

DEFENDING LIBERAL EDUCATION FROM THE LAW

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There are, of course, many positive reasons for including a study of law in a liberal arts education.¹ A liberal arts education is, by definition, expansive, since it is meant to prepare students to grasp the nature and range of human problems and to provide a variety of tools to manage them. It is easy enough to argue that the study of law—as a set of tools designed to handle social problems—is a valuable addition and thus that legal scholarship should have a central place. Furthermore, a liberal arts education is meant to provide students with the essential knowledge that is relevant to their particular era, and it certainly takes little argument to convince us that our era is particularly legalistic. Even more to the point, a liberal arts education is meant to equip students to meet the demands of intelligent citizenship. That the liberal arts create well-informed citizens has long been cited as the primary practical justification for this seemingly impractical endeavor. This ambition alone seems so compelling for the explicit inclusion of legal scholarship in a liberal arts education that it makes us wonder why there has ever been any resistance.

We can suggest a practical explanation although we do not defend it. Liberal arts colleges have always defined their vision of education in opposition to an idea of training. Training, as used in this opposition, involves “the acquisition of techniques for which norms or standards have been commonly agreed upon, as in the trades and professions.”² Education, however, is more than simply the acquisition of techniques. In education, norms and standards are explored, critically examined, discussed, and submitted to continuous challenge. Training is to teach us what we can do, whereas education opens up the discussion of what we should do.

In the area of law, a liberal arts education would be focused on law’s critique rather than training students in its use. In education as opposed to training, the law must be empirically explored, discussed, critiqued, and perhaps challenged instead of memorized, manipulated, and applied. But in traditional

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conceptions of law, the line between education and training may appear to be too difficult to maintain. Certainly law has been allowed to appear as a subject of a liberal arts education, but only as minor topics in sociology (of law), history (of law), or political science (of law). The fear of sliding over into training, which characterizes the professional definition of legal education, has kept the *explicit* study of law off of the liberal arts agenda.

Liberal arts colleges have, consequently, avoided training their students in the law as a set of terms and techniques to be memorized, manipulated, and applied. The colleges' vision of the good citizen has meant the citizen capable of interrogating the law, not the citizen who blindly accepts or the technician who uses the law.³ This is the reason colleges have avoided the explicit study of the law—because it will slide too easily into the production of good lawyers rather than the liberal arts' idea of a good citizen.

However, it is not at all clear that they have accomplished this goal. On the contrary, the exclusion of the law as an explicit area of study seems to have encouraged a complicity with the law even more effective because it is too often unquestioned and perhaps soon unquestionable. Could it be an accident that most of the student unrest during the 1960s and early 1970s over race relations, the Vietnam War, and the environment did not have its genesis at liberal arts colleges? Could it be that precisely because it has not been explicitly discussed, the liberal arts colleges are producing students who take the law as fact rather than as a social and moral accomplishment?⁴ Are we not producing students who feel perfectly at home in either the most professional or the most reprehensible law office, who have been trained in that most important of attributes for getting ahead in the legal profession—the unquestioning acceptance of the law as something to be manipulated and used rather than questioned? Has not the lack of education in legal scholarship been the best training possible for showing us what the law can do without ever discussing what the law should be?

In this essay, we develop this more negative tack. Rather than ask why it would be good for a liberal arts education, and by extension, research at liberal arts colleges, to include legal scholarship as an explicit field of study, we ask what harm is being done because we do not include legal scholarship. We do not in any sense intend this as a repudiation of what is good in the study of the law and what is instructive in legal scholarship, but we leave that ground for others to till.

Indeed, the main point of this chapter is to suggest that the case is even worse than we have indicated thus far. The lack of explicit engagement with legal scholarship and lack of informed critique of the law do more than prepare students to accept law as a necessary and self-determining social fact rather than as a social and normative accomplishment. It also allows the law

as a social fact to invade the educational relation itself. We are going to argue that the acceptance of the facticity of law has affected the way in which students and professors view their relations with each other and that this is eating away at the basis of liberal arts education. The relation between students and professors is increasingly seen as a legal relationship defined by an assumed legal contract rather than as a moral accomplishment. In such a juridified relation, the traditional mission of the liberal arts college becomes progressively more difficult. As students become consumers with implied contractual rights and professors become employees of an institution that markets socially valued qualifications, the question of moral and political education becomes irrelevant or even discouraged.

This increasingly legalized relation underlies some of the critiques from those on the left, such as Jerome Karabel and John Marciano,⁵ who decry the lack of moral criticism in education, and those on the right, such as William Bennett, Alan Bloom, and Lynn Cheney, who bemoan the lack of moral principles. Some of these critics see a solution in a return to “eternal verities,” instead of coping with the underlying change in the social structures. We see this even in the leftist critics who should certainly know better. Marciano, for example, urges the adoption of different texts and more critical lesson plans, but he never looks at the social relations that have led to the regressive changes in the first place.

Of course, it is true that the history of the liberal arts has been one of continuing, or at least successive, crises. David Breneman notes the irony of this: “Indeed, the private liberal arts college stands out as one of American society's greatest success stories. Ironically, however, the literature on the private (or independent) college portrays a nearly unbroken history of concern for its survival. Are we looking at one of the hardiest of institutions, or one of the most fragile?”⁶ Here though, we are not asking whether or not it will survive; instead we wish to look at its transformation into something that formally resembles its founding mission but that in practice subverts it.

We point out here at the beginning that we do not believe that this transformation can be halted by simply carving out an area, such as that of liberal arts education, that is free of legal relations. The intrusions of the law into education have not been the result merely of legal overreaching, nor are they wholly due to a contagion from the increasing legalization of almost every sphere of contemporary society. As we discuss more fully later in the chapter, much of the intrusion of legal relations into liberal arts education has been in response to racist, sexist, classist, or other pernicious customs and traditions that are embedded in the institutional structures, personal relations, and ideological goals of the liberal arts education. The recourse to legal techniques, contracts, duties, and liabilities has been the most successful

avenue of challenge by those who were disadvantaged by the liberal arts tradition as it existed throughout much of its history. Even if all discriminatory practices were erased, we still would not call for the reversal of this legalization. We are persuaded that the interdependent relations of modern society, of plural values and normativities, require a self-conscious system of mediation and regulation of those plural normative orders, that is, we require a legal system. It is unlikely that we will ever return to the types of regulation available in more homogeneous social worlds.

