

Social Justice and the American Law School Today:
Since We Are Made for Love

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INTRODUCTION

In *Laudato si'* and other teachings, Pope Francis decries our inequitable global economic system, which has produced a “throwaway culture”¹ that has “rupture[d] the bonds of integration and social cohesion.”² The Pope suggests that this economic system is based on a mistaken presumption that human beings are, by their nature, isolated and competitive consumers. They are presumed to be rational maximizers of individual wealth who make choices by calculating external punishments and rewards—costs and benefits. That inaccurate presumption about human nature has legitimated a system that has produced radical resource inequalities and environmental degradation. In response to this condition of degradation, Pope Francis calls us to engage in a “new dialogue”³ that takes us to the “heart of what it is to be human.”⁴ That dialogue has important implications for our education system, including our legal education system.

This Article is intended to facilitate that new dialogue by finding a series of profound provocations in the Pope’s teachings. First, the Pope provokes us to consider whether our existing education and economic systems are based on an incomplete understanding of human nature.⁵ The first section contends that the understanding that human beings are by nature competitive and consumptive wealth maximizers is not only contrary to the Pope’s teachings but also contrary to the latest research in the fields of neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics.

Second, the Pope provokes us to consider whether our existing education and economic systems can otherwise be justified because they are cost-effective or rooted in founding principles. The second section explains that those existing systems are neither cost-effective nor rooted in founding principles.

Third, the Pope provokes us to consider how and why the current conditions of resource inequality and environmental degradation have been produced and maintained. The third section argues that those who have benefited most from the current conditions of resource inequality and environmental degradation have exploited the mistaken views of human

1. Pope Francis, *Encyclical Letter, Laudato si': On Care for Our Common Home* para. 43 (2015), http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_ enciclica-laudato-si_en.pdf [<https://perma.cc/X7J8-6DNW>].

2. *Id.* para. 46.

3. *Id.* para. 14.

4. *Id.* para. 11.

5. *See id.*

nature, efficiency, and founding principles to legitimate those current conditions.

Fourth, the Pope provokes us to consider what education, and particularly legal education, might look like if it were based on a complete understanding of human nature and human learning.⁶ The fourth section demonstrates that, if legal educators took seriously the Pope's teachings, law schools would become transformative learning communities in which all members construct knowledge and build social justice together through meaningful relationships. The Article concludes by suggesting ten ways in which law schools can develop those transformative learning communities.

I. THE POPE CALLS US TO CONSIDER WHETHER OUR EDUCATION AND ECONOMIC SYSTEMS ARE BASED UPON AN INCOMPLETE UNDERSTANDING OF HUMAN NATURE

What is our collective image of the child? Do we believe that children are by nature prone to being overcome by destructive emotions and thus, require a behaviorist model of educational training? Or, do we understand children to be naturally curious, capable, and connected citizens of the world? A regime's collective image of the child shapes and is shaped by its education system.

A. The Existing Education and Economic Systems Reflect a Behaviorist and Consumptive Understanding of Human Nature

The United States' education system, including our legal education system, has for generations reflected behaviorist assumptions and practices about human nature and development. The foundation of behaviorism is the belief that learning is defined as a change in observable behavior. In *Psychology as the Behaviorist Views It*,⁷ John Watson built upon Pavlov's conclusions regarding conditioned responses by animals to external stimuli, showing that children could be "conditioned" to fear an object by repeatedly aligning that object with a painful experience.⁸ For example, by linking a child's observation of a white rat with a harsh noise, a child could be conditioned to fear (and to avoid) all similar white objects.⁹

6. *See id.*

7. John B. Watson, *Psychology as the Behaviorist Views It*, 20 PSYCHOL. REV. 158 (1913).

8. John B. Watson & Rosalie Rayner, *Conditioned Emotional Responses*, 3 J. OF EXPERIMENTAL PSYCHOL. 1, 1-14 (1920), https://archive.org/stream/journalofexperim03ameruoft/journalofexperim03ameruoft_djvu.txt [<https://perma.cc/MS5T-9XBX>].

9. *Id.*

B. F. Skinner then extended Watson's research, finding that animals could be conditioned to perform a particular behavior (such as pushing a lever) when that behavior is repeatedly and immediately rewarded.¹⁰ Significantly, the animals placed into a "Skinner Box" could be conditioned to perform the desired behavior regardless of their actual need for the reward itself.¹¹ Rats, for example, can be trained to continue to push levers in return for food even if they are not hungry, thereby becoming obese. Moreover, animals can be conditioned to compete with each other for the reward of food, even if they do not want the food or are not naturally competitive.¹²

In 1958, Skinner developed a teaching machine based upon his behaviorist approach to education. The machine presented direct instruction of information that was tested in a "carefully prescribed order."¹³ Students were rewarded for correct answers and were punished for incorrect ones. As described by Skinner:

In using the device, the student refers to a numbered item in a multiple-choice test. He presses the button corresponding to his first choice of answer. If he is right, the device moves to the next item; if he is wrong, the error is tallied and he must continue to make choices until he is right.¹⁴

The behaviorist assumptions about human nature and development thus can be, and have been, used to justify a regime of standardized testing.¹⁵ Although Skinner eventually appreciated that individual behavior could not be explained merely by reactions to external stimuli, educators began to contend that children could be conditioned to demonstrate desired behavior on tests through a system of external rewards and punishments.¹⁶ If the digestion of accepted facts is the goal of education, then tests can be devised to assess whether or not students have memorized such facts. Students who fail to demonstrate appropriate external behavior can be made to do so with negative reinforcements like poor grades and being held back in school. In this construct, the process by which the human mind functions is not particularly important. A

10. B. F. Skinner, *Teaching Machines*, 128 *SCIENCE* 969, 970 (1958).

11. *Id.*; see also B. F. SKINNER, *THE BEHAVIOR OF ORGANISMS: AN EXPERIMENTAL ANALYSIS* (1938).

12. Skinner, *supra* note 10.

13. *Id.* at 970.

14. *Id.* at 969.

15. See PHILLIP HARRIS, BRUCE M. SMITH & JOAN HARRIS, *THE MYTHS OF STANDARDIZED TESTS: WHY THEY DON'T TELL YOU WHAT YOU THINK THEY DO* 73–75 (2011).

16. MICHAEL J. KAUFMAN ET AL., *LEARNING TOGETHER: THE LAW, POLITICS, ECONOMICS, PEDAGOGY, AND NEUROSCIENCE OF EARLY CHILDHOOD EDUCATION* 51 (1st ed. 2014) [hereinafter KAUFMAN ET AL., *LEARNING TOGETHER*].

person's thoughts, feelings, desires, emotions, intentions, and cognitive processes are less important than observable behavior and hence less important to learning.

Behaviorist pedagogies also serve to legitimate an authoritarian role for teachers. "The teacher who follows the behaviorist approach will rely primarily on direct instruction to transmit information to students. Direct instruction is teacher-dominated communication designed to deliver to students the facts and values deemed important by the educational institution."¹⁷ In addition, the behaviorist approach helps to justify the development of pre-ordained and inflexible lesson plans.

The principle of 'operant conditioning' also suggests that teachers should deliver their external rewards and punishments immediately after the student has demonstrated the particular behavior being observed. As a consequence, teachers must present their instruction in a linear way in which one particular desired behavior is observed before the next conditioning takes place.¹⁸

Therefore, the teacher breaks lesson plans into small pre-packaged products, which must proceed in a fixed linear fashion. As one of the nation's foremost education experts, Linda Darling-Hammond observed: "Behaviorist learning theory has had substantial influence in education, guiding the development of highly-sequenced and structured curricula, programmed instructional approaches, workbooks and other tools."¹⁹

"The behaviorist method of operative conditioning also has been applied across schools and states. School administrators attempt to condition the behavior of teachers by rewarding and punishing them depending on the performance of their students on standardized tests."²⁰ "Schools that fail to train their students to perform will suffer negative reinforcements such as the withdrawal of funds."²¹

The behaviorist approach appears to be a cost-effective way to provide large numbers of students with mass-produced pieces of information, the acquisition of which can be efficiently measured by standardized tests.²² Skinner, in fact, suggested that his approach to teaching and assessment was economically efficient: "It is a labor-saving

17. *Id.* at 22–23.

18. *Id.* at 22.

19. Linda Darling-Hammond et al., *How People Learn: Introduction to Learning Theories*, STAN. UNIV. SCH. OF EDUC. 6 (2001).

20. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 23.

21. *Id.* at 11.

22. *Id.* at 22–23.

device because it can bring one programmer into contact with an indefinite number of students.”²³

Although legal education has developed new pedagogical approaches and assessments, it nonetheless is still based primarily on this behaviorist and consumptive model of education.²⁴ Law students are trained to become consumers of information by a system of external and standardized rewards and punishments. Professors in first-year, required classes usually deliver instruction in a cost-effective and authoritarian manner to large classes of students. Casebooks provide students with a pre-edited canon of cases designed to instruct students in settled legal principles. Many law schools still use an external system of curved grades to reward students for their acquisition of the settled legal doctrine and to punish them for their lack of acquisition of that doctrine.²⁵ The law school’s system of curved grades serves the labor market for law school graduates by helping employers to sort students for stratified careers.

The bar examination, then, is the controlling, standardized, and increasingly uniform method of assessing sufficient competence to enter the legal profession. That exam still primarily tests the ability of law students to consume, memorize, and regurgitate settled legal doctrine in response to predictable testing stimuli, prompts, and commands.²⁶

In her article, “Nurturing the Law Student’s Soul: Why Law Schools Are Still Struggling to Teach Professionalism and How to Do Better in an Age of Consumerism,”²⁷ Professor Elizabeth Usman declares that:

[t]he pronounced increase over the past few decades of the role of consumerism in higher education in general and in law schools specifically, in which schools and students view themselves, respectively, as consumers and sellers of an educational product, has only been accelerated in recent years with the competition over the

23. Skinner, *supra* note 11, at 971.

24. See generally Elizabeth Usman, *Nurturing the Law Student’s Soul: Why Law Schools Are Still Struggling to Teach Professionalism and How to Do Better in an Age of Consumerism*, 99 MARQ. L. REV. 1021 (2016).

