CRITICAL ENCULTURATION: USING PROBLEMS TO TEACH LAW

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INTRODUCTION: THINKING ABOUT TEACHING LAW

It is easy to lose oneself in both the excitement and enormity of the challenge that has become legal education. The recent publications of *Best Practices for Legal Education*[1] and *Educating Lawyers*[2] have reminded us that law teachers are shouldered with a task that extends beyond bar passage, duties that are felt beyond the teacher's own knowledge, and privileges that cannot be enjoyed in isolation, with paper and pen, in the law professor's office.[3] Law teaching practices should focus on effective *learning*, and so the call has been made to reassess our teaching practices.

As we launch into this noteworthy project, one identifiable challenge seems to be left largely (even if intentionally) unaddressed: in both *Best Practices* and *Educating Lawyers*, an emphasis has been placed on clinical programs and other mechanisms of experiential learning, perhaps overshadowing the attention that might be given to appropriate design considerations in doctrinal course offerings. As a result, a pressing question remains: if doctrinal law teaching should join in the shift to elevating professionalism and confidence in the law student—a shift to teaching with a focus on competency and skills instead of information—to what degree of confidence

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1. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

3. For an interesting analysis of the relationship between scholarship and teaching effectiveness, see generally Benjamin Barton, *Is There a Correlation Between Law Professor Publication Counts, Law Review Citation Counts, and Teaching Evaluations? An Empirical Study*, 5 J. EMPIRICAL LEGAL STUD. 619 (2008).

can the shift be championed by the doctrinal teacher?[4] This Article contributes to the dialogue by exploring the transfer of experiential learning principles into doctrinal course design. Specifically, this Article considers the applicability of one teaching method addressed in *Best Practices*—Problem-Based Learning (PBL), otherwise known as the "problem method"—in the doctrinal classroom.

Many doctrinal teachers have turned to educational and cognitive theory to model new methods of teaching and learning with the hopes of improving both the law school experience and the effectiveness of law school teaching. PBL has captured a great deal of attention to its success in a variety of fields, professions, and subject matters.[5] Although there are a variety of styles implemented in this method, the common element among them involves learning by doing: PBL is a curriculum choice to place students in an active role as problem solvers.[6] With its experiential underpinnings, the problem-based approach in law teaching is not new.[7] Recent experiments in law school, however, suggest that PBL methods offer a promising alternative for teaching students to react as effec-

4. It is not the intention of this project to construe law teaching methods as necessarily dichotomous—say, that all doctrinal teaching is merely the conveyance of information, and that all experiential learning is focused on lawyering skills. I find persuasive the idea that most law teachers fall somewhere in the middle between the need to grasp the meaning of certain fundamental rules of law and the need to foster the skills of critical analysis and legal reasoning to use those rules effectively. More important, perhaps, is the idea that we hope the two converge on the necessity of teaching critical thinking as a skill in the profession. *See also infra* note 107 and accompanying text.

5. The idea of learning through problems has emerged in many disciplines as a popular subject of scholarly articles and books, but by most accounts remains in its development stages. At least, those interested in the ideas behind this instructional method could access articles published in the newly established Interdisciplinary Journal of Problem-Based Learning and the variety of initiatives and associations at educational institutions. *See, e.g.*, UKCLE Problem-Based Learning Working Group, http://www.ukcle.ac.uk/resources/pbl/group.html (last visited Dec. 1, 2009); Transformational Learning Abilities Project, http://www.samford.edu/ctls/archives.aspx?id=2147484118 (last visited Dec. 1, 2009); Problem-Based Learning Faculty Institute, http://www.pbl.uci.edu/ (last visited Dec. 1, 2009); Problem-Based Learning, http://www.udel.edu/pbl/ (last visited Dec. 1, 2009).

6. *See* Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409–10 (1998); Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 654–55 (1984) (providing an explanation of the problem method and considering its strengths relative to the case method).

7. The notion that practical experience provides a more effective learning process (for lawyers, as in any discipline) has been championed by many jurists and scholars. *See, e.g.*, Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 914–23 (1933) (arguing in favor of teaching through the experiences of law practice); Morgan, *supra* note 6, at 413 (discussing promotion of experiential learning by the Legal Realists).

tive lawyers to problems that lawyers face and resolve.[8] It has also been argued that experiential learning can be a "superior method for generating passion and providing important types of context, and it can be cost effective as compared to alternatives."[9]

The present popularity of PBL in law school is often traced to discontent with the Langdellian, purportedly scientific-method-style of law school teaching and its Socratic implementation.[10] For instance, it is argued that the examination of appellate opinions provides a limited model for understanding how lawyers engage in legal problem solving: appellate decisions "do not help students understand why litigation was necessary to resolve a dispute, the decision-making processes of lawyers and clients, why settlement efforts failed, or why the judicial process failed to resolve the dispute before the appellate level."[11] Student reactions to the Socratic method suggest that the traditional law school class adversely affects student self-confidence, gender disparities, interest in the subject matter, and even the relationship between the students and the educational experience.[12] It is also noted that the design of the Socratic method limits the range of skills it engenders, most notably due to the lack of participation by students not

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8. *See, e.g.*, Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992) ("If our job is to train students to 'think like lawyers,' then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do. But—you reply—law schools cannot spend their scarce academic resources teaching students every single skill they will need in law practice—how to bill clients, how to manage an office, how to find the courthouse. True, but problem-solving is not like any of those activities. Problem-solving is the single intellectual skill on which all law practice is based.") (footnote omitted).

9. Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 52 (2001) (arguing for experiential learning in the classroom because "passion and context," which can be generated and fostered in the process of legal problem solving, "are central to effective legal education").

10. *See generally* Cynthia G. Hawkins-León, *The Socratic Method–Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1 (1998) (comparing the effectiveness, benefits, and criticisms of both the Socratic method and the problem-based approach, and ultimately concluding that a combination of the two methods, with more emphasis on the problem-based method, is the preferable way to teach law).

11. STUCKEY ET AL., *supra* note 1, at 144; *see also* Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 93 (2001) (stating that "the law is not contained in a few cases, it is distilled from many").

12. *See* Jennifer Gerarda Brown, *Apostasy?*, 75 CHI.-KENT L. REV. 837, 840 (2000) (identifying the intellectual and emotional impact of self-realization on law students); Hawkins-León, *supra* note 10, at 16 (discussing hostilities toward particular students or teacher).

engaged in the particular dialogue.[13] Of course, it is certainly arguable that traditional law teaching methods have survived due to proven effectiveness in transforming the way that students think.[14] Nonetheless, legal educators are in search of improved methods and models for law teaching.[15]

This Article makes the case for incorporating PBL methods into the law school curriculum based on two independent but overlapping reasons: the first, reflecting on pedagogical advantages, addresses the needs of the learner; the second, a theoretical point, considers the needs of the critical law teacher. The first suggestion is that the constructivist foundations of PBL can create an environment in which students do not learn merely because they are *exposed* to professional knowledge, but because they *use* the lessons in a manner expected of professionals in the field. Teaching through problems is thought to address the perceived deficiencies in legal education by transforming the students' thought processes—"thinking like a lawyer"[16]—*and* by providing opportunities to incorporate many dimensions of lawyering, including critical, conscientious, and effective professionalism.[17] The case for

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13. STUCKEY ET AL., *supra* note 1, at 134–35.

14. Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound 1/31/90)*, 109 HARV. L. REV. 911, 922 (1996) ("This method helps students learn lawyerly analysis by actually doing it before his peers and the instructor. The student becomes confident that he can discover answers he didn't suspect he knew—that he can reason through from what he knows to solve a problem . . . . The student sees that he *could* have asked himself those questions before class; that the kinds of questions the instructor asked can be self-posed after class. The internalization of that questioning process is not an illusion. It is the essence of legal reasoning and the prize of the SM.").

15. *See, e.g.*, Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 55–56, 77 (2003) (suggesting that legal education must change to catch up with the evolving purpose of law school and criticizing the tendency in law schools "to teach skills in separate courses from doctrine").

16. *See* SULLIVAN ET AL., *supra* note 2, at 186; Henderson, *supra* note 15, at 62 (arguing that "there are four elements to thinking like a lawyer: judgment capacity, legal reasoning capacity, communication capacity, and comprehension of professional norms and responsibilities").

17. *See, e.g.*, STUCKEY ET AL., *supra* note 1, at 152–59 (discussing the educational value of incorporating professionalism into legal education). Use of the term "critical" here is intended to mean both the more general idea of critical thinking (e.g., "to reason from evidence, to examine the quality of their reasoning using a variety of intellectual standards, to make improvements while thinking, and to ask probing and insightful questions about the thinking of other people," *id.* at 110), but also to the external, alternatives analysis provided in contemporary jurisprudence. *See generally* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) (describing the first-year law school experience and law school curriculums, and making suggestions for improvement that can be used in the debate over law school pedagogy).

PBL is bolstered in this Article with an example—teaching land use law through PBL methods—to demonstrate how adaptable and accessible the method can be.

The second reason for incorporating PBL into doctrinal courses is that PBL might also serve a teacher's more overt goals for a critical pedagogy. Assuming the question, from a critical perspective, is how to teach law and legal reasoning without subjecting students to unreflective indoctrination, PBL methods respond by helping to negotiate the divide between critical ideals and the need to teach doctrine in law school.[18] PBL methods address this perceived need by encouraging students to explore critical constructions in a meaningful way—allowing the exploration of both dominant and marginalized constructions, while working with (both within and without) a doctrinal framework. In other words, what is notable about teaching law through problems is not merely that it prioritizes professional competency (which may be trivially true about all teaching methods), but also that it can improve on our ideals about professionalism in the process.

Section I of this Article appraises the core concepts of problem-based learning as a critical, constructivist method of engaging students in the tasks of the profession. This section then discusses elements of effective problem design in a PBL curriculum, recognizing that well-designed problems offer the best incentive and environment for productive student participation in the learning process. Section II offers land use law as an example of how the advantages of PBL methods might be realized in teaching a challenging law school subject. To engage the exercise, this Article analyzes the character of land use law to identify the goals that problem-solving exercises might accomplish in the classroom. The Article concludes in Section III by offering three land use problems intended to engage students in the subject matter and foster critical, professional skills in the transition from students to lawyers.

18. ANTONIA DARDER, CULTURE AND POWER IN THE CLASSROOM: A CRITICAL FOUNDATION FOR BICULTURAL EDUCATION xvii (Henry A. Girous & Paulo Freire eds. 1991) ("A major concern of critical pedagogy is that students develop the critical capacities to reflect, critique and act to transform the conditions under which they live.").

I. USING PROBLEMS TO TEACH LAW

PBL's most obvious and pervasive application to law school, and the area of much of the literature on this subject, is in "lawyering skills" courses and clinical offerings in the law school curriculum: "[t]here is no more effective way" to enlighten students "than to have them perform the tasks that lawyers perform or observe practicing lawyers at work."[19] The literature on the use of PBL in law schools also illustrates ambitious experiments of increasing frequency and pervasiveness in all subject matters, including property law,[20] constitutional law,[21] civil procedure,[22] criminal law,[23] environmental law,[24] and alternative dispute resolution (ADR).[25] In each of these experiments, professors report an explosion of student interest, striking and surprising student innovation and ambition, and a renewed sense of passion for teaching the subject matter.[26]

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19. STUCKEY ET AL., *supra* note 1, at 170.

20. *See, e.g.*, Ann R. Shorstein, *"Coastal Kingdom," a New Vehicle for Teaching Property: How I Became Queen for More than a Day*, 18 ST. THOMAS L. REV. 803, 817 (2006).

21. *See, e.g.*, Barbara J. Flagg, *Experimenting with Problem-Based Learning in Constitutional Law*, 10 WASH. U. J.L. & POL'Y 101, 159–60 (2002).

22. *See, e.g.*, Michael P. Allen, *Making Legal Education Relevant to Our Students One Step at a Time: Using the Group Project To Teach Personal Jurisdiction in Civil Procedure*, 27 HAMLINE L. REV. 133, 152 (2004).

23. *See, e.g.*, Myron Moskovitz, *From Case Method to Problem Method: The Evolution of a Teacher*, 48 ST. LOUIS U. L.J. 1205, 1209–13 (2004).

24. *See, e.g.*, Heidi Gorovitz Robertson, *Methods for Teaching Environmental Law: Some Thoughts on Providing Access to the Environmental Law System*, 23 COLUM. J. ENVTL. L. 237, 260–61 (1998).

25. *See, e.g.*, Linda Morton, *A New Approach to Health Care ADR: Training Law Students To Be Problem Solvers in the Health Care Context*, 21 GA. ST. U. L. REV. 965, 975–77, 979–83 (2005).

26. Ann Shorstein's description of her goals in the "Coastal Kingdom," created for her Property Law course, illustrates how far the discovery process can be taken:

> Students would be given the opportunity to acquire property interests according to the rules laid down by the legislative body and, additionally, a monetary system would be put in place. It was my hope that students would become engaged in the process of acquisition; that they would understand the use of what they acquired, and the value of protecting their interests in their acquisition. Thus, I hoped that a power structure would be created in the classroom and that the students' exercise of that power would promote an understanding of the concept of property as a "bundle of rights." I anticipated that the "hands-on" activity involved in non-freehold and freehold ownership would better position the students to embrace the principles of property that are fundamental to any first year property course. The creation of Coastal Kingdom, as described in the following sections, is my attempt to maximize the limited time that the students spend in a first year survey course by emphasizing infusion and rigor.

