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Teasing the Arc of Electric Spark: Fostering and Teaching Creativity in the Law School Curriculum

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TEASING THE ARC OF ELECTRIC SPARK: FOSTERING AND TEACHING CREATIVITY IN THE LAW SCHOOL CURRICULUM

*Jason G. Dykstra**

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I. INTRODUCTION

Perhaps the opening stanza of Charles Dickens' *A Tale of Two Cities* best encapsulates the current state of the legal profession:

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us . . . —in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.¹

At the gilded top of law firm culture, a narrow stratum of rainmaking partners at the largest firms rake in an enormous amount of money for practicing law. As an example, last year, Kirkland & Ellis LLP earned \$3.76 billion in revenue.² This revenue allowed roughly four hundred of the firm's top lawyers to divvy up between \$1.75 million and \$15 million each in earnings.³ Amongst the top 100 largest firms in the nation, "average equity-partner profits have doubled since 2004, to \$1.88 million last year."⁴ Eight of these firms now average over \$4 million.⁵ As one litigator formerly with Cravath, Swaine & Moore LLP noted,

¹ CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (Barnes & Noble Classics ed. 2001) (1859).

² Sara Randazzo, *Being a Law Firm Partner Was Once a Job for Life. That Culture is All But Dead*, WALL ST. J. (Aug. 9, 2019, 10:53 AM), www.wsj.com/articles/being-a-law-firm-partner-was-once-a-job-for-life-culture-is-all-but-dead-11565362437 [<https://perma.cc/TG8Q-KFTX>].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

“[w]e’re making much more than anybody who doesn’t save lives deserves”⁶ This revenue growth reflects the growing size of a few dozen large law firms, mirroring the growth of large corporate clients that desire a one-stop legal shop to handle their global suite of legal issues.

Commencing in the mid-1980s, large firms merged and grew their practice areas to include transactional work, litigation, and tax advice.⁷ This rapid expansion reflected the growth of the firms’ corporate clients.⁸ Presently, twenty-nine firms based in the United States employ at least 1,000 associates and partners.⁹ The biggest global law firm, Dentons, recently reached the metric of 10,000 lawyers spread amongst offices located in 78 countries.¹⁰ In contrast, the largest law firm in the 1960s, Shearman & Sterling, employed only 169 lawyers.¹¹ But darkness lurks in the shadows of this meteoric growth in firm size and revenue: in order to fuel increasing revenues, firms expect more work from all of their attorneys.¹²

Behind the growth in firm size lie stagnant revenues in real terms as law firms continue to operate “with a business model that has not changed since the time of Charles Dickens[.]”¹³ This antiquated business model purveys legal services largely by the hour. To sustain revenue growth, firms increasingly focus on data to track how many hours each lawyer is billing, to view which clients have yet to pay outstanding bills, and to track the number of hours for various assignments.¹⁴ In addition to focusing on data, firms contain costs by elongating the partnership track for associate attorneys, increasing the side-tracking of associates and less productive partners into non-equity positions, and hiring contract attorneys paid by the hour.¹⁵ Firms also expect associates to bill more hours.¹⁶ At Kirkland & Ellis LLP, junior partners compete for the few equity partnership slots conferred annually by often logging more than 2,500 billable hours a year, which equates to working over eighty hours a week.¹⁷ So while a handful of rainmaking partners may earn more, their salaries are subsidized by others at the firm who are expected to produce more work.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Rita Gunther McGrath, *Creative Destruction Visits the Legal Profession*, HARV. BUS. REV. (Jan. 15, 2013) hbr.org/2013/01/creative-destruction-visits-th [<https://perma.cc/CB4R-NVFF>].

¹⁴ Randazzo, *supra* note 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Further, a swath of changes forced on law firms by large corporate clients since the mid-1990s curtailed profitability in the legal services industry.¹⁸ The traditional law firm model proved ripe for disruption in an era of enhanced corporate client sophistication fueled by rapid technological advances and increased global competition in the market for legal services.¹⁹ Percolating for decades, these factors continue to force law firms to operate more efficiently.²⁰ Corporate clients increasingly retain legal work in-house and approach outside legal work with enhanced cost-consciousness.²¹ The net result of these ongoing cost containment measures reflects a lack of growth in revenues in the legal services sector, as revenues have remained largely static at mid-1990's levels when adjusted for inflation.²² In large measure, law firms have not strategically addressed the flat-lined revenue in the legal services sector. Instead, firms prioritize billable hour productivity, often with troubling consequences for their attorneys.²³

Perhaps Baker McKenzie's former global chair, Paul Rawlinson, represents the proverbial "canary in the coal mine" of the modern law firm culture of prioritizing productivity. In October of 2018, Baker McKenzie announced, "[b]ased on the advice of his doctor, in response to medical issues caused by exhaustion, Paul has decided to take a step back from firm leadership and client responsibilities to make his health and recovery his immediate priority."²⁴ Mr. Rawlinson's putatively temporary leave caused by exhaustion seems to have taken on a permanence, given that he remains erased from the Baker McKenzie website.²⁵ But Paul Rawlinson is not the only casualty of the modern law firm grind.

¹⁸ Jason G. Dykstra, *Beyond the "Practice Ready" Buzz: Sifting through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys*, 11 DREXEL L. REV. 149, 163 (2018).

¹⁹ *Id.*

²⁰ See James Podgers, *State of the Union: The Nation's Lawyer Population Continues to Grow—Barely*, 97 A.B.A. J 58, 58 (2011) ("The U.S. Legal Profession is going through some heavy turbulence these days: downsizing at larger firms, a more competitive business environment, the growing impact of globalization and technology, and angst about job prospects and debt.").

²¹ Stephen M. Sheppard, *The American Legal Profession in the Twenty-First Century*, 62 AM. J. COMP. L. 241, 251 (2014) (noting that many companies "have been enlarging their in-house counsel staff, both as a means to manage better their legal affairs and as a means of cutting costs. Corporations have also been increasingly cost-conscious in placing work and accepting bills from outside counsel, relying increasingly on alternative fee arrangements, or AFAs, rather than hourly billing.").

²² Dykstra, *supra* at note 18, at 160.

²³ See *infra* notes 26–37 and accompanying text.

²⁴ Kathryn Rubino, *Global Chair of Biglaw Firm Taking Temporary Leave Due to Exhaustion*, ABOVE L. (Oct. 22, 2018, 10:52 AM), [abovethelaw.com/2018/10/global-chair-of-biglaw-firm-taking-temporary-leave-due-to-exhaustion/](https://www.abovethelaw.com/2018/10/global-chair-of-biglaw-firm-taking-temporary-leave-due-to-exhaustion/) [<https://perma.cc/M7RG-LCRS>].

²⁵ See *Rawlinson Paul: Page Not Found*, BAKER MCKENZIE, www.bakermckenzie.com/en/people/r/rawlinson-paul [<https://perma.cc/V7CC-TSN2>] (last visited Nov. 26, 2019) (showing a "Page Not Found" result after conducting a search for "Paul Rawlinson" in the Baker McKenzie online directory).

A recent study of 12,825 active attorneys practicing in nineteen states found that more than 67 percent worked over forty hours per week.²⁶ Twenty-three percent reported working fifty-one or more hours per week.²⁷ This survey also revealed that a concerning percentage of attorneys have issues with behavioral health, with the highest levels of problems reported by attorneys employed at private firms.²⁸ Of the 12,825 attorneys surveyed, over twenty percent screened positive for “hazardous, harmful, and potentially alcohol-dependent drinking.”²⁹ In contrast, only 11.8 percent of a highly educated employees screen positive using the same metric for problem drinking.³⁰

Attorneys with private firms report the highest levels of problem drinking.³¹ Prior research in the early 1990s revealed that problematic drinking increased with the number of years in practice.³² Notably, the 2016 survey showed a direct reversal of this correlation, with the highest levels of problematic drinking now found amongst junior and senior associates.³³ Troublingly, almost one-third of junior associates self-reported problematic use of alcohol.³⁴ These junior and senior associate attorneys also disclosed significant problems with depression, stress, and anxiety.³⁵ These findings comport with other empirical data supporting a concerning diminishment of well-being amongst junior associates.³⁶ Further,

²⁶ Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 47 (2016) (summarizing a study of 12,825 active attorneys practicing in nineteen states assessing alcohol and drug use and the symptoms of depression, stress, and anxiety).

²⁷ *Id.* at 48 tbl. 2. Further, this table reflects 136 respondents reported working 71 or more hours per week. *Id.*

²⁸ *Id.* at 51.

²⁹ *Id.* at 46.

³⁰ *Id.* at 51; see also Christopher Ingraham, *One in Eight American Adults is an Alcoholic, Study Says*, WASH. POST (Aug. 11, 2017, 11:37 AM), [washingtonpost.com/news/wonk/wp/2017/08/11/study-one-in-eight-american-adults-are-alcoholics/](https://www.washingtonpost.com/news/wonk/wp/2017/08/11/study-one-in-eight-american-adults-are-alcoholics/) [<https://perma.cc/E22V-A4HP>] (noting that 12.7 percent of the overall adult population meets the diagnostic criteria for either alcohol dependence or abuse).

³¹ Krill et al., *supra* note 26, at 48.

³² *Id.* at 51.

³³ *Id.* at 48.

³⁴ *Id.* at 49 tbl. 3.

³⁵ *Id.* at 52 (noting that “depression, anxiety, and stress among attorneys reported here are significant, with 28%, 19%, and 23% experiencing mild or higher levels . . . respectively. In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression.”); see also Susan Diacoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) (noting that “[p]sychological problems, substance abuse, depression, anxiety, and job dissatisfaction among attorneys appear to have increased in recent years.”).

³⁶ Lawrence S. Krieger & Kennon M. Sheldon, Ph.D., *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 597 (2015)

a strong negative relationship exists between well-being and required billable hours: as required billable hours increase, income rises but happiness recedes.³⁷ The diminished well-being and widespread behavioral health problems amongst attorneys may correlate to law firms prioritizing billable hour productivity in an effort to generate revenue.

The modern private practice grind continues the legal profession's ingrained tendency to preserve the status quo. Some commentary proposes that the legal profession needs the assistance of innovative and creative non-lawyers.³⁸ As one commentator notes, "[t]urning to creative non-lawyers presents the most advantageous way for the legal profession to grow and change on its own terms. Creative non-lawyers can predict and manage change that is likely to result from competitive forces."³⁹ But rather than letting creative non-lawyers have all the fun, lawyers and law students can also foster and develop the skill of creativity. This Article proposes integrating creativity into the law school curriculum. Part II of this Article examines the rapidly changing practice our students are poised to enter and why baby-boom-era leadership may be poorly positioned to creatively address the challenges faced by the legal profession.⁴⁰ Part III of the Article surveys the nature of creativity, crafts a working definition of creativity, and addresses why the demographic bubble of baby-boom-era attorneys may prove an unlikely creative catalyst for law firm innovation.⁴¹ Part IV of this Article explores why creativity fits in the legal research and writing curriculum and explains how to effectively foster and integrate creativity with classroom activities.⁴²

II. AN ERA OF DISRUPTIVE CHANGE IN THE LEGAL INDUSTRY NECESSITATES CREATIVE SOLUTIONS

The traditional law firm model of selling legal services largely by the hour remained mostly unchanged for generations. However, "the Great Recession revealed [significant] inefficiencies in the traditional law firm model that proved ripe for disruption due to enhanced corporate client sophistication regarding legal services, rapid technological advances, and increased global competition in the market for legal services."⁴³ For decades, these factors continue to force law firms

(noting that empirically, "[t]he 'word on the street' regarding diminished well-being among junior associates in firms was amply supported.").

³⁷ *Id.* at 597.

³⁸ JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 216 (2d ed. 2013).

³⁹ *Id.* at 240.

⁴⁰ See *infra* notes 43–130 and accompanying text.

⁴¹ See *infra* notes 131–95 and accompanying text.

⁴² See *infra* notes 196–279 and accompanying text.

⁴³ Dykstra, *supra* at note 18, at 164.

to operate more efficiently.⁴⁴ But beyond just operating more efficiently, law firms need to foster innovation and creativity to address the challenges faced by the legal services industry. Over the last two decades, innovation in the legal industry emanated largely from corporate clients and as such, the resultant changes were foisted upon law firms.⁴⁵ These changes precipitated flat revenue when adjusted for inflation in the legal sector.⁴⁶ One primary factor in the stagnant growth of revenue in the legal services sector stems from corporate clients retaining routine legal work in-house and approaching outside counsel with an enhanced cost-consciousness.⁴⁷

A. *The Trend Toward In-House Counsel and a Cost-Conscious Approach to Outside Counsel*

Increasingly, corporate clients retain routine legal tasks, performing this work in-house.⁴⁸ For example, rather than retaining outside counsel, insurance companies set up their own “law firms,” employing house or staff counsel to handle routine claims including defense and subrogation litigation.⁴⁹ “The math underlying this trend is relatively straightforward. Consider the traditional rule of thirds: the time honored metric for calculating law firm salary and expense ratios divided an attorney’s annual billable hours into thirds, with one-third covering the attorney’s own salary, one-third covering the law firm’s overhead, and one-third contributing to the firm’s overall profit.”⁵⁰ Not surprisingly, corporate clients seized the opportunity to obtain legal services at a wholesale rate, excising law firm profits by using in-house counsel rather than law firms.⁵¹

⁴⁴ See Podgers, *supra* note 20, at 58 (“The U.S. Legal Profession is going through some heavy turbulence these days: downsizing at larger firms, a more competitive business environment, the growing impact of globalization and technology, and angst about job prospects and debt.”).

⁴⁵ See *infra* notes 48–78 and accompanying text.

⁴⁶ Dykstra, *supra* note 18, at 160.

⁴⁷ See CORPORATE COUNSEL, *supra* note 21.

