Class Crits Workshop II

Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy

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Abstract

Stratification has long existed within the American legal profession, and in many instances, status inequalities between attorneys are based on perceived differences in attorneys' educational credentials. Relying upon the theories of French sociologist Pierre Bourdieu, this essay will discuss how American legal educational institutions operate to reproduce the stratification within the legal profession and within society as a whole.

American law schools are not equalizing institutions that erase all class differences among students to create a profession that awards all of its members a monolithic class status. By allocating professional status based on a system of educational tiers, ranks, and evaluation procedures, American law schools tend to replicate the stratified structure within the legal profession in a way that mirrors pre-existing differences among groups of students. The resulting status differences are then explained in objective terms of merit and intelligence (the "myth of merit"), an explanation that causes law students to internalize a worldview for the legal profession that does not question how its divisional structures are created or maintained. Because the ideology of merit does not allow oppositional questions about the hierarchies within the profession, the stratification continues intact, generation after generation. Moreover, legal

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education's reliance on putatively objective explanations for its outcomes is quite similar to the way that the American common law tradition relies on formal, abstract, and objective heuristics to determine legal results, a process that obscures the fact that our system often produces unfair outcomes that favor dominant groups. Thus, in a way, the rationalist myths within legal education are part of a broader mechanism by which American law produces attitudes and values that help perpetuate our existing societal structure.

From a cultural standpoint, American law schools contribute to existing class differences between lawyers and non-lawyers with lessons that promote the practice of law as an elite upper-class profession. Bourdieu's conclusions about how class-based cultural preferences evolve can be applied to the legal profession to show how the legal profession maintains its aristocratic, high-status image through the outward display of symbolic goods and manners, creating an aura of taste, distinction and high culture. Law schools promote this imagery of the law profession as an upper-class culture of the law by teaching students how to exhibit outward behaviors that symbolize upper-class ideals**.** Learning how to maneuver through the cultural aspects of the legal profession can be quite alienating to those students who are not already familiar with the required aristocratic manners and styles.

The first part of this essay provides a foundational summary of Bourdieu's theories, which explain how social institutions, such as educational institutions, systematically replicate existing hierarchical structures within modern democratic societies. The second part of the essay discusses how Bourdieu's theories might be applied to American legal education, from the standpoint of its institutional structures as well as its culture. Part three offers a reflective critique that asks whether law teachers might be contributing to the status inequalities within the legal profession and society as a whole. Part four concludes with some thoughts on developing

oppositional strategies, specifically focusing on the experiences of students at lower status schools. The challenge here is to develop a critical pedagogy that teaches students how to master the rules of the law game while concurrently developing a critical discourse designed to show how these rules tend to reinforce the inequality within the legal profession and society.

Introduction

I became interested in the intersection between class and the legal education while attending a Continuing Legal Education seminar on strategies for success in the practice of law. At this seminar, the speaker gave an hour-long presentation on professional style and manners for attorneys, with lessons on how to shake someone's hand effectively, what types of attire make the most professional impression, and which fork to use at an upscale restaurant. This speaker's thesis was that attorneys need to master various etiquette rules in order to reach their full potential as practitioners. While sitting and listening to this well-intentioned speaker, I realized that I was essentially listening to a lesson on upper-class manners and clothing styles.

I then thought back to similar lessons that I have taught as a moot court coach and advocacy teacher. Before going to a job interview or an oral argument, I advise my students to take out their visible body piercings, hide their tattoos, avoid wearing too much perfume, leave the flashy jewelry at home and – avoid polyester at all costs. As I looked back on the substance of these lessons, I realized that I have been teaching my students to wear attire traditionally associated with the upper class in America. I began to see other lessons on proper grammar, diction, and professional conduct as advocacy of upper-class mores. I wrestled with the idea that I was becoming the law school version of Henry Higgins.[2] Should I be more critical of these class-based lessons that I am teaching? Or, would that criticism hurt my students and prevent them from acquiring the skills they need in order succeed at practicing law?

[2] George Bernard Shaw, *Pygmalion* (Penguin Classics 2003).

With these questions in mind, I decided to research the issue of class as it relates to legal education. In order to do this, I needed to find a class theory that could be applied to both the American legal profession and legal education. In terms of a theory of class for the legal profession, some theorists would stop the inquiry upon classifying attorneys, in terms of economic income, as members of the upper middle class. Although most would agree that in economic terms, the legal profession is a middle-class/upper-class profession, there are undeniable multi-dimensional striations that exist within the legal profession.[3] Bourdieu's work is relevant to the legal profession because it allows inquiry into these professional differences, by analyzing the amount social and cultural capital a person holds, in addition to economic capital. For instance, distinctions among members of the legal profession can be viewed in terms of differences in economic capital (some attorneys make much more money than others);[4] differences in power relations in the workplace (some attorneys exercise managerial authority;

[3] *See, e.g.,* Ronit Dinovitzer and Bryant C. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 Law & Socy. Rev. 1, 3 (March 2007) [hereinafter Dinovitzer and Garth, *Lawyer Satisfaction*] ("Decades of work on the legal profession have confirmed that there are hierarchies in the profession that every lawyer knows."); Frances Kahn Zemans and Victor C. Rosenblum, *The Making of a Public Profession* 42 (American Bar Foundation 1981) [hereinafter, Zemans and Rosenblum, *Making of a Public Profession*] ("For while the law in comparison with other occupations carries with it relatively high social status, the legal profession isfar from monolithic"); Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers*, 20, 42 (NALP Foundation and The American Bar Foundation 2004) [hereinafter Divovitzer et al., *After the JD*] (detailing significant economic differences between lawyers, mapped by practice area and geographic location). *See also*, John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur and Edward O. Laumann, *Urban Lawyers: The New Social Structure of the Bar*, (Univ. of Chicago Press 2005) [hereinafter Heinz et al., *Urban Lawyers*]. *Urban Lawyers* contains the results of a detailed sociological study of the Chicago Bar conducted in 1995. This study followed up on a previous study of the Chicago legal profession conducted in 1975. *See* John P. Heinz and Edward O. Lauman, *Chicago Lawyers: The Social Structure of the Bar* (Russel Sage Foundation and the American Bar Foundation 1982). The data collected by these studies illustrates the social and economic striations within the Chicago Bar.

[4] Another way to describe the stratification within the legal profession is to view it in terms of what type of clients attorneys represent. *See, e.g*, Randolph Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. Sch. L. Rev. 863, 868 (2006-2007) [hereinafter Jonakait, *Two Hemispheres*] (citing Heinz et al., *Urban Lawyers: The New Social Structure of the Bar*, *supra* n. __). The attorneys at the top of the hierarchical structure lawyers represent large corporations. *See id*. at 864. Attorneys at the bottom primarily represent personal clients. *See id*. Attorneys who have corporations for clients receive substantially more income in the form of higher legal fees than attorneys who represent individual clients. *See id.*

others do not); and what Bourdieu refers to as symbolic capital[5] (levels of prestige and honor assigned based on credentials).

Bourdieu also devoted a great amount of research into educational institutions, writing about institutional pedagogies create collective attitudes that cause individuals to docilely accept their place within the greater social structure. I found that much of what he wrote about the quality of French higher education to be applicable to American legal education. There is also an important moral dimension within Bourdieu's theories. In speaking to fellow sociologists and academics, Bourdieu urged his colleagues to uncover and publicize the myths that lead to structural subordination. But he also cautioned theorists not to ignore potential conflicts between an objective view of hierarchical societal structure and an individual's conscious subjective view of herself. I found the moral aspects of Bourdieu's theories compelling because they addressed my own internal conflict as a teacher at a low-tier institution where many students are the first in their family to receive a professional degree. I would like my students to succeed in the practice of law and enjoy the higher status in society that a law license affords, but I do not want them to so blindly embrace the law's aristocratic ideals so much that they do not see how the professional culture produces inequality and division. I am also concerned with the thought that, just like Henry Higgins and Eliza Doolittle, if I teach my students how to master the upper-class culture of the law, there is still no guarantee that the legal profession will return the favor and accept my students as bona fide members. Thus, in this essay, I look for a middle ground that would allow students to learn the rules and mores required in order to succeed as attorneys but also become critically aware of how these rules and mores mask hidden processes that tend to reproduce

[5] *See* Bourdieu, *Outline of a Theory of Practice* 182-183 (Cambridge Univ. Press 1977) [hereinafter Bourdieu, *Outline*]. For instance, attorneys who work at large law firms, representing corporate clients, are viewed as having much more prestige than attorneys who engage in individual client representation. *See also*, Heinz et al., *Urban Lawyers*, *supra* n. __ at 77-97.

institutional and societal structures, which in turn produce outcomes that favor advantaged groups at the expense of the disadvantaged.

Sources Consulted

Bourdieu's work spans the disciplines of anthropology, sociology, education and history.[6] Because of the breadth of his work, there is a danger of a misreading if one merely chooses individually digestible pieces to work from.[7] In researching this essay, I have tried to avoid the fallacy of a myopic view by looking at several of Bourdieu's writings, including: his anthropological fieldwork conducted on a pre-capitalist society in Kabylia, Algeria;[8] his exposition on taste and class;[9] his study, with Jean Claude Passeron of education;[10] and Loic J. D. Wacquant's explanations of Bourdieu's theories found in the book, addressed to sociology students, co-written with Bourdieu.[11] To help me understand the context of Bourdieu, I have also consulted Elliot B. Weininger's *Foundations of Pierre Bourdieu's Class Analysis* found in Erik Olin Wright's *Approaches to Class Analysis*.[12] I also reviewed Bourdieu's recent essays on the suffering borne out by disadvantaged persons in contemporary France.[13] Finally, I looked at

[6] *See* Loic J. D. Wacquant, *The Structure and Logic of Bourdieu's Sociology,* in Pierre Bourdieu and Loic J.D. Wacquant, *An Invitation to Reflexive Sociology*, 1, 2 (Univ. of Chicago Press 1992) [hereinafter Wacquant, *The Structure and Logic of Bourdieu's Sociology*].
[7] *See* i*d. at* 4
[8] Bourdieu, *Outline*, *supra* n. __.
[9] Pierre Bourdieu, *Distinction, A Social Critique of the Judgment of Taste* (Harvard Univ. Press 1984) [hereinafter Bourdieu, *Distinction*].
[10] Pierre Bourdieu and Jean-Claude Passeron, *Reproduction in Education, Society and Culture* (Sage 1990) [hereinafter Bourdieu and Passeron, *Reproduction*].
[11] Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __.
[12] Elliot B. Weininger, *Foundations of Pierre Bourdieu's Class* Analysis 82-118 (Erik Olin Wright ed., Cambridge Univ. Press 2005) [hereinafter Weininger, *Foundations*].
[13] Pierre Bourdieu and Patrick Champagne, *Outcasts on the Inside*, in *The Weight of the World: Suffering in Contemporary Society*, 422-424 (Bourdieu ed., Patricia Parkhurst Ferguson et al., trans., Stanford Univ. Press 1999) [hereinafter Bourdieu and Champagne, *Outcasts on the Inside*].

Bourdieu's general essay on the field of the law and the cultural production of law (which draws upon examples from French and American legal systems).[14]

I. Bourdieu's Theories – A Foundational Explanation

A. Types of Capital

For Bourdieu, class analysis is not a matter of classifying and placing individuals into pre-defined groups, such as the working class, the middle class and the upper class.[15] Rather, a person's class is determined by looking at how much and what types of capital a person has (economic, cultural and social) and how long the person has held that type of capital.[16] Thus, the term class can be defined as a person's specific place within a social sphere or *field*,[17] as determined by the value, composition and trajectory of one's capital holdings.[18] Although he views class in fluid terms, Bourdieu does share the Marxist view that dominant groups can be expected, as a matter of course, to subordinate weaker groups.[19]

The first and most important factor bearing on one's class status is the volume of capital that a person has.[20] The overall amount of capital a person holds determines what class level he/she resides at.[21] Factors two and three, the composition of one's capital and the temporal trajectory of one's holdings, determine where a person will be situated within his/her class level.[22] The different types of capital include: economic (money); cultural (education, consumer

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[14] Pierre Bourdieu, *The Force of the Law: Toward A Sociology of the Juridical Field*, 38 Hastings Law Journal 805 (July 1987) (Translated by Richard Terdiman) [hereinafter Bourdieu, *The Force of the Law*].
[15] *See* Weininger, *Foundations*, *supra* n. __, at 86; Bourdieu and Passeron, *Reproduction*, *supra* n. 8, at 11.
[16] *See* Bourdieu, *Distinction*, *supra* n. __at 114.
[17] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 17. A *field* is an arena of play, analogous to a battlefield, where players compete to establish control over the types of capital contained in the field, such as cultural and legitimate authority. *See id.*
[18] *See* Weininger, *Foundations*, supra n. __, at 89.
[19] *See, e.g.*, Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 31.
[20] *See* Bourdieu, *Distinction, supra* n. __ at 114.
[21] *See id.* at 114-115.
[22] *See id.*

practices/tastes); and social (family or political connections).[23] A person can hold different types of capital and each type is valuable in determining one's class status. For instance, a person with little economic capital but a larger amount of cultural capital (such as a teacher or professor) will generally reside in the same class as a "rags to riches" entrepreneur, who has much money, but little cultural and social capital in the form of education or family connections.[24] The difference is that these two persons will reside in different spaces within their field.[25] The final factor concerns changes in capital volume and composition over time, as "manifested by the past and potential trajectory in the social space." [26] For instance, whether a person is "old money" or "nouveau riche" is a question that relates to this third factor, which determines where, in the upper-class space, a person resides.

B. Valuing Symbolic Capital

For Bourdieu, existing class structures within a field and within a society as a whole are reproduced when each new participant learns to accept, without question, an accepted value for symbolic capital and the placement that results from a person's capital holdings. Bourdieu created the concepts of *habitus*, *objectification*, and *symbolic violence* to explain the process of how class structures come to be internalized and replicated by members of a society.

Habitus is, according to Bourdieu, a series of preferences and dispositions that cause persons to behave a certain way and see the world in a certain way.[27] Habitus is created through a process of objectification, which occurs when a person internalizes the world's external hierarchical structures into their mental structures, which creates a worldview that the person

[23] *See* Bourdieu, *Distinction*, *supra* n. __, at 114. Bourdieu often refers to social and cultural capital as *symbolic* capital. Bourdieu, *Outline*, *supra* n. __, at 182-183.
[24] *See* Bourdieu, *Distinction*, *supra* n. __, at 115.
[25] *See id.*
[26] *See* Bourdieu, *Distinction*, *supra* n. __, at 114
[27] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 214, n.1.

takes for granted as the way the world works.[28] Habitus further evolves when individuals in a given culture, through the process of objectification, agree upon the value of symbolic capital, such as honor, prestige and credit.[29] Putting an agreed upon value on symbolic capital reinforces the "well-grounded illusion that the value of symbolic goods is inscribed in the nature of things, just as interest in these goods is inscribed in the nature of man."[30] Modern society's placement of an unquestioned, agreed-upon upon value for symbolic capital allows domination to occur in a self-automated way: the dominating actors do not have to constantly prove the value of the symbolic goods to create demand in the dominated.[31]

The creation of a habitus through objectification enables a society to switch from violent domination – where one individual exercises force over another individual (such as what occurs in slavery) to symbolic violence, where individuals participate in their own subordination to obtain symbolic capital, such as honor or prestige.[32] Bourdieu provides an example of symbolic violence, occurring in a pre-capitalist society, when peasants agree to work (for very little renumeration) for a prestigious landowner in exchange for gifts[33] and the honor and prestige of being associated with that landowner.[34] Because there is a collective understanding of what these symbolic goods are worth (gifts and prestige), the peasant agreeably participates in his own domination.