The project illustrated in these efforts has been to engage legal problem solving, rather than to concentrate on explaining to students the solutions reached by appellate courts. Even the most vigorous and successful discovery of legal reasoning through the Socratic process is likely to leave off without imparting the critical lesson: now that we see how courts dispose of their function, what role does the lawyer play? The goal of PBL methods, in effect, is to stimulate student interest and focus student energy on tasks designed to develop an understanding of the substance of law by using the tools that law has to offer. Such lofty goals are illustrated both in the purposes of PBL and the principles for effective problem design.

A. Why Problems in Law Teaching?

The core principle of problem-based learning is that the *type of participation* in which students engage the materials will affect the quality of learning and understanding: PBL teachers hold to the principle that "[p]roblem solving is arguably the cornerstone of all formal education."[27] Using problems, it is argued, helps transform students from "passive receptors of the wisdom of the past" into participants in identifying both the existing law and the principles which should (or could) be reflected in the law.[28] In this "learner-centered approach,"[29] "students are active learners . . . [and] [t]eachers are facilitators . . . . During this process students work, usually in small groups, discovering solutions on their own, gaining insights into their own performance, and acquiring skills and knowledge as they solve problems."[30] PBL teachers intend to push

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Shorstein, *supra* note 20, at 806; *see also* James Rhem, *Problem-Based Learning: An Introduction*, 8 NAT'L TEACHING & LEARNING F., Dec. 1998, at 1–4, *available at* http://www.ntlf.com/html/pi/9812/v8n1smpl.pdf (explaining that PBL teachers generally agree that "they've seldom felt as energized about their teaching and seldom seen their students so motivated and involved").

27. Stephen Nathanson, *Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325, 328 (1998); *see also* Hawkins-León, *supra* note 10, at 12 ("Arguably, the most important lawyering skill is problem-solving.").

28. Morgan, *supra* note 6, at 413–14.

29. John R. Savery, *Overview of Problem-Based Learning: Definitions and Distinctions*, 1 INTERDISC. J. PROBLEM-BASED LEARNING, May 2006, at 9, 12, http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1002&context=ijpbl.

30. Nathanson, *supra* note 27, at 326.

students to learn,[31] while alleviating concerns about the effectiveness of theoretical lessons which have answers but questionable or confusing relevance to the practice of law.[32]

Advocates insist that PBL improves students' cognitive participation in the learning process by incorporating the notion that learning and understanding are inseparable. PBL teachers champion the constructivist notion that "what we understand is a function of the content, the context, the activity of the learner, and, perhaps most importantly, the goals of the learner."[33] PBL changes the goals of the learner from the student-centric goal of memorization for test taking, toward the ideal of understanding how professional problem solving is approached and applied. In confronting legal problem solving, students are required to position themselves underneath and prior to appellate decisions, into a framework from which the facts and law can be constructed.

By engaging students in problem solving, PBL courses are designed to encourage student freedom (and responsibility) in identifying the knowledge needed to resolve dilemmas in a given discipline. "Rather than reading or hearing about the facts and concepts that define an academic field of study, students solve realistic (albeit, simulated) problems that reflect the decisions and dilemmas people face every day."[34] In this process, the focus on resolving problems helps develop an awareness of the concepts and strategies employed in the profession. Hence, Joanna Dunlap argues:

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31. David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 455 (1943) ("What is needed and what the problem method can do is to give the student an active part in his own education. To make him cease to be an automaton grinding out notes, briefs, and summaries in which he redistills other people's thinking. To make him sweat, mentally and physically. To drive him and make him like it.").

32. *See* William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 222–23 (1996).

33. John R. Savery & Thomas M. Duffy, *Problem-Based Learning: An Instructional Model and Its Constructivist Framework*, *in* CONSTRUCTIVIST LEARNING ENVIRONMENTS: CASE STUDIES IN INSTRUCTIONAL DESIGN 135, 135 (Brent G. Wilson ed., 1996) (describing the constructivist exercise as founded in, or at least analogous to, Richard Rorty's pragmatic vision of epistemology and cognition).

34. John R. Mergendoller et al., *The Effectiveness of Problem-Based Instruction: A Comparative Study of Instructional Methods and Student Characteristics*, 1 INTERDISC. J. PROBLEM-BASED LEARNING, Nov. 2006, at 49, 49, http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1026&context=ijpbl.

> Learners study the knowledge and tools of the profession in a classroom, which is an artificial, decontextualized setting making it difficult to transfer learning into authentic situations. Describing how most students learn to use the conceptual tools (e.g., mathematics) of a culture (e.g., physics), Brown and colleagues described the need to situate the learning of tools, skills, and strategies within an authentic or simulated culture:
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> > Conceptual tools . . . reflect the cumulative wisdom of the culture in which they are used and the insights and experiences of individuals . . . . To learn to use tools as practitioners use them, students, like apprentices, must be enabled to enter that community and its culture. Thus, in a significant way, learning is, we believe, a process of enculturation.
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> Acting as practitioners and using the tools to address authentic problems of the domain exposes students to the culture of expert practice.[35]

The advantage of this method, then, is identification and practice of the expertise required of a given discipline. Enculturation of lawyers is the ultimate purpose of law schools,[36] and students confront the culture of the legal profession when teaching methods expose "the correspondence, in some way or other, of learning to the world of practice that exists outside of teaching institutions."[37]

What is notable about this method is that what teachers gain in opportunities to address professionalism and lawyering skills is not offset by a loss in teaching substantive law. Mindful of the student mantra—"I read and I forget; I see and I re-

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35. Joanna C. Dunlap, *The Effect of a Problem-centered, Enculturating Experience on Doctoral Students' Self-Efficacy*, 1 INTERDISC. J. PROBLEM-BASED LEARNING, Nov. 2006, at 19, 21, http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1025&context=ijpbl (quoting John S. Brown et al., *Situated Cognition and the Culture of Learning*, 18 EDUC. RESEARCHER 32, 33 (1989)).

36. Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L.J. 17, 30 (2008) ("The purpose of law school, to a great degree, is to acculturate a student—a would-be lawyer—to the traditions of the legal profession so that the student is imbued with the proper expectations, interests, and prejudices.").

37. Karen Barton et al., *Authentic Fictions: Simulation, Professionalism and Legal Learning*, 14 CLINICAL L. REV. 143, 145 (2007) (evaluating the challenges to truly authentic learning experiences).

member; I do and I understand"[38]—PBL recognizes that "[p]roblem-solving skills can be developed only by actually working through the process of resolving problems."[39] PBL methods improve retention by situating knowledge into a constructive context, embedding information through *use*.