⁴⁸ Stephen M. Sheppard, *The American Legal Profession in the Twenty-First Century*, 62 AM. J. COMP. L. 241, 251 (2014) (noting that “[m]any companies that outsourced the bulk of their legal work have been enlarging their in-house counsel staff, both as a means to manage better their legal affairs and as a means of cutting costs.”).

⁴⁹ See Debra Baker, *A Grab for the Ball*, 85 A.B.A. J. 42, 43–45 (1999) (noting that “[a]lmost all major insurers now use house counsel to represent significant numbers of policyholders.” By 1999, State Farm employed “500 attorneys in 39 firms, who represent about 25 percent of policyholders.”).

⁵⁰ Dykstra, *supra* at note 18, at 165 (citing Susan A. Berson, *10 Tips to Maximize Your Firm’s Profits and Keep Your Numbers on Track*, A.B.A. J. (Dec. 1, 2014, 1:20 AM) (discussing the one-third rule as “a standard practice for salary and expense ratios . . . ”)).

⁵¹ THOMAS S. CLAY & ERIC A. SEEGER, ALTMAN WEIL, INC., 2017 LAW FIRMS IN TRANSITION 1, 3 (2017), www.altmanweil.com/dir_docs/resource/90D6291D-AB28-4DFD-AC15-DBDEA6C31BE9_document.pdf [<https://perma.cc/FDX2-LLFH>] (noting that over two-thirds of surveyed law firms “report losing business to corporate law department insourcing.”); see also 2018

Additionally, insurance companies increasingly use “contractual arbitration clauses to resolve coverage and subrogation claims and disputes amongst insurers without the need for legal services.”⁵² By using inter-company arbitration agreements, insurance companies reduce “the volume of claim-related litigation and largely excised the need for legal services to resolve these disputes.”⁵³ With inter-company arbitration, insurance companies’ own adjusters present claims to arbitrators, who determine liability and assess damages.⁵⁴ With the use of inter-company arbitration, “an enormous annual volume of disputes are resolved expediently, extra-judicially, and without resort to hiring legal counsel.”⁵⁵

Beyond retaining routine legal tasks and resolving disputes without resort to legal counsel, corporate clients also approach outside legal expenses with enhanced sophistication and cost-consciousness. Corporate legal departments, including insurance companies, increasingly monitor and manage outside counsel.⁵⁶ A majority of corporate clients negotiate price reductions with law firms.⁵⁷ Insurance companies commonly impose contractual billing guidelines, require itemized statements, expect discounts, and subject itemized statements to third-party audits.⁵⁸ Additionally, corporate legal departments increasingly shift legal work to lower-priced firms.⁵⁹

Beyond constricting billable time and expenses, corporate legal departments increasingly manage spending on outside counsel by replacing the billable hour with alternative fee arrangements, such as fixed fees for services and reverse

CHIEF LEGAL OFFICER SURVEY: AN ALTMAN WEIL FLASH SURVEY ii (2018), www.altmanweil.com/dir_docs/resource/154F22DC-E519-4CE2-991D-492A0448C74F_document.pdf [<https://perma.cc/A7W2-Z67B>] (noting that surveyed law departments anticipate growth in 2019, reflecting a “long-term trend the survey has tracked since 2010.” One-third of legal departments anticipating growth “will hire new lawyers in an effort to save money on outside counsel.”).

⁵² Dykstra, *supra* at note 18, at 166 (citing Peter Kochenburger, *Arbitration Clauses in Insurance Policies*, NAT’L ASS’N INS. COMM’RS (Apr. 5, 2016), www.naic.org/documents/cmte_d_predispute_arbitration_wg_exposure_kochenburger_arbitration_provisions_in_insurance_contracts.pdf).

⁵³ Dykstra, *supra* at note 18, at 166 (citing Michael Young, *Insurance Coverage Arbitration*, COLLEGE COMMERCIAL ARB., 2017 at 1, www.ccaarbitration.org/wp-content/uploads/Insurance.pdf [<https://perma.cc/X7Z8-WPUL>]).

⁵⁴ *About Arbitration Forums, Inc.*, ARBITRATION FORUMS INC., home.arbfile.org/company-information/about-af [<https://perma.cc/T4WT-74B7>] (last visited Nov. 26, 2019).

⁵⁵ Dykstra, *supra* at note 18, at 166–67.

⁵⁶ See CORPORATE COUNSEL, LAW DEPARTMENT METRICS BENCHMARKING SURVEY 2013 57–59 (2013), www.lexisnexis.com/counsellink/documents/2013-ALM-Lexis-Law-Department-Metrics-Benchmarking-Survey.pdf [<https://perma.cc/W4UP-ZL43>].

⁵⁷ 2018 CHIEF LEGAL OFFICER SURVEY, *supra* note 51, at iv (noting a median discount of 10% off standard hourly rates reported by surveyed law departments in 2018).

⁵⁸ Baker, *supra* note 49, at 43; CORPORATE COUNSEL, *supra* note 21.

⁵⁹ Baker, *supra* note 49, at 43; CORPORATE COUNSEL, *supra* note 21.

auctions for services.⁶⁰ Reverse auctions allow clients to “invite qualified counsel or firms to bid on a flat fee basis for performing routine legal work.”⁶¹ In the aggregate, corporate clients can wring significant savings from reverse auctions. The annual legal expenses incurred by Fortune 500 companies typically range from \$20 million to \$200 million per year and reverse auctions can cut fifteen to forty percent from a company’s legal expenses.⁶²

By “insourcing” legal work and decreasing the profitability of routine tasks with billing guidelines, audits, and alternative fee arrangements, corporate clients eliminate or at least reduce the profitability of a significant volume of work handled by law firms. Beyond gaining savings from the routine provision of legal services, technology, in particular the Internet, allows the disaggregation of routine legal services into discrete, fungible, and outsourceable tasks.

B. Technology Allows the Disaggregation of Legal Services into Outsourceable Tasks

Since the mid-1990s, U.S.-based corporations outsourced a growing volume of legal services to various foreign countries.⁶³ There exists no consolidated data on specific outsourcing destinations for legal services but India appears to be the primary location.⁶⁴ During the new millennium, the volume of outsourcing legal services has accelerated.⁶⁵ Additionally, a growing group of outsourcing vendors help U.S.-based corporations and law firms outsource routine legal services both domestically and abroad.⁶⁶ The term outsourcing references the use of third parties to provide services in lieu of employees.⁶⁷ Most legal services outsourcing takes the form of either domestic outsourcing or exporting work offshore to either third-party contractors or foreign employees.⁶⁸ The lower cost of outsourced

⁶⁰ CORPORATE COUNSEL, *supra* note 21; see Patrick G. Lee, *Pricing Tactic Spooks Lawyers, Companies Use of Reverse Auctions to Negotiate Legal Services is Accelerating*, WALL ST. J. (Aug. 2, 2011), www.wsj.com/articles/SB10001424053111904292504576482243557793536 [<https://perma.cc/7ZXS-2ADB>] (noting that large companies including eBay Inc., GlaxoSmithKline PLC, and Toyota Motor Corp. have used reverse auctions to significantly reduce legal expenses).

⁶¹ Dykstra, *supra* note 18, at 170.

⁶² See Lee, *supra* note 60.

⁶³ Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2193 (2007).

⁶⁴ WORLD TRADE ORG., LEGAL SERVICES, BACKGROUND NOTE BY THE SECRETARIAT (2010), www.americanbar.org/content/dam/aba/administrative/professional_responsibility/gats_migrated/wto_legal_services.authcheckdam.pdf [<https://perma.cc/WJ2T-CSNB>].

⁶⁵ Krishnan, *supra* note 63, at 2201. Of note, “[i]n 2004 alone, 12,000 legal jobs were outsourced abroad.” *Id.* at 2194.

⁶⁶ K. William Gibson, *Outsourcing Legal Services Abroad*, L. PRAC. MAG., Jul-Aug. 2008, at 47.

⁶⁷ *Id.*

⁶⁸ *Id.*

services stems from lower labor costs: a junior lawyer in India in 2010 earned the equivalent of just over \$8,000, compared to the six-figure salaries expected by law firm associates in major cities in the United States.⁶⁹

By one estimate, legal services vendors in India and the Philippines employed over 5,200 professionals and generated an approximate annual revenue of \$300 million in 2010.⁷⁰ Another study placed estimates even higher, noting that revenue growth from outsourcing to India grew from \$146 million in 2006 to \$640 million by 2010.⁷¹ Beyond India, law firms based in the U.S. and the United Kingdom also outsource legal services to various other countries—including Australia, Canada, New Zealand, and South Africa—to both save on costs and to reap the benefits of time differences which allow for around-the-clock coverage of tasks.⁷²

However, the explosive growth of legal services outsourcing has proven an imperfect elixir for lowering the cost of legal services. Some skepticism remains regarding the suitability for outsourcing of many higher-value legal services tasks.⁷³ Moreover, domestic retention of even routine legal tasks by law firms “provides a valuable opportunity to train new lawyers to develop the judgment which provides the basis for the reputation of the top law firms.”⁷⁴ Further, law firms may risk tarnished reputations as the trusted law firm-client relationship transforms the lawyer’s role into project managers of a variety of low-cost contractors sprinkled around the globe. Not surprisingly, legal services outsourcing poses a thicket of potential ethical challenges related to billing, confidentiality, and disclosure.⁷⁵ Notably, “rising costs and growing concerns about the offshoring of legal services coincide[ed] with the rise of the domestic gig economy, creating a new wave of home-shoring legal services” in the United States.⁷⁶

Rising wages in India coupled with soft labor costs in the United States following the Great Recession narrowed the arbitrage opportunity of outsourcing

⁶⁹ *Id.*

⁷⁰ Shivani Shinde & Arijit Barman, *Thomson Reuters to Acquire LPO Firm Pangea3*, BUS. STANDARD (Feb. 11, 2013, 5:10 PM), www.business-standard.com/article/technology/thomson-reuters-to-acquire-lpo-firm-pangea3-110111900086_1.html [<https://perma.cc/LJ3C-H8WV>].

⁷¹ GEORGE YARROW & CHRISTOPHER DECKER, REG. POL’Y INST., ASSESSING THE ECONOMIC SIGNIFICANCE OF THE PROFESSIONAL LEGAL SERVICES SECTOR IN THE EUROPEAN UNION (2012), www.ccbe.eu/NTCdocument/RPI_study_Yarrow_D1_1348650358.pdf [<https://perma.cc/7DEA-7B8E>].

⁷² *Id.* at 75.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Dykstra, *supra* note 18, at 176.

legal services abroad.⁷⁷ Tough times in the United States resulted in a mass of underemployed and unemployed law school graduates in the United States.⁷⁸ This narrowed India's advantage as once lower labor costs rose with other costs, such as capital expenses.⁷⁹ The diminished labor arbitrage opportunity and challenges of providing American-style legal services abroad are driving a new wave of domestic outsourcing. However, the use of insourcing and outsourcing of legal services in the U.S. coupled with the heightened cost consciousness of corporate clients has led to flat revenue growth in the legal services sector.

C. Stagnant Revenues for Legal Services Due to Cost Containment

The impacts of cost containment, insourcing, outsourcing, and rise of the non-traditional provision of legal services are reflected in the portion of the Gross Domestic Product (GDP) generated by the legal services sector, which has remained relatively static at mid-1990s levels when adjusted for inflation.⁸⁰ Within the overall GDP, various sectors are independently measured to reflect the contribution of each sector toward the GDP. Legal services are included within the broader category of "Professional, Scientific, and Technical Services," which also includes a wide variety of services such as accounting, architectural, engineering, advertising, and veterinary services.⁸¹ The legal services sector includes attorneys engaged in private practice but omits attorneys employed in government and other sectors, such as in-house counsel.⁸² Therefore, the legal services sector includes the vast majority of attorneys, almost seventy percent of whom are engaged in private practice.⁸³

⁷⁷ Vanessa O'Connell, *Lawyers Settle . . . For Temp Jobs*, WALL ST. J. (June 15, 2011), www.wsj.com/articles/SB10001424052702303714704576383641752966666 [<https://perma.cc/G3PW-7UH4>].

⁷⁸ Barry Shlachter, *Atlas Legal Research: A Passage to India*, D MAG. (Dec. 2013), [www.dmmagazine.com/publications/d-ceo/2013/december/atlas-legal-research-a-passage-to-india](http://dmmagazine.com/publications/d-ceo/2013/december/atlas-legal-research-a-passage-to-india) [<https://perma.cc/GA7L-29JV>].

⁷⁹ *Id.*

⁸⁰ *Government Agencies*, CTR. FOR POVERTY RES., poverty.ucdavis.edu/government-agencies-and-other-poverty-centers [<https://perma.cc/LT68-RCJ9>] (last visited Nov. 26, 2019) (explaining that the GDP is compiled by the U.S. Department of Commerce, Bureau of Economic Analysis (BEA), which "collects source data, conducts research and analysis, develops and implements estimation methodologies, and disseminates statistics to the public.").

⁸¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM 461 (2017), www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf [<https://perma.cc/4G5P-BWZ3>].

⁸² *Id.* (of note, within this group, "Offices of Lawyers" is further defined to include "offices of legal practitioners known as lawyers or attorneys . . . primarily engaged in the practice of law. Establishments in this industry may provide expertise in a range or in specific areas of law, such as criminal law, corporate law, family and estate law, patent law, real estate law, or tax law.").

⁸³ THE NALP FOUND. FOR LAW CAREER RESEARCH AND EDUCATION AND AM. B. FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 25 (2004), www.americanbarfoundation.org/uploads/cms/documents/ajd1_final_report_for_distribution.pdf [<https://perma.cc/C5PG-VC4M>].