We are caught between the discriminatory but living traditions of the liberal arts education that we have known and the more just but lifeless and impersonal form that it is becoming. We argue that the solution to this problem cannot be a rearguard action or a fencing off of a liberal arts preserve. The solution can only be to involve the students in a project that transforms the legal form that the college is assuming from a legalistic social fact into a critical engagement and thus a moral accomplishment. Liberal education must involve an explicit embrace of legal scholarship, a discussion of the development and extent of this legal encroachment, the reasons it came about, its moral and educational effects, and the reasons it must be transformed through cooperative effort, understanding, and critique.

Before proceeding, we think it is useful to clarify two points. First, when we say that the law is a moral accomplishment, we do not mean that the law is morally right but rather that it comes out of discussions related to what is right. In other words, the law is a moral accomplishment when it is produced by discussions about what we should do, what it is good to do, what it is right to do, rather than discussions about what we can do, what is technically feasible. We use the term *moral accomplishment* to mean that law is constituted through the transactions of persons deploying diverse motives and meanings, instrumental, normative, affective, and habitual.⁷ Even a law that emerged from discussions that conclude that there ultimately is no universal morality would be a moral accomplishment, since the discussions out of which it originated were focused on what should be done and not on what can be done. Therefore, to say that the law is a moral accomplishment is not to say that the law conforms to any moral system. To identify the law with a particular moral system would be to present the law as a self-determining fact. The law is a moral accomplishment only when the discussion includes the confrontation of moral systems.

Second, we should clarify how we see the relation between teaching and research in the liberal arts. When we speak about law in the liberal arts curriculum, we mean to include both the production of legal scholarship and the teaching of it. We do not believe that it is only a historical accident that teaching and research are often linked by their common institutional base. As for

our particular focus—the role of law in the liberal arts—it is not important to distinguish between institutions that demand that undergraduate faculty be active scholars and institutions that do not make such stringent research demands. Similarly, it is not important to distinguish between liberal arts colleges and universities. At the heart of this inquiry is not the liberal arts college per se or the relationship between teaching and research specifically. Rather, we are talking about the goal that historically has been identified with the liberal arts college but that has also been embraced by many colleges of arts and science within larger universities. We certainly recognize a great deal of variation in these institutions, but we do not believe it is pertinent to our argument. When we talk about law in the liberal arts, we are making an argument about the status of legal scholarship outside of law schools and beyond the domain authority of the legal academy. Thus, the question is the degree to which a liberal education should include legal scholarship in teaching and as a focus of faculty research.

JURIDIFICATION AND THE DEMISE OF IN LOCO PARENTIS

The problem we are going to examine is often labeled juridification. By this we mean, first, the attempt to apply formal laws to situations that inherently depend on flexible, informal social interactions and, second, the tendency of these laws to be treated as reified social facts rather than moral accomplishments. Juridification is one aspect of what Weber diagnosed as the irreversible growth of bureaucratic rationality and that Habermas described as the colonization of the lifeworld by a system. Legal rules do not necessarily lead to juridification, but as we argue later in the chapter, law is inherently vulnerable to it.

In this section, we consider the rise of juridification in the post-in loco parentis college. As an example of this more general phenomenon, we look at the effects of juridification on the relation between faculty and suicidal students. We use this example because of the wide gap between the human and institutional response to this situation. The faculty member finds him or herself in a predicament in which concerned and informed care is called for, whereas the institutional directive is, in general, to refer the student to an anonymous professional. Here we see, in its starkest form, the emptying out of the moral dimension of the educational relationship and its replacement by a professionalized, legalized relation. Although we do not argue that faculty should become emotional caregivers—or therapists, heaven forbid—we suggest that education and critical engagement cannot take place within a hyperrationalized division of labor that limits the instructor's role to the formal presentation of technical expertise.

The greatest recent change in the legal environment of colleges has been the disappearance of the *in loco parentis* doctrine. In regard to colleges, *in loco parentis* meant that the institution had a responsibility to and authority over students similar to the responsibility and authority of a parent to a child. Before the 1960s, the courts viewed college students as children who required guidance and protection. Colleges were allowed to determine the limits of students' freedom in dress, in social behavior, and in association. The college's authority to act in place of the parent had never provided a blanket authorization for unconstitutional or immoral action. It was, however, given wide latitude. In a much-quoted decision, the Illinois Supreme Court said of Wheaton College's seemingly arbitrary rule: "Whether the rule be judicious or not, it violates neither good morals nor the law of the land and is therefore clearly within the power of the college authorities to make and enforce."⁸ The court assumed that, like the relation between children and their parents, the relation between a college and its students was one that the court should only reluctantly interfere with.

The history of higher education law since the 1960s has been, as one legal scholar has written, "the gradual application of typical rules of civil liability to institutions of higher education and the decline of insulating doctrines, such as *in loco parentis*, which traditionally protected institutions of higher learning from scrutiny in the legal system."⁹ The college has not yet entered the strict liability regime, but it is no longer in a sphere of protected autonomy.

Nevertheless, few mourn the passing of *in loco parentis*. In its traditional autonomy, colleges were permitted autocratic powers over students, and at least a few of them abused that power. Some of the first and most important challenges to the doctrine arose during and after the civil rights movement of the 1960s and involved the assertion of fundamental civil rights by college students. There was a series of cases in the 1960s and 1970s holding that colleges must provide basic constitutional rights to students. Most famously, the court in *Dixon v. Alabama* prevented a state college from expelling students for exercising their constitutional right to participate in a legal demonstration.¹⁰

In addition, there had been significant social changes within and outside the college that made *in loco parentis* increasingly inappropriate. Students were coming to campuses in greater numbers, and these numbers included more mature students. They were not all eighteen- to twenty-two-year-olds. Also, society's view of those in that age bracket had changed so that they were viewed as already adults. All but the youngest college students are legally entitled to vote, to sign contracts, to marry without parental approval, and to purchase firearms and, at the time, alcohol. In such a social environment, *in loco parentis* was no longer viable. However, despite the impossibility of returning to it, we should be clear about what has resulted from its withdrawal.

In loco parentis protected the relation between the college and the student from legal intrusion. The demise of *in loco parentis* created an intellectual and moral vacuum concerning college/student relations and obligations, because colleges never initiated any serious discussion involving faculty and students about alternative responses to this changing legal environment. Consequently, relations between administrators, faculty, and students began to assume legal forms defining market, rather than educational, relationships.