25. See, e.g., Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253, 256 (2012) (stating that a majority of law schools have adopted a mandatory curve).

26. According to the National Conference of Bar Examiners, the Uniform Bar Exam (UBE), which is now being administered in more than twenty-five jurisdictions, is “composed of the Multistate Essay Examination, two Multistate Performance Test tasks, and the Multistate Bar Examination, which contains 200 multiple choice questions. It is uniformly administered, graded, and scored by user jurisdictions and results in a portable score that can be transferred to other UBE jurisdictions.” *Jurisdictions That Have Adopted the UBE*, NAT’L CONF. OF B. EXAMINERS, <http://www.ncbex.org/exams/ube/> [https://perma.cc/VAC2-84X9].

27. Usman, *supra* note 24. Professor Elizabeth Usman tracks the dramatic rise of the consumer model of legal education. See also Michael S. Harris, *The Escalation of Consumerism in Higher Education*, in *THE BUSINESS OF HIGHER EDUCATION: MARKETING AND CONSUMER INTERESTS* 89, 95 (John C. Knapp & David J. Siegel eds., 2009).

declining number of potential entering law students. With no end to this trend in site, consumerism appears to have become a part of the reality of legal education.²⁸

As Professor Usman recognizes, “the consumer-driven model of law school education in which the students are the consumers of the product sold by schools” has influenced the “nature of legal education itself.”²⁹ Not surprisingly, our education system, including our legal education system, has produced a regime of excellent consumers.

B. The Pope Teaches that the Behaviorist and Consumptive Understanding of Human Nature Reflected in Our Education and Economic Systems Is Incomplete

In *Laudato si'*, the Pope takes us on a faith-filled journey to the “heart of what it is to be human.”³⁰ He teaches that the consumerist vision of human nature reflected in both our economic and our education system, is incomplete.³¹ Pope Francis shows that we need a new way of thinking about human beings that rejects the paradigm of consumerism.³² As Professor Amelia Uelmen suggests, the Pope leads us to a more relational framework for understanding human behavior because we are all deeply connected to each other.³³ As the Pope declares: “For all our limitations, gestures of generosity, solidarity and care cannot but well up within us, since we were made for love.”³⁴

C. The Pope's Teachings Regarding Human Nature Are Supported by Evidence from Multiple Disciplines³⁵

While the Pope's understanding that human beings long to build loving relationships is, of course, rooted in faith, that vision has also been validated by the recent evidence from the fields of neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics.

Relying on sophisticated research techniques, including brain imaging, the world's foremost neuroscientists have discovered the

28. Usman, *supra* note 24, at 1021.

29. *Id.* at 1024–25.

30. Pope Francis, *supra* note 1, para. 11.

31. *See id.* para. 144.

32. *See id.* para. 215.

33. Amelia Uelmen, *Where Morality and the Law Coincide: How Legal Obligations of Bystanders May Be Informed by the Social Teachings of Pope Francis*, 40 SEATTLE U. L. REV. 1359 (2017).

34. Pope Francis, *supra* note 1, para. 58.

35. This section has been influenced by, and expanded on, the influential work of *The Pre-K Home Companion* authored by Sheryl R. Kaufman, Michael J. Kaufman, and Elizabeth C. Nelson.

existence of mirror neurons in human beings.³⁶ These neurons fire the same way when a person performs an activity as when a person watches someone else perform the same activity.³⁷ The neural connectivity between human beings is the result of human evolution;³⁸ it is the foundation for the natural impulse toward empathy.³⁹ Human beings are not hard-wired to consume or compete; rather, they are hard-wired to pursue meaningful, loving relationships, which are critical to the continued growth of their cognitive functioning.⁴⁰

In his path-breaking brain research, renowned child psychiatrist Dr. Bruce Perry has found dramatic evidence that we are in fact “born for love.”⁴¹ Based on his brain imaging and clinical research, Dr. Perry concludes that human beings have a distinct biological make-up and survival instinct that compels them to form meaningful relationships.⁴² Dr. Perry demonstrates that: “Humankind would not have endured and cannot continue without the capacity to form rewarding, nurturing, and enduring relationships. We survive because we can love.”⁴³

Indeed, children are born with a natural desire and capacity for “attachment,” which is the ability to form and maintain emotionally significant, reliable, and enduring bonds with others.⁴⁴ Meaningful attachment relationships are based on genuine communication that supports the development of social, emotional, and cognitive functioning.⁴⁵ Early attachment experiences alter the chemicals in the brain that develop the nervous system’s capacity to support emotional resilience.⁴⁶

Loving relationships also develop the uniquely human capacity for inter-subjectivity, which is the process by which human beings understand

36. V. S. RAMACHANDRAN, *THE TELL-TALE BRAIN: A NEUROSCIENTIST’S QUEST FOR WHAT MAKES US HUMAN* 22 (2012).

37. *Id.*

38. *Id.* at 23.

39. *See id.* at 261, 265 (noting the role of mirror neurons in empathy).

40. *Cf.* CHARLES DARWIN, *THE DESCENT OF MAN*, 98 (“When two tribes of primeval man, living in the same country, came into competition, if the one tribe included (other circumstances being equal) a greater number of courageous, sympathetic, and faithful members, who were always ready to warn each other of danger, to aid and defend each other, this tribe would without doubt succeed best and conquer the other.”).

41. *See generally* MAIA SZALAVITZ & BRUCE D. PERRY, *BORN FOR LOVE: WHY EMPATHY IS ESSENTIAL—AND ENDANGERED* (2010).

42. *See id.* at 4, 30.

43. *Id.* at 4.

44. DANIEL J. SIEGEL, *MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION* 167–68 (2011).

45. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 214.

46. *Id.*

the thoughts, feelings, and intentions of others.⁴⁷ In exercising their natural disposition toward inter-subjectivity, human beings find great joy; they realize what they have in common with others. Children who experience attachment and inter-subjectivity in early learning environments are more likely to exhibit focus, perseverance, and control over their behavior.⁴⁸ The security in feeling that any disruption in a meaningful relationship will be repaired allows a student to develop grit and resiliency in the face of life's inevitable hardships.⁴⁹

Similarly, the natural human desire for love is vital to cognitive integration. As neuropsychiatrist Daniel Siegel has found:

We come into the world wired to make connections with one another, and the subsequent neural shaping of our brain, the very foundation of our sense of self, is built upon these intimate exchanges between the infant and the caregiver. In the early years, this interpersonal regulation is essential for survival, but throughout our lives we continue to need such connections for a sense of vitality and well-being.⁵⁰

According to Siegel, meaningful relationships develop the prefrontal cortex in the brain, thereby integrating the cognitive processes that are essential to success and well-being.⁵¹

Dan Siegel's most recent book fully supports the Pope's vision that human beings are made for love.⁵² The book's very title could have been borrowed from the Pope: *Mind: A Journey to the Heart of Being Human*.⁵³ In that book, Siegel finds that the human mind is "*an embodied and relational, self-organizing emergent process that regulates the flow of energy and information both within and between.*"⁵⁴ He declares that "the mind is not just within us—it is also between us."⁵⁵ Accordingly, Siegel concludes that all human "[e]nergy and information flow happens in relationships as energy and information is shared."⁵⁶

Such relationships also can be developed between individuals and their environment. David Hawkins writes about the relationship that forms

47. *Id.* at 208–09, 210.

48. *Id.* at 208–09, 215.

49. *Id.* at 214–15.

50. SIEGEL, *supra* note 44, at 10–11.

51. *Id.* at 26.

52. DANIEL J. SIEGEL, *MIND: A JOURNEY TO THE HEART OF BEING HUMAN* (2017).

53. *Id.*

54. *Id.* at 37.

55. *Id.* at 167.

56. *Id.* at 53.

between a child, a teacher, and natural materials.⁵⁷ He notes that, when a teacher explores a natural material with a child, the teacher has made possible a “relation between the child and ‘It[.]’”⁵⁸

The human urge to develop loving relationships is indispensable to well-being. In “A Survey Method for Characterizing Daily Experience: The Day Reconstruction Method,” Nobel Prize winning psychologist and founder of behavioral economics, Daniel Kahneman, presents his transformative research regarding the determinants of happiness and well-being. The evidence indicates that individuals experience the greatest degree of happiness from their social relationships.⁵⁹ As Professor Kahneman’s research confirms, the most significant determinant of happiness—whether measured as momentary feelings, reflective thoughts, or life satisfaction—is the quality of a person’s relationships.⁶⁰ In fact, he finds that the evidence shows that “very happy people” differ from unhappy or modestly happy people in the level of their “fulsome and satisfying interpersonal lives.”⁶¹

The research is clear: the single most important factor in fostering happiness and well-being is the quality of a person’s relationships.⁶² People who have developed the ability to form and maintain meaningful relationships are “significantly happier and healthier than their peers who do not have such meaningful relationships. Moreover, those who have formed meaningful relationships are even happier and healthier than their wealthier peers who have not formed those relationships.”⁶³

Quality of relationships also is connected to physical well-being, health, and wellness. Meaningful relationships increase immunity to disease and infection, lower the risk of heart disease, and reduce the degree of cognitive decline through the aging process. Indeed, the absence of meaningful relationships is as deleterious to health as obesity or smoking. It is not surprising, therefore, that Nobel Prize winning economist James Heckman, in *Giving Kids a Fair Chance (A Strategy that Works)*, presents irrefutable evidence that learning environments that develop the capacity to build meaningful

57. See DAVID HAWKINS, *THE INFORMED VISION: ESSAYS ON LEARNING AND HUMAN NATURE* 56–57 (2002).

58. *Id.* at 59.

59. Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 *SCIENCE* 1776, 1776–80 (2004).

60. *Id.* at 1777–78.

61. SHERELYN R. KAUFMAN ET AL., *THE PRE-K HOME COMPANION* 33–34 (2016) [hereinafter KAUFMAN ET AL., *THE PRE-K HOME COMPANION*] (citing Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 *SCIENCE* 1776, 1776–80 (2004)).

62. *Id.* at 41.

