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LAWYERING PARADOXES: MAKING MEANING OF THE CONTRADICTIONS

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

This Article argues that these seemingly contradictory practices can be brought together through the theory and action of paradox. After identifying the features of these two lawyering practices—called here legality and proactive lawyering—the Article sets out five lawyering paradoxes that stem from the opposing yet interdependent features of legalistic and proactive lawyering: (1) paradoxes of thought and discourse; (2) relationship; (3) motivation; (4) mindset; and (5) justice. Next, the Article shows the consequences of legal education's tendency to avoid, sidestep, or downplay these paradoxes. Finally, drawing on existing research and experiences of innovators, the Article identifies three strategies that can enable students and lawyers to construct a

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dynamic tension between legality and proactive lawyering, and in the process, build the potential for transformative learning and meaningful justice.

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I. INTRODUCTION

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

In practice, I continued to grapple with these contradictions. Legal reasoning and adversary process proved simultaneously necessary and limiting, just as collaboration and problem solving frequently encountered an immovable status quo. As a litigator, I was continually buffeted by the need to fight while cooperating—as part of conducting discovery, orchestrating a trial, or settling a case. As an assistant to a master in a prison case, I witnessed the court's power to force prison officials to pay attention to inhumane and abusive conditions that they had tolerated without consequence until the court intervened. Yet, the court could not induce the cooperation and commitment necessary for sustainable change; the force of law

that put prison reform in the spotlight also triggered backlash and resistance that undercut its power.[1]

As a law professor, I have experienced these contradictions in my scholarship and teaching. In both arenas, I have explored concepts and strategies that move from mindsets of compliance to creative problem solving, from paradigms of gladiators to those of problem solvers.[2] I have grappled with ways that courts can simultaneously serve as the backstop for enforcing prescriptions against first-generation employment discrimination while creating the framework to encourage problem-solving to address second-generation discrimination.[3] I have proposed ways to integrate problem-solving approaches with judicial intervention, and yet until recently I remained dissatisfied with the strategies proposed to reconcile or resolve the tensions between informal and collaborative modes of problem-solving and more formal and compliance-based approaches. Those contradictions also surfaced in my work to build the capacity of judges, clerks, and other employees throughout the court system to engage openly and constructively with race while also developing a robust compliance process that holds people accountable when they violate anti-discrimination rules.

As a teacher, every year I have witnessed many students struggling with the contradictions that buffeted me as a law student. I teach Civil Procedure alongside courses called Lawyering for Change, Theater of Change, and Lawyer Leadership: Leading Self, Leading Others, Leading Change. Each course aims to equip students with capacities fundamental to lawyers' roles in enabling constructive human interaction. Yet, on their face, they seem to require opposing capacities and to cultivate competing mindsets. Students experienced this disconnect firsthand during an exercise we conduct on the first day of class in Lawyer Leadership. We divide students into small groups and ask each group to list the qualities or descriptors that come to mind when they think of the words "law" and "lawyer." We then ask them to do the same with the word "leadership"

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

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

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

and "leader." When we come back together, we ask students what they noticed about the "Law/Lawyer compared to the Leadership/Leader" lists generated by each group. Students typically describe lawyers as "competitive," "aggressive," "critical," "adversarial," "hard-working," and "risk-averse." In contrast, the column for leaders contains descriptors such as "creative," "entrepreneurial," "visionary," "inspiring," and "collaborative." It doesn't take long for an observant student to notice that there is virtually no overlap in their "lawyer" and "leader" descriptors.[4]

These tensions have taken on particular urgency in the current political moment. Many are looking to law—and especially the judiciary—as the bulwark against the threat to democratic values facing the United States and the larger world. At the same time, the legitimacy of those same institutions is under attack from the highest levels of government. Scholars and students are faced with the quandary of simultaneously relying on traditional legal institutions while looking to political mobilization and community organizing that call into question the legitimacy of those core institutions.[5] This requires finding ways to address some of the most vexing challenges facing law schools and the legal profession: How do you find and sustain meaning and imagination in the face of skepticism built into law's methodology? How do you pursue justice through law if the legal system itself is, in important respects, unjust? How do you equip law students and lawyers to navigate the competing call of power and purpose?

I have come to realize that lawyers' capacity for impact depends upon making sense of and being able to forge constructive tension between these oppositional aspects of lawyering. These core roles and practices simultaneously contradict and depend on each other for the legitimacy and effectiveness of both. Lawyers play a key role in designing human interaction so that diverse people can peacefully and effectively govern themselves. They bear responsibility for helping individuals, organizations, and governments structure their affairs so they can live and work together, even when they disagree. They are

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

5. *See* Mari Matsuda, *When the First Quail Calls, Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989) ("[O]utsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice."); Bob Post, *Leadership in Law Schools*, SEC. ON LEADERSHIP (Mar. 8, 2019), https://sectiononleadership.org/2019/03/08/leadership-in-law-schools/; *see also infra* Section II.E.

called upon to be problem solvers and facilitators of human interaction. These informal and facilitative interactions take place in the shadow of background norms and rules developed by lawyers and legal institutions. When conflict erupts and relationships break down, law—through lawyers—enforces rules and enables people to fight without resorting to violence, using adversarial tools to allocate responsibility, impose judgment, and enforce rules. Effective lawyers must both fight and collaborate, judge and build trust, debate and design new institutions, minimize risk and enable effective risk-taking, and advance clients' values and hold clients accountable for adhering to societal values.

A. The Conventional Approach: Supplementing Legality With Proactive Lawyering

Progress has been made in incorporating what I call *proactive lawyering* into a curriculum organized around the logic of what I call *legality*. I define legality to mean the application of legal precepts to situations requiring authoritative resolution, along with the behavior of lawyers seeking to influence those enforceable rules and outcomes. More simply put, legality involves adjudication. Its focus is on legal rules, the adversary process, and legal reasoning. I define proactive lawyering to mean lawyers' practices enabling the realization of social norms and goals by individuals, groups, and institutions in situations operating in the shadow of formal law. It calls upon lawyers to "integrate not only the 'is' and 'ought,' but the 'is,' the 'ought,' and the 'what might be.'"[6] Proactive lawyering bears many of the markers of leadership—utilizing skills and practices enabling others to identify and pursue their needs and goals, communicate effectively, resolve conflicts, solve problems, and design settings that facilitate productive human interaction. Proactive lawyering operates at the intersection of professional practice and purposeful human interaction.

Although many law schools continue to be organized around legality's logic of learning to "think like a lawyer,"[7] in recent years law schools have expanded offerings cultivating proactive lawyering, including clinical legal education, added experiential learning requirements, and introduced interdisciplinary offerings and courses focused on problem-solving, deal-making, and alternative dispute resolution.[8] Some doctrinal teachers incorporate critical methodologies into their teaching and experiment with experiential pedagogy in the

6. Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

7. *See infra* Section I.A.

8. *See infra* Section I.B.

conventional law school classroom. Most recently, law schools, including my own, have focused explicit attention on cultivating lawyer-leadership skills.[9]

Notwithstanding these developments, most law schools have yet to come to terms with how to prepare students—and the legal profession—to navigate the tensions between legality and proactive lawyering.[10] They have tended to avoid, sidestep, or downplay the tendency of legality to crowd out proactive lawyering, and of legal education's culture to undercut efforts to promote students' transformative potential. The prevailing strategy for promoting the capacity to navigate these opposing aspects of lawyering could be called "add and stir." Much of the literature either explicitly or implicitly assumes that proactive lawyering can be added into the law school curriculum as supplementary competencies.[11] A case in point is a report urging that lawyers "be equipped with a broad range of 'complementary competencies' that supplement and expand the 'core' competencies of legal reasoning and analysis that have been traditionally taught in law school and emphasized in legal practice."[12]

The complementarity argument goes something like this: the current law school curriculum (and the accompanying pedagogy) emphasizing the development of legal analytical skills are valid and should continue to be the center of the law school curriculum and pedagogy. It is, however, too narrow. It does not adequately equip students to navigate the array of challenges they will face in their multiple roles, to take up the leadership that society calls upon lawyers

9. *See Leadership*, COLUM. L. SCH., https://www.law.columbia.edu/areas-of-study/leadership (last visited Nov. 17, 2021). As of March 2019, more than 50 law schools reported having some type of leadership programming and/or courses. Leah Teague, *A Message from the Chair-2019*, SEC. ON LEADERSHIP (Mar. 8, 2019), https://sectiononleadership.org/2019/03/.

10. There are law schools that have faced this challenge head on as part of their creation, such as CUNY Law School, Northeastern Law School, and more recently, University of California at Irvine. *See History*, CUNY SCH. L., https://www.law.cuny.edu/about/history/ (last visited Aug. 15, 2019); *UCI Law Historical Timeline*, UCI L., https://www.law.uci.edu/10th/timeline.html (last visited Aug. 15, 2019).

11. *See* Georgia Sorenson, *The Nexus Between Leadership Theory and Law*, *in* LAW AND LEADERSHIP: INTEGRATING LEADERSHIP STUDIES INTO THE LAW SCHOOL CURRICULUM 19, 19-32 (Paula Monopoli & Susan McCarty eds., 2013); Larry Richard, *Leadership Competencies in Law*, *in* LAW AND LEADERSHIP: INTEGRATING LEADERSHIP STUDIES INTO THE LAW SCHOOL CURRICULUM 35, 35-53 (Paula Monopoli & Susan McCarty eds., 2013); *see also* Amanda Perry-Kessaris, *Legal Design for Practice, Activism, Policy and Research*, 46 J.L. & SOC'Y 185 (2019) (focusing on legal design for activism which exposes and remedies biases and inequalities).

12. BEN W. HEINEMAN, JR., WILLIAM F. LEE & DAVID B. WILKINS, LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY 9 (2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf.

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

This "complementarity" strategy sidesteps fundamental ways that legal education geared toward cultivating legality operates in tension with—and sometimes in opposition to—the kind of learning and practice required for proactive lawyering. Much of the literature promoting proactive lawyering treats the capacities and mindsets celebrated in the Socratic classroom—judgment, categorization, critique, risk minimization, and reasoning from precedent—as limitations to be overcome or minimized. Perhaps most fundamentally, the notions of justice embraced by legality as opposed to proactive lawyering directly collide.[13] Unless these tensions are addressed, features of legal education operating within the conventional paradigm are likely to marginalize and undercut the efforts to build lawyers' proactive lawyering capacities.

B. Reframing Legality's Dualities as Paradoxes

The concept of paradox holds the key to navigating these contradictory yet linked aspects of lawyering. A paradox is a statement or proposition with positions that are conflicting and yet both are true.[14] Paradoxes involve struggle because they call upon mindsets or practices that tend to interfere with each other, even as they depend upon each other. A growing body of organizational and change literature offers insights into both how paradoxes operate and how they can operate virtuously rather than as a vicious cycle.[15] This literature points toward finding ways to live with and learn from the tensions, instead of ignoring or trying to eliminate them.

In key respects, the paradoxical elements of lawyering are built into law's structure, role, and practice. At the level of *structure*, formal and informal constitutions (such as contracts) set up law both to provide

13. *See infra* Section II.E.

14. *See* KENWYN K. SMITH & DAVID N. BERG, PARADOXES OF GROUP LIFE: UNDERSTANDING CONFLICT, PARALYSIS, AND MOVEMENT IN GROUP DYNAMICS 3-18 (1987); Peter Elbow, *Embracing Contraries in the Teaching Process*, 45 C. ENG. 327, 300 (1983).

15. *See infra* Section I.B.

structures and processes enabling people to interact, cooperate, and make decisions, on the one hand, and to enable people to fight without violence and to abide by decisions that will be backed by force, on the other. Lawyers sit at the cusp of these paradoxical functions.[16]

These tensions also inhere at the level of *role*. Lawyers are called upon to build relationships, design contracts, enable cooperation and collaboration, "constitute" governments, facilitate transactions,[17] solve problems, and facilitate wise decision-making. They must simultaneously be ready to fight on behalf of clients, to be the stewards of the adversary process, and to discipline the exercise of the violence of the state. These roles are in tension. They are also interdependent. Lawyers cannot conduct a trial without both cooperating and fighting. They cannot steward an effective deal without both minimizing and facilitating risk-taking.

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

The tensions that manifest in the relationship between legality and proactive lawyering lie at the heart of what makes lawyers distinctive, necessary, and effective. The most successful and impactful lawyers live in these tensions. The role of law and lawyers fundamentally involves the capacity to combine these contradictory modes of thinking, acting, and interacting. This capacity to hold paradox may be what equips lawyers to exercise truly effective leadership.[18] It matters both for lawyers in more conventional roles and for those who, over the course of their careers, will occupy formal leadership roles in the public,

16. Robert Cover brilliantly portrayed these dualities as a defining feature of law: "Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative." Cover, *supra* note 6, at 9.

17. Lawyers help facilitate transactions as part of their roles in making deals, crafting contracts, working as in-house counsel, structuring public policymaking, navigating the break-down of long-term relationships, and conducting alternative dispute resolution.

18. *See* ROBERT J. ANDERSON & WILLIAM A. ADAMS, MASTERING LEADERSHIP: AN INTEGRATED FRAMEWORK FOR BREAKTHROUGH PERFORMANCE AND EXTRAORDINARY BUSINESS RESULTS 94 (2016) ("The ability to hold opposites, conflict, tension, and polarity, without avoiding them, over-simplifying them or resorting to quick fixes is the hallmark of leadership.").

private, and non-profit sectors.[19] When lawyers without this capacity occupy leadership roles, that deficit may help us understand the spectacular failures that unfold when they get stuck on one side or the other of the paradox. The challenge facing law schools is to figure out how to build that tension—and the capacity to manage it—into their practices and cultures. Law school can have a profound impact on how lawyers approach the paradoxical aspects of their roles. It offers a unique opportunity to forge a dynamic relationship between legality and proactive lawyering.

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

II. DEFINING THE DUALITY

Legality and proactive lawyering employ different and, in some respects, opposing logics that are also interdependent. Before we can explore the duality's paradoxical nature, we must first define its two sides.

Section A identifies and briefly describes three defining attributes of legality: formality, authority, and adversarialism. These pillars of legality's logic also anchor the contradictions built into legal education

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

and lawyering. Section B first identifies the forms of practice falling under the rubric of proactive lawyering, and then identifies the features that operate alongside and, in certain respects, in tension with legality in both the law school curriculum and legal practice: informality, a focus on efficacy, and collaboration.

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

Legality lies at the heart of conventional legal education and of law's claim to legitimacy.[20] Law school initiates students to the legal profession by schooling them in a distinctive mode of thinking, relating, and motivating action, which has come to define what it means to "think like a lawyer."[21] This is conventionally conceived to mean engaging in formal, adversarial modes of argumentation and decision-making, governed by precedent and backed by sanctions.[22] The first-year curriculum focuses primarily on teaching students legal reasoning, argumentation, and decision-making as the operating system for the rule of law, which functions as lawyers' default mode of thinking and acting.[23] For many lawyers and commentators, traditional legal methods and analysis "should continue to be at the core of legal education, as well as of any plausible professional licensing regime."[24]

Legality's domain is not limited to judges and the lawyers appearing before them. Administrative agencies, legislatures, and organizations also deploy legality's processes and analytical tools to enhance their decisions' legitimacy.[25] Students often learn about

20. I am using "legality" as a descriptive rather than evaluative term, to connote the modes of reasoning and decision making that characterize widely shared features that define what it means to operate under the rule of law. I am in good company in using the term "legality" in this manner. *See, e.g.*, Lauren B. Edelman, *Legality and the Endogeneity of Law*, *in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK (Robert A. Kagan et al. eds., 2002); H.L.A. HART, THE CONCEPT OF LAW (1961); PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969).

21. HEINEMAN, LEE & WILKINS, *supra* note 12, at 9.

22. *See id.* at 59; ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007); FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009); SELZNICK, *supra* note 20; *see also* Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 607 (2007).

23. HEINEMAN, LEE & WILKINS, *supra* note 12, at 13.

24. *Id.* The MacCrate Report, intended to spark curricular reform in legal education, states that "law schools should continue to emphasize the teaching of 'legal analysis and reasoning,' and 'legal research.' " AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 234 (1992) [hereinafter MACCRATE REPORT].

25. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 14 (2008); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1951 (2020); Sarah A. Seo, *Democratic*

administrative agencies, legislatures, or business transactions by reading appellate decisions that deal with unresolved conflicts occurring in those settings, and by applying an adversarial mode of inquiry to analyzing the work of these institutions. Legality provides the stamp of legitimacy associated with the rule of law.[26]

The literature analyzing what it means to "think like a lawyer"—and how legal education teaches the mastery of adjudicatory lawyering—focuses on three defining features: formality, authority, and adversarialism. These features combine to structure how law students, particularly in their first year, learn to reason, communicate, interact, and orient their learning.[27] Together they operate as "a now canonical practice of legal analysis,"[28] an operating system that orients many students' professional identity as lawyers. These pillars of legality's logic also anchor the contradictions built into legal education and lawyering.

