHIO STATE L. J. 323 (2009).

²⁵⁹ See Sturm, *supra* note XX.

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unfold.²⁶⁰ By assuming that the processes themselves will take care of this, the new governance scholars (myself included) fail to deal with the predictable ways that power differentials and differences in capacity or willingness to engage will undermine new governance regime's effective operation.²⁶¹ In retrospect, I see that some new governance critics also underappreciated the paradoxical nature of law, leading them sometimes to advocate one side of the paradox over the other, or to misread or stylize my efforts to create a hybrid approach.²⁶²

In *Violence and the Word*, Robert Cover warned of the dangers of downplaying or overlooking the impact of legality's relationship to violence on law's effort to generate norm communities. That tension to some degree is inescapable. Robert Cover expresses these contradictions in their most stark form, observing that, "pain and death destroy the world that "interpretation" calls up."²⁶³ "Judges kill the diverse legal traditions that compete with the State."²⁶⁴ By failing to attend to the lawyering paradoxes, law schools similarly squelch capacity to navigate ambiguity and stay connected to what they care about.

C. Critique detached from transformative possibilities: Contributing to cynicism about law's relationship to justice

Many faculty and students alike are well aware of many of these limitations built into the conventional lawyering. Critical analysis of case law happens regularly in mainstream law school classrooms. "Thinking like a lawyer" includes learning to identify the flaws in courts' reasoning, weighing competing policy considerations, and understanding the limits of courts as a way of addressing complex problems lacking clear solutions. Indeed, this form of critique is part and parcel of effective doctrinal teaching.²⁶⁵ These include critiques of the reasoning or results of particular court decisions or more crosscutting critiques of legality's operation, drawing on legal realism, critical legal studies, critical race theory, feminist theory, interdisciplinary studies, and experimentalism.

Many faculty expose the contradictions between law and justice, but do not equip students or the legal system to build an affirmative way of grappling with them. Often, this critical lens identifies the limits of legality, but does not incorporate proactive lawyering methodologies and mindsets into the overall pedagogy and practice. Critique remains within the mindset and method of critique and argumentation, without inviting or equipping students to

²⁶⁰ See, e.g., Sabel and Simon, *supra* note XX; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2003).

²⁶¹ As Amy Cohen noted, "A collaborative social project that aims to challenge extant power hierarchies by enhancing the capacities of stakeholders to act on their own behalf may evade a critical assessment of the ways in which negotiations skills and strategies (and the interests they produce) are already inflected with the effects of inequality. Cohen, *supra* note , at 543-544 (negotiations meet new governance).

²⁶² Bagenstos, *supra* note XX; NeJaime, *supra* note XX (reading the move to include more collaborative forms of interaction as inconsistent with and thus a rejection of lawyers' more adversarial roles)).

²⁶³ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 (1986).

²⁶⁴ Cover, *supra* note XX, at 40-44.

²⁶⁵ Post, *supra* [at](#) .

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view their lawyering roles to include advancing values and developing innovative and effective solutions.²⁶⁶ As one student in *Lawyering for Change* noted:

During orientation, law students are urged to never let go of their values, to use their education to go forth and make change they want to see, etc. But these values are by no means reflected in our classes, though to be fair I do think that almost all my professors do a really good job of pushing all of us to be critical of the systems we study. The main issue is that the type of thinking essential to leadership values aren't really the ones that are fostered or tested in class, and I don't really even know how that would look.²⁶⁷

Students report that they lack venues and opportunities for processing their doubts and ambivalence. In many law schools, the mainstream curriculum does not systematically focus on the non-judicial forms and venues that lawyers occupy and that law engages. Nor has legal education generally structured the curriculum to afford students opportunities to reflect on their own. We have not yet developed the rigorous methodologies of possibility into our thinking and teaching. The relentless press of work, combined with the pressure to project competence, discourages students from engaging in much needed reflection about the contradictions they face. Some of this is a function of the court-centeredness of so much of legal education.

So, faced with glaring disconnects between law and justice, students are left to their own devices to figure out what to do with those critiques. When students experience this critique without also engaging what can be done about it, students become cynical about the law and its relationship to justice. This leads some to disengage from law school and from the possibility of achieving justice through law. Students anguish about the disconnect between their values and the law, between legal definitions of justice and justice as it is experienced in the world (as did I when I was in law school).

If students lack regular opportunities to engage with other and with faculty about these emotions and concerns, and to grapple seriously with ways to have positive impact in the face of legality's limitations, the paradoxes turn into frustration, discouragement, and for some, disengagement.

We all seem to feel similarly that the law degree has the potential to empower us to make meaningful change and also forces us into a rigid system with a specialized skillset that makes it feel more difficult to make these changes. I sometimes wonder if we just have to accept that we're going into a very structured world or if accepting that just makes us more complicit/unmotivated to actually make these changes. ²⁶⁸

As Duncan Kennedy noted in his pathbreaking critique, first year law students have no way 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.” Students are immediately told that “their success or failure largely turns on swiftly learning to use the new

²⁶⁶ See Kennedy, *supra* note ; KISSAM, *supra* note ; UNGAR, *supra* note ; MERTZ, *supra* note XX; Post, *supra* note XX.

²⁶⁷ S.K. [insert name], [insert title of blog post], Lawyer Leadership Course Blog (Insert date)].

²⁶⁸ J.L.[insert name], [insert title of blog post], Lawyer Leadership Course Blog (Insert date.)