63. *Id.*

relationships [not only produce robust economic returns but also] produce significant health advantages, including a reduction in obesity, blood pressure, and hypertension.⁶⁴

In addition, the natural human desire for meaningful relationships helps produce executive function.⁶⁵ The concept of executive function has been recognized as part of recent scholarship about the importance of “grit” or “growth mindset” to learning.⁶⁶ “These popular catch phrases capture some, but not all, of the power of executive function.”⁶⁷ “Executive function properly understood includes three types of capacities: working memory, cognitive flexibility, and inhibitory control.”⁶⁸ Education programs that enable students to develop meaningful, positive relationships are particularly effective in supporting the growth of executive function.⁶⁹ The relationship-building capacities of neuro-connectivity, attachment, inter-subjectivity, cognitive integration, interpersonal well-being, and executive function are uniquely human.⁷⁰ They are vital to human nature, human survival, and human evolution.

These competencies are critical to the development of the five habits of mind, which Howard Gardner argues are indispensable for future success and well-being.⁷¹ Gardner, one of the world’s most influential educational psychologists, concludes that education must be directed toward creating habits of mind that will be valuable in the future, including:

[(1)] a disciplined mind—the ability to become an expert in at least one area[;]

[(2)] a synthesizing mind—the ability to gather information from many sources, to organize the information in helpful ways and to communicate the information to others[;]

64. KAUFMAN ET AL., THE PRE-K HOME COMPANION, *supra* note 61, at 41.

65. *Building the Brain’s “Air Traffic Control” System: How Early Experiences Shape the Development of Executive Function 6* (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 11, 2011) [hereinafter *Building the Brain’s “Air Traffic Control” System*], <http://46y5eh11fhgw3ve3ytpwxt9r.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/How-Early-Experiences-Shape-the-Development-of-Executive-Function.pdf> [https://perma.cc/DX8U-WF4F].

66. *See generally* PAUL TOUGH, HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER (2012).

67. KAUFMAN ET AL., THE PRE-K HOME COMPANION, *supra* note 61, at 41.

68. *Id.* at 42.

69. *See Building the Brain’s “Air Traffic Control” System, supra* note 65, at 10. *See also* W. Steven Barnett et al., *Educational Effects of the Tools of the Mind Curriculum: A Randomized Trial*, 23 EARLY CHILDHOOD RES. Q. 299, 299–313 (2008).

70. John Barresi & Chris Moore, *The Neuroscience of Social Understanding*, in THE SHARED MIND: PERSPECTIVES ON INTERSUBJECTIVITY 39, 39–66 (Jordan Zlatev et al. eds., 2008).

71. *See* HOWARD GARDNER, FIVE MINDS FOR THE FUTURE 5–9 (2006).

[(3)] a creating mind—the ability of adults to keep alive in themselves the mind and sensibility of a young child, including an insatiable curiosity about other people and the environment, an openness to untested paths, a willingness to struggle, and a desire and capacity to learn from failure[;]

[(4)] a respectful mind—the ability to understand the perspectives and motivations of others, particularly those who appear to be different[; and]

[(5)] an ethical mind—the ability to appreciate one’s social or professional role and to act in accordance with shared standards for that role[.]⁷²

These habits of mind are developed through interpersonal relationships and in turn produce critical life-long relationship-building competencies.⁷³ It is these particular habits of mind—rather than just the traditionally tested abilities to consume information—that significantly increase the chance that a student will grow to experience life-long success and well-being.⁷⁴

Accordingly, recent findings from the disparate fields of neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics all support the Pope’s recognition that human beings are “made for love.” Our educational and economic systems, which reward atomistic, competitive, and consumptive behavior, and which have produced gross inequalities and environmental degradation, cannot consequently be justified as an accurate reflection of human nature.

II. WHETHER THE EXISTING EDUCATION AND ECONOMIC SYSTEMS CAN BE OTHERWISE JUSTIFIED BECAUSE THEY ARE COST-EFFECTIVE OR ROOTED IN FOUNDING PRINCIPLES

Although the existing inequitable economic and educational systems are based on an incomplete view of human nature, we could nonetheless decide to retain them because they are cost-effective or rooted in founding political or economic principles. However, this section demonstrates that neither rationale supports the preservation of those economic and educational structures.

72. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 33–34 (citing GARDNER, *supra* note 71, at 3, 5–9).

73. *See* GARDNER, *supra* note 71, at 5–9; *see also* KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 34–36.

74. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 35.

*A. The Existing Economic and Education Systems
Are Not Cost-Effective*

In his classic book, *Equality and Efficiency: The Big Tradeoff*, Arthur Okun, economic adviser to President Lyndon Johnson, argued that economic efficiency and economic equality are opposing forces and suggested that economic inequality is a necessary result and indicator of economic efficiency.⁷⁵

Yet, the premise that economic efficiency depends on economic inequality is belied by the evidence, including the current economic situation. In his masterwork, *Lawless Capitalism: The Subprime Crisis and the Case for an Economic Rule of Law*,⁷⁶ Steven Ramirez documented the inefficiencies of unrestrained capitalism and demonstrated how “excessive economic inequality breeds too much elite privilege,” which in turn leads to the “irrational underdevelopment of human potential.”⁷⁷ In fact, countries with relatively low economic inequality experience sustained economic growth.⁷⁸ Moreover, sustained economic growth is not adversely impacted by the redistribution of resources to achieve economic equality.⁷⁹

Like an unregulated approach to the economy, the behaviorist approach to education creates a mistaken perception that it is efficient. “The ‘standards’ movement generally accepts the idea that a single teacher can impart a single set of facts to a large number of students at the same time.”⁸⁰ Consequently, this type of education appears cost-effective. However, the education system built upon behaviorist principles is inefficient by any credible measure. After reviewing many measures of cost-effectiveness, including overall educational expenses relative to student outputs, Stephen Heyneman concluded: “The sum of this evidence would suggest that by many different measures the U.S. is less efficient than other countries and that the record of inefficiency is consistent over at least two decades.”⁸¹

75. See ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (2015).

76. STEVEN RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* (2012).

77. *Id.* at 132.

78. See Andrew G. Berg & Jonathan D. Ostry, *Inequality and Unsustainable Growth: Two Sides of the Same Coin?*, INT’L MONETARY FUND 9 (Apr. 8, 2011), <https://www.imf.org/external/pubs/ft/sdn/2011/sdn1108.pdf> [<https://perma.cc/6MK9-GL62>].

79. See Jonathan D. Ostry et al., *Redistribution, Inequality and Growth*, INT’L MONETARY FUND 24 (Apr. 2014), <https://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf> [<https://perma.cc/L7GJ-E2CN>].

80. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 11.

81. See Stephen P. Heyneman, *The International Efficiency of American Education: The Bad and the Not-so-Bad News*, in *PISA, POWER, AND POLICY: THE EMERGENCE OF GLOBAL EDUCATIONAL GOVERNANCE* 279, 284 (Heinz-Dieter Meyer & Aaron Benavot eds., 2013).

In *Education and the Cult of Efficiency: A Study of the Social Forces That Have Shaped the Administration of the Public Schools*, Raymond Callahan shows how the growth of the “standards” movement in education became linked to mistaken attempts to achieve “efficiency” by assembling large numbers of students in a single classroom, conveying prepackaged information to them, and measuring their outputs as if they were factory workers.⁸² Callahan explains that “[a]s the business-industrial values and procedures spread into the thinking and acting of educators, countless educational decisions were made on economic or on non-educational grounds.”⁸³ As such, “school administrators, already under constant pressure to make education more practical in order to serve a business society better, were brought under even stronger criticism and forced to demonstrate first, last, and always that they were operating the schools efficiently.”⁸⁴ The result is that: “Our schools are, in a sense, factories in which the raw products (children) are to be shaped and fashioned into products to meet the various demands of life.”⁸⁵

B. F. Skinner himself recognized that behaviorism could be misappropriated by the demands of industry to frustrate the growth of genuine learning in a democracy.⁸⁶ Even as he was proposing his teaching machines, Skinner was rejecting any calls for “aversive” educational practices such as punishing students and schools for “failure, the frequency of which is to be increased by ‘raising standards.’”⁸⁷

Skinner cautioned that, while the “discipline of the birch rod” or the threat of failure may “facilitate learning,” it also “breeds followers of dictators and revolutionists.”⁸⁸ Skinner celebrated the progressive educational practices advocated by John Dewey and condemned aversive learning strategies.⁸⁹ Skinner asserted only that his behaviorist approach could replace those aversive practices based on negative reinforcement of failure. Skinner knew that such aversive educational practices threatened “democratic principles” and hoped that his insights would be useful for teachers in their efforts to reach all their students.⁹⁰

82. See RAYMOND E. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY: A STUDY OF THE SOCIAL FORCES THAT HAVE SHAPED THE ADMINISTRATION OF THE PUBLIC SCHOOLS* 247 (1964).

83. *Id.* at 246–47.

84. *Id.* at 18.

85. *Id.* at 152 (citing ELLWOOD P. CUBBERLEY, *PUBLIC SCHOOL ADMINISTRATION* 338 (1916)).

86. See Skinner, *supra* note 10, at 977.

87. *Id.*

88. *Id.*

89. *Id.*; see John Dewey, *Democracy and Education*, reprinted in *CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION* 288–89 (Steven M. Cahn ed., 2d ed. 2011); John Dewey, *Experience and Education*, reprinted in *CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION* 362 (Steven M. Cahn ed., 2d ed. 2011).

90. See Skinner, *supra* note 10, at 977.

Moreover, recent research in neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics demonstrates that an authoritarian, behaviorist approach to education is counterproductive. The behaviorist approach does not provide most students with the habits of mind and heart that are necessary to life-long success and well-being. In his path-breaking study, *The Growing Importance of Social Skills in the Labor Market*, Professor David J. Deming provides a wealth of empirical evidence, which reveals the “growing demand for social skills in the U.S. labor market over the last several decades.”⁹¹ Deming demonstrates that “social skill-intensive occupations have grown by nearly 10 percentage points as a share of the U.S. labor force, and that wage growth has also been particularly strong for social skill-intensive occupations.”⁹² He also finds that “high-paying jobs increasingly require *social skills*.”⁹³

According to Deming, the social skill that is the key determinant of success is “the ability to attribute mental states to others based on their behavior, or more colloquially to ‘put oneself into another’s shoes.’”⁹⁴ He explains:

Reading the minds of others and reacting is an unconscious process, and skill in social settings has evolved in humans over thousands of years. Human interaction in the workplace involves team production, with workers playing off of each other’s strengths and adapting flexibly to changing circumstances. Such non-routine interaction is at the heart of the human advantage over machines.⁹⁵

Additionally, findings from the Equity and Excellence Commission, a federal advisory committee chartered by Congress, show:

While some young Americans—most of them white and affluent—are getting a truly world-class education, those who attend schools in high poverty neighborhoods are getting an education that more closely approximates school in developing nations. In reading, for example, although U.S. children in low-poverty schools rank at the top of the world, those in our highest-poverty schools are

91. David J. Deming, *The Growing Importance of Social Skills in the Labor Market* 30 (Nat’l Bureau of Econ. Research, Working Paper No. 21473, 2015), <http://www.nber.org/papers/w21473.pdf> [<https://perma.cc/7R79-MNQG>].