Measurement of the legal services sector is “based on the total revenues earned in the sector.”⁸⁴ Measuring the legal services sector by revenue provides a gauge of the growth of that sector, or in the in the case of the legal services sector, a lack of growth. Specifically, when adjusted for inflation, the Real Gross Output of the legal services sector gradually retreated from \$291.7 billion in 2008 to \$259.8 billion in 2014.⁸⁵ This amount did climb to \$262.9 in 2015, but still remains below the \$267.3 billion output of 1998.⁸⁶ Further, when adjusted for inflation, the Gross Output of the legal services sector remained less than the sector’s output of \$277.1 billion in 1999 for *every* year from 2009 to 2017.⁸⁷

The rising trends of cost containment, insourcing, outsourcing, and the increasing trend of the non-traditional provision of legal services are reflected in anemic growth in revenues of the legal sector.⁸⁸ Importantly, each of these trends appear forced upon the legal industry by their corporate clients and global competition. Responding to pressure from corporate clients, “law firms are attempting to reduce costs by improving efficiency and consolidating job duties.”⁸⁹ But much of this response seems reactive rather than innovative.

For example, some law firms are using contract and staff lawyers and are also insourcing work to their lower-cost domestic offices.⁹⁰ The global law firm Orrick operates a domestic insourcing center located in a former metal stamping plant in Wheeling, West Virginia.⁹¹ Orrick’s insourcing center relies on flexible

⁸⁴ YARROW & DECKER, *supra* note 71, at 50 (noting that the GDP estimates for the legal services sector based on revenue “fail to capture the significance of the legal sector in facilitating other sorts of business transactions . . .”).

⁸⁵ See *Interactive Access to Industry Economic Accounts Data: GDP by Industry*, BUREAU ECON. ANALYSIS n.1 (Apr. 19, 2018), www.bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=2&isuri=1 [<https://perma.cc/A6XC-X7GP>] (follow “GDP-by-Industry” hyperlink; then follow “Gross Output by Industry” hyperlink; then follow “Real Gross Output by Industry (A) (Q)” hyperlink; then click “Annual;” then click “Next Step” hyperlink) (explaining that chained 2009 dollar series are calculated as the product of the chain-type quantity index and the 2009 current-dollar value of the corresponding series, divided by 100).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ CLAY & SEEGER, *supra* note 51, at ii (noting that “[d]ecreasing demand for legal services is endemic in the profession.”).

⁸⁹ Craig Stalzer, *Careers in Law Firms*, U.S. DEP’T LABOR (Sept. 2014) www.bls.gov/career-outlook/2014/article/careers-in-law-firms.htm [<https://perma.cc/2M9Q-KQUC>].

⁹⁰ CLAY & SEEGER, *supra* note 51, at iii (noting that survey responses reflect “[f]irms are using contract lawyers, staff lawyers and part-time lawyers in an effort to mitigate costs and improve efficiency and profitability.”).

⁹¹ *Wheeling, W.V. (GOC)*, ORRICK, www.orrick.com/Locations/Wheeling [<https://perma.cc/W33Y-YFSJ>] (last visited Nov. 26, 2019).

contract labor, including attorneys hired and paid by the hour.⁹² While perhaps not done with the transparency and marketing buzz of Orrick's insourcing center, other traditional law firms also are routing work to their lower-cost domestic offices. Traditional firms appear to be insourcing legal work from expensive coastal metropolitan branches to lower-cost, inland offices. For example, when Hewlett-Packard recently sought bids from outside counsel for legal services, law firms offered to source the work to partners billing at lower rates in regional offices.⁹³ This anecdote may reveal a significant trend amongst large and regional law firms: reacting to the price competition of non-traditional legal services providers by insourcing legal work from expensive urban offices on the East and West coasts to lower-cost, inland offices.

But overall, law firms primarily continue to address change in a reactive manner that maintains the status quo. Law firms seek to contain costs by elongating and eliminating partnership tracks and using contract attorneys paid by the hour. Firms seek to bolster revenue by expecting attorneys to bill more hours and by poaching partners from competitors. This strategy may not prove sustainable. A recession may see more firms dissolve, following the recent example of prominent firm LeClairRyan's bankruptcy filing and imminent dissolution.⁹⁴ In part, the needless stasis at law firms may be the result of a demographic bubble of well-established baby boom attorneys who may not be inclined or optimally prepared to conceive of or implement creative solutions to address the flat revenue of the legal services sector.

D. The Ranks of Practicing Attorneys are Aging Due to a Demographic Bubble

The mid-twentieth century baby boom followed the Second World War and lasted from the mid-1940s until the early 1960s; the baby boom led to a corresponding boom in active attorneys that more than doubled the number of

⁹² Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce, All Things Considered*, NPR (Jan. 22, 2018), www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now [<https://perma.cc/5T2V-2Q9G>].

⁹³ Drew Combs, *Disruptive Innovation, Look Out Firms, Axiom is Trying to Beat You at Your Own Game*, AM. LAW., June 27, 2012.

⁹⁴ Debra Cassens Weiss, *More Law Firms May Close if Recession Hits; Recruiter: 'Once This Party Ends, It's Going to End Very Quickly'*, ABA J. (Sept. 4, 2019, 3:11 PM), www.abajournal.com/news/article/more-law-firms-could-close-if-recession-hits [<https://perma.cc/34KG-9NWX>]; Debra Cassens Weiss, *LeClairRyan Files for Bankruptcy and Lists its Joint Venture as a Creditor*, ABA J. (Sept. 4, 2019, 10:15 AM), www.abajournal.com/news/article/leclairryan-files-for-bankruptcy-and-lists-its-joint-venture-as-a-creditor [<https://perma.cc/VRK3-GGZP>] (describing how LeClairRyan grew into a national firm that peaked with about 385 lawyers including 160 partners, located at the firm's 25 offices. But, with waves of attorney departures in recent years, the firm's gross revenues declined adversely affecting profits due to "excess office space and overhead . . ." leading to the firm's bankruptcy).

attorneys in the United States from 326,842 in 1970 to 846,036 in 1993.⁹⁵ The oldest baby boomers turned 65 in early 2011.⁹⁶ Commencing on January 1, 2011, an estimated 10,000 baby boomers have celebrated their 65th birthday every day and these birthdays will continue every day for the next nineteen years.⁹⁷ As a result of this demographic phenomenon, the ranks of practicing attorneys are aging.⁹⁸ The median age of licensed attorneys steadily crept up from 39 in 1980 to 49 in 2005.⁹⁹ By 2012, roughly sixty percent of law partners were fifty-five or older, and some estimates noted that a quarter of all practicing attorneys in 2013 were at least 65 years old.¹⁰⁰

While this upwards trajectory in the age of practicing attorneys might naturally result in the same trajectory of retiring attorneys, this older contingent of attorneys have not retired on schedule.¹⁰¹ Instead, baby-boom-era practitioners continue to practice, in part, due to longer life expectancy. The life expectancy of a sixty-five year-old lawyer is almost twenty more years, and the lingering effects of the great recession caused many lawyers to postpone retirement.¹⁰² According to one survey, eighty-five percent of the managing partners at the top 100 law firms belong to the baby-boom-era, while only three percent hail from Generation X, a demographic which includes those born from the early 1960s through the early 1980s.¹⁰³ Further, at the biggest law firms, a majority of partners age sixty and over exercise control over at least a quarter of their firm's revenue.¹⁰⁴ But the potential ramifications of this demographic bubble go beyond just inhibiting the career opportunities of younger generations.

⁹⁵ ABA NATIONAL LAWYER POPULATION SURVEY 1878–2019 (2019), www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2019.pdf [<https://perma.cc/SJ7W-GJNK>].

⁹⁶ Russel Heimlich, *Baby Boomers Retire*, PEW RES. CTR. (Dec. 29, 2010), www.pewresearch.org/fact-tank/2010/12/29/baby-boomers-retire/ [<https://perma.cc/5LLB-6U7H>].

⁹⁷ *Id.*

⁹⁸ Robert Jessup, *The Disappearing Young Attorney*, L.'S MUTUAL (June 14, 2016), www.lawyersmutualinc.com/blog/the-disappearing-young-attorney [<https://perma.cc/VA6U-EWYV>].

⁹⁹ A.B.A., *LAWYER DEMOGRAPHICS: YEAR 2016* (2016), 45e2ly1gtqp9jmqme2fiw751-wpengine.netdna-ssl.com/wp-content/uploads/sites/3/2016/11/Incubators-The-Next-Wave-in-the-Access-to-Justice-Movement.pdf [<https://perma.cc/52JK-9FFS>].

¹⁰⁰ Larry Latourette, *Partners in Practice: The Era of Modern Retirement*, ABOVE L. (Sept. 26, 2012, 1:49 PM) abovethelaw.com/2012/09/partners-in-practice-the-era-of-mandatory-retirement/ [<https://perma.cc/WW7L-ZY2V>].

¹⁰¹ *Id.* (noting that “[n]ormal retirement remains at 65, the historical retirement age under Social Security.”).

¹⁰² *Id.*

¹⁰³ Elizabeth Olsen, *Graying Firms Wrestle with Making Room for Young Lawyers*, N.Y. TIMES (Nov. 4, 2015), www.nytimes.com/2015/11/05/business/dealbook/graying-firms-wrestle-with-making-room-for-younger-lawyers.html [<https://perma.cc/6BQR-4CSQ>].

¹⁰⁴ *Id.*

Most law firms continue to reflect the business model wherein associates climb the proverbial ladder to equity partnership over a period of many years.¹⁰⁵ However, this business model may result in law firms splintering when their current leaders eventually retire.¹⁰⁶ As one marketing director notes, “[t]he boomers inherited clients and don’t give them up, or the income they generate, until they retire.”¹⁰⁷ This may foretell future volatility in the legal services sector, including dissolutions and mergers for law firms, as retiring baby boom partners find that little remains of their practices or firms to sell.¹⁰⁸ At that point, there may be a wave of firm breakups.¹⁰⁹ The largely unplanned succession of baby boom partners remains a serious and unresolved issue at many firms.¹¹⁰ So far, the legal industry has largely failed to plan for the succession of baby boom partners.

Only thirty-one percent of law firms have instituted a succession planning process.¹¹¹ Thus, the majority of firms may face an imminent impact economically of their failure to institute a plan for succession.¹¹² Given the strong pull of the status quo amongst law firms, most firms are apt to chip away at the margins of this problem.¹¹³ Mandatory retirement policies may provide one potential, albeit partial, solution, at some law firms.

Traditionally, law firms allowed attorneys to practice as long as they desired.¹¹⁴ However, one “significant trend is that law firms are today culling their partner ranks, actions that would have seemed unthinkable years ago.”¹¹⁵ Additionally, many firms have implemented mandatory retirement policies.¹¹⁶ These plans gained popularity under the belief that the law profession was no exception to evolution and change, and often begged for younger and more innovative talent.¹¹⁷ While steeped in ageism stereotypes, the rationale underlying mandatory retirement policies was “that older, less vibrant partners should step

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (as noted by Professor William Henderson, “[s]ome law firms could crumble after this generation because they don’t have a lot to sell to the next generation . . .”).

¹⁰⁹ *Id.*

¹¹⁰ CLAY & SEEGER, *supra* note 51.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Olsen, *supra* note 103 (noting that change at law firms tends to be “limited, tactical and reactive . . .”).

¹¹⁴ Latourette, *supra* note 100.

¹¹⁵ McGrath, *supra* note 13.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Perhaps ironically, mandatory retirement policies initially gained popularity in the 1980s, presumably to the benefit of baby boom partners.

aside and let the younger . . . lawyers take the reins, thus allowing for an orderly succession of firm leadership and the handing off of client relationships to the next generation.”¹¹⁸ Beyond the perceived benefits of orderly succession, mandatory retirement policies raise a host of potential disadvantages.

Cognizant of the potential disadvantages of mandatory retirement policies, including losing productive and profitable senior partners and the potential of Age Discrimination in Employment Act claims, some firms, including K&L Gates and Pillsbury, have jettisoned their mandatory retirement policies.¹¹⁹ Nonetheless, “more than half of large law firms have a mandatory retirement age on the books . . . generally between ages 65 and 75, with 70 as the most common choice.”¹²⁰ Some mandatory retirement policies simply dictate that attorneys leave at a certain age.¹²¹ Other firms create a transitional phase lasting several years or convert older attorneys from equity partners to some other status such as senior counsel or senior partner.¹²² However, mandatory retirement policies seem more reflective of the symptoms underlying the demographic bubble of baby boom attorneys aging in the legal industry rather than indicia of a cure for the issues that stem from this bubble.

Some theorize that “the baby boomer generation is now entering retirement—and that means millions of lawyers leaving the job field.”¹²³ Eventually this prognostication may prove somewhat accurate.¹²⁴ But this transition will be slow, given that an estimated 10,000 baby boomers will celebrate their 65th birthday every single day for the next nineteen years.¹²⁵ So for at least the foreseeable future, this aging demographic bubble will continue to occupy an outsized portion of the premium real estate in the legal industry.

This aging demographic bubble of baby boom attorneys may foretell deeper issues for the legal services industry. In general, change at law firms tends to

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Considering Law School? Statistics Say the Time is Right*, CONCORDIA U. SCH. L., law.cu-portland.edu/admission-financial-aid/considering-law-school-statistics-say-time-right [https://perma.cc/RV3V-HETL] (last visited Nov. 26, 2019) [hereinafter *Considering Law School*].

¹²⁴ The term millions may be a bit of an overstatement given that the number of lawyers in the United States hailing from all generations as of December 31, 2018 totaled 1,338,678. Debra Cassens Weiss, *Lawyer Population 15% Higher than 10 Years Ago, New ABA Data Shows*, ABA (May 3, 2018, 2:31 PM), www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows [https://perma.cc/M7G5-8DHQ].

