

The Caste System and Best Practices in Legal Education

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Introduction

I would like to thank ALWD for asking me to speak. This is a really daunting audience for me. All of you, by virtue of training and position, take words seriously – how they are crafted, what they say, and how they say it. And just as, in the last thirty years, society in general has experienced an erosion of the average quality of written expression (in newspapers, correspondence, and student papers), it also has seen an erosion in the quality of the oral address (including in sermons, political speeches, and commencements). Many of us have come to expect religious leaders, presidents, deans, and university leaders to ramble off-the-cuff or to “deliver” words written by others. I tend to labor over every spoken and written word of mine, but I also have become used to the fact that most audiences will not notice if I cut corners. This audience will notice, and I am both grateful for that, and intimidated by that.

I want to dedicate these remarks, which I have entitled “The Caste System and Best Practices in Legal Education,” to Professor Gary Schwartz of the University of California Los Angeles Law School, who died suddenly earlier this week. Gary was truly one of the great teachers and scholars I have ever encountered. He took words seriously, he cared about people, and he taught me every time he wrote or spoke. Legal education is immeasurably richer because he lived.

My thesis today is that the evolution and adoption of “best practices” in legal education has been retarded by our unique caste system, which tends to categorize both people and teaching methods in ways that are harmful to the outcomes legal education should care most about. I want to talk first about the castes as I see them and then about best practices. I will then turn to some implications—in particular, some ways best practices might overcome caste, and some ways best practices might be pursued despite the reality of a

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stubbornly enduring caste system.

My experience does color my views of these issues. My first job teaching, from 1981-1982, was in a year-long legal writing class for twenty-five students. I had just graduated from the law school and the Dean told me the writing course was a small, part-time commitment I could easily meet while completing my doctoral dissertation in economics. I never worked harder in my life, and I never finished my dissertation. I returned to teaching five years later on the tenure track, and regularly ever since have taught both traditional doctrinal and rules-based litigation courses and skills courses in negotiation and drafting. I have worked extensively with two great writing teachers in revising the first-year writing programs at both Michigan (with Grace Tonner) and Vanderbilt (with Craig Smith); I have worked in an administrative capacity with two of the great law librarians and legal research teachers (Margaret Leary and Pauline Aranas); and I have worked periodically in the classroom and on cases with both clinical faculty and adjunct faculty. For the last three years, I have read every manuscript submitted to the *Journal of Legal Education*. I am pleased to report that because of the quality and quantity of legal writing scholarship we have been publishing, I have asked Jo Anne Durako to help us with the *Journal* as advisor and she has agreed to serve. So I have had some experience, admittedly limited, seeing legal education as it is practiced (and written about) within each of the castes of our discipline.

The Castes of Legal Education

There are seven castes in most American law schools, ranging from the elite Brahmins to the dalits, or untouchables. A caste, in traditional Hindu society, was and is “one of the hereditary social classes that restrict the *occupation* of their members and their *association* with the members of other castes.”² In India, caste persists despite little remaining formal legal validation; in American Legal Education, caste was calcified and embodied to only a minor degree in the American Bar Association accreditation standards for law schools, which specify different terms and conditions of employment for at least six different types of legal educators. The seven castes really emerged over time in the glacial way societies and law school curricula change. The castes include: tenured and tenure track faculty, deans, clinical faculty, law library directors, legal writing directors and faculty, and adjunct faculty. The untouchables, who are barely mentioned when we talk about what our institutions teach students, are, of course, the professional staff of law schools.

I want to make some provocative observations about how each of these seven castes is viewed by those from outside it. I will be presenting stereotypes I do not necessarily share, but that are important to acknowledge because they are real barriers to the adoption of best practices across caste and across the curriculum. There are, of course, people and institutions where the

2. *Webster's Ninth New Collegiate Dictionary* 212 (9th ed. Merriam-Webster, Inc. 1991) (emphasis supplied).

stereotypes have been exploded—there are wonderful teachers who have migrated across castes in their careers, and teachers who have in other ways defeated the almost hereditary restrictions on what teachers from one caste can do in the classroom and outside it. But I confess that in the small corner of legal education I have personally experienced, caste still seems awfully powerful and enduring. So here are the seven castes, as caricatured by those outside each.

