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Cover Page Footnote

We wish to thank our wonderful administrative assistants Nora Santos and Lynette Driscoll Breshears for preparing the manuscript, and world-class librarians Kelly Kunsch and Susan Kezele for all their help.

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Can the Professor Come Out and Play?— Scholarship, Teaching, and Theories of Play

Bryan Adamson, Lisa Brodoff, Marilyn Berger, Anne Enquist,
Paula Lustbader, and John B. Mitchell*

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“[P]lay as a process lies at the very core of human behavior and development. It is the definitive text, whereas most of the rest is gloss written by particular societies and subcultures that are ephemeral from the perspective of history.”¹

INTRODUCTION

In January 2008, we presented an *Open Source* program at the National AALS Conference in which we explored the applicability of cognitive/developmental theories of play to our work as scholars and teachers. We sang, lectured on theories of play, and involved over 100 law

* The authors are all members of the faculty of Seattle University School of Law. We wish to thank our wonderful administrative assistants Nora Santos and Lynette Driscoll Breshears for preparing the manuscript, and world-class librarians Kelly Kunsch and Susan Kezele for all their help.

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¹ Paul Chance, Ph.D., *Learning Through Play: Summary of Pediatric Round Table* co-chaired by Brian Sutton-Smith, Ph.D. and Richard Chase, M.D., Forward, XV, (Sponsored by Johnson & Johnson Baby Products, 1979). This notion as to the centrality of play to our natures is manifest at every level of social thought. Thus, a hand-written sign in a store window in Silver City, New Mexico proclaimed, “You don’t stop playing because you get old. You get old because you stop playing”; while in a more academic vein Martha C. Nussbaum in her book *Frontiers of Justice: Disability, Nationality, and Species Membership* 77-78 (Cambridge, Ma., 2006), posits that a just society will attempt to insure its members attain a minimum threshold of ten capacities, among which is “Play. Being able to laugh, to play, to enjoy recreational activities.”

professors in an exercise in which participant groups employed either visual art or music to explain the tort concept of “lost chance.”

In this article, we build upon that program and present an extensive analysis of the literature on childhood play, focusing on those aspects of the type of “play” that enhances development of creative problem-solving and innovation. We then explore the adult manifestation of this childhood cognitive activity, what John Dewey called a “playful attitude,” assessing its implications for our scholarship and teaching. As it turns out, these implications are significant, as we detail in the last two sections of the article where we focus on the nexus between play theory and our work as professors of law.

* * *

As legal educators in the early years of the twenty-first century, our plates have suddenly become very full. The Carnegie Foundation has called for us to restructure our entire curriculum and modify our pedagogy.² At the same time, a generation of students who seem unlike any we have seen has begun to fill the seats in our classrooms. Whether our students are from generation X or Y or Z, their world is an E-culture of podcasts, blogs, sound-bites, and bouncing graphics that pop off their screens as they cruise the internet, watch DVD’s, text message each other, do their e-mail, and check out the latest video on YouTube—and all during class time! To them, present-day legal education as taught in the classroom must feel like it belongs to a world of relics: printed cases in hard-bound books, green or blue bound treatises, printed study aids and flip-cards.

Nancy H. Rogers, then President-elect of the AALS, captured all this in her address before the House of Representatives at the 2007 Annual Meeting when she simply said, “change is in the air.”³ So, with all this

² See William M. Sullivan, et. al., *Educating Lawyers: Preparation for the Profession of Law 194-97* (San Francisco, 2007).

³ AALS Newsletter, February, 2007, reprinting the Presidential Address of Nancy Rogers before the House of Representatives at the 2007 Annual Meeting in January.

going on in our professional world, is this really the time to engage in thinking about an enterprise that is normally confined to school playgrounds, and in the workplace is equated with slacking-off? Absolutely; play is in the air.

A vast amount of comparatively recent research has emerged regarding links between “play” and child cognitive development,⁴ including comparing the play of toddlers with that of their closest relatives, primates.⁵ Since neither law professors nor law students are chronologically children,⁶ it might be surprising how much this research tells us about possible paths to both better scholarship and better teaching. While a law school-related literature has developed regarding using a form of play in

Dean Nancy H. Rogers, The Ohio State University, 2007 AALS President’s Address by President’s Message Reassessing Our Roles in Light of Change.

⁴ See Olivia N. Saracho and Bernard Spodek, A Historical Overview of Theories of Play, in *Multiple Perspectives on Play in Early Childhood Education* (Albany, N.Y., 1998) (Olivia N. Saracho and Bernard Spodek, eds.); Larry Smolucha and Francine Smolucha, The Social Origins of Mind: Post-Piagetian Perspectives on Pretend Play, in *id.* at 34-35, 49-51; Joan B. McLane and Julie Speilberger, Play in Early Childhood Development Education: Issues and Questions, *Topics in Early Childhood Education—Vol. 2, Playing For Keeps Supporting Children’s Play* 7-8 (St. Paul, 1996).

⁵ Both young children and young chimpanzees spend a great deal of time playing as part of their development. See generally, Jane Goodall, Hugo van Lawick, and Stephan Goodall, *In The Shadow of Man* (Boston, 1971). “The antics of physical play are virtually identical for both children and monkeys, and the chief difference between a one-year-old chimpanzee and a one-year-old person engaged in manipulative play is that the chimpanzee is better at it.” Chance, *Learning Through Play*, *supra* note 1, at 5. On the other hand, human children bring objects into play (some of which are created particularly for play, i.e., toys), add idiosyncratic contributions that are the product of imagination, *id.*, at Forward, xviii, and “spend a great deal of time in communication activities involving a language—talking, watching T.V., reading, writing, all of which are not open to wild primates as alternatives.” Marion Lundy Dobbest, *Play Is Not Monkey Business: A Holistic Biocultural Perspective on the Role of Play in Learning*, *Educational Horizons* 158-59 (Summer, 1985).

⁶ Actually, at least through the middle ages (and even in some subsistence societies today) there was not any real concept of a period of “childhood” where one’s days were spent in play. As soon as the child was capable of carrying out chores, he did so; “[e]veryone, even children, had to contribute to the survival of the group.” Chance, *Learning Through Play*, *supra* note 1, at 18-19.

the classroom termed “gaming,”⁷ the implications of theories of play for the legal academy and classroom go far beyond this single manifestation.

As a professional school, law school in part provides students with the conventions, expert knowledge-base, and ethics of the profession. But at its core, it has the sensibilities of a liberal arts education.⁸ Jean Piaget, the noted Swiss child developmental psychologist, saw two goals as underlying such an education: “Creating [persons] who are capable of doing new things, not simply repeating what other generations have done,” and developing “critical thinkers,” persons who are capable of distinguishing “what is verifiable and what is simply the first idea [to be offered].”⁹ For law students in training, this means preparation to be creative problem-solvers, who at the same time always have the tools of careful analysis at hand. For the academic, this means developing the capacity to re-envision the nature of law and legal relationships, whether local or global, while at the same time bringing critical analysis to the

⁷ See generally Jennifer L. Rosato, All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques Into the Law School Classroom, 45 J. Legal Educ 568 (1995).

⁸ In its report, the Carnegie Foundation supports this view when, at the end of the following passage about law school, it cited to R.J. Shiller, How Wall Street Learned to Look the Other Way, N. Y. Times, Feb. 8, 2005, A25, for the “value of taking a ‘liberal education’ approach to the teaching of core concepts in business school,” Sullivan et al., *Educating Lawyers*, *supra* note 2, at 201 n. 1:

Integrative strategy imagined here would, from the outset, link the learning of legal reasoning more directly with consideration of the historical, social, and philosophical dimensions of law and the legal profession, including some cross-national comparison—a dimension that is sure to become increasingly important in an age of global integration among legal systems. Such a rich intellectual matrix would provide a context within which students could pursue a fuller “theorizing of legal practice,” including their own future roles and responsibilities.

Id. at 194.

⁹ Jean Piaget, quoted in D. Elkind, *Children and Adolescents* 29 (3rd ed., Oxford, 1981).

task. Some of the best scholarship offers creative problem-solving, not only in advancing creative solutions to established problems (for the scholar with intellectual curiosity consistently looks upon problems with a “what if we...” attitude), but in the identification, framing, and confirmation of the very existence of the problem as well. Legal training excels at refining the capacity of critical analysis, with law professors being among the highest practitioners of this skill. But what about the capacity to bring novel solutions to real-life legal problems and to see law and legal constructs in ways not seen before? It is here that the research and literature of “play” have something to offer both student and teacher/academic.¹⁰

In the following sections of this article, we will first discuss our terms, i.e., what we mean by “play,” and from there move to the connection between theories of play and our scholarship and pedagogy. We conclude with some specific examples of how we apply play to these two pursuits. In the teaching portion of the examples, we explain in some detail an exercise we did at the 2008 AALS conference using art and music as mediums for conducting legal analysis. Finally, as examples we also provide several play-based assignments that we have given our students, and include examples of the student work product we received in response.

¹⁰ A few have looked at play when discussing adult cognition. Thus, some have proposed incorporating play theory into adult-oriented learning. See Lloyd P. Reiber, *Seriously Considering Play: Designing Interactive Learning Environments Based on the Blending of MicroWorlds, Simulations, and Games*, 44(2) *Educ., Tech., Research & Develop.* 43 (1996); Stegan Von Aufshnaiter and Hannelore Schwedes, *Play Orientation in Physics Education*, 78 *Science Education* 467 (1989). Others have linked childhood participation in make-believe to the capacity of adults to respond to novels and works of art. See Robert D. Kavanaugh and Susan Engel, *The Development of Pretense and Narrative in Early Childhood*, in *Multiple Perspectives*, *supra* note 4, at 80, 95. In fact, adult educators created an “emergent curriculum” for children by themselves using the modalities of childhood play. See Mary Beth Lakin, *The Meaning of Play: Perspectives from Pacific Oaks College*, in “Playing for Keeps,” *supra* note 4, at 33, 37.

WHAT DO WE MEAN BY “PLAY?”¹¹

As will be discussed, it is questionable whether one can develop a precise definition of “play”—though we perhaps know it when we see it.¹² So let us be as precise as possible. When the authors refer to the concept of play as applied in a law school setting, we have in mind the combination of (1) a set of external conditions (2) certain types of activities *and* (3) an internal attitude, termed “playfulness”¹³ or “playful disposition.”¹⁴

¹¹ Why do children play? Classical theories of the nineteenth century included the notions that play dealt with surplus energy; that play was a means of relaxation; that play was part of a developmental sequence paralleling the stages of evolution of the human race; that play was an instinctive manner of preparing children for the endeavors of adult life. See Olivia N. Saracho and Bernard Spodek, A Historical Overview of Theories of Play, *in* Multiple Perspectives, *supra* note 4, at 5-6. Modern theories, generated after 1920, *id.* at 5, include Freud’s psychodynamic theory that play is a way of dealing with childhood anxieties and fears through incorporating them into fantasy; Piaget’s view that through play children take information from the outside world and incorporate it into their evolving schemas of understanding, *id.* at 6-7; and Vygotsky’s view that, in the place of Piaget’s child in solitary play reinforcing existing cognitive structures is rather a domain where play leads to internalizing the values and cultures of parents and caretakers who participate in the play. See generally L. S. Vygotsky, *Mind and Society: The Development of Higher Psychological Process* (Cambridge, Mass., 1978):

Unlike earlier research and theory reflecting either a psychoanalytic or a Piagetian framework, research conducted in a Vygotskian/sociocultural framework emphasizes the role of the social and cultural contexts. This means that the role of other people in the child’s world—parents, siblings, teachers, peers—will be an important factor in analyzing how children play and what they gain from their play.