¹²⁵ *Considering Law School*, *supra* note 123.

be limited and reactive.¹²⁶ One survey in 2015 queried law firm leaders about the changing nature of the legal profession; these leaders concurred about the increased tempo of change and that most of the current industry trends would prove permanent.¹²⁷ The firm leaders also noted a struggle with resistance to these changes by their law firms' partners.¹²⁸ According to forty-four percent of surveyed law firm leaders, one of the leading causes of a firm's reluctance to enact new and innovative strategies is directly tied to partner resistance.¹²⁹

The heightened velocity of change in the legal industry necessitates both creative solutions and innovation. Due to age and resistance to change, baby boom managing partners may not be inclined, let alone optimally positioned, to conceive and implement creative solutions.¹³⁰

III. COMPOUNDED BY AN INGRAINED LAW FIRM CULTURE THAT QUASHES CREATIVITY AND RESISTS INNOVATION, BABY-BOOM-ERA LEADERSHIP IS POORLY POSITIONED TO SERVE AS A CREATIVE CATALYST FOR INNOVATION

Any discussion of creativity and wisdom is apt to tread dangerously close to ageism stereotypes, but a few grains of truth underly many stereotypes. For example, the age of a stereotypical summer Olympic medalist likely comports with the statistics: the average female Olympic medalist is 25.2 years old while the average male medalist is 26.2.¹³¹ Exceptions abound, such as the outlier

¹²⁶ Olsen, *supra* note 103.

¹²⁷ CLAY & SEEGER, *supra* note 51 (noting that over two-thirds of surveyed law firms "report losing business to corporate law department insourcing."); *see also* 2018 CHIEF LEGAL OFFICER SURVEY, *supra* note 51.

¹²⁸ 2018 CHIEF LEGAL OFFICER SURVEY, *supra* note 51.

¹²⁹ *Id.*

¹³⁰ Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97-144, 112-13 fn. 61 (2001) (noting that "[a]n interesting body of work has confirmed that certain personal characteristics are associated with high levels of individual creativity-independence or non-conformance and selfishness, birth order, persistence and hard work, focus on particular problems and depth in domain, intrinsic motivational pulls, an ability to live with ambiguity and tension, playfulness, outsider family, high expectations and deep commitment." While not entirely reflective of personal characteristics of the stereotypical aging big firm managing partner, these "personal characteristics may also be found among leading legal creative figures-see biographies of Louis Brandeis, Oliver Wendell Holmes, Thurgood Marshall, and Benjamin Cardozo" (internal citations omitted)).

¹³¹ *Olympic Sports – How Does Peak Age Vary?*, STAT ZONES, www.thestatszone.com/olympic-sports-how-does-peak-age-vary [https://perma.cc/4NT8-K2CA] (last visited Nov. 26, 2019) [hereinafter *Olympic Sports*] (based on a data set compiled by the International Olympic Committee that includes every Summer Olympics' medalist between 1992 and 2012). Each athlete earning a medal is included in this data set, including team events and event medalists in multiple events. *Id.*

of Canadian Ian Miller winning a silver medal at age sixty-one in Equestrian Team Jumping at the 2008 Beijing Olympics.¹³² But the prime age for winning an Olympic medal peaks in the mid-twenties, albeit with athletes in sports like gymnastics peaking a bit younger and endurance athletes tending to peak a little later.¹³³ Managing partners at law firms certainly do not need to be at the peak of their athletic abilities, but given the velocity of change in the legal industry, firm leadership needs to be creative in order to solve problems, innovate, and thrive. And like athletic performance, creative performance and productivity also peaks and then recedes during a normal human lifespan.

From Wolfgang Amadeus Mozart's prodigious output of over 600 musical works before his death at thirty-five, to Homer's conception of Nestor as not just the oldest but also the wisest Greek battling the Trojans, both creativity and wisdom are often associated with age and stereotyped as antithetical.¹³⁴ "Creativity and wisdom are frequently viewed as exhibiting contrary relations with aging: Where the former is seen as a privilege of youth, the latter is seen as a prerogative of old age."¹³⁵ Law firms need both creativity and wisdom, but the aging demographics of law firm leadership tilt stereotypically toward wisdom rather than creativity. But before discussing why baby boom law partners may not be chronologically situated for optimal creative production, a brief tromp into the nature and definition of creativity is in order.

A. *Considering a Broad Working Definition of Creativity: Categorizing Creativity into Exceptional or Big-C Creativity and Incremental or little-c Creativity*

Studying creativity remains a relatively new field, only commencing in earnest in the 1950s.¹³⁶ Long considered somewhat mysterious, the concept of creativity defies a single, unified definition.¹³⁷ Amongst scholars studying creativity, little

¹³² *Canadian Olympic Medal Count*, CAN. OLYMPIC TEAM OFFICIAL WEBSITE, olympic.ca/team-canada/ian-millar/ [https://perma.cc/5ZGJ-RN52] (last visited Nov. 26, 2019).

¹³³ *Olympic Sports*, *supra* note 131.

¹³⁴ See LEWIS R. AIKEN, *ASSESSMENT OF INTELLECTUAL FUNCTIONING* 283 (2d ed. 1996); Dean Keith Simonton, *Creativity and Wisdom in Aging*, in JAMES E. BIRREN, *HANDBOOK OF THE PSYCHOLOGY OF AGING* 320 (3rd Ed. 1990)); Sara Peach, *Why Did So Many Classical Composers Die Tragically Young?*, DURHAM MED. ORCHESTRA (Apr. 16, 2018), dmomusic.org/2018/04/composer-health-intro/ [https://perma.cc/JZS3-AG3W].

¹³⁵ Simonton, *supra* note 134, at 326.

¹³⁶ KATHLEEN ELLIOTT VINSON ET AL., *MINDFUL LAWYERING, THE KEY TO CREATIVE PROBLEM SOLVING* 41 (2018).

¹³⁷ *Id.* (noting that creativity is frequently "referred to as one of those things that 'you'll know it when you see it.'").

consensus exists on how to define what constitutes creativity.¹³⁸ This lack of consensus is reflected by the over 100 definitions of the word itself.¹³⁹ But the gist of these various definitions encompasses the ability to come up with some novel idea or act that results in something new, often a solution or a work.¹⁴⁰ Patent law provides a framework that parallels this definition, extending the ability to obtain a patent to any person who “invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”¹⁴¹ But use of the singular “person” in this definition overlooks the important role of collaboration in creativity.¹⁴² Further, a broader definition of creativity may be necessary to capture creativity beyond just novel ideas that result in some object or process.

A broader definition captures the creativity of framing and asking new questions. Developmental psychologist Howard Gardner explains:

People are creative when they can solve problems, create products or raise issues in a domain in a way that is initially novel but is eventually accepted in one or more cultural settings. Similarly, a work is creative if it stands out at first in terms of its novelty but ultimately comes to be accepted within a domain. The acid test of creativity is simple: In the wake of a putatively creative work, has the domain subsequently been changed? . . . Creativity includes the additional category of asking new questions [or creating new fields or domains].¹⁴³

¹³⁸ See DEAN KEITH SIMONTON, *Big-C- Versus Little-c Creativity: Definitions, Implications, And Inherent Educational Contradictions*, in *CREATIVE CONTRADICTIONS IN EDUCATION, CROSS DISCIPLINARY PARADOXES AND PERSPECTIVES* (Ronald A. Behgetto & Bharath Sriraman ed., 2017) (noting that while the body of creativity research has grown considerably, no consensus exists on a definition of creativity).

¹³⁹ *Id.*

¹⁴⁰ Menkel-Meadow, *supra* note 130, at 113 (noting various definitions of creativity such as “a process by which a symbolic domain in the culture is changed”, “any act, idea or product that changes an existing domain or that transforms an existing domain into a new one”, “how the new comes into being”, “the quality of products or responses judged to be creative by appropriate observers and . . . also be regarded as the process by which something so judged is produced,” and “that process which results in a novel work that is accepted as tenable or useful or satisfying by a group at some point in time.” (internal citations omitted)).

¹⁴¹ 35 U.S.C. § 101 (2019).

¹⁴² VINSON ET AL., *supra* note 136, at 49–50. As an example, consider the songwriting partnership of John Lennon and Paul McCartney, who together are credited with the lyrics and music for almost 200 songs, even if some specifics as to who wrote what may defy the credits. See Scott Simon & Ned Wharton, *A Songwriting Mystery Solved: Math Proves John Lennon Wrote ‘In My Life’*, NPR (Aug. 11, 2018, 8:19 AM), www.npr.org/2018/08/11/637468053/a-songwriting-mystery-solved-math-proves-john-lennon-wrote-in-my-life [<https://perma.cc/7SGL-Z9DT>].

¹⁴³ Menkel-Meadow, *supra* note 130, at 97–144, 113–14 (quoting HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY* 116–19 (Basic Books 1999)).

Creativity also includes the synthesis or combination of existing concepts and information in innovative ways.¹⁴⁴ As Steve Jobs noted, “[c]reativity is just connecting things.”¹⁴⁵ A broad definition of creativity also incorporates simplification, referring to that which jettisons the superfluous.¹⁴⁶ Gabrielle “Coco” Chanel once etched an epigraph to her fabric shears on a Baccarat crystal plate that that read: “With these scissors, I cut away everything that was superfluous in the creations of others.”¹⁴⁷ As jazz artist and composer Charles Mingus explained, “[a]nyone can make the simple complicated. Creativity is making the complicated simple.”¹⁴⁸

Further, a broad definition of creativity includes the seemingly paradoxical creativity of destruction, a definition which also encompasses the variety of innovative creative destruction defined by economists.¹⁴⁹ Creativity includes some expressions of destruction, such as the iconic image captured in 1979, just as Paul Simonon, the bass player for The Clash, raised his bass by the neck above his head, poised to smash it on the stage of the Palladium Theatre in New York.¹⁵⁰ As another example of creative destruction, consider the Banksy painting sold at a

¹⁴⁴ Samantha A. Moppett, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 S. ILL. U. L.J. 253, 276 (2013). “The creative act . . . does not create something out of nothing; it uncovers, selects, re-shuffles, combines, synthesizes already existing facts, ideas, faculties, skills. The more familiar the parts, the more striking the new whole.” *Id.* at 273 (quoting ARTHUR KOESTLER, *THE ACT OF CREATION* 119–20 (1964)).

¹⁴⁵ Meredith Cooper, *How to Break Free From the Confines of a Creative Rut*, ADWEEK (July 31, 2018), www.adweek.com/creativity/how-to-break-free-from-the-confines-of-a-creative-rut/ [<https://perma.cc/Y2K2-K24M>] (noting that “the best creative ideas can be generated out of something you’ve already seen and connecting those pre-existing experiences to come up with something new . . .”).

¹⁴⁶ Chuck Frey, *The Surprising Connection Between Simplification and Innovation*, INNOVATION MGMT. (Jan. 23, 2013), innovationmanagement.se/2013/01/23/the-surprising-connection-between-simplification-and-innovation/ [<https://perma.cc/8KP9-5RMZ>] (noting how Kevin Sprouls, an artist for the Wall Street Journal creates portraits for the newspaper that consist of dots on white space, rather than explicit lines or brushstrokes. The dots and white space create an optical illusion that harnesses the “brain’s talent for closure – for filling in the missing information – that interprets them as a picture of a person.”).

¹⁴⁷ Herbert Muschamp, *An Elegant Blow to Kitsch*, N.Y. TIMES, Sec. B, 1 (July 23, 1996), www.nytimes.com/1996/07/23/nyregion/an-elegant-blow-to-kitsch.html [<https://perma.cc/C56R-V4S9>].

¹⁴⁸ David Wahl, *Mingus on Creativity: Making the Complicated Simple*, CREATIVE CREATIVITY (Aug. 30, 2017), creativecreativity.com/2017/08/30/mingus-on-creativity-making-the-complicated-simple/ [<https://perma.cc/3Q4U-TVEJ>].

¹⁴⁹ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 83 (1942) (coining the term creative destruction and outlining “the process of industrial mutation . . . that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.”).

¹⁵⁰ Giancarlo Losco, *The Shot on the Clash’s London Calling: An Act of Destruction that Made History*, AURALCRAVE (July 9, 2018), auralcraive.com/en/2018/07/09/the-shot-on-the-clashs-london-calling-an-act-of-destruction-that-made-history/ [<https://perma.cc/HG5H-ABLW>] (describing the iconic image, subsequently used as the cover on the album *London Calling*, as a

Sotheby's auction in October of 2018.¹⁵¹ Just after the auctioneer's gavel dropped at \$1.4 million, a shredder inside the frame of the painting began to destroy the artwork.¹⁵² The artist designed this self-destruct feature as a failsafe should the work ever be sold at auction.¹⁵³ In an Instagram post shortly thereafter, Banksy quoted Pablo Picasso, writing that "[t]he urge to destroy is also a creative urge."¹⁵⁴

Beyond defining types of creativity, a single creative project often incorporates numerous types of creativity.¹⁵⁵ As an example from a century ago, Ford Motor Company engineers, faced with demand for Model T automobiles that far outstripped production, borrowed an idea from Swift & Company's Meat Packing House, which featured an innovative system of conveyors that moved hog carcasses past stationary meat cutters who removed various pieces.¹⁵⁶ Ford reversed the concept of the moving hog "disassembly line" to create the first moving assembly line to build automobiles.¹⁵⁷ The Ford engineers seemingly incorporated four types of creativity: they framed a problem, synthesized a solution from an existing concept, simplified the production of automobiles, and perhaps even engaged in creative destruction, in the economic sense, at least for competitors inefficiently handcrafting cars one at a time. But beyond types, creativity is often categorized by degree of magnitude.¹⁵⁸

gesture of "rebellion and destruction" and noting the "importance of the gesture considered as a creative movement and an artistic dance of American Abstract Expressionism (Pollock and De Kooning above all) [that] live again in this cover, which shows also the America that the English band loved and hated at the same time.")

