SHORTCOMINGS OF LAW SCHOOL AND BIG LAW

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INTRODUCTION

The present Colloquium, on *Lawyers and Their Institutions*, seeks to consider how various legal institutions shape lawyers' professional norms, values, and conduct. In this Essay, I will consider the two legal institutions with which I have been most involved, law school and "big law"—more specifically, transaction practice at an elite law firm. I will argue that these institutions exert a problematic influence on developing attorneys by inculcating opposing types of disrespect for the law.

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Consider first law schools. It is my contention that the process of legal education tends to suggest that the law is fundamentally indeterminate. Law school gives the impression that the law is more uncertain and malleable than it is, and it exaggerates the role of litigators in effecting change in the law. Compare that with transaction practice at elite law firms. I argue that big law tends to suggest to junior associates that the law is largely irrelevant, leading them to feel more like middle management in business than lawyers. These influences push novice attorneys away from the reality that the law is fairly stable—reasonably clear, but not unchangeable.

Why does this matter? Because of accuracy. A misunderstanding about the nature of law is likely to result in a misconception of the purpose of lawyering and give a false impression of a lawyer's power. This is likely to make lawyers less helpful to their clients than they otherwise could be. Only with a proper appreciation of legal realities can lawyers optimize their representation of clients' interests.

To be clear, I am not arguing that law school and big law are fundamentally flawed or that the main influences that they exert on novice attorneys are negative. To the contrary, I am convinced that both institutions are important and provide tremendous value to both attorneys and society generally. I am merely highlighting certain negative influences that ought not to be ignored.

In Part I, with respect to law schools, I argue that the very tools that are used to train attorneys tend to suggest that the law is indeterminate. In Part II, with respect to transaction practice at elite law firms, I argue that the nature of the work given to junior associates makes it difficult for them to appreciate the big legal picture. In Part III, I suggest that all that can be done is mitigation and that the institutions are already engaged in mitigation efforts. Nevertheless, a greater acknowledgment of the issues and more conscious mitigation efforts are appropriate.

I. LAW SCHOOL

Law school is a professional school: it prepares students for careers in the law, especially the practice of law.[1] The practice of law involves many different activities, including counseling clients about compliance with law.[2] To do this, a lawyer must know the substantive law.[3] Thus, one aspect of legal education is teaching substantive law.[4] The importance of this aspect is evidenced by the fact that, to practice law, law students must pass the bar exam, which emphasizes knowledge of substantive law.[5] However, as

1. *See* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 50 (2007) ("Like all professional schools, law schools function as institutionalized sites for apprenticing new professionals.").

2. *See id.* at 11.

3. *See id.* at 13.

4. *See id.*

5. *See About the UBE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/ube/about-ube [https://perma.cc/52BG-7TVS] (last visited Feb. 14, 2025).

important as knowledge of substantive law is, many law professors would not necessarily consider it the most important part of a legal education.[6]

Very often, the practice of law requires attorneys to navigate and exploit—and perhaps even to create—uncertainty in the law. Far more important for these situations is training law students how to "think like a lawyer" and cultivating the various skills that are necessary for the practice of law.[7] Among the skills that students must learn are how to conduct legal research, read critically, think logically, craft a persuasive argument, and communicate effectively, both orally and in writing.[8] This is a much more demanding skill set than simply acquiring knowledge, and law school rightly focuses more heavily on these skills than on substantive knowledge.[9] But in doing so, it also suggests that the law is indeterminate: that lawyering skills can change outcomes because the law is uncertain.

In the following sections, I will explain how I believe that four specific aspects of contemporary legal education have an unfortunate side effect on students by suggesting that the law is indeterminate. These four aspects are the casebook, the Socratic method, moot court, and law review.

A. Casebooks

Most law school courses are taught from "casebooks."[10] A casebook is a legal education textbook that is composed primarily of edited judicial opinions from important cases.[11] The idea behind the casebook is that judicial opinions are primary sources in the law because they tell us what the law is.[12] Although it could be done, I have no intention of challenging the casebook method. I think it generally works well most of the time. Nevertheless, it has its shortcomings.[13]

One such shortcoming is that the casebook method gives the impression that the law is primarily about litigation. In reality, litigation comprises a

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6. *See, e.g.*, Louis Michael Seidman, Robert A. Katzmann, Philip G. Schrag, Robin L. West & Patricia D. White, *The Crisis in Legal Education*, AM. ACAD. OF ARTS & SCI.: BULLETIN, Spring 2016, at 9, https://www.amacad.org/news/crisis-legal-education [https://perma.cc/8QA9-V7XQ] (pointing to the value of experiential opportunities, skills development, and an interdisciplinary curriculum).