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language,” leaving no time to find the political substance of the rules they are studying. This can lead to cynicism about the law, and giving up on the law as a way to advance justice.

For non-believers in law's neutrality, which includes many law students, the cognitive dissonance between legal doctrine and their sense of fairness, their politics, and their values leads them to question law's legitimacy, to become cynical about law's relationship to justice, and for some, to disengage. However, as the next section explores, the paradox literature offers a way to move forward in way that treats these contradictions as a source of creative friction, rather than as a self-defeating cycle.

IV. EMBRACING LAWYERING PARADOXES

This journey through the lens of paradox shifts attention toward figuring out how legal education and legal practice can foster creative tension between legality and proactive lawyering, rather than have one polarity crowd out, confuse, or undermine the other. Is there a way to equip law students and lawyers to hold that tension? Can individuals and systems simultaneously learn and practice the critical, categorical, formal, and judgment-based logic of legality *and* the creative, improvisational, relationship building logic of proactive lawyering? Are there ways to facilitate students' and faculty's engagement with lawyers' roles as catalysts for justice and facilitators of democracy when the institutions and politics demonstrably thwart those values?

There is much at stake in the way law schools and the legal profession takes up this challenge. Many both inside and outside the academy and the legal profession have expressed deep concern about law's legitimacy: whether we will can have legal and political institutions that will uphold the rule of law, advance justice, and work to revitalize a polarized and unjust democracy. Law students will have to assume responsibility for these challenges, and law schools bear the responsibility for equipping them to do so. They cannot succeed without learning to navigate paradox.

This section shares what I have learned from my decades of study and struggle. The Article draws on the insights gleaned from paradox scholars, as well from the “positive deviants” among us in law schools. Positive deviants are the outliers who, working with the same resources as everyone else, have been successful in addressing a tough problem where most others have failed.²⁶⁹

There is much to be learned from the positive deviants who have been experimenting with a third way to approach the tension between legality and proactive lawyering. Because of their focus on integrating theory and practice, clinical faculty have been actively grappling with these challenges for decades, usually in their separate spaces. Some non-clinical faculty have figured out ways to incorporate proactive lawyering into teaching conventional subjects like contracts, civil procedure, and corporations. Some students come into law school with

²⁶⁹ RICHARD PASCALE, JERRY STERNIN, AND MONIQUE STERNIN, *THE POWER OF POSITIVE DEVIANCE: HOW UNLIKELY INNOVATORS SOLVE THE WORLD'S TOUGHEST PROBLEMS* 3 (2010).

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experience navigating these kinds of tensions or with a strongly developed sense of purpose and a community to keep them grounded. Those that did were more likely to report that they could set these practices aside and focus on legality without shifting their overall mindset and practice. A few law schools have from their inception been organized to integrate legality and proactive lawyering into students' learning from the beginning of their law school experience.²⁷⁰

Most have done this through experiments within a classroom, program, or project. Some law schools are experimenting with more institutionally rooted experiments, and a few more law schools have recently undertaken to build this dynamic tension into their mission. Many of these innovators are proceeding in isolation, without connecting in any systematic way to others who have undertaken innovation. Most have not recognized the value in naming and engaging explicitly with the paradoxical nature of their practice.

A crucial move enabling these positive outliers to navigate paradox entails re-centering the focus from law to lawyering. Even when legal strictures tether conflicts to legality, lawyering have much a much wider range of motion. They can move back and forth between the spaces employing legality and proactive lawyering, and invent new locations and institutions that link back to those more constrained by history and structure. This shift from law to lawyering also enables law students and legal practitioners to define "thinking like a lawyer" to include the methodologies and practices of both legality and proactive lawyering, and to reconceive law to include norms and forms of accountability generated through participatory practice.²⁷¹ Lawyering can bridge these paradoxes by creating provisional, experimental projects and spaces that link these contradictions and, where possible, transform both sides of the paradoxical relationship. By framing students' learning in terms of lawyering, the possibilities for navigating paradox become real and actionable.

Drawing on the paradox literature, my experience in teaching and action research, and the practices of positive deviants, this Section offers three strategies for forging dynamic tension between legality and proactive lawyering: (1) holding paradox by observing, understanding, and building awareness and acceptance of their operation; (2) building capacities that enable people, groups, and systems to hold paradox, and (3) designing and organizing experiments, spaces, and practices to facilitate and, in some instances, to transcend paradox.

A. *Holding Paradox: Naming, Observing, and Understanding Paradoxes*

One of the most surprising and encouraging insights from the paradox literature involves the power of simply seeing the conflicting aspects of lawyering through the lens of paradox. Research suggests that seeing those tensions as paradoxes actually changes how we experience

²⁷⁰ CUNY Law School is widely acknowledged as a curricular innovator that has from its inception undertaken to integrate theory and practice, focuses on the relationship between law and lawyering, and engages students regularly in reflection about the tensions and value choices facing lawyers. See Barbara Bezdek, Charles Halperin, Howard Lesnick. A review of its core pedagogy and philosophy suggests that the school creates the context and capacities to wrestle directly with the tensions between legality and proactive lawyering.

²⁷¹ Lesnick, *supra* note ; Sturm, *supra* note XX.