Of course, PBL might be considered relatively benign, perhaps amounting to little more than a reformulated and repackaged method of maintaining the status quo and training students to adapt to the circumstances of the legal hierarchy.[40] Of course, this criticism would largely be accurate to the extent that PBL is intended to foster students' effective transition into a professional community that is arguably defective in its structure and content. However, rather than subtly suggesting to students that they succumb to the "prophecies the system makes about them and about that world,"[41] teaching through problem solving is constructed upon the student discovery of the values that are lost or gained in the application of legal rules, of the perspectives that shaped law (or were excluded from law), and of the consequences of legal protection. The enculturation process underlying PBL thus faces a longstanding pedagogical conflict noted in critical scholarship by requiring students to differentiate between legal rules and inopera-

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38. Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 943 (1996) (citing Robert E. Keeton, *Why Use a Computer in Teaching and Learning Law?*, *in* TEACHING LAW WITH COMPUTERS: A COLLECTION OF ESSAYS 3, 6 (Russell Burris et al. eds., 1979)).

39. STUCKEY ET AL., *supra* note 1, at 142.

40. If so, even the PBL approach would serve the purposes of subordination, "effectively withholding from most law students any structured opportunity to acquire self-liberating knowledge." Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 71 (2003). Duncan Kennedy remains unconvinced that the mere act of renaming the methods of legal education will operate to overcome the hierarchical training of the institution. He cautions that legal education:

> builds consciousness, a way of being that makes you a willing participant. It makes you a bought-in person who is doing the work of the system and enjoying the rewards of rulership, administering disastrous policy for yourself as well as for other people. That is a psychological enterprise; it inculcates a way of being in relation to the state; a way of being in relation to power in general, and it's taught in law school classrooms. Not today in the brutal Socratic mode of the 1960s but in a much more seductive, in fact, mind-numbing mode. The new, nicer mode is just as much a mode of recruitment, of intra-elite solidarity, as the old hazing mode was, and we can resist this one, too.

Duncan Kennedy, *Teaching From the Left in My Anecdotage*, 31 N.Y.U. REV. L. & SOC. CHANGE 449, 453 (2007).

41. Kennedy, *supra* note 17, at 591.

tive facts, but without requiring students to shed extra-legal or alternative constructs of a legal system which is allegedly imbalanced, nonlinear, and even capricious in organization.

Stated otherwise, the element that PBL adds to the enculturation process is a constructive one: PBL "helps put a human face on legal issues"[42] in the same manner that narrative scholarship adds to legal analysis. Stories tell "the qualities of actual human experience"[43] and "humanize us";[44] they give access to the dominant story, but also require students to look beyond the "walls of social complacency that obscure the view out from the citadel"[45] in ways that appellate decisions cannot (by design) strive to achieve. What PBL adds to critical legal education is a pedagogical goal about which critical scholarship can only hypothesize: access to the stories of marginalized communities and selves may bring the question of power to the fore,[46] but teaching students to represent the storyteller is empowerment.

B. Design Considerations in PBL Courses

Attention to the design and the methods of PBL reflects that students do not learn merely because they are given problems to solve.[47] PBL's emphasis on design recognizes that appropriate problems, combined with calculated problem management, a challenging context in which to apply knowledge, and a constructive environment in which to perform and reflect on

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42. Morgan, *supra* note 6, at 413.

43. Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 IND. L.J. 589, 635 (2009) (quoting JAMES BOYD WHITE, *Doctrine in a Vacuum*, *in* FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 8, 18 (2000)); *see also* SULLIVAN ET AL., *supra* note 2, at 96 ("[Storytelling] is the source of meaning and value, even in contemporary society.").

44. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989).

45. *Id.* at 2441.

46. *See* Valdes, *supra* note 40, at 86 (stating that the "indispensable features" of a critical pedagogy include the following: "(1) a consistent commitment to antisubordination knowledge and praxis, (2) guided by multidimensional yet contextual understandings of law and society, and (3) informed by critical and self-critical analysis").

47. *See* Richard E. Mayer, *Should There Be a Three-Strikes Rule Against Pure Discovery Learning?: The Case for Guided Methods of Instruction*, 59 AM. PSYCHOLOGIST 14, 16–17 (2004) ("Students need enough freedom to become cognitively active in the process of sense making, and students need enough guidance so that their cognitive activity results in the construction of useful knowledge . . . . [W]hen students have too much freedom, they may fail to come into contact with the to-be-learned material.").

the process, will further the learning process. Effective PBL design requires that we change both the manner in which knowledge is presented to students and the way we think about learning. Although some students may learn problem-solving strategies simply by being given a problem to solve, the teacher-as-facilitator[48] will avoid disparate results, provide a more effective learning environment, and will reduce the likelihood that many students will experience frustration and error. On the other hand, students' stake in the problems, and ownership of proposed solutions, requires giving sufficient berth so that students can identify information needed to solve the problem. Teachers can optimize the benefits of PBL methods in the problem-solving process through the quality of problems presented to students.

PBL literature illustrates a variety of interesting and undoubtedly critical paradigms for a successful PBL course, rather than a single, uniform model.[49] From my own experiences and the literature, I would suggest the following non-exhaustive list of design factors for consideration in designing

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48. Although doctrinal courses may not be completely well-situated to maximize the benefits of effective mentoring (compared to other experiential learning activities, such as clinical programs), law teaching arguably serves fewer and less ideal aspirations where teachers fail to adopt the duties and framework of the mentor's role. By simulating problem-solving activities of the law profession, the PBL teacher might play the role of the mentor to facilitate professionalism and competency in lawyering. *See generally* Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102 (2007) (discussing the functions of the mentor relationship).

49. *See supra* notes 20–25 and accompanying text. Woei Hung has proposed the "3C3R" conceptual framework for problem design, which suggests the integration of two classes of components for successful problems. Woei Hung, *The 3C3R Model: A Conceptual Framework for Designing Problems in PBL*, 1 INTERDISC. J. PROBLEM-BASED LEARNING, May 2006, at 55, 56, http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1006&context=ijpbl. The three "core" knowledge-building components, including content, context, and connection, focus on learning concepts necessary for the discipline. *Id.* The three "processing" components, including research, reasoning, and reflection, engage the cognitive processes of problem solving. *Id.*

In the legal context, Stephen Nathanson has provided six features of good problems. Nathanson, *supra* note 27, at 330. To maximize the benefits of PBL, Nathanson advises that problems should illustrate the following characteristics: problems should be user-friendly; realistic; relevant; consistent with course objectives; similar, but different; and challenging. *Id.* Although Nathanson's problem features have obvious relevance to problem design in PBL, these features are likely applicable to any teaching method. For instance, choosing opinions to teach under the case method should also avoid unnecessary or confusing tangential issues (which require too much explanation at the loss of the lesson); should be "user-friendly" relative to the students' level of sophistication; should be relevant, timely, and interesting; and so on. That said, Nathanson has specific goals in mind in identifying these features, which should be explored and emphasized in designing problems.

problems in a law school course. In a general sense, the design of the PBL course depends on consideration of the subject matter, the skills needed to practice effectively in the professional area, and the resulting goals of the course. The content of problems should stimulate passion for the subject matter and creativity in problem solving. The rules of the problem should be relatively well defined and exhibit high expectations for active engagement and sophisticated performance. The problem-solving process should allow for management and supervision by the teacher-as-facilitator, but sufficient independence to allow for personal autonomy and self-discovery. Beyond these generalities, a few specific elements of design require deep consideration.