7. SULLIVAN ET AL., *supra* note 1, at 87 ("Learning to think like a lawyer is, accordingly, the main occupation of students' first phase in law school."). *See generally* Rosamond Parma, *The Origin, History and Compilation of the Casebook*, 4 AM. L. SCH. REV. 741 (1922); *cf.* Jay Tweet, *The Paper Chase Skulls Full of Mush*, YOUTUBE (Aug. 26, 2016), https://www.youtube.com/watch?v=yQLW7v3s7KQ [https://perma.cc/U2DQ-WKYC] ("You teach yourselves the law, but I train your mind. You come in here with a skull full of mush, you leave thinking like a lawyer.").

8. *See, e.g.*, Stephen M. Johnson, *The Course Source: The Casebook Evolved*, 44 CAP. U. L. REV. 591, 609 (2016) (discussing the minimum-competency outcomes identified by the American Bar Association's amended Standard 302 and its interpretation).

9. *See id.*

10. *See id.* at 591 n.6, 591–92, 617.

11. *See* SULLIVAN ET AL., *supra* note 1, at 55.

12. *See* C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (1871).

13. *See generally* Johnson, *supra* note 8, at 591–92 (outlining the evolution of the Langdellian casebook, its benefits, and limitations).

very small portion of what counts as law.[14] This is because litigation requires a dispute. But to the extent that the law is clear, there are no disputes. Two parties may have conflicting interests in a matter, but if the law clearly favors one party, the other generally will yield. There often is no litigation. Since most people do not litigate often, it is fair to say that usually, the law is not indeterminate, but clear enough to avoid judicial intervention.

By nature, casebooks cannot easily convey this reality. Because casebooks focus on judicial opinions, they emphasize the small subset of situations that lead to judicial opinions and ignore the vast majority of situations that do not.[15] In fact, most disputes settle out of court.[16] Although there are many reasons why a dispute might not lead to a judicial opinion, it is often because one party did not have a good enough chance of prevailing to pursue litigation.[17] This suggests that the law is relatively clear, or at least not truly indeterminate, in many cases. Accordingly, casebooks present a biased view of the law: one that highlights situations in which law is relatively indeterminate and ignores situations in which the law is relatively clear.

Moreover, casebooks do not present a random cross section of judicial opinions.[18] Casebook editors make deliberate decisions in choosing which cases to include.[19] Because of classroom time and space considerations, editors select only the very best cases for inclusion in casebooks. And although there may be differences of opinion as to what the very best means are, most judicial opinions are excluded.[20] Typical and boring cases are often excluded because editors look for exceptional and interesting cases.[21] In addition, editors generally prefer appellate opinions to trial court opinions.[22] Moreover, editors are likely to prefer cases in which the law changed in some

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14. *See* Rachel Reed, *Resolving Conflict Outside the Courtroom*, HARV. L. TODAY (Apr. 29, 2024), https://hls.harvard.edu/today/resolving-conflict-outside-the-courtroom/ [https://perma.cc/P967-9DZS] ("[U]p to 92 percent of cases are resolved out of court, a figure that does not include the number of lawsuits that are never filed because the parties used other dispute resolution methods at the outset.").

15. *See, e.g.*, Johnson, *supra* note 8, at 632.

16. *See* Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html [https://perma.cc/EV78-8ZSM] ("The vast majority of cases do settle—from 80 to 92 percent by some estimates.").

17. *See id.*

18. *See* Johnson, *supra* note 8, at 632.

19. *See id.*

20. *See* LANGDELL, *supra* note 12, at vi ("[T]he cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study.").

21. *See, e.g.*, Johnson, *supra* note 8, at 632 (listing a casebook editor's criteria for what cases to select).

22. *See id.* at 597 (discussing how historically, casebooks only included appellate opinions). That tradition largely continues today.

significant respect over those in which the law is merely restated.[23] However, most cases are more straightforward.[24]

Furthermore, most casebooks are designed with a national audience in mind. In our federal system, there are many jurisdictions to draw from: fifty states and thirteen federal circuits, not to mention the occasional cases from foreign jurisdictions.[25] As a result, editors often choose to include conflicting and even directly contradictory opinions from different jurisdictions. This serves an important pedagogical purpose: to demonstrate how different courts come to different conclusions. This is very important when discussing policy and with respect to jurisdictions that have not yet decided a particular issue. However, it gives students the general impression that "the law could go either way." Yet that generally is not entirely fair. First, even if there is a conflict *among* jurisdictions, there may very well be no conflict *in* any particular jurisdiction. Second, although there may be conflict among jurisdictions, there is often a majority position which jurisdictions that have not yet decided the issue are likely to follow. In other words, despite a conflict among jurisdictions, the law in most jurisdictions may be rather clear, and even if not, it may not be true that the law is entirely up for grabs.

Finally, casebooks often show the development of an area of law over time.[26] This is pedagogically very useful. However, a collection of such legal developments may tend to suggest that the law is more subject to change than it actually is. Although each development may have occurred over decades or even centuries, students are exposed to them simultaneously over the course of a semester. This too can warp students' perspective.

In short, as good as they are, casebooks misrepresent the law by suggesting that it is more indeterminate than it really is. Casebooks give the impression that the law is a fascinating collection of tough cases that could go either way, but that is only true of a small subset of cases from which casebook editors draw. Most of the time, the law is not nearly as interesting, uncertain, or malleable.

