The Holmes School of Law: A Proposal

Robert Rubinson
THE HOLMES SCHOOL OF LAW: A PROPOSAL

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This Article is in the form of a proposal for a fictional law school to be called The Holmes School of Law. Ideas first articulated by Oliver Wendell Holmes form the basis upon which the Holmes School is built. Holmes argued that law is not to be found in appellate opinions or in the conventions of legal analysis. Rather, “law” is the product of the political, psychological, and economic assumptions that judges bring to bear in decision-making. Moreover, what forms the substance of “law” is what actually happens “on the ground” in the wildly divergent processes and applications experienced by actual litigants. The Holmes School thus rejects the prevailing curricula of law schools. The Holmes School instead employs an experiential curriculum in order to explore the social processes that define what law is. A particular emphasis of the Holmes School is on low-income litigants, who are the largest group impacted by law. For this population, the substance and process of law as taught have nothing to do with law as experienced. “Rent courts,” for example, litigate thousands of cases a day with pro se tenants, and criminal courts can only accommodate the mass of cases through plea bargains. This is not the civil procedure or criminal law of law school. The proposal therefore seeks to articulate how a law school would teach law as it actually is as opposed to law as we assume or hope it to be.

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MISSION STATEMENT

The mission of the Holmes School of Law is to teach law.1

COURSE DESCRIPTIONS2

Adjudication: 8 credits. An examination of different fora where matters are adjudicated. Students will observe where the bulk of adjudication takes place, including the Two Minute Hearing Court to Evict Tenants;3 Default Judgment Foreclosure Courts and the “processes” they employ;4 Administrative Court for Prolonged and Fruitless Review of Unjustified Denials of Government Benefits;5 the Court for Incarceration through Plea Bargains and

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1 The Holmes School teaches law, not what “‘Law’ School” teaches. See infra everything else in the Article. This Mission Statement says nothing, and, in that regard, it is like all other mission statements. It has, however, the virtue of being transparent in its lack of substance.
2 The Proposal holds that breaking down a law school curriculum into “subjects” that have purported independence is misleading and a simplification because, as noted at length below, law is really all about context and interactions. See infra text accompanying notes __-__.
3 For precision’s sake, some of the content of the catalog refers to courts descriptively in order to express the idea behind studying these fora. For examples of different “rent courts” and the degree of process defendants are accorded within them, see Trina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 GEO. J. Pov. L. & Pol’y 181, 195 (2003) (on a typical day at Boston's Housing Court, 141 of 208 cases on the docket were set for trial, and in these trials “landlords were represented in 111 cases, tenants were represented in 13 cases”; Cook County courts handle about 40,000 eviction cases in a year, in which only about 10% of tenants are represented); Lawyers’ Committee for Better Housing, No Time for Justice: A Study of Chicago’s Eviction Court A System in Collapse, (“average eviction court case lasted 1 minute and 44 seconds”); ABELL REP., Mar. 2003, at 2 (a typical day in Baltimore’s “rent court” includes a docket of 1050 cases); 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (1992) (cases in New York City's Housing court are “disposed of at an average rate of five to fourteen minutes per case, with many settlements in the range of five minutes or less”); Janathan L. Hafetz, Almost Homeless, 2002-AUG LEGAL AFF. 11 (2002) (300,000 housing court cases are filed in New York each year, with each judge, on average, hearing 7,000 cases per year). The illusory nature of such “courts” is addressed in Williams v. Housing Authority of Baltimore City, 361 Md. 143 (2000) (finding that a so-called “Rent Court” is an administrative fictions which, despite its geographical separation from other courts, has no jurisdictional limitation). Appendix I contains an extended treatment of the Williams case in the context of a class plan.
4 See Ariana Eunjing Cha & Brady Dennis, Amid Mountain of Paperwork, Shortcuts and Forgeries Mar Foreclosure Process, WASH. POST, September 23, 2010 (“[t]he nation’s overburdened foreclosure system is riddled with faked documents, forged signatures and lenders who take shortcuts reviewing borrower’s files”). A well-publicized example of this “process” is the prevalence of “robo-signing” and “robo-verification,” through which court papers are filed without individualized review by the mortgagee. Andrea J. Boyack, Community Collateral Damage: A Question of Priorities, 43 LOY. U. CHI. L.J. 53 135 (2011). Courts accommodate the influx of cases with “rocket dockets” which, in the spirit of robo-signing itself, fail to present even a façade of due process. Michael Corkery, A Florida’s ‘Rocket Docket’ Blasts through Foreclosure Cases, WALL ST. JOURNAL (Feb. 18, 2009).
5 Robert Rubinson, A Theory of Access to Justice, 29 J. LEG. PROF. 89,109-112 (2004-2005). An example is one case in which a federal magistrate noted that “it has taken six years for this relatively simple claim to work its way this far through the system, approximately two years of that time having been expended
Sham Waivers of a Constitutional “Right” to a Jury Trial; judicial process “adjudicating” the welfare of children, especially in contrast to adjudication of matters involving large business entities; the inapplicability of “rules of civil procedure” to “summary proceedings” that overwhelmingly impact indigent litigants. In the discretion of the instructor, the course may also examine, by way of contrast, fora whose degree of process and resource allocation vastly exceed the volume of cases they adjudicate, such as the federal courts.

The Judicial Opinion. 1/10 credit. This course offered during orientation, explores the irrelevance of judicial opinions in understanding law; the overwhelmingly correlation between judges’ political and policy affiliations in predicting judicial outcomes; how endless citations of precedent and legal analysis in opinions are an ex post facto means to foregone conclusions; judicial opinions as means for presenting a veneer of rationality and
scientific precision. As part of this course, students will choose a judicial opinion of at least sixty pages and draft a full explanation of and basis for the decision in 2 pages or less. NOTE: This course fulfills the legal analysis requirement.

The Supreme Court. 1/10 credit. This course continues examines the subject matter of the course on Judicial Opinions in the context of the nation’s High Court. Topics covered: the failure of a single current Justice having a single day as a practicing law; the extraordinary attention lavished by academics and other legal commentators on the Court’s hypertechnical arguments and dense thickets of citation and logical forms to justify preexisting conclusions; the virtually infallible ability to predict decisions across a wide range of substantive areas based on a judge’s ideology without reading or knowing a single precedent or reading briefs displaying a virtuosic ability to set forth hypertechnical arguments and dense thickets of citations and logical forms; whether the rule that the Supreme Court is the only court in which “Court” must be capitalized is analogous to the capitalization of the names of Supreme Deities.