First, problems should be relevant to and consistent with the objectives of the topic. Of course, consistency with the subject topics cannot be overstated. Problems should be drafted to avoid frolics: depending on the intended scope of the exercise, an environmental law problem intended to emphasize the legal differences between characteristic and listed wastes might avoid being resolved on standing grounds; a takings problem intended to illustrate "background principles" of property rights might avoid a factual scenario lending itself to a procedural due process challenge; and so on. Consistency between student problem-solving strategies and course objectives ensures that students confront problem solving in an organized and calculated fashion. Relevancy and consistency require that problems facilitate use of subject-specific resources and address the subject topics.[50]

Second, students should feel they are learning useful knowledge and skills, something that is essential to the PBL method. The need for student feeling of ownership of the problem and solutions, often depending on the authenticity of the experience and ability of students to personalize the process, suggests that problems should be as realistic and engaging as possible.[51] The more realistic the problem, and hence the more exposure students have to lawyering, the more that teachers

50. To this extent, a problem should be generalizable if possible, such as in facilitating resource identification and use and recognizing doctrinal authorities.

51. *See generally* GABRIELE BAUER, QUALITATIVE ASSESSMENT ACTIVITIES FOR PEW GRANT ON PROBLEM-BASED LEARNING (PBL) (2003), *available at* http://www.udel.edu/pbl/Final-Report-Pew-PBL.pdf (reporting that among the most significant benefits of PBL methods identified by students is the retention of knowledge realized in authentic problem engagement).

can expect their students to adopt the roles they seek to inherit.

Third, students should be encouraged to collaborate through the problem-solving process. As indicated throughout the PBL literature, collaboration "is an immeasurably valuable tool" in the lawyering process.[52] Literature on the importance of a collaborative context for problem solving recognizes that collaboration can be both a learning *tool* and a learning *goal*.[53] As a learning tool, collaboration allows students to learn through the exchange of perspectives, through negotiation over conceptual understandings, and also through sharing workloads and assuming leadership or expert roles (both in content and as a social skill set). In the collaborative process, students can assist, challenge, and even model for one another, and group discovery can act as a motivator where students are individually accountable to the group, while sharing responsibility for the results of their efforts.[54] As a learning goal, participants develop the skills necessary to engage in successful team play. In the meantime, problems designed for collaborative resolution can be more aggressive (pedagogically speaking), sophisticated, and authentic, without the correlative fear that students will be overwhelmed in their new roles. Not every problem calls for collaboration, perhaps, but the collaborative process has been identified as one of the features which distinguishes the student-based discovery process from the passive learning environment.[55]

Fourth, problems should be designed to reflect ordinary and everyday conflicts and circumstances. Recognizing that the real world is messy and ill-structured,[56] PBL advocates note

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52. Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 698 (2004).

53. Louisa Remedios et al., *Framing Collaborative Behaviors: Listening and Speaking in Problem-based Learning*, 2 INTERDISC. J. PROBLEM-BASED LEARNING 1, 2 (2008), http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1050&context=ijpbl.

54. STUCKEY ET AL., *supra* note 1, at 124 ("Active learning requires students to share responsibility for acquiring knowledge, skills, and values.").

55. *See generally* Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 185 (2003) (discussing the pedagogical background and promise of collaborative learning projects). *But see* Allen, *supra* note 22, at 150–51 (discussing problems in group projects).

56. Nathanson points out that problems should be "user-friendly," or relatively clear and easy to understand. *See* Nathanson, *supra* note 27, at 330–31. Nathanson appropriately points out that "poorly written problems impede learning" by taking time away from learning and

that "[t]he problem simulations used in problem-based learning must be ill-structured and allow for free inquiry."[57] A more authentic problem provides a more persuasive link between the learning process and skills upon which the student will be asked to base her profession. In all likelihood, such a problem is messy.[58] In practice, few attorneys encounter a perfectly situated controversy, and students are likely aware of that circumstance (and, as such, the "perfect problem" risks appearing contrived and arbitrary). In contrast, an authentic experience of lawyering allows students to engage as lawyers in a real-world problem, encouraging students to take ownership of the solutions, strategies, and advocacy developed in the process. As Alan Lerner states, "Learning tends to be more powerful when its motivation is internally generated by the learner's belief in the usefulness of the learning. A belief that what one is doing has real value to oneself or others is a powerful motivator."[59]

Finally, students must be given an opportunity for reflective presentation, or reporting on the results of the problem-solving process. Performance plays an important role in the problem-solving process by requiring students to organize the problem, solutions, and methods encountered in the process. In addition, as much of the PBL literature reveals, learning in the PBL setting is partially dependent on effective problem management, guidance, and evaluation of performance, each of which is most effective in a performance setting. It is important to recognize the role performance plays in design: it both allows teachers to assess progress and accomplishment of

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misdirecting student attention toward the design of the problem (instead of the problem-solving process itself). *Id.* Nathanson's suggestion on the importance of meticulous drafting and avoiding sloppy problems is unquestionable, so long as the concern is not prioritized over the need for designing well-structured problems. Among other things, the process of organizing and identifying the important issues in a problem facilitates the application of substantive course objectives to professional practice. In this process, students can take ownership of the problem and its solutions, connecting the authenticity of the problem to the subject matter.

57. Savery, *supra* note 29, at 13.

58. One important consideration in designing messy problem exercises is how difficult a problem can be while retaining the functional, constructive benefits of PBL methods. As Jonassen and Hung note, "PBL is an instructional methodology, and like all instructional methodologies, is not universally applicable to different learning problems." David H. Jonassen & Woei Hung, *All Problems are Not Equal: Implications for Problem-Based Learning*, 2 INTERDISC. J. PROBLEM-BASED LEARNING, Fall 2008, 6, at 15, http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1080&context=ijpbl.