Tenured and Tenure-Track Faculty: These are the Brahmins, whose teaching methods and values define American legal education. They are paid the best; they have job security; they control most key decisions involving curriculum; they rarely change what they teach or how they teach it; they largely teach through a modified Socratic lecture and a single final examination; they value published legal research, especially to the extent it will be respected by peers at Harvard, Yale, Stanford, and Chicago; they like teaching really good students (like the ones on the law review) but they abhor grading and, except in seminars, rarely evaluate and correct written work. Many of them are nice as individuals, but as a group it is a different matter; *they* become “The Faculty” (capital T capital F), as in the sentence “The Faculty will never agree to requiring THAT new course in the curriculum.”

Deans: Deans are administrators whose primary constituency is The Faculty, whose support is a necessary but not a sufficient condition to success in leading the law school. Deans are of the tenured faculty. They have not taught legal writing; they have not taught legal research; they have not been clinical professors. They do talk a lot to lawyers and judges, particularly their alumni, so they are more likely than The Faculty to be concerned about teaching skills (including writing) and values, and they are more likely than The Faculty to get worried when bar passage rates (including on essays) drop. Deans have tight budgets and occasional miserable experiences with getting a tenured faculty member to meet student needs; for those reasons among others, few deans really want to eliminate caste by making everyone Brahmins.

Clinical Faculty: In the last quarter century, clinical faculty drove the great changes in the curriculum in the last two years of law school, including the emphasis on skills training, learning by doing under supervision, individual mentoring and evaluation, and integration of practice and theory. They cost a fortune relative to how many students they teach. With curriculum reform has come social acceptance ranging from full integration at a small minority of schools to grudging toleration from The Faculty at most schools. Success has bred a struggle to define clinical scholarship and scholarship about clinics (a struggle I now very much see repeating itself in legal writing work). Some clinicians try to look more Brahmin-like through their scholarly emphasis every year. Some clinicians also manifest a palpable defensiveness against upstart lower castes; a fear that hard-won gains will be watered down if teaching methods are spread too thinly over, for example, legal writing faculty and others.

Legal Writing Faculty: Legal Writing Faculty are lower caste. They teach courses that relatively few tenured faculty want to teach, although many

tenured faculty once did so. Few are on a tenure track, and even tenure-track directors experience some caste discrimination at tenure-time, when “The Faculty” and “The Dean” focus, often for the first time, on the nature of scholarship about legal writing. The terms and conditions of employment reflect the status, with caps on terms of employment, low salaries, and other restrictions – including resistance at many schools even to the use of a Professor or Faculty title. All of these conditions vary widely by school. At the same time, the legal writing, lawyering, advocacy and research courses have evolved dramatically almost everywhere, particularly in the last ten years.

Law Librarians: This is an ancient caste better understood and accepted by The Faculty, in part because of an ancient tradition that the library director was a Brahmin, a member of the tenured faculty, and in part because most law librarians are adept at providing a service to The Faculty upon which they are daily dependent. At the same time, many faculty are only dimly aware of the reality of this caste that:

- there is a distinction between professional law librarians and library staff;
- law librarians teach, and are usually integral to skills education and an integrated legal writing program; and
- the caste of law librarians is in a very difficult transition because of technology, with painful adjustment to shifting priorities between access and services (on the one hand) and collections (on the other). Librarians are often best aware of technology and its implications for best practices in legal education.

Adjunct Faculty: Adjunct faculty are the equivalent of temporary foreign visitors from what The Faculty admire and respect as a rich and civilized country. They are worth talking to and treating respectfully, as long as they do not get the idea they are going to stay and settle down. But, because they come from practice where life has been changing much more quickly than in law schools, adjunct faculty are also more likely, in the substance they teach if not the way they teach it, to emphasize the changing needs of the profession. It is my adjunct faculty who are maddest when students cannot write or cannot manage time, or when students treat them as if they are the concierge at a four-star hotel.

Staff: Last, the untouchables, the staff. I deeply believe that a future professional learns from the entire professional environment that he or she sees every day. The staff, in their interactions with students and the community, model that environment. A medical student who sees staff treated like morons who have nothing to contribute becomes a surgeon who treats staff the same way. So it is also for law students. For reasons I have struggled with and often failed to address adequately, many law students see

staff treated like morons. I think it is partly because so many of The Faculty are frustrated that the law school cannot provide numbers and quality of staff like Covington & Burling or Cravath, where the professor once worked.