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[28] *See* Bourdieu, *Outline*, *supra* n. __, at 164-165.
[29] *See* Bourdieu, *Outline*, *supra* n. __, at 182.
[30] *See id.* at 183.
[31] *See id.* at 184.
[32] *See id.* at 192.
[33] In the Kabylia societies that Bourdieu studied, gifts did not have as much economic value as symbolic value. "[A] present in which what counts is not so much what you give as the way you give it. . ." Bourdieu, *Outline*, *supra*, n. __ at 192-193.
[34] *See id.* at 190-197.

As societies evolve, the symbolic violence begins to occur systematically, that is, through processes that ensure "the reproduction of the established order by its own motion."[35] Bourdieu has identified the law as one such mechanism that enables symbolic violence to operate in modern democratic societies.[36] The production of law (which Bourdieu refers to as the juridical process) converts "direct conflict between directly concerned parties into a juridically regulated debate between professionals acting by proxy."[37] Persons on the outside of the legal field (lay persons), must "submit to the 'power of form,' that is, to the symbolic violence perpetrated by those who, thanks to their knowledge of formalization and proper judicial manners, are able to put the law on their side."[38] By maintaining a logical and aristocratic detachment, lawyers and judges are able to maintain the symbolic value of the law and its processes as neutral and trustworthy ways for resolving disputes, obscuring the fact that the law allows powerful groups to impose their vision of social order onto the less powerful.[39] Thus, for Bourdieu, common law and civil law processes encapsulate symbolic violence because the subordinated participate in their own subordination by allowing their disputes to be resolved through a process that favors the positions of socially dominant groups.[40]

C. Education and the Reproduction of Class Structure

Bourdieu theorized that modern educational institutions are uniquely situated to foster the objectification process and thus play a major role in reproducing a society's class structures. Democratic educational systems[41] replicate existing class structures by giving the school the

[35] *See* Bourdieu, Outline, *supra* n. __, at 189-190.
[36] *See* Bourdieu, *The Force of Law*, *supra* n. __; Outline, *supra* n. __ at 188.
[37] *See* Bourdieu, *The Force of Law*, *supra* n. __, at 831.
[38] *See id*. at 849-850.
[39] *See id*. at 844, 848.
[40] *See generally id.* at 839-850.
[41] Bourdieu based his theories on the ethnographic research conducted on French secondary and post-secondary education. However, he recognizes that his theories would apply to American secondary and post-secondary

authority to communicate meanings that have the function of reproducing the arbitrary[42] way that groups are organized.[43] Educational systems communicate meanings that favor the interests of the dominant class in three ways. First, educators teach in a way that mirrors the dominant culture in a way that is sanctioned by the dominant culture,[44] producing a student habitus that sees the dominant organizational structure as the natural way that things are.[45] Second, schools reinforce the theme that success is a product of individual merit or an innate gift, rather than any sort of inherited capital, economic or symbolic.[46] Finally, by giving socially approved sanctions an economic value, the educational system adheres to a hierarchy that tends to reproduce economically-based social hierarchies.[47]

Bourdieu uses the example of language to explain how teachers mirror and reinforce the dominant culture. In France, teachers must use "university" language, the abstract and detached language of the upper class, or lose authority.[48] Teachers can also be expected to use upper class language because they are teaching in the way that they were taught.[49] By using the language of the dominant class, the teacher encourages the belief that this language is the proper language, thus reproducing the dominant class's language and culture in his/her students.[50] This teaching causes students to recognize the legitimacy of the dominant culture but to also see the

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schools, which are stratified into tiers, much like French schools. *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at xi.

[42] Bourdieu defines "arbitrary" as something that "cannot be deduced from a universal principle, whether physical, biological or spiritual." *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 8. That groups are organized one way over another is arbitrary when you look at the way that groups are organized in the "sum total of present or past cultures or, by imaginary variation, to the universe of possible cultures." *See id.*

[43] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 5-11.

[44] *See id.* at 27.

[45] *See id.* at 31-35.

[46] *See id.* at 20-21, 167.

[47] *See id.* at. 152-153.

[48] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 123-126.

[49] *See id.* at 26, 60.

[50] *See id.* at 123-126.

illegitimacy of their own subordinated culture.[51] Thus, students come to believe that an upper class way of speaking is "proper" and the more literal language employed by the lower classes is "vulgar."[52] Throughout the learning process, the student does not see the arbitrary nature of these distinctions.[53]

Language also demonstrates how the French educational system hides the fact that success and rank might result from arbitrary factors (such as inherited capital) rather than innate ability. In order to succeed, a student must master "proper" language early.[54] A student who has inherited "linguistic capital" by being exposed to complex language transmitted by her family will have an advantage over students whose family members do not speak in a school sanctioned way.[55] Moreover, schools mask the importance of inherited cultural capital, such as linguistic capital, by defining aptitude in terms of individual merit and grades rather than as a product of "socially qualified teaching and learning."[56]

In addition to using merit to mask the social factors that produce academic success, members of dominant groups will often devalue the performance of students who do not come to school with much educational or cultural capital. For instance, working class students who master the language skills necessary to enter post-secondary education in France are nonetheless subject to claims that their speaking is too "forced" and does not demonstrate "ease and distinction or university tone and breeding."[57] They simply do not have "the gift" required for

[51] *See id.* at 41-42.
[52] *See id.* at 116-118, 123-126.
[53] *See id.* at. 11-15.
[54] *See id.* at 153-159.
[55] *See id.* at 72-73.
[56] *See id.* at 163.
[57] *See id.* at 130, 162.

academic success.[58] Performance based evaluations, such as oral examinations, lend themselves to class bias because the examiner has the authority to pass judgment using:

> the unconscious criteria of social perception on total persons, whose moral and intellectual qualities are grasped through the infinitesimals of style or manners, accent or elocution, posture or mimicry, even clothing or cosmetics.[59]

In addition to producing the habitus, or the mental acceptance of a society's divisional structures, evaluative examination systems reproduce pre-existing economic differences between groups. The French examination system that Bourdieu studied places students into hierarchical tiers, which tend to reflect pre-existing economic and social differences between students.[60] The system is "democraticized" in that secondary schools are open to students from all classes.[61] However, it is a tiered system: students who do well on exams at all stages of their education end up at "elite," "prestigious" secondary schools, whereas students who do less well on these tests end up at marginalized institutions focusing on technical skills (as opposed to the skills that would enable a student to get into post-secondary schools).[62] French post-secondary schooling appears to have a similar hierarchy, also based on prestige and distinction.[63] Low-status students, excluded from the elite institutions and unable to see the arbitrary nature of the selection system, internalize the ideology of merit and adopt the belief that they deserve to be excluded as a matter of course.[64]

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[58] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 130.
[59] *See id.* at 162.
[60] *See id.* at 153-159, 167.
[61] *See id.* at 158-159.
[62] *See id.* at 158-159.
[63] *See id.* at 165
[64] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 4-19, 208-210; *see also* Bourdieu and Champagne, *Outcasts on the Inside*, *supra* n. __, at 421.

Degrees and diplomas from the various tiers within the French educational system are given different economic values, depending on their place in the hierarchy. The differing economic values conferred on academic degrees can also be viewed as a *status closure* device.[65]

> When class fractions who previously made little use of the school system enter the race for academic qualifications, the effect is to force the groups whose reproduction was mainly or exclusively achieved through education to step up their investments so as to maintain the relative scarcity of their qualifications and, consequently, their position in the class structure. Academic qualifications and the school system which awards them thus become one of the key stakes in an interclass competition which generates a general and continuous growth in the demand for education and an inflation of academic qualifications.[66]

Thus, the type of job and salary available to a graduate depends on the degree to which the student's academic qualifications "have been consecrated by the school and university."[67] Within the same professional post, a graduate with indispensable technical skills but with marginal academic qualifications is paid less than someone with a degree from a more prestigious and elite institution.[68] The privileged students who do well at all stages of their academic career end up with the most prestigious high-paying jobs.[69] The disadvantaged, who struggled to get through the system, most likely receive a degree worth very little.[70] By obscuring the self-preservation interests served by these status closure devices and instead linking a graduate's hierarchical placement to individual merit, the educational system replicates

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[65] *See* Bourdieu, Distinction, *supra* n. __, at 133; *see also* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 Law & Social Inquiry 547, 548-549 (Summer 2004) (describing Bourdieu as a social closure theorist).
[66] *See Id.* at 133.
[67] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 4-19, 208-210.
[68] *See id.* at 167
[69] *See* Bourdieu and Champagne, *Outcasts on the Inside*, *supra* n. __, at 423-425.
[70] *See Id.*

existing social structures and disguises the unfair ways in which the privileged receive the most benefits from the system. [71]

D. Symbolic Consumption -Taste

In addition to studying how institutions replicate and reproduce class structures in society, Bourdieu also analyzed the creation of individual class identities through the consumption of goods. A major premise that underlies Bourdieu's field-work in *Distinction, A Social Critique of Taste,* is that social participants construct class identities through symbolic consumptive and behavioral practices.[72] Participants located near each other in the social space of society's structure will exercise similar behavioral and consumer choices, in other words, will share a similar *lifestyle*.[73] The ranking and ordering of lifestyle choices is completed through the exercise of *taste*, which translates these choices into signs that have different hierarchical values.[74] Because the dominant class has the most access to media forums in which cultural taste can be defined (e.g. theater reviews, etc.) and because taste is the internalized reflection of the existing social order (where the dominant class has the power), the dominant class is able to allocate value to different behavioral and consumer practices.[75]

Bourdieu noted "[e]very group tends to set up the means of perpetuating itself beyond the finite individuals in whom it is incarnated."[76] One way that groups do this is through representation and symbolization, which can come in concrete form (such as a tombstone or statue) but which can also appear through the display of taste and manners. [77] Thus, in a way, the

[71] *See id.*
[72] *See* Weininger, *Foundations*, *supra* n. __, at 92.
[73] *See* Bourdieu, *Distinction*, *supra* n. __, at 167-177.
[74] *See id.* at 174-175.
[75] *See id.*
[76] *See Id.*, *supra* n. __ , at 72.
[77] *See Id.*, *supra* n. __ , at 77.

outward display of manners and symbolic goods showing the purchaser's taste, are ways that the "unconscious unity of a class" is impressed through "bodily experiences."[78]

A major opposition that determines the rank of a particular lifestyle is that of *distinction* versus *vulgarity*, which operates on a system of supply and demand.[79] Distinctive practices are ranked high because they are rare and difficult to obtain whereas vulgar practices are ranked low because they are "easy [to obtain] and common."[80] By way of example, from Bourdieu's study of consumer practices in 1970s France, the upper class approved the use of highly censored language and slow gestures, signaling passivity and restraint, but found spontaneous verbal outspokenness, agitation, and haste to be vulgar.[81]

In displays of taste, the privileged rely on a "sense of distinction" and signal their status through an "ostentatious discretion, sobriety and understatement."[82] The display of "legitimate manners" are especially valuable because manners "manifest the rarest conditions of acquisition, that is, a social power over time which is tacitly recognized as the supreme excellence: to possess things from the past. . ."[83] Occasionally, members of the dominated classes seek to co-opt a marker of a higher social status and *bluff* their way into a higher social condition.[84] The example given is when one adopts body-language that signals the "self-confidence, ease and authority of someone who feels authorized."[85] The bluff is only successful if the participants

[78] *See Id.* The bodily experience may be "as profoundly unconscious as the quiet caress of beige carpets or the thin clamminess of tattered, garish linoleum, the harsh smell of bleach or perfumes as imperceptible as a negative scent.
[79] *See id.* at 176
[80] *See id.*
[81] *See id.* at 177.
[82] *See id.*
[83] *See id.* at 71.
[84] *See id.* at 252-253.
[85] *See id.*

higher up in the structure do not recognize the bluff and take the bluff as a genuine signifier of the person's higher condition.[86]

E. The Moral Dimension of Bourdieu's Theory

Bourdieu has argued that academics and intellectuals have a moral duty to uncover and demystify the myths of institutional domination.[87] If one accepts the premise that symbolic values help constitute the system of social order, then changing and questioning the values we place on the symbolic may "transform the world."[88] However, in order to oppose dominant objective structures, the educational "insider" must overcome two paradoxes: the liar's paradox[89] and the paradox that arises when a person's subjective understanding of herself conflicts with violent class structures.[90]

Bourdieu posits that all teachers who try to speak in opposition from within become embroiled in a liar's paradox: "[w]hat I am telling you is a lie."[91] This paradox arises because educational institutions' implicit role in the propagation of existing systems of domination automatically reduces the authority of anyone who wishes to criticize the existing system from within.[92] The dilemma is that oppositional academics are "trying to destroy and reconstitute an activity even while performing it."[93]

As a result of the liar's paradox, Bourdieu urges academics to do more than argue that the established order is wrong; academics must also study and critique how institutions reproduce

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[86] *See id.* at. 253
[87] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. 4, at 14; Weininger, *Foundations*, *supra* n. __, at 117-118.
[88] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 14.
[89] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 12.
[90] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 7-9.
[91] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 12.
[92] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 12.
[93] *See* Robert Conn Davis, *A Manifesto for Oppositional Pedagogy: Freire, Bourdieu, Merod and Graff* in *Reorientations: Critical Theories and Pedagogies* (Bruce Henricksen and Thais E. Morgan, eds., Univ. of Illinois Press 1990).

the established order.[94] Silence, as to the role that education plays in replicating this order, supports objectification of these institutional processes and contributes to their fertility.[95] The implication is that educators must be willing to critique their own culture.[96]

The second paradox is a result of conflicts between a person's conscious subjective view of herself and what Bourdieu calls the "objective" view of society's hierarchical structures.[97] Bourdieu urges the observer to look at the objective structures of domination but also at the "consciousness and interpretations of agents [that] are an essential component of the full reality of the social world."[98] When a conflict occurs, the dichotomous view that submission is always bad and resistance is always good does not always make social sense. For instance, resistance can be alienating if the person must proclaim "the very properties that make [him] as dominated."[99] On the other hand, submission can be empowering, such as when an actor works hard to obscure her class origins to obtain the economic and symbolic rewards available to those with a higher status.[100] This contradiction, between submission and domination is, according to Bourdieu, an "'unresolvable contradiction' inscribed in the very logic of symbolic domination."[101]

II. Bourdieu's Theories Applied to Legal Education

This part of the essay explains how Bourdieu's theories might be applied to legal education, from a structural and cultural standpoint. The first section looks at how legal education's ranking and evaluation systems, based on concepts of merit, reproduce the social

[94] *See* Bourdieu, *Outline*, *supra* n. __, at 188-189.
[95] *Id.*
[96] *See* Weininger, *Foundations*, *supra* n. 10, at 118 (internal citation omitted). Bourdieu argued that sociologists must be willing to critique their own culture. The same idea can be applied to educators.
[97] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 7-9.
[98] *See id.* at 9.
[99] *See id.* at 23.
[100] *See id.* at 23-24.
[101] *See id.* at 24 (internal citation omitted).

structure of the legal profession and help reinforce an important theme within the culture of the law itself, a theme that enables continued acceptance of the way our legal system operates. The second section looks at how law schools replicate the image of the legal profession as an upper-class culture and the ways in these cultural expectations affect students.

A. Reproduction of Class Differences Through Tiered Rankings, Examinations, and the Myth of Merit

Similar to the French educational institutions that Bourdieu studied,[102] American legal education replicates existing class structures by assigning each law school to a tier; ranking students within a law school; and utilizing the bar examination as a gate-keeping mechanism for entry into the profession. These classification methods and entry barriers replicate existing group relations because they advantage persons who already possess cultural or economic capital and disadvantage those who do not. Specifically, persons who do not possess much cultural or economic capital are more likely to end up at low-status schools, have a low-class rank or fail the bar exam, thereby receiving less economic value for their law degree (or no law degree at all). On the other hand, persons who have access to cultural capital, in the form, for instance, of a high-quality secondary education and family support for educational pursuits, will be in a better position to obtain admittance to a higher ranking institution.