59. Lerner, *supra* note 52, at 696 (citations omitted).

the method, and ensures that one intended product of the PBL process—internalization of the subject matter, the practice, and the profession—has hit the mark.

There are a variety of methods to foster student reflection as a product of performance. Some teachers assign problems as research and writing projects which require students to apply core subject-matter principles to novel dilemmas in the field. Some teachers work through such problems in a collaborative, classroom discussion. Other PBL methods employ class group advocacy in formal or even informal settings.[60] The forum employed should result from careful consideration. In a group-advocacy problem, opposing arguments or a decision-making forum would force students to evaluate their performance in a realistic setting. In an informal problem-solving setting, constructive involvement of the entire class may isolate a particular group, but could be conducted in a manner that emphasizes the successful strategies and builds on those successes. Although it seems it is more important that a process for constructive reflection occur (than that it take any particular form), a well-designed problem will conclude with a reflection component which complements the problem objectives.

In this process, it should be recognized that the foundations, goals, and methods of problem-based learning differ substantially from the manner in which many law teachers learned law, and, as such, PBL may take some adjustment on the behalf of teachers.[61] As one PBL teacher recalls, "I had to unlearn the idea that teaching was about my content; I had to learn that it was about their thinking."[62] In the traditional approach, students are exposed to knowledge and expected to understand (or eventually come to understand) how that knowledge is applied in the profession. In contrast, the teacher's role in

60. Simulated oral argument requires students to engage in factual analysis, case synthesis, and delivery of argument, forcing students to break those habits that distinguish legal reasoning from all else, and, in this sense, enabling law students and teachers alike to "begin to realize the goals of the [*Best Practices* and *Educating Lawyers*] Reports." McElroy, *supra* note 43, at 636.

61. Nathanson adds, "A problem-centered curriculum is different from a traditional, knowledge-based curriculum. In the knowledge-based approach, the curriculum is organized into subjects and teachers are regarded as experts in their subject." Nathanson, *supra* note 27, at 326.

62. JOHN R. MERGENDOLLER & JOHN W. THOMAS, MANAGING PROJECT BASED LEARNING: PRINCIPLES FROM THE FIELD 17 (2000), *available at* http://www.bie.org/tmp/research/researchmanagePBL.pdf.

PBL is that of a facilitator or tutor, providing an initial stimulus and then fostering cognitive curiosity within the confines of the discipline while students develop problem-solving strategies. Teachers may be inclined to coach, but must ultimately give students the opportunity to discover and reflect on the lesson.

When effectively implemented, PBL design principles complement one another in creating a participatory environment in which students learn by "doing" law (even if in a simulated setting). Well-designed problems capitalize on a constructive process as students are set to the task of lawyering. By engaging the practice of the profession, students learn from themselves and their partners, opponents, and teachers—not by mere exposure to answers (e.g., "The code says . . ."), but by discovery and critical problem solving.

II. APPLYING PBL TO THE CLASSROOM: LAND USE LAW AS A PBL OPPORTUNITY

It is hoped that any proposed teaching method will be useful, in that it is at least adaptable to a teacher's needs. On this very point, PBL has been heavily scrutinized in the debate over teaching methods.[63] It has been argued that the identification, drafting, and preparation of appropriate problems is too time consuming for professors and their classes.[64] It has been argued that the time devoted to navigating problems in class may prevent otherwise productive lecture time, resulting in less subject matter coverage in the course.[65] It is also contended that the problem method is only effective in smaller classes and seminars.[66] In large part, these challenges may be surmountable, illusory, or may entirely depend on how PBL design elements are implemented: teaching methods must be adapted to the context and circumstances of the audience, and, as discussed above, adaptation in PBL courses is primarily the

63. *See generally* Hawkins-León, *supra* note 10 (examining the problem-based approach and the Socratic method).

64. Ogden, *supra* note 6, at 664.

65. *Id.* at 665; Suzanne Kurtz et al., *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 DALHOUSIE L.J. 797, 802, 814–15 (1990).

66. *See* Ogden, *supra* note 6, at 664 (stating that "[t]he intensity of the problem method and the development of skills that can result from its use require small classes for the sake of both teacher and student"). *But see* Moskovitz, *supra* note 8, at 261 (stating that "the problem method works quite well in large classes").

function of problem design. To illustrate the adaptability of PBL, this Article now considers how one might approach PBL teaching by sketching the development of a problem-based course in land use law. Not surprisingly, the enterprise begins at the subject matter of land use law, viewed for the purpose of determining how to best design land use problems in such a course.[67]

As a preliminary matter, it might be notable that the academy has only recently given attention to this subject. Indeed, in his seminal work, *The Zoning Game*,[68] Richard Babcock described the scurry and scatter of attorneys from zoning disputes in the decades following the 1926 *Village of Euclid v. Ambler Realty Co.* decision,[69] observing:

> [The] indifference of the bar was matched by the indifference of most law schools toward the legal and social implications of land use planning. Zoning had an inheritance of constitutional law and real property law, but neither parent wished to admit responsibility for parenthood. As a result, zoning and city planning [are] orphans in the law school . . . .[70]

Given the reality of the subject matter—that "[w]hatever the role of architects, planners, and economists, the ultimate resolution, as well as the day-to-day contests, will be legal"[71]—Babcock's dissatisfaction with legal education reflected his

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67. A course in land use law should exemplify and/or complement the general objectives of legal education: case analysis, statutory and regulatory interpretations, negotiation, drafting, persuasive writing, and oral advocacy. In addition, a land use course should cover the core legal issues typically faced by land use attorneys and proficiency in resolving land use issues. Problem-solving exercises can help develop these skills, while focusing more particularly on the expertise occurring in land use practice. However, as indicated above, PBL methods dictate that we look beyond case method teaching materials, and to the history and characteristics of land use law to identify strategies for employing PBL methods.

68. RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966).

69. 272 U.S. 365 (1926).

70. BABCOCK, *supra* note 68, at 87–88. Similarly, Lea S. VanderVelde wrote:

> It has always struck me as odd that legal scholars and legal education have paid so little attention to the field of local government law, and specifically to zoning law. Legal scholars outside the field tend to know less about zoning law than they do about the technical details of other specialized fields. In fact, much of the best new scholarship in the area is read by only a small, closed community, making the subject even more insular.

Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1057 (1990) (citations omitted).