Recently, those defending colleges in legal and public forums have invoked the specter of *in loco parentis* in a way that tends to confuse the issue.¹¹ Attempts to hold colleges accountable for negligence through the extension of duty rules have been characterized as returning to a "new" or "hidden" form of *in loco parentis*. However, as Lake points out, such a characterization makes no sense:

First, courts continue to insist that *in loco parentis* is dead in higher education law. Second, courts imposing legal responsibility—duty—on IHE's [Institutes of Higher Education] do not do so explicitly on *in loco parentis* doctrine. In fact, the decisions are bereft of any such reference to *in loco parentis*. And, third, it would make no doctrinal sense at all to speak of a return to *in loco parentis* because the doctrine originally existed as a protective insulating doctrine in higher education law with regards to IHE's and it was not used to create legal responsibilities of IHE's.¹²

Under current legal interpretations, the closest analogy for the relation between the college and the student is that between a business and a client, consumer, or tenant. Increasingly, courts treat colleges like other businesses, even though previous legal eras had always recognized a special relation between colleges and students. This special relation now generally means the special application of general rules of tort duty to institutions of higher learning. In essence, colleges are seen as similar to businesses but in some ways distinct from landlords, retailers, or factories. Courts have attempted to recognize the special circumstances of the college situation. Thus, the current legal approach is "both a time of mainstreaming and of tailoring."¹³

This mix of mainstreaming and tailoring has been a confusing one, however. There has been a disparate combination of three approaches: (1) the application of businesslike duties; (2) the deflection of responsibility for student misconduct, particularly around alcohol use; and (3) an assertion of the special duties of a college. It is this last item that colleges have found particularly troubling.

Under *in loco parentis*, the college was able to enforce encompassing rules of conduct in regard to student behavior. Along with this, the college was

assumed to have a duty to protect the student. In fact, this duty to protect was often cited by the courts invoking *in loco parentis* as the reason for the college's power to promulgate rules. However, this duty was never clearly spelled out, and it was rarely used as the basis for a suit against the college. Lake notes that it amounted to *de facto* immunity from liability.

There was never a "university" tort immunity as such: courts wove analogous immunities given to other institutions and other doctrines together to make a *de facto* university immunity that was similar to, but not the same as, protections given to other major societal institutions. Where appropriate, the university was immunized as a parent (*in loco parentis*), a charity, or a government; or protected like a "social host" would be regarding alcohol use, or shielded by rules of proximate causation or by all-or-nothing affirmative defenses. The net result was minimal legal/judicial intrusion in college affairs regarding student rights and safety.¹⁴

Ironically, the duty that was invoked to justify the college's powers under *in loco parentis* appears to some to have created the new liabilities and become the basis for numerous lawsuits now that *in loco parentis* is gone. For example, colleges are required to minimize the risks of peer sexual and racial harassment. They have a duty to protect students from hazing if the college knows or should know of dangerous hazing activities. Colleges have a duty to exercise reasonable care in assigning student residents to housing units.¹⁵ More important than these successful suits, the courts now rarely recognize a no-duty relation that would allow for easy and early dismissal of costly law suits.

Colleges have argued that these new duties are more difficult than those that were recognized by *in loco parentis*, because the duties exist with few of the previous authoritative powers. "Institutionally, colleges perceive that they must control the uncontrollable and reasonably act to do what reasonable care cannot prevent."¹⁶ The effect of the new liability regime on the institution goes beyond the actual rulings, that is, the legal changes over the last few decades have done more than simply increase the college's formal liability. Importantly, it has meant an increase in judicial scrutiny of college affairs and parallel loss of its cherished autonomy. It is true that judicial consideration is still cautious, but even where courts have determined that there is no liability, the area has still been opened up to judicial review. This is especially relevant in a legal environment that is not stable but that is instead characterized by a trend toward increasing legal involvement in educational policy. With typical institutional caution, colleges are receiving a message of increased

responsibility and legal accountability from the legal system, even where there is not (or not yet) strict liability.

Colleges have responded to this new situation with a mix of attempts to reassert paternalistic control where duty is clear and to avoid all signs that they might be assuming a duty where it is not clear. It is an example of the latter that we focus on: colleges' attempts to avoid signs of an affirmative duty in the case of student suicides, where courts have not recognized a legal duty. We argue that the incursion of the legal viewpoint into these matters has led to a juridification of the relation between the student and the college, and in particular, the professor as the college's representative.

FACULTY'S DUTY TO SUICIDAL STUDENTS

To a large extent, colleges have abandoned all but a legal responsibility for students' moral and social life. One commentator describes this new post-*in loco parentis* relation:

Unable to play the role of the parent, no longer prescribing bedtimes or enforcing a moral code, the institution has effectively withdrawn from the field of morality and character formation. Even to suggest that colleges bear responsibility not only for the academic achievements but also for the character of their graduates has today a ring of anachronism and nostalgia.¹⁷

Professors are increasingly reluctant to promulgate moral values, even when the moral value is central to the mission of the liberal arts college, such as academic honesty. Despite indication of increased cheating among students, one study reported that most faculty members "said they would go to little or very little effort to document an incident" of academic dishonesty.¹⁸ Gary Pavela reports that one of the reasons faculty are reluctant to pursue academic dishonesty cases is the "fear of confrontation and litigation; and the bad experiences some faculty members have had with burdensome hearing procedures."¹⁹ In the absence of any discussion between faculty, administrators, and students about the benefits, drawbacks, and alternatives to litigation and legalistic procedures, professors tend to avoid any relation with students that might lead to legal consequences.

One particularly crucial example of this is the role of a faculty member in dealing with students with emotional difficulties, especially those that are suicidal. We have been unable to locate any research on the proper role for a college faculty member to assume in such a situation. This lack of research is itself significant. What exactly faculty should do is, of course, beyond the scope

of this chapter, but we note that there is no research to support the idea that the faculty should *not* be involved or that their involvement should be limited to referring the student to professional counseling. Nevertheless, as we describe more fully later in the chapter, referring the student to professional counseling is, in most cases, the extent of the “training” that college faculty get in dealing with students with emotional difficulties. After a brief discussion of our preliminary research findings, we argue that the faculty’s lack of involvement can be explained by the legal environment and its juridifying effect.