92. *Id.*

93. *Id.* at 3.

94. *Id.* at 3–4.

95. *Id.* at 30–31.

performing on a par with children in the world's lowest-achieving countries.⁹⁶

The predominant system of financing education from local property taxes is inefficient because it directs the least amount of funds to the students who need them the most. The Report states:

Twenty-two percent of American schoolchildren live in conditions of poverty Nearly half of today's schoolchildren qualify for free or reduced-price school lunches. The achievement gap between children from high- and low-income families is 30 to 40 percent larger among children born in 2001 than among those born 25 years earlier. Poverty rates are disproportionately high for students of color.⁹⁷

Students who need the greatest amount of effective resources receive the least. In fact, the Supreme Court of New Jersey, in *Abbott IV*, held that the state's system of financing public education, which directed funds to students in accordance with the property wealth of their school districts, was in violation of the state constitution's requirement that the state maintain an "efficient" system of education.⁹⁸ The system was not efficient because it allocated the least amount of funding to the students who needed the most funding, and allocated the most amount of funding to the students who needed it the least.⁹⁹

Moreover, as Raj Chetty and John Friedman prove in *Does Local Tax Financing of Public Schools Perpetuate Inequality?*, this prevalent method of financing education through local property taxes also promulgates intergenerational inequality: low parental income is a determinant of the low quality of a child's school, and the low quality of that child's school is a determinant of that child's low future income.¹⁰⁰

Finally, as James Heckman, Nobel Prize winning economist, has shown, the nation's investment in education is inefficient because it focuses on the wrong age group.¹⁰¹ The bulk of educational spending is

96. FOR EACH AND EVERY CHILD: A REPORT TO THE SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION BY THE EQUITY AND EXCELLENCE COMMISSION 12 (2013).

97. U.S. DEP'T OF EDUC., FOR EACH AND EVERY CHILD—A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 30 (2013) (citations omitted), <https://edpolicy.stanford.edu/sites/default/files/publications/each-and-every-child-strategy-education-equity-and-excellence.pdf> [<https://perma.cc/ULP3-C565>].

98. *Abbott ex rel. Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 439 (N.J. 1997).

99. *Id.* at 431.

100. Raj Chetty & John Friedman, *Does Local Tax Financing of Public Schools Perpetuate Inequality?* 7 (Harvard Univ. & Nat'l Bureau of Econ. Research), https://www.rajchetty.com/chettyfiles/proptax_nta.pdf [<https://perma.cc/K2YY-CVH2>].

101. See James J. Heckman, *Schools, Skills, and Synapses* 25 (Nat'l Bureau of Econ. Research, Working Paper No. 14064, 2008), <http://www.nber.org/papers/w14064.pdf> [<https://perma.cc/GD2R-GK3E>].

dedicated to secondary and higher education.¹⁰² Those investments are too late in the life of a student to produce an effective rate of return.¹⁰³ Bruce Perry notes that the country ramps up the amount of money it devotes to educating children at precisely the wrong time—after the child’s brain has stopped developing at a rate that can be shaped by the investments.¹⁰⁴

Although investments in some programs, such as adolescent mentoring and after school programs, may produce some modest returns,¹⁰⁵ the greatest returns are produced from investments in early childhood education. According to Heckman, investments in early childhood education produce the most robust returns in the form of reduced grade retention, special education costs, health care costs, criminal involvement costs, prison costs, and family instability costs.¹⁰⁶ These investments also generate higher taxable income and increased home ownership.¹⁰⁷ As such, the nation is currently spending the most money educating children who need the least amount of funds, at a moment in their lives that is the least effective at producing educational growth.

*B. The Existing Economic and Education Systems Are Not Rooted
in Founding Principles*¹⁰⁸

The current inequitable educational and economic structures cannot be justified by founding political or economic principles. Steven Ramirez argues that the founders of our capitalist economic system, including Adam Smith, actually espoused a much more nuanced understanding of human and market behavior—one that establishes the value of mutually beneficial transactions rather than the advantage of one side at the expense of the other.¹⁰⁹

102. KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 16, at 117, 247 (citing *The Heckman Equation*, HECKMAN, <https://heckmanequation.org/the-heckman-equation/> [<https://perma.cc/N2EP-48XD>]).

103. *The Heckman Equation*, *supra* note 101.

104. Bruce Perry & Annette Jackson, *The Long and Winding Road: From Neuroscience to Policy, Program, Practice*, INSIGHT MAG., no. 9, 2014, at 4–8, 9.

105. *Id.*

106. *The Heckman Equation*, *supra* note 101, at 20.

107. KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 16, at 121–24. See generally *Research Summary: The Lifecycle Benefits of an Influential Early Childhood Program*, HECKMAN, <https://heckmanequation.org/resource/research-summary-lifecycle-benefits-influential-early-childhood-program/> [<https://perma.cc/W8SR-4DGG>].

108. This section has been influenced by, and expanded on, the influential work of *Learning Together: The Law, Politics, Economics, Pedagogy, and Neuroscience of Early Childhood Education* authored by Michael J. Kaufman, Sheryl R. Kaufman, and Elizabeth C. Nelson.

109. See RAMIREZ, *supra* note 76, at 17.

Adam Smith understood that knowledge about human motivations and decision-making is itself constructed through relationships; in *The Theory of Moral Sentiments*, Smith declared:

We can never survey our own sentiments and motives, we can never form any judgment concerning them, unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.¹¹⁰

Thus, the foundations of capitalism do not justify the unfettered acquisition and consumption of resources. Rather, as Professor Ramirez demonstrates, it is the Pope's message that is "fully consistent with the most robust systems of capitalism."¹¹¹

Similarly, the inequities in our education system cannot be fairly attributed to our regime's founding political principles. The behaviorist approach that has been used to rationalize educational and economic inequities cannot be fairly justified by a proper understanding of the democratic regime established by the Framers of the Constitution. Although the Framers justified their constitutional structure by claiming that their government was necessary to diffuse otherwise unbridled human passions, they also erected a regime of self-government that "presupposes" the existence of other qualities in human nature that justify a certain portion of "esteem and confidence."¹¹² Specifically, the Framers built legal structures into their regime that presume the natural human capacity to construct and disseminate knowledge through meaningful relationships.

The Constitution's limitation on the term of appointment of representatives is based on the presumption that even those prone to share power are self-regulated by empathy.¹¹³ According to the Framers, elected representatives will "anticipate the moment" when they are not in power, and will naturally put themselves in the shoes of the governed.¹¹⁴ "The Framers believed that: 'There is in every heart a sensibility to marks of honor, of favor, of esteem . . . which, apart from all considerations of interest, is some pledge for grateful and benevolent returns.'¹¹⁵ "There is

110. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 161 (1759).

111. Steven A. Ramirez, *Social Justice and Capitalism: An Assessment of the Teachings of Pope Francis from a Law and Macroeconomics Perspective*, 40 SEATTLE U. L. REV. 1229 (2017).

112. *Id.*

113. *Id.*

114. *Id.*

115. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 24 (quoting THE FEDERALIST NO. 57 (James Madison)).

disposition toward gratitude in human nature, by which representatives ‘will be bound to fidelity and sympathy with the great mass of people.’”¹¹⁶

The structure of the American regime also presumes that the construction of knowledge requires cooperation.¹¹⁷ The First Amendment’s free speech and free press clauses depend upon the belief that human interactions—in dialogue, in the marketplace of ideas, and in myriad forms of “expression”—are imperative to human advancement.¹¹⁸ Knowledge is built and spread in the public sphere.

Indeed, the Supreme Court has recognized that the First Amendment’s protections of the freedom to construct knowledge, form beliefs, and express oneself are dependent upon the freedom to develop meaningful relationships in which knowledge is shaped, belief is formed, and expression is respected:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹¹⁹

In Article 1, Section 8, Clause 8, the United States Constitution further reflects the Framers’ appreciation of the importance of meaningful associations to the construction and dissemination of knowledge.¹²⁰ That section grants to Congress the power to promote “the [p]rogress of science and the useful arts.”¹²¹ One method by which Congress is empowered to promote such “[p]rogress” is by giving to “Authors and Inventors the exclusive right to their respective writings and discoveries.”¹²² The Constitution recognizes that human discovery requires the ingenuity of individual inventors.¹²³ Yet, the Constitution does not grant to Congress the power to give such inventors unlimited exclusive control over their

116. *Id.* (quoting THE FEDERALIST NO. 57 (James Madison)).

117. *Id.*

118. *Id.*

119. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) (citations omitted). See generally *id.* at 461, 463; NAACP v. Button, 371 U.S. 415, 429–30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); *In re Primus*, 436 U.S. 412, 426 (1978); Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981).

120. KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 16, at 24 (citing U.S. CONST. art. I, § 8, cl. 8).

121. *Id.*

122. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

123. *Id.*

inventions; rather, it provides such control only for “limited times.”¹²⁴ As James Madison wrote in the Federalist Papers, the “public good fully coincides in both cases with the claims of individuals.”¹²⁵

The intellectual property protections in the Constitution can be traced to the political philosophy of John Locke. In his *Second Treatise of Civil Government*, Locke wrote that human beings have a natural right to property in their own bodies.¹²⁶ The right of individuals to their own bodies also gives them a property right to the “labors” of their bodies and the fruits of those labors.¹²⁷ A person has a natural right to own that which his labor has created.¹²⁸ Locke’s understanding of a natural right to property that pre-dates civil society undoubtedly influenced the drafters of the Constitution.¹²⁹

Yet, as the Framers understood, Locke cautioned against the excesses of the natural right to property.¹³⁰ Because the right to property is an extension of the right to self-preservation, it cannot be used to justify the appropriation of material that is not necessary for self-preservation.¹³¹ There is no natural right to the acquisition of property that is not necessary for self-preservation.¹³²

To the contrary, Locke shared the Pope’s belief that individuals who appropriated to themselves more property than they could efficiently use to sustain themselves, acted in a way contrary to their true natures, particularly where there is not enough left in common for others.¹³³ There is no natural right to appropriate that which is not useful for the improvement of knowledge, the progress of civilization, and the advancement of human happiness.

The Framers not only understood the natural limits on individual work-product, they also grasped the collaborative nature of human discovery.¹³⁴ Their temporal limit on Congress’s power to protect the individual creator’s exclusivity was designed to ensure that knowledge will enter the public domain.¹³⁵ By ensuring that a discovery will enter the

124. *Id.*

125. *Id.* (quoting THE FEDERALIST NO. 43 (James Madison)).

126. *Id.* at 25 (citing JOHN LOCKE, *Concerning the True Original Extent and End of Civil Government*, in TWO TREATISES OF GOVERNMENT para. 27–28 (1698)).

127. *Id.*

128. *Id.*

129. KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 16, at 56.

130. *Id.* at 23; *see* LOCKE, *supra* note 126, para. 25–27.

131. *See* LOCKE, *supra* note 126, para. 25.

132. *See id.* para. 30.

133. *See id.* para. 27, 31.

134. KAUFMAN ET AL., LEARNING TOGETHER, *supra* note 16, at 56.

135. Tzen Wong, *Intellectual Property Through the Lens of Human Development*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT 1, 18 (Tzen Wong & Graham Dutfield eds., 2011).

public domain at some point, the Framers also recognized the value of collaboration in constructing human knowledge.¹³⁶

The Framers' understanding of the social nature of the construction of knowledge is captured by Thomas Jefferson's analysis of the nature of ideas: "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea"¹³⁷ Jefferson understood that the moment a person divulges an idea, "it forces itself into the possession of every one, and the receiver cannot dispossess himself of it."¹³⁸ Jefferson argues it is the social construction of knowledge that is natural, not the individual's property interest in any particular discovery: "That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature"¹³⁹

Jefferson uses the image of a flame emanating from a candle to show the social nature of knowledge: "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."¹⁴⁰ An individual's ideas are like fire, they "spread from one to another"; they illuminate all without "lessening their density in any point"; and thus they are "incapable of confinement or exclusive appropriation."¹⁴¹

Jefferson's image of the candle is an apt metaphor for the tenets of social constructivism. Like Jefferson, social-constructivists appreciate that knowledge cannot be delivered or captured by any particular individual or group. Rather, knowledge is constructed when ideas are "spread from one to another" through meaningful relationships.

The Framers recognized that human beings have a natural instinct to collaborate with others.¹⁴² In *Democracy in America*, Alexis de Tocqueville writes about the tendency of Americans to join associations:

Americans of all ages, all minds constantly unite. . . . As soon as several of the inhabitants of the United States have conceived of a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other, they unite.¹⁴³

136. *Id.* at 18–19.

137. Thomas Jefferson, *Letter to Isaac McPherson* (Aug. 13, 1813).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 489–92 (H. Mansfield & D. Winthrop eds. & trans., 2000).

143. *Id.*

In a democratic regime like the United States, de Tocqueville argues, “the art of associating must be developed.”¹⁴⁴ In fact, associations are essential to human progress: “In democratic countries, the science of associations is the mother science; the progress of all the others depends on the progress of that one.”¹⁴⁵ Particularly to the American people, associations of all varieties are necessary because of their yearning for freedom and equality. De Tocqueville further argues that the “art of associating must be developed and perfected” among Americans in order to “remain civilized.”¹⁴⁶

The American peoples’ natural inclination to group with their neighbors into associations, both large and small, must be cultivated and celebrated. In fact, de Tocqueville argues that of all “the laws that rule human societies,” the law requiring the act of associating is the most “precise” and “clear.”¹⁴⁷ As de Tocqueville recognized, the United States regime depends upon a view of human nature that drives individuals to develop meaningful relationships through which they achieve well-being and find joy in the social construction of knowledge.

In fact, the Framers of the Constitution promulgated a subtle conception of human nature and development not inconsistent with that suggested by the Pope. Human beings are equal in their capacity to govern and to be governed. They possess the innate ability to understand another person’s perspectives, feelings, and intentions. The constitutional structure of self-governance depends on the belief that individuals have a natural desire for the freedom to construct and to spread knowledge through meaningful relationships. Accordingly, the behaviorist practices that have dominated American education and rewarded consumption cannot be fairly justified by any claim that they are aligned with our founding documents or principles.

III. WHETHER THOSE WHO HAVE BENEFITED FROM THE CURRENT CONDITIONS OF RESOURCE INEQUALITY AND ENVIRONMENTAL DEGRADATION HAVE EXPLOITED MISTAKEN VIEWS OF HUMAN NATURE, EFFICIENCY, AND FOUNDING PRINCIPLES TO LEGITIMATE THOSE CONDITIONS

The current conditions of gross inequality and environmental degradation cannot be justified as a true reflection of human nature. Nor can the retention of those conditions be justified as cost-effective or as aligned with our founding documents and principles.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

Accordingly, the Pope calls us to consider seriously whether the false consumptive view of human nature has been used to legitimate the misappropriation of resources by the few at the expense of the many.¹⁴⁸ In other words, the behaviorist model of education has been wielded to produce a regime of consumers, who, contrary to their nature, are rewarded for the kind of unbridled consumption that leads to radical inequality and unchecked dominion over the environment. The regime can also try to rationalize the plight of the weak, the poor, and the environment by claiming that they are merely “items” to be consumed.

The process of rationalization begins with the education system. As John Bellamy Foster contends, “the forms of consciousness and behavior fostered by capitalist schooling are designed to reproduce existing classes and groupings, and thus are meant to reinforce and legitimize the social relations of production of capitalist society as a whole.”¹⁴⁹ Foster demonstrates that

[s]chools are, then, less about education than a kind of behavioral modification, preparing the vast majority of students for a life of routinization and standardization, in which most will end up employed in essentially unskilled, dead-end jobs. Indeed, most jobs in the degraded work environment of monopoly capitalist society—even those set aside for college graduates—require precious little formal education.¹⁵⁰

Similarly, Albert Einstein recognized how our education system trains students to accept the false necessity of the unequal acquisition of resources by the most wealthy and powerful: “This crippling of individuals I consider the worst evil of capitalism. Our whole educational system suffers from this evil. An exaggerated competitive attitude is inculcated into the student, who is trained to worship acquisitive success as a preparation for his future career.”¹⁵¹

As Dean Ileana Porras suggests, the law—and therefore law schools—may be “complicit” in the very harms the Pope seeks to address.¹⁵² The law may be complicit because it sets up doctrines that protect the acquisition of property and the maximization of personal wealth. For example, the United States Supreme Court, in *San Antonio*

148. Pope Francis, *supra* note 1, para. 26.

149. John Bellamy Foster, *Education and the Structural Crisis of Capital*, 63 MONTHLY REV. no. 3 (July-Aug. 2011).

150. *Id.*

151. Albert Einstein, *Why Socialism?*, 1 MONTHLY REV. no. 1, 14 (May 1949).

152. Ileana M. Porras, *Symposium: The Pope’s Encyclical and Climate Change Policy: Laudato Si’, Pope Francis’ Call to the Ecological Conversion: Responding to the Cry of the Earth and the Poor—Towards an Integral Ecology*, AM. SOC’Y OF INT’L L. no. 109, 2015 at 138.

Independent School District v. Rodriguez,¹⁵³ rationalizes its decision to uphold the constitutionality of admittedly unequal state educational funding regimes by indicating that the provision of equitable funding for children throughout the community would be contrary to human nature. The Court tries to legitimate the radical disparities in educational funding by claiming that those disparities are merely the natural result of the “continual struggle between two forces: the desire by members of society to have educational opportunity for all children and the desire of each family to provide the best education it can afford for its own children.”¹⁵⁴

Law schools also may be complicit because they reward their students for digesting neutral-seeming principles that rationalize inequities and they continue to employ behaviorist pedagogies and practices that generate a labor force of trained consumers. Accordingly, Professor Carmen Gonzales shows us that we cannot continue by just “tinkering around the margins.”

IV. WHAT WOULD LEGAL EDUCATION LOOK LIKE IF IT WAS INFORMED BY A MORE COMPLETE CONCEPTION OF HUMAN NATURE?

If we did not merely tinker around the margins and instead truly answered the Pope’s call for an educational system based on an understanding that human beings are “made for love,” law schools would become transformative learning communities in which knowledge and social justice are constructed through meaningful relationships. In this section, I suggest ten strategies that can help law schools to become those transformative learning communities.

A. Law Schools Can Expand Their Social Constructivist Pedagogies

1. The Foundations of the Social Constructivist Approach

Social constructivism is an educational approach that recognizes that true knowledge is not passively or individually consumed; instead, knowledge is co-constructed socially through meaningful relationships with family, caregivers, teachers, peers, the environment, and the community.

This educational approach was founded on the discoveries of Russian lawyer and psychologist Lev Vygotski. Vygotsky was born in Orsha, Belorussia (Belarus) in 1896 and graduated from Moscow University with

153. 411 U.S. 1, 62 (1973).