In fact, a look at the history of American legal education reveals that class exclusion was the explicit goal behind the adoption of many of these procedures. The practices of classifying law schools into tiers, ranking students, and insisting on rigorous standards for entry into the profession can also be viewed as a form of status closure, where members of the legal profession act to restrict access to economic benefits associated with the practice of law, thereby maximizing the value of those benefits for themselves. Finally, a student's status and place

[102] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 165.

within legal education and within the profession is represented in terms of merit, supported by the "objective" test-score entrance requirements and examination-based ranking systems. The myth of merit encourages law students to mentally internalize the institution's structures without questioning their arbitrary nature. Perhaps more insidiously, the myth of merit mirrors and reinforces the way that our common law tradition uses themes of equality and objectivity to foster the idea that social outcomes are the fair result of neutral processes rather than the result of pre-existing inequalities.[103] In this way, the myth of merit forms part of a habitus that, when it is fully ingrained, causes unquestioning acceptance of the hierarchy within the legal profession as well as the role that the law continues to play in resolving moral and social problems.

i. Law School Tiers

The history of American education in the late 19th and early 20th century reveals the classist and xenophobic origins of legal education's striated forms. Fast-forwarding to contemporary American legal education, we see that class-based elitism remains within the structure of legal education, but now cloaked in terms of objective merit and individual ability.

a. The Historical Evolution of Class-Based Hierarchy Within Legal Education

The history of American legal education shows that elite lawyers created a hierarchical structure within legal education for the express purpose of excluding "the great unwashed masses" from educational institutions as well as the bar.[104] Throughout the 19th Century, entry

[103] *See supra* notes __ - __ and accompanying text (explaining Bourdieu's theory of how the law emphasizes neutrality and objectivity in order to instill public faith in the system, a process that tends to obscure the ways the legal outcomes dominant groups) **search for "Bourdieu has identified the law…"**; *See also* Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* 4-6, 212-214 (Oxford University Press 2007) [hereinafter Mertz, *The Language of Law School*] (explaining the process by which the law employs abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues).

[104] *See* Randall Collins, *The Credential Society: An Historical Sociology of Education and Stratification* 148-159 (Academic Press, Inc. 1979) [hereinafter Collins, *The Credential Society*]; Robert Granfield, *Making Elite Lawyers* 26-27 (Routledge 1992) [hereinafter Granfield, *Making Elite Lawyers*]. One could also view this hostility as exemplary of Bourdieu's distinction/vulgarity opposition. Bourdieu, *Distinction*, *supra* n. 7, at 176-177. Obtaining a

into the profession was relatively informal and democratic; Abraham Lincoln exemplified the ability of the everyman to practice law after spending time "reading law."[105] The first part-time law schools were established in the 1860s, designed to provide a legal education to working students.[106] During the second-half of the 19th Century, more part time schools sprang up to serve urban areas with heavy immigrant populations.[107] With lax admission policies, these part-time and night schools provided working students with legal educational opportunities and a means for social advancement.[108]

Most part-time law school graduates took jobs as sole practitioners, in part because the newly emerging "white-shoe"[109] corporate law firm adhered to strict hiring policies that excluded graduates from low status schools (defined, at the time, as any school that was not Harvard, Yale or Columbia).[110] The result was that graduates of the low status schools, for the most part, went into practice as sole practitioners, while graduates from the elite university-centered law schools

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degree from an elite institution is more difficult and thus carries an aura of distinction whereas obtaining a degree at a law school with more relaxed admissions standards is easy, common and thus vulgar. *Id*.

[105] *See* Collins, *The Credential Society*, *supra* n. __, at 149-150.

[106] *See* Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 74 (Univ. of North Carolina 1983) [hereinafter Stevens, *Law School*].

[107] *See* Stevens, *Law School*, *supra* n. __, at 75; Collins, *The Credential Society*, *supra* n. __, at 155; Granfield, *Making Elite Lawyers*, *supra* n. __, at 33.

[108] *See* Stevens, *Law School*, *supra* n. __, at 75; Auerbach, *Unequal Justice*, *supra* n. __, at 88; Tinnelly, *Part-Time Legal Education*, *supra* n. __, at 12.

[109] The adjective white shoe derives from the "white buck shoes that were a fashion requirement within elite social organizations in the 1950s." *Investopedia Dictionary*, http://www.investopedia.com/terms/w/whiteshoe.asp (last accessed May 7, 2007).

> Historically, the term 'white-shoe' conveyed class envy and a gentle ridicule of the educated effete. The wealthy could afford special shoes for boating, tennis, and other genteel pursuits, and in the summer they wore white bucks -- perhaps with a bow tie and a seersucker suit -- to the exclusive Wall Street firms where they worked.

Elizabeth Chambliss, *The Shoe Still Fits -- The White Buck Is Gone From Elite Law Firms, But The Snobbery It Represented Lives On*, 2004 Legal Affairs 18 (October 2005).

[110] *See* Jerold Auerbach, *Unequal Justice* 24, 26-27 (Oxford Univ. Press 1976) [hereinafter Auerbach, *Unequal Justice*]. Apparently, John Foster Dulles was rejected from a job at Sullivan & Cromwell because his law degree, from George Washington University, was not acceptable. *Id* at 26-27. Even a successful Jewish graduate of Harvard or Columbia would not be accepted as an associate at the emerging white shoe firms, which refused to hire non-WASP graduates of the elite schools. Auerbach, 25-27.

practiced law at the nation's emerging corporate law firms.[111] Elite attorneys, believing that the influx of immigrant and ethnic attorneys threatened the status of the legal profession, vilified the night-school trained sole practitioners as corrupt shysters with no professional standards or discretion.[112] Personal injury lawyers, in particular, were maligned for not being able "to speak the King's English correctly," leading to the conclusion that "[t]hese men, by character, by background, by environment, by education were unfitted to be lawyers."[113] Lawyers who accepted criminal defense work were similarly disparaged.[114] A common theme in the attack on low-status lawyers was that they were corrupted by the pursuit of legal fees.[115] Lawyers should not, thought the elite lawyers of the day, actively solicit clients.[116] Rather, they should await clients "[l]ike young maidens awaiting suitors."[117] Implied in the dichotomy between the corrupt ambulance chasing attorney and the virtuous passive attorney was the idea that only lawyers of pre-existing wealth and means are in a position to maintain the dignity of the profession.[118]

As ethnic immigrant attorneys gained more power, many in conjunction with Irish-Catholic political machines in urban areas, white Anglo-Saxon protestant attorneys, fueled by nativist class fears and xenophobia, worked to create exclusionary educational policies to combat

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[111] *See* Stevens, *Law School*, *supra* n. __, at 92; Auerbach, *Unequal Justice*, *supra* n. __, at 5, 62.
[112] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 41-42; Joseph T. Tinnelly, *Part-Time Legal Education* 6 (Foundation Press 1957) [hereinafter Tinnelly, *Part-Time Legal Education*].
[113] Auerbach, *Unequal Justice*, *supra* n. __, at 48-49 (citing Isidor J. Knesel "Ambulance Chasing, Its Evils and Remedies Therefor," New York State Bar Ass'n, Proceedings 52, pp. 337-339 (1929)). This concern over fitness for the practice of law ultimately led to the creation of character and fitness requirements for state bar applicants. *See id*. The character examination would "eliminate those who lacked proper antecedents, home environment, education and social contacts." *Id.*
[114] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 26.
[115] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 48-49. A leading lawyer characterized the contingency fee system as "the great blot on the history of the American bar" because the lure of money encouraged "undesirable persons" to enter the profession. Id. at 48 quoting Reginald Heber Smith, *Justice and the Poor* 86 (New York 1919).
[116] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 41.
[117] Auerbach, *Unequal Justice*, *supra* n. __, at 41.
[118] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 41. The ideal of the passive, virtuous attorney was ultimately canonized in the ABA's Rules of Professional Conduct, which outlawed attorney advertising and direct solicitation of clients. Id. at 42.

the threat of the corrupt immigrant attorney.[119] Elite members of the profession charged that the night schools, with their low admissions requirements (many did not require any college coursework) and lecture instruction methods, were "unqualified" to prepare students for the practice of law.[120] Other critics mounted professionalism attacks on the practice-oriented schools, arguing that the night schools were failing to produce socially responsible attorneys.[121] Thus, the part-time and "night" schools began receiving the derogatory remark of being nothing more than a "trade school," incapable of instilling any professional ideals into its student body.[122]

The concurrent actions of the American Bar Association, the American Association of Law Schools and state bar examiners succeeded in driving many low-status schools out of business. In the 1920s, the ABA, together with the AALS, created a body of accreditation requirements that excluded many of the part-time schools with admissions requirements and curricular offerings deemed too lax.[123] In turn, State bar examiners began to require a diploma from a school accredited by the American Bar Association, in order to sit for that State's bar examination.[124]

b. The Hierarchical Rankings System in Contemporary Legal Education

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[119] *See* Collins, *The Credential Society*, *supra* n. __, at 152-153. The project of raising education standards for admission to the bar was carried out in part by the nation's first local bar associations, which were country-club like social organizations, formed for the purpose for drawing together the best elements of the profession. *See* Auerbach, *Unequal Justice*, at 62-63 (internal citation omitted). The American Bar Association was founded with the same ideals in mind. Erwin N. Griswold, *Law and Lawyers in the United States* 23 (Harvard Press 1965) ("[The ABA's] objectives were chiefly social, and it was a rather exclusive organization, open only to those who were regarded as leaders of the bar in their communities."); *See also* Amy R. Mashburn, *Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*, 28 Valparaiso University Law Review 657, 669-670 (Winter 1997)

[120] *See* Collins, *The Credential Society*, *supra* n. __, at 155; Auerbach, *Unequal Justice*, *supra* n. __, at 97-101; Tinnelly, *Part -Time Legal Education*, *supra* n. __, at 8-11.

[121] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 99-101. Auberbach points out that the professionalism arguments of this time period were thinly veiled anti-semitic and nativist rants. *Id*.

[122] *See* Stevens, *Law School*, *supra* n. __, at 113, 114-115 (quoting Joseph Redlich, *The Common Law and the Case Method*, 70 (Carnegie Foundation 1914)).

[123] *See* Stevens, *Law School*, *supra* n. __, at 115; Warren A. Seavey, The Association of American Law Schools in Retrospect, 3 J. Legal Educ. 153, 153-167 (Winter 1950).

[124] *See* Warren A. Seavey, The Association of American Law Schools in Retrospect, 3 J. Legal Educ. at 162-163, 166-167 (Winter 1950).

Accreditation accomplished the ABA and AALS goal of driving out the least desirable law schools, but historical *de facto* stratification within legal education remains intact. Class exclusion remains in the structure of the legal profession today, couched now in terms rank, prestige, and merit. American law schools are striated into a tiered continuum, with elite schools at the top and low-status schools at the bottom.[125] An informal hierarchical ranking system has been in place as far back as 1870, when Harvard Law School's president declared that he would make Harvard the best law school by making it the "longest and the toughest."[126] Since 1987, the U.S. News and World Report has made the structure of American legal education publicly available in print and online.[127] The magazine places law schools into four tiers, with the most elite schools at the top and the low-status, "local" law schools filling the bottom tiers.[128] Large law firms accept the U.S. News and World Report as credible authority and make hiring decisions based on it.[129] By basing the rankings on factors that already support a school's elite status (LSAT scores, career placement, reputation), schools who have long-held elite status (e.g. Harvard, Yale, University of Pennsylvania, University of Chicago, Stanford[130]) are guaranteed to appear within at the top of this ranking system. Indeed, the list of top law schools that appear

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[125] *See* Granfield, *Making Elite Lawyers*, *supra* n. __, at 123; Phillip C. Kissam, The Discipline of Law Schools, 19-23 (Carolina Academic Press 2003) [hereinafter Kissam, *Discipline of Law Schools*].

[126] Richard Buckingham, Diane D'Angelo, Susan Vaughn, Law School Rankings, Faculty Scholarship, and Associate Deans for Faculty Research, Legal Studies Research Paper Series, Research Paper 07-23 (May 4, 2007) available at http://ssrn.com/absract=965032 (citing Paul D. Carrington, On Ranking: A Response to Mitchell Berger, 53 J. Legal Educ. 301, 301 (2003)).

[127] *See* David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 Suffolk Univ. L. Rev. 249 (1997) (Although there are other law school rankings systems, the most prominent is the ranking system conducted by the U.S. News and World Report.)

[128] U.S. News and World Report, *America's Best Graduate Schools* (2008).

[129] *See* Jonakait, *Two Hemispheres supra* n. __, at 863, 877-878 (citing William D. Henderson & Andrew P. Morris, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 Ind. Law Journal, 183, 194 (2006)).

[130] When a group of NYU professors were asked, in 1954, to list the top-rated law schools in the country, they named: Harvard, Yale, Columbia, Pennsylvania, Michigan, Stanford, California, Minnesota, Tulane and Chicago. David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 Suffolk Univ. L. Rev. 249, n. 10 (1997).

every year in the U.S. News and World Report do not differ, in great part, from those schools that were considered elite in the 1920s.[131]

By using LSAT scores and undergraduate grades as ranking factors, the U.S. News and World Report rewards elite law schools for their self-perpetuating admissions policies while access law schools, committed to providing a legal education to the underserved, are forever consigned to the bottom tiers.[132] The historic disdain for practice-oriented schools[133] also continues. The U.S. News and World Report rankings reward schools that develop a reputation for research and scholarship and devalue schools that emphasize teaching and practice skills.[134] Many schools with innovative practice-centered curricula remain at the bottom of the rankings.[135]

The law school ranking system sets a process in motion that perpetuates the historic stratification within the legal profession. In terms of the way that the law school attended determines one's law practice, very little has changed from the turn of the century when graduates from elite schools handled mostly corporate clients and graduates of the lower-rung schools handled personal clients.[136] Graduates from elite schools are able to secure high-paying,

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[131] *See id.*.
[132] *See* Kissam, *Discipline of Law Schools*, *supra* n. __, at 270.
[133] *See supra* note __ and accompanying text. **(search for trade school discussion)**
[134] *See generally*, Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of Professional Schools,* 100 Dickinson Law Review 647 (Spring 1996); Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 University of Toledo Law Review 517 (Winter 2007); *See also* Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 360-361 (2001) ("[The] emphasis on scholarship derives from law schools' aspirations for upward mobility within the law school hierarchy. Law schools enhanced their prestige based, in significant part, on faculty publications; teaching skill or effectiveness is not considered in the [U.S. News and World Report] rankings.")
[135] *See id.*; *see also* posting of Michael Dorf to Dorf on Law, http://michaeldorf.org/2007/09/did-chemerinsky-dodge-bullet.html (September 16, 2007 12:01 EST) ("The schools that have made [practical skills training] central to their curriculum, e.g., CUNY, Northeastern, have had some local success, but that has not translated into moving themselves schools up in the pecking order or getting the innovations widely adopted").
[136] *See* Stevens, *Law School*, *supra* n. __, at 92; Jonakait, *Two Hemispheres supra* n. __, at 864 (citing Heinz et al., *Urban Lawyers*, *supra* n. __).

high-status jobs at large law firms while, for the most part, graduates from low-status law schools enter practice making substantially less money, representing personal clients and small businesses.[137] Moreover, corporate law firm work continues to carry a higher level of symbolic status and prestige, whereas personal client representation continues to be marginalized.[138] Although some studies indicate that socio-economic origins and law practice status are not as heavily correlated as they were in years past,[139] other scholars continue to find support in the idea that persons from disadvantaged backgrounds are more likely to attend a low tier school, whereas graduates of elite schools are "overwhelmingly the children of advantage."[140]

ii. Class Rank

Hierarchically ranking students within a law school, based on grades they receive through the case-book law school examination system,[141] also replicates pre-existing structures. Class rank and a competitive selection process for law review membership began in earnest in 1887,

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[137] Jonakait, *Two Hemispheres*, *supra* n. __, at 878-880. During the 1990s law practice boom, some law firms did begin hiring graduates from less elite schools. *Id.* But, the continuing preference, for the large firms, is to hire graduates from elite schools. *See also*, David E. Van Zandt, *Merit at the Right Tail: Education and Elite Law School Admissions*, *Choosing Elites: by Robert Klitgaard* (Book Review), 64 Tex. L. Rev. 1493, 1493-1494 (May 1996). The median salaries for recent graduates of third-tier and fourth-tier schools was $60,000 and $56,341, respectively, whereas the median salary for graduates from top ten school was $135,000. Jonakait, *Two Hemispheres*, *supra* n. __, at 878 (citing Ronit Donovitzer, Nat'l Ass'n for Law Placement, *After the JD: First Results of a National Study of Legal Careers* 34 (2004), available at http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf)).