1. Formality

Formality is one of legality's most visible and defining features. The actors operating within the legal system occupy formal roles that define their authority and structure their relationships (lawyer, client, judge, legislator, administrator, etc.). Professional and legal norms dictate how people in different legal positions communicate and relate to each other. People refer to each other by role (Judge, Professor), and their interactions often take place in venues that structure the form and boundaries of interaction among the participants in the adversary process. Classrooms are organized to resemble courtrooms, with attention focused on the professor and the judge as the arbiter of interaction. The relationships of professor and student, lawyer and client, judge and litigant operate within a ritualized structure with a prescribed form.[29] Learning the law involves becoming acculturated to

Policing Before the Due Process Revolution, 128 YALE L.J. 1246, 1248 (2019); Edelman, *supra* note 20, at 187; *see also* Sim B. Sitkin & Robert J. Bies, *The Legalistic Organization: Definitions, Dimensions, and Dilemmas*, 4 ORG. SCI. 345 (1993).

26. Edelman, *supra* note 20, at 187; Sitkin & Bies, *supra* note 25.

27. *See* MERTZ, *supra* note 22; Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007).

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

29. MACCRATE REPORT, *supra* note 24, at 242-44 (observing that the predominant form of pedagogy in the law school classroom is dissecting an appellate case, and that a minority of students have exposure to other aspects of legal interaction); SCHAUER, *supra* note 22, at 9-10 (describing the traditional Socratic ritual between professor and student demonstrating

the formality of space, language, roles, and relationships in the classroom and the law school culture.[30]

Formality also prescribes the prevailing mode of thought for judges, lawyers, and law students. Legal reasoning—reasoning analogically, formally, and from precedent—is "what distinguishes lawyers from other sorts of folk."[31] Legal norms "characteristically satisfy certain formal conditions—such as generality—which are usually taken to be necessary conditions also for justice."[32] Legal reasoning proceeds by identifying the relevant legal categories and placing people's conduct into those categories.[33] In this sense, formality operates as defining feature of "the rule of law": "to move from a nonlegal to a legal mode of governance is to move to a situation where there will be a special and explicit concern for treating like cases alike, for universalization, and for proceeding in a rule-like manner."[34] Although legal analysis has moved beyond formalism, formality continues to remain alive in legal thought, with its emphasis on predictability, uniformity of treatment, reasoning from precedent, and transparency.[35]

2. Legitimacy grounded in authority

Legality prioritizes rule-based decision-making, precedent, and reliance on authority as the source of law.[36] "A legal system is known by the existence of authoritative rules."[37] Argumentation and decision-making proceed by reasoning from precedent and authority—essentially backward-looking analytical and logical analysis assessing whether the conduct falls within the scope of an authoritative legal rule or principle.[38] Decisions turn on the dictates of written-down

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to the "hapless student" how "the best legal outcome may be something other than the best outcome for the immediate controversy.").

30. MERTZ, *supra* note 22 (providing through a detailed ethnographic study of the first year law school class the process by which law students become acculturated to formal, hierarchical modes of interaction that normalize power imbalances and make value choices seem neutral); Sturm & Guinier, *supra* note 27 (showing how the culture of legal education defines students' conception of lawyering in terms of adversarial, formalized conflict, overseen by professors and judges, and resolved through win-lose choices).

31. SCHAUER, *supra* note 22, at 1.

32. Jeremy Waldron, *Does Law Promise Justice?*, *in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK, *supra* note 20, at 110.

33. *See* Cover, *supra* note 6, at 6-7.

34. Waldron, *supra* note 32, at 110.

35. SCHAUER, *supra* note 22, at 32-33 (describing law's formalism as pervasive).

36. *Id.* at 5; EDWARD LEVI & FREDERICK SCHAUER, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990).

37. SELZNICK, *supra* note 20, at 5.

38. LEVI & SCHAUER, *supra* note 36.

rules, applied in new situations.[39] Individual judgment operates under the constraint of precedent.[40] "It is the precedent's source or status that gives it force, not the soundness of its reasoning nor the belief of the instant court that its outcome was correct."[41]

Law students and lawyers are socialized to value this mode of thought as fundamental to what it means to "think like a lawyer."[42] Students learn to support their arguments for how a case should turn out with authority and reasoning by analogy to precedent, rather than with what they think is right or just, might improve the situation, or produce a better outcome.[43] This form of reasoning is counter-intuitive; it dictates, "[o]utcomes other than those the decision-maker would otherwise seem to be the best all-things-considered outcome for the case at hand."[44]

Authority operates within legality in a second important respect: as a way to enforce compliance with legal norms. A distinguishing feature of law is its relationship to state-sanctioned coercion. Legality relies ultimately on the power of the state to enforce norms and thus to motivate behavior. Legal actors achieve adherence through the imposition of legal requirements, the expression of legal duties to comply with those responsibilities, threats of negative consequences for failing to adhere, and when necessary, coercion.[45] The motivation for adhering to norms is basically extrinsic, in the form of duty, incentives, threats, and force.[46]

Both of these aspects of authority relate to one crucial function of law: as Larry Alexander and Frederick Schauer have written, "an important—perhaps the important—function of law is its ability to settle

39. *Id.*

40. *Id.* at 2-3.

41. SCHAUER, *supra* note 22, at 41; *see also* SELZNICK, *supra* note 20, at 12 (arguing that law's legitimacy derives from emphasis on authoritative sources as a way to cabin arbitrariness).

42. SCHAUER, *supra* note 22, at 7-8.

43. *Id.* at 8-9.

44. *Id.*

45. *See* Cover, *supra* note 6, at 7-8.

46. *See id.*; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 42 (Gráinne de Búrca & Joanne Scott eds., 2006) ("The American legal system stands ready to commit vast resources to the determination and evaluation of past conduct in order to calibrate present reward or punishment to it."); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role Of Motivation In Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1934 (2009) ("[T]he law operates in the first instance as an external motivator that defines wrongful behaviors and penalizes people who engage in them . . . ."); Cover, *supra* note 6, at 40 (defining law as necessarily jurispathic because it involves norms backed by the violence of the state).

authoritatively what is to be done."[47] In Philip Selznick's words, "the special work of law is to identify claims and obligations that merit official validation and enforcement."[48]

3. Adversarialism

A third defining feature of legality is adversarialism: two opposing sides put their best arguments forward, enabling a neutral decision-maker to reach a correct decision based on the merits of those arguments.[49] Adversarialism constructs conflict as a contest between competing positions. Each situation has two opposing sides, and the process will produce a winner and a loser. Within the adversary model, lawyers are understood to have a fiduciary duty to advance the interests and improving the situation of one party as against the interests of the opposing party.[50] Lawyers' ethical responsibilities to their clients stem from a commitment to the adversary system, incarnated in the Model Rules of Professional Responsibility.[51]

From the outset, students learn that the adversary process is the gold standard for the rule of law. In the conventional law school classroom, adversarial conflict provides the underlying framework of interaction, knowledge generation, and problem-solving. As presented in most law school classes, law addresses conflict in highly formal settings aimed at determining winners and losers. Problems are converted into binary options, and they are "resolved" by using authority and rigorous analysis to test the strength of those options. Competition functions to establish

47. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997).

48. SELZNICK, *supra* note 20, at 5.

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

50. *Id.*; *see* Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 551 (1994) ("In the litigation context, the client's preferred position is given shape through the norm of zealous advocacy: the lawyer must vigorously assert the client's interests; the final authority on important issues of strategy rests with the client; and the client may discharge his lawyer at will, but the lawyer has only limited ability to withdraw from representation."); Geoffrey C. Hazard, *Lawyer for the Situation*, 38 VAL. U. L. REV. 377, 378 (2004).

51. *See* William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, GEO. J. OF LEGAL ETHICS 1, 9 -10 (2010) (acknowledging that the Model Rules incarnate adversarialism but critiquing legal ethics scholars for failing to incorporate ordinary morality as part of resolving ambiguities in what adversarialism requires).

the truth. The adversary process and rank ordering define success as winning that competition—in class, in an argument, in the courtroom, or elsewhere.[52]

The conventional law school classroom mirrors adjudication's adversarial and formal idea of conflict. The professor structures interactions with students by invoking the style of an appellate judge who questions lawyers representing one side or the other to ferret out the weaknesses in their positions and validate winning arguments.[53]

The adversary process holds a special place in the prevailing professional and public understanding of what it means to be governed by the rule of law.[54] Felix Frankfurter's oft-cited quote from *Joint Anti-Fascist Refugee Comm. v. McGrath* conveys the essence of the commitment to adversarialism as a hallmark of legality:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[55]

Legality's defining features—formality, authority, and adversarialism—orient students to the legal profession and shape how many in the legal profession understand what it means to "think like a lawyer." Legality casts a shadow over non-adjudicatory aspects of lawyering, such as negotiations and client counseling.[56] These defining features also figure prominently in the popular understanding of law and lawyering.[57] In conventional pedagogy, jurisprudence, and scholarship, legality is often contrasted with other modes of thought and decision making—politics, personal preferences, bargaining, mediating, organizing, managing—as a way of differentiating law from other modes

52. Sturm & Guinier, *supra* note 27.

53. *See* MERTZ, *supra* note 22, at 7-8; SCHAUER, *supra* note 22, at 9.

54. *See* Alexander & Schauer, *supra* note 47, at 1371.

55. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

56. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing how lawyers conduct settlement negotiations in light of the outcomes they would be likely to achieve if the case went to trial); ROBERT MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000) (describing how lawyers conduct settlement negotiations in light of the outcomes they would be likely to achieve if the case went to trial).

57. Merriam-Webster's definition of "law" embodies legality's features: "binding custom or practice of a community: a rule of conduct or action prescribed . . . or formally recognized as binding or enforced by a controlling authority." *Law*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/law (last visited Nov. 18, 2021).

of decision making and aspiring to make good on legality's promises of predictability, generality of understanding and application, legitimacy, and order.[58]

Though legality has endured as the default logic in most law schools, it has been the focus of waves of critique by legal scholars, educational reformers, and students.[59] Legal realists criticized the court-centered and formalistic focus of legality, both in practice and in legal education, and sought to widen or shift the focus to include systematic empirical study, sociological jurisprudence, and the legislative realm.[60] Critical legal scholars, critical race theorists, and feminist theorists have challenged basic assumptions underlying legality–that politics could be separated from law, that law operates neutrally, and that legal doctrine rather than power and ideology dictates judicial outcomes.[61] Commentators have criticized legality for its disconnection from practice and its failure to prepare students for the full array of competencies required for effective lawyering. Legality conveys an overly narrow idea of lawyers' roles if it addresses lawyering at all. These critiques have prompted the introduction of courses that extend beyond legality, with features quite different from those called for by legality.

B. Legality's Duality: Proactive Lawyering

Although legality has maintained its canonical status in legal education, lawyers and academics alike recognize that law and lawyering also entail ways of thinking, relating, and practicing that do not conform to legality's conventions.[62] Though these practices occur in different venues, they share features requiring overlapping competencies and roles that can be cultivated systematically if they are

58. *See* SELZNICK, *supra* note 20 (contrasting law with other forms of public decision making); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (differentiating adjudication from voting and agreement as forms of social ordering). Roberto Unger eloquently summarizes the animating idea of contemporary law and legal doctrine "as a binary system of rights of choice and of arrangements withdrawn from choice the better to make the exercise of choice real and effective." UNGER, *supra* note 28, at 27, 65.

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

60. *See* JEROME FRANK, COURTS ON TRIAL 161-62 (1949); Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008). The realist critique is summarized in SCHAUER, *supra* note 22, at 124-34.

61. *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (1983) (critiquing that the American legal education a reinforces class, race, and gender inequality); UNGER, *supra* note 28.

62. *See* Fuller, *supra* note 58 (embracing lawyers' roles in contracting, politics, and legislation, along with adjudication); *see also* MACCRATE REPORT, *supra* note 24.

recognized as part of the same field of practice. These lawyering practices also bear a similar relationship to legality: they both conflict with legality's defining features and are integrally linked with legality's operation.

This Article uses the term "proactive lawyering" as the umbrella for the full range of lawyering activities that involve taking the steps needed to meet needs, address problems, and achieve goals.[63] The umbrella term of proactive lawyering refers to lawyers' roles and practices that enable individuals, groups, and institutions to realize collective aims in situations operating in the shadow of legal rules. It includes lawyers' role as what Lon Fuller referred to as the *architect of social structure*: creators and managers of the various forms of legal order.[64] Fulfilling this architectural role requires close attention to problems of institutional design, in which the concern is with ends as well as means. Proactive lawyering also includes lawyers' roles as *problem solvers*: actors whose role is to help people and institutions move in the desired direction, where there is no obvious path from the current situation toward the desired outcome, again where legal rules operate in the background. Finally, proactive lawyering includes lawyers' roles in combining the human and professional dimensions of lawyers' adjudicative roles. These three dimensions all fall within the dictionary definition of proactive: "acting in anticipation of future problems, needs, or changes."[65]

I also use "proactive" as an acronym to convey the range of roles and practices that lawyers engage in that share these features:

P	**P**roblem solver
R	**R**esearcher **R**eflective practitioner

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

64. Lon Fuller, *The Lawyer as Architect of Social Structure*, *in* THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 269 (Kenneth Winston ed., 1981), *quoted in* David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998).

65. *Proactive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/proactive (last visited Sept. 14, 2021).

O	**O**bserver
A	**A**dvisor **A**rchitect of social structure
C	**C**ounselor **C**apacity builder **C**hange agent
T	**T**ranslator **T**ransaction engineer **T**hought partner
I	**I**ntermediary **I**nstitutional designer **I**nformation integrator
V	**V**alues maximizer
E	**E**nabler **E**ducator **E**thicist

Lawyers' proactive roles as architects of social structure, problem solvers, and humanistic lawyers demand a shared set of practices, skills, and mindsets that operate in tension with those called for by legality. This section first catalogues the domains that regularly employ proactive lawyering. It then identifies three features that characterize proactive lawyering: informality, a focus on efficacy, and collaboration.

1. A map of proactive lawyering domains

Lawyers are called upon to engage in proactive lawyering both as part of their work representing clients in litigation and in the many domains of legal practice operating outside of adjudication.

a. Aspects of adjudication requiring practices beyond legality

Although legality structures the logic of analysis and decision making in adjudication, the processes required for adjudication to occur, as well as for giving force to resulting judgments, cannot proceed only through legality. They also require more collaborative, informal, and facilitative modes of thought, interaction, and practice. Interactions with the client leading up to litigation involve advising, counseling, and

fact-gathering.[66] Discovery and trial preparation calls for non-adversarial, forward-looking interactions with opposing counsel, experts, and potential witnesses. Indeed, the Federal Rules of Civil Procedure demand that lawyers work together at every critical juncture of litigation.[67] The rules, along with mutual self-interest, also yield incentives and processes to induce settlement.[68] Indeed, most cases settle, meaning that even for litigators, lawyers (encouraged by judges) will resolve cases through informal interactions aimed at achieving mutually agreed-upon resolution, which in turn requires cooperation with client and adversaries.[69] Remedies, particularly injunctive remedies, also call upon courts and lawyers to construct forward-looking solutions that can effectively address legal violations.[70]

Even within legal doctrinal analysis, modes of thinking beyond conventionally defined legality come into play. As legal theorists and critics have noted, classic legal reasoning (meaning using logic, analysis, analogy, and precedent to decide cases) cannot actually resolve cases where the legal rule is ambiguous, the situation is complex, and competing policies dictate different outcomes. Where there is no clear rule or applicable precedent, courts and lawyers must grapple with competing values.[71] Some mode of decision-making beyond logic and analogy is needed to select among these competing values.[72]

b. Non-legalistic judicial arenas

A panoply of judicial arenas—some old and some new— do not conform in significant respects to the pillars of legality envisioned by the first-year curriculum and instead operate with a logic that emphasizes

66. *See generally* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991).

67. *See, e.g.*, Fed. R. Civ. P. 16, 26, 37, 68.

68. *See* Gilson & Mnookin, *supra* note 50, at 516.

69. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459–570 (2004) (describing the growing predominance of alternative dispute resolution as opposed to adjudication as the means of resolving conflicts).

70. *See* Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1364-65 (1991); Joanne Scott & Susan Sturm, *Courts as Catalysts; Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUROPEAN L. 565 (2006); *see also* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1055 (2004).

71. *See* UNGER, *supra* note 28, at 115; *see generally* Michael C. Dorf, *The Supreme Court 1997 Term – Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998).

72. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379-80 (2007) (quoting ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 10-11 (2005)).

problem-solving and conflict resolution. Family court,[73] juvenile court, problem-solving courts[74] (such as drug courts and homelessness courts), and bankruptcy courts all depart significantly from conventional adjudication and rely heavily on informal processes.[75] Their focus is on problem solving and remediation. Their method relies heavily on collaboration and strives to minimize adversarialism. In addition, many litigants proceed *pro se*; many court systems have adapted their roles and practices to adapt to this reality, often in ways that do not hew closely to the demands of legality.[76]

c. Non-adjudicative legal practice

Alongside their roles in processing adversary conflict, law and lawyers are called upon to structure and facilitate human interactions enabling individuals, groups, communities, and polities to achieve shared goals, produce value, and solve problems. Many aspects of legal practice operate outside of the confines of the legality framework and require different mindsets, competencies, and practices. Alternative dispute resolution takes place both in the shadow of the law and outside the formal legal system.[77] Mediation and negotiation are a mainstay of legal practice. These processes and practices come into play both as an explicit form of conflict resolution and in the process of everyday interactions with clients, collaborators, and adversaries.