Joan B. McLane and Julie Speilberger, Play in Early Childhood Development Education: Issues and Questions, *in* *Playing for Keeps*, *supra* note 4, at 8.

¹² “Within a given culture, people know what play is and have little difficulty pointing it out.” Chance, *Learning Through Play*, *supra* note 1, at 17.

¹³ See John Dewey, *How We Think* 210 (2d ed. Rev., Lexington, Ma., 1933).

¹⁴ See Margaret H. Cooney, Patricia Gupton, and Michael O’Laughlin, Blurring the Lines of Play and Work to Create Blended Classroom Learning Experiences, 27 *Early Childhood J.* 165, 171 (2000); W.A.R. Boyer, Playfulness Enhancement through Classroom Intervention for the 21st Century, 74 *Childhood Educ.* 90, 95 (1997/98).

The Set of External Conditions

Some believe that play is “too complicated to be defined”¹⁵ and that “the search for a neat, crisp definition of play is probably futile.”¹⁶ That, however, has not kept others from trying. Typically, this definitional exercise focuses upon what play is *not*. So play is “what children do when they are *not* involved in activities that meet biological needs or that are required by adults.”¹⁷ But how does that square with the common plea not to “play with your food,” or with a young boy playing “fireman” while urinating?

In the same vein, play has been defined as activity that is *not* work.¹⁸ This notion likely accounts for a cultural feeling that play is “trivial.”¹⁹ But for children, the play/work dichotomy blurs, being a function of the amount of control children have on the direction of the activity.²⁰ Also, play is not a specific behavior or activity such that one can point at it and label it work or play. Flailing in water may be a source of joy to a child in a bathtub, and

¹⁵ See Chance, *Learning Through Play*, *supra* note 1, at 1.

¹⁶ *Id.* at 17.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2; Lawrence Dennis, *Play in Dewey’s Theory of Education*, 25 *Young Children* 230, 231 (1970) (“The followers of Froebel had exaggerated his ideas, which lead them to draw sharp distinctions between work and play as if they were two opposing elements.”).

¹⁹ “Our deep conviction is that play is trivial [W]e can’t help feeling that when children play they are doing something unimportant.” Chance, *Learning Through Play*, *supra* note 1, at 21. “Adults, on the other hand, are given cues when they have permission to play, when they’re told that they will not be held to the usual expectations of society—nightclubs, amusement parks, taverns, New Year’s Eve Parties are just some of the places where everyone understands that adults have permission to play.” *Id.* at 16.

Perhaps this public attitude towards play in part explains why current proposals for the direction of public school education revolve around assessment and structured assignments, without any mention of play “in spite of compelling evidence regarding the benefits of play in facilitating learning.” Linda Pickett, Ph.D., *Literacy Learning through Play in a Primary Classroom* 21, Paper Presented at Head Start’s Sixth National Research Conference, 21 (Washington, D.C., 2002).

²⁰ See Cooney, et al., *Blurring the Lines of Play and Work*, *supra* note 14, at 165, 166.

terror in a swimming pool; “a given act can be play at one time and not another.”²¹ We all understand that our decision to relax after a stressful day by hitting a bucket of balls at a driving range is completely different from a decision by Tiger Woods to hit some balls. Interestingly, even little kids stop doing activities they formerly enjoyed as play once they are rewarded for the same activity; once tied to a reward structure, the activity loses its meaning as play.²²

Most scholars involved in cognitive, social, and educational research take a different approach than this dictionary-type methodology. Adopting an approach suggested by philosopher Ludwig Wittgenstein, most studying play resolve the definitional issue by looking for overlapping characteristics that circumscribe our notion of “play.”²³

Wittgenstein’s conclusion [in trying to define “game”] is that there is no single characteristic that is common to all games, which means there is no single characteristic that is common to all kinds of play. The solution to the problem is not to look for a single trait, the *sine qua non* of play, but to look for overlapping characteristics, traits that run across many kinds of play, the way the fibers that make up a thread overlap.²⁴

There is no a single list of characteristics to which all in the field subscribe.²⁵ Nevertheless, three recurrent characteristics in the literature

²¹ See Chance, *Learning Through Play*, *supra* note 1, at 2.

²² *Id.* at 13 (“...extrinsic rewards can turn play into work”). Given this, once can only wonder whether the current typical incentives for producing scholarship—research grants (some split ½ at the front end, the other ½ when the work is produced), complete with reporting and accountability—tend to undermine the inherent satisfaction of intellectual play. On the other hand, perhaps all that happens is that the playful scholar simply thinks, “I would have done this anyway, but I’ve got to admit that getting some extra dollars is a nice treat.”

²³ See e.g., Chance, *Learning Through Play*, *supra* note 1, at Foreward, xvi, 11-17; Janet Naumberg, *A Review of Play and its Relationship to Learning* (Field Study 600) 28 et. seq. (Trinity College, 1978).

²⁴ Chance, *Learning Through Play*, *supra* note 1, at 10.

²⁵ Some have suggested that, in addition to the three factors we felt best described play for our purposes, play bears the attributes of being more than it seems (i.e., one child in play handing another a piece of wood may be handing over “fresh baked bread” within

comported with the authors' intuitive notions of play, and appeared particularly appropriate for considering play in the context of teaching law to adult learners and for producing professional academic scholarship:

- Low-risk; there are no real “wrong answers.”²⁶ As a result, there are no real ego, professional identity harms which follow the activity. Notions such as “failure” or even “mediocre” do not apply to the activity under our common use of language.²⁷ [Imagine the sentence “You were a very poor fairy-ninja-princess” addressed to a four-year-old.]

But most important, the child needs freedom to make mistakes, to perform imperfectly. One thing that sets play off from other activities is that there are no evaluations, no grades, no scores, no real failures. In play, a person gets to do something and fall flat on

the context of the play), providing a challenge, and taking place in a relaxed setting. See Chance, *Learning Through Play*, *supra* note 1, at 14, 16.

²⁶ See e.g., Pickett, *Literacy Learning through Play in a Primary Classroom*, *supra* note 21, at 19 (“Play provides a low risk environment in which children are able to apply concepts and practice skills that are introduced in the formal curriculum”); Chance, *Learning Through Play*, *supra* note 1, at 22 (“Play gives us permission to make mistakes.... The freedom to fail, the permission to explore the impossible and absurd, allows the child to explore the outer limits of his skill, thereby gradually extending those limits.”) Naumberg, *A Review of Play and its Relationship to Learning*, *supra* note 23, at 37 (“Play is not evaluated or graded.... Play, therefore, gives the player the opportunity to experiment with solutions and options without risking real life consequences.”).

²⁷ Interestingly, even in play where there is ostensibly a correct outcome—e.g., tossing a small ball through a ring—the notion of failure or mistake is diluted to the point of insignificance by the existence of a tacit agreement between the child and the other players or participant adult caregiver that the child gets to have free “do-overs.” No assessment, evaluation, or reified label on their misflung ball; all of that is immediately erased from memory as they laugh and try again—and again.

As children get older, the “do-over” concept changes in context, though retaining its capacity to transform situations from right and wrong, correct and incorrect, back into the domain of play. In an informal game where sides are formed by the “choose up” method an argument breaks out among the two teams of eleven-year-olds over whether a ball was kicked out of bounds or kept inbounds. Back and forth the shouting goes until from the edge of the crowd someone yells “do-over.” Tensions immediately dissipate, as this flexibility of freezing the action and going back allows everyone to return to the core of their activity—the fun of play.

his face without feeling bad about it. It is probably because of this freedom that children perform at more sophisticated levels during play than at other times.²⁸

- Fun. The activity is enjoyable²⁹ for its own sake.³⁰
- Total Freedom and Flexibility.³¹ This involves the freedom to switch directions, to “change rules to meet emerging scenarios, or to see things differently without constraints on how things ‘should’ be.”³²

Types of Activities

Play has been categorized as physical, manipulative, symbolic, or game³³ (with games being play “covered by rules or conventions.”)³⁴ Within these categories, this article focuses upon symbolic play, adding manipulative play in the sense of manipulation of ideas rather than physical objects.

We put games to one side in this article. The use of games in the law school classroom offers a creative methodology for increasing student

²⁸ Chance, Learning Through Play, *supra* note 1, at 42.

²⁹ See *id.* at 11 Forward, xvi (“Play involves *enjoyment*; something that is done for fun (emphasis added)”; Pickett, Literacy Learning through Play in a Primary Classroom, *supra* note 19, at 19 (“Play is a context for learning in which coercion or extrinsic motivation become unnecessary. We are able to join children in partnership when we provide opportunities to learn during ‘the best time of the day.’”).

³⁰ See Chance, Learning Through Play, *supra* note 1 at Foreward, xvi (“Play emerges in the pages as an *intrinsic* activity; that is one that is done for its own sake rather than as a means to an end.” (emphasis added.)

Interestingly, educator John Dewey felt that both work and play had “intrinsic” value and thus were “enjoyable for their own sake.” Dennis, Play in Dewey’s Theory of Education, *supra* note 18, at 232. Lest this seems too off the mark from our daily experience, one must realize that Dewey contrasted “work” with “labor and drudgery,” with the latter being “an activity carried out without any significance being attached to the actual doing, exclusive concern being with the result, which is often urged by some external pressure.” *Id.* at 232. The authors consider themselves fortunate that their main job involves “work” in Dewey’s sense.

³¹ Chance, Learning Through Play, *supra* note 1, at 33, 36.

³² Cooney, et al., Blurring the Lines of Play and Work, *supra* note 14, at 169.

³³ Chance, Learning Through Play, *supra* note 1, at 3.

³⁴ *Id.* at 7.

interest and motivation.³⁵ Games can also provide excellent vehicles for reinforcing specific knowledge and doctrine³⁶ (e.g., a game of Jeopardy where all the answers refer to the Federal Rules of Civil Procedure). But such games do not really have the qualities of the type of play we envision. While they certainly may be fun, they do not provide total freedom and flexibility to the participant in how to proceed, and there is some ego risk since there are *the* right answers, and thus completely wrong answers.³⁷

³⁵ The primary benefit of gaming is “increased motivation that comes with an active learning experience.” Rosato, *All I Ever Needed to Know I Learned Teaching Kindergarten*, *supra* note 7, at 570, 57 n.9. Other benefits according to Rosato are that “games encourage cooperation,” *id.* at 571, and that games may improve learning of doctrine and professional skills and values. *Id.* at 572.

³⁶ Classroom gaming involving, e.g., game shows such as Jeopardy appears to be “an effective way to help students comprehend this [civil procedure] rule-oriented material.” Rosato, *All I Ever Needed to Know*, *supra* note 7, at 580. Children’s play similarly reinforces learned knowledge and skills. Pickett, *Literacy Learned through Play in a Primary Classroom*, *supra* note 19, at 16 (“Specific scenarios and narrative themes were developed [in the children’s play] around reenactment of formal lessons and activities.”); Chance, *Learning Through Play*, *supra* note 1, at 24 (“It may not be that play is where things are first learned, but they are certainly nailed down in play.”).