[138] *See* Heinz et al., *Urban Lawyers*, *supra* n. __, at 81-87 (Explaining that the attorneys surveyed for the studies ranked corporate work as having the highest prestige and personal client representation as having the lowest prestige).

[139] *See* Zemans and Rosenblum, *Making of a Public Profession*, *supra* n. _ at 95(finding a statistically significant relationship between the prestige of a law school and a student's social background [measured by the occupation of the father] but not finding a statistically significant relationship between an attorney's social background and the prestige of his/her law practice and setting).

[140] *See* Dinovitzer & Garth, *Lawyer Satisfaction*, *supra* n. __, at 33-35. *See also*, Dinovitzer et al., *After the JD*, *supra* n. _ at p. 20 ("The more selective the law school, the more likely it is to educate the children of relative privilege, and the less selective schools are notably more accessible to the less privileged students."); Heinz et al., *Urban Lawyers*, *supra* n. __, at 50 ("[Persons with prestigious law degrees. . .are more likely to have a privileged socioeconomic background, to have been born into an upper-class or upper-middleclass family and to have useful social connections.").

[141] Similar to the LSAT, Charles Langdell's casebook method (of which the law school exam is a product) also arose out of the desire to use objective principles "to winnow out large numbers of students, allowing only the fittest and the most able (who also happened to be the most affluent and Anglo-Saxon) to survive." Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 84 Cal. L. Rev. 1449, 1481 (October 1997) (citing Stevens, *Law School*, *supra* n. __, at 55).

when Harvard established its law review and selected members based on their academic rank.[142] Most of the other university-centered law schools followed Harvard's lead and established their own student-edited law reviews that invited members based on academic performance.[143] The class rank system grew further when newly-emerging corporate law firms began basing hiring decisions on a student's class rank and law review membership.[144]

Perhaps not surprisingly, the class rank system has not changed substantively from its origins at Harvard in 1887.[145] Class rank, based on grades received on law school examinations, continues to serve as the competitive selection process for membership on law review, law school honors, and as a gate-keeping mechanism for legal employers.[146] Legal employers use a student's class rank to determine who they will interview for positions, refusing to consider students who do not make the strict cut-off point.[147] Moreover, even if a law firm elects to interview students from lower tiered schools (and many will not), the class rank cut-off point for graduates at lower tiered schools is significantly smaller than where it is for graduates at more prestigious schools.[148]

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[142] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 27.
[143] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 27.
[144] *See* Auerbach, *Unequal Justice*, *supra* n. __, at 27-28. While the newly emerging corporate law firms used academic merit to make hiring decisions, the process was not a pure meritocracy. For the most part, academically talented black, Jewish and female law school graduates were excluded from these law firms. *Id*. at 29-30.
[145] While some of the more elite schools have abolished the class-rank system, the lower-status schools continue to employ the system. *See, e.g.*, Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 Jurimetrics Journal 413, 431-434 (Summer 2005) (explaining that Yale and University of California – Berkeley follow a honors/pass/fail system that does not utilize traditional class ranks).
[146] *See* Douglass A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. Mich. J. L. Reform, 399, 405-406 (Winter 1994) (citing Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 Ark. L. Rev. 411, 455 (1997)); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against The System* 81 (New York Univ. Press 1984); Kissam, *Discipline of Law Schools*, *supra* n. __, at 52.
[147] *See id.*; *See also*, John M. Conley, *Tales of Diversity: Lawyers' Narratives Of Racial Equity in Private Firms*, 31 Law & Society Inquiry 831, 841-842 (Fall 2006).
[148] *See* David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response To Sander*, 57 Stanford L. Rev. 1915, 1928 n.53.

The class ranking system favors students who have amassed cultural and economic capital over others with less capital. For instance, students who have gone to high quality secondary and undergraduate schools are better able to master exam taking skills than students who have had less exposure, in secondary and undergraduate education, to rigorous analysis and logic.[149] Or, students who can afford to attend law school without having to work will have advantages over students who must balance a job and child-care responsibilities while studying law.[150] Similar to what occurs with the overall ranking of law schools, the economic value of a law degree will depend on the class rank of the student.[151] Because the class rank system allows the advantaged to retain their elevated station and places the disadvantaged on a lower level, it continues to perpetuate existing stratification.[152]

iii. The Bar Examination

The bar examination is the third and final educational mechanism that tends to replicate the hierarchical social makeup of the legal profession. Although the bar examination is not conducted under the auspices of a legal educational institution, its structure and format mirror

[149] In her article *Boalting Opportunity: Deconstructing Elite Norms in Law School Admissions*, 6 Georgetown Journal on Poverty Law and Policy 199, 217 (Summer 1999), Abiel Wong explains that when the casebook method was first introduced, students with less formal educations were at a major disadvantage. "Because the casebook method was completely removed from any real-life experience, less-advantaged, self-taught individuals were placed at a substantial disadvantage in law schools emphasizing abstract, hypothetical teaching, vis-à-vis wealthier students with more formalized education." *Id.* Arguably, these disadvantages continue to exist today, where there are major differences in the rigor and quality of education opportunities in America. *See also,* Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 Georgetown L. Review 1711, 1719, 1724-1725 (April 1995) (Arguing that merit-based academic success depends on access to cultural and educational capital, which the objective criteria tend to ignore).

[150] *See* Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities For Multicultural Students In Law School*, 31 New Eng. L. Rev. 739, n. 107 (citing Linda F. Wightman, *Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men*, LSAC Research Report Series (1996)). The evidence for this thesis also exists anecdotally and by analogy to the experiences of students studying for the bar exam. *See, e.g.*, Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696, 1700 n. 13 and 14 (October 2002); Kristin Booth Glen, *Out of the Bar Exam Box: A Proposal to "Macrate" Entry to the Profession*, 23 Pace L. Rev 343, 494 n. 657 (Spring 2003).

[151] *See, e.g.*, Kissam, *Discipline of Law Schools*, *supra* n. __, at 52-53.

[152] *See* Bourdieu and Champagne, *Outcasts on the Inside*, *supra* n. 11, at 423-425.

that of written law school exams.[153] The currently accepted justification for the traditional bar examination is that it screens out applicants who are not fit for law practice.[154] The high-stakes pressurized format of the bar examination is justified because "the life of the lawyer is inevitably one of testing."[155] However, like the status-based classification scheme of law schools, the origins of the modern American bar examination also has roots as an attempt by the upper-class to exclude members of the lower classes.[156] As explained above, the influx of immigrant and ethnic attorneys around the turn of the century posed a great threat to the legal profession's upper-class image and ideals.[157] Accordingly, the campaign, carried on by the ABA and the AALS, to create a written examination requirement for admission to practice law, has been characterized as "an effort to reassert traditionalistic upper-class and WASP monopoly over legal practice."[158]

Notwithstanding the insidious exclusionary purposes that might be behind the bar examination, the bottom line is that those who fail the examination are refused entry into the profession and access to its economic benefits. The bar examination operates as the ultimate status closure mechanism[159] by limiting the supply of lawyers to ensure that the price of legal

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[153] *See* Randall Collins, *The Credential Society: An Historical Sociology of Education and Stratification*, 154 (Academic Press, Inc. 1979).
[154] *See, e.g.*, Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem" -- "Do The Work*," 40 Cal. W. L. Rev. 321, 335 (Spring 2004).
[155] Erwin N. Griswold*, In Praise of Bar Examinations*, 60 American Bar Association Journal 81, 82-83 (Jan. 1974) (citing Joseph Cardozo, *Law and Literature and Other Essays and Addresses*, 160-162 (1931)).
[156] Randall Collins, *The Credential Society: An Historical Sociology of Education and Stratification*, 153-156 (Academic Press, Inc. 1979).
[157] *See id*. at 156.
[158] *Id. But see*, Daniel R. Hansen, *Do We Need The Bar Examination? A Critical Evaluation of the Justifications For the Bar Examination and Proposed Alternatives*, 45 Case Western Law Review 1191, 1200 (Summer 1995) (citing Stevens, *Law School*, *supra* n. __, at 21) (Hansen argues that the written bar examination arose to replace oral examination procedures; there was no specific intent to exclude students from less-elite law schools).
[159] *See supra* notes ___ - ___ and accompanying text. **(Search for "The differing economic values conferred on academic degrees can also be viewed as a *status closure* device.").** In addition to the bar examination, the evolution of modern fitness standards might also be seen as a status closure mechanism designed to limit the supply of attorneys in order to halt salary erosion.

services remains elevated.[160] One theory is that that economic concerns have been driving recent efforts by states to enact higher bar passage standards.[161] Although a common justification for increasing bar passage standards has been that law school graduates are of inferior quality than those in previous generations, evidence showing an oversupply of attorneys in the labor market gives credence to the status closure theory.[162] Attempts to heighten bar passage standards could be, in reality, an attempt to limit the number attorneys entering the job-market in order to halt salary erosion.[163]

Another substantive problem with the bar examination is that its structure is grounded in the older, white-shoe law-firm mentorship model which presupposes that the bar examination does not need to test practice skills because attorneys do not need real-life practice skills when they begin work. Rather, lawyers can expect to receive skills instruction on the job, through the mentoring and instruction of the firm's senior associates and partners.[164] Thus, for the elite large law firms and the law school graduates who will work for these firms, all that is necessary to enter the profession is the ability to master the structure and form of the test.[165] Thus, the bar examination does not assess whether or not attorneys have the skills necessary to succeed in a

[160] *See* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 Law & Soc. Inquiry 547, 548-549, 555 (Summer 2004). Class rank may also function as a status closure device because it reserves access to the legal profession's most valuable economic benefits – the exorbitant salaries paid by the elite law firms – to those students who meet the rigid credential requirement of a high class rank.
[161] *See id.* at 547-563.
[162] *See id*. at 522, 556-563.
[163] *See id*. at 581-582. Regardless of the reasons for the higher standards, Professor Kidder argues that those higher standards have a disparate impact and create unfair results for bar applicants of color. Id. at 581-582.
[164] *See* Jayne W. Barnard and Mark Greenspan, *Incremental Bar Admission: Lessons From the Medical Profession*, 53 J. Legal Educ. 340, 355 (Summer 2003) (Explaining that the understanding for law students was that licensure was merely the first step toward professional competence; professional competence came later, after training and mentoring from law firm partners and senior associates bridged the gap between licensure and practice competence.)
[165] In recent years, the large law firms are allocating less resources and time to mentor young associate attorneys. *See id.*

small firm or sole practice, where mentoring opportunities are limited.[166] There is also a curricular effect – because the bar examination does not assess practice skills, but rather, places value on abstract knowledge of legal rules, practice skills tend to be devalued within law school curricula.[167]

Moreover, persons who come from disadvantaged socio-economic backgrounds have a more difficult time with the bar examination than those who have access to more educational and economic capital.[168] For instance, students who received quality secondary and undergraduate educations are more likely to have greater test-taking skills over those who did not.[169] Students who can afford to take commercial bar exam preparation classes will have advantages over students who cannot afford those classes.[170] No empirical studies exist that seek to correlate a bar applicant's individual economic and social situation (amount of debt, hours worked for

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[166] *See, e.g.*, A.B.A., *Legal Educational and Professional Development--an Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 277-278 (1992) [hereinafter MacCrate Report]277-278 (American Bar Association 1992)(Explaining that the traditional bar examination does not assess many of the fundamental lawyering skills necessary for the successful practice of law); Jayne W. Barnard and Mark Greenspan, *Incremental Bar Admission: Lessons From the Medical Profession*, 53 J. Legal Educ. 340, 354-355 (Summer 2003) (Arguing that although licensure suggests that new lawyers are fit to open an office and begin practicing law, the reality is that sole and small-firm lawyers are ill-equipped to handle that responsibility.).

[167] *See The MacCrate Report* at 278 ("[T]he examination influences law schools, in developing their curricula, to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills.") *See also infra* p. __ and note __ (discussing how law teachers are often constrained to present the law conservatively, in a form that will be rewarded by the bar examiners).

[168] *See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696, 1700 n. 13 and 14 (October 2002) (citing Linda F. Wightman, LSAC National Longitudinal Bar Passage Study 37-38 (LSAC Research Rep. Series 1998)); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives,* 45 Case W. Res. L. Rev. 1191, 1206 & n.88 (1995) (positing that bar passage rates correlate to LSAT scores).

[169] In fact, this is the position of the National Council of Bar Examiners in explaining disparities in bar performance between white and ethnic applicants. *See also,* Kidder, *Dream Deferred*, *supra* n. _, at 565 (citing Stephen P. Klein, *Bar Examinations: Ignoring the Thermometer Does Not Change the Temperature* in New York State Bar Journal, 28-33 (October 1989)); Stephen P. Klein, *Summary of Research on the Multistate Bar Examination*, 38 (GANSK 1993). Professor Kidder's view is that the NCBE has overly de-emphasized the disparate impact that the bar examination has had on persons of color.

[170] *See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696, 1704 (October 2002); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "Macrate" Entry to the Profession*, 23 Pace L. Rev 343, 494 (Spring 2003).

income per week, child-care responsibilities) with performance on the bar examination.[171] Anecdotal evidence suggests, however, that students who must work and/or shoulder child-care responsibilities while also studying for the bar have material disadvantages in succeeding on the bar exam.[172] Because persons with fewer economic and educational resources have less of a chance of succeeding on the bar examination than those with more, the bar examination favors entry for the advantaged, thereby replicating pre-existing hierarchical structures.[173]

iv. The Myth of Merit

The success of an American law student – gaining admission to a highly ranked school; obtaining a high class rank; and passing the bar exam – is largely defined in terms of merit, which obscures the arbitrary ways in which professional status is awarded. By defining success in law school and in the profession in terms of merit and ability, the legal profession hides the fact that, in many instances, the privileged are the ones who benefit the most from the legal

[171] *See* Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "Macrate" Entry to the Profession*, 23 Pace L. Rev 343, 494 (Spring 2003).

[172] *See* Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696, 1700 n. 13 and 14 (October 2002) (explaining anecdotal evidence that graduates of CUNY Law School who must work full-time, take care of children, and study for the bar may have a higher likelihood of failing the bar exam than students who have no child-care responsibilities and are able to study full-time for the bar exam); Kristin Booth Glen, *Out of the Bar Exam Box: A Proposal to "Macrate" Entry to the Profession*, 23 Pace L. Rev 343, 494 n. 657 (Spring 2003) ("At CUNY, we have often surmised that paying for the bar review course. . .and supplying childcare and similar substitutes for our graduates' familial work and community responsibilities would be the most effective strategy for raising bar pass rates. Our own lack of resource has, however, made this hypothesis impossible to test.")