Lawyers also are engaged in problem-solving as a crucial aspect of their counseling, facilitation, advising, and intermediary roles.[78] They help clients, organizations, communities, and systems address problems

73. ELEANOR E. MACCOBY ET AL., DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 52-54 (1992) (noting divorces resolved through negotiation).

74. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 829 (2000) (discussing the experimentalist and collaborative architecture of the drug courts); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851 (1997) (discussing the need for moving beyond adjudication in criminal justice, family court, and jury system).

75. *See* Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 100-01 (2011).

76. Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 253 (2018).

77. *See, e.g.*, CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2018); MNOOKIN, PEPPET & TULUMELLO, *supra* note 56; *see also* THE NEGOTIATOR'S FIELDBOOK 616 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

78. Paul Brest & Linda Hamilton Krieger, *Lawyers as Problems Solvers*, 72 TEMP. L. REV. 811 (1999); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 793–94 (1999); Sturm, *From Gladiators to Problem Solvers*, *supra* note 2 (exploring the features of a problem-solving approach to legal education and lawyering).

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

Transactional lawyering and lawyers representing organizations certainly employ legality as part of their practice, but their roles and relationships are much more facilitative and oriented toward enabling clients to achieve their aims. [79] They add value by sharing non-legal knowledge, facilitating collaboration, serving as intermediaries, building trust, problem-solving, and designing systems of mutual accountability and problem-solving. All of these aspects of transactional lawyering call for informal, constructive, integrative, and forward-looking modes of thinking, relating, and motivating practice. Lawyers representing organizations (both for-profit and non-profit) operate both inside and outside the legality frame, using mindsets and strategies focused on enabling the organization to achieve its goals while minimizing legal risk.[80]

Human rights practice is another area that calls upon lawyers to play roles beyond legality. Core human rights practices call for changing norms and practices through political mobilization and building the capacity of directly affected communities to advocate on their own behalf.[81] Human rights practice thus rests upon multidimensional lawyering, using informal norms, building alliances, marshaling public opinion, building the capacity of directly affected communities to advocate on their own behalf, and marshaling informal incentives and tools to hold individuals, corporations, and governments accountable, realize rights, and advance change.

Movement lawyering and social change lawyering increasingly involves these multi-dimensional strategies and roles, operating alongside law reform and litigation strategies. [82] Although litigation continues to play a central role in social change work, lawyers and legal

79. Gilson & Mnookin, *supra* note 50, at 3 (celebrating lawyers' roles in value creation and allocation).

80. *See* BJARNE P. TELLMANN, BUILDING AN OUTSTANDING LEGAL TEAM: BATTLE TESTED STRATEGIES FROM A GENERAL COUNSEL 34-40 (2017).

81. JO BECKER, CAMPAIGNING FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE (2012); TRICIA CORNELL, KATE KELSCH & NICOLE PALASZ, NEW TACTICS IN HUMAN RIGHTS: A RESOURCE FOR PRACTITIONERS (2004) (describing the importance of mobilizing power and tactical mapping as core human strategies important for lawyers).

82. Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 7 (2015); *see also* KIMBERLY AUSTIN, ELIZABETH CHU & JAMES LIEBMAN, RE-ENVISIONING PROFESSIONAL EDUCATION (2017), https://cprl.law.columbia.edu/sites/default/files/content/Publications/CPRL_2017_Re-envisioning%20Professional%20Education_FINAL.pdf.

scholars utilize an array of methods, with litigation embedded in a broader theory of change aimed at having an impact.[83]

d. New forms and institutions of legal decision making

Finally, law and lawyering practices and roles are adapting to the demands of highly complex, uncertain, and troubled times by forging new institutional forms that can accommodate volatility, complexity, and uncertainty. These forms emphasize collaboration, peer-to-peer learning, experimentation, and adaptability. Legality's limits have also prompted some scholars to call for an expansion of what we mean by legality to include institutional reimagination and redesign.[84]

Some of this work focuses on expanding or rethinking the role of the judiciary to operate in dynamic relationships with other institutional actors that develop effective modes of problem solving and innovation.[85] Some focus on linking informal dispute resolution and problem solving with the process of generating public norms.[86] Some focus on constructing and linking intermediary institutions and "organizational catalysts" that will spur ongoing learning, mutual accountability, and adaptive norms.[87] These new forms, emerging in both theory and practice, call for more collaborative, creative, and learning-focused modes of law and lawyering.

2. Proactive lawyering's defining features

The proactive lawyering practices discussed in the previous section are all aimed at enabling individuals, groups, and institutions to achieve their goals and aspirations in a world shaped but not fully defined by law. This section describes three key features of proactive lawyering practices and roles: (1) informality, (2) legitimacy grounded in efficacy,

83. *See generally* Goldberg, *supra* note 82; Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25 (2011).

84. *See, e.g.*, Michael C. Dorf, *The Supreme Court 1997 Term – Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Rakoff & Minow, *supra* note 22, at 602 (calling for pedagogy developing students' legal imagination–"the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well-honed analytic skills").

85. *See* Sabel & Simon, *supra* note 70; *see also* Scott & Sturm, *supra* note 70 (arguing for courts' roles in structuring deliberation by other actors in accordance with rule-of-law values).

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

87. *See* Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 46, at 2-3; Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 287 (2006).

and (3) collaboration. Each of these modes of practice operates in tension with a core feature of legality.

a. Informality

Proactive lawyering contrasts with legality in its emphasis on informality. Its processes call for flexibility and adaptability in both roles and modes of thinking, and the capacity to tailor the mode of reasoning and relationship to the demands of the situation. Its modes of thought and action emphasize adaptability rather than adherence to established procedures. Whereas legality calls for prescribed modes of interaction and relationships defined by roles, non-legalistic processes rely on effective communication, experimentation, and interactions that build understanding, learning, and the capacity to work together. The modes of interaction are designed to encourage relationships that foster trust and connection. Participation is defined not by formal status (party, attorney of record, judge) but by the stake an individual might have in addressing an issue and their power to affect the desired outcome (either positively or negatively). Structure serves the role of facilitating purposeful and effective informal interaction rather than prescribing the modes of interaction and decision-making.

b. Legitimacy grounded in efficacy

Proactive lawyering prioritizes efficacy—defined as the ability to produce a desired or intended result, to enable problem-solving and the achievement of goals.[88] The gaze is forward-looking rather than backward-looking, and focused on impact rather than predictability.[89] Problem-solving is integral to proactive lawyering;[90] it requires facilitating a process of understanding, specifying, diagnosing, and seeking to achieve the desired state.[91] This role corresponds to Robert Cover's capacious definition of law as the relationship between the "is," the "ought," and the "what might be."[92]

88. The dictionary definition of efficacy is the ability to achieve the desired result. The focus on achieving desired outcomes is central to the definition of lawyers as problem solvers. *See generally* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Sturm, *From Gladiators to Problem Solvers*, *supra* note 2.

89. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 177-78 (2004) (describing a pragmatist turn that emphasizes desired impact in the future, rather than remediation of rights violations, emphasized by legal liberalism).

90. Problem solving is the first skill identified in the MacCrate Report setting out key lawyering competencies. MACCRATE REPORT, *supra* note 24, at 135.

91. Brest & Krieger, *supra* note 78, at 812.

92. Cover, *supra* note 6, at 10.

Proactive lawyering's inquiry is exploratory rather than adjudicative: how can the lawyer or decision-maker facilitate the achievement of goals and the furtherance of purposes? What will it take to effectuate the desired outcome? What actually will work to address the problem, rather than what category or legal significance does this problem involve?[93] This mode of engagement relies on creativity, innovation, imagination, and the strategic use of information to craft effective solutions and resolutions that satisfy the participants and meet the demands of the situation.[94] Power stems not from authority and the capacity to enlist coercion but instead from influence, persuasiveness, and demonstrated capacity to achieve desired outcomes.[95]

c. Collaboration

Proactive lawyering prioritizes collaboration. Its success depends on enabling people affected by, interested in, and responsible for an issue to work together, even across competing interests and opposing positions.[96] Processes like learning from failure, deliberation, experimentation, design thinking, problem-solving, and innovation get their power from bringing diverse perspectives together to learn with and from each other. They call for engaging with difference not as a way to evaluate the merits of each but instead to enable effective learning from peers, adversaries, and outsiders, and interacting that enables creative solutions and effective implementation. Trust is a necessary lubricant of these interactions.[97]

93. *See* Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 367 (2004) (describing the role of lawyers in deliberative problem solving and building consensus based solutions that meet stakeholders' needs); Rakoff & Minow, *supra* note 22, at 602 (lawyers need "the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills"); Simon, *supra* note 89, at 179-80 (emphasizing a focus on future collective benefit rather than compensation for past wrongdoing).

94. *See* MACCRATE REPORT, *supra* note 24, at 151-52.

95. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 110-16 (1992).

96. *See* HEINEMAN, LEE & WILKINS, *supra* note 12, at 15 ("We need lawyers who are not just strong individual contributors but who have the ability to work cooperatively and constructively in groups or on teams that are increasingly diverse and multidisciplinary—and who can lead these teams effectively."); Cohen, *supra* note 86, at 503 (showing how new governance and negotiation practice together connect problem solving techniques to building citizen participation and new governance).

97. Amy Cohen's description of juvenile and family courts identifies informality, conciliation, and anti-adversarialism as characteristics enabling these courts to provide "social justice" in contrast to "legal justice," provides an example of the contrast between legality and proactive law and lawyering. *See* Cohen, *supra* note 75.

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

Adjudicatory Lawyering	**Proactive Lawyering**
Formality	Informality
Authority	Efficacy
Adversarialism	Collaboration

II. WHAT MAKES LAWYERING PARADOXICAL?

Law and lawyering call for both adjudicatory and proactive lawyering, as exhibited by the previous section. Yet, these opposite modes of thought, interaction, and experience sometimes operate at cross-purposes and even contradict each other. These opposing mindsets and practices are nonetheless interdependent and mutually constitutive. In short, they are paradoxical.

Although students and scholars alike have observed the tensions built into lawyering,[98] the significance of their paradoxical nature has been largely overlooked. A burgeoning literature demonstrates that paradoxes operate as a particular form of duality that affect how those tensions are experienced and whether they will undermine or facilitate the pursuit of both sides of the duality.[99] The paradox lens thus offers a conceptual tool for engaging productively with the tensions between legality and proactive lawyering, paving the way for the practical strategies set out in Part IV.[100]

98. *See, e.g.*, CULLEN, *supra* note 4; PHILIP C. KISSAM, THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS (2003) (describing paradoxes in legal education, identifying practices at cross-purposes, and holding out little hope for significant change); RHODE, *supra* note 19; Richard, *supra* note 11.

99. *See, e.g.*, Wendy K. Smith, Marianne W. Lewis, Paula Jarzabkowski & Ann Langley, *Introduction: The Paradoxes of Paradox*, *in* THE OXFORD HANDBOOK OF ORGANIZATIONAL PARADOX 1 (Wendy K. Smith et al. eds., 2017) (ebook); LINDA A. HILL ET AL., COLLECTIVE GENIUS: THE ART AND PRACTICE OF LEADING INNOVATION (2014); BARRY JOHNSON, POLARITY MANAGEMENT: IDENTIFYING AND MANAGING UNSOLVABLE PROBLEMS, at viii (4th ed. 2014); Moshe Farjoun, *Beyond Dualism: Stability and Change as a Duality*, 35 ACAD. MGMT. REV. 202-25 (2010); Charles A. O'Reilly III & Michael L. Tushman, *Ambidexterity as a Dynamic Capability: Resolving the Innovator's Dilemma*, 28 RES. ORGANIZATIONAL BEHAV. 185 (2008); SMITH & BERG, *supra* note 14; Wendy K. Smith & Marianne W. Lewis, *Toward a Theory of Paradox: A Dynamic Equilibrium Model of Organizing*, 36 ACAD. MGMT. REV. 381 (2011).

100. Scholars and commentators have sometimes used other language to describe a similar phenomenon, including "polarities," JOHNSON, *supra* note 99, at 270; "dualities," Farjoun, *supra* note 99, at 205; *contradictions*, "dilemma," "dichotomy," and "dialectics," Smith & Lewis, *supra* note 99, at 385.

In the legal and scholarly literature about lawyering, the term "paradox" is often used interchangeably with "dilemma," but these two dualities have very different implications for how to proceed.[101] A dilemma is a necessary choice between mutually exclusive alternatives, each with advantages and disadvantages.[102] Bernard Williams uses the example of a comfortably seated person who is both lazy and thirsty.[103] The person could grab drinks located elsewhere, but that would mean exerting energy and giving up their comfortable position.[104] An either/or choice must be made. Unlike a dilemma, a paradox involves truths that are contradictory but interdependent rather than mutually exclusive. Peter Elbow, a scholar of teaching and learning, offers an example of a paradox in the context of teaching and learning: "students seldom learn well unless they *give in* or submit to teachers. Yet, they seldom learn well unless they *resist* or even reject their teachers."[105] As a paradox, this tension cannot be resolved; the demand for the contradictory elements is built into the situation.

The tension between individuals and groups illustrates the potentially paralyzing impact of paradoxes. Kenwyn Smith and David Berg have shown that groups become strong and resourceful only if the individuality of their members is expressed.[106] Individual expression, however, sparks group conflict—that is, conflict capable of fostering novel understandings and disrupting group decision-making and performance.[107] Each method of disposing of the conflict gives rise to a new set of tensions; the attempt to unravel these contradictory forces creates a circular process that can be paralyzing to groups.[108] Smith and Berg also show that paradoxes can become a source of learning and change.[109]

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101. *See, e.g.*, RHODE, *supra* note 19; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Scott L. Cummings, *Introduction: What Good Are Lawyers?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 1 (Scott L. Cummings ed., 2011).

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

103. Bernard A. Williams & W.F. Atkinson, *Ethical Consistency*, 39 PROC. ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES 103, 104 (1965).

104. *Id.*

105. Elbow, *supra* note 14, at 65. This "authority paradox" resembles the justice paradoxes, explored more fully in *infra* Section II.E.

106. SMITH & BERG, *supra* note 14, at 90-93, 102.

107. *See* Charles Sabel, *Studied Trust: Building New Forms of Cooperation in a Volatile Economy*, 46 HUM. REL. 1133, 1145-46 (1993).

108. SMITH & BERG, *supra* note 14, at xxxii-xxxiii, 225.

109. *Id.* at 215-16, 222-24; *see also* JOHNSON, *supra* note 99; Smith & Lewis, *supra* note 99, at 391-93.

The first step in putting the paradox concept to work is to understand how paradoxes are operating. This Section aims to facilitate that understanding by naming the recurring paradoxes facing lawyers, and what makes them both conflicting and interdependent—that is, paradoxical. Drawing on the scholarly literature, teaching experience, and field research, I have identified five lawyering paradoxes that stem from the opposing yet interdependent features of legalistic and proactive lawyering: (1) paradoxes of thought; (2) relationship; (3) motivation; (4) mindset; and (5) justice.

A. Thought Paradoxes: Methodological Skepticism v. Methodological Possibility

The modes of thought characterizing legality as compared to proactive lawyering could be thought of as two competing methodologies, or systematic ways of thinking about issues or challenges lawyers face.[110] Legality employs a methodology of skepticism, emphasizing critical thinking, logic, categorization, argumentation, vigilance, detachment, evaluation, and judgment. Proactive lawyering employs a methodology of possibility, emphasizing creativity, intuition, seeing patterns, learning from difference, innovation, empathy, experimentation, openness, and synthesis.[111] The methodologies of skepticism and possibility thus pull in different directions in their thought processes, aims, emotional valence, and role expectations.[112]

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110. This discussion of competing methodologies is inspired by Elbow's articulation of competing methodologies he detected in the context of teaching and learning. He defines "methodological doubt" as "the systematic, disciplined, and conscious attempt to criticize everything no matter how compelling it might seem–to find flaws or contradictions we might miss" and "methodological belief" as "the equally systematic, disciplined and conscious attempt to believe everything no matter how unlikely or repellent it might seem—to find virtues and strengths we might otherwise miss. Both derive their power from the very fact that they are methodological." Elbow, *supra* note 14, at 257-58.

111. *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 51-52 (2011). A methodology of possibility draws on what Kahneman calls System 1 thinking. Those characteristics include generating impressions, feelings, and inclinations, suppresses doubt, cognitive ease, and associative thinking. *Id.* at 51-52.