71. BABCOCK, *supra* note 68, at 88.

measurement of the inadequacy of counsel in land use disputes who think like lawyers, instead of like *land use lawyers*.[72] Babcock noted that "the lawyer who has developed an empathy with those who practice these arts finds himself with more business than he can handle, while his brother who sneers at planners as wild-eyed dreamers may make noises on oral arguments which sound good to his client—until the decree is entered."[73]

Although land use planning was emerging in law schools at the time Babcock first published *The Zoning Game* in 1966, land use law has arguably become a vital, even if noncore, law school course. Since Babcock's *Zoning Game* was first published, land use lawyers have played an increasingly central role in identifying the role of state and local governments in (among others) transportation and environmental planning, constitutional protections affecting religious land uses, housing discrimination and free speech, infrastructure financing, and, of course, property rights. Even outside of the litigation context, land use lawyers are actively engaged in creating livable and opportunity-rich communities in the increasingly far reach of zoning and planning arenas. Land use law is pervasive.

To teach any subject matter—land use law included—we can look to the subject matter for helpful clues for effective problem design. First, land use law is complex.[74] Similar to the challenges of teaching environmental law, land use appears overwhelming because it involves such a diverse (and often chaotic) array of federal, state, and local regulatory schemes, applying regulations laden with the insights and ex-

72. *Id.* at 99–100.

73. *Id.* at 100.

74. Hence, the syllabus might include the following subjects and issues (which can be, and are, taught through the case method): basis and limitations on zoning and planning authority; dimensions of zoning; administrative law; constitutional limitations; subdivision controls; contracts; torts, such as nuisance and SLAPP suits; real property; exclusionary practices on the basis of race, family, religion, etc., including the provision of affordable housing; state and local government; eminent domain and urban revitalization; laws governing public improvements and utilities; voting and other public rights of participation; aesthetics and architectural control; preservation of agricultural lands; historic preservation; federal, state, and local environmental restrictions; and, given the recent onslaught of takings legislation and robust rhetoric behind the successes and failures of such legislation, it is very important that the very needs, goals, and extent of zoning authority be critically examined.

pertise of other professions and interdisciplinary practices.[75] Therefore, a land use course could be used to simplify the structure of land use law. Students should learn how to identify and research local, state, and federal laws; how to prioritize and contextualize those sources; how the procedures affect the substance of relevant rights; and how to differentiate among the local variations.

Now to use the clue: although it may be a simple notion *to explain* that a solution lies embedded in a regulatory or statutory code, PBL offers land use students an experiential means *to illustrate* how solutions can be extracted from the development and organization of the subject matter. Hence, assuming that a lecture on cluster subdivisions, open space set-asides, or transportation concurrency regulations can only scratch the surface on the many approaches to such schemes in state-enabling legislation and at the local level, it might be more

75. Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything Is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 359–63 (1999); *see also* Robertson, *supra* note 24, at 244–45 (noting that studying one environmental statute involves learning "the role of state and federal agencies, federal authorization of state programs and the interaction of statutes and regulations"). Land use law covers a wide variety of procedural and substantive subject matters, suggesting that land use be incorporated into other courses, such as Property Law, Environmental Law, or State and Local Government. Arguably, zoning laws are apt and able to follow the "felt necessities of the time," often unchecked and more often determined by popular appeal in an unstable, local political process. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (photo. reprint 2005) (1881). *See also* BABCOCK, *supra* note 68, at 124–25 ("It is that part of the political technique through which the use of private land is regulated. When zoning is thought of as a part of the governmental process it is obvious that it can have no inherent principles separate from the goals which each person chooses to ascribe to the political process as a whole."). In addition, land use law borrows from several disciplines and perspectives (e.g., engineers, architects, biologists, planners, etc.), all of which are necessary in achieving the goals set out in the subject matter. *See* BABCOCK, *supra* note 68, at 99 ("[T]he lawyer compounds his own perplexity in this field by his inability or unwillingness to understand the planner's value judgments."). One historical shortcoming in the teaching materials involves the emerging subject of local environmental law. Although it is common to find coverage of federal environmental regulations, such as wetlands and water quality, endangered species protection, and statutes designed to inform decision makers of the environmental impacts of proposed development, local environmental regulations are typically bound by inconsistent regulatory schemes reflective of parochial concerns and priorities. The recent attention given to local environmental law by Patricia Salkin and John Nolon, among others, has resulted in a developing body of insightful materials that are extremely helpful to students in learning how to identify and assess local regulatory schemes. *See generally* NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (John Nolon, ed., Environmental Law Institute 2003). The Seventh Edition of LAND USE AND COMMUNITY DEVELOPMENT, prepared by John Nolon, Patricia Salkin, and Morton Gitelman, largely responds to this deficiency and provides a broader recognition of environmental decision making at the local level. *See generally* JOHN NOLON ET AL., LAND USE AND COMMUNITY DEVELOPMENT (7th ed. 2008).

productive to combine such a lecture with the students' in-depth application of at least one. Given the opportunity to put such an ordinance to work, students can explore the relationship of such a scheme to the police power, to a comprehensive zoning or planning scheme, and even to common law, while considering impacts on housing, traffic circulation, property values, and property rights (among others).

The complexity of land use is not limited to sources of legal authority. Rather, communities are created on the collaboration of several professions and disciplines, making the subject difficult to organize and painful to abbreviate.[76] Therefore, as strongly suggested by Babcock, a land use course should incorporate the professional perspectives which make up the practice of land use law.[77] Students need to understand not just that other disciplines are important to the resolution of land use controversies, but also the roles that such professionals play. Communities are created through the economics and other sensitivities of political bodies; the vision of long range and project planners (after all, the Supreme Court recognizes the expertise exercised by planners[78]); the insight of architects, engineers, biologists, chemists, hydrologists, and geologists (not to mention financial institutions and insurance companies, among others); and, of course, the paranoia of private property owners. Notably, appellate decisions resolving land use disputes seldom divulge the significant vision of planners and architects in designing walkable neighborhoods, accessible open spaces, and attractive skylines. The courts do not typically discuss the engineering hurdles overcome in designing stormwater systems, sewer systems, or workable traffic circulation. On few occasions will courts express concern for development costs, including the costs of delay. These important aspects of the land use process could be made available by

76. The frustration of the teacher of land use law is reminiscent of Joseph Sax's apology on teaching environmental law: "[v]irtually every law teacher—however broad his or her overlook—wants to introduce students to the specific material in the field, and to provide some experience and familiarity with it. Yet, every such attempt is an encounter with statutes of numbing complexity and detail." Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 ENVTL. L. REP. 10,251, 10,251 (1989).

77. BABCOCK, *supra* note 68, at 88.

78. As Justice Brennan argued, "After all, a policeman must know the Constitution, then why not a planner?" San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

providing students with a land use application to examine, deconstruct, understand, and implement.