B. Socratic Method

Many law professors use the Socratic method, in whole or in part, to teach their classes.[27] The Socratic method differs from the lecture method. Lectures convey information directly, whereas the Socratic method does not.

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23. *See* LANGDELL, *supra* note 12, at vii.

24. *See* Alex Kozinski, *In Praise of Moot Court—Not!*, 97 COLUM. L. REV. 178, 191 (1997) ("Most cases, it must be recalled, are decided by courts bristling with controlling authority.").

25. *See Comparing Federal & State Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts [https://perma.cc/V8PA-REM8] (last visited Feb. 14, 2025).

26. *See* Johnson, *supra* note 8, at 632.

27. *See* Michael P. Harvey-Broughton II, Note, *Ending the Chill of Cold Calling: A Multimodal Solution to the Pitfalls of the Socratic Method*, 16 DREXEL L. REV. 359, 369 (2024).

Rather, the Socratic method involves the professor continuously asking questions of the students.[28] In its milder form, the professor leads students to the truth; in its extreme form, the professor demonstrates to students that there are no satisfactory answers.[29] In any event, where a lecture format naturally suggests certainty in the subject matter, the Socratic method tends to suggest uncertainty.[30]

The Socratic method often starts by encouraging students to question their basic assumptions.[31] This is an excellent way to get students to understand the subject matter. However, it can lead students to the subconscious belief that this is fundamentally how the law works and that it is a good way to practice law. But if the law is not so indeterminate, then that probably is not true. It may occasionally be a good idea to challenge fundamental assumptions in a particular case, but that is probably rare. In the vast majority of cases, it would be a waste of time at best and likely even counterproductive to do so, as judges are generally not interested in reinventing the wheel in every case. In most cases, it is probably best to convince the judge or jury that what you are asking for is insignificant and obvious rather than something groundbreaking.

Moreover, in the Socratic method, every question and every answer must be taken seriously and treated with respect. Obviously, there are many good reasons to do this, both in terms of pedagogy and basic human decency. However, the practice can also have a serious negative effect. The saying that "[t]here is no such thing as a dumb question" can bear only so much weight.[32] Sometimes, questions and answers are not very good, and the other students know this. But if professors regularly take "dumb" questions and answers seriously, students may believe that there is more tolerance for error in the practice of law than there is. Aside from the other ramifications, this may encourage the idea that arguments for change in the law have a higher chance of success than they do, feeding the impression of indeterminacy.

Finally, there is the normative discussion that is a part of most law school classroom discussions. Without a doubt, normative discussions are an important part of both the intellectual and moral formation of students,[33] and I am not suggesting that they are inappropriate. However, the practice of discussing normative issues involved in every legal matter can give the

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28. *See id.*

29. *See* Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 878 (1985).

30. *See id.* ("Having learned the techniques of case and doctrinal criticism from their teachers, the students become skeptical at best, cynical at worst . . . . For their belief in objective law, students substitute a perception of law as hopelessly indeterminate, with a counterrule for every rule, where the uniform answer is, 'It depends'—with the critical factor as often the caprice of the judge as the justice of the claim.").

31. *See* Harvey-Broughton II, *supra* note 27, at 375 ("Socratic law professors often pepper students with questions that reveal what they *do not* know.").

32. *See* CARL SAGAN, THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK 323 (1995).

33. *See generally* Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

wrong impression. It rightly suggests that normative issues are important in the entire process of creating law (e.g., the legislative or rulemaking processes), but it wrongly suggests that it is equally important in litigating and deciding cases (or transaction practice for that matter). At trial, no one cares about a practicing attorney's normative opinion about the law. Clients hire attorneys for their ability to navigate the law, not for their wisdom in expounding on what the law should be; judges generally only want to hear legal arguments, not moral ones. To be fair, normative considerations may sometimes play a role, especially when the law really is indeterminate. But most often it plays no role in litigation, and certainly not commensurate with the time that it gets in law school classes.

C. Moot Court

A common law school experience is moot court.[34] In moot court, students practice arguing a designated hypothetical case before a panel of judges.[35] The case is often a hypothetical designed for the purpose of moot court, but it can be loosely based on an actual case. The panel of judges usually is comprised of upper-level law students or faculty and can also include attorneys and judges.[36] Students are assigned to prepare a brief for one side of the case but often are expected to prepare oral arguments for both sides.[37] In a moot court competition, students argue against each other repeatedly in a tournament-style elimination process.[38]

Moot court provides an invaluable learning experience.[39] It allows students to practice legal argument, both in writing and orally, in a simulated litigation environment.[40] The problem is that, as a practical matter, moot court must be agnostic as to the truth. To function on a large scale, the moot court case is standardized, and students are required to defend a particular side or both sides.[41] Students cannot reject the case on the merits or try to settle it.[42] They must put forward the best defense they can muster. Usually, the case is designed or selected as a close case on the merits, but students often believe that one side is stronger than the other. In any event, they must present their best arguments.