The Supreme Court II. 8 credits. The circumstances faced by litigants in selected matters decided by the Court. The topics to be covered vary based on the availability of circumstances to observe or participate in, but it may include: witnessing an execution in order to assess the Court’s decisions regarding whether capital punishment is cruel and unusual; visiting homeless shelters and soup kitchens in order to explore the Court’s

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13 Holmes noted that “the logical method and form flatter that longing for certainty and for repose which is in every human mind.” Id. at 465.
15 Holmes yet again: “I have sent round an opinion in which I take three pages to say what should be said in a sentence, but Brandeis thought it ought to be put in more solemn form because of its importance.” Letter from Oliver Wendell Holmes to Harold Laski (Nov. 30, 1917) in THE ESSENTIAL HOLMES 30 (Richard Posner, ed.) (1992). In crafting this assignment, Holmes’ statement has been reduced to a ratio: three sentences would equal about 40 words, and three pages, assuming the standard of 250 words per page, would equal 750 words. This reduces then to the following arithmetic: 40÷750=.053. Thus, a 60 page opinion times .053 equals 3.18, and, after rounding, this would equal 3 pages. Given that any pages beyond the requisite sixty would, by definition, would have to include lengthy and multiple concurrences and dissents which massage the ego of individual justices who believe the nuances of their distinct jurisprudence warrants detailed study, such concurrences and dissents are minimally relevant, and thus can be summarized in a subordinate phrase.
17 See supra text accompanying notes ___.
18 See supra text accompanying notes ___.
20 Judge Alex Kozinski reflected as follows on this subject:
jurisprudence on due process and how it does not extend to insuring the right to food, shelter, and other means of subsistence;\textsuperscript{21} residing in an urban neighborhood riddled by handgun violence in order to assess the role handguns play in contrast to militias in rural America in 1791;\textsuperscript{22} attempting to exercise First Amendment rights as an individual in contrast to multi-national legal entities that are not human beings and which possess massive aggregations of capital;\textsuperscript{23} assessing how the First Amendment promotes the “marketplace of ideas” when only a few organizations and fabulously wealthy individuals have the resources to purchase an idea to be offered and sold in the marketplace.\textsuperscript{24} NOTE: The intricate legal analysis offered by the Court justifying preexisting conclusions is not covered in this course.

Property. 3 Credits. This course will examine the impact of property law on the mass of individuals whose property “interests” are as tenants and owners of modest homes at risk of foreclosure or who are homeless and thus whose “bundle of sticks” has no stick.\textsuperscript{25} Most of the course entails individual interviews with individuals whose homes have been foreclosed\textsuperscript{26} or who have been evicted\textsuperscript{27} or who are homeless and the extent to which the low-wage labor enables an ability to secure livable and affordable housing.\textsuperscript{28} There will be no more than 30 minutes devoted to government subsidies for affluent homeowners in the form of the deduction for mortgage interest and an exploration of the pressing needs of owners of mythical parcels of land such as Blackacre and Whiteacre, the owners of which also mythical given the vanishingly small number of individuals who can afford to own land where easements, the rule against perpetuities, adverse possession, bundles of rights, and so on could plausibly come into play.

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

Alex Kozinski, \textit{Tinkering with Death}, NEW YORKER, Feb. 10, 1997, at 52.\textsuperscript{21} DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (due process guarantee only extends to “affirmative exercise of [State] power”).\textsuperscript{22} District of Columbia v. Heller, 554 U.S. 570 (2008).\textsuperscript{23} Citizens United v. Federal Election Commission, 558 U.S. 50 (2010).\textsuperscript{24} David Kairys, \textit{Freedom of Speech, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE} 190-215 (David Kairys, ed., (1998)).\textsuperscript{25} The metaphor of a “bundle of sticks” or “bundle of rights” is a pervasive in the study of property. Lee Ann Fennell, \textit{Lumpy Property}, 160 U. PA. L. REV. 1955, 1978 (2012).\textsuperscript{26} The logistics of this aspect of the course is fortunately quite simple insofar as the supply of foreclosed families hugely outstrips the number of law students who will need to complete this requirement. For the degree of “process” accorded such claims, see \textit{supra} note __.\textsuperscript{27} \textit{Id.} See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and U.S. DEPARTMENT OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2009 92 (2011) (the number of households who were evicted in 2009 alone was 169,000).\textsuperscript{28} BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).
The Unrepresented Client. 6 Credits. This course will be co-taught by low-income litigants who have claims adjudicated without representation and minimal process. Topics to be covered: The overwhelmingly high percentage of litigants who are not represented in a variety of fora and in matters that constitute the bulk of all matters that are adjudicated; the instructors’ experience as low-income litigants in the judicial system; how the norms of the adversary system collapse because most litigants cannot afford lawyers; the crucial importance of insuring that pro litigants are treated the same way as represented clients so as to eliminate injustice and favoritism in adjudicative process; self-representation in a variety of settings, such as court and administrative agencies, in which the litigants face judges, lawyers, and clerks who know intimately the workings of court and procedural and written law, and about which the litigants know nothing.

Professional Responsibility. 3 credits. This course explores ethical issues and the norms of the profession. Topics include: the co-option of the norms of “zealous advocacy” characteristic of criminal defense of individuals to justify over-the-top (and lucrative) representation of legal fictions like corporations; masking professional self-interest through discussions of the central role lawyers play in the administration of justice and maintaining

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29 See, e.g., Williams v. Housing authority of Baltimore City, 361 Md. 143 (2000) (“out of a total of 807,000 civil cases filed in [State] District Court, nearly 570,000 were landlord-tenant cases, but only 21,000 of those landlord-tenant cases (3.7%) were contested”) (citing Annual Report of the Maryland Judiciary 1998-99, Table DC-4 at ). Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyer’s Negotiations with Unrepresented Poor Persons, 85 CAL. L. REV. 70. Engler concludes that in such situations, lawyers often mislead and misrepresent the law or facts to pro se litigants. Id. at 130-157.


31 Deborah L. Rhode, ACCESS TO JUSTICE 5 (2004) (“[i]n most family, housing, bankruptcy, and small claims courts, the majority of litigants lack legal representation . . . [y]et too little effort has been made to ensure that it is fair or even comprehensible to the average claimant”).

32 Russel Engler has gathered substantial citations and descriptions regarding this issue in And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1987, n. 122 (1999).


34 Critiques of representation of organizations as if they were people or even viewing them as “things” – what has been called “thingification” – has a long history. Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 811 (1935) (noting in his critique of “thingification” that “[n]o one has seen a corporation). The norms of corporations entitled to zealous representation akin to that of a criminal defendant perhaps reached its apotheosis when a court held that Powell v. Alabama, 287 U.S. 545 (1932) – a case addressing guilty verdicts against African-American teenagers by white juries in segregated Alabama – was an apt analogy. United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740, 743 (3d Cir. 1979) (“an accused has no less of a need for effective assistance due to the fact that it is a corporation”).
the fabric of society; freely offering resounding statement about the importance of representing to low- and moderate-income litigants while not doing anything about it.

Constitutional Criminal Procedure. 3 credits. This course explores the application of the 6th Amendment to the representation of indigent criminal defendants. The course will briefly focus on constitutional provisions regarding criminal prosecutions and will focus exclusively on plea bargaining in criminal courts and the “procedures” implemented by all criminal that cannot accommodate any result other than plea bargaining. The course will also survey the law of ineffective assistance of counsel, paying particularly evolving jurisprudence on whether sleeping lawyers in capital cases have provided effective assistance of counsel. Other topics: the criminalization of poverty and the racialization of criminal prosecutions.

35 Deborah Rhode, IN THE INTERESTS OF JUSTICE (2000) ( “[l]awyers, no less than grocers, are motivated by their own occupational interests [but w]hat distinguishes the American bar is its ability to present self-regulation as a societal value”).

36 Consider the Preamble of the ABA MODEL RULES OF PROFESSIONAL CONDUCT:

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

MODEL RULES OF PROF’L CONDUCT Preamble cmt. There are, however, no obligations anywhere in the Rules for lawyers to do anything about this core “deficiency” either through pro bono or any other steps. See Id. R. 6.1 (providing for “voluntary pro bono publico service”) (emphasis added).

37 See supra text accompanying notes __-__. Michelle Alexander, Go to Trial: Crash the Justice System, March 3, 2011, available at www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system (“[i]f everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with ensuing tsunami of litigation”). The Supreme Court itself has recognized (or at least a majority of the Supreme Court has recognized) the “simple reality” that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” Missouri v. Frye, __U.S. __, 132 S.Ct. 1399, 1407 (2012). The Court went on to quote with approval the following: “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system: it is the criminal justice system.” Id. quoting Robert E. Scott and William J. Stuntz, Plea Bargaining as Contract, 101 YALE L.J. 1909, 1912 (1992).