³⁷ Roleplays, or what some would call “simulation games,” Phillip H. Gillespie, *Learning Through Simulation Games 4* (New York, 1973), are a familiar pedagogy, particularly in lawyering focused classes. See also, Rosato, *All I Ever Needed to Know I Learned Teaching Kindergarten*, *supra* note 7, at 568 n.2. The Carnegie Foundation Report gave significant value to this form of pretend play in legal education:

The value of simulation, for example, is increasingly recognized in legal education as in other fields of professional education. In a study of the use of simulation pedagogies in the teaching of practice in a variety of professional contexts, Pam Grossman and colleagues concluded that such teaching enables students to improve their performance of key components of practice through “targeted instruction.” Grossman and others (2005) show that by identifying specific components of expert practice, such as taking a deposition, interviewing a client, or questioning a witness, skillful teachers can break down complex practices so that students can “see” and enact specific parts of the activity through various approximations of practice. Teaching professional practice, they discovered, typically involves an exaggeration and repetition of key activities that could not take place in real-time interaction with actual clients. As a result of this decomposition of practice for the sake of learning, students can be given detailed feedback on elements of their performance. As they develop some competence with each of the elements of the practice, these

The Internal Attitude

While the previously discussed external conditions and types of activities are necessary to our notion of play in the legal academy and professional school, they are not sufficient. A type of internal “attitude” is required. To move through a world of newly realized constructs and ideas, to see clearly what others have only glimpsed fuzzily, requires what educator John Dewey termed the attitude of “playfulness.”³⁸ An extension of the attitude underlying children’s play, this playful attitude is the “capacity to draw satisfaction from the immediate intellectual development of a topic, irrespective of any ulterior motive.”³⁹

Play is spontaneous and creative, malleable to circumstances. It is the means whereby we preserve our freshness, open-mindedness and originality. Routine marks the close of the power to vary; the playful

parts can then be put back together, with a considerable gain in the quality of the overall performance.

Sullivan, et. al, *Educating Lawyers*, *supra* note 2, at 119.

Depending on the nature of the simulation and the atmosphere within which it is conducted, such roleplays may constitute “play” as we are considering it. On the other hand, we have seen simulation exercises in class where the students seemed to be in as great ego-risk and where their performance could be as “wrong,” as in a traditional, Socratic class.

To the extent that roleplay in the law school setting in part helps students try on and develop the identity of “being a lawyer,” it parallels those aspects of the play of children which likewise coalesce around the creation of a role identity:

In addition to the value opportunities for developing specific skills and concepts related to literacy, it appears that children need time and opportunities to form identities and explore future roles as literate individuals. Children are aware that reading and writing are necessary behaviors of the adults they pretend to be; play allows them to explore those roles and build upon prior experiences as they apply new knowledge and construct new understandings.

Pickett, *Literacy Learning Through Play in a Primary Classroom*, *supra* note 21, at 20.

³⁸ Dewey, *How We Think*, *supra* note 13, at 210.

³⁹ See John Dewey, *A Cyclopedia of Education*, Vol. IV. 727 (Paul Monroe ed., New York, 1913).

attitude keeps it alive. It is flexible. It tolerates and welcomes changed direction when appropriate. It represents, as it matures, the willingness to change, to adjust to the unexpected. It involves, of course, active intelligence in perceiving the altered circumstances and in acting upon the perception.⁴⁰

Others echoing Dewey refer to this notion of playfulness in adults as a “playful disposition,”⁴¹ or being in “flow”⁴² where you are so deeply concentrating that you lose awareness of yourself and that you are enjoying what you are doing.⁴³ For the mature adult, such a playfulness of mind triggers the ability to “spontaneously shift directions...in order to imagine other possibilities.”⁴⁴

WHY DOES “PLAY” HAVE ANY BEARING ON OUR TEACHING AND SCHOLARSHIP?

Compared with the exercise of attempting to explain what we mean when we refer to play, answering this question is relatively straightforward. In conjunction with training our students to be crisp, analytic thinkers, we want the attorneys we train to be effective, creative problem-solvers. As for ourselves, we’d like to be innovative, insightful scholars. That is where theories of play offer an effective tool for achieving those ends. One must only look at the cognitive capacities nourished by play.

⁴⁰ Dennis, *Play in Dewey’s Theory of Education*, *supra* note 18, at 230.

⁴¹ See Cooney, et al., *Blurring the Lines of Play and Work*, *supra* note 14, at 171; Boyer, *Playfulness Enhancement Through Classroom Intervention*, *supra* note 14, at 95:

Playfulness is a precious gift that will provide priceless opportunities for children to think, plan and enjoy life with all of the incipient changes and challenges offered by the 21st Century.

⁴² Chance, *Learning Through Play*, *supra* note 1, at 11.

⁴³ *Id.* at 12.

⁴⁴ Cooney, et al., *Blurring the Lines of Play and Work*, *supra* note 14, at 169.

Play stimulates curiosity⁴⁵—the lifeblood of the scholar. Further, it minimizes the consequences of the participant’s actions, making the situation less risky and affording the learners the opportunity to try combinations which, under functional pressures, they never would try.⁴⁶ Play thereby opens the door for creative options,⁴⁷ as the learner engages in “divergent” thinking⁴⁸ and creative synthesis.⁴⁹ In adults, this “playfulness” of mind manifests itself in “daydreaming,” which in effect is internalized pretend play.⁵⁰ But this is no child’s play. Rather, this willingness to manipulate reality is “what makes cultural change possible...what keeps innovations from becoming immediately and thoroughly rejected.”⁵¹ In fact, it is said that “most

⁴⁵ “It is nothing short of a miracle that the modern methods of instruction have not yet entirely strangled the holy curiosity of inquiry....” Albert Einstein, *Autobiographical Notes* 17, in *Albert Einstein: Philosopher Scientist* (Paul A. Schipp ed., Evanston, IL, 1949). See also Michael L. Henniger, *Learning Mathematics and Science Through Play*, 63 *Childhood Educ.* 167, 169 (1987) (children must be curious about their world and how it works to be productive thinkers, and current methods are un motivating, uninteresting and therefore unsuccessful in stimulating curiosity.).

⁴⁶ See Jerome S. Bruner, *The Nature and Uses of Immaturity*, 27 *Amer. Psychologist* 687, 693 (1972). See also Lee Y. Martin, *The Role of Play in the Learning Process*, 43 *Educ. Forum* 51, 51 (1978) (“Empirical data demonstrates that the opportunity for sociodramatic and fantasy play helps enlarge competencies foundational to problem solving skill....”).

⁴⁷ See O.W. Weininger, *Play and the Education of Young Children*, 99 *Education* 127, 129 (2001) (“while the child is involved with his comprehensive and [cognitive] ...map-making, he is also developing schemata which seem to permit the child the experience of creativity. If this cognitive schema is sufficiently broad—and broadness can only be acquired by exploration and curiosity and playing with bits of material—then the creativity should be greater’); Marion Lundy Dobbert, *Play is Not Monkey Business: A Holistic Biocultural Perspective on the Role of Play in Learning*, *Educational Horizons* 158, 161 (Summer, 1985). (“Equally important from a human perspective are the aspects of play that seem to develop flexibility and novelty generation.”).

⁴⁸ Henniger, *Learning Mathematics and Science Through Play*, *supra* note 45, at 167.

⁴⁹ “[T]he desire to arrive logically at logically connected concepts is the emotional basis of this [children’s] rather vague play.... This combinatory play seems to be essential feature in productive thought.” Albert Einstein, *Ideas and Opinions* 25-26 (New York, 1954).

⁵⁰ “[Humans] seldom engage in pretend play after puberty. Instead, they daydream—which is really just a kind of internal pretend play.” Chance, *Learning Through Play*, *supra* note 1, at 6.

⁵¹ *Id.* at 35.

of Einstein's work would be dubbed play...,⁵² which is not really surprising for a man quoted as saying, "Imagination is more important than knowledge."⁵³

A FEW IDEAS ON HOW TO BRING THE THEORY OF PLAY TO OUR SCHOLARSHIP AND TEACHING

Scholarship

Most of us have experienced little glimmers of what a playful approach to our scholarship would be like. It is the sheer bliss of that "a-ha" moment of a new discovery, a new connection, a piece of an intellectual puzzle falling into place. And interestingly, those discoveries often happen when we are not chained to our computers or "hard at work" at our desks. They often happen when we are relaxed, enjoying ourselves, or otherwise engaged in some activity that gives us mental space and freedom.⁵⁴

Suddenly in the middle of dinner inspiration will strike and we'll grope for a napkin (preferably not cloth) on which to scribble our thoughts. Or it may be a walk when some great idea comes forth seemingly from nowhere,

⁵² Neville V. Scarfe, *Play: An Agent for Learning Social Values*, in *Play: Children's Business* 5 (Olney, Md., 1974).

⁵³ George S. Viereck, *Glimpses of the Great* 377 (1930).

⁵⁴ When we asked our audience at the American Association of Law Schools meeting in January 2008 when its members had experienced an "a-ha" moment in their legal scholarship, they gave numerous answers:

- when talking with a friend (most common answer)
- when they were taking a bath or shower (one mentioned swimming, another said "at a spa," all of which suggests that water seems to promote the "a-ha" experience)
- when they were exercising (several mentioned walks, running, hiking)
- when they were listening to music
- when they were doodling in a margin

Analogously, most of us have found that when we are blocked in writing—stuck on how to solve a legal problem, stuck on how to organize our research, or stuck on how to articulate a point—we cannot break through the impasse by sheer force of will. Far from solving the problem by forcing it, we have to walk away for a while. Relaxed, our minds set free once again, our minds then do their work as if by magic.

floating up to our consciousness like the “Magic 8-ball.” Commonly, we’re just daydreaming, playing with ideas in our mind. On these private little mental journeys there is no real risk to our feelings. So what if the idea doesn’t pan out. Is one part of your mind going to tell another part that its idea is stupid, leaving you feeling ashamed? Hardly. Daydreaming about ideas is an immensely safe and pleasurable journey, particularly for those of us drawn to academics in the first place. For most of us genuinely enjoy, and even crave, the pursuit of ideas.

Yet ask any member of a law faculty what comes to mind when he or she thinks about legal scholarship, and the chances are that the word “play” will not be anywhere near the top of the list. In fact, some of what many associate with their scholarship are words and feelings more like “punishment,” “tiresome,” “dread,”⁵⁵ “hard work,” fear,” “guilt,” “drudgery,” and “pressure.”⁵⁶

We all know some of the reasons why many feel their legal scholarship is more of a burden than a delight—the pressure to meet a tenure or promotion standard,⁵⁷ insufficient time or resources, lack of confidence about the value of one’s ideas, dread of the writing process, the constraints of academic prose.⁵⁸ While some of these reasons are beyond an individual scholar’s control, what is within each one’s control is the attitude he or she brings to doing legal scholarship. And, given what the play theorists have said about the value playfulness brings to the creative development of ideas, perhaps what is missing in legal scholarship is just that—a playful attitude.