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them.²⁷² This shift in meaning enables a move from trying to resolve a dilemma that may not be resolvable to sitting with observed contradictions, accepting that they coexist, trying to understand how they operate, and inquiring about whether we can resolve them or must instead learn how to work through them. “‘Working through’ does not imply eliminating or resolving paradox, but constructing a more workable certainty that enables change.”²⁷³ This shift occurs by creating opportunities for noticing, observing, and accepting the paradoxical relationship between legality and proactive lawyering when that duality surfaces, with specific attention to the opposing yet interdependent practices and mindsets called for by each and the potential links between them. The idea is to foster actors’ active awareness of the duality by noticing a paradox without attempting to resolve or resist it, but instead observing it in practice. This reframing move serves to enable people to sit with the conflict, and learn their way into the process of maintaining both.

Peter Elbow provides some insight into why “searching for contradiction and affirming both sides can allow you to find both the limitations of the system in which you are working and a way to break out of it.”²⁷⁴ Using Chaucer as an illustration, Elbow notes that by “setting up a polar opposition and affirming both sides,” we “lay the framework for a broader frame of reference, ensuring that neither side can ‘win.’” The seeming dilemma can be arranged “so that we can only be satisfied by taking the larger view.”²⁷⁵

For example, one study observed successful chamber music groups built the capacity to name and accept the paradoxical relationship between their need to individuate and express autonomy as a musician, on the one hand, and the need to blend, cooperate, and come together around a shared musical idea, on the other.²⁷⁶ Researchers learned that members of successful string quartets came to understand the upside and the downside of either pole. Acceptance helps members avoid unresolvable debates that sparked vicious cycles breeding distrust, and enabling them to “play through” paradox by recommitting to shared overarching goals, expecting each other to express contradictory needs, and focusing on their intense tasks. This framework might help researchers address what tensions exist, why they may fuel reinforcing cycles, and how actors may manage paradoxes to foster change and understanding.

This section first provides readers with some conceptual tools developed by scholars and practitioners to help notice and understand paradox, and then shares some lessons learned from efforts to introduce paradox to teaching and scholarship.

1. Conceptual tools for holding paradox

²⁷² See ELBOW, *supra* note , at 240; Farjoun, *supra* note , at 203; SMITH AND BERG, *supra* note , at 259-265.

²⁷³ Luscher and Lewis, *Organizational Change and Managerial Sensemaking: Working Through Paradox*, 51 ACAD. MGT. J. 221, 234. (2008).

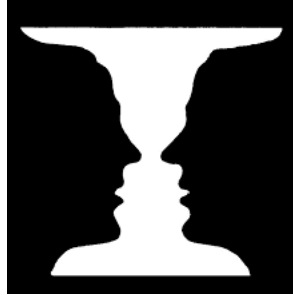
²⁷⁴ *Id.* at 243.

²⁷⁵ Smith and Berg, *supra* note; Smith and Lewis, Hall,

²⁷⁶ Murnighan and Conlon, *supra*.

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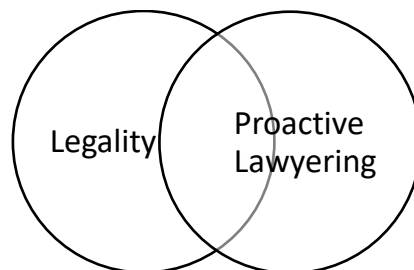
The paradox literature (both scholarly and popular) offers some useful tools for moving back and forth between two opposing yet related concepts. Concrete illustrations of the process of shifting perspective offer one such tool. For example, Barry Johnson explores the image below as a way of helping us alternate “figure” and “ground” to see two conflicting images embedded in a single image, which cannot actually be observed at the same time.



Is the picture above a goblet or two faces? The answer is both, depending on what you identify as foreground vs. background. Johnson offers the practice of shifting back and forth, as well as the concept of breathing in and out, to show that you cannot see from both perspectives at the same moment but you can shift your gaze back and forth to experience both. He also differentiates accuracy from completeness as a helpful way to understand paradox, as well as the dynamics that contribute to vicious cycling.²⁷⁷ The “faces or goblet” exercise exemplifies how metaphor offers a way into paradoxical thinking:

What is most important about metaphor is that there must be a contradiction—a bit of non-sense—before you can have a metaphor. . . The metaphor does not provide a new system or synthesis, it only provides an abutting of opposing elements. Thus, metaphor can be described a refusal to synthesize, an insistence on letting the contradiction stand: simply to live with the contradiction and try to let it reverberate as a way of doing justice to the complexity of its subject.²⁷⁸

The literature also offers some conceptual tools to help in seeing and holding paradox. One tool is a Vent diagram, which is a diagram of the overlap of two statements that appear to be true and appear to be contradictory, with the overlapping middle purposely left undefined:



²⁷⁷ JOHNSON, *supra* note , at 21, 43.

²⁷⁸ ELBOW, *supra* note , at 250

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Venting is used in two senses: as “an emotional release, an outlet for our anger, frustration, despair”, and as a vent that “enables stale, suffocating air to flow out, it allows new fresh air to cycle in and through.”²⁷⁹ By styling these tensions as unlabeled vent diagrams, we get to “a) actively confront binary thinking and b) imagine what’s actually in the overlap every time we see and feel the vent.” Making vent diagrams “helps us recognize and reckon with contradictions and keep imagining and acting from the intersections and overlaps.”²⁸⁰ They concretely illustrate the value of creating a third space or vantage point, not occupied by either pole of the paradox, from which you can observe the operation of both.