38 Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996) applied a three step analysis regarding whether sleeping attorney constitutes violation of criminal defendant’s 6th Amendment right to assistance of counsel: “(1) did counsel sleep for repeated and/or prolonged lapses; (2) was counsel actually unconscious; and (3) were the defendant’s interests at stake while counsel was asleep?”). For other applications of this flexible test, see Burdine v. Johnson, 66 F.Supp.2d 854, 863-66 (S.D. Tex. 1999), aff’d., sub. Nom Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001), cert. den. sub. nom. Cockrell v. Burdine, 122 S. Ct. 2347. Other jurisdictions accord a consciously (or unconsciously) forgiving attitude towards sleeping counsel. For example, the 9th Circuit held that counsel must sleep for a “substantial portion of a trial” in order for there to be ineffective assistance of counsel, thus recognizing the framer’s understanding that the Constitution permits some, but not all, attempts at battling the ill effects of sleep deprivation at trial. Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984). This developing area of the law was recently reaffirmed in Muniz v. Smith, 647 F.3d 619 (6th Cir. 2011). The Muniz Court assessed found that the allegations in support of ineffective assistance were merely “that Muniz’s attorney was asleep for an undetermined portion of a single cross-examination” and “not asleep for the entire cross since he objected near the end of questioning,” and thus Muniz “cannot establish that his trial counsel was
Law and Commerce. 1 Credit. This course provides an overview of the ways attorneys can generate substantial compensation through the representation of large organizations. The course will only briefly address “substantive” areas of law typically focused on in this representation, such as taxation and business organizations. There will be an exploration of why less lucrative areas of legal services, such as representing low-income litigants who otherwise cannot afford representation, pay too little to service student debt.41

Gender, Race, Socioeconomics, and Intersectionality. 3 Credits. This course, primarily taught by students, explores individual experience as a means to understand constructions of the world and the meaning of law. The course is supplemented with work from social psychologists who have demonstrated how humans assume the “normativity of their experience.”42

Legal Education. 3 Credits. An exploration of how legal education, with the exception of the Holmes School of Law, has nothing to do with law;43 how the hypothetical does not offer the remotest reflection of the application of law because no client has ever consulted an attorney with a fact pattern or “Statement of Facts”; the failure to assess how proceedings unfold in matters initiated by under-resourced state entities, such as in criminal prosecution

asleep for a substantial portion of his trial.” Id. at 623-624. Given time, the Constitutional Criminal Procedure course might explore how these holdings reflect the framer’s intent. This is because the lengthy proceedings in the Philadelphia heat during the summer of 1787 demonstrate that the framers no doubt were fatigued and thus both experienced and understood the value of sleep. For a valuable discussion of Philadelphia weather during the Constitutional Convention, see James A. Hutson, ed. SUPPLEMENT TO MAX FARRAND’S RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787 325-326 (examining historical weather records in the summer of 1797 (the time of the Constitutional Convention) and finding the average temperate was 93.8 degrees from June through September of that year).


43 See supra text accompanying notes ___ - ___ and infra text accompanying notes ___-__.
and child abuse and neglect proceedings; the misleading perception that the pedagogy of elite law schools produce more “competent” practitioners.

III. INTELLECTUAL FOUNDATIONS: HOLMES DANGEROUS IDEA

The founding principles of the Holmes School of Law are drawn from ideas articulated by Oliver Wendell Holmes and other legal realists early in the twentieth-century. These ideas continue to be explored today. Nevertheless, Holmes’ conception of law remains radical and, despite the notoriety and esteem in which Holmes as a jurist is held, remains far too outré to have suffused traditional legal thought.

Holmes’ famous essay The Path of the Law captures the essence of his critique:

The training of lawyers is a training in logic. The processes of analysis, discrimination, and deduction are those in which they are most at home. The language of the judicial decision is mainly one of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form . . . [Such a conclusion, however,] is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in

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44 See Gilman, supra note __.
46 This phrase is from DANIEL DENNETT’S DARWIN’S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE (1995).
47 For a collection of seminal writings from the realist school, see AMERICAN LEGAL REALISM (Morton Horwitz et al, ed. 1993).
50 When he was ninety-one Holmes himself reflected that his ideas were merely his “old chestnuts” that remained unrealized. Id. at 21.
short, because of some attitude of yours upon a matter not capable of exact quantitative measure, and therefore not capable of founding exact logical conclusions.51

Another way of expressing the idea is found in a Chinese proverb:

A judge decides for ten reasons  
Nine of which nobody knows.”52

Succeeding realists explored the extraordinary technical skill brought to bear in efforts to present conclusions in logical dress. A good example is Felix Cohen, who envisioned an analytic “heaven” in which

one found a dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.53

Cohen’s “dialectic-hydraulic-interpretive press” produces determinate results that, through a syllogism, offers a compelling vision of what is right and what is wrong.54

Holmes offered an alternative view of “law”: law is “[t]he prophecies of what courts will do in fact, and nothing more.”55 “Courts in fact” are what courts do in fact: they are situated in facts, with facts the most important thing.56 Moreover, as discussed momentarily, facts are a

51 Holmes, supra note __, at 465-466. Holmes expressed the same idea two much less familiar sentences after his “life of the law” quote: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
54 See Burt Neuborne, Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques, 67 N.Y.U. L. Rev. 419, 420 (1992). Holmes also critiqued the idea the syllogism in the opening paragraph of THE COMMON LAW. See supra note __. As the foremost modern proponent of formalist logic in the law, Antonin Scalia sees the goal of a judge in interpreting law “is to get the meaning precisely right.” Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Reserv.L. Rev. 581, 582 (1989-1990).
55 Holmes, supra note __, at 460-461.
56 The notion of law being “in” something recalls a “container metaphor.” A metaphor “constitutes the
textured, variegated thin thing having little to do with the misleadingly stripped down “statement of facts” that are the opening act of most judicial opinions.

Consider, then, in a slightly different way what Holmes is saying law is not. “Law”\(^{57}\) is not the law of contracts, criminal law, property, family law – the stuff of law school classes, treatises, and, as children learn in grammar school, what the legislative branch legislates, the executive branch executes, and the judicial branch judges.\(^{58}\) Law is not appellate opinions, despite being subject to laser-like like scrutiny, because, as Jerome Frank put it, “an opinion is not a decision,” and thus is “hopelessly simplified.”\(^{59}\) All of these things collectively are what Richard Posner has called “law’s traditional preoccupations”\(^{60}\) which are, not coincidentally, the “traditional preoccupations” of legal education.\(^{61}\)

Rather, law is what happens “on the ground.” Law is the lived experience of a defendant in a debt collection case, or a criminal defendant facing drug charges, or a tenant seeking to

way we think, what we experience, and what we do every day.” Lakoff and Johnson, supra note __, at 43. The “container metaphor” is particularly important in cognition. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 29-30 (1980); ZOLTAN KOVECSES, LANGUAGE MIND AND CULTURE 123 (2006); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS 272 (1987). Consider the following examples from from Lakoff & Johnson, supra note __, at 92 (emphasis in original) regarding the “argument is container” metaphor:

- “Your argument doesn’t have much content.”
- “That argument has holes in it.”
- “I’m tired of your empty arguments.”
- “You won’t find that idea in his argument.”
- “That conclusion falls out of my argument.”
- “That argument won’t hold water.”