⁵⁵ Gerald Lebovits, *Academic Legal Writing: How to Write and Publish*, 78 N.Y. St. B.J. 64, 64 (Jan. 2006).

⁵⁶ Christian C. Day, *In Search of the Read Footnote: Techniques for Writing Legal Scholarship and Having It Published*, 6 J. Legal Writing 229, 235, 240-41 (2000).

⁵⁷ See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 Harv. L. Rev. 926 (1990).

⁵⁸ See e.g., Day, *In Search of the Read Footnote*, *supra* note 56, at 229; John E. Nowak, *Woe Unto You, Law Reviews!*, 27 Ariz. L. Rev. 317 (1985); Lasson, *Scholarship Amok*, *supra* note 57, at 926; Donald J. Weidner, *A Dean’s Letter to New Law Faculty about Scholarship*, 44 J. Legal Educ. 440 (1994).

But does such a thing as a playful legal scholar exist?⁵⁹ Apparently such a creature is so rare in legal academia that there is not so much as a mention of a playful scholar or having a playful attitude in the literature about creating legal scholarship.⁶⁰ The closest things to such mentions of a playful scholar or a playful scholarly attitude is an article that suggests one reason for writing a law review article is that it is “enjoyable,”⁶¹ another tongue-in-cheek piece about law review writing that actually uses the word “fun” in its title⁶² and another that asserts “writing law reviews articles may be fun, but it is also hard work.”⁶³

Since this article is about applying theories of play, let’s play “what if law professors were playful legal scholars?” What if their intellectual curiosity were set free? What would their scholarship be like?

At this juncture, a minor confession is in order. We wanted to be specific and concrete in this section. But unlike teaching where the application of play theory easily manifests in specific, concrete class exercises like the one we did at the AALS (described in the next sub-section), incorporating notions like Dewey’s playful attitude into our work as scholars is really

⁵⁹ The co-authors are delighted to report that we have known several playful scholars over the course of our careers. Indeed, one of the co-authors and the catalyst of this article, Professor John Mitchell, is the Tom Sawyer of legal scholarship. Professor Mitchell is mischievous, adventurous, spontaneous, and yes, 100 percent playful in his exploration of ideas.

⁶⁰ See e.g., Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 *J. Legal Educ.* 1, (1987); J.M. Balkin and Sanford Levinson, *How To Win Cites and Influence People*, 71 *Chi.-Kent L. Rev.* 843 (1996); C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit*, 44 *J. Legal Educ.* 13 (1994); Richard Delgado, *How to Write a Law Review Article*, 20 *U.S.F. L. Rev.* 445 (1986); Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 *J. Legal Educ.* 14 (1987); James Lindgren, *Fifty Ways to Promote Scholarship*, 49 *J. Legal Educ.* 126 (1999); Gail Levin Richmond, *Advice to the Untenured*, 13 *Nova L. Rev.* 79 (1988); Weidner, *A Dean’s Letter to New Faculty about Scholarship*, *supra* note 61, at 440; Alfred C. Yen, *Advice for the Beginning Legal Scholar*, 38 *Loy. L. Rev.* 95 (1992).

⁶¹ Delgado, *How to Write a Law Review Article*, *supra* note 60, at 446.

⁶² Bradford, *As I Lay Writing*, *supra* note 60, at 446.

⁶³ Day, *In Search of the Read Footnote*, *supra* note 56, at 235.

about a state of mind, an attitude from which certain directions and outcomes emanate. So, again, let's imagine.

First, playful legal scholars would live in a wide world of ideas coming from every discipline, every aspect of life. politics, religion, human psychology, technology, science, industry, medicine, you name it. They would have total freedom and flexibility, the essential qualities of children's play, to explore this world. Nothing would be out of bounds. They would be free to pursue any question, idea, or insight that occurred to them, and take it wherever it led them. Naturally because their specific expertise is in law, they would be inclined (not required) to connect these questions, ideas, and insights to law.

Second, their world of legal scholarship would be a low-risk adventure. Law professors would feel free try out new ideas, make mistakes and, like a child playing a game, call out "do over" when some line of inquiry does not pan out. Egos would be a thing of the past. No more fear of failure. Instead of worrying about whether an article will meet a tenure or promotion standard or worrying about placement in a highly ranked journal, playful legal scholars would engage in legal scholarship worry-free. All of their energy would be focused on the exploration and articulation of their new ideas.

Even if this seems unlikely as a matter of real politics, plainly there is no reason why the freedom resulting from the playful attitude be squelched when ideas are merely in the scholar's mind, or in scribbled notes or word outlines. And who knows, perhaps one day that wonderful idea developed when in a playful state of mind might just turn up in an article, book, or blog.

But what, you ask, are the standards to assess this playful scholarship? Would any work (admit it, you are thinking, any piece of garbage) qualify a person for promotion and tenure? Obviously not. But the standards for obtaining tenure or promotion would change. Instead of using some of the current arbitrary markers of excellence such as the ranking of the journal in

which the work is published or the number of footnotes in the article, the emphasis would shift to those markers we already use to examine quality—peer review and personal assessment after reading the work. In short, the primary focus would be on one question: is this a good, new, original, useful, provocative, interesting idea/contribution to legal scholarship?⁶⁴ And we could add another factor—the playful attitude factor. Does the scholar applying for promotion or tenure approach this big part of his or her job as an obligation, chore, or drudgery? Or is he or she genuinely excited and enthusiastic about the life of the mind, playing with ideas, and sharing them with others?

Third, playful legal scholars would be well, playful. Instead of an overly serious and unhappy approach to scholarship, playful legal scholars would actually enjoy their work and engage in it because it is fun. Faculty lounges, lunches with colleagues, scholarship workshops, and roundtables would be sites of spirited conversation where ideas are bounced about, tested, broken apart, turned upside down, and put back together again.⁶⁵ The point would be the love of the exploration and sharing it with others.

Ah, you say, *talking* about one's scholarship has always been the fun part. What about the arduous process of putting it down on paper? The playful legal scholar would also be a playful writer.⁶⁶ Of course tedious and

⁶⁴ See generally Lasson, *Scholarship Amok*, *supra* note 57, at 927 (stating that scholarship is primarily done in pursuit of promotion or tenure); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 *J. Legal Stud.* 451, 468-75 (2000) (using citation numbers to rank scholarly impact); *Law Journals: Submissions and Ranking*, available at <<http://lawlib.wlu.edu/LJ/index.aspx>> (last visited August 12, 2008) (ranking law reviews based on citation frequency, among other criteria).

⁶⁵ These types of exchanges are regular parts of many law schools. See Lindgren, *Fifty Ways*, *supra* note 60, at 126. The question, of course, is whether the exchanges occur in more of a dueling-to-the-death atmosphere or more of a everyone-who-plays-wins atmosphere.

⁶⁶ A few authors have tried to offer suggestions about how to make the writing process for a law review article more pleasant and fulfilling. See e.g., Day, *In Search of the Read Footnote*, *supra* note 56, at 229; Elizabeth Fajans and Mary R. Falk, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers* (3d ed., St. Paul, 2005); Eugene Volokh, *Academic Legal Writing: Law Review*

difficult work is inevitable; but bringing the attitude of playfulness into the endeavor makes all the difference. Slogging through mundane tasks to bring out exciting thoughts is qualitatively different from slogging through mundane tasks to bring out mundane thoughts. Freed from the calcified formats of law review articles, obligatory and stifling bows to this or that school of legal thought,⁶⁷ and pompous academic vocabulary, playful legal scholars would write as though someone beyond a narrow circle of academics were actually going to read their work. And, drum roll here, they would have a wider circle of readers, *and* their readers would enjoy reading about their ideas. Why? Because the excitement, passion, and enthusiasm of the writers would not be submerged beneath layers of “scholar–speak,” and because the ideas themselves would be innovative and worthwhile.

Assuming for a moment then that the life of a legal scholar would be vastly improved by adopting a playful attitude, the other key question is whether the scholarship itself would be better. Would playful legal scholars produce more articles and more books, and would those articles and books do more to advance legal thought and practice? Would the work be more creative, insightful, and significant?

In addressing the first question concerning the quantity of legal scholarship, one might well ask, do we really need more legal scholarship?⁶⁸ The short answer is, of course; there is no such thing as too many good ideas.

Articles, Student Notes, Seminar Papers, and Getting on Law Review (3d ed., New York, 2007); Abrams, Sing Muse, *supra* note 60, at 7 (stating that “spending a summer writing need not be unpleasant”).

⁶⁷ See Comment, Originality (Writing an Original Law Review Article), 6 Const. Comment 1 (1989).

⁶⁸ While at first blush there does not currently seem to be a shortage of legal scholarly articles and books, Espresso received approximately 5,000 articles last year, though the number is slightly less “because some authors submit their articles multiple times.” E-mail from Jean-Gabriel Bankier, BePress, Oct. 10, 2008. If one considers that there are 9880 (<http://aals.org.cnhost.com/statistics/2008dlt/titles.html>) legal academics at 200 (<http://www.abanet.org/legaled/approvedlawschools/approved.html>) (11 are provisionally approved) law schools in the United States and most of their deans would say that a large

The second and more important question is the quality, not the quantity, question. Will a playful attitude in scholarship open us to producing more creative, interesting, significant scholarship?⁶⁹ There seems to be an endless supply of real-life legal problems that cry out for novel solutions. What would a playful attitude bring to serious issues such as conflicts between property owners and cities using eminent domain to promote economic development, conflicts between school districts and parents of children with special needs, or detention of non-citizen enemy combatants at Guantánamo Bay, Cuba? If the play theorists are correct, adopting a playful attitude toward solving these serious problems opens the door to re-envisioning the problems and how law and legal relationships are defined. The openness inherent in a playful attitude toward legal problem-solving creates room for critical thinking and creative solutions. The playful “What if we...” attitude facilitates looking at the problems from new perspectives and brainstorming new options and solutions. The approach certainly worked for Albert Einstein in his field.⁷⁰

Transforming the established world of legal scholarship into a playground of intellectual exploration and adventure may be a tall order that takes some time, but in the short run at the very least individual scholars can adopt a playful approach to their own scholarship. After all, the majority of most law professors’ careers occurs post-tenure when there is almost

part of their jobs is the production of scholarly work (see generally, Weidner, A Dean’s Letter to New Faculty about Scholarship, *supra* note 57, at 440), one might ask why more is not already being written. Perhaps it is because in the current environment, doing legal scholarship is just not enjoyable.

⁶⁹ More judges and practitioners say that they no longer find the scholarship in law reviews helpful or relevant to the cases they are working on. See e.g., Stephen I. Vladeck, The Law Reviews vs. the Courts: Two Thoughts From the Ivory Tower, 39 Conn. L. Rev. 1 (2007) (suggesting that law review scholarship may not be as useful to judges deciding cases because of the decline in judicial discretion and constriction of federal remedies but arguing that the shorter articles in online law reviews may have more utility for practitioners); Adam Liptak, When Rendering Decisions, Judges are Finding Law Reviews Irrelevant, N.Y. Times, Mar. 19, 2007, at A8.