To confirm the results of our search of the relevant scholarship, we sent out a brief survey to faculty subscribing to three listserves, asking them to let us know whether they have received instruction from their college or university about how to deal with students displaying emotional difficulties, and if so, what advice, information, or instruction they received. We also did six one-on-one interviews with counseling staff and student advisers. Of course this cannot be considered in any way a systematic survey, and the results may not be representative, but the responses we received are certainly suggestive and provocative. Half of the 41 respondents said that they had never, to their knowledge, received information from their institution about how to deal with students’ emotions or personal issues. The response of a professor at a small liberal arts college is illustrative.

We take great pride in the attention we give to students—in every dimension of their lives, and it can reasonably be said that we, as professors, are expected to be attuned to more than just the academic well being of our students. That said, I cannot recall in 35 years of teaching a single time in which any formal efforts were made to educate faculty or elicit their help with severe emotional problems.

If we received any of this kind of information or directive . . . it was in such a vague form that I never noticed it. We got a lot more very explicit stuff about protection of human subjects in our research, including field research and classes that have a research component. . . . We have an active office of disabilities, and it has a host of requirements for people with impairments of vision, hearing, mobility etc. and even for learning disabilities. But again, nothing that I have heard addresses emotional issues.

The other half of our respondents said that they were advised to direct students whom they thought were in emotional distress to the counseling services and/or the dean of students offices. Some faculty recalled being given this

advice in a brochure for new faculty; others reported receiving such advice every once in a while along with notices of the variety of counseling and medical services available on campus. “We do receive so much instruction on so many issues [that are legally sensitive] that it is hard to keep track,” more than one reported. Some faculty described the individual letters they received asking them to make academic accommodations for a particular student who had come for counseling and was experiencing emotional or medical difficulties. Also, some faculty reported that their institutions sent out seasonal reminders to take care of students’ levels of stress. “Every semester around finals time we get a memo from the Dean of Students alerting us to this in case we have any students who are having difficulty.” And, “each fall we get a brochure and letter through campus mail from the wellness center [reminding us about the availability of] their services and how to handle a variety of issues.” The general tone of the colleges’ advice giving is summarized by this comment, “on rare occasions, such as 9/11, we are entreated by the administration to be sensitive to student problems, to accommodate them in terms of relaxing academic rules, and to refer them to our fairly extensive counseling/clergy staff.”

We specifically asked whether there had ever been mention of possible legal problems as a reason for their institution’s recommended response to students. Here we received provocative replies that seem to corroborate our general analysis. A dozen or more faculty reported that they received information and instruction on a range of student issues about which their college/university wanted faculty to be cautious. Most often this information concerned sexual harassment or physical disabilities. However, some of the faculty responses and all of the responses we heard from the counseling and dean of students staff focused on students’ rights to privacy. There seemed to be a heightened attention to this topic, and it was the first issue mentioned in a half dozen one-on-one interviews with counseling staff and student advisers.

In 20 odd years at Z, nine of these as department chair, I have received no advice or information relating to the “handling” of the kinds of situations about which you inquire. I do recall admonitions couched in the language of students’ “rights to privacy” [when I] attempted to raise specific concerns with class [counseling] deans.

We have been made aware of legal implications in dealing with psychologically disturbed students, but in my experience it has been with respect to protecting student privacy when seeking information about them. . . . We are encouraged to get troubled students to Counseling and Psychological Services for direct intervention. Given the availability of services, it is understood that faculty should

not offer lay counseling, not because of legal concerns, but because we are not qualified to deal with serious emotional problems. I suppose there is an implicit legal admonition that to do something as foolish as intervening in place of the pros might get us sued, but the emphasis is always on getting help for the student.

Our university did tell us that if a student wants to talk to us about being sexually harassed and asks if we can keep it confidential, we have to say no and are obliged (even against the student's wishes) to report it to higher ups. (Of course, I don't know how this could be enforced.)

Notably, the one respondent out of forty-one who reported receiving "a detailed faculty referral guide" that described in full the "various common symptoms of mental/emotional health problems" was from outside the United States. Nonetheless, this and another non-U.S. respondent noted that they expected their university's policies to change and had observed signs of such change already. "There isn't the same degree of readiness to resort to litigation in Canada [as in the United States], although I am concerned we are catching up fast." A British respondent went on to describe the specific changes now taking place at his university.

I attended a briefing for supervisors of research students a couple of days ago where [verbal] reference was made to the growing "problem" of students taking legal action against universities for perceived failures of supervision, teaching, etc. and supervisors were advised to keep some kind of documentary record of all interactions with students. A photocopy of a newspaper article reporting a recent case was distributed to drive home the point. Clearly, issues of students' emotional difficulties may well play a part in such cases but that was not the primary focus of the advice. Nevertheless, it seems that juridification is making itself felt at this University, albeit still in a fairly ad hoc way, although it doesn't take much imagination, as the number of cases of litigation by aggrieved students increases, to see this as the beginning of a trend that is likely to become more formalized.

The trend, as faculty describe it, is for students and teachers to become estranged and functionally segregated so that education becomes more like training—imparting a set of specific skills—rather than cultivating capacities of mind and sensibility.

My own perception is that while the College has actually done more in recent years to attend to student emotional needs in a formal way, at the same time much of that effort has been taken away from teaching faculty and placed on other professional people in the "student life" division of the college. In that sense, our charge as faculty is more purely academic now than it was years ago. This coincides, of course, with greater demands placed on us for research/publishing.

This increasingly legalized relation constrains what the faculty can do. One faculty member described his colleagues' inability to exclude a disruptive student "who was constantly talking to his computer. . . . We were told that we could do nothing because of legal concerns. This student continued to be disruptive and very difficult to handle." In another situation, a student "with a criminal record," who was believed to be dangerous, was stalking another student. The concerned faculty were told that the "stalker" could not, by law, be prohibited from registering for classes. Where university administrations are willing to take action, they require that the faculty create a "paper trail" of warnings and notices in writing to disruptive students before taking any action. "More than anything," one professor wrote about his institution's instructions, "it implied to me that we should be thinking like attorneys; i.e. making things public, creating a type of paper trail so that it is not merely a matter of one's word against another."

Ironically, law professors seem to have less difficulty with the legal constraints than do others. One respondent described a series of interventions she made, along with help from the counseling services and the dean of students at the law school at which she teaches. She was motivated by fear that a student was suicidal and was pleased by the openness of the counseling service to her interventions with the student.