\(^{57}\) This sentence raises the specter of what should be designated law and what should be designated “law.” To clarify, this Proposal will designate the right conception, that is, what the Holmes School will teach, as law without quotation marks, and designate the wrong conception, that is, what every other Law School teaches (or, rather, what every other “Law” School teaches), as “law.”

\(^{58}\) Devera B. Scott et al, The Assault on Judicial Independence and the Uniquely Delaware Response, 114 PENN ST. L. REV. 217, 248 (2009) (“[e]ducation has to start at the earliest levels by teaching school children at a young age about the doctrine of separation of power and the rule of law”). As the premise of the Holmes School demonstrates, children should also learn “at a young age” about the limitations of the “rule of law” by exploring the limitations of what is usually assumed (at a young age) to be law.


\(^{61}\) See supra text accompanying notes __-__.
avoid eviction, or a mother seeking to retain custody of her child. These, for sure, fall superficially into the laws of contract, criminal law, property, and family law. But the “law” – the rules, procedures, cases – that “define” these areas doesn’t tell us much. Or, at least, it tells us much less than an inside-out perspective with “law” as merely one piece of the picture – and a pretty unimportant one at that. 62

Law also pervades lives in ways that have nothing to do with courts or adjudication and are almost or entirely invisible in law school. For example, the mass of forms and legal regulations confront low-income people at every turn. Consider how Stephen Wexler characterizes “law” in the context of poor people:

Poor people do not have legal problems like those of the private plaintiffs and defendants in law school casebooks . . . [T]hey do not have personal legal problems in the law school way . . . Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms . . . Life would be very difficult for the not-poor person if he had to fill out an income tax return once or twice a week . . . [P]oor people are always bumping into sharp legal things . . . 63

Law is also an ordering system that defines and shapes everyday life. Some of this is obvious, such as taxes and motor vehicle laws (speeding, parking tickets, license and registration renewal, emissions testing). Motor vehicle laws in particular generate ire because they crop up with irritating regularity and, just by happenstance, only affect people who have cars. 64

62 Holmes nuanced idea of “experience” – the fundamental concept underlying his “life of the law is experience” opening of THE COMMON LAW - has been described by one commentator as “everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values policies, prejudices.” Louis Menand, THE METAPHYSICAL CLUB 341-342 (2001).
64 The legal impact of mass transportation on the lives of those who cannot afford cars, especially in urban centers, is huge. It affects the ability to adapt to the unpredictable schedule of many low-wage jobs, to manage child care, to transport children to school, and so on. Outrage about delays experienced by airline passengers, however, which has negligible social cost and only affects the small segment of the population that flies, has spurred the federal government into action by passing a “Passenger Bill of Rights.” For a detailed consideration of what is officially known as the “Tarmac Delay Rule,” see Jennifer Henry & Mary Gardner, The New Tarmac Delay Rule and the Volcanic Ash Cloud Over European Air Space: One Year Later, 76 J. AIR L. & COM. 633, 634-650 (2011). It appears there has
also conflicts that might not even make it into affirmative cases or involve courts, agencies or lawyers.\textsuperscript{65}

Holmes himself was ambivalent about, or at least shirked from, the consequences of his own dangerous idea:

\ldots Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions – adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore \ldots \textsuperscript{66}

Go where the law is, Brandeis suggests. Lawrence, Massachusetts - the site of a massive textile industry in which a largely female, poor, immigrant population worked and lived in deplorable conditions – was a good place to go.\textsuperscript{67}

\begin{footnotes}
\item[67] Lawrence was also the site of a strike was popularly known as the “Bread and Roses Strike” - an important event in the history of the labor movement generally and of the International Workers of the World specifically. \textit{See} 4 Philip S. Foner, \textit{HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES} (1965); William Cahn, \textit{LAWRENCE 1912: THE BREAD AND ROSES STRIKE} (1980). Perhaps Brandeis’ idea was a particularly sharp rebuke to Holmes because Lawrence is less than thirty miles from Boston where Holmes grew up, and thus would constitute a minimal effort on Holmes’ part to see “how it really is.”
\end{footnotes}
Subsequent realists, influenced by Holmes, extended and drew consequences from Holmes’ dangerous idea. Karl N. Llewellyn, for example, described “law” in the context of a contract case regarding a “right” that a party performs under a contract:

[I]f the other party does not perform as agreed, you can sue, and if you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, and you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will probably get a judgment for a sum considerably less than what the performance would have been worth – which, if the other party is solvent, and has not secreted his assets, you can in further due course collect with six percent interest for the delay.\(^\text{68}\)

In a different vein, Felix Cohen drew upon Holmes’ ideas about law in terms of being fundamentally a social act:

A judicial decision is a social event . . . [A] judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it . . . \(^\text{69}\)

Cohen is calling for examining decisions synchronically – probing the “reality” of what goes into decision making and the reality of “human activities.” This is emphatically not the development of precedent.

In the end, then, the fundamental idea of “realism,” and of, by extension, the Holmes School of Law, is that law is about people’s multi-faceted interactions with the world – a goal that conventional law school curricula avoids in order to maintain its legitimacy as an “objective” school of reason driven by the rigorous application of logic. The realities of law as it applies the mass of people are too messy, too subversive of popular conceptions of “the rule of law” - the foundation of what law school is supposedly teaching.\(^\text{70}\)


\(^\text{69}\) Cohen, supra note __, at 843.

\(^\text{70}\) Consider the father of modern law school pedagogy, Christopher Columbus Langdell: to improve legal education it is “indispensable to establish at least two things: first, that the law was a science; secondly,
So, in the end, the Holmes School of Law seeks to achieve two things:

- What law *is* in all its messiness, social contexts, assumptions – its reality “on the ground.”
- What law *is* to the vast majority of litigants who have few or no resources.

**IV. THE PEDAGOGY OF THE HOLMES SCHOOL**

The Holmes School of Law builds upon critiques not only of “law” but of legal education – a critique that extends back over a century. This Proposal examines how the Holmes School’s curriculum fits into prior critiques of legal education, how its premises are different from those calls for reform, and the signature pedagogy to achieve its goals.

**A. The Holmes School in Debates About Law School Pedagogy**

1. *Langdellian Science and Logic*

Christopher Columbus Langdell was the father of law school pedagogy as it has existed for well over one hundred years. Langdell’s signature pedagogy was the “case method.”

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*One recent article has characterized Langdell as a “straw man” for simplistic (if not simple-minded) formalism. Catharine Pierce Wells, Landell and the Invention of Legal Doctrine, 58 BUFF. L. REV. 551, 552 (2010). Whether the formalist curriculum so characteristic of law school is appropriately attributable to Langdell is, for purposes this Proposal, not important. What is important is that these norms are at the core of legal education as it exists.*
Discussion of this method in this Proposal need not be prolonged. The case method assumes that cases are the lifeblood of “law” as understood in “law” school and that “thinking like a lawyer” entails developing or “synthesizing” rules from cases to produce certain results. As any first year law student knows, the case method is not only the primary vehicle, but the vehicle for learning what “law” is.

2. Counterpoint: Clinical Education and “Practical” Knowledge

Jerome Frank offered an early, and still idiosyncratic, critique of the case method by attacking the very idea that the “case” method deals with “cases.” Frank wryly observed that students do not study cases; rather “[t]heir attention is restricted to judicial opinions. But an opinion is not a decision.” The case method, according to Frank, is really the “opinion method.” An “opinion” says nothing about decision-making or why a judge reached a particular decision.

The case method fails for many reasons: 1) it “disclos[es] merely a fractional part of how decisions come into being”; 2) it generates within a lawyer and, by extension, a student “a treacherously false sense of certainty in advising clients”; 3) it “is hopelessly simplified”; 4) it fails to take into account “the slippery character of ‘the facts’ of the case.”