Thus, students learn to defend not only positions that they believe are right or reasonable but also those that they believe are wrong and those to which they may be morally opposed. This is necessary and appropriate for students

34. *See* LARRY L. TEPLY, SUCCESSFULLY COMPETING IN U.S. MOOT COURT COMPETITIONS 1–2 (2014).

35. *See id.*

36. *See id.* at 3.

37. *See id.*

38. *See id.* at 3–4.

39. *See The Value of Moot Court Competitions Explained*, FED. BAR ASS'N (Mar. 20, 2024), https://www.fedbar.org/blog/the-value-of-moot-court-competitions-explained/ [https://perma.cc/7KG8-LRJS].

40. *See id.*

41. *See* TEPLY, *supra* note 34, at 3.

42. *See id.* at 2 (explaining moot court as rooted in appellate advocacy).

to hone their skills. Because the ability to argue is distinct from prudential judgment, it ought to be taught as an independent skill. After all, lawyers are often called upon to defend positions with which they do not agree.

Nevertheless, the experience of learning such a skill through moot court can have a negative side effect: it can lead students to be overconfident in the power of argument, such that they may believe that any case is winnable.[43] But that is only possible if the law is fundamentally indeterminate and subject to manipulation by argumentation. Thus, the moot court experience naturally suggests to students that the law is indeterminate.

This dynamic is not limited to moot court. A similar experience often occurs in classrooms. Many law professors regularly call upon students to defend a specific side of an issue, or both sides. As pedagogically valuable as those experiences may be, they also reinforce the notion that the law is malleable at the hands of a good lawyer and thus indeterminate.

D. Law Review

Law review is the final law school institution that I will discuss. Although most academic disciplines publish scholarship in peer-reviewed journals, legal scholars tend to publish their work in student-edited journals.[44] Law students compete to get on the staff and editorial boards of the journals, especially the flagship law review at each school.[45] Regardless of the merits of this system, it is undeniably an important part of the law school experience.[46]

As might be expected of any publication, law review editors tend to prefer articles that tackle interesting issues rather than boring ones.[47] Common examples of issues include conflicting holdings, such as circuit splits, recent changes in law, proposals for change, and reconceptualizations of the law. Such topics are more often published than mere restatements of the law or defenses of the traditional view.

As true as this dynamic might be of any journal, it may be even more true for student-edited journals over peer-reviewed journals.[48] Experts in a field are more likely to find interesting topics that nonexperts find boring. Because

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43. *Cf.* Kozinski, *supra* note 24, at 185 ("[Moot court] also teaches students the perverse lesson that the strength of the client's case—indeed the fate of the client—is irrelevant, and the only thing that counts is how well the lawyer engages in repartee with the judges.").

44. *See* Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 564–65 (2007) ("No other discipline or profession entrusts their cutting-edge work to students.").

45. *See id.* at 571–73.

46. *See* Scott M. Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1100–01 (1986); *see generally* Mary Garvey Algero, *Long Live the Student-Edited Law Review*, 33 TOURO L. REV. 379 (2017).

47. *See, e.g.*, Day, *supra* note 44, at 575–76; Natalie C. Cotton, Comment, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PENN. L. REV. 951, 970 (2006).

48. Day, *supra* note 44, at 575–76.

students are not experts, one can reasonably expect them to have a lower tolerance for esoteric topics and emphasize those with surface-level appeal.[49]

Moreover, what is true on the demand side is also reflected on the supply side. To get their work published, law professors write articles that appeal to student editors. Some professors conclude that the more exciting the article, the better. In such an environment, one can expect legal scholarship to sacrifice quality for appeal. Indeed, some law review articles are downright nutty.[50] This process, I submit, tends to cultivate an attitude in student law review editors, and possibly law professors as well, that the law is indeterminate—i.e., more uncertain and malleable than it is.

Moreover, even those students who are not on a journal are still exposed to this effect. In classes, students are often assigned portions of law review articles; in seminars, they are often assigned entire articles; when they write notes or papers, their research includes many law review articles. In this way, law review articles help to impress legal indeterminacy upon all students, not just those on law review. To be clear, I am not claiming that the institution of law review is fatally flawed. Rather, my claim is that law review articles give the impression that the law is more indeterminate than it actually is.

In short, many of the most basic aspects of a legal education in the United Sates have a natural tendency to suggest that the law is more indeterminate than it is. This can lead students to have an inflated view of the role and power of attorneys. If the law is uncertain and malleable, then it might seem that the law is subject to the skill of the lawyer, not that the lawyer and their clients are subject to the law.

II. BIG LAW

In Part I, I discussed how law school leads students to believe that the law is more indeterminate than it is. In this part, I argue that practice in a big law firm, especially transaction practice, tends to suggest to junior associates that the law is almost irrelevant. This is because most of the time, junior associates are engaged in tasks that appear to have little to do with the practice of law, such that they feel like businesspeople rather than attorneys.