[173] In describing the exclusionary history and effect of the bar examination, I am not proposing here that States should eradicate the bar examination altogether. Rather, my hope would be that state admissions authorities would embrace alternative methods of evaluation, which take a more holistic approach and which genuinely seek to measure and assess an applicant's ability to practice law, as it is actually practiced and experienced. *See, e.g.*, Kristin Booth Glen, *In Defense of the PSABE, and Other "Alternative" Thoughts*, 20 Georgia State University Law Review 1029,1031 (Summer 2004)(Proposing a Public Service Bar Alternative Exam that would be a "true performance test" where applicants would have to demonstrate minimum competence in core lawyering skills over a 10 to 12 week period of time); Jayne W. Barnard and Mark Greenspan, *Incremental Bar Admission: Lessons From the Medical Profession*, 53 J. Legal Ed. 340, (September 2003) (proposing a bar admissions process, focusing and practice and doctrine, that would be administered in pieces, throughout law school); Daniel R. Hansen, NOTE - *Do We Need The Bar Examination? A Critical Evaluation of the Justifications For the Bar Examination and Proposed Alternatives*, 45 Case W. Rest. L. Rev. 1191, 1231-1235 (Summer 1995) (proposing bar admission requirements that would include a "intensive supervised research project" and a mandatory clerkship).

educational system.[174] In Bourdieusian terms, the myth of merit[175] creates a habitus that causes law students to internally arrive at individual expectations and goals based on the legal profession's existing hierarchy.[176] Through this process of objectification,[177] students come to believe that status within the law profession is not arbitrary, but is instead based on "objective" principles of individual merit and intelligence. By focusing on these ranking mechanisms alone, proponents of the system choose to see legal education as a democratic meritocracy; they choose not to see the social barriers that affect the award of status.[178] The myth of merit excludes the possibility that a poor performance might be the result of access to less social and economic capital, in the form, for instance, of an ability to live in districts with better kindergarten, elementary, secondary and secondary schools;[179] to pay for Kaplan/Princeton Review LSAT tutoring;[180] or to benefit from the knowledge of family members who can help guide a student through the educational system.[181]

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[174] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 167.
[175] The myth of merit, as it appears in educational institutions, originated in the work of Max Weber. *See*, Max Weber, 2 *Economy and Society*, 998 – 1001 (Univ. California Press 1978).
[176] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 214, n.1.
[177] *See* Bourdieu, *Outline*, *supra* n. __, at 164-165
[178] For instance, reminiscing about his days at Harvard Law School between 1903-1906, Felix Frankfurter celebrated Harvard's "democratic" class-blind and color-blind academic ranking system, without taking into account that at the time, Harvard's admissions requirement of a college degree barred 96% of the American population from the chance to excel academically. *See* Auerbach, *Unequal Justice*, *supra* n. __ at 28 (citing Felix Frankfurter, *Felix Frankfurter Reminisces* 26-27 (Reynal & Co. 1960)). Frankfurter also glossed over the fact that even if a Jewish student (like himself) excelled academically, the chances were slim that the student would be able to use his credentials to get in the door at most Wall Street law firms, which refused to hire Jews. *See id.* Although law schools no longer make exclusionary admissions decisions based on race, sex, or class, modern law school admissions criteria and ranking mechanisms have the same limiting effect.
[179] There is empirical evidence that applicants from lower socio-economic backgrounds do not score as well on the LSAT as applicants from higher socio-economic backgrounds. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 New York Univ. Law Review 1, 42-43 (1997). Professor Wightman posits that the difference in performance might be related to "differences in educational opportunity." *Id.* at 42.
[180] *See* Kirsten Edwards, *Found! The Lost Lawyer*, 70 Fordham L. Rev. 37, 45 (October 2001) (enumerating the socio-economic factors that correlate with academic achievement in high school, college, which lead to acceptance at an elite law school); Abiel Wong, *Boalt-ing Opportunity?: Deconstructing Elite Norms in Law School Admissions*, 6 Georgetown Journal on Poverty Law and Policy 199, 232-233 (Summer 1999) (positing that higher LSAT scores can be had by those who can afford to pay for commercial LSAT preparation courses).
[181] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 172-173; Bourdieu and Champagne, *Outcasts on the Inside*, *supra* n. 8, at 424.

The myth of merit also causes advantaged law students come to believe that their success is based on their individual merit, gaining the "supreme privilege of not seeing themselves as privileged."[182] On the other hand, disadvantaged students see their failure in terms of their "lack of gifts or merits, because in matters of culture[,] absolute dispossession excludes awareness of being dispossessed."[183] Thus, American legal education, with its hierarchy of prestige and adherence to the cult of merit, enables the privileged classes "to appear to be surrendering to a perfectly neutral authority the power of transmitting power from one generation to another, and thus to be renouncing the arbitrary privilege of the hereditary transmission of privileges."[184] Students learn to expect and accept, as a matter of course and without any kind of fight, their assigned station in the professional hierarchy.[185] Thus, within the legal profession, this un-coerced participation in the subordination process enables the efficient replication of the existing hierarchy for future generations.[186]

It would be quite an overstatement to argue that legal education's replication of existing inequalities within the legal profession is one of the more unjust instances of hierarchy and class subordination in American society. The legal profession, despite its ingrained hierarchy, does afford all of its members a certain amount of professional prestige and the economic benefits of having a middle-class/upper-class income. However, the way that our legal educational institutions reproduce the hierarchy within the legal profession, is a micro-example of the way that our legal educational institutions, in general, engender deeply ingrained beliefs about the fairness and neutrality of our legal systems and discourage inquiries into the underlying

[182] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 210.
[183] *See id.*; Bourdieu and Champagne, *Outcasts on the Inside*, *supra* n. __, at 421.
[184] Bourdieu and Passeron, *Reproduction, supra* n. __, at 167.
[185] *See* Bourdieu, *Outline*, *supra* n. __, at 192.
[186] *See id.* .

inequalities and injustices operating beneath the structural foundation of the law. Elizabeth Mertz's recent book, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press 2007) provides ample evidence of this process at work in the law school classroom.[187]

Professor Mertz's study shows that when students learn to "think like a lawyer" they are acquiring, in Bourdiesian terms, a powerful habitus that works collectively to achieve outcomes using abstract, "objective" notions of procedure and precedent, which tend to make social and moral contextual factors invisible or, in the language of legal analysis, irrelevant.[188] Moreover, the process by which certain meanings become dominant is invisible, because of the ostensible neutrality that the legal language affords.[189] Legal education's role in recreating the striations within the legal profession is but one example of such a hidden process at work. Beyond the unfairness that results from our multi-tiered legal education system, the analogy between legal education's role in replicating the existing structure of the legal profession and the law's power, in general, to propel acceptance in legal outcomes that favor the privileged makes this problem worth pointing out for discussion.[190]

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[187] *See* Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford University Press 2007). Professor Mertz's book contains the results of a linguistic study on the socializing effect of legal language. A central theme that emerges from Professor Mertz's study is that the common law method of legal analysis used in the United States, which students learn in law school, requires mastery of a core legal language. *See id.* at 4. When used to solve legal problems, this core language privileges technical form and levels of legal authority over social contexts and moral issues. *See id*. at 4-6, 212-214. The core legal language taught at American law schools also tends to situate legal actors equally and erase and ignore social differences. *See id.* Although the dominant method of legal analysis has been used to achieve liberating results (such as the case with the 1950s and 1960s Civil Rights litigations), it also causes some viewpoints to become invisible and others to dominate. *See id.* at 212-214.

[188] *See* Mertz, *Language of Law School, supra* n. __ at 4-6, 212-214.

[189] *See* Mertz, *Language of Law School*, *supra* n. __ at 5.

[190] Pointing out the problem is in line with Bourdieu's belief that academics should critique and study the educational institutions they are a part of in order to uncover and demystify the invisible ways that our institutions operate to maintain the structures of our society. *See, e.g.*, Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. 4, at 14; Weininger, *Foundations*, *supra* n. __, at 117-118.

B. The Exhibition of Taste and Distinction

In addition to its ranking systems and merit ideology, law schools replicate the imagery of the law profession as an upper-class culture by teaching students to adopt upper-class "professional" mannerisms and behaviors.[191] The American legal profession has long been viewed as occupying the cultural and social space of the aristocracy.[192] The prestige of the legal profession is advanced in part through the outward display of symbolic goods and manners, which create aura of taste, distinction and high culture.[193] The display of symbolic goods (in the form of tasteful, conservative clothing) and the performative aspects of professional manners (speaking with proper restraint and diction) promotes the legal profession as a noble, elite profession.[194]

From a common sense perspective, the legal profession's obsession with upper class culture can be explained in terms of self-serving notions of status – lawyers certainly like to view themselves as members of a high-status group. A deeper analysis indicates that adopting upper class manners and language styles may actually help maintain public faith in the validity of the legal profession and legal institutions. The detached manners of the upper class help represent the law as neutral, objective, and non-violent, creating faith in the fairness of legal process and

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[191] *See, e.g.*, Granfield, *Making Elite Lawyers*, *supra* n. __, at 109-142; Mary O'Brien and Sheila McIntyre, *Patriarchal Hegemony and Legal Education*, 2 Canadian Journal of Women and the Law 69 (1986); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against The System* 54 (New York Univ. Press 1984).

[192] The famous De Tocqueville quote speaks for itself:

> In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich who are united by no common tie, but that it occupies the judicial bench and bar.

Alexis De Toqueville, *Democracy in America* 288 (Vintage Books 1954).

[193] *See supra* notes __ - __ and accompanying text **(search for "every group tends to set up the means . . .display of taste and manners").**

[194] The analogy here is to the concept that groups reinforce their image displaying purchases and behaviors that create a bodily experience. *See* Bourdieu, *Distinction*, *supra* n. __, at 77.

obscuring the unfair ways in which the law privileges the powerful, creating a faith in the fairness of legal process.[195]

i. Acquiring Taste and Distinction

The culture of the law values upper class styles and manners.[196] While in law school, students acquire cultural capital and learn, either directly or through observation, how to exhibit what Bourdieu calls taste and distinction,[197] and to participate in a lifestyle[198] that will mark them as members of the legal profession. Law students learn to pick up "mannerisms, ways of speaking, gestures, which would be 'neutral' if they were not emblematic of membership" in the legal profession."[199] Law students learn to speak about the law in rational, measured tones by observing their teachers comment, critique, and correct student case analyses in the Langellian/Socratic classroom.[200] Law students may also learn class markers by interacting with their peers; students might learn, for instance, that Brooks Brothers is the proper place to go to purchase a suit for an interview or a court appearance.[201]

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[195] *See* Bourdieu, *Force of the Law*, *supra* n. _ at 830 (explaining how the law uses "ascetic and simultaneously aristocratic attitudes" in order to transform "conflicts of personal interest into rule-bound exchanges of rational arguments between equal individuals.").

[196] *See, e.g.*, Ellen Joan Pollock, *Turks and Brahmins, Upheaval At Milbank, Tweed* 45-46 (Describing how the law firm's culture of aristocratic manners and styles were passed down from generation to generation.); Elizabeth Chambliss, *The Shoe Still Fits -- The White Buck Is Gone From Elite Law Firms, But The Snobbery It Represented Lives On*, 2004 Legal Affairs 18 (October 2005).

[197] *See* Bourdieu, *Distinction*, *supra* n. __, at 174-175, 249.

[198] *Id.* at 167-177.

[199] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against The System* 80 (New York Univ. Press 1984). However, I disagree with Professor Kennedy's characterization of the law culture as "middle class."

[200] *See, e.g.*, Elizabeth Mertz, *Language of Law School*, *supra* n. __ at 21-22 (The teacher's use of language in the law classroom brings students to a "new social identity."); Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 351 (2001) (The theory behind the Socratic method assumes "professor's comments, questions and corrections will not only help the selected student, but will rub off on all the students in the class.").

[201] *See*, *e.g.,* Granfield, *Making Elite Lawyers*, *supra* n. __, at 116-118; *see also* Duncan Kennedy, *Legal Education and The Reproduction of Hierarchy: A Polemic Against The System* 82 (New York Univ. Press 1984). ("Lower middle class students learn not to wear an undershirt that shows, and that certain patterns and fabrics in clothes will stigmatize them no matter what their grades.")

In law school, there is a danger of class bias in any performance based evaluation. For instance, through comments by moot court judges, students learn that a woman's legitimacy as an advocate depends on clothing choices that match upper-class ideals of what a professional woman should wear.[202] Or, a law student may receive the comment that their speaking style and diction is too "forced" and "unnatural" that perhaps - they just do not have the "gift" of oral advocacy.[203] In this way, members of the dominant class devalue those skills that they deem "cannot be learned," dismissing disadvantaged students because they lack the "natural" abilities necessary for the practice of law.[204]

Students who are able to excel academically but who do not master the necessary stylistic professional mannerisms and lifestyle preferences may nonetheless find themselves rejected from a job.[205] Further, students from disadvantaged backgrounds who learn and acquire social markers that signify the distinctive taste of the legal profession are always vulnerable to a claim, from someone with more power, that bluffing is going on.[206] Whenever a student slips up in some way, by inadvertently using slang or an accent, the fear is that the student will be exposed

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[202] *See* K. C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 American University Law Review 1141 (1985); *See also* Barbara Ehrenreich, *Bait and Switch, The Futile Search for the American Dream*, 103-104 (Owl Books 2005) (explaining that acceptable professional business attire should enable one to "pass as a hereditary member of the upper middle class.").

[203] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __. at 20-21, 167.

[204] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 130, 162.

[205] *See, e.g.*, Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 Georgetown L. Review 1711, 1722-1723 (April 1995):

> The interview, or job test, rewards the candidate who has the greatest store of cultural capital, the one who soaked up cultural knowledge so easily at his father's or mother's knee. The household had the right kind of music and books. The dinner table conversation taught precisely the mannerisms, conversational patterns, and small talk skills that the employer finds comforting, familiar, and reassuring.

[206] *See, e.g., supra* notes __ - __ and accompanying text. (**search for this text: "Occasionally, the dominated classes seek to co-opt a marker of a higher social condition and *bluff* their way into a higher social condition.)**

as a marauder.[207] While a legal education does give students a chance to increase their status in the structure, a student often has no control over how they are perceived in these performance-based evaluations because those in power control the classification system.[208]

ii. The Language of Distinction

Law school stresses a measured, unemotional and grammatically sound form of communication, which correlates to the preferred communication style of the upper class.[209] In so far that use of good grammar and tone is an upper-class attribute,[210] law schools teach students that proper grammar and a formal tone will cause readers to perceive text as legitimate, whereas bad grammar or a strident, emotional tone will cause the reader to view a text and its author with suspicion. More substantively, a formal and objective discourse helps present the law as neutral and fair, perhaps obscuring the unfair results that happen outside of the law's

[207] bell hooks, in writing about class in the undergraduate context, explains the fear that if a non-advantaged student shows any aspect of their vernacular culture in the classroom they will be "placed always in the position of the interloper." bell hooks, *Confronting Class in the Classroom,* in *The Critical Pedagogy Reader*, at 145 (Antonia Darder, Martha Baltadano and Rodolfo D. Torres, eds., Routledge 2003) Many non-advantaged students experience "psychic turmoil" in trying to negotiate the conflict between what they view as their true selves and the way they must present themselves in elite settings. *Id*.

[208] *See* Bourdieu, *Distinction*, *supra* n. __, at 174-175.

[209] *See, e.g.,* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 123-126; Bourdieu, *Distinction*, *supra* n. __, at 177. Although Bourdieu was writing about French citizens in the 1970s, the description also correlates with American perceptions of a cultured or distinguished speaking style. *See, e.g.* Nelson W. Aldrich, *Old Money: The Mythology of Wealth in America* 88 (Allworth Press 1996) (describing Theodore Rooselvelt's upper-class "cultured" words as "cool and gracious" whereas Huey Long's lower-class speaking style involved shouting and over-gesticulation.). Bell hooks, writing about her undergraduate classroom experiences, explains that

> [l]oudness, anger, emotional outbursts, and even something as seemingly innocent as unrestrained laughter were deemed unacceptable, vulgar disruptions of classroom social order. These traits were also associated with being a member of the lower classes. If one was not from a privileged class group, adopting a demeanor similar to that of the group help one to advance.

bell hooks, *Confronting Class in the Classroom,* in *The Critical Pedagogy Reader*, at 143 (Antonia Darder, Martha Baltadano and Rodolfo D. Torres, eds., Routledge 2003).