112. Duncan Kennedy's pathbreaking work also informs this typology. Kennedy juxtaposes the hermeneutic of suspicion vs. hermeneutic of restoration. Duncan Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary Legal Thought* 1-3 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931428; Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary Legal Thought*, 25 L. & CRITIQUE 91, 106-07 (2014). For a discussion of the mechanisms that account for the oppositional character of these modes of thought, *see* KAHNEMAN, *supra* note 111, at 24-26; TERESA AMABILE & STEVEN KRAMER, THE PROGRESS PRINCIPLE: USING SMALL WINS TO IGNITE JOY, ENGAGEMENT, AND CREATIVITY AT WORK 31 (2011).

Legality's mode of argument and decision-making is logical, analytical, and backward-looking.[113] As a popular text on legal reasoning and writing observes:

> Your documents will be read by judges and supervising lawyers who must make decisions based on what you have written. They won't read out of general curiosity. They are decisional readers and need you to be a decisional writer . . . Your readers are skeptical by nature and for good reason. Skepticism helps them make better decisions. Their job is to look for weaknesses in your analysis. If they find any, your writing is not helpful to them, and they will react negatively to it. But if your readers can't find any weaknesses, they will rely on you, respect you as a professional, and be grateful for your guidance.[114]

Legality requires careful thinkers who are what Daniel Kahneman calls engaged System 2 thinkers:[115] "alert, intellectually active, less willing to be satisfied with superficially attractive answers, and more skeptical about their intuitions."[116] The discipline of analysis and interpretation holds legal thinkers to institutionally authorized forms of reasoning that respect institutional roles and rules.[117]

A methodology of skepticism thus prioritizes effort, sustained attention, reasoning, and slow thinking required to "construct thought in an orderly series of steps" through criticism, caution, making comparisons, planning, exercising choice, and "checking the validity of a complex logical argument."[118]

Legality also explicitly invites—indeed, requires—judgment and evaluation. Adjudicatory lawyering harnesses ceremonial contest—using dialogue to get ideas or propositions to wrestle with one another so as to expose contradictions in what had been assumed.[119] It proceeds by placing conduct and people into categories and attaching judgment to those categories. Legal inquiry determines fault. Decision-making involves isolating cause and allocating responsibility to one side as opposed to another. It casts parties as opposing and invites each party to focus on the weaknesses of the other side's position. It proceeds by

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113. *See supra* Section I.A.

114. RICHARD K. NEUMANN, JR., ELLIE MARGOLIS & KATHRYN M. STANCHI, LEGAL REASONING AND LEGAL WRITING 58 (9th ed. 2021).

115. System 2 is "the conscious reasoning self that has beliefs, makes choices, and decides what to think about and what to do." KAHNEMAN, *supra* note 111, at 21.

116. *Id.* at 46.

117. *See* MICHELE DESTEFANO & GUENTHER DOBRAUZ, NEW SUITS: APPETITE FOR DISRUPTION IN THE LEGAL WORLD 96-98 (2019).

118. KAHNEMAN, *supra* note 111, at 21, 22.

119. This aspect of methodological skepticism is not unique to legal analysis, *see* Elbow, *supra* note 14, at 262. However, conventional legal analysis privileges this mode of thought.

narrowing the areas of dispute and reaching a clear, singular, and unequivocal outcome. This mode of thought undergirds legality's relationship to rule-of-law values. It disciplines the exercise of power, cabins discretion, and clothes legal decision-making with the imprimatur of principles over personal biases.[120]

Rules, precedent, and authority serve to justify the use of force to back up legal decisions.[121] Robert Cover's path-breaking work illuminated this relationship between violence and law's legitimation: "Beginning with broad interpretive categories such as 'blame' or 'punishment,' meaning is created for the event which justifies the judge to herself and to others with respect to her role in the acts of violence."[122] Legality thus allows decision-makers to justify imposing decisions with serious consequences, including violence.

Proactive lawyering, in contrast, calls for contextual, forward-looking and creative thinking.[123] This mode of thought is sometimes called lateral thinking; moving beyond purely linear, analytical thought and shifting mental paradigms.[124] "The lateral thinking attitude involves firstly a refusal to accept rigid patterns and secondly an attempt to put things together in different ways. With lateral thinking one is always trying to generate alternatives, to restructure patterns."[125] Proactive lawyering prizes innovation,[126] unlike legality, which privileges authority over efficacy.[127]

A methodology of possibility draws on what Kahneman calls System 1 thinking: generating impressions, feelings, and inclinations, suppresses doubt, cognitive ease, and associative thinking.[128] Many of the texts used to develop proactive lawyering capacities discourage comparing, categorizing, and assigning responsibility, all of which are

120. *See supra* Section I.A.

121. *Id.*

122. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1061, 1608 (1986), https://digitalcommons.law.yale.edu/ylj/vol95/iss8/7.

123. *See supra* Section I.B. Metaphor and narrative featuring prominently in the methodology of possibility, or what Robert Cover calls world-creating or juris generative. *See also* Cover, *supra* note 6, at 12-13, 15; Menkel-Meadow, *supra* note 78, at 807-08.

124. EDWARD DE BONO, LATERAL THINKING: CREATIVITY STEP BY STEP (2011); *see also* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995) (describing the importance of story as a complement to analytical and logical analysis in legal advocacy).

125. DE BONO, *supra* note 124, at 53.

126. *See* DESTEFANO & DOBRAUZ, *supra* note 117, at 97-98.

127. *See* SCHAUER, *supra* note 22, at 9-10 (highlighting that thinking like a lawyer means applying authoritative rules rather than figuring out what might be best under the circumstances).

128. *See* KAHNEMAN, *supra* note 111.

integral to formal, authority-based thinking.[129] Design thinking, problem-solving, and facilitating difficult conversations explicitly discourage the critical and backward-looking mode of thought that is the hallmark of legality. Rather than assigning fault or responsibility, the modes of thought associated with proactive lawyering promote mapping joint contributions,[130] understanding root causes, and generating multiple and even conflicting approaches to a problem. The goal of proactive lawyering is to "understand what actually happened so we can improve how we work together in the future."[131] Predictability is not possible or even desired.[132]

Innovation has been identified as a crucial competency and practice by design thinkers, experimentalists, and transactional lawyers.[133] Proactive lawyering calls for expanding options, understanding connections, intuition, and legal imagination, a form of thinking that enables its practitioners to produce a more robust definition of the problem at hand, and a more plural version of possible solutions. Legal imagination involves "the ability to generate the multiple characterizations, multiple versions, multiple pathways, multiple solutions" to which students then apply "very well-honed analytic skills."[134]

This mode of thought contrasts with the requirements of legality. Legality's skepticism cuts against the more imaginative and improvisational form of thinking integral to problem-solving, brainstorming, and design thinking:

> Though lawyers tend to make a sport out of shooting down ideas as quickly and thoroughly as possible—whether it's because 'they've been tried before,' an instinct says that 'it won't work,' or otherwise. But the designer's mindset pushes us to explore and test ambitious ideas before trashing them . . . . We've been trained as lawyers to

129. This pattern surfaces in the literature on design thinking, empathetic listening, interacting across differences, and having difficult conversations. *See, e.g.*, MICHELE DESTEFANO, LEGAL UPHEAVAL: A GUIDE TO CREATIVITY, COLLABORATION, AND INNOVATION IN LAW (2018); MARSHALL B. ROSENBERG, NONVIOLENT COMMUNICATION: A LANGUAGE OF LIFE (3d ed. 2015); CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 56-62 (2017); DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (10th-anniversary ed. 2010); Perry-Kessaris, *supra* note 11; Margaret Hagan, *Law By Design*, LAW BY DESIGN, http://www.lawbydesign.co/en/home/ (last visited Sept. 15, 2021).

130. STONE, PATTON & HEEN, *supra* note 129, at 78-79.

131. *Id.* at 60.

132. TIM BROWN, CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION 17 (2009).

133. Hagan, *supra* note 129; Perry-Kessaris, *supra* note 11.

134. Rakoff & Minow, *supra* note 22, at 602.

> poke holes and give critiques, but often that stops us from creating new things or supporting others who are doing so.[135]

Authors seeking to cultivate this mindset of creativity, empathy, and possibility explicitly caution against the methodology of skepticism called for by legality. They emphasize the imperative of *not* judging, *not* blaming, *not* comparing or categorizing, and *not* assigning responsibility. In *Difficult Conversations: How to Discuss What Matters Most*, a book widely used in negotiations classes and in training lawyers, the authors designate the "blame frame" as "a bad idea" that will get in the way of handling a difficult conversation.[136] Proving we are right gets in the way of "understanding the perceptions, interpretations, and values of both sides."[137] The goal is to move away from judging the truth of each party's position, establishing who is right and who is wrong, or allocating blame. Talking about fault "produces disagreement, denial, and little learning. It evokes fears of punishment and insists on an either/or answer,"[138] (the essence of the adversarial process). Blame and responsibility "distract us from exploring why things went wrong and how we might correct them going forward."[139] Instead, the methodology of possibility calls for systematic effort to see and experience the ideas of others as the speaker does, to listen with appreciation. This mode of inquiry "forces us to enter into unfamiliar or threatening ideas instead of just arguing against them without experiencing them or feeling their force."[140]

These differing modes of thought produce different default modes of communication. Legality proceeds through argumentation and advocacy. The form of communication also reflects law's formality. Dialogue within legal interactions has an instrumental purpose. It produces the facts and law needed to advocate, persuade, and decide. Clients and witnesses—those who directly experience the interactions giving rise to the facts—supply that information to the formal actors who turn those experiences into facts that become the focus of analysis. The focus of attention is on questions such as: What rule or principle applies to this situation? What category does this situation fit into? How does

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135. Hagan, *supra* note 129, at *Design Mindsets*.

136. STONE, PATTON & HEEN, *supra* note 129, at 59.

137. *Id.* at 10.

138. *Id.* at 11-12.

139. *Id.* at 12.

140. Elbow, *supra* note 14, at 263. The emphasis is not on trying to construct or defend an argument but rather to transmit an experience or enlarge a vision. This mode of thought asks, "not what are your arguments in support of a [silly] belief," but instead "[g]ive me the vision in your head. You are having an experience I don't have: help me to have it." *Id.* at 261.

this situation or actor compare to other situations that have previously been decided? What are the problems with this argument? What have other courts or authoritative sources previously decided and with what reasoning?

This mode of communication invites "level 1" or "focused listening." [141] The spotlight is one's own thoughts, judgments, and conclusions. Listening serves to get the information needed to decide how to use or act on what one learns from another person, on what that information means for your own positions, evaluation, or response. The focus of awareness is on the relationship of the facts to relevant legal categories.[142] The thought process proceeds by comparing the situation at hand to other situations to determine their legal significance. The purpose of this analysis is evaluation and judgment. The structure, timing, and purpose of interactions flow from the aim of evaluating and judging for the purposes of producing a decision. The personal stories underlying the facts presented in legal decisions matter only in so far as they relate to the relevant legal categories.[143]

For interactions aimed at building a relationship, difficult conversations, designing innovative solutions, or solving problems, however, arguing "is not helpful . . . [It] inhibits with the ability to learn how the other person sees the world."[144] In contrast, the practices of proactive lawyering invite "a move from certainty to curiosity, from debate to exploration, from simplicity to complexity."[145] This stance of curiosity is embraced in design thinking, conflict resolution, coaching, systems thinking, and problem-solving. The purpose of inquiry is understanding, integrating, and making sense of differing perspectives. Communication adopts a both/and, rather than a yes/but stance. Even if you are convinced you are right, the conversation is not about establishing who's right. The focus is on working out a way to connect that will enable you to move forward.

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141. HENRY KIMSEY-HOUSE ET AL., CO-ACTIVE COACHING: CHANGING BUSINESS, TRANSFORMING LIVES 33-34 (3d ed. 2011) (introducing level 1 listening as a focus on what the information means to the listener); Susan Sturm, Listening 1 Pager (2021) (unpublished manuscript) (on file with author).

142. Lawyers are expected to convert legal theories to factual propositions, as part of developing the arguments they might present to adversaries' lawyers, judges, juries, arbitrators, or mediators. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 83 (4th ed. 2019).

143. MERTZ, *supra* note 22, at 9 ("When handed a case to read, you now automatically check to see what the court did in reaching its decision. Poignant, glaring, pitiful stories of human drama and misery begin to sail easily past you, as you take them expertly in hand and dissect them for the 'relevant' facts.").

144. STONE, PATTON & HEEN, *supra* note 129, at 26, 29.

145. *Id.* at 37.

The methodology of possibility thus calls for Level 2 or focused listening and Level 3 or global listening.[146] The idea is not to categorize but instead to understand, learn, and see the possibility for two stories that conflict and still coexist. Design thinking also calls for this focus on communicating to learn about and engage intended beneficiaries: "to deliver to [them] something that will be useful and usable to them, first [you] need to understand them. This means caring deeply about their needs, their values, and their behavior."[147] Rather than engaging in arguments and counterarguments, this approach invites questions such as: "what's interesting or helpful about the view? What are some of the intriguing features that others might not have noticed? What would you notice if you believe this view? If it were true? In what sense or under what conditions might this idea be true?"[148]

The aims of adjudicatory as compared to proactive modes of thought pull in different directions. Legality aims to produce a single, certain right answer, a singularity of meaning that will decide a particular conflict. Its aim is to narrow the scope of the dispute and settle on a single answer that disposes of the conflict. Proactive lawyering, at least at some stage of the process, generates multiple possibilities.[149]

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

> [G]ood mood, intuition, creativity, gullibility, and increased reliance on System 1 form a cluster. At the other pole, sadness, vigilance, suspicion, an analytic approach, and increased effort also go together. A happy mood loosens the control of System 2 over performance: when in a good mood, people become more intuitive and more creative but also less vigilant and more prone to logical errors . . . . Cognitive ease is both a cause and a consequence of a pleasant feeling.[150]

"Recent research has also revealed that emotions can have both positive and negative effects on a range of work behaviors, including creativity,

146. *See* KIMSEY-HOUSE, *supra* note 141, at 36, 38 ("At Level II, there is a sharp focus on the other person. . . Level II listening is the level of empathy, clarification, collaboration. . . When you listen at Level III, you listen as though you . . .were surrounded by a force field.").

147. Stephanie Dangel, Margaret Hagan & James Bryan Williams, *Reimagining Today's Legal Education for Tomorrow's Lawyers*, *in* MAPPING LEGAL INNOVATION: TRENDS AND PERSPECTIVES 383, 391 (Antoine Masson & Gavin Robinson eds., 2021).

148. Elbow, *supra* note 14, at 275.

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

150. KAHNEMAN, *supra* note 111, at 69.

decision making, and negotiations."[151] For example, positive feelings can lead to greater flexibility in problem solving and negotiations.[152] By contrast, negative emotions narrow and restrict the social and cognitive environment; at the same time, they facilitate careful and unbiased judgment.[153]

Notwithstanding their oppositional relationship, methodological skepticism and methodological possibility depend upon each other for their successful realization and even give rise to their opposite twin even as they resist that call. Judgment and evaluation require the input of accurate and reliable information that can only be obtained through forms of inquiry that do not prejudge or evaluate, and that employ empathy, appreciate listening, and learning.[154] Clear rules and boundaries can, under certain conditions, actually enable creativity. Linear and logical analysis alone cannot reach a resolution in situations of ambiguity and competing values, at least if it is to proceed with integrity and legitimacy.

Critical legal scholars, legal process scholars, and pragmatic lawyers alike have called for incorporating the methodology of possibility into adjudication's methodology of skepticism. Roberto Unger shows that conventional legal analysis leads to discovering the limits of legal analysis and the dependence on more proactive and imaginative modes of thought:

> When we begin to explore ways of ensuring the practical conditions for the effective enjoyment of rights, we discover at every turn that there are alternative plausible ways of defining these conditions, and then of satisfying them once they have been defined. For every such conception, there are different plausible strategies to fulfill the specified conditions . . . . Thus, a method designed to vindicate conceptual unity and institutional necessity revealed unimagined diversity and opportunity in established law.[155]

Hard cases—where existing precedent cannot resolve value conflicts that would produce different outcomes—introduce the necessity of generating (and then choosing between) multiple plausible ways of proceeding or prioritizing values. The multiplicity of possibilities, in

151. AMABILE & KRAMER, *supra* note 112, at 31.

152. Barbara Fredrickson provides research associating positive emotions—such as joy, amusement and interest—with broadening perspectives; they build social and intellectual resources. *See generally* BARBARA L. FREDRICKSON, POSITIVITY: DISCOVER THE UPWARD SPIRAL THAT WILL CHANGE YOUR LIFE (2009).

153. KAHNEMAN, *supra* note 111, at 60, 65.

154. *See* BINDER ET AL., *supra* note 66, at 2-4; MACCRATE REPORT, *supra* note 24, at 151-52.

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

turn, generates a need for resolution among those possibilities, either to enable progress toward a goal or to resolve conflicts.