Those are the castes, as stereotypically viewed by those outside them. Every observation I have just made is wrong, at some school and often at most. But no observation rings false in most of the castes. Caste boundaries are felt by those in legal education, and acted upon, and they affect the adoption and dissemination of best practices.

Best Practices in Legal Education

What are the best practices in Legal Education?

I really do not think the substance of best practices is hard to identify. I can summarize the substance in five minutes, drawing from two sources: first, a symposium on *Seven Principles for Good Practice in Legal Education*, which Jerry Hess and Paula Lustbader put together for the Institute for Law School Teaching and which we published last year in the *Journal of Legal Education*, and second, the pioneering work on Applied Learning Theory captured in the National Academy of Sciences Book, *How People Learn*. The author, Professor John Bransford of Vanderbilt, applied this work to legal education at a conference last month in Calgary. Several of you were there (legal writing faculty are always present in disproportionate numbers at experienced teaching conferences).

What do we know from these sources? From the symposium:³

1. Best practices *encourage student-faculty contact*, inside and outside class, to facilitate feedback, encouragement, and inculcation of skills and values.
2. Best practices *encourage cooperation among students*, because effective learning, like effective professional work, is usually collaborative and social rather than competitive and isolated.
3. Best practices *encourage active learning*. Students must talk about what they are learning, write about it, and apply it to their own lives and work.
4. Best practices give *prompt* and frequent *feedback*.
5. Best practices teach students *effective time management* in performing tasks.
6. Best practices *communicate high expectations* to students coupled with

3. See generally Gerald F. Hess, *Seven Principles for Good Practice in Legal Education: History and Overview*, 49 J. Legal Educ. 367 (1999).

assurances that students can indeed meet those expectations. Professor Claude Steele's work on stereotype threat demonstrates startlingly, in many contexts, the destructive effect of communicating low expectations, particularly on women and students of color.

7. Best practices respect *diverse talents and diverse ways of learning*. Different people learn effectively in different ways, which teaching methods and technology need to take into account.

What do we know about the *substance* of Best Practices from research on *How People Learn* (from John Bransford's work, and its recent application to law teachers)?⁴ Three additional points:

1. Effective learning requires that students develop *deep* understanding of part of the substance of what they are studying. They really do need to learn in depth and in detail the interactions of different sections of the Uniform Commercial Code, or rules of grammar, or the rhetoric and logic of argument. Expertise requires, as a first step, an appreciation of just what "deep understanding" requires in some portion of the discipline.
2. Effective learning requires the law teacher to *know individual students* well enough that their individual misconceptions are revealed and corrected, or else other learning is layered on top of those misconceptions.
3. Effective learning requires *creating a community* within each class where students become self-conscious about their own education and monitor their own learning through interaction with teachers and peers.

Overcoming Caste

Those are ten general points about best practices in legal education. They provoke several observations.

First, you knew all that already. If you are a dedicated teacher who cares about your students actually learning what you are teaching, and I believe almost all of us are, it is not news that we need frequent student contact, that students learn from each other, and so on. Just what creative ways we might use to do all these ten things, under constraints of time and energy and budget, is worth discussion and comparison among dedicated teachers. But that is what this conference does every other year, and the *Journal of Legal Education* has done for fifty years.

4. National Research Council, *How People Learn: Brain, Mind, Experience, and School* (John D. Bransford et. al. eds. Natl. Acad. Press 1999).

Second, in my experience, it is the majority view *in every caste* that this challenge—the challenge of achieving learning—is the most important thing we do. I wrote a cry from the heart in the *Journal of Legal Education* eight years ago entitled “Taking Students Seriously.” It ended with this statement, which I thought extremely provocative at the time:

I have a colleague, a scholar with broad experience and an international reputation for his writing, who insists that the biggest impact he will make in this world is through the students he teaches. I agree. The startling truth is that, with the exception of a few dozen law professors, our ideas will improve the world more through our students than through our writing.⁵

When I published that statement, I was gratified by an outpouring of agreement I received from caring teachers, especially writing faculty and clinical faculty. But over the years I have been surprised to discover that most all in the castes agree—including deans and tenured faculty members. When I wrote that statement, I had ten particular exceptions in mind—people like Cass Sunstein and Catherine MacKinnon and Gary Schwartz, whose writing I believe has been so influential. Yet even for them, I discovered, what has mattered most over the career is the learning and subsequent influence and work of the *students* they taught. That is certainly how a scholar’s scholar, Gary Schwartz, felt.