I was actually quite surprised to be let in on the details of the therapy. . . . I found it enormously helpful because I could work with the therapist and the student to figure out how the student could make up the work to graduate on time. In my 20 years of university teaching I had never seen such a case where faculty, administrators, and the mental health professionals in the counseling service worked so well together. . . . It's funny how a faculty of lawyers seems to have no fear of litigation and it never comes up explicitly. By the way, this is true of many aspects of policy where I have found far more explicitly juridicalized procedures outside of law schools than in them.

Juridicalization became so bad at one school that the faculty formally rebelled. The dean had convinced most of the faculty that the school was on the “verge of a nasty lawsuit if we didn’t handle students’ emotional difficulties in a very formal manner.” Several members of the faculty as well as the student body “challenged this liability regime,” which led to a change in the administration and deanship.

A new Dean of Students took a far more practical attitude to the whole thing. Unless we found a case where a small liberal arts college was sued for mishandling an emotionally troubled student, we would give emotionally troubled students the same care and attention we give to all our students. In other words, we would honestly respond to their situation. We wouldn’t worry about lawsuits.

These latter examples stand in marked contrast to the tenor of the majority of comments we received in response to our queries. In most cases, a suicidal student who reaches out to a faculty member that he or she knows and respects is referred to professional strangers.

The traditional role of *in loco parentis* has been replaced by a new legal relation. There were and are strong reasons for this replacement. The traditional relation was often discriminatory and infantilizing. However, the legal relation has lost its moral dimension, which depends on engaged discussions. Because there was no place in the liberal arts for that discussion to take place, the relation has become juridified. Relations between faculty and students are now determined by a system of laws that are viewed as background social facts rather than moral accomplishments.

THE LACK OF INSTITUTIONAL RESPONSE TO THE ROLE OF FACULTY IN DEALING WITH SUICIDAL STUDENTS

Many faculty, as discussed earlier, have their own reasons for avoiding any relation with a student that might lead to litigation or legalistic procedures. In addition, a look at the legal environment indicates the reason that most colleges avoid any training of the faculty in suicide prevention or even any mention of the faculty’s role beyond that of referring the student to professional counseling.

Where the courts have recognized an affirmative duty, colleges have found themselves in a difficult predicament.²⁰ They feel a need to assert authoritative control in areas in which they feel both uncomfortable and ineffective. Consequently, colleges have a strong incentive to avoid any recognition of an affirmative duty. This is especially true in cases of student suicide, an area in

which a number of (mainly unsuccessful) suits have already been brought against colleges and in which the stakes are high in both money and public relations.

Currently courts have rejected the idea that there is a special relationship and, consequently, duty of care between the college and a suicidal student.²¹ Colleges have therefore been immune under the general doctrine that third parties are not responsible for a person’s decision to commit suicide. Nevertheless, colleges have reasons to be cautious. Some courts have recognized a college’s assumption of an affirmative duty where there would have been no duty if the college had done nothing. These cases have involved injuries sustained while drinking alcohol, and it is worthwhile to look in detail at a representative case to see the lessons a college might take from such a ruling.

In *Coghlan v. Beta Theta Pi Fraternity*, the court held that despite the lack of a special relation and the demise of *in loco parentis*, the college may be found liable if, through its actions, it has assumed an affirmative duty.²²

Coghlan, an eighteen-year-old pledge of a university sorority, was participating in rush week and attended two sorority-sponsored parties involving alcohol—one titled Jack Daniels’ Birthday Party and the other Fifty Ways to Lose Your Liver. The sorority had a protective system in place that involved a “guardian angel,” a sorority sister who was supposed to look out for the pledge. However, the guardian angel deserted Coghlan, and she proceeded to the parties without her angel. In addition, university employees were assigned to monitor the party. Despite this, the freshman was served liquor. She became “intoxicated and distraught” and was later taken back to the sorority house by a sister. Later that night, Coghlan fell from the third floor fire escape and suffered serious permanent injuries.

Citing the reasoning in *Bradshaw v. Rawlings*, the trial court dismissed Coghlan’s claim against the university because the university owed no duty of care to the plaintiff.²³ The Idaho Supreme Court, while agreeing that “the modern American college is not an insurer of the safety of its students,” nevertheless reversed the decision. The university could still be held liable, because “it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.” In other words, the basis for the court’s decision was not *in loco parentis* or any other special relation between the college and the student, but the creation of an affirmative duty as a result of the steps—that is, the presence of university supervisors at the party—taken to protect the student.²⁴

One can easily imagine how this doctrine might be applied to dealing with suicidal students. So long as the college does nothing, the court would not recognize any special relation that might make the college liable. However, training or encouraging faculty to attempt to care for suicidal students might create

an affirmative duty and involve the university in the task of controlling the uncontrollable.

TOWARD A GENERAL THEORY OF JURIDIFICATION

The example of the relation between faculty and suicidal students reveals that juridification has at least two dimensions. On the one hand, it empties out the moral and communicative substance of personal relations, and on the other hand, it motivates the institutional response or lack of response. In the particular case of the emotionally disturbed and suicidal student, the solution seems to us to be clear. Faculty should be trained to recognize and respond to suicidal students. Of course, this training should include a recognition of the important role of professional counseling, but that should not be to the exclusion of the faculty's own role. In the absence of any research to the contrary, there is every reason to believe that a trained faculty member who has an ongoing personal relation with the student can be at least as effective in dealing with emotional problems as a professional counselor.

Juridification, however, is a general problem, and it requires more than a piecemeal solution. Indeed, the very invisibility of the problem of how faculty should deal with suicidal students—the lack of research on the proper role of faculty, the lack of training and guidelines at the institutional level, the tendency of administrators and counselors to see it as an example of professionalization rather than juridification—argues for a general theory that helps to reveal and interpret particular cases. In this section, we turn to the theories of Jürgen Habermas to help us frame a general approach to the problem of juridification in the liberal arts.

Much of Habermas's analysis of juridification is derived from Weber and the early Frankfurt school and is related to such concepts as loss of meaning, the growth of bureaucracy, alienation, and reification. To understand what is new in Habermas's theory, we need first to understand what he means by *lifeworld* and *system* because juridification is an aspect of the pathological relation between the lifeworld and system under advanced capitalism.