Thought paradoxes also cut in the opposite direction: the methodology of possibility requires engagement with the methodology of skepticism to succeed. Critical feedback is crucial to learning and improvement, even as it discourages the disclosures necessary to enable that critique to happen. Intuition and creativity are susceptible to bias, which requires a methodology of skepticism as a form of accountability.[156] Design thinking, innovation, and problem-solving require boundaries to enable creativity, as well as ways to deal with conflict that cannot be resolved through dialogue. Researchers have documented the critical role of boundaries, limits, and rules in setting the conditions that enable creativity.[157] Indeed, design thinking makes explicit the need for both types of thinking by calling first for flaring–the generation of ideas without critique and then for funneling–critical analysis of those ideas (even as it generally fails to address the tensions between them).[158]

Thought paradoxes are built into law at the level of the meaning, structure, and operation of law. Law operates through the simultaneous operation of practices and precepts that create the possibility for creative and cooperative action, while also affording the vehicle for preventing destructive conflict by imposing general norms backed by the force of the state.

Lawyers operating within conventional legal thought are called upon both to accept the constraints of conventional legal analysis even when those constraints operate against problem-solving, while they are also called upon to find ways to solve the problems that clients bring to them. As problems increase in complexity and the limits of rule-based solutions become more evident, lawyers operating in both the public and private sectors occupy positions that call for creativity alongside critique.[159]

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156. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31 (2007) ("[I]ntuitive, heuristic-based decision making led the judges to make erroneous decisions that they probably would have avoided had they adopted a deliberative approach.").

157. *See* O'Reilly & Tushman, *supra* note 99, at 188; Elbow, *supra* note 14; KAHNEMAN, *supra* note 111, at 99.

158. Olga Trusova, *Dealing with Ambiguity: Flaring and Focusing for Creative Problem-Solving*, MEDIUM: STAN. D.SCH. (Nov. 29, 2020), https://medium.com/stanford-d-school/dealing-with-ambiguity-flaring-and-focusing-for-creative-problem-solving-6b3a5f6d6ead ("Creativity requires divergent thinking and convergent thinking, two distinct modes that imply different behaviors . . . ."); Perry-Kessaris, *supra* note 11, at 110.

159. Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U. L. REV. 529, 531 (2019).

Thus, although conventional 1L curriculum and jurisprudence equate "thinking like a lawyer" with the thought processes of legality, lawyering actually involves a broader and sometimes conflicting array of thought processes that depend upon each other for their effective operation.[160]

B. Relationship Paradoxes: Strategic vs. Trust-based

A second set of paradoxes built into lawyer's roles involves the tension between strategic and trust-based relationships. Legality and proactive lawyering promote different and sometimes conflicting yet intertwined practices and assumptions related to relationships. Legality, as rehearsed in the conventional law school classroom and the formal legal system, relies upon formal roles to define the contours and purpose of relationships. Relationships are instrumental, defined by formal roles and legal interests. Students are invited to step into the shoes of various legal personae; the relationships they develop both in the class and with the roles they play reflect the characters and settings defined by the "distinctively legal drama."[161] Selves are conceived, and relevant characteristics are defined by their relationship to the legal problem. Elizabeth Mertz documents this pattern of identity formation in the first-year classroom:

> As people in the cases become parties (i.e. strategic actors on either side of the legal argument), they are stripped of social position and specific context, located in geography of legal discourse and authority. Their gender, race, class, occupational, and other identities become secondary to their ability to argue that they have met various aspects of legal texts. These contextual factors do sometimes become salient to the discussions, but only as ammunition in just this way.[162]

Classroom discourse "models a split between the selves with which [they] approach problems: there is the personal opinion, which [they] hold in abeyance and over which they exercise control, and there is the professional response, which is 'agnostic' and whose primary goal is honing the students' discursive power."[163] Students are encouraged "to

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

161. MERTZ, *supra* note 22, at 97.

162. *Id.* at 131.

163. *Id.* at 122.

adopt a new, more distanced attitude toward morality and emotion."[164] Their effectiveness turns on their ability to strategize and make arguments, and to channel discomfort or emotion into arguments.[165] Relationships also have an instrumental character to them, defined by the purpose of the interaction. Dialogue is both central and scripted, with the lawyer and the judge setting the terms, flow, and areas of inquiry. Lawyer/client relationships (and currency of time for measuring value) set clear boundaries on the form, purpose, and scope of interactions, both between the lawyer and the client and among adversaries. Students learn to see and be able to argue both sides of an argument and to recognize the strengths and weaknesses of their own argument from the perspective of the other side.

Legality's ideal is "blind justice"—dispassionate application of rules to objectively determined facts, with decisions governed by reason rather than politics or emotion. Legality operates to maintain distance and minimize vulnerability and expression of emotion.[166] Emotional distancing enables lawyers and judges to exercise their roles requiring them to witness and even cause human pain, and thus both cope and escape responsibility:

> The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers.[167]

Conflict is managed indirectly by intermediaries, with the emphasis on producing a result that is favorable to the client or that warrants respect and adherence, rather than achieving understanding or reshaping the nature of the relationship among the parties. Those with a direct stake in the outcome of the legal context rely on representatives to speak on their behalf. Trust and legitimacy come from the fulfillment of role expectations, the ability to rely on the predictability and accountability built into the formal relationship, and transparency of the legal process. Conflict is managed through ritualized processes and representation, rather than by direct engagement of the stakeholders. Emotions are to be managed rather than worked through.[168]

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164. *Id.* at 24.

165. *Id.* at 124.

166. Oliver R. Goodenough, *Institutions, Emotions, and Law: A Goldilocks Problem for Mechanism Design*, 33 VT. L. REV. 395, 401 (2009) (discussing the law's operation as "a kind of circuit breaker against emotion-driven responses").

167. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 201 (1975).

168. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2014 (2010) (documenting the resistance to using law as a vehicle for

Proactive lawyering, in contrast, prioritizes building relationships of trust that enable people to work together, disclose sensitive information, share perspectives, and have difficult conversations. The development of mutual trust is key to lawyers' counseling and advising roles, as well as to structuring productive interactions that can achieve mutual aims.[169] Mobilizing people to achieve a common goal requires cultivating self-awareness and informal relationships in which people seek to connect, engage openly with emotions and needs, develop empathy, and build trust.

Effective collaboration calls for authenticity, connection, credibility, and empathy.[170] Proactive lawyering treats emotion as a driver of self-awareness, creativity, inspiration, and understanding. It calls for the willingness to take risks, which in turn both requires and builds relational trust. This calls for engaging with your own emotions and those of others, understanding your own and others' needs, seeing how aspects of experience beyond reason and rationality affect the way we think and act, and learning how to "have your feelings or they will have you."[171]

Domains where proactive lawyering predominates explicit call upon lawyers to understand and address human needs. New governance and negotiation "share methodological and normative commitments to purposive human development, to an expansive imagination of human possibilities, to the idea that these possibilities are expansive because human desires are dynamic and produced through social interaction.[172] Design thinking asks lawyers to develop mutual relationships where stakeholders speak in the first person and share their interests and needs:

> Being user-centered means **Being Participatory**, looping in stakeholders into your process. You can have the people you're working with join you in trying to create new solutions. Rather than

engaging emotion); Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching about Race and Gender*, 53 J. LEGAL EDUC. 531 (2003); BINDER ET AL., *supra* note 142, at 11-17 (grounding the need to address emotions in the outcome goals to be achieved through the adversary process).

169. Sabel, *supra* note 107, at 1133 (defining trust as "the mutual confidence that no party to an exchange will exploit the other's vulnerability"); Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1742 (2006).

170. *See* Bill George et al., *Discovering Your Authentic Leadership*, HARV. BUS. REV., Feb. 2007, at 4-7; *see also* RHODE, *supra* note 19, at 31.

171. STONE, PATTON & HEEN, *supra* note 129, at 85; ROSENBERG, *supra* note 129, at 37, 46 (emphasizing the importance of developing a fuller vocabulary for feelings); Abrams & Keren, *supra* note 168, at 2004 ("Efforts to exile affective response—a damaging outgrowth of historic dichotomizing—can produce legal judgments that are shallow, routinized, devaluative, and even irresponsible.").

172. Cohen, *supra* note 86, at 517.

> you playing the all-powerful expert who will solve their problems for them, the participatory approach means deferring to your users and other experts at key moments. The **users' voices should drive your work.**[173]

In contrast with legality's de-emphasis on identity, client-centered lawyering encourages recognizing and actively engaging with cultural differences.[174] Proactive lawyering generally highlights the role of developing empathy, which is a different kind of perspective-taking than seeing both sides of an argument. "Empathy involves a shift from my observing how you seem on the outside, to my imagining what it feels like to be you on the inside, wrapped in your skin with your set of experiences and background, and looking out at the world through your eyes."[175] Empathy, cultivated through reflective practice, is crucial for proactive lawyers.[176] Both enable lawyers to take account of how their own views and assumptions might color the kind of advice they offer, assess facts, and prioritize values.[177] "Emotion, a potential barrier to problem solving, when carefully understood and revealed is vulnerable to a set of strategies designed to enhance productive self-expression."[178] Engaging rather than ignoring emotions enables lawyers to address needs and values directly so they can be addressed as part of negotiation and problem-solving.[179]

Collaboration and team building also call upon lawyers to building informal relationships that enable trust building:[180]

> Even in highly stressful situations such as litigation, [lawyers] establish a working relationship whenever possible, including with their clients and even with opposing counsel and parties. They take a collaborative, noncompetitive approach to many situations, are good at listening, and are open to new ideas. [They] use a variety of information-gathering techniques to gather vital information through conversation, dialogue, questions, and interaction. They thoroughly vet their ideas with their colleagues, learn from their adversaries, and

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173. Hagan, *supra* note 129, at *Design Mindsets*.

174. *See* GROSE & JOHNSON, *supra* note 129, at 37-43.

175. STONE, PATTON & HEEN, *supra* note 129, at 183-84.

176. GROSE & JOHNSON, *supra* note 129; *see* MACCRATE REPORT, *supra* note 24, at 220.

177. GROSE & JOHNSON, *supra* note 129, at 54-55 (discussing the importance of cross-cultural communication in lawyering).

178. Cohen, *supra* note 86, at 525.

179. *See, e.g.*, Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 975 (2003) ("Practical deliberation . . . can work around value differences, and in the long run, even change them.").

180. Heidi K. Gardner, *Effective Teamwork and Collaboration*, *in* MANAGING TALENT FOR SUCCESS: TALENT DEVELOPMENT IN LAW FIRMS 145, 145–59 (Rebecca Normand-Hochman ed., 2013); Sabel, *supra* note 107 (documenting the malleability of trust and the conditions that enable trust to develop in repeat relationships).

> collaborate whenever possible. Through inquiry and collaboration, they develop their own emotional insights and inspire the same awareness and capacities in their team members.[181]

Proactive lawyering aims to build the capacity of stakeholders, parties, communities, and organizations to organize, deliberate, work together, solve problems, and pursue common goals.[182] Collaboration and relationship building are also important to learning, staying engaged, being able to work effectively in groups, and fulfilling group-related functions successfully, including those related to legality.[183] Technology, globalization, complexity, and market forces are forcing private practitioners and public interest lawyers toward collaboration.[184]

In *Collaborating with the Enemy*, Adam Kahane documents the conventional understanding of collaboration to push adversarialism and conflict into the shadows, and to proceed as if "we can problem-solve our way into the future."[185] He shows the paradoxical relationship between conflict and collaboration—the risk of unconstrained engaging.[186]

> Conventional collaboration focuses on engaging, and that does not make room for asserting, so it becomes ossified and brittle; it settles into a stupor and gets stuck . . . If we embrace harmonious engagement and reject discordant asserting, we will end up suffocating the social system we are working with.[187]

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

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181. CULLEN, *supra* note 4, at 11.

182. *See, e.g.*, Grinthal, *supra* note 83, at 41-42; Charles F. Sabel, *Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability*, 4 WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID [WRR] VERKENNINGEN 173, 176 (2004) (Neth.); Cohen, *supra* note 86, at 528 ("[I]nnovations, 'such as benchmarking, simultaneous engineering, continuous monitoring, error detection and root cause analysis,' make it possible to devolve decision-making control to 'civil society actors' in ways that promote 'social learning about the effective pursuit of the broad imprecise goals' . . . .") (citations omitted).

183. AUSTIN, CHU & LIEBMAN, *supra* note 82, at 4; Sturm & Guinier, *supra* note 27, at 534; Amy Edmondson, *Psychological Safety and Learning Behavior in Work Teams*, 44 ADMIN. SCI. Q. 350, 379 (1999).

184. *See* AUSTIN, CHU & LIEBMAN, *supra* note 82; DESTEFANO, *supra* note 129, at 4-10 (documenting the forces impacting the law market).

185. ADAM MORRIS KAHANE, COLLABORATING WITH THE ENEMY: HOW TO WORK WITH PEOPLE YOU DON'T AGREE WITH OR LIKE OR TRUST, at xii (2017).

186. *Id.* at 64.

187. *Id.* at 65.

On one hand, the approach to legal reading found in law school classrooms offers students a potentially liberating opportunity to step into an impersonal, abstract, and objective approach to human conflict. On the other hand, erasing (or marginalizing) many of the concrete social and contextual features of these conflicts can direct attention away from grounded moral understandings, which some critics believe are crucial to achieving justice.[188]

The tensions also work in the other direction. The distancing and detachment required by formality and adversarialism undercut the trust-building and interpersonal responsibility that is necessary to the effective implementation of norms.[189] William Simon illustrates this dynamic in his article on the impact of legalization on the welfare system: while the formalization of AFDC rules and procedures "seem[s] to have reduced the claimant's experience of oppressive and punitive moralism, of invasion of privacy, and of dependence on idiosyncratic personal favor. . . . [it] also [has] reduced their experience of trust and personal care and [has] increased their experience of bewilderment and opacity."[190] Formality also hides from view "the contextual and human factors that influence how people observe and interpret facts."[191]

Robert Cover conveys the irresolvable tension between proactive lawyering's organic norm communities and the relationship underlying legality.[192] Legality's relationship to state power and violence destroys the normative ties between a judge and those before the court, as well as those attached to the court's power:[193]

> [A]s long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organization of violence in making their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.[194]

Yet, both types of relationships are necessary for effective lawyering; law students and lawyers must learn to navigate this tension between relationships premised on strategic interaction and relationships

188. MERTZ, *supra* note 22, at 133-34.

189. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2100-01 (1989); Sabel, *supra* note 107; Sitkin & Bies, *supra* note 25, at 349.

190. William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 Yale L.J. 1198, 1220-21 (1983).

191. *See* Massaro, *supra* note 189, at 2101-02.

192. Cover, *supra* note 122, at 1617.

193. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1894 (1987); KISSAM, *supra* note 98, at 96.

194. Cover, *supra* note 122, at 1629.

oriented around building trust. Adversaries who cannot cooperate are less effective in making deals and settling cases.[195] Effective learning in law school depends upon being able both to operate in formal public settings and to build authentic relationships, take the risk of being wrong, and ask for help when you need it. Lawyers cannot obtain the information needed to build a case or design a deal without building a relationship of trust, which requires building empathetic relationships with clients, with whom they also have a formal and bounded professional relationship defined by instrumental aims. Litigation both invites mutual cooperation to avoid the limitations of solutions derived through adversary process and creates conditions that make cooperation difficult and even risky.[196] Effective lawyering requires both relationships of trust and the capacity to detach, assert positions, and fight when necessary.[197]

C. Motivation Paradoxes: Extrinsic vs. Intrinsic Motivation

Legality and proactive lawyering take contrary approaches to motivating behavior. Legality relies on extrinsic motivation—the desire for a "separable outcome," such as a reward or avoidance of a penalty,[198] while proactive lawyering emphasizes intrinsic motivation—engaging people in behavior "because it is interesting, enjoyable, satisfying, engaging, or personally challenging."[199]

Within legality's logic, the motivation for adhering to norms is basically extrinsic, in the form of duty, incentives, threats, and coercion.[200] Legality takes a compliance orientation and ultimately relies on force, or the power of the state to enforce norms and motivate behavior. Legal actors achieve adherence through the imposition of legal requirements, the expression of legal duties to comply with those responsibilities, threats of negative consequences for failing to adhere, and when necessary, coercion.[201]

Proactive lawyering, in contrast, emphasizes the importance of learning, shared purpose, inspiration, and participation as ways to

195. Gilson & Mnookin, *supra* note 50, at 514.

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

197. KAHANE, *supra* note 185, at 31; Goldberg, *supra* note 82, at 11-12 (noting strategies for combining collaborative and adversarial advocacy).

198. Bartlett, *supra* note 46, at 1934-35.

199. AMABILE & KRAMER, *supra* note 112, at 34.

200. *Id.* Extrinsic motivation is "the grasp of what needs to be done and the drive to do it in order to get something else." *Id.* at 33.