Another tool, offered by Barry Johnson, is a Polarity Map, which identifies the upside and the downside of each pole, and provides a guide for moving through the quadrants to maximize creative tension and minimize resistance:²⁸¹

L+ Positive outcomes from focusing on legality	R+ Positive outcomes from focusing on proactive lawyering
L- Negative outcomes from focusing on legality	R- Negative outcomes from focusing on proactive lawyering

Cutting across all these tools is a focus on reflection. Ronald Heifetz offers the idea of “going to the balcony,” which involves imagining that you are simultaneously on a dance floor and observing yourself and other on the dance floor from a balcony perched some distance above. “Achieving a “balcony perspective” means “taking yourself out of the dance, even if only for a moment,” returning to the dance floor, and then moving back and forth from the balcony to the dance floor, with the goal of coming as close as possible to being in both places at the same time. ²⁸² Ellen Schall invites people to “learn to love the swamp”—moving back and forth between the solid ground of legality and the mucky yet potent swamp where adaptive problems reside, and to use reflective practice as the vehicle enabling that process. Reflective practice involves “learning-in the midst of rapidly changing and constantly challenging situations-to be self-aware, to understand oneself personally and in role; to be conscious of the impact of the self on others, and others on self; to develop a ‘theory of action’ in a particular situation that is testable and adjustable; and finally, to build theory from across one's own practice, theory that is generalizable and available for testing by others.”²⁸³

²⁷⁹ Vent Digrams, available at <https://www.ventdiagrams.com/vision-and-values>. I am indebted to sujatha baliga for introducing me (along with my Lawyering for Change class) to Vent Diagrams.

²⁸⁰ *Id.*

²⁸¹ JOHNSON, *supra* note , at 4-5.

²⁸² Ronald Heifetz and Marty Linksy, *Get on the Balcony*, in LEADERSHIP ON THE LINE 51-55 (2002).

²⁸³ Ellen Schall, *Learning to Love the Swamp: Reshaping Education for Public Service*, 14 J. POL’Y ANALYSIS AND MGT., 202, 204 (1995)

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Although they do not necessarily use the language of paradox, legal scholars of different stripes have offered various conceptual tools that help in paying attention to when paradoxes arise and what impact they have.²⁸⁴ Robert Scott identifies “the paradox of context which lies at the heart of the binary choice between the desert and the swamp. . . Without context, no legal rule can be applied, but with nothing but context no legal rule can be found.”²⁸⁵ Mari Matsuda offers the concept of multiple consciousness as jurisprudential method—the ability to work within a particular viewpoint and then “shift out it for purposes of critique, analysis, and strategy” as well as to “search for the pathway to a just world.”²⁸⁶ Roberto Unger proposes that we identify the shaping influence of fundamental institutions and beliefs while also acknowledging the replaceable and ramshackle, although often resilient character of these formative contexts.”²⁸⁷ Robert Mnookin identifies three tensions inherent in negotiation, noting that the problem-solving negotiator cannot make these disappear. The first step in the process of learning to managing these tensions is to pay attention to when they arise and what impact they have.²⁸⁸

2. Lessons from the field

The power of simply noticing paradox resonates with my own observation and experience in my teaching and research. In *Lawyer Leadership*, students have concretely demonstrated the impact of simply offering the framework of paradox as a way to understand the relationship between legality and leadership. In their reflections and an anonymous survey, many students described the paradox frame for lawyer leadership as paradigm-shifting in their self-conception, their choice to pursue law, and their path to success and thriving as lawyers.²⁸⁹ These students had been stuck in a dilemma about how to choose between prestige and purpose, lawyering and social justice, cooperative and adversarial roles, and professional identity and personal growth. The idea of holding both shifted the questions they asked themselves, enhanced the quality of their reflections, and gave them tools to choose how they think, relate to classmates and material, and express emotions and needs.

I have also experimented with heightening awareness of the paradoxical relationship between legality and proactive lawyering in mainstream law classes. In *Civil Procedure*, for example, I now keep an eye out for situations where formal legal doctrine or practice implicates

²⁸⁴ MNOOKIN et al, *supra* note , at 9. *See also* Cohen, *supra* note ; Kahane, *supra* note.. *See also* Grinthal, *supra* note , at 41. *See also* Bartholet, *supra* note, at .

²⁸⁵ Scott, *supra* note , at 1646-47.

²⁸⁶ Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS, L. REP. 7, 9 (1989). *See also* Kathryn Barthlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 851 (1990)(advocating for practical reasoning, which “approaches problems not as dichotomized conflicts but as dilemmas” which “do not call for the choice of one principle over another, but rather “imaginative integrations and reconciliations,” which require attention to particular context”).

²⁸⁷ UNGER, *supra* note, at 23.

²⁸⁸ MNOOKIN et al, *supra* note , at 9. *See also* Cohen, *supra* note ; Kahane, *supra* note.. *See also* Grinthal, *supra* note , at 41. *See also* Bartholet, *supra* note, at .

²⁸⁹ *See, e.g.*, blog posts of Students A, B, C, and D.

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proactive lawyering practices, mindsets, and relationships. I have introduced the idea of paradox at the points where cooperation and competition have to operate simultaneously,²⁹⁰ or where there is a tension between students' sense of justice and the law's definition of justice. These opportunities actually permeate even the most conventional civil procedure class. When these contradictions arise, rather than simply bracketing them and moving on (as I have done in the past), I invite the students to identify the multiple and conflicting meaning of due process, the requirements to collaborate and mediate before parties can call upon the court to sanction an opposing party. I provide opportunities in and out of class for students to reflect about the roles they might occupy, and what kinds of questions might they ask or relationships might they build in each of those roles.