¹⁵¹ Jason Daley, *Watch This \$1.4 Million Banksy Painting Shred Itself as Soon as It's Sold*, SMITHSONIAN.COM (Oct. 8, 2018), www.smithsonianmag.com/smart-news/watch-14-million-banksy-painting-shred-itself-soon-it-sold-180970486/#HBZkz4RAjsgR4LVq.99 [<https://perma.cc/RP7B-AJ9M>].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Swift & Company's Meat Packing House, Chicago, Illinois, "Splitting Backbones and Final Inspection of Hogs," 1910-1915*, HENRY FORD, www.thehenryford.org/collections-and-research/digital-collections/artifact/354536/ [<https://perma.cc/82HC-EH4F>] (last visited Sept. 8, 2019).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ VINSON ET AL., *supra* note 136, at 45. Of note, many scholars delineate a creative process. As an example, consider the "four stages of the creative process" denoted as preparation, incubation, illumination, and verification. *Id.* at 47-48. This particular process has deep roots. See GRAHAM WALLAS, *THE ART OF THOUGHT* (Solis Press 1926) (proposing a four-step creative process that entails preparation, incubation, illumination, and verification). But deep roots aside, the notion that the creative process might be corralled into a particular format seems questionable in light of countless creative individuals whose creative production either predated this process or they seemingly just tore up the script. As an example, consider John Coltrane, who jumped right ahead to "illumination" as not knowing what direction his musical muse might take as he experimented and unleashed solos that were "transcendent and structureless, episodic bursts of light." Jason Parham, *What Haunted John Coltrane*, FADER (Apr. 25, 2017), www.thefader.com/2017/04/25/john-coltrane-chasing-trane-film-essay [<https://perma.cc/RE3Y-7ZSS>].

Creativity is often framed into two broad categories based on magnitude. The first consists of the quintessential lightning bolt breakthroughs—like Albert Einstein’s interrelated theories of special relativity and general relativity—called exceptional or *Big-C* creativity. This category is juxtaposed with much smaller arcs of electric spark, sometimes called incremental or personal creativity and dubbed *little-c*, like discovering that swapping out a few key ingredients in a recipe can create a new, delicious dish.¹⁵⁹ Notably, one issue with the *Big-C* category is the inherent subjectivity of delineating what types of creativity ought to fall into this category.¹⁶⁰ Some scholarship further assigns non-*Big-C* creativity into *mini-c* creativity denoting “experiences of transformative learning,” *little-c* creativity referencing everyday creative expression and problem-solving, and *pro-c* creativity referring to vocational creativity.¹⁶¹ But for this discussion, delineating creativity into *Big-C* and *little-c* will suffice.

B. Neither the Law nor Traditional Law Firm Culture is Particularly Receptive to Creativity

Some scholars argue that the law is a veritable dead zone devoid of *Big-C* creativity since “Anglo-American law, at least, is based on adherence to precedent and incrementalism.”¹⁶² However, this position overlooks some arguably *Big-C* creative moments from landmark decisions that veer far from stodgy established precedent, like *Brown v. Board of Education*, or even the audacious communal creativity underlying the convention that ripped up the Articles of Confederacy and created the Constitution itself.¹⁶³ Nonetheless, the law does not seem particularly conducive to creativity, except perhaps for the occasional landmark decision. But the Constitutional Convention hints at the importance of time, place, and community to the rhythms of creativity.

Some aspects of creative activity can be socially incubated, and thus, “certain conditions may be more or less likely to foster, encourage or exploit creativity”¹⁶⁴ Consider Thomas Edison’s Menlo Park laboratory abrim with

¹⁵⁹ SIMONTON, *supra* note 138, at 3; see also Menkel-Meadow, *supra* note 130, at 114.

¹⁶⁰ Nancy C. Andreasen, *Secrets of the Creative Brain*, THE ATLANTIC (July/Aug. 2014), www.theatlantic.com/magazine/archive/2014/07/secrets-of-the-creative-brain/372299/ [https://perma.cc/CAW3-SP6Z] (noting the inherent subjectivity of the *Big-C* category and rhetorically asking “[w]hat does it mean, for example, to have “created” something? Can creativity in the arts be equated with creativity in the sciences or in business, or should such groups be studied separately? For that matter, should science or business innovation be considered creative at all?”).

¹⁶¹ MARY BANKS GREGERSON ET AL., *TEACHING CREATIVELY AND TEACHING CREATIVITY* (James C. Kaufman et al. eds., Springer New York, 2013).

¹⁶² *Id.* at 114 (citing EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (University of Chicago Press 1949)); KARL N. LLWELLYN, BRAMBLE BUSH (1930).

¹⁶³ *Brown v. Board of Educ.*, 347 U.S. 483 (1954); Menkel-Meadow, *supra* note 130, at 114.

¹⁶⁴ Menkel-Meadow, *supra* note 130, at 112.

new ideas and inventions. In contrast, most law firm cultures seem ingrained and resistant to change which tends to be metered, limited, and reactive.¹⁶⁵ Attorneys tend to be risk averse because they operate largely in an adversarial system primarily focused on assessing blame and fault.¹⁶⁶ In order to protect their clients' interests, attorneys tend to focus on what might go wrong rather than right.¹⁶⁷ This myopic focus on risk reduction often quashes creation and development and also discourages risk taking.¹⁶⁸ Law firm culture tends to reflect and compound this risk aversion.¹⁶⁹

Further, some epochs seemingly foster creativity, often when a “critical mass” of creative thinkers converge together and either discover problems to solve or find a resource-rich environment supportive of their creativity, for example, the Golden Age of Athens, Renaissance Europe, Impressionism in the 19th century, the Motown sound, and the infamous mergers and acquisitions decade.¹⁷⁰ The current epoch does not appear poised to be recalled as a golden age of law firm creativity and innovation. Instead, the typical law firm structure quashes creativity. As an organization, law firms are structured in a rigid, hierarchical manner which rewards conformity and places unnecessary emphasis on status symbols, resulting in a great inhibition of creativity.¹⁷¹ From the rigid hierarchy of partnership tracks to the status symbol of the corner office, the traditional law firm structure inhibits creativity. Additionally, senior partners often prioritize their reputation and maintaining the status quo which oftentimes hinders creative ideas.¹⁷² The successful ranks of associates rising to partnership achieve success by keeping their heads down, toiling to exceed billable hour requirements, and emulating the partners at their firm—not by experimentation or taking risks: Simply, law firms tend to be “brilliantly organized to prevent creativity.”¹⁷³

¹⁶⁵ Olsen, *supra* note 103.

¹⁶⁶ *Can Risk-Averse Lawyers Learn to Embrace Change? An Interview with Dr. Larry Richard*, OGLETREE DEAKINS (Jan. 12, 2016) ogletree.com/insights/2016-01-12/can-risk-averse-lawyers-learn-to-embrace-change-an-interview-with-dr-larry-richard/ [<https://perma.cc/5GK3-952C>].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; see also Reid Trautz, *If Times They Are a-Changing, Why Aren't Lawyers Too?*, ABA L. PRACTICE TODAY, (Dec. 14, 2016), www.lawpracticetoday.org/article/times-are-changing-why-arent-lawyers/ [<https://perma.cc/V699-Y5DG>] (noting that lawyers' reaction the current dramatic changes in their industry manifests itself in anxiety and a focus on threats as opposed to opportunities).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Katharine Rosenberry, *Organizational Barriers to Creativity in Law Schools and the Legal Profession*, 41 CAL. W. L. REV. 423, 427 (2005).

¹⁷² *Id.* at 430.

¹⁷³ *Eight Ways Law Firms Usually Stifle Creativity: How to Encourage Innovation in a Law Firm*, L.CROSSING, www.lawcrossing.com/employers/article/900045147/Eight-Ways-Law-Firms-Usually-Stifle-Creativity-How-to-Encourage-Innovation-in-a-Law-Firm/ [<https://perma.cc/L957-256J>] (last visited Nov. 26, 2019).

Further, the personality characteristics that thrive in law firm culture may not comport with the characteristics commonly associated with creativity:

An interesting body of work has confirmed that certain personal characteristics are associated with high levels of individual creativity—independence or non-conformance and selfishness, birth order, persistence and hard work, focus on particular problems and depth in domain, intrinsic motivational pulls, an ability to live with ambiguity and tension, playfulness, outsider family, and high expectations and deep commitment.¹⁷⁴

Some of these characteristics may overlap with the personal characteristics of the stereotypical big firm managing partner, such as selfishness, depth in domain, and hard work. But few managing partners are likely revered for their playfulness, intrinsic motivation, or non-conformity. In contrast, these creative characteristics are found amongst many historic leaders in the law; as examples, consider the biographies of Oliver Wendell Holmes, Thurgood Marshall, Benjamin Cardozo, and Louis Brandeis.¹⁷⁵ Historical creative legal luminaries aside, the structure of the modern law firm does not seem to create a culture fertile to creativity.¹⁷⁶ Beyond the law firm culture, the practice of law, at least at first blush, appears unfriendly to creativity.¹⁷⁷ Rarely does a judge intend a compliment during a hearing by noting that an argument is “creative.” Thus, neither the traditional law firm culture nor the practice of law appears particularly receptive to creativity.

Not surprisingly, given this culture’s hostility to creativity, even strategic planning can prove challenging for law firms. One professor and strategy expert characterized her “rather thankless task” of conducting a strategy program for law firms: “It was thankless in part because about half the participants didn’t think law firms needed a strategy. They figured if you were smart, served your clients well and worked hard that things would be fine, as they historically often have.”¹⁷⁸ One might forgive a degree of complacency, since the participants have been working with a dated business model relatively unchanged since the

¹⁷⁴ Menkel-Meadow, *supra* note 130, at 112–13 fn. 61.

¹⁷⁵ *Id.* (internal citations omitted).

¹⁷⁶ *Can Risk-Averse Lawyers Learn to Embrace Change? An Interview with Dr. Larry Richard*, *supra* note 166.

¹⁷⁷ *Id.*; see also Trautz, *supra* note 168 (“[L]awyers not only resist change, we run from it. We not only seek stare decisis, we revel in it. At a time of great change, we are as a group totally unprepared to meet the challenges created by change.”). *But see* VINSON ET AL., *supra* note 136, at 58 (noting that a good lawyer “must be able to apply, analyze, synthesize, and evaluate the law in order to solve the unique problems that clients have. A great lawyer must be creative to solve his or her client’s unique problems.”).

¹⁷⁸ McGrath, *supra* note 13.

nineteenth century.¹⁷⁹ Viewed through this lens, it seems a small wonder that innovation in the legal industry largely emanates from outside the rigid structure of the traditional law firm. But beyond a culture unfertile to creativity, the baby-boom-era managing partners and leadership at many firms may not be optimally positioned as they age to proffer creative solutions in an era of rapid change in the legal services sector.

C. Aging Managing Partners are Unlikely to Be the Creative Catalysts Needed for Innovation

The perception of creativity as a provenance of youth raises potential concerns about the creative aptitude of older attorneys. A few kernels of truth tend to underlie many stereotypes; creativity is often perceived as a youthful privilege seemingly receding with the sands of time.¹⁸⁰ This perception is supported by empirical research on creativity.¹⁸¹ Whether based on psychometric test performance or assessment of actual achievements, creativity seemingly peaks and tapers off in early to middle adulthood.¹⁸² Life-span studies of creative output reflect that “productivity tends to rise fairly rapidly to a definite peak and thereafter tends to decline gradually.”¹⁸³ Picture a “non-monotonic, concave downward curve” or just imagine an upside down and backward “J”.¹⁸⁴ Typically, an individual’s creativity peaks where the lower curve of the “J” turns into a straight line, in a person’s late thirties or early forties, comporting with the peak of creativity reflected in psychometric inquiries.¹⁸⁵ During the span of a normal lifetime, “a creative individual in the last decade of his or her career will exhibit an output rate about half that observed at the career peak”¹⁸⁶ Basically, creative performance, whether measured by actual creative works produced or by psychological tests, peaks and then declines.

To add a little precision to when this creative peak occurs and to the magnitude of the decline, the age of the peak in creative performance and the magnitude of the decline vary depending on the area of creative achievement.¹⁸⁷ Some creative disciplines peak early followed by a precipitous decline.¹⁸⁸ For

¹⁷⁹ *Id.*

¹⁸⁰ BIRREN, *supra* note 134, at 326.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 322.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

example, mathematics, theoretical physics, and lyrical poetry peak relatively early, in the late twenties or early thirties, followed by somewhat steep descents.¹⁸⁹ As an individual exemplar, consider mathematician and logician Alan Turing's brilliant cryptanalyst work on a system for decrypting Enigma signals, performed largely in his twenties.¹⁹⁰

Contrarily, other creative disciplines peak later and are followed by a gentler rate of decline.¹⁹¹ Consider philosophy, history, and novel writing, which "display a leisurely rise to a comparatively late peak, in the individual's late 40s or even 50s, with a minimal, if not largely absent, drop-off afterwards."¹⁹² As an illustration, consider the longevity of the prolific creative output of philosopher Bertrand Russell, who received the Nobel Prize in literature in his late seventies and then continued to contribute books and articles for almost two more decades.¹⁹³

But many, if not most, creative disciplines fall somewhere between mathematics and novel writing, featuring "a maximum output rate around chronological age 40, and a notable, if yet moderate, decline thereafter."¹⁹⁴ Importantly, no data illuminates the specific variety of creative achievement optimal for innovation by law firm leadership. But this vein of creativity likely falls between the two extremes of creative disciplines, somewhere between mathematician and novelist.

As such, the optimal creativity needed to conceive and effectuate strategic innovation at law firms likely peaks around age forty and tails off thereafter. So just as the baby boom generation is less likely to win Olympic medals, except perhaps for Ian Miller, so too this aging demographic cohort is less likely to spawn the creative innovation needed at law firms. For firms faced with an era of ongoing, tumultuous disruption, this seems acutely problematic given that eighty-five percent of the managing partners at the top 100 law firms belong to the baby boom generation.¹⁹⁵ Compounded by the ingrained law firm culture that tends to quash creativity and resist innovation, the demographic bubble of baby boom partners appears unlikely to be the creative catalysts needed for law firm innovation. Of course, law firm innovation will require buy-in from senior leadership to create a culture that incubates creativity. But legal education must serve as the playground that fosters creativity in new attorneys.