[210] One of the respondents, identified as working-class, in Granfield's study of students at Harvard University stated that if she were from the middle class, she would not have lapses of grammatical errors. Granfield, *Making Elite Lawyers*, *supra* n. __, at 113.

formal margins.[211] If we accept Bourdieu's theories about how class is mentally internalized, then we should expect that law students will come out of law school with the view that their education has provided them with the natural way, the only way, to think and speak about the law.[212] Moreover, because the dominant discourse favored by the law tends to ignore those narratives that do not fit into an acceptable form, students are prevented from seeing the full effects of the law in action.

III. The Moral Dimension – A Self-Critique

Bourdieu argues that academics have a moral obligation to study how educational institutions replicate the class structure of our society.[213] As law teachers, we should critique our own role in reproducing the hierarchy within the law.[214] At this point in my essay, I offer a reflective critique that asks whether or not legal scholars – even progressive legal scholars – may be contributing to the subordination of students who graduate from low-tier law schools. How does this happen? In this section, I have identified two questions for law professors to consider. First, how does the dominant research oriented educational model of legal education reproduce the existing stratification within the legal profession? Second, in discourses about the legal profession and the role of legal education, how do law teachers reinforce the low status afforded to non-elite legal career choices? Then, from a normative standpoint, I discuss some modest steps that we might take to begin the process of dismantling the institutional biases that produce

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[211] *See, e.g.*, Elizabeth Mertz, *The Language of Law School*, *supra* n. __ at 4-6, 212-214 (explaining the process by which the law employs abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues); Bourdieu, *Force of the Law*, *supra* n. _ at 819-820 (explaining how the law receives its force from "syntactic traits" that emphasize the passive and impersonal, establishing impartiality and objectivity).

[212] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __, at 21, 31-35; Pierre Bourdieu and Patrick Champagne, *Outcasts on the Inside*, in *The Weight of the World: Suffering in Contemporary Society*, 424 (Bourdieu ed., Patricia Parkhurst Ferguson et al., trans., Stanford Univ. Press 1999); Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. __, at 24.

[213] *See, e.g.,* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. 4, at 14; Weininger, *Foundations*, *supra* n. __, at 117-118.

[214] *See* Weininger, *Foundations*, *supra* n. 10, at 118 (internal citation omitted).

the cultural expectations that enable hierarchy in the law and legal profession to continue. Finally, I conclude with some thoughts on how we, as critics, should not ignore the experiential understanding that our students have toward the legal profession, which may conflict with the theory that they are being subordinated.

A. Does Legal Education's Research and Scholarship Tradition Encourage Stratification?

The most highly-ranked law schools are research institutions[215] that adhere to a curriculum that has historically been designed to prepare students for work in a large law-firm setting.[216] The research-based approach to teaching and learning is rewarded by the U.S. News and World Report ranking system.[217] Scholarly publications, no matter how politically progressive— or *even* radical[218]—elevate a faculty member's professional status and their institution's status.[219] On the other hand, many low-tier schools define themselves as student-centered schools with a mission to prepare students for the practice of law, specifically – for

[215] *See* Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 University of Toledo Law Review 517, 519-526 (Winter 2007) (Dean Garon explains how the U.S. News and World Report grant high status to those institutions that engage in "elitist" scholarship while devaluing schools that try to introduce alternative student-oriented models of legal education); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools*," 100 Dickinson Law Review 647, 667-675 (Spring 1996) (Professor Terry argues that instead of holding all law schools to the standard of a research institutions, law schools should be ranked on two different tracks – research institutions and teaching institutions.)

[216] *See* Kissam, *Discipline of Law Schools*, *supra* n. __, at 10-11.

[217] *See* Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 University of Toledo Law Review 517, 524 (Winter 2007) (Dean Garon argues faculty who pursue "elitist standards of scholarship" in their own self interest and their institutional self-interest, do so at the expense of quality teaching and student learning).

[218] *See, e.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979); George S. Swan, *The Thirteenth Amendment Dimensions of Roe v. Wade*, 4 J. Juv . L. 1 (1980) (analogizing the unborn to slaves)

[219] This view is supported by Professor Leiter's increasingly popular weblog rankings, which rank law schools based on faculty reputation, scholarly output, and scholarly impact. *See, e.g.*, Bryan Leiter, Bryan Leiter's Law School Rankings (website), http://www.leiterrankings.com/faculty/index.shtml (last accessed December 18, 2007). Despite any criticisms that might be leveled against Leiter's system, elite legal scholars of all persuasions are represented in his ranking system. *See also*, Kissam, *Discipline of Law Schools*, *supra* n. __, at 127, 162, 184. Kissam's thesis is that radical reform oriented legal theories do not succeed in changing the structure of legal education because institutional structures mitigate the power of these theories "by fragmenting, marginalizing and infiltrating them, by enfolding them within itself and by ensuring that reforms serve rather than subvert the discipline's values and practices." *Id*. at 126. Implicit in Kissam's critique is that reform-based legal theories lack teeth in part because radical theorists are corrupted when they use their work to elevate their own institutional status. *See id.*

representing individual clients.[220] However, schools that emphasize teaching and practical training do so at the expense of their prestige and rank.[221] Student-oriented teaching schools are dismissed as mere trade schools, incapable of producing well-rounded students with professional ideals.[222] Thus, in broad-strokes, American legal education values research and scholarly output, but devalues alternative educational models that would be most useful to attorneys who plan to represent individual clients.[223]

B. In Debating Where There Is Value Within The Legal Profession, Do Law Teachers Reinforce The Low Status of Non-Elite Law Students?

In debates about what types of law practice lawyers have the most social value, the legal academy tends to ignore individual client representation, the type of work that many graduates of low status schools end up doing. For an example, we can look at the politicized debate between "practical" scholarship and critical legal theory.[224] On one side in this debate, conservative elites

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[220] *See* Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 University of Toledo Law Review 517, 524 (Winter 2007); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools*," 100 Dickinson Law Review 647, 670-671 (Spring 1996).

[221] *See id.*; *See also* posting of Michael Dorf to Dorf on Law, http://michaeldorf.org/2007/09/did-chemerinsky-dodge-bullet.html (September 16, 2007 12:01 EST) ("The schools that have made [practical skills training] central to their curriculum, e.g., CUNY, Northeastern, have had some local success, but that has not translated into moving themselves schools up in the pecking order or getting the innovations widely adopted").

[222] As discussed, *supra*, the pejorative designation of a "trade school" dates back to the turn of the century and was used to disparage students at part-time night schools. Stevens, *Law School*, *supra* n. __at 113, 114-115 quoting Joseph Redlich, *The Common Law and the Case Method*, 70 (Carnegie Foundation 1914). The appellation survives in the present and is used to insult low-tier schools that emphasize teaching and skills training. Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of Professional Schools,* 100 Dickinson Law Review 668-669, notes 61-62 (Spring 1996).

[223] *See* Kissam, *Discipline of Law Schools*, *supra* n. __, at 11. (explaining that that the dominant model of legal education in the United States is designed to train new associates for corporate law firm jobs, but fails to even meet this limited goal). Professor Kissam further explains that the entrenched form of legal training "subordinates valuable teaching methods that address a broader set of legal skills and different models of lawyers that are important to sectors of the legal profession such as the representation of personal clients, public agency work and small practice law firms." *Id.*

[224] For the conservative view of what scholarship should be, *see* Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Michigan Law Review 34 (October 1992). In this article, Judge Edwards argues that "many 'elite' law schools "have abandoned their place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. *Id*. at 34. For the progressive response to Edwards' critique, *see* Derrick Bell and Erin Edmonds, *Students As Teachers, Teachers As Learners*, 91 Michigan Law Review 2025 (August 1993). In this article, the authors justify what Judge Edwards calls "impractical theory" as helpful for

believe that legal education should prepare students for traditional practice in the large law-firm or judicial-clerkship setting.[225] On the other hand, there are the progressive elites, who see progressive, interdisciplinary learning as valuable for students entering a career in law reform and public service.[226] Encouraging elite students to enter a career in law reform or public service mirrors the historic view that law reform and public service are the special province for elite, credentialed experts.[227] Strains of professionalism can also be heard in the argument that law students must be exposed to different interdisciplinary ways of thinking about the law because law schools "are training people who will be in profound positions of power – future lawyers, judges, politicians, policymakers, and so on."[228]

What these arguments miss is that many law students from low status schools are not getting anywhere near "profound positions of power." Instead, due to economic barriers or a perceived lack of credentials, many graduates of low-status institutions are thwarted from entering a corporate law practice or a career in public service. It is well known that elite law firms shut their doors to students who lack elite credentials.[229] What is less publicized is that,

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students who "are committed to careers in public service or law reform." Students, they argue, need exposure to non-traditional legal theories so that they can "write briefs that effectively challenge the many injustices that now threaten our society in ways so dire, so dangerous, that few in policymaking positions are willing even to contemplate, much less attempt, much needed reform." *Id*. at 2026.

[225] Although Judge Edwards does not explicitly say that law schools should prepare students for large law firm practice, his belief that students should master "basic doctrinal skills" reflects the traditional view that a Langdellian legal education, steeped in doctrine, effectively prepares students for large firm practice. Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Michigan Law Review 34, 38 (October 1992); Kissam, *Discipline of Law Schools*, *supra* n. __, at 11 (the dominant model of legal education is designed to train "new associates for corporate law firms who are technically adept at productive doctrinal analysis.").

[226] *See, e.g.,* Derrick Bell and Erin Edmonds, *Students As Teachers, Teachers As Learners*, 91 Michigan Law Review 2025, 2026 (August 1993).

[227] *See* Auerbach, *Unequal Justice*, *supra* n. __ at 82-85 ("[T]he cry for reform, trumpeted by law teachers, enhanced the prerogatives of those who fully accepted the basic contours of the social system and trained young men for success within it.")

[228] *See* Posting of Daniel Solove, to Legal Affairs Debate Club, http://www.legalaffairs.org/webexclusive/debateclub_2yr0905.msp (September 20, 2005 12:51 p.m.) (last accessed June 5, 2008).

[229] *See* surrounding text for note __, *supra*. SEARCH FOR THIS TEXT: David E. Van Zandt, *Merit at the Right Tail: Education and Elite Law School Admissions*, *Choosing Elites: by Robert Klitgaard* (Book Review), 64 Tex. L.

because of the limited opportunities available and because of the law's systemic obsession with credentialed prestige, public policy and public service jobs are also highly competitive, requiring the same elite credentials and top grades that the large firms require.[230] Moreover, many low-status law school graduates, who face a median law school debt load of $80,000[231] decide that they cannot afford the low salaries that public sector jobs pay.[232] Even though there are large differences in salary between large firm practice and public interest work, both areas of practice enjoy a certain amount of symbolic prestige. [233] Approximately 1/3 of all lawyers in the United States are solo-practitioners who represent individual clients.[234] And yet this career trajectory is not considered, by the profession or the academy, as having any kind of prestige.

The problem is that the business of the elite schools remains the same as it has always been: preparing elite students for law practice – either in a private law firm setting or in the

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Rev. 1493, 1493-1494 (May 1996); *See also*, Jonakait, *Two Hemispheres*, *supra* n. __, at 879-880 ("[T]he large-firm preference for elite law school graduates continues, and it can be expected to increase further.").

[230] *See, e.g.*, Georgetown Law School, Office of Public Interest and Community Service, Fellowship Planning Timeline, available at http://www.law.georgetown.edu/opics/fellowships/timeline.html (last accessed on December 18, 2007) ("Many students are surprised to learn that, despite the huge disparity in salries, public interest jobs are harder to obtain than large law firm jobs."); The University of Chicago Law School, Public Service and Public Interest Opportunities, available at http://www.law.uchicago.edu/careersvcs/public_service.html (last accessed on December 18, 2007) ("[E]ven unpaid [summer] positions can be hard to get, because public interest employers are not equipped to handle an inflow of 50 to 100 summer associates in the way that large law firms can.").

[231] The $80,000 figure reflects the median law school student loan debt for the year 2004. Phillip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Other Nonprofit Organizations*, 36 Hofstra L. Rev. __ (forthcoming, Fall, 2007).

[232] The minimum yearly salary required to make payments on an $80,000 debt load was $42,621. George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. Legal Educ. 103, 136-137 (March 2003).

[233] *See, e.g.*, Bourdieu, *Outline*, *supra* n. __ at 182-183 (defining symbolic prestige in cultural, rather than economic terms); *But see*, *Urban Lawyers*, *supra* n. __, at 95-96. In the *Urban Lawyers* survey, when participants were asked to rank practice areas in terms of prestige, public defenders and other lawyers for impoverished clients received a low prestige rank. However, in a slightly different survey question, responders gave "civil rights/civil liberties" work a higher prestige rank. *Id*. at 84. Notwithstanding the somewhat ambiguous nature of the survey results, my argument is that reform traditions at the elite law schools have stamped these career choices with a certain amount of honor, if not prestige.

[234] The lawyer demographic statistics compiled by the American Bar Association (last updated for the year 2000) indicate that of the 74% of attorneys in private practice, 48% are solo practitioners. American Bar Association Lawyer Demographics, http://www.abanet.org/marketresearch/Lawyer_Demographics_2007.pdf (last accessed May 28, 2008). The After the J.D. Study indicates that 32% of all recent graduates engage in a solo practice. Ronit Dinovitzer et al., *After the JD: First Results of a National Study of Legal Careers*, 27 (NALP Foundation and The American Bar Foundation 2004).

culturally prestigious public interest sector. The career plans of low-tier students, who are effectively shut out (for lack of elite credentials or because of economic barriers) from these high-status areas, are devalued. It does not help matters that the vast majority of law teachers have been inculcated at elite educational institutions,[235] which creates a gulf between the actual experiences of low status students and the experiences and expectations of their teachers. The academy's failure to value the experiences of non-elite attorneys might also reflect an upper-class contempt for working attorneys who provide legal services in order to make a living.[236] Academics need to ask whether or not we are communicating meanings that favor elite members of the legal profession and discourage questions about how the profession's hierarchy is created and maintained.[237] As law teachers, we must do more than simply argue that the established order is wrong.[238] We must also critique ourselves.[239] The danger of silence is that it strengthens the habitus, making the institution a more fertile mechanism for reproducing existing inequalities – within our profession and within our society as a whole.[240] In writing about the danger of not building in a critical discourse for students learning the language of the law, Professor Elizabeth Mertz points out that the law "does not have a mechanism by which its own basic orientations and structure can be opened to question."[241] American legal education institutions mirror and reinforce this closed system by ignoring inquiry into how its underlying structures reproduce pre-existing inequalities. Developing a critical self-awareness will open up

[235] *See, e.g.*, Bryan Leiter, Where Tenure Track Faculty Went To Law School 2000-2002 (weblog) located at http://www.leiterrankings.com/faculty/2000faculty_education.shtml (last accessed December 31, 2007).
[236] *See* surrounding text and notes __ - __, *supra*. (Go back and cite to three notes re: corrupted by the pursuit of legal fees).
[237] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. __ at 5-1.
[238] *See* Bourdieu, *Outline*, *supra* n. __ , at 188-189.
[239] *See* Bourdieu, *Outline*, *supra* n. __ , at 188-189.
[240] *See* Bourdieu, *Outline*, *supra* n. __ , at 188-189.
[241] *See* Mertz, *The Language of Law School*, *supra* n. __ at 219.

dialogues that help us identify ways to share the resources of our legal educational institutions in a way that furthers the liberating and democratic ideals of American legal education.[242]

C. Normative Strategies

What follows represents some actions that we, as educators, might take to weaken the power of the institutional mechanisms that reproduce the economic and cultural stratification within the legal profession and our society. However, because our institutions are so deeply entrenched in U.S. and News Report system of tiered prestige and because law schools are not likely to give up what power and prestige they have amassed, I recognize that these strategies may not do nothing more than remove a thin layer of the foundational structure. Nonetheless, I