That exercise gives rise to questions that push students to identify and grapple with the paradoxes: How might those roles and modes of thought conflict? How might you manage that conflict? What challenges might you face? Where in your legal education will you have the opportunity to focus more deeply on the critical proactive lawyering skills? When justice defined by the courts starkly contradicts students' (and often the judge's stated) conception of justice, the paradox idea has also helped give students a way be both inside and outside conventional legal analysis. We can explore, even if superficially, what other venues, roles, and practices might be part of an effort to advance substantive as well as formal justice, provide a space for students to draw on their prior experience, and concretely identify when and where students can learn in greater depth about proactive lawyering.. This strategy enables students to see early on that thinking like a lawyer actually involves multiple ways of thinking, including mastering traditional legal reasoning as well as connecting it to other ways of thinking, even when the primary focus of the class is on legality.

My effort to introduce paradox in the classroom has been informed by the innovative teaching practice of my colleague, Elizabeth Emens. Professor Emens teaches Contracts, and Law, Justice, and Reflective Practice, along with co-teaching Lawyer Leadership. She uses a variety of teaching tools to enable students to hold onto their sense of purpose and commitment to advancing justice, even as they learn to think and speak like lawyers in the more conventional sense of the word. Professor Emens has developed a variety of innovative techniques for holding these contradictions in the classroom, including: requiring students keep an intellectual journal, reflecting regularly about the relationship between the normative understandings of the court and their own normative understandings, understanding the nature students' objections and how they would communicate them most effectively, and using various mindfulness strategies (sometimes without naming them as such) to increase awareness and create space for values and emotion.²⁹¹

I have also seen how the concept of paradox can be a helpful framework for rethinking legal, regulatory, and institutional design. For example, the paradox framework has helped me rethink some of my earlier work, much of which was framed around resolving dilemmas or

²⁹⁰ These situations happen throughout civil legal process, and are built into the federal rules. See, e.g., F.R.C.P. 16, 26, 37 & 68.

²⁹¹ Professor Emens is writing an article called "To Speak Like a Lawyer: Voice, Engagement, and Reflection in Legal Pedagogy," which lays out the themes and strategies she uses to equip them to hold the contradictions built in to legal practice, and to

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finding both/and solutions to problems that were not amenable to resolution through judicial fiat.²⁹² My work sought to avoid the limits of legal process as a means of addressing second generation discrimination or similarly complex problems by using a deliberative, problem-solving process to generate the legal norms that would be enforced by the court. Subsequent work showed that the conflicts and tensions between formal legal process and adaptive leadership process remained, and frequently led scholars to characterize the work as advancing one prong of the duality at the expense of the other. The paradox frame now trains my attention on how, when, and where to maintain both.²⁹³

There is thus value in identifying paradox as a conceptual frame, and cultivating dialogue among people experiencing different aspects of the duality. This can be done both in spaces understood to be grounded in methodological skepticism and those grounded in methodological possibility.

B. Building the Capacity to Navigate Paradoxical Concepts and Practices

Although recognizing lawyering paradoxes when they arise constitutes an important first step, it is not enough to equip students and lawyers to construct a dynamic tension between legality and proactive lawyering. This capacity is a learned skill, and one that calls for a high level of complexity of mind.²⁹⁴ The paradox literature provides a foundation for building a lexicon of competencies that lawyers require to navigate this tension.

This Section sketches out competencies needed to navigate the lawyering paradoxes, along with illustrative strategies for cultivating those competencies in law school. Going into depth about how to develop these competencies is beyond the scope of this article. But this framework hopefully provides a roadmap for building these competencies and, as a first, step, making them a central part of what law schools seek to cultivate.

1. Identifying competencies related to managing paradoxes

Commentators have provided different but overlapping concepts for the capacity to hold paradox. Peter Elbow begins with the capacity “to gain as many *different* and *conflicting* knowings as possible:

People who are good at this seem to call upon some subtle tact, judgment, or intuition. I think they are using a metaphorical, analogical, Gestalt-finding ability. They are good at maintaining contradictory points of view simultaneously and at living with the

²⁹² See, e.g., Sturm, *supra* note XX [*Resolving the Remedial Dilemma*]; *From Gladiators to Problem-Solvers*, *supra* note XX; Sturm, *supra* note XX.

²⁹³ See, e.g., Sturm, *supra* note XX; Susan Sturm, *Advancing Equality in and through Legal Institutions: A Paradoxical Approach* (work in progress).

²⁹⁴ See ANDERSON AND ADAMS, *supra* note XX; HEIFETZ, *supra* note XX.

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contradictory points of view simultaneously and at living with ambiguity in order to refrain from premature resolution.²⁹⁵

The ability to hold paradox calls upon lawyers to develop what Lisa Lahey and Robert Kegan call a self-transforming mind: a way of making meaning which requires the ability to: “step back from and reflect on the limits of our own ideology or personal authority; see that any one system or self-organization is in some way partial or incomplete; be friendlier toward contradiction and opposites; and seek to hold on to multiple systems rather than projecting all but one onto the other.”²⁹⁶

Adam Kahane draw on Keats' concept of negative capability, also suggested by Elizabeth Emens, to “maintain equanimity in a conflictual, uncomfortable situation where we don't know how things we turn out, or when, or even if we will succeed. The poet John Keats called this “negative capability, which he defined as ‘being capable of being in uncertainties, mysteries, and doubts without any irritable reaching after fact and reason.’”²⁹⁷ The capacity to navigate competing forces requires “conflict optimality: the ability to respond optimally in conflict by navigating between different or competing motives and emotions and by combining different approaches to conflict to achieve desired outcomes.”²⁹⁸