⁷⁰ See Scarfe, Play, *supra* note 55.

unlimited scholarly freedom. At that point at least, individual scholars can consider what they want the rest of their scholarly lives to be like. The key may be to leave behind the scary, no sudden moves, carefully conservative approach to scholarship that earned tenure and move toward a fearless, why-not-try-something-different, playful approach to legal scholarship.⁷¹

TEACHING

The initial sections of this article defined the pure theory of play. In this section, the authors discuss what we have learned about applying this body of research and accompanying theory to the law school classroom. We explore the pedagogical benefits we have seen to result from application of play theory, provide a range of concrete examples of incorporating play theory into our classrooms, and end with what we've found to be the "Five Essentials" of effective play pedagogy.

A Look at the Benefits We've Seen from Play Pedagogy

Play pedagogy engages and energizes the class, enhances learning, and enables us as teachers to more easily assess student learning. It engages the whole class because different learners can excel in participating in a variety of learning activities. When we gave a play assignment, we found that the student who never spoke in class suddenly broke her silence and would readily write a poem, sing a song, or do a drawing that spot-on elucidates the concept or policy. We have found that this student will then increase her participation in the more traditional classroom environment as well. Play pedagogy also engages students because as peers, this pedagogy tends

⁷¹ Such conservatism may have some empirical basis. According to Rachel J. Anderson, *Revisiting the Imperial Scholar: Market Failure on Law Review?* (April 7, 2008); UNLV William S. Boyd School of Law Legal Studies Research Paper No. 08-13 (available at <<http://ssrn.com/abstract=1117764>>) the social/cultural biases of law review editors lead them to choose more mainstream scholarly topics, approaches, and ideas.

to place them in the “zone of proximal development,” an optimal learning environment where the task is not so easy as to be boring nor so difficult as to be frustrating.⁷² They will also often be able to better engage each other than can the professor since the students have common reference points and use examples that resonate with their peers.

Like any active learning activity, play pedagogy energizes the class because it moves students from being passive recipients of knowledge to active pursuers of knowledge. Each time they have to create something, their energy shifts. Notice the sounds of learning next time you are in the classroom. When you are engaged in Socratic dialogue, you will hear your voice, one student’s voice, and the clicking of fingernails on the laptop keyboard. We don’t really know if that clicking represents someone taking notes or someone shopping for shoes or dialoguing via instant messaging or Facebook. In contrast, when we have our students collaborate, either in a simple pair and share exercise, or in writing a poem or preparing a visual presentation we commonly hear many different voices, some arguing, and much laughing. We believe that is the sound of learning.

Play pedagogy also enhances learning. When the quiet student feels comfortable enough to present his/her thoughts and others listen, a learning community forms. When students in class work collaboratively, take risks, and have fun, it creates trust and the feeling that they are in this enterprise together. It can reinforce their interdependency and increase mutual respect. When the student whose oral presentation skills

⁷² The concept of the “zone of proximal development is defined by its creator, Russian psychologist Lev Vygotsky as follows:

...the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance, or in collaboration with more capable peers.

Lev S. Vygotsky, *Mind and Society: The Development of Higher Psychological Processes* 86 (Cambridge, Mass., 1978).

are week becomes the one who draws the concept that the group created, that student feels he/she has something to contribute and others appreciate what that student brings to the table.

Play pedagogy not only offers alternative ways to learn and approach topics. From what we've seen, asking students to place concepts in a non-traditional format like a song, poem, or sculpture requires a grappling with the materials that results in a deeper understanding of it. When students can articulate the concept in their own medium and with their own words or pictures, we believe that they truly understand it instead of merely reciting how someone else (the casebook, hornbook, commercial study aid, or professor) has articulated it. Of course the materials for this play can come from the virtual world that surrounds us, with web-based images, graphics, and clips from YouTube supplanting magic markers, stickers, and poster board.⁷³

⁷³ One of us, Bryan Adamson, uses a web-based exercise akin to a "treasure hunt" in the classroom component of his predatory lending clinic. He describes the exercise as follows: "The Predatory Lending Clinic is a year-long, civil litigation course. Each year, up to eight students represents clients who may have been subject to some form of unfair financial transaction. Automobile finance, debt collection practices, home remodel, or home financing transactions comprise the majority of the subject matter in this clinic."

Within the past two years a particularly insidious form of predatory lending has taken hold in communities: the foreclosure rescue scam. In as straightforward a description as possible, it entails the following: (1) homeowners find themselves a few to several months behind in their mortgage payments, and have been issued a foreclosure notice; (2) a "rescuer" approaches them, offering to help them get a loan to catch up on the payments, promising that once the homeowners get "back on their feet" (e.g., repair their credit, find new jobs); (3) in exchange, the homeowners agree to enter in a "sale-leaseback," under which the homeowners quitclaim the deed to the rescuer; (4) the homeowners are permitted to live in the home pursuant to a six-month or twelve-month rental agreement (which, in fine print, is non-renewable); (5) the homeowners are promised that at the end of the term, they will be able to buy the home back from the rescuer; (6) then, one of two events occurs: (a) the homeowners miss a monthly rent payment and are evicted (and the rescuer owns the home outright), or: (b) at the end of the term, the rescuer raises the "repurchase" price, or flatly refuses to sell it back to the homeowners. In either instance, it allows the rescuer to strip any equity that might exist in the home.

It is perhaps apparent that these cases can be quite complicated, involving many parties, and fact-intensive. Often, the scam perpetrators have fledging companies, are

Getting Real—How We've Applied Play Theory in Our Teaching

You don't have to be a Picasso or Bob Dylan to pull this off; we certainly aren't. In fact it is probably better if you are not. What is key is that you approach this with an open mind, a sense of humor, and most importantly a willingness to take a risk in the name of fun and learning. If you do this, you will be doing exactly what we will ask our students to do in class: You will be a partner in the learning environment rather than just the director. What follows are examples from our classroom teaching and presentations in which our instructional methodology was guided by play theory.

principals in several affiliated corporations, or use "straw men" as transaction parties. In addition, many may have purchased other properties, been sued, or initiated eviction proceedings against other "tenants" of other properties they have "rescued." Two in-class exercises are aimed to engage students in directed surfing, i.e., open-ended searches which hopefully yield additional information relevant to their cases.

A. Find the Players

Finding the players entails the use of principal players' names in open-sourced and closed-sourced web portals. Students are asked to enter the name of a party of interest, and locate relevant current addresses. Students are also directed to go to court, government, or public record websites to determine whether there are lawsuits involving the party, other properties upon which the party's name shows up on a deed of trust or warranty deed, or as a licensed principal or agent of a company.

B. Scour the Websites

In several instances, some perpetrators are "legitimate" companies, that is, to the extent that they may have a website advertising their services. One other directed surfing task entails sending the student to relevant websites, and identifying possible legal claims. Claims made on the websites may reveal possible violations of state unfair or deceptive practices laws, federal trade or lending laws, or common law prohibitions. For example, a website may advertise a loan at a certain rate. If a client has relied upon that rate, but is subsequently given a less favorable rate, students can then attempt to explore the nuances of a possible claim based upon the website representations.

During these exercises, the goal is to ensure that each student is engaged. The class size and configuration allows the professor to circulate, view the students' laptop screen, invite the students to share what they've "discovered" aloud, and ask follow-up questions. Importantly, creative use of technology in the classroom enables students to channel their "inner Sherlock Holmes" to further their casework.

What Would Happen if 100 Law Professors Played Together in One Small Room?

In our *Open Source* program at AALS in January 2008 that was the impetus for this article, our goal was to encourage law teachers to use play by demonstrating how to use play in the classroom. We created a safe learning environment that was conducive to play by engaging participants from the outset. We modeled play by opening the presentation and each section by having all the presenters sing lyrics about the importance of play in scholarship and pedagogy to the Beach Boys, “Fun, fun, fun” (Appendix A).

We then presented a legal theory called the “lost chance” doctrine, applying it to a made-up case in which a law graduate who had repeatedly failed the bar exam was alleging educational malpractice. The case in turn was presented through a court opinion we created (Appendix B), which was read to the participants by one of us who played a judge. Our objective was for participants to understand the lost chance doctrine and its policy implications. As we later articulated to the group, we constructed the exercise with the following goals and objectives:

1. Learning objectives: we want our students to understand this new concept.
2. Pedagogical objectives:
 - a. Provide students with another way to learn/approach the topic
 - b. Engage and energize the students
 - c. Build community in the class
 - d. Assess whether the students understand the concept

If this example had been designed for use at the end of a semester, we might have had participants synthesize this with other related cases or explore the relationship of lost chance with other doctrines or policies. But for our purposes, because we were introducing the concept for the first time,

we just wanted the participants to understand the doctrine and policy in their most basic forms.

We then divided the group into two, A and B, and gave them the following clear instructions:

1. Organize yourselves into groups of three.
2. Brainstorm the key concepts for the lost chance doctrine.
3. Talk.
4. No idea is bad; keep an open mind; listen.
5. Group A: Put the lost chance doctrine and/or its underlying policy implications into a song to the tune of "Tea for Two."
6. Group B: Visually represent the lost chance doctrine and/or its underlying policy implications (using these art and craft materials are provided).
7. TIME: you have 15 minutes to write your song/create your visual representation.

As the groups were working, we walked around and listened and prompted them to keep going. People jumped in; the energy and buzz vibrated throughout the room and spilled into the hall. This mirrors the energy shift we experience in our classes when giving a play assignment for in-class work. After fifteen minutes, we had each group get up and sing its song or show its visual product to the group. We were laughing and making so much noise that the AALS people had to come in and ask us to quiet down because we were disrupting the other sessions. We adopted the sign language applause of raising both hands in the air and shaking them. Every group wanted to share. Each time a group presented, we were able to assess the learning, make tiny revisions, and reinforce the concepts. A feeling of goodwill, openness, and community was created within minutes, and lasted beyond the session. You can foster similar experiences with your class by creating a play environment.

In many ways, the exercise at the AALS was an experiment that tested our theories. And like many experiments, the results bore lessons we had

not really considered before. We believed that adding the vocabulary of art or music to that of verbal analysis might allow a deepening and clarity in the “student’s” understanding of legal concepts. What we got was something more.

One thing we saw was that the translation of the text-based concept of lost chance into art or music resulted in a clarity of conception that could then easily be retranslated into a verbal articulation of this complex concept that would be readily understandable by a deciding judge or the most novice juror. Accordingly, one group which had been assigned art as the medium to express the concept of lost chance used magic markers, yarn, and small plastic figurines to create a mountain climbing scenario in which poor equipment had placed a climber in peril. It was a perfect explanation of lost chance. We know that people spend \$60,000 to \$80,000 to be guided up Mt. Everest. We also know that even with the best guides many do not reach the summit—accidents, sudden weather changes, altitude sickness, and avalanches happen. But it is a given that the climbers will have the proper, high quality equipment in working order. If climbers are not provided with, e.g., working equipment to dispense oxygen, they will never be able to summit even if all other conditions are ideal; they will have lost whatever chance they had. One might ask why this explanation couldn’t have been conceived in the first place without art as a middle man. Plainly it could, but our sense of the group process was that the groups didn’t first reach a full verbal understanding of the concept, and then decide how to portray that concept as art or music. Rather, they seemed to expand and enrich their initial verbal conceptions through the use of the languages of art or music, discovering images of the concept that they had not had before.