[242] Thurgood Marshall's legal education is but one example of the liberating effect that a legal education can have. In discussing the legacy of Brown v. Board of Education, David Wilkins aptly pointed out the race/class divide between Thurgood Marshall and John W. Davis. David B. Wilkins, *From "Separate Is Inherently Unequal" To "Diversity Is Good For Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harvard Law Review 1548, 1548-1549. Harvard educated Davis, "[]as senior partner at the Wall Street law firm Davis, Polk, Wardwell, Sunderland & Kiendl[,] "epitomized the power and prestige of the [white] elite corporate bar in the years following World War II. Far apart from Davis's world of "corporate titans, elite standing and sumptious fees" stood the Howard educated Thurgood Marshall, who struggled as a solo practitioner before being hired as the NAACP's second full-time attorney. *Id*. at 1549, n.8 (citing Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936-1961* 282 (1994)). *See also, e.g.*, Juan Williams, *Thurgood Marshall: American Revolutionary* (Times Books 1998). Juan Williams relates a revealing conversation with Justice Marshall that demonstrates the potential for breaking out of the hierarchal mold of "top-tier" school thinking:

> Q: Do you ever feel like these guys (colleagues on the court) have had a better education?
>
> A: No, I don't see anybody, I don't think so. Do they have SJDs? I don't think anybody here, no. But they're from better law schools. They're from Harvard, I'm from Howard. It didn't compare with Harvard.
>
> Q: Do you wish you had a better education to compete with these guys?
>
> A: Oh no, no. I know as many cases as they do….
>
> Thurgood Marshall: American Revolutionary (companion website), undated interview with Thurgood Marshall, available at http://www.thurgoodmarshall.com/interviews/justices.htm (last accessed January 19, 2008).

think it is important to imagine how alternative models of legal education and legal services could lead to substantive reform.

i. Embrace Alternative Educational Models

Professor Randolph Jonakait argues that low status "local" law schools should make more of an effort to teach lessons that will be useful to students planning to represent individual clients.[243] I would go one step further and urge legal education to stop devaluing this type of instruction. Schools that emphasize skills training should not be penalized by the law school rankings system, which expects every school to model itself after Ivy-league research-oriented institutions.[244] If we can give students the entrepreneurial and practice tools that will enable them to develop successful law practices that do not follow the dominant large law firm model, that may create a competitive threat to the large law firm model, which in turn might lead to a reorganization of how status is allocated within the profession. Large law firms may have to change the way they do business as younger lawyers, who value time and flexibility more than traditional notions of status and prestige, may start choosing entrepreneurial opportunities available at small firms or solo practices in lieu of big firm careers.[245]

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[243] *See* Jonakait, *Two Hemispheres supra* n. __ at 863, 887-901.

[244] *See, e.g.*, Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values To Legal Education and Provide An Alternative To Tiered Rankings*, 38 University of Toledo Law Review 517, 522-526 (Winter 2007); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools*," 100 Dickinson Law Review 647, 667-675 (Spring 1996). I agree with Dean Garon that the rankings system should begin recognizing and rewarding different models of legal education. I do not agree, however, with Professor Terry's idea that legal education should divide itself into two tracks or even two rankings systems – one for practical education and one for academic/research education. Formally separating legal education into two tracks would exacerbate the existing status differences within the law and may take us down the path of de jure stratification, as envisioned by Alfred Reed in 1921. *See, e.g.*, Alfred Reed, *Training for the Public Profession of the Law* 419 (Scribner's Sons 1921).

[245] In fact, law firms are already struggling with the legal profession's decline in status among younger attorneys, who view status in terms of "ideas of flexibility and creativity, concepts alien to seemingly everyone but art students even a generation ago." *See* Alex Williams, *The Falling Down Professions*, New York Times January 6, 2008, *available at* http://www.nytimes.com/2008/01/06/fashion/06professions.html?_r=1&oref=slogin (last accessed June 5, 2008).

ii. Recognize the Value of Alternative Career Paths

Law teachers should also consider redefining the types of law practice that we value. Either by choice or because of credential-based exclusion, a student from a low status school is likely to enter practice as a sole practitioner or work at a small firm doing personal injury work, criminal defense work, family law, or residential real-estate law.[246] From recent studies that have been done on the legal profession, we know that many attorneys view these types of law practices as low-status work.[247] For instance, personal injury attorneys are still characterized as greedy ambulance chasers.[248] Criminal defense attorneys who defend paying clients are also considered to have low status and a practice that requires little intellectual skill.[249]

An attorney who helps a client receive compensation for a personal injury may not be pursuing social justice in its traditional sense, but there is an important social purpose served in helping individuals obtain remedies for wrongs done to them (often by corporations). Similarly, defending persons accused of a crime, in exchange for legal fees, is not public service in the traditional sense (public defender work would be) but attorneys who do this work provide a valuable service within our justice system. The same can be said for attorneys who provide

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[246] *See, e.g.*, Jonakait, *Two Hemispheres supra* n. __ at 863, 875 (2006-2007); Heinz et al., Urban *Lawyers*, *supra* n. __ at 58-59.

[247] *See* Jonakait, *Two Hemispheres supra* n. __ at 903-904; *see also*, Heinz et al., *Urban Lawyers*, *supra* n. __ at 81-97; Zemans and Rosenblum, *Making of a Public Profession, supra* n. __ at 94.

[248] *See* Mary Neil Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 New York Law School Law Rev. 215, 216 (2006-2007) ("Plaintiffs' personal injury lawyers are commonly portrayed as greedy "ambulance chasers" who will take any case regardless of merit."); *see also*, John Fabian Witt, *First Rename All the Lawyers*, Op Ed Column, New York Times, October 24, 2006 (Although the personal injury tort lawyers' association changed its name from the Association of American Trial Attorneys to the American Association for Justice [in order to improve their image], Witt concludes that "some will say that the trial lawyers are still chasing ambulances.")

[249] *See* Gabriel Chin and Scott C. Webb, *Can't Reasonable Doubt Have an Unreasonable Price*? *Limitations on Attorney's Fees in Criminal Cases*, 41 Boston College Law Review 1, 51-52 n.254 (December 1999) (Collecting sources reporting that most attorneys view criminal defense work as having low status and low prestige). *See also*, Heinz et al., *Urban Lawyers*, *supra* n. __ at 93-97 (Indicating that the lawyers surveyed in the study gave a low prestige rank to criminal defense work.) On the other hand, certain types of criminal defense work, capital cases, for instance, might be considered prestigious because of its association with reform oriented public service. *See* text of note ___, *supra*.

middle-income and lower-income individuals with access to legal services in the realm of family law and residential real estate. Small firm and solo practice models also allow us to re-imagine law practice in ways that differ from the oppressive large firm model, with its entrenched hierarchies, billable hours requirements, and commitment to big-business private law. Working at a small law firm or in solo practice provides an attorney with more autonomy to choose to serve underserved clients or perform community service.[250] For instance, David Wilkins has argued that attorneys at small minority owned law firms are more likely to represent minority clients, engage in community service and mentor younger attorneys than minority attorneys at majority law firms.[251] Others see small and solo firm models as providing a format for women to create profitable part-time and flex-time practices, particularly in high-tech suburbs, where telecommuting is an acceptable way of working.[252]

D. In Critiquing the Legal Profession and Legal Education, Law Teachers Should Not Ignore the Subjective Experiences of Students

Finally, we should look at the social effects of criticizing the idea that law school is an instrument of empowerment and social good when so many students and their families are relying on a law degree to raise their status in the system and their self-esteem.[253] We should be

[250] There is a conflict, within Western educational institutions, between teaching students to become participants in a democratic society and training students to function in "relatively authoritarian work regimes." *See* Mertz, *The Language of Law School*, *supra* n. __ at 25. To the extent that law professors are uncomfortable with our role of preparing students for the "authoritarian work regime" of a large firm corporate practice, training students to enter alternative practice models in which they have more autonomy and control over their work presents a more satisfying role.

[251] *See* David B. Wilkins, *Separate Is Inherently Unequal to Diversity Is Good For Business: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harvard Law Review 1548, 1604 n. 240 (March 2004) (Explaining that lawyers working at smaller, minority owned law firms are more likely to "to serve black individuals and small black businesses, to mentor young black lawyers [including ones in other institutions], and otherwise to be an important presence in the black community.").

[252] *See* Caroll Seron, The Status of Legal Professionalism at the Close of the Twentieth Century: Chicago Lawyers and Urban Lawyers, 32 Law & Social Inquiry 581, 602-603 (Spring 2007).

[253] In a comment written in response to Duncan Kennedy's *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, Peter Gabel argues that "the only plausible explanation for why law students don't spontaneously resist and reject their assimilation to a hierarchy that "maims" them and deprives them of their

loathe to destroy the self-esteem that our students have built up for themselves, based on their attendance at law school. This relates back to the paradox Bourdieu identified as the empowering nature of subordination and the alienating nature of resistance. [254] Many students who attend low tier law schools buy into the liberal idea that law school and the law is an instrument of good. Many students from lower socio-economic backgrounds look forward to the upward social mobility and membership in a high-prestige profession when they obtain their degree.[255] Of course, in order to reach this point, we must teach our students to be "gentlemen"[256] who can conform to the rules, speak the language of the law and display all of the correct mannerisms required for entry to the profession. Whether we accept the view that this conformity is subordination or not, obtaining the degree and passing the bar leads to a very real personal and family happiness and sense of empowerment.[257] Thus, when we speak about law school as a negative mechanism that subordinates and reproduces class hierarchies, we risk maligning the self-esteem of our students. Some might argue that it is best to tell all law students, elite and non-elite, to be proud in their accomplishments and not to question the inequalities within the legal profession or how those inequalities have come to be. However, a

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authentic selfhood is that the reproduction of hierarchy is the reproduction of our own social alienation, to which, absent some liberating social movement that frees us for a more authentic form of social connection, we have no choice but to succumb." Peter Gabel, *The Spiritual Foundation of Attachment to Hierarchy,* in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy, A Polemic Against The System* 154, 159-160 (New York Univ. Press 1994).

[254] *See* Wacquant, *The Structure and Logic of Bourdieu's Sociology*, *supra* n. _, at 23-24.

[255] *See* Donivitzer and Garth, *Lawyer Satisfaction*, *supra* n. __, at 38-40 (explaining that students at low-status schools view law school as a means for social mobility); Zemans and Rosenblum, *Making of a Public Profession*, 30-31 (explaining that one of the most popular reasons that student give for attending law school is the prospect of an above average income and the social prestige that comes from being an attorney.)

[256] *See, e.g.,* Lani Guinier with Michelle Fine and Jane Balin, *Becoming Gentlemen, Women, Law School, and* Institutional *Change* (Beacon Press 1997) The title of Professor Guinier's book derives from advice a male professor gave a first-year class at the University of Pennsylvania: "To be a good lawyer, behave like a gentleman." *Id.* at 29

[257] In his commentary to Kennedy's polemic, Peter Gabel warns that we should not expect students to resist hierarchy as soon as they learn about it because students may be more inclined to avoid the social suffering that might occur in an act of resistance. Peter Gabel, *The Spiritual Foundation of Attachment to Hierarchy,* in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy, A Polemic Against The System* 154, 161 (New York Univ. Press 1994).

greater risk inures when students never see beyond the myths that hide the arbitrary location of the chutes that determine status within the profession. Students need to be armed before they enter the field of law so that they can predict how their reputation and status will be affected, make reasoned choices to response to the realities and, ultimately, refuse to buy into the myths that explain their place in the profession.

Critiquing ourselves and identifying ways that we, as teachers, might be unconsciously contributing to the existing hierarchy within the legal profession and legal education is a vital step, but it is equally important that we identify active teaching approaches that we can employ in the classroom to ensure that we do not reproduce a mindset in our students that enables stratification to continue within the legal profession, but more importantly, enables our legal processes to continue to operate in a way that privileges the advantaged while maintaining the appearance of neutrality and reason. With this goal in mind, what follows are some suggestions for discussions that teachers might conduct to bring students to understand how class bias is invisibly interwoven throughout American legal institutions.

IV. Pedagogical Strategies

Opponents of our current system would agree that a law teacher should induce something of a critical consciousness[258] in her students, creating an awareness of the ways in which the law school system replicates class structure, which harms current and future students of the law as well as the rest of society.[259] On the other hand, as law teachers, we also have an obligation to teach our students the mannerisms and skills they will need to succeed in the practice of law.

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[258] *See* Paulo Freire, *Education for Critical Consciousness* 16-20 (Continuum Press New York 1994).

[259] It is also possible to change the law school institution from the outside. Franklin Snyder has proposed that the emergence of non-hierarchical web-based discourse through law blogs and Social Science Research Network (SSRN) might actually lead to a "breaking down of caste." Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy's Legal Education and the Reproduction of Hierarchy in an Arkansas Motel Room*, 11 Nexus 111, 121-124 (2006).

This necessarily means that we will be teaching our students explicit and implicit lessons on upper-class mores. How can we teach these lessons while also criticizing them? The compromise I propose is to instill a critical class consciousness in students while still teaching the skills necessary to succeed at the law game. Paulo Freire's concept of critical consciousness or *Conscientizacão*, is the ability of a person to reflect on themselves and their role in the cultural climate thereby transcending a naïve or magical understanding of reality.[260] Teaching critical consciousness while teaching the law creates a liar's paradox because we are teaching students to be critical of the system while at the same time teaching the skills necessary to succeed within that system.[261] Lori Lefkovitz, writing about this paradox in teaching remedial English composition at the undergraduate level, suggests we teach students to recognize the margins:

> To teach students to write within the margins of the page and the culture, to obey the rules of the dominant discourse, and to be aware of the possibilities for challenging the placement of margins, we need to make the margins themselves visible.[262]

As a practical method for making visible the metaphorical margins dividing dominant legal tradition from the real work of people's lawyers, I suggest a classroom teaching paradigm that focuses on posing series of questions to students designed to shed light on the ways in which the production of law tends to privilege the views of socially dominant groups while excluding and marginalizing the experiences and voices of lower status groups. The idea underlying such a paradigm is that students will learn the rules encapsulated within dominant legal texts but will

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[260] *See* Paulo Freire, *Education for Critical Consciousness* 18-19 (Continuum Press New York 1994). The Bourdieu corollary to Freire's magical or naïve understanding of reality is the habitus, where one does not question the external structures which are embodied in her internal structures, but rather, because of objectification, accepts the world the way it is as the natural way, as a matter of course. *See* Bourdieu, *Outline*, *supra* n. 3 at 166, 168-169. Freire himself developed a way to develop critical consciousness while also successfully teaching Brazilian students how to read and write. *See* Paulo Freire, *Education for Critical Consciousness*, 41-58.

[261] *See* Bourdieu and Passeron, *Reproduction*, *supra* n. 8, at 12.

[262] Lori H. Lefkovitz, *Writing Within the Margins,* in *Reorientations, Critical Theories and Pedagogies* 172 (Bruce Henricksen and Thais E. Morgan, eds., Univ. of Illinois Press 1990).

also learn to see beyond the text into the processes by which rules of law are formulated and canonized. Some of the areas that would lend themselves for critical student inquiry might include judicial authorship, the professional ideals ensconced in American ethics rules, and the curricular choices that law schools offer students.