73 Robert Stevens, Legal Education in America from the 1850s to the 1980s 52-53 (1983); Margaret Martin Barry, et al., Clinical Education for the Millennium: The Third Wave, 7 Clin. L. Rev. 1, 2-3 (2000).
75 This footnote is inserted solely for the sake of appearances. Any informed reader does not need support for this proposition.
76 Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. Pa. L. Rev. 907 (1933) (emphasis in original). Karl Llewellyn – another realist – also tended towards the Frank critique: “[N]o case can have meaning itself! Standing alone, it can give you no guidance.” Karly Llewellyn, The Bramble Bush 49 (1930). Llewellyn, however, did not go as far as Frank in rejecting the entire conception of “case.” Rather, Llewellyn’s point is how one case must be read in “the background of other cases.” Id. This does not reject the case method but reaffirms it: “case synthesis” and “legal analysis” as a means to understand “law.”
77 See supra text accompanying notes ___.
78 See Frank, supra note __.
A more widely articulated critique entails not merely rejecting the value of examining cases, opinions, decisions, but rather a focus on “practice.” And this leads directly into the clinical education movement.79

Supporters of clinical education extend well back into the nineteenth-century and consistently thereafter.80 Consider the following selection of quotes:

Professor Blewett Lee of Harvard Law School in 1896:

It is odd if our profession is the only one in which students cannot have a practical training before they enter their life-work. The medical student can have clinical instruction and hospital practice. The clergyman, ere the Seminary doors close behind him, can inflict his maiden efforts on his fellows, or on the weaker flocks of the faithful. The civil engineer has already a goodly share of field work before he leaves the technological halls. But in this year of grace, most law students still go forth among a long suffering public having only read books and disputed over them. The evil of this condition cannot be remedied by any half measures, or cheap devices or cheap men. To give practical instruction in law work will require immense intellectual labor and the finest quality of teaching – but let us not say it is impossible because we have never done it.81

William V. Rowe in 1917, in an article entitled Legal Clinics and Better Trained Lawyers – A Necessity:

[I]t may be said at once that a knowledge of practice can be acquired only by practicing, and that it will be absorbed quickly and naturally as an incident and result of right training. It is folly to waste time to teach practice in the classroom in the customary manner – a folly as pronounced as the continued encouragement of “moot courts” . . . The familiar idea of the clinic, to be adapted to the teaching of law, by bringing the law office, with this “direct atmosphere of daily professional life,” to the law school and the student . . . is now seriously suggested for general adoption, with a view of filling this needless and dangerous gap in legal training.”82

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79 For an overview of the history of clinical education, see Barry, supra note __.
80 One could make a plausible argument that apprenticeship – the foundation of legal education in the United States prior to the rise of law schools as a requirement for being admitted to the bar –is itself “clinical legal education,” but in practice these apprenticeships were ad hoc affairs and certainly had no systematic pedagogy – a defining characteristic of clinical education. See infra text accompanying notes __-__.
81 Blewett Lee, Teaching Practice in Law Schools, 19 A.B.A. PROC. 507 (1896). The flowery language typical of the era should not obscure his basic critique, which is fully modern.
82 William V. Rowe, Legal Clinics and Better Trained Lawyers – A Necessity, 9 ILL. L. REV. 591, 595-596 (1917) (emphasis in original).
Jerome Frank in 1933 in an article called Why Not a Clinical Law School?:

Medical schools rely to a very large extent on the free medical clinics and
 dispensaries . . . Suppose . . . that there were in each law school a legal clinic or
dispensary . . . [A] considerable part of the teaching staff of a law school should
consist of lawyers who already had varied experience in practice . . . What is
intended is not that (as a scoffing neo-Landellian recently suggested) the student
in his law-school days learn “the way to the post-office” or “the mechanics of the
short-trial list.” What is intended is that, almost at the beginning of and during his
law-school days, the student should learn the very limited (although real)
importance of the actual legal world of so-called substantive law and of so-called
legal rules and principles. He should learn that “legal rights” and “duties” mean
merely what may some day happen at the end of specific lawsuits . . . He should
learn that judges are fallible human beings and that legal rights often depend on
the unpredictable reactions of those fallible human beings to a multitude of
stimuli, including the rules, but also including the fallible testimony of other
human beings called witnesses. The student should become aware of the slippery
character of “the facts” of a case, when there is conflicting testimony, and of the
marked importance of what happens in trial courts.83

Despite these prescient critiques, clinical education only came into its own in the 1960’s
when “clinical legal education solidified and expanded its foothold in the academy.”84

Depending on the institution, many issues continue to bedevil clinical education: law schools’
willingness to develop or maintain a “clinical program” with minimal resources or
sophistication; the status of and job security of clinical faculty (if, indeed, they are even called
“faculty”); and the condescension of Langdellian teachers of “doctrinal courses” that clinics
merely teach “skills,” not “theory” or “doctrine,” which requires greater intelligence and
sophistication.85

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84 Barry, supra note __, at 12.
85 See supra text accompanying notes __-__. Other battles are, for the most part, won. Clinicians have
had their own law journal – the CLINICAL LAW REVIEW – since 1994 and so-called “clinical scholarship”
appears regularly in student-edited journals.
Nevertheless, clinical legal education has been remarkably successful in establishing for the importance of teaching lawyers how to practice.86

3. The Ensuing Debate: Theory and Practice and Why It’s Beside the Point

There is a longstanding tension between “theory” and “practice,” “doctrinal” and “clinic.” This is the core of the matter to many. For example, a leading study of legal education known as the “Carnegie Report”87 sees debates about legal education as, at bottom, a “conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.”88 The challenge taken on by another leading study of legal education – the “MacCrate Report”89 - and the Carnegie Report and by others before them90 is to resolve the tension of whether a law school is a professional school teaching how to be a lawyer or an “academic institution” devoted to a scientific inquiry of the law.91 These efforts see both as complementary and propose integrating them to create a more comprehensive legal education. Consider how the authors of the Carnegie Report frame their project: “We are convinced that this is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice.”92 A primary concern in this project is “to bring the teaching and learning of legal doctrine into more fruitful dialogue

86 The American Bar Association’s Standard 302 of its STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS – the basis for law school accreditation - requires that a “law school offer substantial opportunities for live-client or other real-life practice experiences, appropriately supervised, and designed to encourage reflection by students on their experiences.”
87 CARNEGIE REPORT, supra note __, at 8.
88 Id.
89 See supra text accompanying notes __-__.
90 See, for example, and largely obscure earlier Report – known as the “Reed Report” – funded by the Carnegie Foundation. Alfred Z. Reed, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921). The crux of the Reed Report’s conception of legal education is familiar: “general education, theoretical knowledge of the law, and practical skills training.” Barry, supra note __, at 7.
91 The Carnegie Report does an excellent job tracing the origins of this tension. Carnegie Report, 4-8.
92 Carnegie Report, supra note __, at 12.
with the pedagogies of practice,” “to bridge the gap between analytical and practical legal knowledge.”

This Proposal rejects the purported dichotomy between the “analytic” and “practical.” They are not, as Carnegie frames it, “the two kinds of legal knowledge.” Neither do they constitute legal knowledge at all. Neither are they even a dichotomy, which presupposes that each side of the dichotomy has meaning. These ideas do not describe, collectively or separately, what law is.

Consider the Holmes School alternative conception: examining what happens when most people encounter rules (regulatory, statutory, Constitutional), procedures (whether “formal” or, even more importantly, informal), court forms, clerks, social workers, lawyers, or no one, that is, legal claims that are not asserted because potential litigants do not know they have them.