Another thing we saw from this experiment was how this form of activity revealed exceptionally bright thinking even when the product did not respond to the task. Thus, one group produced a word-filled flow chart that in no way, shape, or form assisted in explaining the concept of lost chance. But after a puzzled moment one could see that the group had the insight that

all lost chances are not equal, and that it matters in the arena of damages whether the lost chance was one in three or one in ten billion. Their chart was a very thorough, sophisticated model for a fact finder to calculate the remoteness of the chance lost. As a teaching moment, it would be easy to both show why the group's product was off task (i.e., not responsive to the issue of defining lost chance), but at the same time was very smart and useful in its own right. The class could even focus on the model, discussing its completeness, usefulness, and the like. If offered in the context of a Socratic dialogue exploring the meaning of lost chance, however, this bright thinking was unlikely to have ever been fleshed out, and rather was more likely to be met with a curt, "that's not the issue." As a pedagogical matter, ironically this interaction would have constituted a lost chance.

The Cinema, Costumes, and Set Design

One of us, Marilyn Berger, introduces films into her classes—Hollywood "block-busters," foreign language films, and documentaries—that raise complex issues of social justice, ethics, evidence, and human behavior while tapping into those capacities for unbounded thought that characterize play. One reason many of us love films is that they are an entry into the world of fantasy.⁷⁴ Even brief clips on YouTube are able to capture our imagination. Just ask any law student in class—would they like to see a film clip or spend more time discussing a case?

But it isn't just for an escape from educational drudgery that professors introduce films in class; rather, both film and law, by emphasizing creativity, imagery, and imagination, share a similar artistic and educational

⁷⁴ Paul Bergman, Teaching Evidence The "Reel" Way, 21 Q LR 973 (2003) (presentation the author gave at the Association of American Law Schools (AALS) Conference on Evidence in Alexandria, Virginia, on June 1, 2002); Law & Cinema Special Symposium Issue, An Analysis Scheme For Law Films , 36 U. Balt. L. Rev. 329 (2007).

rationale. Storytelling thus resides at the core of both film and the world of the lawyer.

When law students connect with stories and storytelling they are using their imagination and creativity to understand the backbone of the appellate cases they are assigned. Especially when law and film connect to tell a universal story that explains the motivations in cases; students, like jurors,⁷⁵ are able to fit the law and facts together in a meaningful way that is both creative and fun. Exposed to the motivations of the parties—truly finding out what happened—they see that the stories in legal cases are universal.⁷⁶

We are all familiar with the universality of stories—the triumph of good versus evil, greed, love lost, and so forth. Just think about some of the universal stories that are the foundation of well-known films—*The Star Wars Episodes*, *Lord of the Rings*, *The Wizard of Oz*, *It's a Wonderful Life*. A gateway to connecting with the digital generation is telling stories which, because they are conveyed through film, contain vivid images, lively sound, and universality. What follows are descriptions of two class projects that integrate storytelling techniques from film, and apply them to law. As you will note, play pedagogy is infused throughout.

The first project is conducted in a large civil procedure class. Students are assigned “a novel-thriller,” *A Civil Action*, by Jonathan Harr, the summer before law school.⁷⁷ They are also encouraged to view the movie by the

⁷⁵ See W. Lance Bennett, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* (New Brunswick, N.J., 1981).

⁷⁶ Joseph Campbell, *The Hero with a Thousand Faces* (2nd ed., Princeton, N.J., 1972). Campbell devoted his life to the study of stories by studying myths in diverse cultures. He observed that stories are universal: consisting of common structural elements found in myths, fairy tales, and dreams. Their universality can be seen “in the smallest fairy tale, just as the flavor of the ocean is contained in a droplet, or the whole mystery of life can be seen within the egg of a flea.” *Id.* at 4. Myths according to Campbell are “living inspiration.” They touch and inspire creative centers in the human body and mind.

⁷⁷ Jonathan Harr, *A Civil Action* (New York, 1996).

same name.⁷⁸ The students watch clips in class from the documentary, *Lessons from Woburn*, which features the real participants from the *Anderson* case that forms the basis for Harr's book.⁷⁹ The object of the assignment is to inspire students to explore the question, *Whose Story Is It?*

Using Harr's book, *A Civil Action*, the movie, and the documentary, students discover a rather minor character—the Whistleblower, Al Love.⁸⁰ Al Love was the receiving clerk who checked in the chemicals at the WR Grace Plant which was accused of illegally dumping chemicals on the ground.

Students take a mock deposition of Al Love, and see the story focus shift to a new “hero.” Al Love changes the story from just a few teaspoonfuls of chemicals dumped on the ground to significant barrels. Students get into costume and assume roles played by the plaintiffs' and defendants' attorneys, the judge, the plaintiff-mothers, and Al Love. The students find the “back story” of the real parties and witnesses in the case, and thus

⁷⁸ *A Civil Action* (Touchstone Pictures, 1998) (starring John Travolta, Robert Duvall, Tony Shalhoub, and William H. Macy).

⁷⁹ *Lessons from Woburn*, available at <<http://www.law.seattleu.edu/x1873.xml>> (last visited Mar. 26, 2009). The *Anderson* story begins in Woburn, Massachusetts, a working class town approximately fifteen miles north of Boston. To obtain drinking water, the City of Woburn commissioned building two municipal wells. The residents noted that the water smelled, had an odd color, turned laundry orange-brown, and ate through pipes. Families suffered from rashes, intestinal difficulties, and headaches. Eight families had children who developed a rare form of childhood leukemia in the 1970s. The families accused two large corporations, WR Grace and Beatrice Foods of dumping chemicals that seeped into the ground and polluted the drinking water in the wells. The plaintiffs (termed the “hysterical mothers”) brought the case, Anne Anderson and Donna Robinson on behalf of Jimmy Anderson and Robbie Robinson, who both died in 1981. They were represented by Jan Schlichtmann against two corporations.

⁸⁰ Up to this point, the WR Grace Company and employees stated that dumping was in teaspoonfuls, not in barrels of chemicals. In the documentary, the segment entitled “The Real Al Love” provides key insights as to how his deposition by plaintiffs' attorney became a turning point in his role in the plaintiffs' case. *Lessons from Woburn*, available at <<http://www.law.seattleu.edu/x1873.xml>> (last visited Mar. 26, 2009).

explore the reasons behind the shifting viewpoints presented.⁸¹ The second project requires students in a Film and the Law seminar to prepare a fifteen minute film. The idea behind the project is to have students “play,” be creative and let their imaginations run wild, while requiring them to apply critical thinking and creative problem solving. The mini-films encompass any topic that “evokes the law.” The only caveat is, “let your imagination and intellect unite to bring dramatic techniques from film into law—to captivate your audience.”⁸² Consistent with play pedagogy, there is no such thing as *the* right answer.

The student films are wide-ranging—presenting game shows (gone haywire); a docudrama of a law school class set in a large classroom with the attendance of three students taught by a CIA-type inquisitor for a professor; a re-interpretation of the Mary LeTourneau rape case,⁸³ a comedic portrayal

⁸¹ *Rashomon* (1950) is a black and white Japanese movie also known as “In the Woods,” *Rasho-Mon* (United States) (alternative spelling) *Rashomon* (Japan) (alternative transliteration). Directed by Akira Kurosawa, it is the story of an alleged rape and murder of a samurai’s wife. The film tests the possibility of whether there ever can exist “The absolute truth, nothing but the truth, so help me God.” Is there a rape? A seduction? A murder? Kurosawa invites the viewer to examine differing accounts as told by the actors in the film.

⁸² In class we explore how film techniques are used to tell a dramatic story by developing a theme; and how film directors by using camera techniques, lighting, color, costume, and setting enhance the story. Students examine character development and how characters’ stories have an arc (borrowing from the Campbell myth and Hero’s Journey). Campbell, *The Hero with a Thousand Faces*, *supra* note 76; Christopher Vogler, *The Writers Journey: Mythic Structure for Writers* (3rd ed., Studio City, Ca., 2007).

⁸³ Mary Kay Letourneau was arrested for statutory rape of a child, Vili Fualaau in Washington State. Four months later, she gave birth to Fualaau’s daughter. She pled guilty to two counts of second-degree statutory rape and was sentenced to eighty-nine months in prison. The prison term was suspended, and Letourneau was sentenced to serve six months in county jail and enroll in a three-year sex offender treatment program. Released from jail early for good behavior, she was not supposed to have contact with Fualaau. However, she was arrested for violating conditions of her suspended sentence: failure to comply with her sex offender treatment program and contact with Fualaau. The original sentence of seven and a half years was reimposed. While in prison Letourneau gave birth to another child by Fualaau. After serving her sentence, Fualaau and Letourneau married. Subsequently, Fualaau’s family sued the School District and a city in Washington for lost wages, and the costs of rearing his two children, claiming

(using much artistic license) in putting together members of the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), a fringe sect of the Church of Latter Day Saints, in a talk show setting. The groups provide background stories, a story board, create appropriate sets in the seminar room (so, for a film set on a hot day in New York City, the students commandeered a hot dog cart and turned up the heat in the room), and even provide food that specifically complements their film segment. Students also develop original costumes, original musical scores, and lighting to tell their stories.

Of Limericks, Poems, and Drawings

What follows are two play exercises some of us have successfully used in class. The first is a “drafting” exercise where given free rein, one group of students drafted a power of attorney in the form of a limerick (Figure 1). The second and third are synthesis exercises where *mens rea* is explained in couplets (Figure 2) and the interrelationship between *actus reus* and *mens rea* is expressed through art (Figure 3).

the school had failed to protect him from Letourneau. The jury ruled against them and no damages were awarded. See <http://en.wikipedia.org/wiki/Mary_Kay_Letourneau> (last visited Mar. 26, 2009); see Google for references to books, websites, and the cases, available at <http://dir.yahoo.com/Government/Law/Cases/Mary_Kay_Letourneau_Case/> (last visited Mar. 26, 2009).

Figure 1

Example of taking a traditional drafting assignment (durable power of attorney document) and instead using a “play” element:

IN CLASS EXERCISE ON DRAFTING DPOAS

Instructions to students:

After advising Alice about the pros and cons of various planning for incapacity options, Alice decides she wants to have a Power of Attorney document. She wants to have Byron be the person to make decisions for her, but only when she is unable to make them herself. She would like him to be able to pay her bills using the money in her checking account only, and she wants him to be able to make health care decisions for her when she is unable to say. One other thing: she agrees that it would be good to allow Byron to make gifts on her behalf, but only if needed to qualify for Medicaid or to avoid a Medicaid Lien. These are the only powers she feels comfortable giving Byron, because she has told you that he is not great with money but she trusts him with her health care decisions. “He knows me really well and we’ve talked about the kind of care I want.”

Your team’s job, should you choose to accept it, is to draft Alice’s power of attorney. But, this draft will be different from any other drafting you have ever done. I want you to draft it in the form of a poem, song lyric, drawn picture, or story narrative. Your goal should be understandability. Be creative and have fun. Take the next 30 minutes to do this. I’d like each team to present your creation to the class.

Teaching goals:

1. Help you to break down the purposes of the planning document so that you understand what you are drafting and can more easily explain it to clients.
2. Help in your creativity in drafting in the more traditional format.
3. Fun!

Example of students' product:

A Limerick for Alice By Todd Hubbard and Oleg Salakhov

Dear Demented Alice, daughter of the Swinomish,
Darkened our door to make known her wish. See,
she's gotten sick and things have been rough, So she
wants her Boy Byron to take care of her stuff.