Based on my experience in practice, I will offer three aspects of a junior transaction associate's job that de-emphasize the importance of law: (1) the extensive use of drafting precedents, (2) the compartmentalization of their duties, and (3) the amount of time pressure imposed on them. Together, these aspects of practice hinder the junior associate's ability to see the big legal picture involved in their work.

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49. *See id.* at 575; *cf.* Bernard J. Hibbitts, *Last Writes?: Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 641 (1996) ("Professors have alleged that student editors are incompetent to judge academic contributions to an ever-more-complex field . . . . They have asserted that students are inherently conservative (or, alternatively, faddish) in their publication choices, preferring the familiar to the truly original.").

50. *See, e.g.*, Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1171 (2007).

A. Precedents

First, transaction attorneys deal with a lot of paperwork, and that paperwork is not drafted anew in each transaction.[51] Rather, the attorneys work off of "precedents" meaning that, for the most part, they take the deal documents from one or more previous deals that are very similar and edit them, rather than draft new documents.[52] And I mean this in the most literal sense: they do not simply look at old documents when drafting new ones—they take old documents and edit them to make new ones.[53]

The archetypical deal is thus a cookie-cutter deal where the documents are essentially forms. Instead of filling in the blanks, the attorneys replace key terms. Thus, if the current deal is an offering of "XYZ Corp.'s 8% Notes," the attorney might turn to the documents for the "ABC Inc. 7% Notes" deal, search, and replace "ABC Inc." with "XYZ Corp." and "7%" with "8%.

Obviously, drafting any transaction document is much more complicated than that. The changes are inevitably more substantial than could be captured by a simple search-and-replace strategy.[54] Nevertheless, this is how the process begins. Moreover, because junior associates will often take the first stab at such documents, they do the most menial parts of preparing the documents.[55] And this will happen over and over on each deal with multiple documents, ranging from the main contracts to the disclosure documents to the closing documents.

Furthermore, even when the documents are drafted from scratch, they often are drafted from forms that, more or less literally, provide a fill-in-the-blank approach to drafting.[56] For example, many government disclosure requirements are provided as forms.[57] Some of these are not quite fill-in-the-blank forms, but they are not very far from it. Moreover, big law firms generally have their own forms for key documents, such as opinion letters, and many of these are fill-in-the-blank forms, albeit with many options along the way. To the junior associate preparing these documents in the first instance, such tasks can seem very far removed from the practice of law.

To be fair, there are large portions of many documents that cannot be prepared in this way. Much of the company-specific and deal-specific disclosures must be prepared de novo, and the deal terms must be negotiated and drafted individually. But these responsibilities typically are not given to junior associates. Moreover, much of the more sophisticated drafting and preparation also has little to do with law and more to do with facts. For many deals, only a small part of transaction practice deals heavily in law, and this

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51. *See* Claire A. Hill, *Why Contracts Are Written in "Legalese"*, 77 CHI.-KENT L. REV. 59, 63–64 (2001).

52. *See id.* at 71–72.

53. *See id.*

54. *See id.* at 59–60.

55. *See id.* at 72–73.

56. *See id.* at 76.

57. *See, e.g.*, 17 C.F.R. § 239.11 (2025) (Form S-1); 17 C.F.R. pt. 229 (Regulation S-K); 17 C.F.R. pt. 210 (Regulation S-X).

is usually handled by partners. So, although partners may be engaged in what truly resembles the practice of law, junior associates in transaction practice often are not.

B. Compartmentalization

A second aspect of transaction practice that tends to de-emphasize the importance of law is the compartmentalization of duties. Ideally, a small group of lawyers work together for a company for a long time and then work on a particular deal from start to finish. However, it does not always work out that way, especially for junior associates. They often get called in to start working on a deal for a company with which they have little to no familiarity. Under such circumstances, their responsibility is necessarily minor, and it is difficult for them to appreciate the big picture.

Of course, this is largely inevitable. After all, junior associates cannot possibly have long histories with companies. It takes time to develop relationships and learn about companies' work. Junior associates will eventually become more experienced, but they cannot be immediately. Of course, this is not the fault of big law. Training junior associates is necessary to have experienced partners in the future.

Nevertheless, junior associates are called upon to do discrete tasks for clients about whom they know very little. Perhaps they are told to prepare a first draft of the closing documents.[58] But realistically, all they can do at first is replace key terms. Perhaps they are sent to conduct the documentary review portion of a due diligence investigation.[59] But realistically, how are they supposed to know what to look for except at the most general level? Perhaps they are asked to conduct a "form check" of the disclosure documents—i.e., make sure that the disclosure formally satisfies government disclosure requirements.[60] But even a form check is highly compartmentalized—it does not even involve any review of the substance of the disclosures, which junior associates would be unqualified to make; it only involves compliance with technical form. These discrete tasks do not feel like the practice of law. They feel ministerial.