2. Cultivating the capacity to hold paradox

The paradox literature has identified a set of strategies and capacities that can increase the capacity of individuals, groups, and organizations to sit with the accompanying complexity, emotional disruption, and uncertainty. Many of these are process strategies demand processual responses.²⁹⁹

a. Reframing

One strand of research finds that developing common and expansive goals, which place contradictions within a wider context, help actors accept paradox. That overarching goal can provide frameworks that link the two conflicting modes of thought, as well as the motivation to stay engaged in the face of tension. Elbow draws on his reading of Chaucer to illustrate how paradox can contribute to reframing: “By setting up a polar opposition and affirming both sides,

²⁹⁵ *Id.* at 242.

²⁹⁶ ROBERT KEGAN AND LISA LASKOW LAHEY, IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION 17 (2009).

²⁹⁷ KAHANE, *supra* note , at 81, quoting JOHN KEATS, THE COMPLETE POETICAL WORKS AND LETTERS OF JOHN KEATS 277 (Boston).

²⁹⁸ Peter T. Coleman, *Conflict Intelligence and Systemic Wisdom: Meta-Competencies for Engaging Conflict in a Complex, Dynamic World*, 34 NEGOTIATION J. 7 (2018).

²⁹⁹ Smith and Tracey, *supra* note, at 459.

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he lays the foundation for a broader frame of reference, ensuring that neither side can win. He arranges the dilemma so that we can only be satisfied by taking the larger view.”³⁰⁰

Framing is a skill that can be cultivated. The concept of braiding, introduced by Charles Sabel, Robert Scott, and Ronald Gilson, offers one example of a reframe that enables legal actors to link together cooperative and compliance strategies without losing the character of either. Another example from my own work is the effort to reframe equality interventions as a way to navigate a paradox that has previously been understood as a dilemma of difference with no solution. Neither interventions that ignore differences nor those that focus on them are reliably effective, as both can reproduce the very disparities they aim to eliminate. An alternative intervention strategy, one that *both* ignores *and* focuses on differences, holds promise. This strategy involves identifying features of the organization's culture—its structures, practices, norms, and patterns of interaction—that undermine its aspirational vision and, at the same time, are on the critical path to employee thriving and success; changing those features in ways that advance the vision and also reduce disparities in employee thriving and success; and monitoring outcomes to ensure the intervention has its intended effects without reproducing disparities.³⁰¹

Another important reframing strategy involves moving across levels of analysis and the locus of decision making. Paradox theory could usefully inform the work of the scholars that have been seeking to expand beyond a court-centric approach to legal education, including experimentalists, feminist scholars, critical race scholars, and law and society scholars.

b. Dealing with emotions

Another set of strategies focuses on addressing the emotional reactions evoked by paradox, particularly uncertainty and anxiety. This focus acknowledges the importance, often under-appreciated, of cultivating students' capacity to deal with emotions generated by the lawyering paradoxes—an aspect of learning that law schools and the legal profession tend to discount. Law students and lawyers face a variety of emotional challenges which affect the way they make meaning of their roles.

For example, confronting the gap between one's sense of justice and justice as defined by the court often provokes a range of strong emotions: anger, disgust, hopelessness, anxiety. The immediate emotional tendency might be to lash out, reject, withdraw, or defend. The paradox framework suggests that, rather than avoid or delegitimize those emotional reactions, the capacity to act in the face of these contradictions requires the ability to recognize, acknowledge, and experience those emotions, and to identify the needs and values that underlie those reactions. That skill and capacity is one that can be learned. To be taken seriously by students, that learning

³⁰⁰ Elbow, *supra* note XX, at 240.

³⁰¹ Sturm, *supra* note , at ; Heidi Brooks, Robin Ely, Lisa Lahey, and Susan Sturm, Organizational Culture Change to Advance Workplace Equality, September 14, 2019 (unpublished proposal on file with the author).

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needs to take place in the context of conventional law school classes, as well as in the contexts set up to build proactive lawyering skills.

A starting point for this capacity is building explicit attention to the skills of listening, speaking up, providing feedback, and developing strategy, and focusing explicitly on the process of shifting gears from one kind of listening and discourse to another. In a book called “Collaborating with the Enemy,” Adam Keohane introduced the idea of stretch collaboration, which “gives up the assumption of control.” Stretch collaboration advocates embracing both conflict and connection, and “moving toward experimenting systematically with different perspectives and possibilities” with the intention of staying “alert and courageous enough to make a countervailing move when it is required, to notice and correct dynamic imbalance.”³⁰² The idea of polarity management introduces a set of practices aimed at enabling people to shift focus from background to foreground—a constant process of shifting back and forth from one polarity to the other, along with the idea that these competencies take practice to develop.³⁰³

Clinical faculty members have been working with these concepts for decades, and have much to others about how to build these competencies in the large law school classroom as well as in leadership offerings.³⁰⁴ Basic skills that are the backbone of clinical teaching, such as empathetic listening, developing mindfulness practice, cultivating empathy, interacting across difference, cultural competency, and practicing nonviolent communication, provide a strong foundation for a systematic practice of navigating paradox. Habits of mind developed, for example, to develop cultural competency also cultivate students’ capacity to sit with difference, understand its impact, and explore ways to make it a source of productive tension rather than stereotyping and disconnection.³⁰⁵ Particularly when these practices are linked to areas that students view as core to their roles as lawyers—such as learning doctrine, participating in moot court, navigating performance in an adversary setting, undertaking a major social change initiative, or doing deals—these practices provide a concrete setting for learning how to sit with intellectual and emotional discomfort, uncertainty, and conflicting feelings and practices, while also engaging in conventional legal reasoning.