154. *Id.* at 49. In the area of civil procedure as well, the Supreme Court has justified its decisions to erect barriers to judicial access through new pleading and summary judgment standards by claiming that they are based on the (mistaken) presumption that human beings are, by nature, individual wealth maximizers. See Michael J. Kaufman, *Summary Pre-Judgment*, 43 LOY. U. CH. L.J. 593 (2012).

a degree in law.¹⁵⁵ He authored more than 180 path-breaking articles and books on child psychology and human development.¹⁵⁶

Vygotsky demonstrated, and eventually convinced Jean Piaget, that learning is a social construct. Indeed, after he studied Vygotsky's work, Piaget developed his constructs to recognize the primal role of social relationships in the development of mental processes and language.¹⁵⁷ Vygotsky's conclusions illustrated the idea that all of "*human learning presupposes a specific social nature and a process by which children grow into the intellectual life of those around them.*"¹⁵⁸ The social, interpersonal process of the construction of knowledge is altered by the child into an internal one.¹⁵⁹ Every function of a child's development happens twice: "first *between* people . . . and then inside the child."¹⁶⁰ In fact, all the higher mental functions, including attention, memory, and the formation of concepts, "originate as actual relations between human individuals."¹⁶¹

Vygotsky's research revealed that "human beings become ourselves through others."¹⁶² This fundamental rule that knowledge is constructed through meaningful social relationships "applies not only to the personality as a whole, but also to the history of every individual function."¹⁶³ The child's social context is an integral part of the construction of knowledge and the very process of cognition.¹⁶⁴ That context includes the child's direct interactions with individuals and materials that are proximate to the child. Yet, the social context also includes the child's family, school, culture and society.¹⁶⁵ All of these social networks are not merely received by a child, they shape the way in which the child thinks.¹⁶⁶

Significantly, Vygotsky revealed how a child's mental processes are actually shaped by social interactions.¹⁶⁷ Mental processes grow in an exchange among human beings.¹⁶⁸ Children "acquire a mental process by

155. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 116.

156. *See, e.g.*, ELENA BODROVA & DEBORAH J. LEONG, *TOOLS OF THE MIND* (1996); L. S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF PSYCHOLOGICAL PROCESSES* (1978); LEV VYGOTSKY, *THOUGHT AND LANGUAGE* (rev. ed. 1986).

157. VYGOTSKY, *MIND IN SOCIETY*, *supra* note 156, at 67.

158. *Id.* at 88.

159. *Id.* at 57.

160. *Id.*

161. *Id.*

162. *Id.*

163. L. S. VYGOTSKY, *Development of the Higher Mental Functions*, in 1 *PSYCHOLOGICAL RESEARCH IN THE U.S.S.R.* 43 (A.N. Leontyev et al. eds., 1966).

164. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 117.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

sharing, or using it when interacting with others.”¹⁶⁹ The child must first share an experience with another human being before internalizing the mental process and being able to perform that process independently.¹⁷⁰ Without a shared social experience, knowledge cannot be genuinely constructed.¹⁷¹

2. The Social Constructivist Approach Exemplified: The Reggio Emilia Experience

The social constructivist approach is exemplified in the remarkable schools of Reggio Emilia, Italy. The Reggio Emilia experience is named after the city in which it originated and for the community of people that was dedicated to changing the culture of early childhood.¹⁷² Its schools have become the gold standard and are deemed to be the best in the world.¹⁷³

After World War II had seriously damaged their city, the community of Reggio Emilia came together and decided that the rebuilding process must be focused upon children and their early education.¹⁷⁴ In a city torn by trauma and violence, its leaders were determined to place children at the center of policymaking.¹⁷⁵ They dedicated themselves to establishing a new kind of education in which children are vital, contributing members of the democratic community and in which the community is an active participant in the development and well-being of children and their families.¹⁷⁶ The educators in Reggio Emilia were guided by the fundamental image of the child as a capable, caring, creative, curious, and connected member of the community who has “legitimate rights.”¹⁷⁷

The following educational pillars are central to the Reggio Emilia experience: (1) the environment is a “teacher” that encourages the co-construction of knowledge through relationships; (2) the curriculum emerges from and inspires children’s curiosities, relies on teachers’ collaborative research, and values multiple forms of representation; (3) the learning of each child and the community is made visible through documentation; (4) shared projects arise naturally from the interests of groups of children and are as brief or lengthy as seems constructive; (5) all materials in the environment are respected—whether naturally

169. *Id.* at 117.

170. *Id.*

171. *Id.*

172. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 31.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 29.

designed, human-designed, or repurposed; and (6) collaboration is emphasized—among children, among teachers, and among children and teachers, including perspective taking, role playing, dialogue, negotiation, problem solving, listening, and respect for different perspectives.¹⁷⁸

In Reggio schools, educators celebrate the spectrum of diversity brought to the learning environment by students.¹⁷⁹ As the city of Reggio Emilia has become increasingly diverse, educators in Reggio Emilia understand the integration of immigrant families into the centers and schools as an opportunity for tremendous growth and learning.¹⁸⁰

Moreover, “[c]hildren with special needs (or ‘special rights’ as they are called in Reggio Emilia) are not limited by adult perceptions of their cognitive functioning and are included in all activities.”¹⁸¹ Children with special rights are not defined by perceived limitations; rather, they are fully included in a classroom in Reggio Emilia and are respected for their capability to use all their senses to learn through play, touching, dancing, moving, listening, seeing, and creating.¹⁸²

The Reggio Emilia experience also reflects the work of highly skilled educators who provide authentic assessment through documentation of a variety of learning experiences, which is then used as a tool for additional learning and advocacy for children.¹⁸³

Documentation is vital to individual and group learning: it is an intentional act of reflecting on the process of individual and group growth, and it collects and holds up artifacts of shared group learning experiences to assist the group in reflecting on its own progress.¹⁸⁴ The documentation informs all subsequent teaching in the classroom and outside the classroom.¹⁸⁵ It makes visible to multiple stakeholders the learning that takes place in an early childhood education program.¹⁸⁶

Moreover, documentation provides direct evidence of learning that can be shared with the community surrounding the school.¹⁸⁷ In this way, documentation provides an authentic assessment of the learning

178. *Id.* at 22, 25.

179. *Id.* at 26.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* Documentation is the practice of observing, recording, interpreting, and sharing through a variety of media the processes and products of individual and community learning.

184. KAUFMAN ET AL., *LEARNING TOGETHER*, *supra* note 16, at 14.

185. *Id.*

186. *Id.*

187. *Id.*

process.¹⁸⁸ The promise of documentation is that it will augment forms of assessment and accountability based primarily on standardized tests.¹⁸⁹

The fundamental belief that students construct knowledge through meaningful relationships also creates a foundation from which those students are inspired to become engaged citizens.¹⁹⁰ In a Reggio-inspired education program, the community beyond the doors of the school is a vital partner in the learning.¹⁹¹ The community provides a forum for expression in common spaces. The city surrounding the school may become involved in a community-wide activity.¹⁹²

Not only do students learn outside of their school walls, but community members learn to appreciate the abilities of young children to construct knowledge.¹⁹³ Through documentation, Reggio-inspired educators make the learning that takes place within the school visible to the community surrounding the school.¹⁹⁴ This form of authentic assessment provides evidence of the profound effectiveness of the children's experience to community stakeholders, including policy-makers, taxpayers, and funding sources.¹⁹⁵

Accordingly, students emerge from a social constructivist learning experience with the habits of mind and heart that they need to lead, to create, to respect the environment, to problem-solve, to collaborate, to express themselves, to negotiate, to build alliances, to focus, to listen, to absorb, to relate to each other, and to find joy in learning.¹⁹⁶ Educators in these environments also nurture, inspire, and empower their students to pursue their natural instinct to build the kind of relationships from which knowledge and social justice are created.¹⁹⁷

3. Social Constructivist Law School Pedagogies

In the social constructivist law school environment, students experience the pedagogy of "perspective taking." They learn to understand, recognize, appreciate, respect, and respond helpfully to the thoughts, feelings, and intentions of others. As the Pope envisions, these

188. *Id.* at 14–15.

189. *Id.* at 15.

190. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 27.

191. *Id.* at 30.

192. *Id.*

193. *Id.* at 31.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 29.

students are taught to “hear both the cry of the earth and the cry of the poor.”¹⁹⁸

Experiential learning, which is one of the key ingredients in Ignatian Pedagogy, is indispensable to learning the habit of perspective taking. It can be provided through clinics, practice, and externships. In these learning environments, students are required to become proximate, to experience discomfort, to engage in accompaniment, and to act in solidarity with others.

In a social constructivist law school learning community, the environment is a source of tremendous value and meaning. It becomes a critical “third” teacher. Natural materials of all kinds are praised and repurposed rather than misappropriated or thrown away. As the Pope teaches, reusing something is an act of love that expresses our own dignity.¹⁹⁹ Social constructivist learning environments serve the Pope’s goal of promoting a “new way of thinking” about “our relationship with nature.”²⁰⁰ Law schools can encourage this way of appreciating natural and repurposed materials by creating “maker spaces,” either in common areas or in library space no longer needed for hard copy materials.

Law students both in and out of the classroom should be prompted to pursue collaborative projects in which learning grows from “compassionate care”²⁰¹ and “dialogue with others.”²⁰² The best collaborative exercises require students to perform self-examination, dialogue, and generous encounters between persons.²⁰³ The pedagogy of perspective taking also requires that students understand and work to overcome implicit biases in themselves and others. It fosters the development of cultural competencies.

In addition, the most effective collaboration includes projects in which faculty are partners with students in their learning. In fact, in the social constructivist law school, tenured faculty, untenured faculty, adjunct faculty, and staff would all become partners in the learning community. All members of the law school community would be given dignity in their work.²⁰⁴ The school would support access to “steady employment for everyone no matter the limited interests of business and dubious economic reasoning.”²⁰⁵

198. Pope Francis, *supra* note 1, para. 49.

199. *Id.* para. 211.

200. *Id.* para. 215.

201. *Id.* para. 210.

202. *Id.* para. 81.

203. *Id.* para. 47.

204. *Id.* para. 124, 128.

205. *Id.* para. 127 (footnote omitted).

In collaborative and experiential learning settings, law students also break down the artificial divisions between domains of learning, between subjects within law school and among disciplines outside of the law; they discover an integral ecology.²⁰⁶ They hear the cry of the poor and of the environment not as either a math problem or a literacy problem, or as either a torts problem or a contracts problem, but as a human and social problem that requires a transdisciplinary, multifaceted solution.