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58. *See* LEXISNEXIS, WHITE PAPER: HIRING PARTNERS REVEAL NEW ATTORNEY READINESS FOR REAL WORLD PRACTICE 2, 6 (2015), https://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf [https://perma.cc/VR9E-GKFW]. In a survey among 300 hiring partners and senior associates rating the importance of transaction skills upon hiring, "[d]raft simple contracts and agreements" scored 74 percent and "[d]raft substantive contracts and ancillary agreements" scored 61 percent. *See id.*

59. *See* Prac. L. Corp. & Sec., *Securities Offering Due Diligence Toolkit*, THOMSON REUTERS PRAC. L., https://uk.practicallaw.thomsonreuters.com/w-000-6383?transitionType=Default&contextData=(sc.Default) [https://perma.cc/W2R3-Q9RD] (providing "[r]esources to assist counsel to the underwriters or initial purchasers and issuer's counsel when they are conducting a due diligence investigation of an issuer for a securities offering.").

60. *See* Prac. L. Corp. & Sec., *SEC Form Check Toolkit*, THOMSON REUTERS PRAC. L., https://content.next.westlaw.com/practical-law/document/I92bdd5527b2911e9adfea82903531a62/SEC-Form-Check-Toolkit [https://perma.cc/C4JG-4GQU] (providing "[p]ractical guidance and helpful resources for attorneys completing a form check of an SEC filing").

Moreover, junior associates in a big law firm will be assigned to multiple transactions for different companies, often simultaneously. Over time, they may develop a relationship with some of those companies. More quickly, they will develop the skills they need to perform the tasks at hand. But at the early stage, they are assigned to a large number of compartmentalized tasks. They are barely able to figure out what is going on; they do not have the ability to figure out how it all ties together as the practice of law.

C. Time Pressure

Finally, as a third aspect, junior associates in big law firms are often under tremendous time pressure. This busyness denies them the luxury of taking the time to put together the bigger picture of what is going on. Thus, they often feel more like technicians than like attorneys practicing law.

One cause of this pressure is the billable hour.[61] Most law firms charge their clients based on time spent on the project.[62] The way for a law firm to make more money is to have their attorneys work more. Junior associates are made aware of their responsibility to the firm in various ways, including an expectation as to the number of hours they are expected to bill.[63] Moreover, actual expectations are often higher than published expectations, and bonuses or promotion opportunities are often tied to billable hours. Thus, junior associates are under pressure to keep as busy as they can billing clients.

In smaller firms, junior associates may have an added responsibility to generate their own work. In big law, however, this is not usually a worry for junior associates; the partners generally have more than enough work to keep junior associates busy. To the contrary, junior associates generally are forced to juggle multiple assignments. There simply are not enough hours in the workday to get all the work done. All they can do is tread water.

With such time pressure, junior associates do not have the time to digest everything that they should be learning. They barely have time to get their work done; they do not have the time to understand it all. Of course, junior associates do learn as they work. However, it is a slower process than it could be if they had more time.

D. Limits

To be fair, there are serious limits to my observations. For one thing, they apply most strongly to junior associates. As the attorney gains more experience, the effects fade. The lead partners on deals surely have a

61. *See* YALE L. SCH. CAREER DEV. OFF., THE TRUTH ABOUT THE BILLABLE HOUR, https://law.yale.edu/sites/default/files/area/department/cdo/document/billable_hour.pdf [https://perma.cc/6UNM-ZQSE] (last visited Feb. 14, 2025).

62. *See id.*

63. *See* Jonathan Masur & Eric A. Posner, *Horizontal Collusion and Parallel Wage Setting in Labor Markets*, 90 U. CHI. L. REV. 545, 572 n.95 (2023) ("Law firm associates are typically expected to bill at least two thousand hours, and in some cases many more. The number of billable hours significantly understates the total number of hours worked." (internal citations omitted)).

complete understanding of the facts and the law. They delegate individual responsibilities while keeping track of the big picture. Thus, it is not entirely unfair to say that my observations amount to little more than saying that inexperienced attorneys are inexperienced whereas experienced attorneys are more experienced. And, certainly, I do not mean to suggest that the clients are suffering as a result. My only claim is that the nature of the practice tends to give the junior associate the impression that the law is more or less irrelevant to what they are doing.

In addition, my observation about forms and precedents does not do justice to the fact that those forms and precedents bake in a great deal of legal experience. After all, they are not created in the first instance by inexperienced attorneys, but rather by the most experienced of attorneys. The requirements of law are, to a very great extent, baked into those forms and precedents. In filling out the forms or editing the precedents, junior associates are learning to comply with the law even if they do not realize it.

Finally, my observations are from the perspective of transaction practice. Litigation practice may be substantially different. However, I have been assured by colleagues with litigation experience that these factors, or at least analogous ones, are equally present in litigation practice. I suspect that is true.

III. MITIGATION

I have identified certain problems with law schools and big law. Now the question is what are we to do about it? In this part, I will consider some possible mitigation strategies and then assess how realistic they are.