201. *See* references cited *supra* note 46.

motivate behavioral change.[202] These strategies deploy intrinsic motivation. Interpersonal commitments are characterized by reciprocal acknowledgment. Proactive lawyering's broader roles call for a different relationship to values and purpose, and highlight the importance of self-awareness, connecting to values, acting consistently with purpose, practicing one's values and principles.[203]

This tension between intrinsic and extrinsic motivations also plays out in the incentive structures shaping law students' and lawyers' choices. Many law students came to law school out of genuine and intrinsic interest in the law and a desire to advance deeply held public values and positive social change, but experience the pull of extrinsic motivations (grades, prestige, money) coming from law school and the legal profession.[204] A study of students at Yale Law School documents this tension between prestige and purpose that many students experience when they arrive at law school.[205] A similar tension operates in private practice as well.[206]

The tension between intrinsic and extrinsic ways of motivating behavior is well documented in legal, psychological, and economic literature. Scholars have shown that extrinsic motivation in the form of punishment, threat, carrots, and sticks, can crowd out intrinsic motivation, which is necessary for changes in behavior required for compliance with those norms.[207] "If extrinsic motivators are extremely strong and salient, they can undermine intrinsic motivation: when this happens, creativity can suffer."[208] The reliance on extrinsic motivations that coerce or induce compliance through threat of sanctions can

202. *See supra* Section I.B.2 (describing the features of proactive lawyering).

203. *See* HEINEMAN, LEE & WILKINS, *supra* note 12, at 64; *see also* RHODE, *supra* note 19, at 4, 66-67.

204. *See* PETE DAVIS, OUR BICENTENNIAL CRISIS: A CALL TO ACTION FOR HARVARD LAW SCHOOL'S PUBLIC INTEREST MISSION 71 (2017), http://hlrecord.org/wp-content/uploads/2017/10/OurBicentennialCrisis.pdf; John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School*, 51 U.C. DAVIS L. REV. 1973, 2032 (2018); Sturm & Guinier, *supra* note 27 at 535-37.

205. *See* SUSAN STURM & KINGA MAKOVI, FULL PARTICIPATION IN THE YALE LAW JOURNAL (2015), https://www.yalelawjournal.org/files/FullParticipationintheYaleLawJournal_otc6qdnr.pdf.

206. *See* Cummings, *supra* note 101, at 1-2.

207. Kristen Underhill has provided a useful analysis of the distinction between intrinsic and extrinsic motivations. *See* Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. REG. 213, 219-23 (2016).

208. AMABILE & KRAMER, *supra* note 112, at 35.

undermine the acceptance of the court's legitimacy, the willingness to take risks, and assume responsibility.[209]

Katherine Bartlett summarized these tensions in an article analyzing how law affects the internalization of norms related to discrimination.[210] On one hand, law provokes compliance by "symbolizing a consensus" that may challenge people to think critically about and perhaps revise biased thoughts. It may reinforce a self-identity consistent with complying with the law and educate others on what it means to be a good person. On the other hand, coercion may provoke resistance when people feel a law is unfair, or when it threatens their sense of identity or autonomy. Law may also be in a more fundamental tension with internal motivation: it may crowd out people's sense of responsibility to do the right thing in the absence of a coercive rule backed by a sanction.[211]

Another text aimed at promoting empathetic interaction puts it this way: "When we submit to doing something solely for the purpose of avoiding punishment, our attention is distracted from the value of the action itself. Instead, we are focusing on the consequences, on what might happen if we fail to take that action."[212] This leads to "diminished goodwill on the part of those who comply with our values out of a sense of either external or internal coercion."[213]

Robert Cover's work places this tension between extrinsic and intrinsic motivation in the context of a fundamental and unavoidable tension built into the meaning and structure and operation of law.[214] Law works through the simultaneous operation of practices and precepts that create the possibility for creative and cooperative action, while also affording the vehicle for preventing destructive conflict by imposing general norms backed by the force of the state. This produces an irreconcilable tension between law's "jurisgenerative" role in fostering and promoting creative and organic norm communities (which generate conflict among those communities) and law's "jurispathic" role in using

209. Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355, 1394-95 (1991) (documenting the tendency of defendants to resist court-imposed injunctions). The economic and psychological literature documents "how incentives may have counterintuitive and counterproductive effects on human behavior." Underhill, *supra* note 207, at 215-16; *see also* AYRES & BRAITHWAITE, *supra* note 95, at 50.

210. *See* Bartlett, *supra* note 46.

211. *See id.* at 1937.

212. ROSENBERG, *supra* note 129, at 188.

213. *Id.* at 15-16.

214. *See* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1992).

violence to enforce order-preserving norms (which undercuts those norm communities).[215]

This tension between intrinsic and extrinsic motivation is built into law school, lawyers' roles, and the legal system. Although the prevailing culture in many law schools skews that tension in favor of extrinsic motivations, adult educational theory demonstrates the necessity of both investing in students' growth and assessing their performance.[216] Likewise, part of law's value lies in its simultaneous proximity to power and its responsibility for enhancing value and values.

D. Mindset Paradoxes: Fixed vs. Growth Mindset

These differing constellations of thinking, communicating, and relating combine to produce competing mindsets with opposing approaches to conflict, failure, and risk. Within the frame of legality, conflict is a contest, with a winner and loser. The judicial system (or its equivalent when mimicked in other settings) is justified as operating as a theater of competition to displace and defuse violent conflict and increase the legitimacy of decision-making.[217]

Within the frame of proactive lawyering, conflict is a function of inevitable difference, a normal part of human interaction, and an opportunity for learning and growth. Conflict thus invites efforts to understand and explore ways to accommodate the feelings, needs, and requests of each participant in the conflict. Rather than identifying a winner and loser, the conflict resolution process aims to reframe the conflict to enable each participant to benefit in some way.

Competing approaches to failure also exemplify the tension between adjudicatory and proactive logic. In the context of the adversary process, mistakes and failures matter when they cross a legal line and make that behavior susceptible to a finding of fault. Thus, fault and mistakes are either a basis for entitlement to relief or for exposure to judgment. Failure means losing. Thinking and analysis focus on whether wrongful behavior occurred, if so whether it could be adjudged unlawful. Mistakes are to be minimized or avoided because they cause actionable harm or give rise to liabilities, or adjudged wrongful if they

215. *Id.* at 112 ("The conclusion emanating from this state of affairs is simple and very disturbing: there is a radical dichotomy between the social organization of law as power and the organization of law as meaning.").

216. *See* Elbow, *supra* note 14; Bonita London, Geraldine Downey & Shauna Mace, *Psychological Theories of Educational Engagement: A Multi-Method Approach to Studying Individual Engagement and Institutional Change*, 60 VAND. L. REV. 455, 459-67 (2007) (discussing the impact of situational and individual factors on students' reactions to external stress and competition).

217. *See* Edelman, *supra* note 20, at 199-201.

occur. For a law student, making a mistake on a cold call in class means not "getting it."[218]

In the context of proactive lawyering, failure plays a very different role. Failure operates as the driver of learning and growth. The important question is not whether the behavior violated a norm, but rather, *how can the relevant participants learn and change from the failures and mistakes?* The motto of design thinking is "fail early to succeed sooner."[219] The process of building effective teams and collaboration requires building conditions of psychological and identity safety.[220] The hallmark of psychological safety is being able to make mistakes without fear that you will be labeled or judged as a result. The driver of improvement in new governance is the identification of failures at the moment they occur by those closest to the problem.[221]

These different approaches to failure give rise to different orientations to risk, particularly under conditions of uncertainty. Legality invites treating legal risk as something to be minimized or avoided. It's risky to ask questions when you don't know the answer or to act in the face of legal uncertainty. Playing it safe means not taking actions that could invite litigation or judgment. In contrast, proactive lawyering calls for treating risk as a necessary part of learning, growth, and innovation.[222]

Legality and proactive lawyering also have diametrically opposed reactions to uncertainty. Legality treats uncertainty as something to be reduced and managed, and its unavoidability produces pessimism about law's capacity to address the issue.[223] Proactive lawyering (such as experimentalism, design thinking, deal-making, and negotiations) takes a contrary view:

> This incompleteness of facts, circumstances, priorities, and normative benchmarks is not necessarily a challenge to overcome or even a source of conceptual trouble. To the contrary, it provides the

218. Sturm & Guinier, *supra* note 27, at 523.

219. BROWN, *supra* note 132, at 174.

220. *See* Edmondson, *supra* note 183, at 379; Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY AND SOC. PSYCHOL. 615 (2008) (showing how identity threats undermine the performance and sense of belonging of students of color).

221. Simon, *supra* note 46, at 47.

222. *See* Ben W. Heineman, Jr., *Law* and Leadership, 56 J. LEGAL EDUC. 596, 600 (2006); DESTEFANO, *supra* note 129, at 68 (calling for lawyers to adopt an innovator's mindset in response to risk); Sturm, *From Gladiators to Problem Solvers*, *supra* note 2, at 136 (offering a problem-solving model that treats risks as part of the problem solving process).

223. Charles F. Sabel & William H. Simon, *Democratic Experimentalism*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

> basis for great optimism. It is precisely because interests and priorities are multiple and shifting rather than fixed and known to parties in advance of dialogue, that there are vast opportunities for individuals to innovate, collaborate, and solve very hard problems.[224]

Legality's approach to failure, risk, and conflict coalesces into a mindset or orientation that corresponds to what Carol Dweck has called a fixed mindset.[225] A fixed mindset equates success and failure with people's abilities, which are fixed. Success or failure defines who you are. Law's focus invites a fixed mindset by putting people in categories based on their past behavior and assigning meaning to that person based on those categories. Failure is equated with being wrong (or at least being found wrong), and thus with losing. Failure is therefore something to be avoided.

Individuals with a fixed mindset emphasize compliance, control, and satisfying expectations—all of which form an important (and desired) part of law school and legality. That pessimistic tendency has been defined as both a strength and an occupational hazard. "[T]he nature of what most lawyers do is that we hunt for the negative in order to protect our clients."[226] Studies have associated law students with this tendency to interpret the causes of negative events in stable, global and internal ways.[227] The pessimist will view bad events as unchangeable, and to approach circumstances with a fixed mindset. The optimist, in contrast, sees setbacks as temporary, and as a learning opportunity.[228]

Proactive lawyering both demands and cultivates a growth mindset.[229] Design thinking, experimentalism, mediation and negotiation, and problem-solving courts all emphasize the importance of learning and growth, the role of failure as a driver of growth and change, and the importance of creating environments and relationships that enable people to take risks, try out new ideas, and share what they don't know.

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224. Cohen, *supra* note 86, at 523.

225. CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 6 (2006); *see also* KATHRYNE M. YOUNG, HOW TO BE SORT OF HAPPY IN LAW SCHOOL 109 (2018).

226. Larry Richard, *The Mind of the Lawyer Leader*, LAW PRAC., Sep./Oct. 2015, at 47, http://www.lawyerbrain.com/sites/default/files/the_mind_of_the_lawyer_leader_aba_lpm.pdf.

227. *See* YOUNG, *supra* note 225, at 39.

228. *See* DWECK, *supra* note 225, at 9-11.

229. *See* DESTEFANO, *supra* note 129, at 41; Jay Harrington, *A Growth Mindset, Paired With Daily Deliberate Practice, Is Key to Lawyers' Business Development Success*, ATTORNEYATWORK (Aug. 12, 2020), https://www.attorneyatwork.com/growth-mindset; *see also* Matsuda, *supra* note 5 (describing the resilience needed for lawyers of color to use the law as a vehicle for transformation).

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

> We need lawyers who, in making recommendations or decisions, are capable of assessing all dimensions of risk but who are not risk-averse. Taking well-considered chances is not a quality of mind customarily associated with lawyers but is often vital to innovation and change in the public and private sectors.[230]

A growth mindset also enables law students to navigate the inevitable stresses and setbacks that students experience while they learn to "think like a lawyer." Yet, when learning and growth fail to produce a resolution, law and lawyers step in to impose one, using processes premised on a fixed mindset. Laws' connection to judgment necessitates operating within the fixed mindset. That aspect of lawyering fulfills a core function of the rule of law, as well as a paradoxical relationship with proactive lawyering's call for imagination, creativity, and learning from failure.

E. Justice Paradoxes: Formal vs. Substantive Justice

Finally, legality and proactive lawyering deploy conflicting yet intertwined conceptions of justice. Substantive injustice is baked into the legal system itself, even as that system offers tools to challenge an unjust status quo. Injustices inhere in the origins of the constitution upholding slavery while affording equality and fair process for some. From the outset, the formal rules protecting equal justice under law operate so that the "haves come out ahead," contributing to the starkly unequal access to justice pervading our legal system.[231] The methodology of legality is itself not neutral. Legal realists, critical theorists, critical race theorists, and feminist scholars have identified this contradiction between formal justice and justice as lived experience in the world as it actually operates.[232]

> Methods shape substance also through the hidden biases they contain. A strong view of precedent in legal method, for example, protects the status quo over the interests of those seeking recognition of new rights. The method of distinguishing law from considerations

230. *See* HEINEMAN, LEE & WILKINS, *supra* note 12, at 15.

231. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 99 (1974).

232. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 411 (2018) ("[A] central dilemma of liberal law reform projects, caught between a commitment to the rule of law and status quo arrangements on the one hand, and the desire for substantive justice and social, economic, and political transformation on the other.").

> of policy, likewise, reinforces existing power structures and masks exclusions or perspectives ignored by that law.[233]

This contradiction exemplifies "the conflict between the commitment to defining ideals and the acquiescence in the arrangements that frustrate the realization of those ideals or impoverish their meaning."[234] The challenge, then, is to figure out "how to maintain a normative commitment to the rule of law when we can foresee that this commitment will everywhere be betrayed by the actions of the very positive legal institutions charged with implementing the rule of law."[235]

Although the crisis of legitimacy in the Trump era is recent, the paradox is at least as old as the Constitution. Robert Cover documented the tension between positive and moral justice faced by judges charged with enforcing the law of slavery.[236] Martin Luther King powerfully communicated this dual character of law's justice in the Letter from the City of Birmingham Jail.[237] King explicitly called it "paradoxical" that a group that so diligently urges obedience to the laws outlawing segregation would consciously break the law.[238] He proclaimed the injustice of formal laws that "degrade human personality":

> An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.[239]

The judicialization of rights has the potential to inscribe inequality into law and "to amplify conflict and focus attention on it," and to "transform physical conflict into verbal disputes,"[240] as well as to "give public voice and force to people previously ignored, to make conflict audible and unavoidable."[241]

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

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233. Bartlett, *supra* note 46, at 845.
234. UNGER, *supra* note 28, at 129.
235. Post, *supra* note 5.
236. COVER, *supra* note 167, at 202.
237. Martin Luther King, Jr., *Letter from City of Birmingham Jail*, *reprinted in* WHY WE CAN'T WAIT 77 (1964), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.
238. *Id.*
239. *Id.*
240. MINOW, *supra* note 101, at 293.
241. *Id.*

> [L]aw and order exist for the purpose of establishing justice and that when they fail in this purpose they become the dangerously structured dams that block the flow of social progress . . . . Like a boil that can never be cured so long as it is covered up but must be opened with all its ugliness to the natural medicines of air and light, injustice must be exposed, with all the tension its exposure creates, to the light of human conscience and the air of national opinion before it can be cured.[242]

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

A second dimension of the justice paradox relates to the contradiction between law as a system of values and law as a value proposition.[243] The profession operates as both, and law schools similarly embody this tension between purpose and prestige. Here too, the relationship turns out to be paradoxical. Law's appeal—to future lawyers, clients, and change agents—resides in part in its proximity to power and resources, yet that relationship invites cooptation and acquiescence in the status quo at the expense of one's fulfillment.

Thus, lawyers must straddle five paradoxes built into the relationship between legality and proactive lawyering: (1) thought and discourse paradoxes, (2) relationship paradoxes, (3) motivation paradoxes, (4) mindset paradoxes, and (5) justice paradoxes. How law students and lawyers manage these contradictions will make a big difference to their effectiveness as lawyers, their fulfillment, and their connection to advancing justice. The next section explores the limits of conventional approaches to navigate this tension.

III. THE PERILS OF PARADOX AVOIDANCE

The ability to thrive in law school and in the legal profession—and to pursue lawyers' responsibility to advance justice—turns in no small measure on how students and lawyers fare in navigating the lawyering paradoxes described in the previous section. Yet for the most part,

242. *See* King, *supra* note 237.

243. Cummings, *supra* note 101, at 1-2 (identifying the tension between making money and "embracing a code of professionalism defined by a commitment to competence, independence, and public service" as "a fundamental paradox at the heart of the legal profession"); Samuel Moyn, *Law Schools Are Bad for Democracy*, CHRON. HIGHER EDUC. (Dec. 16, 2018), https://www.chronicle.com/article/Law-Schools-Are-Bad-for/245334.

students are left to their own devices to understand and manage these tensions. Law schools generally pay little attention to this paradoxical dynamic, its impact on law students, or its implications for responding to the clarion call for change. Notwithstanding the growing focus on proactive lawyering, many students and lawyers continue to find themselves buffeted by the demands of legality and proactive lawyering.