¹⁸⁹ *Id.*

¹⁹⁰ CAROLYN P. SOBEL & PAUL LI, *THE COGNITIVE SCIENCES: AN INTERDISCIPLINARY APPROACH* 178 (SAGE Publications, 2001) (noting that often "mathematicians do their most significant work when they are young. This was certainly true of British Mathematician Alan Mathison Turing.").

¹⁹¹ BIRREN, *supra* note 134, at 322.

¹⁹² *Id.*

¹⁹³ *Bertrand Russell Facts*, THE NOBEL PRIZE, www.nobelprize.org/prizes/literature/1950/russell/facts/ [<https://perma.cc/2DDY-987J>] (last visited Nov. 26, 2019).

¹⁹⁴ BIRREN, *supra* note 134, at 322.

¹⁹⁵ Olsen, *supra* note 103.

IV. INTEGRATING AND FOSTERING CREATIVITY IN THE LAW SCHOOL CURRICULUM

Whether as contractors, solo practitioners, or law firm associates, most newly minted attorneys are destined for private practice, where they will most likely focus predominately on civil litigation.¹⁹⁶ These new attorneys will need creativity to address the ongoing disruption of the legal services industry by conceiving and implementing creative solutions, potentially with even *Big-C* creativity. But attorneys also need the ability to act creatively in a myriad of *little-c* ways that include the everyday creative expression and problem-solving skills needed for effective lawyering.¹⁹⁷ Thus, this Article proposes fostering creativity and integrating creative exercises into the law school curriculum. Specifically, the Article focuses on inserting creative exercises into the legal research and writing curriculum to help new attorneys become the needed creative catalysts for law firm innovation.¹⁹⁸

A. *Big-C Creativity Defies Teachability but little-c Creativity is Both Eminently Fosterable and Even Teachable*

Candidly, *Big-C* creativity may defy teachability, at least in a formal educational setting. Both empirically and anecdotally, the relation between exceptional creativity and formal education appears complex, and often even contradictory.¹⁹⁹ Consider exceptionally creative high school dropouts such as Walt Disney, Frank Lloyd Wright, the Wright brothers, and college dropouts including Steve Jobs, Bill Gates, and Mark Zuckerberg.²⁰⁰ Some scholarship theorizes “that education makes a positive contribution to creative development up to the end of undergraduate education, but begins to exert a detrimental effect should the person progress to graduate or professional school.”²⁰¹ This is likely because the specialized and challenging nature of graduate and professional school often impedes creative potential.²⁰² But empirically, exceptionally creative individuals do not jettison education altogether; instead, they replace formalized education with ongoing, self-directed learning and vocational on-the-job experience.²⁰³ Consider

¹⁹⁶ See generally Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 889 (2012) (explaining that “three-fourths of all attorneys work in private practice.”).

¹⁹⁷ VINSON ET AL., *supra* note 136, at 58.

¹⁹⁸ See *infra* notes 199–279 and accompanying text.

¹⁹⁹ SIMONTON, *supra* note 138, at 5.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 16.

²⁰² *Id.*

²⁰³ *Id.*

filmmaker Stephen Spielberg: following an unpaid internship, he dropped out of college and inked a seven year contract with Universal Studios to direct films.²⁰⁴

Beyond ongoing, self-directed learning, “exceptional creativity is also strongly associated with openness to experience.”²⁰⁵ Exceptionally creative individuals enjoy broad interests and pursue diverse hobbies.²⁰⁶ As an example, consider Nobel laureate Murray Gell-Mann:

[His] interests span historical linguistics, archaeology, bird-watching, antiques, and ranching, among other things. Like most Big-C creators, Gell-Mann is an omnivorous reader, and his extra-scientific reading will sometimes leave a trace in his science. He won the Nobel for his work on elementary particles, a domain in which he introduced two key concepts—the quark and the Eightfold Way. The former was taken from James Joyce’s *Finnegan’s Wake*, the latter inspired by the Eightfold Path of Buddhism.²⁰⁷

Exceptionally creative individuals tend to jettison formal education but continue to pursue self-directed learning both vocationally and through a broad range of reading, interests, and hobbies. Additionally, formal education has an uncertain or even negative impact on creative development and accomplishment.²⁰⁸ As Albert Einstein quipped, “[t]he only thing that interferes with my learning is my education.”²⁰⁹

Contrary to depictions of peak creative moments as sudden flashes of discovery, *Big-C* creativity tends to follow a long arc of creative development, comprised of a lengthy process of development that usually extends over several if not many years.²¹⁰ Despite the appeal of “eureka” moment narratives, many forms of *Big-C* creativity, whether writing a novel or decoding the structure of DNA, involve a long ongoing and iterative process.²¹¹ Contrary to popular belief, Isaac Newton did not develop his conception of gravity after an apple fell on his head:

²⁰⁴ *Id.* (noting that Spielberg would later finish his bachelor’s degree in English).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 17.

²⁰⁹ David Wahl, *Einstein on Creativity*, CREATIVE CREATIVITY (Nov. 11, 2007), [creative-creativity.com/2007/11/11/einstein-on-cre/](https://perma.cc/GC88-7HK3) [https://perma.cc/GC88-7HK3] [hereinafter *Einstein*].

²¹⁰ JONATHAN S. FEINSTEIN, *THE NATURE OF CREATIVE DEVELOPMENT* (Stanford University Press 2006). As an example, the interests, early works, and raw ideas that coalesced into John Maynard Keynes’ *General Theory of Employment, Interest and Money* percolated for a twenty-five-year period. *Id.* at 491.

²¹¹ Andreasen, *supra* note 160.

The truth is that by 1666, Newton had already spent many years teaching himself the mathematics of his time (Euclidean geometry, algebra, Cartesian coordinates) and inventing calculus so that he could measure planetary orbits and the area under a curve. He continued to work on his theory of gravity over the subsequent years, completing the effort only in 1687, when he published *Philosophiæ Naturalis Principia Mathematica*. In other words, Newton's formulation of the concept of gravity took more than 20 years and included multiple components: preparation, incubation, inspiration—a version of the eureka experience—and production.²¹²

Given the long arc of the self-directed iterative process that culminates in *Big-C* creativity, law school seems unlikely to foster, let alone capably teach, *Big-C* creativity over the finite arc of a single semester. But the same traits exhibited by exceptionally creative individuals, including self-directed learning, broad interests, and hobbies, may fit within the rubric of professional identity development for law students. Specifically, these traits seem to overlap with emerging empirical evidence regarding happiness in the practice of law.²¹³ Thus, while law school may not be able to teach *Big-C* creativity explicitly, legal education can foster self-awareness, mindful lawyering, and perhaps avoid trampling the traits shared by exceptionally creative individuals and happy lawyers.

The same creative process that occasionally cumulates into the lightning bolts deemed *Big-C* creativity commences with *little-c* arcs of spark. While teaching at Cornell University, theoretical physicist Richard Feynman saw someone throw a plate while fooling around in the cafeteria.²¹⁴ He observed that as it spun through the air, the Cornell logo on the plate spun faster than the plate wobbled.²¹⁵ As he explained:

I had nothing to do, so I start to figure out the motion of the rotating plate. I discovered that when the angle is very slight, the

²¹² *Id.*

²¹³ Lawrence S. Krieger & Kennon M. Sheldon, Ph.D., *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554 (2015) (noting that amongst the personal lifestyle choices made by attorneys that potentially provide stress relief and overall life balance, “[p]hysical exercise was related to increased satisfaction of all needs and . . . [t]he number of vacation days taken was the strongest predictor of well-being” Seemingly, happier lawyers “tend to take personal breaks for rest and recreation.”).

²¹⁴ Richard F. Feynman with Ralph Leighton, *The Dignified Professor*, as reprinted in “SURELY YOU’RE JOKING, MR. FEYMAN” ADVENTURES OF A CURIOUS CHARACTER (1985), <http://calteches.library.caltech.edu/52/2/dignified.htm> [<https://perma.cc/86LP-WH4Q>].

²¹⁵ *Id.*

medallion rotates twice as fast as the wobble rate—two to one. It came out of a complicated equation! Then I thought, “Is there some way I can see in a more fundamental way, by looking at the forces or the dynamics, why it’s two to one?” . . . I ultimately worked out what the motion of the mass particles is, and how all the accelerations balance to make it come out two to one.²¹⁶

At the time, Feynman thought “[t]here was no importance to what I was doing, but ultimately there was. The diagrams and the whole business that I got the Nobel Prize for came from that piddling around with the wobbling plate.”²¹⁷ For Feynman, the *little-c* moment of calculating the wobble rate of a plate would eventually spawn a burst of *Big-C* creativity in the development of quantum electrodynamics, for which Feynman received the Nobel Prize in Physics in 1965. By teaching creativity in the classroom with *little-c* creativity exercises, students get exposure to the creative process. And perhaps with this exposure, students will remain creative both personally and professionally, maybe even germinating their own *Big-C* creativity.

The law school curriculum may not be an optimal vehicle for teaching *Big-C* creativity to individuals, but *little-c* creativity seems eminently fosterable, and even teachable in law school.²¹⁸ Such creativity fits optimally into the legal research and writing curriculum but seems an awkward fit in the traditional doctrinal curriculum for practical and pedagogical reasons. As a practical matter, many great proposals and possibilities exist for the wholesale overhaul of legal education.²¹⁹ But the core doctrinal law school curriculum remains needlessly static, if not quite a fossilized “freemasonry of mediocrity.”²²⁰ Given that a large component of legal education remains impressively resistant to systemic change despite over a century of scathing criticism, it appears improbable that doctrinal courses will yield space for teaching creativity anytime soon.²²¹ The intimidating

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *infra* notes 224–39 and accompanying text.

²¹⁹ See, e.g., Adam Lamparello & Charles E. MacLean, *Requiring Three Years of Real-World Legal Writing Instruction: Law Students Need It; Prospective Employers Want It; The Future of the Legal Profession Demands It*, 4 HOUS. L. REV. 95, 99 (2014) (proposing new requirements for law students to take “skills courses that mirror the actual practice of law,” register for “four writing credits in every semester,” and implement “increased collaboration between legal writing professors and doctrinal faculty.”).

²²⁰ BEN MACINTYRE, ROGUE HEROES: THE HISTORY OF THE SAS, BRITAIN’S SECRET SPECIAL FORCES UNIT THAT SABOTAGED THE NAZIS AND CHANGED THE NATURE OF WAR 25 (Crown/Archetype 2016). This term was used by Col. Sir Archibald David Sterling, founder of the Special Air Services, to describe the fossilized state of the British Army at the inception of World War II. *Id.*

²²¹ A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1984 (2012) (quoting William G. Hammond et al., *Report on the Committee of Legal*

power imbalance between the sage on a stage style doctrinal professor and the students in class imposed by the Socratic method can intimidate students, quashing or inhibiting creativity.²²² Likewise, the doctrinal courses that dominate the law school curriculum tend to focus on “convergent thinking” that invariably leads to one known and correct answer, rather than creative “divergent thinking” that can generate a multitude of answers to an open-ended problem.²²³ Thus, for a variety of reasons, doctrinal courses seem a less likely locus for teaching creativity. However, the legal research and writing curriculum might prove more receptive to facilitating creativity.

B. *Teaching little-c Creativity Fits Naturally into the Legal Research and Writing Curriculum*

Legal research and writing courses focus on communication and language. As such, these courses are likely a better fit for facilitating creativity for reasons rooted in the “evolutionary process that created the human condition.”²²⁴ As philosopher Daniel Dennett noted, “evolution by natural selection is the acid that burns through every myth about ordained purposes and meanings.”²²⁵ And as biologist, theorist, and author Edward O. Wilson explains:

For the complete story, we need to turn to the unique origin of social behavior in the ancestral hominins to the present time The signal event was a massive increase in brain size, mostly entailing the frontal lobe. Starting about three million years ago, the cranial capacity of our prehuman ancestors grew

Education, 13 AM. B. ASS'N REP. 330 (1890)) (“The defects of the present method may be summed up, we think, in one very familiar antithesis: they do not educate, they only instruct In office study, the daily participation in actual business gave the student at least some empiric training Our law schools, as usually conducted, offer nothing. Most of them do not, in their plan of study, seem ever to recognize the need. It is fortunate for them and for their pupils alike that the training thus omitted may be supplied in the early years of practice, at least to a very considerable extent.”); see, e.g., ALBERT J. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 147 (Bancroft-Whitney Co. 1953) (noting the sizable gap between law school learning and the practical skills required for the practice of law); AM. BAR ASS'N, *REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS* (1979) [hereinafter *CRAMPTON COMMITTEE REPORT*]; AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* 1, 13–27 (1992) [hereinafter *MACCRATE REPORT*]; WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *CARNEGIE REPORT*].

²²² Rosenberry, *supra* note 171, at 427.

²²³ Maria Klawe, *Teaching Creativity is a Necessary Part of Undergraduate Education*, *FORBES MAG.*, (May 4, 2017, 4:45 PM), www.forbes.com/sites/mariaklawe/2017/05/04/teaching-creativity-is-a-necessary-part-of-undergraduate-education/#d00ebaf2cab2 [<https://perma.cc/KNS9-47CB>] (discussing generally teaching creativity and convergent and divergent thinking).

²²⁴ EDWARD O. WILSON, *THE ORIGINS OF CREATIVITY* 16 (Liveright 2017).

²²⁵ *Id.* at 93.

from that close to chimpanzees at 400 cubic centimeters (cc) to 600 cc in habilines (*Homo habilis*), then by a million years ago to 900 cc in our direct ancestors *Homo erectus*, and finally by the modern level (around 1,300 cc) in *Homo sapiens*.²²⁶

This tripled brain size represents the most rapid known evolutionary growth exhibited in any complex organism.²²⁷ Beyond growth, it is what humans did and continue to do with those big-bore brains that matters.