The division between lifeworld and system demarcates different forms through which society is achieved.²⁵ Put briefly, the system is that sphere in which regular and predictable social action is accomplished by interconnecting the consequences of actions of rational, self-interested individuals.²⁶ In contrast, the lifeworld is the sphere in which society is primarily accomplished through mutual understanding based on communication.²⁷ System and lifeworld are always together in practice, but a full understanding of modernity requires that they be analytically separated.²⁸

The lifeworld refers to those interpretive patterns that are culturally, often interpersonally, transmitted and linguistically organized. These include the formation of group identities, collective decisions about desired goals, the acceptance of personal values, the transmission of meanings, and the development of individual personalities. All of these share the characteristic of being symbolically structured and dependent on linguistically mediated social reproduction. Such things as meaning, Habermas tells us, cannot be coerced or bought; they can only emerge out of interactive communication.²⁹

Educational institutions are one of the primary examples of the lifeworld, especially when they include the types of goals—such as moral development and good citizenship—that have traditionally been identified with the liberal arts.³⁰ It is not simply that such education requires communication but that they require the type of communication that is oriented toward consensus—even if it is never completely achieved—and that excludes, as much as possible, the effects of power and money. Above all, liberal arts education aims to produce an individual who is open to rational persuasion, and that, for Habermas, is the essential characteristic of the lifeworld.

We should be clear about the difference between an orientation to consensus and actual consensus. According to Habermas, the lifeworld no longer simply passes on a consensus in the form of unquestioned traditions. At least since the Enlightenment, our traditions have included questioning and challenging traditions as a central tenet. One might say that our tradition is to question traditions. In addition, we now live in a society of plural heritages, and even if we should wish to return to our traditions, it is not clear which traditions they would be. This is what makes communicative action in the lifeworld so necessary and so difficult. We can no longer just accept what has always been right and must instead engage in an ongoing discussion about what is right. According to Habermas, even when any consensus about what is right is impossible, the discussion about it will require that we orient ourselves toward reaching consensus—in other words, that we are open to rational persuasion in regard to others' positions, even when we ultimately are not persuaded. It is the orientation that makes it communicative action, not the actual consensus. This, we would argue, is the traditional goal of the liberal arts education: not to produce a consensus among students but to encourage students to engage in discussions that are oriented to consensus and open to rational persuasion.

In opposition to the lifeworld, the system represents those parts of society in which social transactions and patterned action do not directly depend on communication. Instead, regularity and predictability are created by connecting the actions of anonymous individuals through the use of abstract media.³¹ The primary example of a system is a free market economy. If we try to discover, for example, who sets the price of a particular commodity in an ideal free market,

we soon discover that no one really does. The price of the commodity is set by functionally relating the consequences of the actions of producers and suppliers with the actions of consumers, that is, by the coordination of supply and demand. Prices go up and down, companies prosper or fail, people are hired or fired, consumers are disappointed or satisfied all because of market actions that are impossible to trace to the intent of any particular person or even group.

The lifeworld coordinates interactions primarily through mutual understanding and depends on the conscious action orientation of individuals. Systems coordinate interaction by the functional interrelation of consequences of actions and are able to (but do not necessarily) bypass the conscious intentions of individuals.³² As the complexity of a system increases, its rationality no longer coincides with the rationality of any individual. People are able to pursue even antisocial goals that nevertheless result in the social order of the system.³³ Indeed, people's agreement on the goals of the system through rational ethical argument becomes unnecessary for social order. Actors no longer need to agree with or even understand the goals of the system in order for their actions to assume a pattern in pursuit of those goals. This is what Habermas means by the uncoupling of the system from the lifeworld.³⁴ The functionalist interrelations achieved through media such as money mean that the coordination of actions can be increasingly uncoupled from the lifeworld of communication and is able to work, in effect, behind people's backs.

Importantly, Habermas believes that at least some systems are necessary in a modern society, but systems become destructive when they take over functions that can be performed only by the lifeworld. If these essential parts of the lifeworld erode, social pathologies develop and manifest themselves as individual experiences of crises. Habermas calls this *colonization*, and his analysis suggests that education is especially vulnerable under modern conditions because education depends on practices of communication that are oriented to a consensus that is increasingly difficult to actually achieve.³⁵

A lifeworld can be reproduced only through communication that aims at consensus. However, in the modern world, consensus no longer rests on shared cultural (for example, religious) values. Instead, consensus depends on a much more fragile, complex, and unstable process of rational discussion. Consensual agreement must be reached through discussions that often bring into question the very grounds for deciding any dispute. Consequently, agreements based on communication in a modern society are much more difficult to reach and much less stable if reached.

Because of the difficulty of reaching consensus on contestable rational grounds, communication in the lifeworld cannot possibly fulfill all the requirements of a modern society.³⁶ For example, when the traditional value of a commodity is no longer accepted, it is extremely difficult to set a new value

for the commodity through a process of rational discussion. In our pluralistic society, it has become difficult to even imagine any way other than a system to set the prices of commodities, to decide what will or will not be produced, what companies will or will not survive, who will or will not work. Modern societies seem to need an economic system to set prices, since systems are able to coordinate actions in increasingly complex ways without the need for either binding traditions or rational consensus.

Despite the necessity of systems, Habermas argues that the current relationship between the lifeworld and the system is dangerously unbalanced. Systems have penetrated into areas, such as the socialization of children, that require a communicative coordination of action. This is colonization. For example, children are, to an increasing extent, socialized by watching television. However, the values, models, and images that appear on television are not a product of consensual discussion; instead they are decided by a market system using the media of money. Habermas argues that although such a system may be very good at setting the price of commodities sold on television, it cannot be expected to properly socialize children or to properly educate citizens. When systems assume such vital lifeworld tasks as education, unavoidable crises occur. To allow a system to invade these areas is to risk personal crises—such as schizophrenia, anomie, or suicide—that are signs of social pathology.³⁷

At a practical level, this argument should feel very familiar to those involved in liberal arts education. Although not using the terms *lifeworld*, *system*, or *colonization*, liberal arts has always defined itself in opposition to concerns with power and money. Indeed, this has been the perennial complaint about liberal arts, that its students are sent into the world knowing so little about ways to make a living or current political trends.³⁸ Despite these practical drawbacks, Habermas's theory would encourage us in this effort to keep liberal arts a place of rational discussion where at least the goal, if rarely the result, is consensus and where concerns about money and power are, as much as possible, made topics, rather than determinants, of discussion.³⁹

For Habermas, the law is a special case in his theoretical model, because the tension between system and lifeworld is inherent to it.⁴⁰ He therefore reserves the word *juridification* for the colonization of the law by a system.⁴¹ Our argument is that the law is also a special case for liberal arts education and that protecting education from juridification is very different from protecting it from systems of power and money.