Paradox scholars and practitioners have offered some promising directions for experimentation with the development of the capacities needed to hold this complexity.³⁰⁶ The Immunity to Change framework developed by Lisa Lahey and Robert Kegan offers a practice, starting with oneself, for building by creating opportunities to experience and learn from optimal conflict, which they define as:

- The persistent experience of some frustration, dilemma, life puzzle, quandary, or personal problem that is . . .
- Perfectly designed to cause us to feel the limits of our current way of knowing. . .

³⁰² JOHNSON, *supra* note , at.

³⁰³ *Id.*

³⁰⁴ See, e.g., Amsterdam, *supra* note ;

³⁰⁵ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

³⁰⁶ ADAM KEOHANE, COLLABORATING WITH THE ENEMY: HOW TO WORK WITH PEOPLE YOU DON'T AGREE WITH OR LIKE OR TRUST 9 (2017).

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- In some sphere that we care about, with . . .
- Sufficient supports so that we are neither overwhelmed by the conflict nor able to escape or diffuse it.³⁰⁷

I been struck by the power of the Immunity to Change framework, which I employed in both Lawyer Leadership and Lawyering for Change, to build students' capacity to take risks, hold complexity, and deal with contradictory yet interdependent goals and patterns. By inviting and enabling students to push themselves, reflect, and link these capacities to their core aspirations as lawyers, law schools can cultivate the capacity to hold paradox.

c. Holding both fixed and growth mindsets

Navigating lawyering paradoxes also requires the capacity to hold competing mindsets, to manage a fraught relationship between intrinsic and extrinsic motivation, and to build relationships of trust with people that you also compete with or don't fully trust. Some aspects of this tension stem from policy choices (such as the curve, the timing of on campus interviewing by law firms, and law schools' preoccupation with US News and World Report Ratings) which could and should be changed to better support the capacity to navigate paradox.

In the meantime, there is much to be learned from innovators who have found ways to support students' development of a growth mindset alongside a culture of competition, and to value intrinsic markers of meaning even as students grab for the gold rings. Again, Professor Elizabeth Emens' practice is instructive. A visiting scholar who observed Professor Emens class described the strategies that she put into place that enabled students both to push themselves and to support each other, to experiment and fail while experiencing this process as part of their learning:

You facilitated our learning through a wide range of legal and non-legal materials as well as experiential exercises—most of which were totally new to me—that appealed to a wide range of personalities and practice types. Quite deliberately, it seemed, you refrained from “evaluating” the students' engagement in the course by inserting your own personal views . . . unless it was absolutely necessary to make intellectual connections or steer the class in a productive direction. This is one of the reasons that I described your pedagogy as “democratic,” as well. While you were clearly our teacher and guide through the course materials, I really appreciated that you made efforts to equalize the traditionally hierarchical relationship between a law professor and her students as much as possible. Likewise, you tried to ensure relatively equal speaking time between students in order to promote a non-hierarchical learning space without domination by anyone, whether professor or student. Form mirrored content here. You were personally modelling (or appearing to model) best practices of mindfulness to the extent that you

³⁰⁷ KEGAN AND LAHEY, *supra* note, at 54.

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tried to facilitate more open, creative, and non-judgmental awareness among students as a fellow contemplative practitioner in the classroom.³⁰⁸

d. Pursuing justice through lawyering in the face of law's injustice

It is not enough to engage in critique of judicial doctrine or to bemoan the politicization of the federal judiciary. To stave off cynicism and sustain engagement in pursuing justice, students require the opportunity to exercise concrete ways that lawyers can pursue both types of justice—both in and out of court.

The paradox framework can be helpful here. When a contradiction emerges between our conception of justice and that contained in more traditional legal processes, how do we understand that contradiction? How might we reconceive the meaning of authority, the locus of decision-making, the participants in the process, to enable a process of imagination operating alongside legality? To what extent can and should that process connect directly to law's more formal practices of legality? Where and how else do lawyers, courts, agencies, and legal actors address these problems? What does this kind of problem solving and norm generation look like? Who participates in it? How is it supported or undermined by conventional forms of legality? Should these forms of proactive lawyering push us to redesign our understanding of the meaning of courts and legality, or should they operate separately? How will they affect each other?

Serious engagement with these questions will require more capacious materials, forms of pedagogy, and relationships, but conventional teaching can pave the way for those more fundamental changes. Positive deviants in our midst have already begun that work. The question is how can we take these experiments in the margins and bring them to the center of legal education, while maintaining the widely shared commitment to honing methodological doubt.

C. Designing for Paradox

The strategies discussed thus far target individual faculty members and students, who can put those strategies into use without major change in the law school environment. Those local efforts matter. They enable enterprising faculty and students to cultivate the capacity to navigate paradox without the kind of culture change that is both so necessary and difficult to achieve in law schools. But without a change in the larger context, these experiments will remain marginal, and many students are likely to continue to find themselves stuck in counter-productive contradictions rather than dynamic tensions.