Keep in mind that humans and some of our nearest living relatives, chimpanzees, share over ninety-eight percent of the same DNA.²²⁸ Of note, chimpanzees sport surprisingly high IQs and can even learn and retain sequences of numbers better than their human kin.²²⁹ But, unlike humans, chimpanzees are stuck in the present, living in the here and now.²³⁰ In contrast, with increasingly big-bore brains, “the ancestors of our species developed the brain power to connect with other minds and to conceive unlimited time, distance, and potential outcomes.”²³¹ Moreover, humans developed the highest form of communication, language, defined as “an endless combination of words translatable into symbols, and . . . arbitrarily chosen to confer meaning.”²³²

Gathered around campfires in the evening, some of the Earth’s last hunter gatherers, the Ju/’hoansi (!Kung) Bushman, may illuminate what our ancestors did with their super-sized brains: “[i]n the chiaroscuro firelight the talk turns to storytelling, which drifts easily into singing, dancing, and religious ceremonies. Storytelling . . . turns frequently to successful hunts and epic adventures”²³³

²²⁶ *Id.* at 16–17.

²²⁷ *Id.* at 21.

²²⁸ *Id.* at 19; see also Kate Wong, *Tiny Genetic Differences Between Humans and Other Primates Pervade the Genome*, SCI. AM. (Sept. 1, 2014) (noting that sequencing of bonobo and chimpanzee genomes provides confirmation that these two species are the closest living relatives of humans with approximately 99 percent shared DNA), www.scientificamerican.com/article/tiny-genetic-differences-between-humans-and-other-primates-pervade-the-genome/ [<https://perma.cc/D69Z-SL6D>].

²²⁹ WILSON, *supra* note 224, at 19.

²³⁰ *Id.* at 21.

²³¹ *Id.*

²³² *Id.* at 26.

²³³ *Id.* at 22–23. Traditionally foragers, the Ju/’hoansi currently number about 3,000 and reside communally in northwest Botswana and northeast Namibia. Polly W. Wiessner, *Embers of Society: Firelight Talk Among the Ju/’hoansi Bushmen*, 111 PNAS 39 (2014) (noting that the “[l]ives of modern foragers cannot be projected back in the past, but they do allow us to understand interactions under some of the conditions believed to have characterized our evolutionary past, and to generate hypotheses.”).

With their storytelling, the Ju/'hoansi recount “the substance of intelligent thought.”²³⁴ Specifically, they recount:

episodes of the past and those imaginable into the future—among which choices made constitute decision and we call free will. The mind assembles experiences and constructs stories from them. It never pauses. It evolves continuously. As old stories fade with time, new ones are laid upon them. At the highest level of creativity, all human beings talk and sing and they tell stories.²³⁵

Viewed from the analogue of the Ju/'hoansi, our large brains evolved rapidly to facilitate creativity and linguistics: to talk, sing, and tell stories. Beyond the ability to talk, we developed the amazing ability to write and read.²³⁶ While the standard legal research and writing curriculum may neglect singing, the curriculum certainly teaches students to talk and tell stories to communicate professionally and effectively both in writing and orally.

A legal research and writing program aspires to make “each student self-sufficient, able to independently analyze, research, synthesize, and communicate”²³⁷ At a more granular level, individual legal writing programs incorporate learning outcomes that include honing written and oral communication skills, such as the ability to write both an objective and persuasive legal analysis and to orally convey a legal analysis.²³⁸ Unlike much of the law school curriculum, these skills correlate to essential practice skills,

²³⁴ WILSON, *supra* note 224, at 27.

²³⁵ *Id.*

²³⁶ With regard to the latter, consider the amazing process that lets humans read:

[A]s you read these words on a page or a screen, they register as black lines on a white background in your primary visual cortex. If the process stopped at that point, you wouldn't be reading at all. To read, your brain, through miraculously complex processes that scientists are still figuring out, needs to forward those black letters on to association-cortex regions such as the angular gyrus, so that meaning is attached to them; and then on to language-association regions in the temporal lobes, so that the words are connected not only to one another but also to their associated memories and given richer meanings. These associated memories and meanings constitute a “verbal lexicon,” which can be accessed for reading, speaking, listening, and writing. Each person's lexicon is a bit different, even if the words themselves are the same, because each person has different associated memories and meanings.

Andreasen, supra note 160.

²³⁷ A.B.A., SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *SOURCEBOOK ON LEGAL WRITING PROGRAMS* 8 (1997).

²³⁸ UNIV. DENVER STURM COLLEGE OF LAW, PROGRAM GOALS AND STUDENT LEARNING OUTCOMES IN THE LAWYERING PROCESS PROGRAM (2011).

for example, persuading a judge in briefing to rule favorably on a motion or convincing a jury during a closing argument to find a client not guilty. Both good legal writing and effective oral advocacy require some level of creativity.²³⁹ As such, legal writing courses seem like a natural place to foster creativity and integrate creative exercises into the law school curriculum. But before discussing specific creative exercises, the classroom needs to be a place that fosters creativity.

C. *Creating a Classroom Environment that Nurtures Creativity*

In times of tight budgets, law schools are not apt to spend resources to creating optimally creative spaces.²⁴⁰ But one key factor to creativity does not require expenditure: the significant contribution of a positive teaching affect to creativity.²⁴¹ Here, the demeanor and teaching style of a professor can either facilitate or inhibit creativity. One study evaluated how individual teaching styles in the college classroom can either facilitate or inhibit creativity and ranked the teaching traits which facilitate creativity.²⁴² In descending order of importance: (1) treat students as individuals; (2) encourage independence; (3) serve as a role model; (4) share considerable time outside of classroom; (5) indicate an expectation of excellence and that it is achievable; (6) show enthusiasm; (7) treat students as equals; (8) reward creative work or behavior; (9) deliver dynamic and interesting lectures; and (10) provide exceptional one-to-one contact.²⁴³ In contrast, this study also ranked teaching traits that inhibited creativity, also in descending order of importance: (1) discouraged students (ideas, creativity, et cetera); (2) was insecure (hypercritical, sarcastic); (3) lacked enthusiasm; (4) emphasized rote learning; (5) was dogmatic and rigid; (6) did not keep up in the field; generally incompetent; (7) had narrow interests; and (8) was not available outside the classroom.²⁴⁴

²³⁹ VINSON ET AL., *supra* note 136, at 58.

²⁴⁰ See generally Ravi Mehta & Rui Zhu, *Blue or Red? Exploring the Effect of Color on Cognitive Task Performances*, 323 SCI. ISSUE 1226 (2009).

²⁴¹ Sandeep Gautam, *The Little c and Big C of Creativity, Little c Paves the Way Towards the Big C*, PSYCH. TODAY (Sept. 13, 2012), www.psychologytoday.com/us/blog/the-fundamental-four/201209/the-little-c-and-big-c-creativity [<https://perma.cc/3JZB-TPVZ>] (discussing the significant “effect of positive affect on creativity” and discussing scholarship studying how something as trivial “as giving candies to doctors to put them into positive frame of mind, improves their diagnostic skills.”).

²⁴² Rosenberry, *supra* note 171, at 440 fn. 89 (quoting Teresa M. Amabile, *A Theoretical Framework: The Components of Creative Performance*, in CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY 208 fn. 20 (Taylor & Francis 2018) (citing a study of “several hundred creative psychologists and scientists that evaluated what college teaching styles facilitates and inhibited creativity.”)); see also Ronald A. Beghetto & James C. Kaufman, *Fundamentals of Creativity*, 70 J. EDUC. LEADERSHIP 10, 13 (2013) (noting that creativity generally thrives in environments that support personal interest, involvement, enjoyment, and engagement with challenging tasks).

²⁴³ Rosenberry, *supra* note 171, at 440 fn. 89.

²⁴⁴ *Id.*

The takeaway of the study is that a nurturing, respectful, and positive teaching style facilitates creativity, while a negative, intimidating teaching style modeled on Professor Kingsfield's character from the movie *The Paper Chase* inhibits creativity.²⁴⁵ Beyond teaching style and the classroom environment, a few key conditions and traits that influence creativity underlie successful exercises.

D. Conditions and Traits that Optimally Foster Creativity for Successful Exercises

A wide variety of conditions and factors may influence creativity.²⁴⁶ These conditions and factors include critical reception, mentoring, feedback, institutional and organizational structure, and environment.²⁴⁷ Four specific conditions that influence creativity can prove helpful to fostering creativity exercises into a legal writing course: (1) dispensing with ingrained patterns of thought and action sometimes referenced as openness; (2) crafting open-ended, ambiguous problems; (3) embracing risk taking and accepting failure; and (4) carving out time for creativity.

First, creativity flourishes when individuals jettison ingrained patterns of thought and action. Allegorically, it is hard to think outside the box while stuck inside one. For example, songwriter and musician Tom Waits turns to unfamiliar instruments, found objects, or uses no instrument at all: "I usually write acapella. It's more like drawing in the air with your fingers. It's closest to the choreography of a bee. You're freer. You have no frets to constrict you, there are no frets on your voice, and that's a good feeling."²⁴⁸ Law students need to discard the ingrained pattern of "thinking like a lawyer" endemic to the legal education. In most of the law school curriculum "[t]he usual process for solving legal problems is to narrow down, i.e., constrict, the factors that are determined 'relevant' for the solution Professors and students might believe that consideration of factors not 'relevant' to the legal outcome of the case would be a waste of time."²⁴⁹ But, divergent thought "requires openness to considering factors that might not have seemed relevant

²⁴⁵ See *THE PAPER CHASE* (Twentieth Century Fox 1973).

²⁴⁶ FEINSTEIN, *supra* note 210, at 32. A myriad of social-cultural conditions are also likely to foster creativity including "tolerance for divergent views, openness, freedom after a period of repression, and incentives for innovation." *Id.* at 541.

²⁴⁷ *Id.*

²⁴⁸ *Wit & Wisdom*, TOM WAITS, www.tomwaits.com/wit/ [<https://perma.cc/U642-JHPA>] (last visited Nov. 27, 2019) ("I use things we hear around us all the time, built and found instruments-things that aren't normally considered instruments: dragging a chair across the floor or hitting the side of a locker real hard with a two-by-four, a freedom bell, a brake drum with a major imperfection, a police bullhorn.").

²⁴⁹ Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 *CLINICAL L. REV.* 835, 842 (2003).

in a traditional problem solving exercise.”²⁵⁰ In constructing creative activities, professors should craft problems with multiple possible answers that allow divergent thinking. Exercises that consist of drafting professional correspondence, such as demand letters, work well because professional correspondence can take many forms since the exact content can vary and often involves the consideration of factors beyond just the underlying legal issues. For example, a cease and desist letter in a trademark dispute might only be addressed to a small business owner yet copies of the demand letter may land on the desk of counsel for the small business, the adjuster for an insurer of the business, and even a media outlet.²⁵¹

Secondly, creativity thrives in an environment that includes the presence of ambiguity, as creative ideas are oft “proceeded by a feeling of confusion and ambiguity.”²⁵² Thus, creativity blooms with ambiguous, non-linear problems.²⁵³ But law school assignments tend to be refined and linear. For example, the contents of law school case books are meticulously curated by subject matter, linearly organized within each particular subject.²⁵⁴ Each case is further digested to excise extraneous facts and tangential legal issues.²⁵⁵ Most law school legal writing exercises are also meticulously curated.²⁵⁶ These exercises are often confined to a closed research universe.²⁵⁷ To infuse ambiguity into legal writing assignments, include both relevant and irrelevant materials. For example, an assignment could include a scanned set of documents provided by a hypothetical client, that include both legally relevant and irrelevant material and maybe even some inaccurate or contradictory material. The presence of ambiguity in assignments can help push

²⁵⁰ *Id.* at 841–42.

²⁵¹ See Aaron Gulley, *The War on Specialized*, OUTSIDE (Dec. 16, 2013), www.outsideonline.com/1920596/war-specialized [<https://perma.cc/M5R4-EX2P>].

²⁵² Rosenberry, *supra* note 171, at 428–29.

²⁵³ *Wit & Wisdom*, *supra* note 248. As Tom Waits explains: “You know, I don’t like straight lines. The problem is that most instruments are square and music is always round.” *Id.*

²⁵⁴ Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 161 (1965) (noting the composition of casebooks “so that each decision had a discernable relation to those coming before and after. Each case appended some new element or twist to current legal theory.”).

²⁵⁵ *Id.* at 162.

²⁵⁶ See, e.g., Lorraine Bannai et al., *Sailing Through Designing Memo Assignments*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 193, 195–200 (1999) (detailing the top ten mistakes in creating fact patterns); Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 J. LEGAL WRITING INST. 163, 165–68 (1997).

²⁵⁷ The most recent survey of legal writing programs conducted by the Association of Legal Writing Directors and the Legal Writing Institute reports that 154 law schools use a combination of open and closed-universe assignments in their required first-year legal writing courses and that 24 law schools use exclusively closed-universe assignments in their required first-year legal writing courses. ASS’N LEGAL WRITING DIRECTORS & LEGAL WRITING INST., 2015 NATIONAL SURVEY RESULTS 12 (2015), [www.alwd.org/images/resources/2015%20Survey%20Report%20\(AY%202014-2015\).pdf](http://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf) [<https://perma.cc/LB8E-SWXZ>] [hereinafter 2015 SURVEY RESULTS]. Only 37 law schools used exclusively open-universe assignments. *Id.*

students toward a comfort with operating amidst uncertainty. The presence of ambiguity, coupled with problems that include multiple possible answers, foster creativity. By including ambiguous materials and crafting problems that defy a single correct answer into exercises, the exercises can not only spur creativity but also help students better prepare for the practice of law.

Third, creativity requires a level of risk taking and acceptance that failure is simply “part of the creative process.”²⁵⁸ As Albert Einstein once quipped, “[a]nyone who has never made a mistake has never tried anything new.”²⁵⁹ An environment that discourages risk taking or penalizes failure is not apt to facilitate creativity.²⁶⁰ The “freedom to fail” while taking calculated risks is critical to innovation.²⁶¹ In education, assessment can either foster or inhibit creativity.²⁶² Assessment can consider not just the final outcome but also the underlying process.²⁶³ So assessment of creativity exercises should not focus on correct answers but rather on encouraging and refining the creative process. With the promulgation of rubrics in legal writing courses, professors need to ingrain a measure of flexibility to avoid penalizing creativity and divergent thinking.