Dear Alice asked us what can she do?
She needs a solution, needs it P-D-Q. Lo!
We can tell her it'll be "A-O-K" Because
we have the answer: a D-P-O-A.

"D" is for "durable"—it survives a fall off the deep end.
"P" is for "power," which goes to her friend.
"O" is a connector we need not speak of,
And "A" means "Attorney," the kind people love.

To Byron she will grant this DPOA,
Investing in him her command and full sway.
Though we should limit his control, so he can't go crazy,
By giving away her things to any Tom, Dick, or Daisy.

I hope you don't think we're being obtuse, But
these magic words we believe we must use:
"This DPOA won't come into play,
until our Dear Alice has a very bad day."

When it come to her aches, pains, and ills,
Alice wants Byron to write checks for her bills.

The last request, that Dear Alice made,
Was for Byron to give gifts, so she can get Medicaid.

The law demands that two powers must be,
Finances for the future, health care—immediately.
The reason for such trouble, is not very funny,
Turns out that Boy Byron, is not good with money.

Figure 2

Example of a rule synthesis exercise (Model Penal Code Mens Rea)

Instructions to students:

Now that we have completed our discussion of how the Model Penal Code sections 2.02(3) and 2.02(4) work, write a rap song or poem, draw a cartoon or chart, or prepare a skit that shows how to apply these sections. Work in groups of three. You have 15 minutes.

Example of students' product:

July 2008: Steven, KJ, Nathan, Greg, and Raka

AN ODE TO MENS REA

What's the required mens?

Well, that all depends

Separate the elements of the statute at hand

Apply the MPC if that's the law of the land

If the statute gives us state of mind

then 2.02 (4) is where we find

the given state of mind applies to the whole mess
that is of course, unless

a contrary purpose plainly does appear
then MPC 2.02 (3) applies here.

But, if no mens you see
Then apply R, K or P

Figure 3

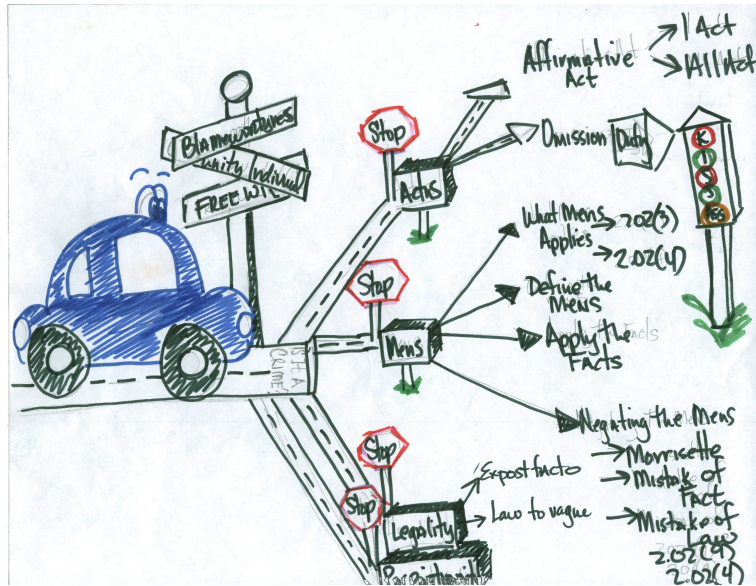
Example of synthesis of Actus Reus and Mens Rea in Criminal Law

Instructions to students:

My goal is for you to review the main doctrines of Actus Reus and Mens Rea. This should help you deepen your understanding of how each part relates to the other parts, as well as provide you with a tool for remembering them.

You can work with up to three other students in a group, or you can work alone. You have 20 minutes to visually represent these concepts and doctrines.





ASSESSMENT—THE PLAY IS THE THING

One of the biggest gifts of using play pedagogy is that, in the end, you can so easily assess whether and how well the students have learned and understood the legal concepts you had set up in your goals for the assignment. The medium of the creative product is a shorter and more immediate way of seeing whether or not the students have actually integrated the learning as opposed to regurgitating the words they have read or heard from you. Visual art, dance, drama, and music are forms that can help boil concepts down to their essence. You simply need to have a deeper understanding of a concept in order to relate it in a creative format. For example, if your students are required to draft a power of attorney in song, to do it well they need to be able to understand and explain concepts without jargon. It is clear when they present their song if they actually get what they are doing. In the process of the writing of the song lyric, they

may discover for themselves what areas they are confused about, and seek answers. Thus, play assignments also afford students the opportunity for ongoing self-assessment.

Also, your reaction to and feedback on the product gives both the creators of the project as well as the student audience an opportunity to test whether or not they understand the concepts. For example, at the end of the semester of Criminal Law, to review the course and help students refine and reinforce their understanding of the key concepts, they are given the key concepts in no particular order printed out on a piece of paper. The assignment is for them to organize the concepts in a diagram that reflects the substantive schema. The students' schemas are then shown on the document camera and discussed.

One year a student drew an elaborate map of a set of islands connected by transit routes (Figure 4). Each island represented a concept. All of the islands were connected except that two islands—representing mistake of law and mistake of fact—were floating by themselves. In an instant, it was clear that the student did not understand those concepts, and the fact the assignment was framed within the language of art provided the opportunity to help him and the rest of the class connect those islands.

Figure 4

Example of course synthesis exercise for Criminal Law

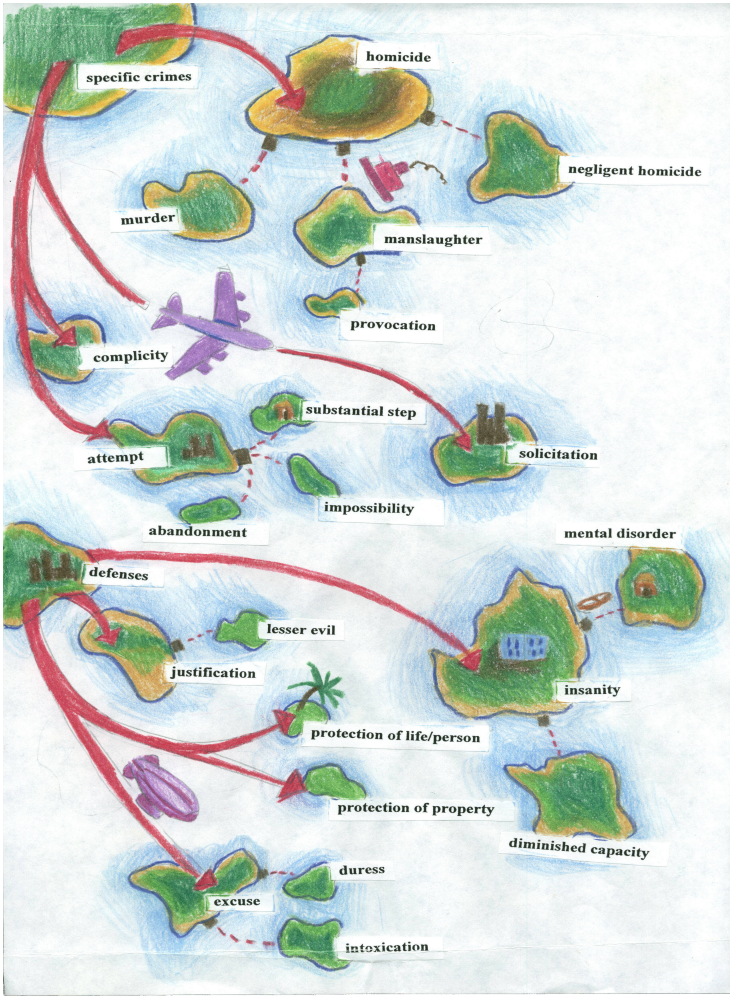
Instructions to students:

My goal is for you to review the main doctrinal areas we've covered this semester and deepen your understanding of how they relate to one another.

You each will receive a bundle of little pieces of paper with the major terms of art of Criminal Law. Your mission is to put these terms of art together into a coherent framework or schema. You can treat them like a jig-saw puzzle, or code them, or place them in a traditional linear outline. The main idea is for you to internalize the meaning of each term of art. You can work with up to three other students in a group, or you can work alone.

This is a take-home assignment. I expect you to spend between 1-3 hours working on it.





THE “FIVE ESSENTIALS” OF EFFECTIVE PLAY PEDAGOGY

To incorporate play in your classroom successfully, you need to establish an environment that is conducive to open, safe learning. Think about when you have fun. An activity is never fun if the stakes are high and the risk of loss, even of face, is great. In the classroom, low risk exercises are those with low stakes in terms of evaluation and interaction with peers. Think about who you have fun with. People you know and trust; people who share common interests; people who share something of themselves; people who listen as well as talk; and people who can laugh with you, not at you, and especially can laugh at themselves. Having fun with others can't be coerced. You have to create the conditions where play and learning can happen. You can create those conditions by stating your goals and objectives for the course in the first class; modeling an open attitude and spirit of playfulness that you will be asking your students to undertake; helping them build community; establishing ground rules; and being clear about your pedagogical goals for the particular application of play theory.

Explain Your Goals for Using Play Pedagogy

It is always good pedagogy to state your goals for the entire course and for each class right from the beginning. In addition to letting your students know what you want them to learn, it is important to let them know what teaching methods you will be using. Incorporating play pedagogy into your classroom is no different. From the first class it is essential to communicate to students that you are going to use play as part of the learning, and explain to them why you are doing that.

When giving an assignment, like in all assignments, it is best practice to clearly articulate both your learning and pedagogical objectives. As at the beginning of the course, it is critical to state your general objectives and give more specific ones for the assignment at hand. When bringing play into the classroom, unlike the pure play theorist would have us do, we are not playing to play for its own sake; we have pedagogical objectives. There is

not total freedom or flexibility; we structure the exercise and have baseline rules, while allowing for some flexibility as long as it meets the objectives. For example, when we asked participants at the AALS presentation to write lyrics describing the key concepts of the lost chance doctrine to “Tea for Two,” one group couldn’t relate to that older song, so they wrote lyrics using music from a different, more contemporary, song (a Talking Heads tune). That was great because our pedagogical objective was to help them understand the concept and to assess whether they understood the concept—what music they used was not the critical point. Their willingness to disregard our instruction and use something of their own underscored the success of the exercise both because they had the spirit of what we had intended and because they felt safe enough in our “class” to buck the system and create what worked for them.

In addition to articulating your objectives, you also want to articulate your criteria and expectations for the end product. Unlike pure play theory where nothing is evaluated or graded, you should have some clear expectations. At times you may want to show examples of what you or other students have done in the past; at other times you may want to let students discover a form for themselves. Finally, give them a structure in which they can be playful. Giving them clarity about what materials they can use, how much time they should spend on the assignment, and what kinds of things are off limits enables them to focus on the assignment.⁸⁴ When

⁸⁴ Example of Instructions for formation of Firms:

1. Break into groups of five (make sure you do not know at least one person in the group).
2. Introduce yourself to the firm members. Give two personal goals for this class. Tell one non-law related thing about yourself.
3. Choose a fun firm name!
4. Write a firm cheer! Include some choreography and at least one thing in the cheer your firm will do for your elder clients.
5. Choose a spokesperson to report back to the whole group on # 2 and 3. The firm will all perform the cheer.

students know the objective, expectation, and structure, they can more quickly get into the task of playing and learning.