A. Judicial Authorship

In the process of teaching legal doctrine, law teachers might consider leading students to see how the process of judicial authorship, which relies on a objective veneer of neutrality and objectivity, reduces judicial actors to inhuman objects, thereby obscuring the way in which the law privileges the views of dominant groups and ignores the experiences of less powerful groups.[263] As a starting place, we might turn to the now-classic example *of* Judge Noonan's retelling of the *Palsgraf* decision.[264] In this case, familiar to law students and lawyers alike, Judge Cardozo shifted issues of tort liability , based on foreseeability of the harm suffered, away from the jury question of proximate cause and instead analyzed foreseeability in terms of a relational duty owed, a question of law for the judge.[265] Under Cardozo's approach, because plaintiffs had to fit foreseeability issues into a strict judge-controlled doctrine rather than having a jury resolve these issues, it became more difficult for torts plaintiffs to win cases. Although Judge Cardozo's approach is no longer favored, the decision, along with Judge Andrews' dissent,

[263] *See generally*, Bourdieu, *The Force of the Law*, *supra* n. __, at 848 (explaining how the operation of the law allows dominant groups to "impose an *official representation* of the social world which sustains their own world view and favors their interests. . ."). Professor Penelope Pether has also written about how the process of judicial authorship impoverishes American law, through the institutional hierarchy created by Judges, "elbow" law clerks and staff attorneys. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Arizona State Law Journal 1 (Spring 2007). Specifically, Professor Pether points out how the court's bureaucratic and hierarchical structures create ingrained habitus that privileges certain types of cases (corporate and complex civil litigation) over others (criminal and pro-se appeals). *Id.* at 53-54.
[264] John T. Noonan, Jr., *Persons and Masks of the Law*, 111-151 (University of California Press 1976) [Hereinafter Noonan, *Persons and Masks of the Law*]; *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339 (1928).
[265] *See* G. Edward White, *Tort Law in America: An Intellectual History* 99, 125 (Oxford 2003).

continues to function as a cannon of tort law.[266] Upon reading Noonan's account of the decision, we see how Judge Cardozo employed his famous clipped prose style to excise all personal information, reducing the case actors to abstract characters that might appear in a law school hypothetical.[267] Left out of the published opinion are the facts that Mrs. Palsgraf was a "very poor" mother of two children who made $416 a year working as a janitress with substantial legal and medical debts.[268] The Court of Appeals' award of $330 in court costs against Mrs. Palsgraf left her a destitute debtor, owing money to her doctor, her lawyer and the Long Island Railroad Company (which, at the time, had at least $100 million dollars in assets).[269] The great logical power of Judge Cardozo's foreseeability/duty rule depends in part on his removal of all references to the personal and economic hardships suffered by the plaintiff as a result of the rule's application.

One question worth posing to students is how and why did Cardozo come to decide that these personal facts were not relevant for crafting the rule of law? Judge Cardozo's approach in this famous decision is emblematic of the linguistic approach that Professor Mertz identifies as the "filtering linguistic ideology" implicit in legal language.[270] The *Palsgraf* decision thus "focus[es] on form, authority, and legal-linguistic contexts rather than on content, morality and social contexts."[271] This detached and unemotional language of the law instills a sense of public faith in the neutrality of modern democratic legal processes and hides the social inequities and

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[266] *See* G. Edward White, *Tort Law in America: An Intellectual History* 138 (Oxford 2003).
[267] *See* Noonan, *Persons and Masks of the Law*, *supra* n. __, at 112-113. Jerome Frank also criticized Cardozo for using "a private time machine to Eighteenth Century England" in order to translate "himself into a past alien speech environment." Anon. Y. Mous (Jerome Frank), *The Speech of Judges: A Dissenting Opinion*, 29 Va. L. Rev 625, 631 (1943). Cardozo language allowed him to promote his prose as reasoned analysis when, in Judge Posner's view, it was really a "substitution of word for thought." Richard A. Posner, *Cardozo: A Study In Reputation* 119 (1990).
[268] *See id.* at 125-128.
[269] *See id.* at 128-129, 139, 144.
[270] Mertz, *The Language of Law School*, *supra* n. __ at 4.
[271] *Id.*

injustices that result from the operation of the law.[272] Judge Cardozo may have also had a more personal need to maintain objectivity and neutrality in his judicial opinions. Justice Cardozo's father, Albert Cardozo, served as a New York State Supreme Court Judge during New York's Tammany Hall era and faced trial for corruption before resigning from the bench in disgrace.[273] Did Cardozo create his famous detached prose style as a defensive measure, to distance himself from the "corrupt" ethnic lawyer represented by his father?[274] We might use the *Palsgraf* case and others like it to point out how dominant methods of producing legal meaning dehumanize judicial actors; obscure the unfair effects that court decisions have on low status groups; and serve institutional and self-preservation goals by building public faith in the legal system and elevating the status of the text's author. A deeper understanding of how dominant legal texts are produced and canonized show students another way in which our legal institutions use hidden mechanisms to allocate power in unfair ways.

B. Professional Identity

Professional Responsibility courses may offer another chance to raise student consciousness of the ways that the legal profession replicates its hierarchical structure. While students must learn the Model Rules of Professional Responsibility in order to pass the Multi-State Professional Responsibility Exam[275], there is no reason not to expose students to the eye-opening historical background behind many of the ABA's canons of professional responsibility,

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[272] *See, e.g.*, *supra* note __ and accompanying text (**citing Mertz, *Language of Law School*, *supra* n. __ at 4-6, 212-214 (explaining the process by which law internalize abstract and formalistic legal reasoning, which emphasizes procedure and precedent, at the expense of social context and moral issues)** and Bourdieu, *Force of the Law*, *supra* n. __ at 819-820 (**explaining how the law receives its force from "syntactic traits" that emphasize the passive and impersonal, establishing impartiality and objectivity)).**

[273] *See* Noonan, *Persons and Masks of the Law*, *supra* n. __, at 143-144. *See also*, Richard Polenberg, *The World of Benjamin Cardozo* 24-31 (Harvard 1997).

[274] *See generally*, Collins, *The Credential Society*, *supra* n. _, at 152-153 (Detailing upper-class attorneys' xenophobic and class-based fears of corrupt ethnic attorneys affiliated with the urban political machines that had risen to power around the turn of the century).

[275] *See* Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 Fordham Law Review 1 (March 2003).

particularly the rules regarding lawyer advertising, direct solicitation, and contingency fees. As explained in part above, the cadre of upper-class WASP lawyers who dominated the ABA and local bar associations adopted the first ethics canons in response to a perceived threat to the profession from the influx of ethnic and immigrant attorneys into American cities at the turn of the century.[276] While students must learn the rules, they should also be able to critique these rules and see that many of these rules may have been designed to subordinate lower caste attorneys rather than preventing any kind of palpable harm to the public.[277] Moreover, as students contemplate professional ideals such as Kronman's lawyer-statesman model, which idealizes the everyman lawyer who never seems to worry about money, but instead "is a devoted citizen. . . [who] cares about the public good and is prepared to sacrifice his own well-being for it,"[278] they should question whether these tropes create a profession that truly serves the public good or rather, whether they are just self-serving narratives that preserve the social power that attorneys have amassed in American society.[279]

C. Alternative Teaching Styles

Finally, law teachers might lead students to question why they are taught the law in a certain way. Elite schools are in a better position to teach the law from a more theoretical and critical perspective than less elite institutions.[280] Doctrinal teachers at low status schools with

[276] *See* Auerbach, *Unequal Justice*, *supra* n. __ at 40-53 (Explaining that many jurisdictions adopted ethics codes in response to perceived threats that immigrant attorneys practicing in urban areas were lowering the status of the legal profession as a whole).
[277] *See id*. *See also*, Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Valparaiso University Law Review 657, 672-673 (Winter 1994)(Explaining that the ABA's ethics codes "replicate[] the hierarchy and prestige strata of the legal profession by codifying the self-serving judgments of those who had (and still have) power in the ABA.).
[278] *Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession*, 13-14 (1993).
[279] *See, e.g.*, Heinz et al., *Urban Lawyers*, *supra*, n. _, at 221-222 (citing A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 363-364 (Belknap Press of Harvard University Press 1993)).
[280] *See, e.g.*, Mertz, *The Language of Law School*, *supra* n. __, at 209-210 (collecting sources supporting the theory that elite schools favor more critical and theoretical pedagogies than less elite schools); *see also*, Heinz et al., *Urban Lawyers*, *supra* n. _ at 57. (explaining a study of curricular offerings at Chicago area law schools indicating that the most elite schools offered the most interdisciplinary courses.).

bar pass challenges would like to teach alternative methods and competing theories for analyzing the law, but we are often constrained to teach legal substance and analysis in a conservative way so that students can reproduce their knowledge of the law in a form that will be rewarded by the bar examiners.[281] The specter of the bar examination also affects the curricular choices that a school can offer its students.[282] The curriculum at low status schools is often made up of a large number of core required classes with few chances to take interdisciplinary classes.[283] While low status schools must hew to the dominant methods of analyzing and learning about the law, because that is what is rewarded on the bar examination, students can still be exposed to competing legal theories and gain an understanding of why and how only certain ways of discussing the law are recognized as legitimate. After reading Elizabeth Mertz's ethnographic study, which illuminates how law professors, employing Socratic teaching methods to teach Contracts, consistently legitimize one core way of approaching the law, silencing other perspectives and voices in the classroom,[284] one is lead to think that alternative, more collaborative pedagogic approaches, that go beyond the Socratic dialogue, may be another

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[281] *See* Joan Howarth, *Teaching in the Shadow of the Bar*, 31 University of San Francisco Law Review 927, 928-929 (Summer 1997) (Explaining how bar exams "determine the curriculum that schools teach . . . [by creating a] canon of legal education, making certain courses central and exiling others to the periphery."); *Society of American Law Teachers Statement on the Bar Exam*, 52 Journal of Legal Education 446, 448-449 (September 2002) (Generally discussing how the bar exam affects student choices in structuring their education, leading students to take subjects tested on the bar examination at the expense of clinical courses and interdisciplinary courses.); *see also*, *supra* note __ and accompanying text (discussing how the bar examination leads law schools to deemphasize practical skills instruction that would be useful for lawyers entering sole or small firm practice). (**search for "[T]he [bar] examination influences law schools, in developing their curricula, to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills.")** By way of example, property law teachers must teach the antiquated property-rights subjects (the Rule against Perpetuities, Shelley's case, etc.) at the expense of subjects (redlining practices) that are more aligned to social justice issues.

[282] *See* Joan Howarth, *Teaching in the Shadow of the Bar*, 31 University of San Francisco Law Review 927, 928-929 (Summer 1997).

[283] *Id.*; *see also*, Heinz et al., *Urban Lawyers*, *supra* n. _ at 57. (Explaining a study of curricular offerings at Chicago area law schools indicating that the most elite schools offered the most interdisciplinary courses.).

[284] Mertz, *The Language of Law School*, *supra* n. __at 54-59. Professor Mertz's exhaustive review and analysis of recordings from eight first-year contracts classrooms showed, quite specifically, the ways that professors use subtle conversational cues to reward students who approached a case from the "correct" perspective, which emphasized abstract precedential and procedural authority, and punish students who spoke about cases in a way that emphasized the "irrelevant" social contexts or narrative concepts from a case. *Id.*

solution.[285] Finally, we should also recognize that clinical and skills teachers, in teaching more client-centered approaches to legal problems, are able to infuse more social context and moral issues into law lessons.[286] By leading students to question the processes by which certain legal meanings are privileged over others, they will see another unspoken way in which legal education's institutional structures replicate and reproduce existing power structures throughout the law and our society.[287]

Recognizing that what I've outlined needs to be fleshed out in greater detail, I have sought to identify a few examples in the law school curriculum that show how American legal institutions – courts, professional organizations, and schools – have hidden processes that tend to replicate existing attitudes about the legal profession and the law, which in turn, collectively, help reproduce the hierarchical structures within our profession and society. Ultimately, the goal is to provide students with sufficient knowledge and skills to succeed in the practice of law while also generating a critical understanding of how the rules, professional mores and legal language they have been asked to master operate to reproduce hierarchy in the legal profession and our society. For it is, we hope, the responsibility of all lawyers to not merely ply a trade, but to contribute to an enlightened evolution of the law through critical reflection on not merely what

[285] For instance, when my colleague, Jeffrey Van Detta, taught labor law using a nontraditional collaborative problem solving approach, the students developed a deep understanding of the law and produced analyses that had a higher level of sophistication and quality than that seen in the traditionally taught course. Jeffrey Van Detta, *Collaborative Problem-Solving Responsive to Diverse Learning Styles: Labor Law as an Active Learning Experience*, 24 N.C. Cent. L. J. 46, 46-49, 75-78 (Fall 2001).

[286] Skills and clinical training is in fact, one area that Professor Mertz identifies as having a possibility of achieving a counterbalance, by encouraging other kinds of legal discussions – beyond the casebook method. Mertz, *The Language of Law School*, *supra* n. __at 220-221. The liberating potential that clinical and skills teachers might bring to bear within legal education, is an idea that can be traced back to Jerome Frank and the Legal Realists movement. *Id*. at 26. Although clinical and skills education have been incorporated into modern law school curricula, the continuing resonance of Frank's ideas is perhaps testament to how little our legal educational model has changed. That clinical and skills teachers continue to occupy, in the academy, a lower class from doctrinal casebook method teachers is an important subject, but it is outside the scope of this essay.

[287] Elizabeth Mertz suggests, in the context of teaching students how to talk about the law, that teachers help students "reach a more self-conscious understanding of the limitations of legal language for apprehending social phenomena, training students to be wary of the hubris that inheres in law's aspiration of universal translation across so many diverse social realms." Mertz, *The Language of Law School*, *supra* n. __, at 208.

the things are that they do, but also why they do the things they do.[288] By getting students to see and discuss these hidden processes, we can develop a critical discourse which will, hopefully, chip away at the ingrained habitus.[289] Specifically, if students develop a sufficient awareness of the suffering that the current legal system continues to cause, despite advances during five centuries in America, the hope is that they will see the ways in which their participation in the system contributes to the subordination of persons of lesser status and will seek alternatives to the existing structures.[290]

Conclusion

Legal education contributes to the stratification within the legal profession and reinforces the representation of the legal profession as an upper-class profession. Historically, powerful members of the legal profession joined together with elite legal educational institutions to accomplish the expressly stated goal of excluding members of the lower classes from legal education and the practice of law. Although overt class-exclusion has disappeared, the legal profession's elite and exclusionary traditions remain ensconced within the structure of legal education, cloaked in terms of professional values and merit-based prestige. When students do gain admission to a legal educational institution, they learn that they must behave and dress in an upper-class way in order to cultivate a "professional" image. The emphasis on merit encourages students to internalize the law's hierarchical structure into their mental consciousness and

[288] One of a myriad of examples that might be cited of outdated hierarchal forms in the law that die hard, and only upon extensive reflection by those who have challenged the system to its foundations, comes in the Indian court system's decision, nearly 60 years after independence, to no longer address judges as "Your Lordship." *See* World Briefing | Europe: Ireland: 'My Lord' Gives Way To 'Judge', N.Y. Times, Apr. 21, 2006, available at http://query.nytimes.com/gst/fullpage.html?res=9C06EEDE153FF932A15757C0A9609C8B63&scp=1&sq=%22Your+lordship%22 (last visited January 19, 2008).

[289] *See* Bourdieu, *Outline*, *supra* n. __ at 169-170.

[290] This is similar to Peter Gabel's urge to generate a resistance as a "morally compelling, spiritual activity rather than merely an intellectual/political revolt of free individuals against a surrounding false consciousness. Peter Gabel, *The Spiritual Foundation of Attachment to Hierarchy,* in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy, A Polemic Against The System* 154, 165-167 (New York Univ. Press 1994).

peacefully accept their place in the legal profession, without question. In this way, individuals within the legal profession passively participate in their own subordination – and in the subordination of others. Law teachers have an obligation to study and demystify the processes by which educational institutions reproduce class hierarchy. This critique necessarily includes an evaluation of the law teacher's role in the subordination process. Law professors should also search for ways to engender critical consciousness within their teaching, perhaps focusing on the ways in which legal meanings are generated that favor dominant groups at the expense of weaker groups. If we do not identify and talk about the ways in which legal institutions, especially legal educational institutions, reproduce the law's existing social structures, we enable the existing stratification within the legal profession and our society to continue for subsequent generations.