A law school that uses social constructivist approaches, such as perspective taking, experiential learning, valuing the environment as a teacher, and collaborative projects, would become a learning community that transforms students from passive consumers of information to collaborative innovators who construct knowledge and social justice by building meaningful relationships. The social constructivist approach is aligned with Pope Francis's teachings about human nature, and therefore has the potential to offer an education to students that will support the fulfillment of their human potential.

B. Law Schools Can Develop an Open-Minded and Openhearted Curriculum for the Future

The social constructivist law school curriculum is emergent from the interests and curiosities of the students. Time is more important than space. Students are given time to explore and act on their ideas in great depth, even if it might sacrifice "coverage." As the Pope teaches, learning takes place by stopping and appreciating, and being grateful for beauty in small things.²⁰⁷

By decrying the replacement of workers with machines, the Pope also provokes us to consider a question that goes both to the heart of what it means to be human and to the future of legal education: in the next ten years, what will lawyers be able to do for their clients that cannot be done better by a machine?

Law school graduates can provide profound value to their clients by offering them habits of mind and heart like discipline and perseverance, synthesis and visualization of data, creativity, ethics, and respect. These are the very habits of mind that Howard Gardner argues are indispensable to the future success and well-being of students pursuing any endeavor.²⁰⁸

These habits or competencies are particularly vital to success and well-being in the practice of law.²⁰⁹ In their report, *Foundations for Practice*, the Institute for the Advancement of the American Legal System

206. *Id.* para. 11.

207. *Id.* para. 215, 220.

208. See GARDNER, *supra* note 71, at 6–7.

209. *Id.*

and the University of Denver School of Law's Educating Tomorrow's Lawyers received and analyzed surveys from more than 24,000 lawyers in fifty states and found that the key to success in the practice of law is the attorney's emotional intelligence and character.²¹⁰

Specifically, practicing attorneys reported that law students who entered the profession achieved success if they developed professional competencies and habits such as the ability to develop relationships with clients, to listen, to communicate effectively, to respond attentively to a client's needs, to treat others with respect, to honor commitments, to persevere, to be trustworthy, to manage stress, and to work collaboratively as part of a team.²¹¹ These habits of mind and heart are indispensable to the effective and the ethical practice of law. They are developed in a social constructivist law school learning environment.

C. Law Schools Can Provide Loving Care for the Whole Person

In this era of growing concerns about law student wellness, all educators should have a conversion of the heart in which they strive to care for the whole person. Educators should be attuned and responsive to the physical, social, emotional, and spiritual needs of all students. Meeting those needs is indispensable to learning and well-being.

Members of a social constructivist law school learning community also understand that all students can contribute to the learning environment, particularly those who display neurodiversity. The consumptive and behaviorist model of education leads to an understanding of human development that treats learning differences as deficits. Students who process information in a common way set the standard for rewarded behavior. All students who learn in ways that depart from the norm are identified as disabled and are given treatment to try to standardize their learning. But research into brain development belies that model; different approaches to learning are not deficits. Rather, they reflect neurodiversity: the variations in learning strategies that are the result of the natural evolution of human brain development.

As Steve Silberman describes in his brilliant book, *NeuroTribes: The Legacy of Autism and the Future of Neurodiversity*, the recognition of neurodiversity correctly reframes diagnoses such as ADHD or autism spectrum disorder as differences in learning strategies along a natural

210. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EDUCATING TOMORROW'S LAWYERS, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 5 (July 2016), http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf [https://perma.cc/E5YM-EWXR] [hereinafter FOUNDATIONS FOR PRACTICE].

211. *Id.*

continuum.²¹² All learning takes place on that continuum. Silberman demonstrates that

[o]ne way to understand neurodiversity is to think in terms of *human operating systems* instead of diagnostic labels like *dyslexia* and *ADHD*. The brain is, above all, a marvelously adaptive organism, adept at maximizing its chances of success even in the face of daunting limitations . . . Not all the features of atypical human operating systems are bugs. By autistic standards, the “normal” brain is easily distractible, is obsessively social, and suffers from a deficit of attention to detail and routine. Thus people on the spectrum experience the neurotypical world as relentlessly unpredictable and chaotic, perpetually turned up too loud, and full of people who have little respect for personal space.²¹³

Accordingly, educators who are attuned to the most recent brain research can appreciate and build upon great strengths in each of the different approaches to learning. Students with learning differences, therefore, should not only be accommodated but also celebrated.

Similarly, educators should not only tolerate but also embrace students for whom English is an additional language. A language-rich learning environment benefits all students, including those whose home-language is English. The evidence is overwhelming: a learning environment that includes and celebrates dual-language learners along with native English speakers is an effective model for both dual-language learners *and* native English speakers.²¹⁴ As the Foundation for Child Development reports, all students “benefit cognitively, linguistically, culturally, and economically from learning more than one language.”²¹⁵ Law students, therefore, should seek out an education program that not only includes students for whom English is an additional language but also embraces the home languages of those students.

Finally, an educational environment inspired by the Pope’s teachings and by neuroscience would implement trauma-informed practices. In “The Pedagogy of Trauma-Informed Lawyering,” Professors Sarah Katz and Deeya Halder describe a traumatic event as one that “renders an

212. STEVE SILBERMAN, *NEUROTRIBES: THE LEGACY OF AUTISM AND THE FUTURE OF NEURODIVERSITY* (2015).

213. *Id.* at 471.

214. See Linda M. Espinosa, *PreK-3rd: Challenging Common Myths About Dual Language Learners: An Update to the Seminal 2008 Report*, FOUND. FOR CHILD DEV. 15 (2013), <https://www.fcd-us.org/assets/2016/04/Challenging-Common-Myths-Update.pdf> [<https://perma.cc/2XGY-B55C>].

215. See *id.* at 19.

individual's internal and external resources inadequate, making effective coping impossible.²¹⁶ They explain:

A traumatic experience occurs when an individual subjectively experiences a threat to life, bodily integrity or sanity. . . . External threats that result in trauma can include, experiencing, witnessing, anticipating, or being confronted with an event or events that involve actual or threatened death or serious injury, or threats to the physical integrity of one's self or others.²¹⁷

Traumatic experiences are a common human experience.²¹⁸ Studies illustrate connections between trauma and experienced racism and between trauma and urban poverty.²¹⁹ Exposure to trauma has a direct impact on academic success.²²⁰ As Professor Miranda Johnson illustrates:

A childhood background of trauma enhances the likelihood of school failure. Many students from neighborhoods high in violence come to school traumatized by what they witness in their daily lives. Constantly in "fight or flight" mode, they may act inappropriately in response to even minor triggers. Traumatized students are more likely to have poor attendance as well as academic and behavioral problems.²²¹

Law school leaders who seek to provide loving care for the whole person will implement trauma-informed practices. They will support law students who have experienced, or are experiencing, trauma. Katz and Haldar explain:

To be trauma-informed means to be educated about the impact of interpersonal violence and victimization on an individual's life and development. . . . Trauma-informed practice recognizes the ways in which trauma impacts systems and individuals. Becoming trauma informed results in the recognition that behavioral symptoms, mental health diagnosis, and involvement in the criminal justice system are all manifestations of injury, rather than indicators of sickness or badness—the two current explanations for such behavior.²²²

216. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 364 (2016).

217. *Id.*

218. *Id.* at 367.

219. *Id.* at 364–65.

220. Miranda Johnson, Opinion, *Education Investment Critical in Ending Chicago's Violence*, HILL (Feb. 17, 2017), <http://thehill.com/blogs/pundits-blog/education/320104-education-investment-critical-in-ending-chicagos-violence> [<https://perma.cc/SAP8-EVNR>].

221. *Id.*

222. Katz & Haldar, *supra* note 216, at 369–70.

Trauma-informed practices include an additional layer of support services needed for students as well as structural changes needed to ensure such services are available and feasible for use by the students. In doing so, law schools would directly reflect what is at “the heart of what it is to be human.”²²³

D. Law Schools Can Become More Inclusive

The Pope teaches us that the cry of the poor should lead us to find ways to invest our resources to provide a legal education to those who cannot otherwise afford one. Additionally, the Pope’s teachings about the plight of migrants and displaced peoples should lead us to ensure that all qualified students are welcome regardless of their immigration status. Importantly, some law schools have developed financial assistance programs for Deferred Action for Childhood Arrival (DACA) students.²²⁴

Diversity in the learning environment should be celebrated. Diversity in backgrounds and perspectives provides tremendous growth and learning.²²⁵ A diverse early learning environment produces significant educational benefits for all students including promoting cross-racial understanding; reducing prejudice, stereotyping, and implicit bias; and fostering collaborative problem-solving.²²⁶ These skills are vital to a law student’s ultimate ability to find success and well-being in increasingly diverse work and social environments.

Moreover, a diverse learning environment advantages students by strengthening their cognitive abilities.²²⁷ We now know that students learn best in small groups.²²⁸ And we also know that the groups that are best for learning are those that are diverse.²²⁹

223. Pope Francis, *supra* note 1, para. 11.

224. See, e.g., *Welcoming Students with DACA Status*, LOYOLA U. CHI. SCH. OF LAW, <http://www.luc.edu/law/homenews/welcomingstudentswithdacastatus.shtml> [https://perma.cc/YH62-5MLN]. Loyola University Chicago School of Law offers scholarship assistance to qualified admitted students with Deferred Action for Childhood Arrivals (DACA) immigration status or who are DACA-eligible. According to the website, “These students are eligible for admission to Loyola’s School of Law and are eligible to sit for the bar exam and apply for and obtain a license to practice law in the state of Illinois. . . . As a Jesuit institution of higher learning, Loyola University Chicago firmly believes in the dignity of each person and in the promotion of social justice. The School of Law offers a welcoming and supportive environment to all students, including qualified undocumented individuals who are interested in pursuing a legal education. Moreover, it is simply in the interest of the legal profession and the people we serve to utilize the talents of qualified students of this immigration status.” *Id.*

225. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 61, at 73.

226. *Id.* at 75.

227. *Id.* at 73.

228. *Id.*

229. *Id.* at 74.