93 Id. at 12.
94 See supra text accompanying notes _. _. Of course this Proposal is wrong in this statement insofar as the dichotomy is full of meaning, and meaning upon which brilliant minds have thought deeply about what it is to teach lawyers about lawyering. But saying things that are both right and wrong violate the norms of paradigm shifting and expressions of certainty that characterize writing that seeks to be provocative.
95 Consider the “procedural” rules that involve pseudo-“courts” that through faux “jurisdictional” limitations force low-income litigants to limit their available claims, although such low-income litigants do not have lawyers and thus do not know what those available claims are because they cannot afford lawyers, and, at the same time, such low-income litigants are also subject to the vagaries of clerks who might or might not adhere to rules regarding what the nature of various proceedings are, and thus preclude low-income litigants from pursuing claims that they probably did not know they had because they did not have lawyers and because the “pleadings” they fill out are of the “check the box” variety which are provided are under the guise of “judicial efficiency” when, in fact, “pleading” (that is, forms) are driven by the need to efficiently dispose of hundreds of thousands of cases with dispatch which is the only way to go given the preposterously limited resources available to courts who adjudicate these sorts of claims. Williams v. Housing Authority of Baltimore, 361 Md. 143 (2000) (describing everything in the prior sentence). Of course, these procedures merely involve simple landlord-tenant cases which only involve shelter, not complex, high level commercial litigation which are of much greater moment and warrant a greater degree of sophistication and deployment of judicial resources. See supra text accompanying note notes _. _.
96 Note how lawyers are stuck in the middle of a long list. The reason for this is that most litigants don’t have lawyers. Their interactions with “law” are far more with the clerks/social workers/public assistance caseworkers than with lawyers.
97 This issue of proto-claims that do not reach the level of recognized claims is rarely (if ever) addressed in law schools and very rarely examined at all in scholarship. A very rare example is William L.F.
What exactly is “theory” when it comes to this? What exactly are “practical skills” when almost all litigants have no benefit from the “practical skills” learned by lawyers since they can’t afford them? What exactly is “doctrine” given the wildly divergent “process” accorded litigants? What exactly is “theory” when any theory must be based on the personal experience likely has nothing to do with most of those who interact with law? And it is in answering these questions, or conveying that these questions are worth asking, or, even, that these questions even exist, that forms the basis of the pedagogy of the Holmes School.

V. LAW IN THE HOLMES SCHOOL

So if “law” is “law in fact,” what would law school look like? It would largely entail examining the experience of litigants who are represented, litigants who are not represented, litigants who are represented but have lawyers with overwhelming case loads or poor preparation or are just not very good at what they do, criminal defendants with court-appointed lawyers, criminal defendants with well-compensated private lawyers. How about geographic differences? How about differences between federal courts, state courts, family courts, small claims courts,

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Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC. REV. 631 (1980-81). The absence of “law” is just as important as its existence, as in the Sherlock Holmes story in which the most significant fact is the dog that did not bark in the night. SIR ARTHUR CONAN DOYLE, *THE ADVENTURE OF SILVER BLAZE* (1892), in *THE MEMOIRS OF SHERLOCK HOLMES* (1974). The reference in this Proposal to two people named Holmes (albeit one real and one fictional) is purely coincidental.

98 Consider also this formulation from the Carnegie Report: “[L]egal analysis is the prior condition for practice because it supplies the essential background assumptions and rules for engaging with the world through the medium of the law.” Carnegie Report, *supra* note __, at 13. This formulation (with due respect to the authors of the Carnegie Report) has it exactly backwards: the world furnishes the essential background assumptions for the medium of “law” and “legal analysis.”

99 *See supra* text accompanying notes __-__.

100 *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 430-31 (1990); *[O]ne must wonder . . . whether anyone could devise a theory that is not grounded in experience. Try it for yourself: invent a theory that does not arise from or relate to anything in your experience. What would such a theory even address? Distributive justice in the Martian economy? Sexual relations in the sixth dimension?*
“rent courts,” administrative tribunals, extra-judicial or non-judicial processes such as arbitration and mediation? How about appellate versus trial courts? How about, more generally, the impact or non-impact on actual human beings of what is designated “law”? How about claims that are not claimed because the claimants do not have the knowledge or resources to claim them? The crux of the matter is that taking Holmes’ dangerous idea to its ultimate conclusion leads to what Daniel Dennett has called, in a different context, “universal acid”:

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

Holmes’ ideas, like Dennett’s “universal acid,” would, if applied or even taken seriously, “eat through” settled notions of law. It is far more than the now banal notion of a “paradigm shift.” It is necessarily “law in context,” and, given that any context is unique, given that context only resides in fluidity and messiness, there is never a point of rest, no set of bedrock principles transferable across contexts.

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101 For an example of the ephemeral existence of such a thing, see supra accompanying notes _____.
102 See supra text accompanying notes _____.
103 Dennett, supra note __, at 63 (emphasis in original). A related image by way of Holmes is “cynical acid.” Holmes, Path of the Law, 10 Har. L. Rev. 457, 461 (1897). “Universal acid” is more corrosive than “cynical acid,” however, and thus more accurately captures the implication of Holmes. Felix Cohen also liked the idea of “cynical acid,” calling it “Holmes’ suggestive phrase.” Cohen, supra note __, at 830.
104 Thomas Kuhn first articulated this idea in THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970). This phrase is so pervasive and used so liberally that paradigms shift ceaselessly and even shifted paradigms are themselves shifted within minutes, with the cycle repeating ad infinitum.
A rare example of a realist who took up the challenge of what to affirmatively do with this worldview was Felix Cohen in *Transcendental Nonsense and the Functional Approach.* \(^{105}\)

Cohen does take Holmes seriously. Holmes, Cohen notes, offered a “basis for the redefinition of every legal concept.” Cohen’s project was to see, learn about, and teach law through a Holmesian lens. His solution was what he called “a science of human behavior”:

> Law is a social process, a complex of human activities, and an adequate legal science must deal with human activity, with cause and effect, with the past and the future . . . Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior. \(^{106}\)

Cohen’s attempt to gain traction in a Holmesian world was to reach, again, for science, but this time in terms of sociology, economics, psychology – “social sciences” which constitute “law.” Cohen, thus, continues to grasp at the rational and the systematic, and thereby seeks to maintain the legitimacy of law school, albeit with a Holmesian twist.

Cohen’s valiant effort does furnish a systematic means to explore legal doctrine. Cohen’s effort, however, encounters a problem:

> [N]o system of concepts that serves as an ordering structure can have categories, definitions, prototypes, principles, or what-have-you that are as numerous, variegated, and nuanced as the circumstances which bring the system into play. \(^{107}\)

Cohen’s efforts thus fall into the trap of imposing a system that shapes and defines what “law is,” and, by doing so, the full impact of “context,” of “reality,” gets lost: one set of “simplifications” or cognitive “constraints” gets replaced by another. \(^{108}\) The universal acid is not universal after all.

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105 Cohen, *supra* note __.
106 American Legal Realism, *supra* note __, at 224.
107 Letter from Anthony G. Amsterdam to Author (October 20, 1996) (on file with the author).
108 In a related vein, Stanley Fish challenges the idea of “critical self-consciousness” – the notion that critical theory reaches a “real” perspective that succeeds (or at least approaches) capturing “reality.” Stanley Fish, *Doing What Comes Naturally* 437-457 (1989). Fish notes that all “perspectives” –
In contrast, the Holmes School curriculum and pedagogy does not aspire to be particularly scientific or systematic. Rather the signature pedagogy of the Holmes School is experiential. It is to go and see places, to grapple with nuances, context, even contradictions. It is to “[t]o get somewhere with the matter at hand” by suspecting that “you are not quite getting it right.”\textsuperscript{109} It is to Lawrence, Massachusetts “to see how things really are.”\textsuperscript{110} The goal is to minimize “concepts” and systematic ways of thinking that shape and mislead – a fool’s errand if there ever was one but one that is at least refreshingly transparent in its foolishness.