Model For Your Students a Playful Mind

Do what you will ask them to do. Early in the course, write and perform a short play, create a song lyric, draw a cartoon. For example, if you will ask them to sing a song, you sing a song, the more imperfectly you sing, the better. (We believe that it was essential to the success of our AALS program that we began the program by singing our rendition of the Beach Boys, Appendix A). If you will ask them to draw, you draw, using stick figures and simple marks to illustrate the concept. The point is to allow yourself to be less than perfect, and to show that you are willing to have fun trying, which will give your students permission to risk having fun themselves. We can't overstate how critical it is for us to be willing to do what we ask our students to do. It's true that most of us don't want to appear to be the fool, but it is the fear of that which inhibits us and our students from trying something new and forging new pathways to learning. If you frame it that the entire exercise is to explore and not have a right answer, and then reinforce that the purpose is to have fun with the ideas, then no one will lose face.

Promote and Create Community in the Class

On the first day of class, do an exercise that requires that the students introduce themselves and get to know one another. It is good to have them share something non-law-related because it helps them be whole people and not just law students. If it is a larger class, you could conduct a talking-survey where you ask questions and have students raise their hands.⁸⁵ You can also use technology, Facebook, or other web-based

⁸⁵ Sample first class exercise:

Pair up with someone you don't know in the class.

Interview and introduce yourselves to each other (5 minutes on each person).

media, to have them post photos of themselves with a brief limerick or quote or photo or video that reflects something about themselves. You can have them either pick one of their favorites or require them to create their own materials that they post. You might also try incorporating a simple exercise that uses play. For example, you could ask students to write a poem about the subject of your course or their goals in taking the course. Another idea is to divide students into law firms and have them create a fun name for the firm and a cheer for the firm that includes a physical movement or dance element. (Figure 5)

In your interview, find out at least the following:

1. Who is your interviewee?
2. What goals does your colleague have in taking this class? Why is he/she here?
3. Find out one interesting but non-legal thing about your new colleague to tell us!

After the interview, you will each introduce your partner to the class and let us know what you found out.

Sample talking survey for first class:

Raise your hand if you or someone close to you has had a personal experience with this area of law.

Raise your hand if you think you will practice in this area of law.

Raise your hand if you are an early morning person. Look around the room, these people will be possible study buddies.

Raise your hand if you don't start functioning until late at night. Look around the room, these people will be possible study buddies.

Raise your hand if you enjoy movies. Raise your hand if you like action movies. Look around the room, these people are possible social buddies. Raise your hand if you like foreign movies. Look around the room, these people are possible social buddies. Raise your hand if you like chick flicks. Look around the room, these people are possible social buddies. Raise your hand if you enjoy rock concerts. Look around the room, these people are possible social buddies. Raise your hand if you like art galleries. Look around the room, these people are possible social buddies. etc.

Figure 5

Sample Cheer written by students for their “law firm” in Elder Law class:

**Nursing home or assisted living
We’ll show you how to pay
Guardianship & Medicare
Your hair will never gray.**

**Social Security benefits, Medicaid
Retirement planning is our game
Collin, Greg, Grant & Val
Come to us, you’ll have it made!**

Set Up “Safe Play” Ground Rules for the Class

You can have the class help establish “safe play” ground rules. For instance, you can ask the class to write down two things that inhibit their participation in class and two things that encourage them to participate. You can then create the list of do’s and don’ts by debriefing. You can have them break into groups and do a skit that shows a classroom with safe ground rules. In addition to ground rules that the class may develop, we always try to include the following:

1. There are no bad answers or questions in this course. There may be wrong answers, but no one will be embarrassed or humiliated for trying.
2. The purpose is to have fun, not make fun. The goal is to have fun in a mutually respectful and supportive learning environment.
3. We laugh with each other not at each other.
4. Risk-taking is rewarded. The act of trying is what we are looking for.

5. Everyone has to play. If everyone plays, everyone takes risks, and everyone learns.

By stating your play pedagogy goals and objectives right at the start, modeling playfulness yourself, and creating a safe classroom community where risk taking is expected and rewarded, you and your students will be ready to reap the benefits of play assignments.

Be Clear About What You Are Trying to Accomplish With the Particular Use of Play Pedagogy

Now that we have created an environment that is ripe for play, we turn our attention to creating playful and effective learning activities. Before we introduce a play-based activity we always consider our teaching goals and then think through how to design an activity that will best accomplish them. You can use play activities to achieve the same goals as more traditional teaching methods: to introduce new concepts, to illustrate concepts, to deepen understanding, to integrate/synthesize, to practice a new skill, and to assess understanding. The key is to be conscious of what substance and skills you want your students to learn from the activity. Some activities will lend themselves better than others for specific goals.

The best and easiest way to create a play assignment is to look at what you currently do with an eye towards adding a creative element. For example, next time you give a drafting exercise, consider having students write a rap song, poem, or limerick as we've done (Figure 2, Figure 3). The next time you ask students to synthesize a group of cases, consider having them demonstrate the synthesis in a visual form ranging from a drawing, collage, cartoon (Figure 4, Figure 5, Figure 6), or a film. Because you have already created an environment conducive to play, when you give them the assignment, students will be open to playing.

CONCLUSION

While initially one might look askance at the notion that “child’s play” could have anything to do with the core components of our careers as law

professors, I feel it has much to offer if we wish to be more effective scholars and teachers. In the realm of scholarship, if incorporating theories of play into teaching and scholarship did no more than maintain our current level of performance in these two realms while adding some fun to it all, it would obviously be worth it. But the research and the experience of the authors promise more. Sure there are times when professional excellence demands focusing on rote-filled drudgery-laden tasks. That's why they call it work. At the heart of our exploration of theories of play, however, is not an escape from the work needed for excellent scholarship, but rather a cognitive worm hole catapulting the mind towards higher and higher levels of connection and insight. Perhaps using the mental processes of Albert Einstein as a core example sets the bar a bit high, even for those with JDs; but Einstein's imagination-centered methodology resonates with many of us whose intellect would be characterized not as Einsteinian, but as "bright." Appreciating what Dewey characterizes as a playful attitude in the academic mind offers a path to developing important, and even groundbreaking, theories and insights in our scholarship.

In our teaching, the use of low-risk, fun, very flexible activities hold significant promise for guiding students towards being creative problem-solvers. Admittedly, as we've indicated, the type of pure childhood play where there are absolutely no "wrong" answers will never take place in a law school classroom. While in play pedagogy there is never the correct answer, there can be wrong answers in the sense that the answer may completely fail to respond to the task. Thus, in our AALS open source program, a group could have put together a song about "lost chance" that in no way, shape, or form represented a coherent understanding of the concept. (In fact, as discussed, something very much like this happened.) Yet even in this extreme example, the place of our playful exercise is so far away on the spectrum of personal risk from an on-the-spot Socratic questioning that we don't believe the student in such a play exercise would be discouraged from taking similar risks in the future. The

socratically grilled student would seem likely to react otherwise. We're not suggesting that law school classes should only be carried out in settings reflecting the central characteristics of childhood play; it shouldn't. Many times class needs to be far more narrow and directed. But the theories of play offer insight into a powerful educational tool. Keep it in your pedagogical toolbox, and don't let it sit there and rust in disuse. The loss will be both yours and your students.

Appendix A

Lyrics to the Beach Boys, “Fun, Fun, Fun” for AALS Presentation

Music by Brian Wilson/Mike Love, New lyrics by Lisa Brodoff

I. Intro to program

Well the pedagogy in law school can be quite a drag now
(can be quite a drag now, can be quite a drag)
There’s Socratic method and once in a while a role play, wow
(we tried a role play once we tried a role play)
Yes, the legal academy is such a, such a serious place now
(we shouldn’t have tried that, we shouldn’t have tried)
Can we try fun, fun, fun while we learn the pedagogy of play?
(fun fun fun while we learn the pedagogy of play)

II. Theory of play

When you play with your kids it’s a no-risk situation
No bad answers no personal confrontation
Everything’s right in the world of our imagination
So let’s have fun, fun, fun at our law school as we learn with play.
(fun, fun, fun at our law school as we learn with play)

III. Play and scholarship

When writer’s block gets you stuck in your scholarly output
You’ve got no new ideas, no words—nothing to sayYuk!
Why not doodle and sing and play—cut through all the old constructs
And you’ll have fun, fun, fun with your writing breakthrough—hooray!
(fun, fun, fun with your writing break through—hooray!)

III. Play and teaching

If you’re tired of the old assignments and hypothetical queries
And your students are down and lost, tired and weary
Get out of that box—have ‘em play! We’ll all be more cheery
And we’ll have fun, fun, fun with our teaching and our learning today

V. Finale

So try art, try music, try games—teach by breaking the rules now

Give your students the gift of creativity while they're in law school, yow!
Try it yourself when you have a new article due now
And we'll have fun fun fun with our teaching and writing today!
And we'll have fun fun fun with our teaching and writing today!
Ouuuuu—fun, fun, fun with our teaching and our writing today...

Appendix B

The Doctrine of Lost Chance Case

128 BOZO APP. 3d. 469 (2007)

Marc Sullivan

v.

Emmit Kelly School of Law

No. C-7629-07

Argued September 23, 2007

Decided September 24, 2007

KLOUGHN, JUDGE.

The Plaintiff, Marc Sullivan, appeals the grant of summary judgment in his suit against Emmit Kelly School of Law (hereinafter “School”). Plaintiff graduated from School in 2004 with a 2.0 average in a 4.0 system (though his grades in three semesters of legal writing, as well as Evidence, Corporations, and Trust and Estates were all below a 2.0). He asserts, however, that he possesses neither the analytic nor writing skills required of the profession. As a result, he was fired from the two jobs he held while in law school, has since been fired from every position he obtained through a lawyer contracting service, can no longer find any law-related jobs, and has twice failed the bar. For all of this Plaintiff holds School accountable, relying on the tort of educational malpractice.

The Court recognizes that it has recently upheld a summary judgment granted in an educational malpractice claim against a local high school. *Clifford v. Wrigley*, 136 BOZO App. 3d. 274 (2006). Unlike the public school setting in *Clifford*, the duty of care for a professional school of laws is clear: the institution has the duty to reasonably prepare the student for a career in law. Public policy supports law teachers fulfilling this duty since they are training those who will pull the laboring oar in the Judicial Branch of our tripartite system of government. As to proximate causation, we believe the “lost chance” doctrine answers this concern. This doctrine has principally arisen in medical malpractice cases.

We agree that a jury could not find that, but for Dr. Green's failure to diagnose plaintiff's disease, plaintiff would now be cured. That however does not end the matter; for Dr. Green's negligence made it less likely that plaintiff would be cured. It is upon this "lost chance" that plaintiff may seek damages *Strock v. Bailey*, 174 BOZO 2nd. 417 (1983).

We believe this concept of "lost chance" equally applies in the arena of educational malpractice, at least in the setting of a professional school of law.

We reverse the lower court's grant of summary judgment as to Plaintiff's Educational Malpractice claim, and remand for trial.

REVERSED.

Barnum, J. Concurring

Bailey, J.