When a student is exposed to different thoughts, ideas, perspectives, and backgrounds, the student experiences cognitive dissonance, incongruity, and imbalance.²³⁰ The student's brain then must work hard to process the information, to absorb the dissonance, and to accommodate the unusual perspective.²³¹ Regular encounters with people with diverse experiences strengthen a person's brain.²³² These encounters help to develop the mental capacity to engage in higher order thinking skills and complex problem-solving strategies.²³³ Diversity thus promotes better problem-solving.²³⁴ Diverse groups of learners consistently outperform otherwise high-achieving groups in solving complex problems.²³⁵ Diverse individuals in a group create a higher level of collective intelligence than groups comprised even of higher achieving individuals.²³⁶ Diversity in the learning environment thereby fosters increased individual and group innovation.²³⁷

A diverse learning environment also builds the critical cognitive capacity to take another person's perspective.²³⁸ The ability to appreciate, understand, and respect the thoughts, feelings, and intentions of people who seem to be different is particularly challenging. But the pattern of confronting and overcoming the challenge of accommodating different perspectives is the key to learning.²³⁹ The experience enables the student to embrace rather than to fear difference.²⁴⁰

In addition, a diverse learning environment creates vital cross-cultural competencies, including the ability to understand and navigate a culture different from one's own.²⁴¹ Students who learn in a diverse learning environment grow to be professionals with the cross-cultural competency necessary to compete in a diverse global economy.²⁴²

Diversity produces greater democratic citizenship outcomes because students grow to understand that differences need not be divisive, appreciate another person's perspective, and become engaged in

230. *Id.* at 73.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 74.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 73.

239. *Id.* at 74.

240. *Id.*

241. *Id.* at 75.

242. *Id.*

leadership and civic activities.²⁴³ A diverse learning environment produces students who are better able to resolve conflict without violence.²⁴⁴

In fact, the development of interpersonal relationships between students of different races in the law school educational environment is more effective at promoting the benefits of diversity than any other pedagogical method.²⁴⁵ Interracial contact leads to stronger interpersonal cognitive skills because students learn to be more careful, nuanced, and precise in their perceptions of the thoughts, feelings, and intentions of others.²⁴⁶

The lack of diversity on the other hand facilitates the growth in minority students of stereotype threat, which is a powerful force undermining belief in one's own abilities.²⁴⁷ Diverse educational environments help to mitigate the harmful effects of implicit bias in all members of the learning community.²⁴⁸ Because students who have important relationships with diverse peers in a learning environment grow to manage implicit bias, they do not suffer the interference with cognitive processes and executive function that such bias can produce.²⁴⁹

Accordingly, law schools wishing to create educational environments aligned with the Pope's teachings should pursue strategies designed to attract, retain, and celebrate a diverse student body. One of the most effective strategies that law schools can employ to become more inclusive communities is to make visible through multiple media the presence of persons of color. Law schools can adorn their walls with pictures of their students, alumni, and teachers of color. These pictures send a powerful message to all members of the learning community that persons of color are an integral part of the culture of the school.

E. Traditional Methods of Formative and Summative Assessment Can Be Augmented by Documentation

In this context, documentation means the practice of making visible the process and the products of individual and group learning through multiple media to multiple stakeholders.²⁵⁰ It represents a significant advance over the traditional, individualized assessment and accountability regimes based on standardized testing. It transcends even the use of formative assessments. It also calls into question the validity of any

243. *Id.*

244. *Id.*

245. *Id.* at 75–76.

246. *Id.* at 76.

247. *Id.*

248. *Id.*

249. *Id.* at 74.

250. *Id.* at 127.

artificial grade curves. Documentation makes visible not just the products of learning but also the processes of learning. It assesses not just individual growth but collective growth. It is not static but involves all partners in the learning process in a dynamic process of meta-cognition.

While there is no limit to the various modalities and styles of documentation, several modes applicable to law schools include group presentations, group capstone projects, culminating interviews with members of the relevant community affected or represented, and demonstrations of processes learned.

F. Law Schools Can Explore Alternative Methods of Delivering Legal Education to Reach a More Diverse Group of Students and to Serve a More Diverse Client Population

The Pope's call for more diversified and innovative forms of production cannot exclude the production by law schools of more diversified and innovative forms of legal knowledge.²⁵¹

Loyola University Chicago School of Law, for example, has developed an innovative Weekend J.D. program which employs blended learning and flexible scheduling to provide access to legal education for students whose economic, family, and work circumstances would otherwise preclude them from entering the profession.²⁵²

Additionally, Loyola School of Law created several hands-on, collaborative clinics aimed to provide services and support to reach diverse and often underserved client populations, including a working law practice serving children²⁵³ and a records relief program serving those reentering society from incarceration.²⁵⁴

In addition, law schools have begun to deliver legal education to non-law students by offering online degrees, such as the M.J. in Business Law and stand-alone certificate programs.²⁵⁵

These programs offer an unbundled legal education, and hold the promise of enabling law schools to provide an education that might

251. Pope Francis, *supra* note 1, para. 191.

252. *Introducing Loyola's Weekend JD program*, LOYOLA U. CHI. SCH. OF LAW, <http://www.luc.edu/law/degrees/jurisdoctor-part-time/> [https://perma.cc/YB67-UVHR].

253. *Civitas Childlaw Center*, LOYOLA U. CHI. SCH. OF LAW, <http://www.luc.edu/law/centers/childlaw> [https://perma.cc/YT4T-J75X].

254. *Life After Innocence*, LOYOLA U. CHI. SCH. OF LAW, <http://www.luc.edu/law/academics/clinicalprograms/lifeafterinnocence/> [https://perma.cc/ML5C-7GFC].

255. The American Bar Association lists the growing number of law schools that are offering non-JD degrees and certificate programs. See *Programs by Category*, AM. B. ASS'N, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html [https://perma.cc/26HP-A9WD].

produce graduates able to deliver less costly, unbundled legal services to clients in the future.

G. Researchers All

Law schools can encourage their faculties to conduct collaborative transdisciplinary research, scholarship, and outreach to pursue social justice by designing solutions to the social problems identified by the Pope. As Dean Vincent Rougeau indicates, law schools should provide “convincing global moral leadership that is intelligible across borders and cultures.”²⁵⁶ Law school faculties should begin to understand themselves as agents of social change within a gritty local and global reality.

Moreover, in a Pope-inspired law school, all members of the learning community—including students, administrators, alumni, full-time faculty, and adjunct faculty—are respected as researchers. The law school should begin by valuing each of these community stakeholders as an equal partner in the scholarship that is produced by the community. Law schools can start this process by giving to all of their faculty—including non-tenured and adjunct faculty—dignity in their work and steady employment. Even if there were structural and economic impediments to treating all of these members of the law school community as co-equal partners in the learning process, the Pope warns us that we should strive to provide that common dignity “no matter the limited interests of business and dubious economic reasoning.”²⁵⁷

H. Law Schools Can Act in, for, and with the Community

Law schools can take steps to break down the barriers between the school and the surrounding community. Law schools can welcome community members into the law school building to make visible the learning that takes place, allow community members to share law school facilities, and transform the law school space into a hub of the community and a center of discourse. By making the law school a center for the community instead of an inclusive society, the world’s leading jurists, policy makers, and thought-leaders from a variety of disciplines would be able to gather to share their wisdom with the public.

256. Vincent Rougeau, *A Cosmopolitan Church Confronts Right-Wing Populism*, 40 SEATTLE U. L. REV. 1343 (2017).

257. Pope Francis, *supra* note 1, para. 127.

*I. Law Schools Can Foster Transformational and
Transdisciplinary Careers*

Many law schools offer internal loan repayment assistance programs to students who pursue careers in public service. The government also offers loan forgiveness and reduction programs for graduates who are employed in the public sector. Law schools can advocate for the expansion of these governmental programs. Moreover, they can increase their own investments in this financial assistance, with the help of creative fundraising efforts like student peer support, alumni giving, and crowd-funding.

Law schools can also support their students (and the clients they will serve) by encouraging them to develop transdisciplinary skills and credentials. As the *Foundations for Practice* report demonstrates, the best attorneys in the future will be able to serve their client's true needs only by approaching those needs from a transdisciplinary perspective.²⁵⁸

*J. The Law School's Centers, Institutes, and Signature Programs Can
Work to Construct Transdisciplinary Solutions to the Complex Local and
Global Problems Identified by the Pope.*

An integral ecology transcends academic disciplines that are narrowly defined and artificially separated.²⁵⁹ The law school can help to establish “a legal framework which can set clear boundaries”²⁶⁰ and can develop transdisciplinary social action projects to battle the specific ills identified by the Pope: environmental degradation; displacement and migration; local and global violence, poverty, and homelessness; gross disparities in resources; market manipulation; consumer exploitation; criminal injustice; health care disparities; racial and gender discrimination; and inequitable access to education, including legal education.

For example, in its most recent 2020 Strategic Plan, Loyola University Chicago declared that it is a “social project” in which all members of the University are called to contribute to transdisciplinary approaches to making our common home more just, humane, and sustainable.²⁶¹ The Plan inspires all departments, including the law school, to collaborate to solve specific global and local problems like health disparities, access to education, and criminal injustice.

258. See FOUNDATIONS FOR PRACTICE, *supra* note 210, at 19.

259. Pope Francis, *supra* note 1, para. 11.

260. *Id.* para. 53.

261. 2015–2020 Strategic Plan, LOYOLA U. CHI. 5 (2015), <http://www.luc.edu/media/lucedu/president/pdfs/FINAL-LoyolaPlan2020-2015.pdf> [<https://perma.cc/ZS6G-MCSE>].

CONCLUSION: SOCIAL JUSTICE IN LAW SCHOOLS THROUGH
'SOLIDARITY'

Pope Francis's teachings provoke us to consider how legal education might become an agent for social justice through pedagogies, practices, and programs that better reflect our natural longing to build meaningful relationships.

Social justice can be achieved through solidarity within a law school community and between the law school and the community surrounding the school. Law schools can pursue that solidarity through: social constructivist pedagogies, open-minded curricula, loving care for the whole person, inclusivity, documentation, alternative delivery models, research by all, in-community partnerships, transformational and transdisciplinary career pathways, and a yearning to pursue social justice through the work of the law school's signature centers and programs.

These strategies would help the law school to become a learning community that transforms students from passive consumers of information to collaborative innovators who construct knowledge and social justice by building meaningful relationships. Inspired by the Pope's teachings, law schools would thereby better serve their students, their communities, and our common home.