So how to get to students to Lawrence, Massachusetts? By going there, of course. Going there, however, can happen in many ways. Most obviously, it can be going someplace physically. It can be going someplace vicariously through narratives, especially from people who have experience the place. It can also be going someplace through expressive means, that is, visual or written arts.

In this respect, “going” is a relatively accurate one word description of the pedagogy of the Holmes School.

VIII. A LIKELY OBJECTION AND RESPONSE

The author of this Proposal does recognize that some might not agree with the principles of the Holmes School, if only because novelty often generates opposition and dismissal. This Proposal will thus conclude with a brief response to what is a likely objection to this Proposal:

\textbf{The proposal merely seeks to indoctrinate students to a leftist agenda that is anathema to a neutral institution of higher learning. The name of the school should really be the “Marx School for Undermining the Free Market for Legal Services and Indoctrinate Students under So-Called ‘Social Justice,’ which Is Really Code for Socialism.”}

\textsuperscript{109} CLIFFORD GEERTZ, \textit{THE INTERPRETATION OF CULTURES} 29 (1973).

\textsuperscript{110} See supra text accompanying notes __-__.
Response.

- The principles upon which the Proposed Holmes School are descriptive. The extensive footnotes that accompany much of this Proposal, and especially the course descriptions, are statistics devoid of some sort of policy “spin.” They merely describe what “law” is to the vast majority of Americans.\footnote{It is also worth noting that the Proposal does not cite Karl Marx.}

- It is the “conventional” law school curriculum that has fundamental political and ideological premises. These premises, moreover, are masked under a veneer of “rigor,” “logic,” and “thinking like a lawyer.” Consider first year classes, which omit anything at all regarding what the vast majority of Americans experience as “law.”\footnote{For an extended discussion of these ideas, see generally Duncan Kennedy, Legal Education as Training for Hierarchy in Kairys, supra note __, at 54.}

- Holmes – the school’s namesake and originator of many of its premises\footnote{See supra text accompanying note __.} - was no radical. To the contrary, he evidenced “hostility to most social reform.”\footnote{Richard A. Posner, Introduction, in THE ESSENTIAL HOLMES xxviii (1992).} His greatest enthusiasm for a particular social policy was a marked fondness for eugenics – the forced sterilization of, as he put it, “degenerates” and “imbeciles.”\footnote{Buck v. Bell, 264 U.S. 200 (1927). The case includes Holmes’ infamous praise of the eugenics movement: “It is better for all the world if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting the Fallopian tubes. Three generations of imbeciles are enough. Id. at 207.} Other “conservative” judges would also find many things to like in the curriculum of the Holmes School.\footnote{Consider Judge Alex Kozinski, whose ideas have been cited previously in this article. See supra text accompanying notes __-___. Similarly, Richard Posner’s conceptions of “pragmatism” involve a great deal of the “law in fact” that constitutes the core of the Holmes School curriculum. See Richard Posner, Pragmatic Adjudication, in THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE 235-253 (Morris Eckstein ed., 1998). Judge Posner is an enthusiastic proponent of}
The rhetoric of the profession acknowledges and excoriates time and time again how the realization of “law” remains elusive given the current distribution of legal resources.117 This endless repetition, despite sounding grand, has pernicious consequences: it transforms an immediate crisis into a “problem” calling for a solution. And this is a crisis that violates or, at best, risks basic human rights to subsistence, shelter, raising children.118 The Holmes School reintroduces the centrality and continuity of a crisis that individuals of all political stripes recognize exists.

CONCLUSION

This Proposal makes sober good sense and offers as close a reflection of the world of law as it is and is, sadly, likely to be in the future. For this reason, it will never see the light of day.

viewing the “facts” of legal formalism much more broadly to include social science. For example, in considering the “enforceability of contracts of surrogate motherhood,” Posner would consider the degree to which surrogate mothers “experience intense regret” and “whether contracts of surrogate motherhood are typically or frequently exploitive in the sense that the surrogate mother is a poor woman who enters into the contract out of desperation.” Posner, supra note __, at 240.

117 See supra text accompanying notes __.118 JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 143 (1983). Sadly almost a century ago one commentator noted “the righteous complaint that the liberty and rights of the mass of the people are now crushed and lost beneath the weight of the system.” William V. Rowe, Legal Clinics and Better Trained Lawyers: A Necessity, 11 ILL. L. REV. 591, 592 (1917). See also Derek C. Bok, A Flawed System of Law Practice and Training, 38 J. LEG. ED. 570, __ (1983) (how “the blunt, inexcusable fact . . . that this nation . . . cannot manage to protect the rights of most of its citizens . . . has become so familiar that it evokes little concern from most of those who spend their lives in the profession”). There is an argument to be made that this Proposal is itself merely another in a long line of expressions of righteous indignation, although given that this Proposal is a detailed Proposal) has a practical focus means that any charge of righteousness is misplaced.
APPENDIX I: SAMPLE CLASS PLAN

Class: Williams v. Housing Authority of Baltimore City

Class Assignment:

- Read Williams v. Housing Authority
- Reside in Ms. Williams Housing Project for Three Days
- Live on Ms. Williams’ Public Assistance Benefits for One Week
- Shadow a tenant through the process of filing a landlord-tenant case
- Observe the ensuing “adjudication.”

[A STUDENT OR STUDENTS MIGHT HAVE LIVED UNDER COMPARABLE CONDITIONS AS MS. WILLIAMS. SHOULD THIS BE THE CASE, THIS STUDENT OR THESE STUDENTS SHALL BECOME INSTRUCTORS IN THE CLASS REPLACING THE “REAL INSTRUCTORS.”]

Class Outline

- Applicable “Rules” *(no more than 2 minutes, preferably 1 minute and 30 seconds)*
  - “Substantive rules”
    - Rent Escrow: depositing rent into a court escrow account because of health-related safety issues in a house.
    - Warranty of Habitability
    - Warranty of Quiet Enjoyment

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119 367 Md. 143 (2000). There will now begin a long series of “id’s”, which are suggestive Freud’s “Id,” which refers to the unconscious and the instinctive –what law, in the Holmesian sense, is all about. See Charles Lawrence, The Ego, the Id, and Equal Protection: Reckoning with Unconscious Racism, 30 Stan. L. Rev. 317 (1987).