As traditional consensus falls apart under Enlightenment questioning and increased pluralism, the role of law in maintaining social order becomes increasingly important. Law has a role in both the lifeworld and the system. In the lifeworld, law functions as a ground for developing and legitimating

whatever consensus we can reach. Where traditional consensus is now impossible to achieve, law replaces it with binding (democratically justified) decisions. For the system, law provides the “anchor” and ground for the media, such as money and power, that constitute systems.⁴² Money is able to function as the mobile, abstract, and anonymous representation of the economic system because it is “legal tender.”

Besides operating in both the lifeworld and the system, the law also stands between them—as the title of Habermas’s book suggests, “between facts and norms.” On the one hand, the law must be seen as an objective fact that stands apart from any communicative interpretation and allows actors to confidently predict its constraint on their future actions. On the other hand, the law must be seen as having moral validity and therefore a part of the lifeworld of meanings, norms, values, and identities. The law in modern society necessarily has this double aspect (the facticity of its coercive force and the capacity to develop and articulate norms) and its resulting tension.

As a social fact, Habermas argues, the law works like a system. Individuals are able to pursue egoistic and even antisocial goals within the rules of the legal system and still create social order, despite there being no intent to reach consensus.⁴³ This, of course, describes the adversarial process in legal proceedings. Lawyers on opposing sides are not attempting to convince each other but to win their case. Individual lawyers engaged in a particular case have little professional concern for the normative values of the legal system, such as justice or fairness, but are instead concerned with the manipulation of the law. Lawyers assume, and for the most part correctly, that even immoral, antisocial actions within an adversarial system will result in legal order so long as one stays within the system’s rules.

Conversely, the law also must work like a norm. No society can maintain a legal order simply through a regime of enforcement.⁴⁴ People must be convinced of the moral validity of the system as a whole, even when they do not accept the validity of each and every law.⁴⁵ Even lawyers who are working their hardest to obtain what might be seen as an unjust outcome in the interest of their current client must believe in the ultimate justice of the system as a whole. Without that, they lose the incentive to compete according to the legal rules, and the system can no longer function. Lawyers can be immoral, they can work for injustice, and yet the system functions so long as they still follow the letter of the law. However, if they lose the moral incentive to follow the legal rules, the system falls apart.

This moral validity cannot be conferred by the system itself. Systems function or not, are efficient or inefficient. They are not, at least from the perspective of the system, moral or immoral. Judgments of morality require a lifeworld; they require communication; they require an orientation toward consensus.

Hence the law is both a fact and a norm, and the tension between the two must be maintained and managed.⁴⁶ However, just as modern capitalism tends to colonization, modern legal systems tend to juridification. In other words, they become more like systems, more like social facts, and less like a normative part of the lifeworld.

CONCLUSION:

LEGAL SCHOLARSHIP AS A DEFENSE AGAINST JURIDIFICATION

Habermas’s analysis has much to say about the relation between liberal arts and the law. The liberal arts are centrally concerned with the reproduction of the lifeworld and yet also concerned with encouraging those cultural forces, such as pluralism and challenges to authority, that make a traditional consensus more difficult. Given this situation, we really are no longer in a position to simply assume traditional roles and relations. Faculty cannot pretend to be parents, nor are students any longer children. But neither can we allow roles and relations to be determined by those economic and administrative systems that cannot create or even transmit the meanings, norms, values, and identities that are the central mission of the liberal arts.

In education, to an even greater extent than in the rest of society, the law must take the place of traditions in order to achieve whatever minimal social order is necessary to the functioning of the institution. Despite the importance of keeping the liberal arts free of systems of money and power, we cannot keep it free of the law, because the law is the only viable substitute that we have for our now suspect traditions. The only alternatives to the law would be to turn the college over to the mechanizations of political or economic systems or to cynically try to retreat to some traditions that no one any longer really believes in. Either choice would betray the mission of the liberal arts.

However, the law in the liberal arts is vulnerable to juridification. The same law that has functioned as a moral force to rid the college of discriminatory traditions can easily lose its moral dimension and become a reified system. In fact, this is exactly what we have argued is happening in the relation between faculty and suicidal students. The traditional role of *in loco parentis* has been replaced by a new legal relation. This replacement originally came about through a moral force that took a legal form in its insistence on the civil rights of all citizens. However, the moral force of law depends on lifeworld discussions. Without that, the law loses its moral dimension and becomes a juridified system.

Because there was no place in the liberal arts for that discussion to take place, juridification is precisely what happened. The relations between faculty and students are now determined by a system of laws that are viewed as background social facts rather than moral accomplishments. The relations

between faculty and students, and among groups of faculty and groups of students, are viewed through legalistic, unreasoned conceptions of the law. Rather than recognize the law as a body of rules and processes constantly in the making, we view it as a concrete set of unambiguous channels that can (and therefore should) effectively constrain action. As a result, emotionally troubled students who reach out to a professor as someone they know and respect are finding themselves referred to professional strangers.

It is significant that it was our respondent from the law faculty who reported that among his colleagues there was a greater willingness to engage students and a greater freedom of action without fear about what the law demanded or restrained. The absence of this familiarity with the law among most faculty, as well as students and administrators, leads to a legalistic invocation of rules for purposes and situations that undermine rather than promote the goals of a liberal education.

The mission of the liberal arts college requires that it be defended from juridification. The transformation of the relation between students and professors into a juridified legal relationship means the end of the singular mission of the liberal arts college. As students become consumers with implied contractual rights and professors become employees of an institution that markets socially valued qualifications, the question of moral and political education becomes personally unappealing and institutionally discouraged.

Despite its dangers, the law is necessary to the liberal arts college in modern conditions. Only law is able to replace discriminatory and suspect traditions. Only law holds any promise of staving off systems of money and power. The trick, then, is not to exclude law but to prevent its juridification—to keep the law as a moral accomplishment without it becoming an assumed social fact.

This, then, is the role of legal scholarship in liberal arts education. To prevent juridification of the law, it must be studied, interrogated, and most importantly, discussed. More than a mere collection of facts to be manipulated, the law should be the embodiment of normative commitments and visions of the good that are always open to challenge and change. Ironically, to protect the liberal arts from the law requires that law become a central concern of a liberal arts education.

NOTES

1. This chapter was prepared originally for presentation at the Conference on Legal Scholarship and the Liberal Arts at Amherst College in April 2002.