Approaching problems with a sense of humor and playfulness aids the free flow of creative ideas.²⁶⁴ Playfulness is critical to creativity.²⁶⁵ Albert Einstein labeled creativity as “combinatorial play.”²⁶⁶ Theoretical physicist David Bohm described creative play as essential to new hypothesis and forming ideas.²⁶⁷ In part, humor and playfulness seem to facilitate creative production:

²⁵⁸ *Id.*

²⁵⁹ *Einstein, supra* note 209.

²⁶⁰ Rosenberry, *supra* note 171, at 434–35.

²⁶¹ See Peter M. Dawkins, *Freedom to Fail*, INFANTRY MAG 9 (1965) (award winning essay voicing concerns that in the stratified rank structure of the mid-1960s Army, the ideal military leader might be “the man who has done so little—who has exerted such a paltry amount of initiative and imagination—that he has never done anything wrong.” And positing the importance of granting military leaders the “freedom to fail” while taking calculated risks in order to “pursue a bold and vigorous path rather than one of conformity and acquiescence . . .”).

²⁶² ROMINA CACHIA ET AL., JRC EUROPEAN COMM’N, CREATIVE LEARNING AND INNOVATIVE TEACHING FINAL REPORT ON THE STUDY ON CREATIVITY AND INNOVATION IN EDUCATION IN THE EU MEMBER STATES 31 (2010).

²⁶³ *Id.* at 34 (noting examples that “evaluate the strategies a student employs when trying to solve a specific problem and reward a logically consistent approach even if the final result is incorrect.”).

²⁶⁴ Rosenberry, *supra* note 171, at 434 (noting that “humor and a sense of playfulness as essential characteristics of creative people.”).

²⁶⁵ Patrick Bateson, *Play, Playfulness, Creativity and Innovation*, 2(2) 99 ANIMAL BEHAVIOR & COGNITION R16 (2014) (discussing how “play contributes to having fun and the sense of feeling good about oneself. The benefit of coming up with new ideas or actions in the course of such play either immediately or in the future is an additional benefit.”).

²⁶⁶ Rosenberry, *supra* note 171, at 434 (citing DAVID BOHAM & F. DAVID PEAT, SCIENCE, ORDER AND CREATIVITY 48 (2d ed. 2000)).

²⁶⁷ *Id.*

Humor is not peripheral to creative environments. Rather than being a luxury, humor is an essential component of a creative atmosphere. It allows people to say ‘stupid’ things . . . that turn out to be not so stupid. It allows the tentative presenter of an off the wall idea, [that may have value], to disguise it as a joke.²⁶⁸

For example, after the Costa Concordia capsized and sank off the coast of Italy in January of 2012, experts geared up for the mammoth task of salvaging the largest cruise ship to ever sink at over twice the gross tonnage of the Titanic.²⁶⁹ One creative solution consisted of pumping air-filled polystyrene balls into the ship, an idea inspired by a 1949 cartoon which depicted Donald Duck raising a sunken ship by filling the hull of the vessel with ping pong balls pushed through a tube.²⁷⁰ Ultimately, environmental concerns of errant ping-pong balls escaping the breached hull of the ship quashed this idea.²⁷¹ But that a creative solution to salvage the wreckage of the ship emanated from a Donald Duck cartoon illustrates the important role of humor and playfulness to creativity. Crafting problems that embed a little humor and some level of playfulness, coupled with modeling an approach to creativity that includes humor and playfulness, can help set the stage for creative activities in the classroom.

Finally, creativity also takes time to allow the mind to roam, conjure up and visualize ideas, and incubate those ideas.²⁷² Anecdotally, “creative individuals, in describing their work habits or the process of creative problem solving, have suggested that oftentimes, creative ideas result from a period of incubation—a process whereby initial conscious thought is followed by a period during which one refrains from task-related conscious thought.”²⁷³ Beyond incubating ideas, as Fred Rogers explained, creativity takes time: “[i]magine something may be the first step in making it happen, but it takes real time and real efforts of real people to learn things, make things, turn thoughts into deeds or visions into inventions.”²⁷⁴ Closely related to time is time-related stress, oftentimes one of the

²⁶⁸ *Id.* at 435 (quoting R. DONALD GAMACHE & ROBERT LAWRENCE KUHN, *Why Creativity Doesn't Start: Barriers of Inertia and Attitude*, in *THE CREATIVE INFUSION: HOW MANAGERS CAN START AND SUSTAIN CREATIVITY AND INNOVATION* 19 (1989)).

²⁶⁹ Charles Choi, *Raise It or Raze It?: How Will Italian the Stranded Italian Cruise Ship Be Salvaged*, *SCI. AM.* (Mar. 6, 2012), www.scientificamerican.com/article/raise-it-or-raze-it-how-will-italian-cruise-ship-be-salvaged/ [<https://perma.cc/DP78-X89B>].

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Rosenberry, *supra* note 171, at 437.

²⁷³ Simone M. Ritter & Ap Dijksterhuis, *Creativity- The Unconscious Foundations of the Incubation Period*, *FRONTIERS HUMAN NEUROSCIENCE*, Apr. 2014, at 1.

²⁷⁴ David Wahl, *Mr. Rogers on Creativity*, *CREATIVE CREATIVITY* (Sept. 30, 2007), creativecreativity.com/2007/09/30/mr-rogers-on-cr/ [<https://perma.cc/HM92-PUF9>].

biggest inhibitors to creativity.²⁷⁵ Carving out time in the classroom always proves challenging but rushing creative activities or setting tight deadlines that create student stress is apt to adversely affect the efficacy of the activity. Also, professors should consider creating activities that span multiple classes to allow creativity to incubate between classes.

E. Sample Creative Exercises and Ideas to Integrate into a Legal Writing Course

Creativity exercises in the classroom can either blend into existing legal writing problems or consist of entirely new materials. For the former, creative activities work well at the front and back end of projects. At the front end, professors should consider integrating non-linear outlining into classes at the research and planning stage of problems such as objective legal memoranda and persuasive briefing problems.²⁷⁶ Non-linear outlining often takes the form of a “mind map” or “whirlybird” diagram used to generate ideas in no particular order or hierarchy.²⁷⁷ These ideas can later be sequenced and arranged into the familiar linear outline structure. Non-linear outlining, brainstorming, and mind-mapping activities also work well with small student groups, adding the benefits of collaborative creativity.²⁷⁸ Professors should consider letting these activities culminate in sequencing the ideas and concepts collaboratively generated into a linear outline with a follow-up, student-driven activity. Toward the end of writing projects, creative activities can fit well at the polishing and editing stage.

As one example, create a group activity that takes a key fact from the record and asks student groups to recast this fact in the light most favorable to their client. The students representing the state might write “officers discovered crack cocaine in the defendant’s backpack while arresting her.” In contrast, students representing the defendant might diminish this fact by not specifying the particular drug and using passive voice to distance the defendant from her drug possession: “during a subsequent search incident to arrest, illicit drugs were

²⁷⁵ Rosenberry, *supra* note 171, at 438.

²⁷⁶ See generally § 2. *For Maximal Efficiency, Plan Your Writing Projects. Try Nonlinear Outlining.*, U. CHI. PRESS BOOKS DIV., press-pubs.uchicago.edu/garner/documents/section2.html [<https://perma.cc/X2XY-VVJQ>] (last visited Nov. 27, 2019).

²⁷⁷ See BRYAN GARNER, *LEGAL WRITING IN PLAIN ENGLISH 9–16* (University of Chicago Press, 2d ed. 2013); see also *Legal Writing Tip: Create a Nonlinear Outline*, LEGAL BY THE BAY (Sept. 30, 2016) blog.sfbar.org/2016/09/30/legal-writing-tip-create-a-nonlinear-outline/ [<https://perma.cc/KG7W-QW3T>] (last visited Nov. 24, 2019) (discussing the creation of nonlinear outlines for briefing by first writing the shorthand name for the brief in a circle drawn in the center of a blank page, then drawing four arcing lines emanating from the circle to the edge of each side of the page. Denote major ideas on the arcing lines, adding more lines if needed and then add subsidiary ideas, points, and topics on new lines branching off the arcing lines).

²⁷⁸ FEINSTEIN, *supra* note 210, at 541 (discussing the importance of collaborative creativity activities and noting as examples “jazz and popular music, the sciences, and business.”).

seized.” Also, try giving students three to five elements to include in a sentence. As part of a collaborative group activity, let the students write their sentences on a dry erase board and discuss the almost unlimited number of ways to convey the same information. In preparation for mock oral arguments, include a creative activity consisting of distilling a written brief into a bumper sticker message, haiku, or elevator pitch.

Beyond incorporating creative exercises into existing problems, consider adding problems designed to provide a forum for creativity. Drafting correspondence can prove a good vehicle for ingratiating creative exercises into a law school writing class. For example, let students create their own letterhead for their fictitious law firm. Drafting a client engagement letter can let students brainstorm their own fee structure and terms. Perhaps let students revise their engagement letters with the one caveat of allowing no hourly or contingent fees. Crafting a demand letter can give students a blank slate of possible demands and remedies. Consider mandating that the demand letter not require the recipient cease and desist an offending activity, but rather propose a solution to the dispute that benefits all parties. The student correspondence should be lightly graded, with comments providing formative assessment but not dictating a single correct answer.

Drafting a complaint can also provide a playground of creative exercises. Provide a simple fact pattern embedded with the sort of ambiguity a real client file tends to include, perhaps providing the client’s disorganized documents that include some relevant documents and others that are superfluous. To conceive causes of action, the student groups can collaborate using non-linear outlining and research to determine the possible legal claims. Each student group can draft a complaint that includes three main causes of action, outlined and agreed upon in class, and a few “wild card claims” researched and chosen by each student group. Like student correspondence, the complaints would be lightly graded with comments providing formative assessment but not dictating a single correct answer for the wild card claims.

The possibilities for integrating creative exercises into legal writing courses are almost unlimited. For example, perhaps the most creative part of teaching legal writing consists of practicing law in reverse: finding interesting, discrete, and appropriately assessable legal issues and then creating a mock fact pattern for an assignment based on those issues. Perhaps, an assignment could flip the format of the standard memorandum-based legal writing assignment. The assignment could consist of a relatively mediocre memorandum purportedly prepared by a former student at another school that lacks a fact section. Students would need to research the legal issues raised in memorandum, create their own fact pattern, and then draft their own memorandum. Creative activities can include individual and collaborative group activities.

For collaborative group activities, consider using a teamwork rubric for some portion of each student's grade, perhaps twenty-five percent of the grade. This portion of the grade could be based upon a peer assessment of each student's contribution using a teamwork rubric to gauge the collaborative effort of each student. The teamwork rubric can explain the performance expectations and assess points in five categories: contribution, problem-solving, attitude, focus on the task, and working with others. This teamwork component of the grade is calculated by averaging the scores of the teamwork rubrics submitted by the other members of the law firm. Simply, integrating creative individual and group exercises into legal writing courses can provide a great opportunity to foster creativity amidst a law school curriculum that often seems hostile toward creativity.²⁷⁹

V. CONCLUSION

Amidst an era of tumultuous disruption, the legal profession remains needlessly static, reflecting an ingrained tendency to preserve the status quo.²⁸⁰ Rather than turning to creative non-lawyers for help upending a business model largely unchanged since the days of Charles Dickens, lawyers can initiate innovative solutions to allow the legal profession to grow and strategically change.²⁸¹ But the optimal creativity needed to conceive strategic innovation at law firms likely peaks around age forty and tails off thereafter.²⁸² Just as the baby boom generation is less and less likely to win Olympic medals, so too is this aging demographic less likely to spawn the creative innovation needed at law firms.²⁸³ For law firms faced with an era of ongoing, tumultuous disruption, this seems acutely problematic given that eighty-five percent of the managing partners at the top 100 law firms hail from the baby boom generation.²⁸⁴ Compounded by the ingrained law firm culture that tends to quash creativity and resist innovation, the demographic bubble of baby boom partners appears unlikely to be the creative catalysts needed for law firm innovation.²⁸⁵

Thus, newly minted attorneys need creativity to both address the ongoing disruption of the legal services industry and for the everyday creative expression and problem-solving skills needed for effective lawyering.²⁸⁶ Law school may

²⁷⁹ See *supra* notes 196–278 and accompanying text.

²⁸⁰ See *supra* notes 38, 94, 113, 172 and accompanying text.

²⁸¹ See *supra* notes 196–98 and accompanying text.

²⁸² See *supra* notes 180–95 and accompanying text.

²⁸³ See *supra* notes 180–95 and accompanying text.

²⁸⁴ See *supra* note 103 and accompanying text.

²⁸⁵ See *supra* notes 131–95 and accompanying text.

²⁸⁶ See *supra* notes 196–98 and accompanying text.

not be optimal for teaching the quintessential lightning bolt breakthroughs of exceptional or *Big-C* creativity, associated with the likes of Albert Einstein or Richard Feynman.²⁸⁷ But *little-c* or incremental creativity is eminently teachable.²⁸⁸ To teach creativity, the law school curriculum must foster creativity and integrate exercises that help students become comfortable with ambiguous problems that require divergent thinking.²⁸⁹ Legal research and writing courses already focus on communication and language. As such, these courses are a good place in the law school curriculum to foster and teach creativity with exercises that include ambiguous problems that defy a single correct answer.²⁹⁰

²⁸⁷ See *supra* notes 199–218 and accompanying text.

²⁸⁸ See *supra* note 218 and accompanying text.

²⁸⁹ See *supra* notes 240–79 and accompanying text.

²⁹⁰ See *supra* notes 224–39 and accompanying text.