120 The School of Law is able to pay the equivalent of Ms. Williams’ government benefits with no impact on its overall budget because the amount is so pitifully small. For a longer range view of how the “working poor” fare, see BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).
• “Procedural rules” in Opinion
  o District Court has jurisdiction over claims for $2,500
  o Appeal should be on the record

• “Facts” in Opinion
  o Tenant’s house had safety concerns
  o Tenant’s claim was for over $2,500
  o Appellate court improperly dismissed the case because the claim was for more than 2,500
  o Remanded

• Williams’ Life in Fact
  o What the Court said:

  Among other things, the house was infested with vermin; the bathtub leaked water, causing sinking holes in the floors and mildew and water damage in other rooms; and there was a large hole in the kitchen ceiling above the stove, from which debris fell into meals as she cooked . . . [T]he unoccupied dwelling next door . . . was filled with garbage and debris. The doors and windows were open, allowing for casual entrance by anyone. Noise from trespassers . . . was often so loud that petitioner could not sleep at night, and their very presence made her feel unsafe. The filth in the property contributed to the rodent infestation in her home.\footnote{Id. at 146-147.}

  o Student Visit

  \begin{itemize}
  \item What does Ms. Williams’ public housing project look like when you visited it?
  \item What was like it like living there for three days?\footnote{With due gratitude to tenants whose generosity allowed students to reside in the project for a brief period of time.}
  \item What was it relying on Ms. Williams’ public assistance benefits while you were living there?
  \end{itemize}
• Introduce Ms. Williams: Discuss Her Experiences In Her Own Words without Consultation or Influence by Instructor

• What “Procedure” Really Was
  o Pleadings were on pre-printed court forms\textsuperscript{123}
  o Postponed for month due to “lateness of hour” and the “large docket”\textsuperscript{124}
  o “Rotation system” for judges so new judge hears case if matter postponed\textsuperscript{125}
  o New judge found warranty claims were not in “jurisdiction” of Rent Court so effectively dismissed warranty claims, even though Rent Court does not exist as a separate court.\textsuperscript{126}
  o Clerk erroneously characterized what kind of appeal it was.\textsuperscript{127}
  o No transcript was ever produced because there was confusion about waiver of costs.\textsuperscript{128}
  o No notice was ever sent to attorney about “trial date” but was sent to the attorney’s office with name of Williams herself, and no one at the attorney’s office knew who she was.\textsuperscript{129}
  o Case dismissed when no one appeared at hearing even though neither Ms. Williams nor her attorney had notice of the hearing because of errors in the clerk’s office.\textsuperscript{130}

\textsuperscript{123} \textit{Id.} at 147.
\textsuperscript{124} \textit{Id.} at 148.
\textsuperscript{125} \textit{Id.} at 149.
\textsuperscript{126} To add to the confusion, so-called “Rent Court” was housed in a separate building even though, as the Court found, “Rent Court” “is simply a vernacular description of . . . separate dockets.” \textit{Id.} at 150 n. 2, 156.
\textsuperscript{127} \textit{Id.} at 151.
\textsuperscript{128} \textit{Id.} at 150-51.
\textsuperscript{129} \textit{Id.} at 151.
\textsuperscript{130} \textit{Id.} at 151.
Despite a plethora of obvious errors in “rules,” the appellate court “summarily” dismissed the appeal.131

• Landlord Tenant “Cases”
  
  o Out of 807,000 civil cases filed, 570,000 were landlord-tenant cases.132
  
  o Out of 570,000, 5,294 (3%) were contested133

131 Id. at 151.
132 Id. at 160 fn. 6.
133 Id.
APPENDIX II: SAMPLE CLASS PLAN II

Class: Employment Discrimination “On the Ground”

_Jesperson v. Harrah’s Operating Company, Inc._\(^{134}\) is an employment discrimination case that “grabbed an extraordinary level of notice from law professors and students.”\(^{135}\) The “facts” of the case as conventionally understood involved a casino’s “appearance standards” that required women to wear make up with no comparable requirements for men.\(^{136}\) The Court found that the differential “appearance standards” did not constitute sex discrimination. The opinion offers the standard fare of conventional legal analysis, although the dissent, by Judge Alex Kozinski, offers an idea very much in the realist mode: “[T]hose of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that requires that all judges wear face powder, blush, mascara and lipstick while on the bench.”\(^{137}\) While visualizing the effects of these actions on the appearance of certain judges might inhibit sober reflection on the deeper issues at play, students not used to wearing makeup should give it a try. Doing so would provide far more than the colorless “statement of facts” typical of the supposed imperatives of neutral logic.

But the deeper point for the Holmes School of Law student is not _Jesperson_’s holding or even to understand the “facts” identified by the court, including Kozinski’s novel cosmetic experiment. Rather, the point is that the only people who cared about the case were law professors and the judges who decided _Jesperson_ itself.\(^{138}\) In reaching this conclusion, authors

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\(^{134}\) 444 F.3d 1104 (2006).

\(^{135}\) George, _supra_ at note __, at 703-704.. _Jesperson_ was “one of only five” circuit court opinions “to have received over 50 citations” in law reviews as of January 1, 2009. _Id._ at 704.

\(^{136}\) _Jesperson_, at 1107.

\(^{137}\) _Id._ at 1118.

\(^{138}\) George, _supra_ note __, at 733-735,
of an article\textsuperscript{139} actually interviewed Las Vegas casino workers whose work should give rise to Jesperson claims. In terms of the Holmes School, then, the authors did the “going”\textsuperscript{140} and their narrative enables students to go along with them.

After their travels, the authors conclusion was as follows:

[C]ase law, and especially the nuanced judicial reasoning of appellate judges, is largely irrelevant in the day to day realities of life in Las Vegas . . . [A] view of legal impact [must] put social and economic factors at the center of the model of legal impact. Cases cannot have an impact if the local social and economic variables are not aligned in a fashion that allows the impact to occur.\textsuperscript{141}

One issue, then, for the Holmes School student is what cases (or rules) actually mean, or do not mean, for the “on ground” lives that are, in theory, supposed to be impacted by whatever purported law is in play. The deeper question for the Holmes School student is that both the article and the case refer to “Law Vegas workers” – in this instance cocktail waitresses some of whom “earn upwards of $150,000 to $200,000 per year.”\textsuperscript{142} Is this typical of those who work in Las Vegas? Presumably there are lots of others whose interaction with “law” – let alone with the issues Jesperson addresses – receive no attention from lawyers, judges, academics, or just about anyone else. These others include housekeeping staffs who clean the 150,000 hotel rooms\textsuperscript{143} in Las Vegas; fast food workers; low-level and low-salaried employees (or, rather, “team members”\textsuperscript{144}) who work for huge retail organizations, and the many others who work in

\textsuperscript{139} George, supra note __.
\textsuperscript{140} See supra text accompanying notes __-__.
\textsuperscript{141} George, supra note __, at 733-734.
\textsuperscript{142} Id. at 719-720.
\textsuperscript{144} This evidently is the term of choice for low-level jobs at massive corporate entities. See http://sites.target.com/site/en/corporate/page.jsp?contentId=PRD03-000521 (Target job description noting how potential employees should see themselves as “team members”); http://mcdonalds-career.blogspot.com/2007/11/production-team-member.html (McDonald’s “team members” are “each an important cog in a machine that must run smoothly, efficiently, effectively, at all times); http://www.kfc-
unheralded (and low-paid) jobs to serve and support 40 million annual visitors to Las Vegas each year.\textsuperscript{145} And then there are, of course, the many unemployed – 13.5\% in the Las Vegas area as of the time of this writing.\textsuperscript{146}

Depending on the location of the Holmes School, it might not feasible to observe the life of these other Las Vegas workers (or those who wish to be workers), although students might relish the prospect, but despite its glamour, the “going” and how that “going” is presented enables experience – and, as Holmes said, the “life of the law is experience.”\textsuperscript{147}

\footnotesize
\begin{itemize}
\item jobs.com/go/Team-Member-Jobs/177913/ (Kentucky Fried Chicken jobs are for “team members,” the duties of which are set forth under a picture of the avuncular Colonel Sanders).
\item http://www.deptofnumbers.com/unemployment/nevada/las-vegas/ (last visited April 12, 2012). This constitutes almost 120,000 people. The height was in May 2010 – almost 150,000 people. \textit{Id.}
\item OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
\end{itemize}