2. Richard Stull, "Liberal Arts, Our Guardian: The Pursuit of the Good Life," *Journal of Higher Education* 33 (1962): 39.

3. Here we are suggesting the traditional Aristotelian distinction between the good citizen and the good man: to whom is one loyal, to one's city or to justice?

4. We are using *fact* here in the same sense as Habermas does, as a reified, objective positivity. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1998).

5. Jerome Karabel, "Community Colleges and Social Stratification: Submerged Class Conflict in American Higher Education," in *Power and Ideology in Education*, ed. J. Karabel and A. Halsey (New York: Oxford University Press, 1977); John Marciano, *Civic Illiteracy and Education: Battle for the Hearts and Minds of American Youth* (New York: Peter Lang, 1997).

6. David Breneman, *Liberal Arts Colleges: Thriving, Surviving, or Endangered?* (Washington, D.C.: Brookings Institution, 1994), 1.

7. Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978).

8. *People v. Wheaton College*, 40 Ill. 186 (1866).

9. Peter Lake, "The Rise of Duty and the Fall of *in Loco Parentis* and Other Protective Tort Doctrines in Higher Education Law," *Missouri Law Review* 64 (1999): 1.

10. *Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961).

11. E.g., G. Shur, "A Response to Professors Bickel and Lake," *Synthesis: Law and Policy in Higher Education* (1996): 543-45; or James Szablewicz and Annette Gibbs, "Colleges' Increasing Exposure to Liability: The New *in Loco Parentis*," *Journal of Law and Education* 16 (1987): 453-65.

12. Peter Lake, "The Special Relationship(s) between a College and a Student: Law and Policy Ramifications for the Post *in Loco Parentis* College," *Idaho Law Review* 37 (2001): 3.

13. Lake, "Rise of Duty," 4.

14. *Ibid.*, 5.

15. Sexual harassment: *Lipsett v. College of P. R.*, 864 F.2d 881 (1st Cir. 1988); racial harassment: *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999); assigning student residences: *Nero v. Kansas State U.*, 861 P.2d 768 (Kan. 1993).

16. Lake, "Special Relationship(s)," 3.

17. David A. Hoekema, *Campus Rules and Moral Community: In Place of in Loco Parentis* (Lanham, Md.: Rowman and Littlefield, 1994), 19.

18. D. L. McCabe reported that academic dishonesty is prevalent and increasing. In a survey of selective schools, he found that 42 percent of students at schools with honor codes and 58 percent of students at schools without honor codes admitted "cheating on written work." In 1990, the numbers were 32 percent and 56 percent, respectively. D. L. McCabe, "New Research on Academic Integrity," *Synfax Weekly Report* (1996); D. L. McCabe, "Faculty Responses to Academic Dishonesty: The Influence of Student Honor Codes," *Research in Higher Education* 34 (1993): 343.

19. Gary Pavela, "Applying the Power of Association on Campus: A Model Code of Academic Integrity," *Journal of College and University Law* 24 (1997).

20. An affirmative duty indicates a specific duty legally required of an individual. This is in contrast to the vast majority of law, which specifies what individuals cannot do. In general, the courts have only recognized affirmative duties when there is a special relationship, such as teacher/child or caretaker/person cared for, or where an authority, such as a police officer, has indicated that he or she is in charge.

21. *Jain v. State of Iowa*, 617 N.W. 2d 293 (Iowa Sup. 2000).

22. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999).

23. *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979).

24. In one sense, the court's decision can be interpreted as an example of an elementary idea of tort law: that one ought to pay for losses others suffer when relying on another's action. In another sense, of course, this can be seen as an example of a Hohfeldian

error, the derivation of a right from a privilege, here the right to be protected from the consequences of one's own actions as a result of the privilege of being a college student. Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997), 84, 85, 276.

25. Jürgen Habermas, "A Reply," in *Communicative Action: Essays on Jürgen Habermas's "The Theory of Communicative Action,"* ed. A. Honneth and H. Joas, trans. Jeremy Gaines and Doris L. Jones (Cambridge: MIT Press, 1991), 215-64.

26. Habermas distinguishes between instrumental rationality and communicative rationality. The former is very similar to Weber's conception of formal rationality and denotes the selection of efficient means for a predefined end. Instrumental rationality is what we mean here by rationality in the system.

27. Jürgen Habermas, *Lifeworld and System*, vol. 2 of *The Theory of Communicative Action*, trans. Thomas McCarthy (Boston: Beacon Press, 1987), 186-87, 124.

28. Habermas, "A Reply," 255-56.

29. *Ibid.*, 259.

30. Robert E. Young, *A Critical Theory of Education: Habermas and Our Children's Future* (New York: Teachers' College Press, 1990).

31. Habermas, *Lifeworld and System*, 154.

32. *Ibid.*, 117.

33. This is the society prescribed by Adam Smith in *The Wealth of Nations*. Smith assumed, however, the existence and constraints of an implicit moral order, which he had earlier described in *The Theory of the Moral Sentiments*.

34. Habermas, *Lifeworld and System*, 153-97.

35. *Ibid.*, 371.

36. *Ibid.*, 180.

37. *Ibid.*, 225.

38. Sidney Hook, "A Challenge to the Liberal-Arts College," *Journal of Higher Education* 10 (1939): 14.

39. It could be argued that it is education's colonization by a system that has made it so difficult to develop a new, multicultural, progressive curriculum to replace the classical canon. Instead, the current college curricula are the product of a market in which student enrollments function as the price-setting mechanism.

40. Hugh Baxter, "System and Lifeworld in Habermas's Theory of Law," *Cardozo Law Review* 23 (2002).

41. Habermas, *Lifeworld and System*, 356-63.

42. *Ibid.*, 266.

43. Habermas, *Between Facts and Norms*, 34.

44. See Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1942), 20; and Abram Chayes, *The Modern Corporation and the Rule of Law* (Cambridge: Harvard University Press, 1959), 31-32.

45. Hugh Baxter, "Habermas's Discourse Theory of Law and Democracy," *Buffalo Law Review* 50 (2002).

46. This duality has been repeatedly observed, although subject to slightly different theorizations. For a recent analysis, see Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998). Note as well the parallels that can be found in the analysis by Herbert Packer of the criminal justice system, in *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), or in jurisprudence, in Robert Cover, "Nomos and Narrative," and in "Violence and the Word," *Yale Law Journal* 95, 8: 1601-29, 1986.