So you see, I met my enemy in talking about Taking Learning Seriously, and discovered few would dispute the principle I espoused. Many more than I realized held it dear.

Given that we know what best practices in legal education need to resemble, and given that support for the best results of learning cuts across all castes, what is the problem? What are the lines we need to erase if best practices are to be universally implemented?

I believe the problems are those of caste and of resources. To be specific: Some of the best practices have been first adopted, and most closely identified, with particular castes. For example, if giving students weekly discrete assignments and team exercises with regular feedback is identified as a teaching attribute of a lower caste, like legal writing teachers, this approach can scare doctrinal teachers away, for fear they will be viewed by The Faculty as breaking caste. This may sound silly to you, but I really have felt this dynamic at work. I have seen skepticism toward quizzes, for example. Strong caste lines discourage dissemination of best practices where, as in legal education, it is lower castes that have been more responsive and innovative in applying learning theory inside and outside the classroom.

That is not the only obstacle to best practices, of course. At least as important is the fact that the best practices I describe are *hard*. They require

5. Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. Legal Educ. 247, 259 (1993).

new work—time spent on each class and each individual—more time than a lecture or a modified Socratic method requires in a large class. It is much easier to look the other way as that effort for most students, and certainly for the most challenged students, is delegated to the lower castes, and particularly to the people who teach writing.

I promised you an uplifting finish, in the form of suggestions of how best practices might erase the lines of caste, and how best practices might be pursued despite the reality of a stubbornly enduring caste system. Here are a few, which I would be grateful for you to supplement in your questions and discussions today.

First, it would help student learning if caste lines were blurred. Perhaps everybody could be a Brahmin, as some schools seem to be trying, and maybe, as at some new proprietary schools, the roles of each faculty member can be entirely scrambled. But it would be a more incremental step if we could just get the best faculty in each caste to teach periodically the classes traditionally assigned to the other castes. It should be encouraged and rewarded when a good tenure-track faculty member teaches a lawyering section or a legal writing faculty member teaches international law, even if it is not taught with the same expertise as a traditional caste member would bring to the course. That not only would help disseminate best practices, but would affect how students view the castes and the respect different types of faculty have for the challenges of others. Team-teaching across castes ought to be encouraged for the same reasons—what I call educational miscegenation. It should be encouraged by giving full teaching credit to both teachers. That is how, by the way, I believe best practices have so smoothly spread between the castes of law librarians and legal writing faculty.

I also believe that deans should address the factors that communicate caste to the community. The ones that matter most to writing faculty are, in my experience, salary and security of position. The market really is helping here, I believe. But deans can also address caste by costless things—titles, mailboxes, invitations to faculty workshops and meetings. At Vanderbilt, the first-year incoming sections meet with their faculty as a group at orientation. I want them to see, up front, the assembled faculty for their year, including legal writing faculty, who each describe what they are working to accomplish during the year. The students get the message from this that their writing teacher is like their contracts teacher in importance. The traditional faculty have to listen to what is being taught, and through what methods, by their writing faculty colleagues. It is such a little thing, but I have been amazed how often a senior professor learns not only the *names* of his writing colleagues, but that they are individuals with variations in method and innovative approaches.

My last suggestion about overcoming caste is the hardest, and the one where I need the most help from you. I mean the staff. I believe that very few law schools, and certainly not mine, effectively model for students the kind of workplace where staff are professionally treated and engaged as an effective team in the work of the institution—which is educating students. At the four law schools where I have worked as a faculty member or visitor, there

has at all times been a staff morale problem, and the students know it. How do you overcome caste and develop best practices here?

Well, maybe they have figured out that one in Australia. For that, among many reasons, I look forward to learning from Dean David Weisbrot.