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

Since attending law school, I have been observing how legal academics, law students, and the legal profession (including myself in each of these roles) navigate the tensions between legality and proactive lawyering. I have been tracking the strategies and the impact informally, by observing how students experience law school, and more systematically by examining scholarship about legal education, conducting qualitative research about law students and lawyers, and analyzing students' blog posts about their law school experience.[244]

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

A. Crowding out proactive lawyering

Problems emerge when legality (like one side of any paradox) "tries to hog the whole bed."[245] Although clinical legal education and experiential learning opportunities have increased,[246] the culture and currency of many law schools remain focused on mastering

244. *See generally* STURM & MAKOVI, *supra* note 205; Sturm & Guinier, *supra* note 27; Sturm & Guinier, *supra* note 168, at 531; Sturm, *From Gladiators to Problem Solvers*, *supra* note 2. I have also coded the blog posts from *Lawyering for Change* and identified patterns emerging from those posts. In both *Lawyer Leadership* and *Lawyering for Change*, students post blogs on a weekly basis, inviting reflection about their experience of law and law school, along with their developing theories of change.

245. Elbow, *supra* note 14, at 258.

246. *See infra* Section IV.

legality.[247] In many law schools, the formative first year focuses almost exclusively on learning legality.[248] Adjudication remains the default mode of inquiry and practice, and court decisions form the backbone of many upper-level classes. Most casebooks proceed within the logic of legality. For many law students, most of their courses emphasize doctrinal analysis. Legality's modes of thought, motivations, and discourse often dictate how students learn the law, even in courses focused on non-adjudicatory settings, such as legislation and transactional lawyering.[249] Non-adjudicatory modes of thought and practice are referred to as "alternative dispute resolution." Learning to "think like a lawyer" prototypically refers to conventional legal reasoning in adjudicatory settings.[250] The default mode of assessment in law school (and on the bar exam) prioritizes issue spotting, legal reasoning, and legal writing.[251] Many law schools grade on a curve, which heightens students' competitiveness and preoccupation with performance over learning.[252] Researchers have also documented the lasting impact of this equation of lawyering with legality on how people think about themselves as lawyers.[253]

Law schools' focus on legality at legal education's defining moments affects the way many law students and lawyers think and feel about the competencies and practices related to proactive lawyering.[254] Legality's emphasis on the methodology of skepticism reinforces the

247. The MacCrate report, based on a systematic study of legal education, observed that, many law schools prioritize legal reasoning skills, and fail to devote attention to proactive lawyering. *See* MACCRATE REPORT, *supra* note 24.

248. *See supra* Section I.A.

249. *See* Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1569-71 (1988); Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyers as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1162 n.10 (1990).

250. *See supra* Section I.A.; Blasi, *supra* note 124, at 325.

251. *See* Sturm & Guinier, *supra* note 27, at 521-22.

252. *See* London, Downey & Mace, *supra* note 216, at 457; Sturm & Guinier, *supra* note 27, at 519-20.

253. *See* Sturm & Guinier, *supra* note 27, at 527; MERTZ, *supra* note 22, at 214, 220 (summarizing the tendency of legal education to shift students' attention from social context, unmoor them from ethical and social identities, and disconnect them from pursuing values); UNGER, *supra* note 28, at 96.

254. *See* Rakoff & Minow, *supra* note 22, at 607 ("The template for legal thinking established in the first year of law school has real staying power."); Sturm & Guinier, *supra* note 27, at 542 ("The structure of courses in the first semester . . . conveys the impression that appellate litigation and corporate practice constitute law's core, and that law emerges when judicial actors interpret the arguments of lawyers, the policies of legislators, or the decision of administrators.").

general tendency to value critical thought over creativity and imagination.[255] This tendency—to remember negatives over positives, to value criticism over appreciative inquiry, to listen with an ear toward refuting rather than understanding—exists in any discipline defined by critical and logical thinking.[256] Many students infer from the pervasiveness of methodological skepticism, particularly in the first year when they are forming their identities as lawyers, the idea that other modes of thinking do not count as part of thinking like a lawyer.[257] Conventional legal reasoning treats politics, emotion, and intuition as a departure from logical and rational inquiry, which threatens the legitimacy of legal decision-making.[258]

Methodological skepticism becomes self-referential— "the mirror through which it judges what it is like;" it negates the value of what cannot be understood through that logic.[259] The emphasis on "thinking like a lawyer" (narrowly defined) leads many students to devalue or marginalize modes of thought that fall outside legality. Many students report experiencing a dampening of their engagement with creative or imaginative thinking and practice. One student in Lawyering for Change, a first-year elective I teach, reported:

> Coming into law school, I was really interested in trying to be creative in my approach [to] the law and took an expansive view of lawyering; however, [when] I actually arrived in the law school environment, that expansive view quickly narrowed down to accepting what people told me about law school and being a lawyer and just keeping my head down and getting my work done.[260]

Another noted that "I am rewarded for how well I can extract rule of law from cases and apply it to a new set of facts. So, after last semester's exams, I have devoted more energy just practicing technical method of rule → facts → application."[261]

This self-referential pattern can lead students (and faculty) to downplay or abandon creative, non-linear modes of thought, even when they had experience prior to law school with these methodologies.[262] For

255. *See* KISSAM, *supra* note 98, at 6-7; *see also* Richard, *supra* note 226, at 48.

256. *See* Elbow, *supra* note 14.

257. *See* Lesnick, *supra* note 249, at 1159.

258. *See* KISSAM, *supra* note 98, at 98.

259. *See* SMITH & BERG, *supra* note 14, at 47-8.

260. Student A, Lawyering for Change 2019 Blog Post (Apr. 19, 2019) (unpublished manuscript) (on file with author).

261. Student B, Lawyering for Change 2019 Blog Post (Apr. 19, 2019) (unpublished manuscript) (on file with author).

262. One law student observed: "The 'softer' leadership skills that I have been learning and building for the past few years working, but also prior to that in undergrad, seem less relevant for law school success. (The fact that my first inclination was to refer to leadership

some this led them to doubt the relevance of abilities that enabled them to succeed prior to law school, many of which fall under the umbrella of proactive lawyering. Some students interpret learning to think like a lawyer to mean setting aside or unlearning other modes of thought, as part of becoming a lawyer.

> I find it interesting just how much this mode of processing seeps into everything we do. In many ways, it causes problems we become unused to solving, since the roles we are thrown into often call for forward thinking, innovative solutions but our practiced mode of analysis is backward looking and self-contained.[263]

The methodology of skepticism, with its focus on adjudication and its essentially critical stance, thus tends to crowd out the imaginative, forward-looking methodologies associated with proactive lawyering.[264] "The greatest imaginative cost of the canonical style of legal reasoning is negative: it fills up the imaginative space in which another way of thinking might take root, and it does so in the crucial testing ground on which authoritative ideals meet practical realities."[265]

Students and researchers also report a shift in the way students listen to each other. They describe themselves as more likely to listen instrumentally and with the relevant legal categories in mind, which draws them away from "the norms and conventions that many members of our society, including future clients, use to solve conflicts and moral dilemmas."[266] This decontextualization encourages students to treat people as characters in a legal drama. They listen for how they can use or refute what they are hearing, and report finding it more difficult to listen with the goal of understanding, empathizing, or appreciating the perspective and experience of others. They also are more likely to speak to demonstrate their proficiency, prove their point, or win an argument. Researchers have documented—and many students reported—reluctance, particularly in large classes, to ask questions solely out of

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skills as 'soft' even though we have learned about concrete methods and processes to improve our leadership capacity exemplifies the ways in which this paradox is playing out in my education.)" Student G, Lawyering for Change 2019 Blog Post (April 16, 2019) (on file with author).

263. Student F, Lawyering for Change 2019 Blog Post (April 16, 2019) (on file with author).

264. *Id.* One advice book, based on interviews and surveys of law students, exhorts law students to understand that "you are being trained as a technician, not an innovator." *See also* YOUNG, *supra* note 225, at 32.

265. *See* UNGER, *supra* note 28, at 106.

266. *See* MERTZ, *supra* note 22, at 99.

curiosity or to take the risk of appearing uncertain or, even worse, not understanding.[267]

Research conducted on practicing lawyers shows that the mindset and methodology of competition and skepticism invited by legality coalesce into a culture and way of being for many lawyers. Although there is evidence of a "lawyer personality" that is predisposed to be skeptical or to see the glass as half empty rather than half full,[268] there is also evidence that these tendencies are engendered at least in part by legal education,[269] as well as by the prevailing legal culture in which one practices.[270] Students describe coming in with an orientation of exploration, learning, and risk-taking, and confronting experiences in and out of the classroom that undercut their orientation toward growth and learning from failure. This fosters a tendency to avoid asking questions if they are uncertain or confused, and to treat performance in law school, and particularly failure, as defining of their ability. This pattern tracks findings of more systematic empirical studies of law student experience.[271] Research also documents that women, people of color, and first-generation students may experience this dynamic with particular intensity.[272]

There is evidence that crowding out proactive lawyering may play a contributing role in the widespread dissatisfaction and unhappiness that many law students and lawyers experience.[273] How many times

267. *See* London, Downey & Mace, *supra* note 216, at 476; Sturm & Guinier, *supra* note 27, at 530.

268. *See* Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, 29 REP. TO LEGAL MGMT., Aug. 2002, at 1, 4. It is worth noting that Richard's findings are based on studies primarily of partners in large private firms and corporate law departments.

269. *See* Sturm & Guinier, *supra* note 27; Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 619, 624 (2015) (describing core changes in student values and motivations during law school and consistent undermining effects on student values, interpersonal caring, and moral and ethical decision-making, and recommending shifting institutional emphases from competition, status, and tangible benefits to support, collaboration, interest, and personal purpose).

270. *See* Gilson & Mnookin, *supra* note 50, at 549-50.

271. *See generally* London, Downey & Mace, *supra* note 216.

272. *See, e.g.*, LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997); London, Downey & Mace, *supra* note 216, at 455-56; Elena Rodriguez, *Student Thriving at Columbia Law School: An Asset-Based Study of Climate for Student Engagement and Support* (2016) (unpublished paper); Sturm, *From Gladiators to Problem Solvers*, *supra* note 2.

273. *See* Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-906 (1999).

have you heard a practitioner say, "I am a recovering lawyer," as if lawyering were a disease? Or describe themselves as having left the practice of law, while continuing to play roles that fall squarely under the umbrella of proactive lawyering? The failure to address head on the tension between legality and proactive lawyering invites some law students to conclude that the most important aspects of themselves are not part of being a lawyer.[274]

B. Inviting premature or problematic resolution of ambivalence and contradictions

Many law schools now supplement their core curriculum with a menu of discrete electives that provide students with the opportunity to learn various proactive lawyering skills and practices, usually starting in the second year.[275] This approach of supplementing legality with proactive lawyering resembles what paradox scholars call "splitting."[276] This strategy assigns responsibility for a less valued activity to a separate and lower status domain. Proactive lawyering pedagogy often occurs in distinct realms, apart from mainstream law school offerings focused on legality and with insufficient opportunity for students to integrate these experiences. Different people occupy the spaces focused on legality and proactive lawyering—often with different status, physical locations, and communities of practice.[277] To varying degrees, these two modes of thought and practice operate on separate tracks, often with non-lawyers, specialized clinical faculty, adjunct faculty, or administrators focusing on cultivating proactive lawyering skills alongside legality, while faculty teaching the mainstream conventional law classes maintain their pedagogy oriented around teaching and critiquing legality.[278]

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274. *See* Schiltz, s*upra* note 273, at 915. The ABA has recently recognized the urgency of addressing the issue of lawyers' wellbeing. *See* NAT'L TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf.

275. *See* HEINEMAN, LEE & WILKINS, *supra* note 12; MACCRATE REPORT, *supra* note 24; *see also* David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1 (2015), https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1002&context=jel.

276. *See* SMITH & BERG, *supra* note 14, at 68.

277. *See* Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice-Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J. L. & POL'Y 129, 137-38 (2014) (discussing a difference in faculty status between clinical faculty and non-clinical faculty).

278. Deborah Maranville, Cynthia Batt, Lisa R. Bliss & Carolyn W. Kaas, *Incorporating Experiential Education Throughout the Curriculum*, *in* BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 162 (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas & Antoinette Sedillo López eds., 2015).

For many students, courses emphasizing proactive lawyering comprise a small part of their overall law school experience. As of August 2014, the American Bar Association requires law students to take six credits of experiential learning as part of their course of study, out of a total of eighty-four credits required for graduation—seven percent of their total education.[279] Although some law professors have begun experimenting with integrating forms of proactive lawyering into conventional pedagogy, many non-clinical faculty members continue to organize their courses around casebooks that prioritize learning legal reasoning and parsing appellate decisions as the primary text for learning the law.[280]

The siloed and lower status nature of proactive lawyering makes it difficult for students to experience proactive lawyering as a coherent methodology with its own rigor and practices extending beyond a particular course or content area. Students struggle to make sense of the conflicting pedagogy and messages promoted in different quarters of the legal academy. Faculty might unwittingly contribute to this counter-productive cycling by introducing methodologies of possibility alongside legality, without making explicit the assumptions and practices of either, discussing the impact of one on the other, or equipping students to navigate the contradictions they experience.

For example, law school leadership courses sometimes use the same materials, cases, and pedagogy used in business schools. Business school cases do not typically address the situations lawyers face, or how proactive lawyering practices relate to conventional lawyering roles. Design thinking instructs students to cooperate and to place critique aside, sometimes without accounting sufficiently for tensions and barriers erected by methodological skepticism.[281] Materials used in law school classes (including my own) to cultivate leadership and build the capacity for difficult conversations contain a blanket critique of evaluation, comparisons, and judgment, without situating those critiques in lawyers' responsibility for engaging in these practices as part of their roles. They may shy away from grappling with how proactive

279. AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015 standard 303(a)(3), at 16 (2014), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.pdf.

280. *See* HEINEMAN, LEE & WILKINS, *supra* note 12, at 54 (observing that legal reasoning, taught through Socratic dialogue, remains the centerpiece of legal education).

281. *See* Hagan, *supra* note 129; Margaret Hagan, *Design Thinking & Law: A Perfect Match*, OPEN L. LAB (Jan. 16, 2014), https://www.openlawlab.com/2014/01/16/design-thinking-law-perfect-match/.

lawyering will be affected by its adjudicatory twin or denigrate the skills that legality requires.

Scholarly work sometimes exhibits this same tendency to sidestep the paradoxical relationship between legality and proactive lawyering by proposing hybrids or substitutes for conventional legality without adequately addressing the tension between adjudicatory and proactive lawyering. My work on second generation discrimination, for example, simply cast the court in the role of catalyst and problem solver, without addressing how legality's approach to motivation and justice might limit courts' capacity to serve as an effective intermediary.[282] After acknowledging critics' worries about cosmetic compliance and cooptation,[283] I downplayed the prevalence of these problems without confronting their roots in paradox, much less strategizing about how to navigate those dualities.[284]

In *Violence and the Word*, Robert Cover warned of the dangers of downplaying or overlooking the impact of legality's relationship to violence on law's effort to generate norm communities. To some degree, that tension is inescapable. Robert Cover expresses these contradictions in their most stark form, observing that "pain and death destroy the world that 'interpretation' calls up."[285] "[J]udges … kill the diverse legal traditions that compete with the State."[286] By failing to attend to the lawyering paradoxes, law schools similarly squelch capacity to navigate ambiguity and stay connected to what they care about.

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

Many faculty and students alike are well aware of many of these limitations built into conventional lawyering. Critical analysis of case law happens regularly in mainstream law school classrooms. "Thinking like a lawyer" includes identifying the flaws in courts' reasoning, weighing competing policy considerations, and understanding the limits of courts as a way of addressing complex problems lacking clear solutions. Indeed, critique is part and parcel of effective doctrinal

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

283. For a sample of the critiques, *see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323 (2009).

284. *See, e.g.*, Scott & Sturm, *supra* note 70, at 593; Susan Sturm, *The Architecture of Inclusion: Interdisciplinary Insights on Pursuing Institutional Citizenship*, 30 HARV. J.L. & GENDER 409, 424 (2007).

285. Cover, *supra* note 122, at 1602.

286. *Id.* at 1610.

teaching.[287] These critiques run the gamut from the reasoning or results of particular court to systemic critiques of legality's legitimacy and impact, drawing on legal realism, critical legal studies, critical race theory, feminist theory, interdisciplinary studies, and experimentalism.

Many professors expose the contradictions between law and justice, but do not adequately equip students or the legal system to build an affirmative way of grappling with them within the current law school structure. Their critical lens identifies the limits of legality and the need to reimagine legal education, but it does not equip students to get from here to there.[288] As one student in Lawyering for Change noted:

> During orientation, law students are urged to never let go of their values, to use their education to go forth and make change they want to see, etc. But these values are by no means reflected in our classes, though to be fair I do think that almost all my professors do a really good job of pushing all of us to be critical of the systems we study. The main issue is that the type of thinking essential to leadership values aren't really the ones that are fostered or tested in class, and I don't really even know how that would look.[289]

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

Faced with glaring disconnects between law and justice, students are left to their own devices to figure out what to do with those critiques. When students experience this critique without also engaging what can be done about it, students may become cynical about the law and its relationship to justice. This leads some to disengage from law school and from the possibility of achieving justice through law. Students anguish about the disconnect between their values and the law, between

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287. *See* Post, *supra* note 5.

288. *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); KISSAM, *supra* note 98; UNGER, *supra* note 28; MERTZ, *supra* note 22; Post, *supra* note 5.