For these spaces to take root and produce sustainable change, innovation must operate on multiple levels simultaneously, and across different time horizons. Individual students, faculty, and lawyers require strategies that will enable them to navigate these tensions from the time they

³⁰⁸ Email from Daniel Del Gobbo to Elizabeth Emens, August 15, 2019.

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enter law school. Teachers require frameworks, strategies, and tools that they can use in the classroom and in programs operating within a culture organized around legality. Institutions and their leadership require ways to push toward transformative change, in an environment that resists change and where the commitments to the status quo are deeply rooted.

The paradox literature offers a third overall approach that could help break out of this pattern—designing for paradox. This step means building the environments and structures, and “choice architecture” that will facilitate productive engagement with the contradictions and connections between legality and proactive lawyering as part of solving problems.³⁰⁹ For this to take hold, it has to bring proactive lawyering from the margins to the center of legal education and culture, and to connect to the sites and incentives that form students' identities as lawyers.

This sounds daunting, but it need not proceed top down and whole hog. Experimentation will be key to moving this strategy forward, as the paradox literature would predict. Scholarship that models the use of design as a way to integrate legality and proactive lawyering provides a jumping off point.³¹⁰ Courses and programs that support an integrated experience for law students offers one form of experimentation. A recent white paper called *Re-Envisioning Professional Education* describes several initiatives underway that are experimenting with building these kinds of learning environments, including at Northwestern and Stanford Law Schools.³¹¹ The Davis Polk Leadership fellowships and innovation grants recently launched at Columbia Law School offer another example of this kind of experimentation. Linking experiential learning with classes focused on developing traditional legal skills.

Another strategy involves building cohorts of students, faculty, staff, and³¹² lawyers who are engaged in this kind of learning and practice, linking them with each other, and identifying core examples in the law school.³¹³ Courses and research that rely on collaboration as the way to develop legal skills could include modules that equip students to collaborate, and thus enhance both lawyering and leadership capacities. The institution might create incentives for people in different roles and with different skills and orientations to collaborate, and build those collaborations into spaces where legality and leadership both operate. Long term sustainability and impact depends upon linking these innovations to core activities that define the culture and values of the law school and the legal profession.

Experimentation has the virtue of proceeding initially without requiring wholesale change at the outset, allowing learning to take place, building communities of practice interested in learning with and from each other, and laying the foundation for the kind of learning required to hold paradox. Support from law school leadership, however, is key to sustaining these

³⁰⁹ See Underhill, *supra* note XX; Ayres and Braithwaite, *supra* note XX; Richard H. Thaler and Cass R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (1987).

³¹⁰ See, e.g., Hagen, *supra* note XX.

³¹¹ Austin, Chu, and Liebman, *supra* note, at 15-16.

³¹² Columbia Law School, Davis Polk Leadership Initiative, <https://www.law.columbia.edu/about/dean-welcome/about-dean/leadership-initiative-columbia-law-school>.

³¹³ CUNY modeled this strategy at the institutional level by introducing “houses” as a core building block of learning—groups of approximately 20 students who worked through problems with a faculty member, who acted as a senior lawyer—one with time and commitment to teach their juniors. Lesnick, *supra* note, at 1187.

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experiments and building them into the fabric of the institutions. Doing this work can feel emotionally draining and somewhat risky for students, faculty, and lawyers, but remains critical to being able to meet the challenges that face law students and the legal profession. Their success depends upon opportunities for thoughtful experimentation, supported by environments that make it possible to fail and recover. This kind of support enables the creation of routines and forums where conflict and cooperation can operate together or in tandem—another strategy that has some support from the paradox literature.³¹⁴

CONCLUSION

The paradox idea affords a way to move forward in the face of daunting challenges facing law schools and the legal profession. I do not mean to suggest that the ills of legal education and the legal profession can be cured by learning how to navigate lawyering paradoxes. Many scholars and commentators have documented structural problems that contribute to students' disengagement and mission drift; the failure to provide access to justice for those without wherewithal to pay for a lawyer, the unhappiness of lawyers, and the low level of trust and legitimacy in the legal system are just a few.

What the paradox idea does is provide a way to start small and think big. In the process of building the capacity to hold paradox, the potential lies to enable lawyers to reimagine institutions while operating within them. These pockets of innovation hold potential as fractiles—"infinitely complex patterns that are self-similar across different scales. They are created by repeating a simple process over and over in an ongoing feedback loop."³¹⁵ This is the mirror image of Howard Lesnick's brilliant use of William Blake's metaphor of infinity in the grain of sand.³¹⁶

The paradox idea, with its emphasis on holding unresolved tensions and experimenting, invites the conscious construction of spaces that can hold legality and proactive lawyering, and link this multiple consciousness to the pursuit of justice. It also builds the capacities needed to address the intractable problems and deep polarization facing the world. Linked to each other and made visible, these experiments hold promise as a launchpad for law schools to equip law students and the profession to make meaning of the contradictions built into law. This is what is necessary to realize law's promise.

³¹⁴ HALL, *supra* note, at 733

³¹⁵ ADRIENNE MAREE BROWN, EMERGENT STRATEGY 51 (2017).

³¹⁶ This poem, quoted by Lesnick, has become an organizing frame for thinking about multi-level change:

To see a World in a Grain of Sand
And a Heaven in a Wild Flower
Hold Infinity in the palm of your hand
And Eternity in an hour.

William Blake, *Auguries of Innocence*, in WILLIAM BLAKE: POETRY AND DESIGNS 209 (M. Johnson & J. Grant eds 1979).

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