A. Law School

Let us start with law school. I discussed four aspects of a law school education that contribute to a sense of indeterminacy. This section will look at each in turn.

First, casebooks. I argued that reliance on cases can give the impression that the law is more uncertain and malleable than it really is.[64] We could overcome this effect by reducing our reliance on cases and increasing our reliance on restatements and summaries of the law. This would convey a greater sense of certainty and stability.

In fact, we do this already. Few casebooks are merely a collection of opinions. Most casebooks include other content, such as statutory provisions, law review articles, and editors' notes that generally summarize other legal developments and ask provocative questions.[65] Different casebooks include such content to different extents.[66] This non-case-based content serves to mitigate any negative effects of the casebook method.

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64. *See supra* Part I.A.
65. *See* Johnson, *supra* note 8, at 645.
66. *See id.*

Next, the Socratic method.[67] If open-ended questioning suggests uncertainty and malleability, then a lecture format could suggest more stability. Most law professors use lectures in addition to some Socratic questioning in their classrooms.[68] My sense is that first year classes tend to be more Socratic whereas upper-level classes tend to include more lecture.[69] This may be because advanced courses are more suited to the lecture format or perhaps it is because upper-level law students are not energetic enough to sustain a true Socratic method. Regardless, the lecture can mitigate any negative effects of the Socratic method.

What about moot court? There can be little doubt that being forced to argue the "wrong" side of a case, or both sides, can foster a little agnosticism toward the law.[70] To counter this effect, we could make law students aware of the pedagogical purpose of the exercise. We could also give them other opportunities to defend the views that they actually hold.

We already do both. Law students are made aware of the pedagogical and practical reasons for the moot court format. Moreover, they are given many opportunities to defend the position of their choice, ranging from classroom participation to exams, papers, and notes, and out-of-classroom discussions with law professors and fellow law students. In other words, the negative effect is reasonably mitigated.

Then there is law review. In both the production and the consumption of law review articles, law students are influenced by the scholarship's indeterminacy-suggesting tendency.[71] However, this effect should not be overstated. Most law review articles are not "nutty." Moreover, to a greater or lesser extent, every law review article plays by the rules and thereby reinforces a more stable view of law. The very process of legal scholarship tends to place some real limits on what law professors can do in law review articles. That process, to some degree, limits the potential indeterminacy effect while also supplying a countervailing stability effect.

Moreover, there are other aspects of a law school education that also have a mitigative effect. For example, clinical work and other forms of experiential training take students out of the ivory tower of the academy and put them into real-world situations in which there is less appetite for lofty

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67. *See supra* Part I.B.

68. *See* Peter Wendel & Robert Popovich, *The State of the Property Course: A Statistical Analysis*, 56 J. LEGAL EDUC. 216, 238 (2006) ("Every professor must determine what works best for him or her—Socratic dialogue versus lecture, or some combination thereof—and then hope that approach works for the students. Despite the range of possible approaches, there is strong consensus that a mixture of the two is the best.").

69. *Cf.* SULLIVAN ET AL., *supra* note 1, at 3 ("Law schools use Socratic case-dialogue instruction in the first phase of their students' legal education. During the second two years, most schools continue to teach, by the same method, a number of elective courses in legal doctrine. In addition, many also offer a variety of elective courses in seminar format, taught in ways that resemble graduate courses in the arts and sciences.").

70. *See supra* Part I.C.

71. *See supra* Part I.D.

theorizing and more need for concrete solutions.[72] This helps to ground students in a more stable understanding of the law.

In short, law schools already do a decent job mitigating those aspects of legal education that suggest indeterminacy in the law. Thus, the problem, while real, does not provide sufficient reason to call for radical reform. A conscious awareness of the issue along with an effort to mitigate the negative effects may be sufficient to ensure that law students receive excellent educations.

Finally, it is worth noting that this tendency may not be universal. Some law professors may provide a more theoretical education whereas others may tend to "teach to the test"[73]—ultimately, the bar exam. The former have a much greater tendency to suggest that the law is indeterminate than do the latter. If a student encounters both types of professors, they may even balance each other out. If, however, different law schools tend to comprise one type of professor or the other, then students may be getting very different educational experiences—some students may graduate believing the law to be fundamentally indeterminate whereas others may graduate believing that the law is essentially fixed. Personally, I doubt that there is such a stark dichotomy. However, even if there were, I would argue that it is important to be aware of the subtle influences of educational practices in any direction.

B. Big Law

As for big law, I discussed three aspects of junior associates' experiences in transaction practice that contribute to a sense of irrelevancy of law.[74] This part considers each.

First, the use of precedents. I argued that reliance on precedents in drafting can give the impression that transaction practice does not even involve the practice of law.[75] It could help to involve junior associates in the more sophisticated aspects of drafting and perhaps even the preparation of form documents that satisfy the requirements of the law.