289. Student D, Lawyer Leadership Blog Post (Sept. 3, 2019) (unpublished manuscript) (on file with author).

legal definitions of justice and justice as it is experienced in the world (as did I when I was in law school).

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

> We all seem to feel similarly that the law degree has the potential to empower us to make meaningful change and also forces us into a rigid system with a specialized skillset that makes it feel more difficult to make these changes. I sometimes wonder if we just have to accept that we're going into a very structured world or if accepting that just makes us more complicit/unmotivated to actually make these changes. [290]

As Duncan Kennedy noted in his pathbreaking critique, first-year law students have no way to think about law "in a way that will allow [one] to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to [their] system of thinking and doing."[291] Students surmise that their success or failure largely turns on swiftly learning to use the new language, leaving no time to find the political substance of the rules they are studying. This can lead to cynicism about the law and to giving up on the law as a way to advance justice.[292]

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

IV. NAVIGATING LAWYERING PARADOXES

How can legal education and legal practice move beyond crowding out proactive lawyering, forcing a problematic choice between legality and proactive lawyering, and critiquing the status quo without offering a pathway forward? Can individuals and systems simultaneously learn and practice the critical, categorical, formal, and judgment-based logic

290. Student E, Lawyer Leadership Class Blog Post (Jan. 14, 2021) (unpublished manuscript) (on file with author).

291. Kennedy, *supra* note 288, at 599-600.

292. *See* MERTZ, *supra* note 22, at 214, 220; YOUNG, *supra* note 225; Sturm & Guinier, *supra* note 27, at 546-47.

of legality *and* the creative, improvisational, and relationship-building logic of proactive lawyering? Is there a way to equip law students and lawyers to hold the tension between this duality? Are there ways to facilitate students' and faculty's engagement with lawyers' roles as catalysts for justice and facilitators of democracy when the institutions and politics demonstrably thwart those values?

These questions underlie core challenges facing the legal profession and the polity: whether we can have legal and political institutions that will uphold the rule of law, advance justice, and work to revitalize a polarized and unjust democracy. Many, both inside and outside the academy and the legal profession, have expressed deep concern about law's legitimacy in the face of institutionalized disconnects between law and justice, order and principle, predictability and purpose. Law students will have to assume responsibility for bridging these gaps, which in turn requires navigating the tensions built into lawyering. Law schools bear the responsibility for equipping law students to do so. This means that law schools must teach their law students how to navigate paradox.

The lens of paradox offers an approach that produces creative tension between legality and proactive lawyering, builds the capacity to hold that tension, and equips lawyers to harness that tension to closing the gap between formal and substantive justice. This section headlines what I have learned from my decades of study and struggle. Drawing on the paradox literature, my experience in teaching and action research, and the practices of creative outliers, this Section offers three strategies for forging dynamic tension between legality and proactive lawyering: (1) building the capacity to navigate lawyering paradoxes; (2) integrating proactive lawyering with conventional legal pedagogy; and (3) designing and organizing short term experiments, spaces, and practices to facilitate long-term culture change.

A. Building the Capacity to Navigate Lawyering Paradoxes

> [T]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.[293]

One of the most surprising and encouraging insights from the paradox literature involves the power of simply seeing the conflicting aspects of lawyering through the lens of paradox and developing the capacity to navigate the contradictions you come to recognize. Research

293. F. Scott Fitzgerald, *Essay: The Crack-Up*, KQED (Aug. 31, 2005), https://www.pbs.org/wnet/americanmasters/f-scott-fitzgerald-essay-the-crack-up/1028/.

suggests that seeing those tensions as paradoxes actually changes how we experience them.[294] This shift in meaning enables a move from trying to resolve a dilemma that may not be resolvable to sitting with observed contradictions, accepting that they coexist, trying to understand how they operate, and inquiring about whether we can resolve them or must instead learn how to work through them.

"'Working through' does not imply eliminating or resolving paradox, but constructing a more workable certainty that enables change."[295] This shift occurs by creating opportunities for noticing, observing, and accepting the paradoxical relationship between legality and proactive lawyering when that duality surfaces, with specific attention to the opposing yet interdependent practices and mindsets called for by each and the potential links between them. The idea is to foster actors' active awareness of the duality by noticing a paradox without attempting to resolve or resist it but instead observing it in practice. This reframing move serves to enable people to sit with the conflict and to learn their way into the process of maintaining both.

Peter Elbow provides some insight into why "searching for contradiction and affirming both sides can allow you to find both the limitations of the system in which you are working and a way to break out of it."[296] Using Chaucer as an illustration, Elbow notes that by "setting up a polar opposition and affirming both sides," we "lay the framework for a broader frame of reference, ensuring that neither side can 'win.'"[297] The seeming dilemma can be arranged "so that we can only be satisfied by taking the larger view."[298]

For example, one study observed successful chamber music groups built the capacity to name and accept the paradoxical relationship between their need to individuate and express autonomy as a musician, on the one hand, and the need to blend, cooperate, and come together around a shared musical idea, on the other.[299] Researchers learned that members of successful string quartets came to understand the upside and the downside of either pole.[300] Acceptance helps members avoid

294. *See* SMITH & BERG, *supra* note 14, at 259-65; Elbow, *supra* note 14, at 240; *see also* JOHNSON, *supra* note 99 (providing practical strategies for managing polarities).

295. Lotte S. Lüscher & Marianne W. Lewis, *Organizational Change and Managerial Sensemaking: Working Through Paradox*, 51 ACAD. MGMT. J. 221, 234 (2008).

296. Elbow, *supra* note 14, at 243.

297. *See id.* at 141.

298. *See* SMITH & BERG, *supra* note 14, at 240, 242.

299. J. Keith Murnighan & Donald E. Conlon, *The Dynamics of Intense Work Groups: A Study of British String Quartets*, 36 ADMIN. SCI. Q. 165, 165 (1991).

300. *Id.*

unresolvable debates that sparked vicious cycles breeding distrust, enabling them to "play through" paradox.

The power of simply noticing paradox resonates with my own observation and experience in my teaching and research. For example, many Lawyer Leadership students described their discovery of the paradox frame as paradigm-shifting in their self-conception, in their choice to pursue law, and in their path to success and thriving as lawyers.[301] These students had been stuck in a dilemma about how to choose between prestige and purpose, lawyering and social justice, cooperative and adversarial roles, and professional identity and personal growth. The idea of holding both shifted the questions they asked themselves, enhanced the quality of their reflections, and gave them tools to choose how they think, relate to classmates and material, and express emotions and needs.

Holding paradox is a learned skill, one that lawyers must master to be effective in their multiple roles. Because lawyering paradoxes cannot, by definition, be either avoided or resolved, effective lawyering requires expanding the conception of what it means to "think like a lawyer" to include understanding lawyering paradoxes and developing the ambidexterity to move back and forth between legality and proactive lawyering.[302] This is easier said than done. Ambidexterity is challenging and inefficient, at least in the short run. But it can happen nonetheless. Law schools have been forced to adapt in new ways during the triple pandemic of Covid-19, the national racial reckoning, and the threat to rule of law values exposed by the 2020 election. These ongoing crises and challenges might provide the impetus for building the capacity to deal with contradictions and face unavoidable risks. Common purpose can sustain connection across the inevitable tensions fueling separation while encouraging continued fidelity to the values of each opposing practice. Shared vision can justify the inefficiencies and time required for ambidexterity to develop.

Holding paradox also requires emotional and relational skills and strategies enabling individuals and institutions to recognize the inevitability of these conflicts and to remain in the tensions and discomfort they generate. The triple pandemic has shown that law schools can help students and faculty collectively cope with stress,

301. *See, e.g.*, Student A, *supra* note 260; Student B, *supra* note 261; Student C, Lawyering for Change 2019 Blog Post (Apr. 16, 2019) (unpublished manuscript) (on file with author); Student D, *supra* note 289.

302. *See* O'Reilly & Tushman, *supra* note 99, at 188 (identifying ambidexterity as the capacity to pursue simultaneously the routines, processes, and skills required for exploitation and exploration, which are fundamentally in tension with each other).

uncertainty, and unavoidable conflict. Supports developed to help current and future lawyers persist amidst uncertainty and crisis will also cultivate the emotional and relational skills needed to hold paradox.

B. Designing for Strategic Integration of Legality and Proactive Lawyering

A second key strategy involves integrating proactive lawyering with legality, while maintaining separate space for the development of proactive lawyering capacities. For students and lawyers to value proactive lawyering, its core practices must be integrated into the formative spaces and understanding of what it means to think like a lawyer. Otherwise, many students will continue to experience proactive lawyering as marginal. To be taken seriously and become part of students' identity as lawyers, proactive lawyering roles and practices must be incorporated into core areas of the curriculum, including the first-year foundation curriculum and courses that most students take, such as corporations, criminal procedure, and family law. Practices such as problem solving, perspective taking, and institutional design can be juxtaposed with legal doctrine and adjudication, in ways that will equip students to understand both their tension and their interrelationship.

At the same time, proactive lawyering requires its own space for development on its own terms. Building on the strong foundation offered by clinical legal education, effective integration requires expanding the number of offerings focused on proactive lawyering skills, increasing the percentage of those offerings that are required for graduation, and finding ways to treat these offerings as part of the core law school canon.

I have experimented with heightening awareness of the paradoxical relationship between legality and proactive lawyering in mainstream law classes. Civil Procedure, for example, provides many opportunities to connect formal legal doctrine or practice with proactive lawyering practices, mindsets, and relationships. I have introduced the idea of paradox at the points where cooperation and competition have to operate simultaneously,[303] or where there is a tension between students' sense of justice and the law's definition of justice. These opportunities actually permeate even the most conventional civil procedure class. When these contradictions arise, rather than simply bracketing them and moving on (as I have done in the past), I invite the students to identify the multiple and conflicting meanings of due process, and the requirements to

303. These situations happen throughout civil legal process and are built into the federal rules. *See, e.g.*, FED. R. CIV. P. 16, 26, 37, 68.

collaborate and mediate before parties can call upon the court to sanction an opposing party. I provide opportunities in and out of class for students to reflect about the roles they might occupy and what kinds of questions they might ask or relationships they might build in each of those roles.

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

This integration process will require experimenting with and rethinking the system of evaluation, including in conventional law school classes. Law schools will have to find ways to assess and reward the cultivation of knowledge and skills called for by proactive lawyering. That will mean moving beyond easy-to-grade issue spotting exams, which tend to overvalue legality and to discourage assessment of proactive lawyering skills.

The call for integration of legality and proactive lawyering provides a strong argument for elevating the status of clinical legal faculty in law schools. Clinical faculty are way ahead of many podium faculty in their focus on cultivating both legality and proactive lawyering, and navigating the inevitable tensions between them.[304] Clinical faculty are well equipped to help students learn proactive lawyering skills. Rather than reinvent the wheel, law schools could integrate legality and proactive lawyering by encouraging and rewarding connections between clinical and non-clinical faculty, both in pedagogy and in research. This move would require flattening the hierarchy that currently maintains

304. *See* Thomson, *supra* note 275; Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353 (2012).

clinical faculty in second-class status in many law schools and blurring or even eliminating the arbitrary distinctions between clinical and non-clinical faculty.[305]

C. Pursuing Long-Term Culture Change Through Short-Term Experiments

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

For these spaces to take root and produce sustainable change, innovation must operate on multiple levels simultaneously and across different time horizons. Individual students, faculty, and lawyers require strategies that will enable them to navigate these tensions from the time they enter law school. Teachers require frameworks, strategies, and tools that they can use in the classroom and in programs operating within a culture organized around legality. Institutions and their leadership require ways to push toward transformative change in an environment that resists change and where the commitments to the status quo are deeply rooted.

This step means building the environments and structures that will facilitate productive engagement with the contradictions and connections between legality and proactive lawyering.[306] Proactive lawyering must move from the margins to the center of legal education and culture, as well as connect to the sites and incentives that form students' identities as lawyers.

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305. *See* Adamson et al., *supra* note 304, at 384 ("In excluding clinical faculty from full governance over issues involving the mission and direction of law schools, especially faculty hiring, retention, and promotion, law schools have created hierarchies in which one class of permanent faculty members makes decisions affecting another class of permanent members, often without reciprocity. Such hierarchies exist without reasonable and adequate justification."); Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 300-01 (2019) (invoking the recommendations of American Association of Law Schools Task Force to urge increasing the status of clinical faculty and reducing the hierarchy that persists in many law schools).

306. *See* Underhill, *supra* note 207, at 216; O'Reilly & Tushman, *supra* note 99 (emphasizing the importance of designing spaces that enable contradictory processes to flourish).

This culture change sounds daunting, but it need not proceed top down and whole hog. Experimentation will be key to moving this strategy forward.[307] Courses and programs that support an integrated experience for law students offer one form of experimentation. A recent white paper called Re-Envisioning Professional Education describes several initiatives underway that are experimenting with building these kinds of learning environments, including at Georgetown, Northwestern, and Stanford Law Schools.[308] The Davis Polk Leadership fellowships and innovation grants recently launched at Columbia Law School offer another example of this kind of experimentation.[309] The line between clinical and non-clinical classes has become more blurry, with some faculty linking experiential learning with classes focused on developing traditional legal skills.

Another strategy involves building cohorts of students, faculty, staff, and lawyers who are engaged in this kind of learning and practice, linking them with each other, and creating incentives for others to learn from their example.[310] Courses and research that rely on collaboration as the way to develop legal skills and solve problems (such as design thinking and deals) could include modules that equip students to collaborate and thus enhance both lawyering and leadership capacities. The institution might create incentives for people in different roles, skills, and orientations to collaborate in spaces where legality and leadership both operate. Long-term sustainability and impact depend upon linking these innovations to core activities that define the culture and values of the law school and the legal profession.

Experimentation has the virtue of allowing learning to take place, building communities of practice interested in learning with and from each other, and laying the foundation for the kind of learning required to hold paradox without also requiring wholesale change at the outset. Support from law school leadership, however, is key to sustaining these experiments and building them into the fabric of the institutions. Doing this work can feel emotionally draining and somewhat risky for students,

307. *See* KAHANE, *supra* note 185 (showing the value of generating scenarios and trying experiments as a strategy for navigating conflicting views; ADRIENNE MAREE BROWN, EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS 35 (2017) (showing the importance of experimentation and small-scale change as a way to build toward more transformative culture change).

308. AUSTIN, CHU & LIEBMAN, *supra* note 82, at 14-15.

309. *Leading Self, Leading Others, Leading Change*, COLUM. L. SCH., https://leadership-initiative.law.columbia.edu/ (last visited Sept. 8, 2021).

310. CUNY modeled this strategy at the institutional level by introducing "houses" as a core building block of learning. "Houses" were groups of approximately twenty students who worked through problems with a faculty member who acted as a senior lawyer—one with time and commitment to teach their juniors. Lesnick, *supra* note 249, at 1187.

faculty, and lawyers, but remains critical to being able to meet the challenges that face law students and the legal profession. Success depends upon thoughtful experimentation, supported by environments where conflict and cooperation can operate in tandem, and where it is possible to fail and recover.[311]

V. CONCLUSION

I have come full circle in my experience confronting the contradictions I first encountered when I entered law school. I continue to encounter unresolvable tensions built into my role as a law professor and my experience of legal practice. Those tensions are particularly apparent in the leadership and anti-racism work I have been doing in legal schools and court systems. How can I as a white woman write and lead anti-racism work? And yet, how can I, as a white woman in a position of responsibility, NOT do anti-racism work?[312] The mindset and tools for navigating paradox have enabled me to stay in this uncomfortable position, and to act even as I regularly confront the limits of my position and experience. Perhaps the most important lesson I have learned is to remain engaged in the face of these contradictions, particularly when it's hard to do so. Lawyer leadership has helped me navigate race, and navigating racism has helped me develop lawyer leadership. Paradox is key to both.

At their best, law schools can cultivate this paradoxical mindset, and in the process tackle the complex problems facing law schools and the legal profession, including racism. In the process of building the capacity to hold paradox, the potential lies to enable lawyers to reimagine institutions while operating within them. These pockets of innovation hold potential as fractals— "infinitely complex patterns that are self-similar across different scales."[313] "They are created by repeating a simple process over and over in an ongoing feedback loop."[314]

The paradox idea, with its emphasis on holding unresolved tensions and experimenting, invites the conscious construction of spaces that can hold legality and proactive lawyering, and link this multiple

311. *See id*.

312. *See* Akilah Folami & Susan Sturm, *The Paradox of Legal Training and Leadership: A Conversation between Akilah Folami and Susan Sturm*, 48 HOFSTRA L. REV. 603, 604 (2020). The paradoxes built into anti-racism work are the centerpiece of my forthcoming book tentatively titled "Rescripting the Racial Narrative: How Anti-racism Paradoxes Can Drive Transformative Change."

313. BROWN, *supra* note 307.

314. *Id.*

consciousness to the pursuit of justice. It also builds the capacities needed to address the intractable problems and deep polarization facing the world. Linked to each other and made visible, these experiments hold promise as a launchpad for law schools to equip law students and the profession to make meaning of the contradictions built into law. This is what is necessary to realize law's promise.