Of course, it is not possible to involve junior associates in advanced tasks from the start. They need to learn the basic tasks first. However, as they progress, they should be exposed to more and more challenging tasks which more fully utilize their legal expertise. This is exactly what happens at law firms. Junior associates are given the simplest tasks, which may not appear

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72. *See* Travis Whitsitt, *The Power of Legal Clinics: Gaining Practical Skills and Experience as a Law Student*, VAULT (Sept. 18, 2024), https://vault.com/blogs/vaults-law-blog-legal-careers-and-industry-news/the-power-of-legal-clinics-gaining-practical-skills-and-experience-as-a-law-student [https://perma.cc/KY4A-JC9A]; Eugenia M. Carris, *The Lasting Benefits of Experiential Learning in Law Schools*, FED. BAR ASS'N (Nov. 19, 2024), https://www.fedbar.org/blog/the-lasting-benefits-of-experiential-learning-in-law-schools [https://perma.cc/PND3-ANTJ].

73. *See* Mary A. Lynch, *An Evaluation of Ten Concerns About Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976, 997–1000 (2012) (discussing "teaching to the test").

74. *See supra* Parts II.A–C.

75. *See supra* Part II.A.

to involve the practice of law, but as they become more experienced, they are given more responsibilities. If they eventually become partners, they take on the most complex aspects of legal representation that clearly bring their legal skills to bear. Thus, the problem that I raised largely resolves itself on its own. Moreover, it seems difficult to imagine how things could be otherwise.

Second, compartmentalization. I argued that the fact that junior associates work on discrete tasks for multiple clients simultaneously makes it difficult for them to see the big legal picture.[76] It would help if they could have the opportunity to take on more tasks for the same client or clients.

Again, it is not possible for junior associates to take on a broad range of responsibilities or to instantly establish a relationship with one or a few clients. However, they are given the opportunity to develop these over time. Thus, once again, the problem largely resolves itself on its own. And things could not be expected to be otherwise.

Third, time pressure. I argued that the amount of work that is expected of junior attorneys in a big law firm makes it very difficult for them to be able to think through what is going on.[77] They must push through the work and subordinate the learning process.

On this issue, I must confess that I cannot see an easy resolution. The only way to mitigate this effect is to reduce the demands on junior associates. However, if elite law firms are to pay high salaries, they simply must demand a great deal from their junior associates. Personally, I do not find this problematic. After all, if junior associates do not want to work such long hours, they can choose to work at less prestigious law firms or in less demanding markets. Firms that pay more also demand more.[78] That is just how markets work.

Nevertheless, junior associates' busyness does not prevent them from eventually putting it all together. As they gain more experience, take on more responsibility, and build relationships with clients, they eventually come to see the big picture. Although it would be nice if it could happen sooner, the situation is acceptable given real-world constraints.

CONCLUSION

It seems that the problems that I raised are not quite devastating. They do not overwhelm the benefits of law school and big law or even undermine their value in any serious way. So, what is my point?

My point is that these problems are real, even if they are not monumental. They merit acknowledgment and consideration, and conscious efforts to mitigate their effects. Although they may not merit a wholesale reconsideration of the process of legal education, that does not mean that they

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76. *See supra* Part II.B.

77. *See supra* Part II.C.

78. *Cf.* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 904 (1999) ("Lawyers could enjoy a lot more life outside of work if they were willing to accept . . . reductions in their incomes.").

are unworthy of attention. I admit that I probably could not get this Essay published as a full-blown law review article because of the bias for more exciting scholarship that I mentioned earlier. Fortunately, I can sneak this thesis into a law review publication by means of an invitation to write for a Colloquium.

I said at the beginning of this Essay that a misunderstanding about the nature of law is likely to lead to a misconception of the purpose of lawyering and give a false impression of a lawyer's power, which in turn is likely to make lawyers less helpful to their clients than they could and should be. I went on to acknowledge that some of these effects are mitigated or resolved over time. However, I suspect that they cannot be undone entirely. These effects are felt at the most formative years of a lawyer's career and therefore are likely to persist at some level.[79] It seems wiser to acknowledge them and deal with them ab initio rather than simply to rely on experience to correct them over time.

I will close by briefly describing how I have dealt with these problems over the years. For the law school problems, I try to make complete disclosure to my students about my plan for each course and why I do what I do. I lay out my pedagogy and its strengths and weaknesses, as far as I know them. By doing so, I warn my students to be on the lookout for hidden influences and arm them to counteract their effects, at least to some degree. As for the big law problems, I try to warn upper-level law students about the problems inherent in life at a big law firm. I convey the importance of trying to understand what they are doing and why, even amid time pressure. And I try to lay out some of the most fundamental concepts of transaction practice in addition to teaching the substantive law. It is surely not enough, but the problems with big law are ultimately the responsibility of big law. Nevertheless, even just flagging the issues can make a difference.

79. *Cf.* SULLIVAN ET AL., *supra* note 1, at 50–51 ("The way the case-dialogue approach presents the law is thus, by and large, the way novice lawyers come to understand the law as both a subject and a field of endeavor.").