The course should also recognize that the decision makers of land use law may infuse social, psychological, political, and philosophical concerns into the business of community creation. Land use law occurs in a system governed by divergent legislative and administrative law principles among a variety of agencies, quasi-judicial decision makers, and local legislators. An understanding of the conflicting voices involved—whether posed as an ongoing tension between public interests and private property rights, between regional and local needs, or between state legislation and parochial concerns—may dramatically influence a lawyer's approach to the subject matter. A land use law problem might allow students to identify (and identify with) the important players in land use controversies, cultivate sensitivity to the parochial concerns of land use decision makers, and provide insights into the processes in which land use decisions are made.

Even if the goals of a land use course were limited to the foregoing, it would be easy to design simulations intended to serve a basic, organized understanding of the subject matter. However, like a course in administrative law, the wide variety and divergent expertise of the agencies at issue, together with the circumstance that local laws are relatively unstable and that relevant case law may involve agencies which are defunct or geographically inaccessible to students of the course, a land use law course must present the material in a way that is interesting to students.[79] Far from an insurmountable dilemma, this circumstance provides an enculturation opportunity due to the how the subject matter is situated in local politics and legislation: land use controversies are accessible-in-fact, and therefore, the circumstances of land use law allow law teachers to draw from lessons that "hit home" in a way that other subjects may be unable to accomplish.[80] Because the land use process occurs at the local level, the professions and politics involved in land use controversies are accessible to students: land use hearings, decision makers (planning commissions,

79. William Funk, *My Ideal "Casebook" or What's Wrong with Administrative Law Legal Education and How to Fix It, in a Nutshell (So to Speak)*, 38 BRANDEIS L.J. 247, 248–49 (2000).

80. *See* VanderVelde, *supra* note 70, at 1057 (pointing out that, to understand land use law, "one must be open to acquire local knowledge").

city councils, boards of commissioners and adjustment, hearings officials), and participants (developers, neighborhood advocates, governmental planners, and other staff). Even the property subject to a land use application may be physically accessible to students, and students may have particular knowledge or familiarity with the location of controversy in their homes or communities.

This circumstance suggests a potentially unique advantage of teaching through problems: using problems which force students to engage legal problem solving from the perspectives of both counselor and client injects self-interest (as a core pedagogical tool of the project, rather than just as an incentive for grading purposes) and invites a different type of understanding than offered by reading appellate opinions. Arguably, by *personalizing* the stakes in the problem-solving process, where students become the very subjects of regulation, students engage the method with more thoughtful reflection on the basic, yet often unasked questions: who seeks counsel and why, what is at stake, and how can counsel effectively accomplish the clients' goals? This aspect of the subject matter allows teachers to experiment in presenting lawyering values and perspectives, while encouraging students to internalize the notion that lawyering is fundamentally premised not on some abstract notions of law and justice, but on problem solving for people with problems.[81] The personal context of knowledge acquisition encourages reflection on the importance of the lawyer's role in the many dimensions of lawyering practice within a framework intended to foster effective understanding and integration of professional knowledge, and, indeed, land use problems can be based on local, multidimensional issues.

In sum, a review of land use law reveals a few simple, but helpful clues in teaching the subject through problems. Because the subject matter is broad and interdisciplinary, land use law can be approached as fundamentally oriented in complex problem solving. Because land use law involves such a wide array of federal, state, and local regulations, a course in

81. The goals at issue here include the recognition that legal education does not offer enough exposure to the "social and cultural contexts of legal institutions." SULLIVAN ET AL., *supra* note 2, at 188. *See also, e.g.*, Joshua Perry, *Thinking Like a Professional*, 58 J. LEGAL EDUC. 159, 159 (2008) (identifying the importance of integrating the person and the professional).

land use should give exposure to and experience in navigating the regulations. Because land use law is practiced in an inherently local and political context, a course in this subject can focus and capitalize on the kind of understanding that lawyers wield. Moreover, if these goals can be effectively incorporated into problems, then teaching land use law might reshape the classroom into a learner-centered environment, repackaging legal education from information to a learning experience. Students can be provided with an opportunity to identify and apply the relevant statutes and regulations occurring in federal, state, and local schemes. Teachers can facilitate student discovery in the process of analyzing legal and factual issues in these problems, including a focus on where resolutions to these controversies may lie. Through this process, students learn about the process in which land use decisions are made, participate critically in the role of lawyers in the process, and leave with an imprint of that understanding.

III. LAND USE PROBLEMS DESIGNED TO TEACH LAND USE LAWYERS

Having identified considerations and objectives for problem design in a land use course, this section tests PBL against the goals of such a course: can PBL foster an understanding of the subject matter *and* engage students in reflective and critical professionalism? Three problems are offered here to illustrate both the power of problems and variation in potential uses of PBL design elements in the land use classroom. As should be expected, varying use of PBL design elements produce different results:[82] problems intended to draw out the complexity of

82. Some consideration should be given to the sequence of problems in any course. As a preliminary matter, by assigning multiple problems, students' progress and confusion can be more closely monitored and managed before they pervade the students' understanding of the entire subject. In the land use context, for instance, a misunderstanding of the differences between planning and zoning, variances and special uses, or legislative and quasi-judicial processes will surface and can be corrected. In addition, Nathanson argues that the sequence of problems should be evolutionary to enable the transfer of learning: "too many features of the problem should not be changed at once; this can confuse students and impede transfer." Nathanson, *supra* note 27, at 340. Nathanson reasonably suggests that a student's repetitive success in problem solving can further the learning process, particularly where the lessons of a successful solution can be applied consistently to another problem scenario. To the extent that law school should employ assimilative learning theories, Nathanson's point seems quite important.

the subject matter may provide an opportunity to navigate the regulatory maze, problems designed around the formalities of the land use process may encourage students to understand the confines of land use decision making and how the process is influenced, and problems designed for authentic experiences may engage students in the subject matter with an eye on professional competence. In each type of problem, students apply core land use concepts as they gain perspective on and an understanding of the subject matter.

A. Bringing Land Use Law to the Doorstep: Working from Home

In the first type of problem, each student[83] imagines that she has decided to hang a shingle and open a solo law practice at her residence. Students research the applicable regulations and draft short memoranda explaining the land uses that can be permitted at their residences under the applicable zoning ordinance. Their memoranda put forward the likelihood of lawfully establishing a solo practitioner's office at that location under the applicable zoning and other land use regulations.

This project requires students to navigate and confront local land use restrictions, to differentiate among land uses, and to recognize the manner in which local governments have traditionally protected residential areas from the impacts associated with incompatible land uses. This project is also intended to jumpstart the learning process by making the students help themselves and become self-reflective lawyers by answering a

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To the extent that law school learning also calls for transformative learning, however, I wonder whether Nathanson's "transfer" feature needs more refinement. A student's estimation of achievement could come simply from repetition, and, where time and the subject matter allow for similarly-situated problems, repetition would surely be effective in indoctrinating students in rule application in problem solving of a particular topic. Yet, a defining feature of legal education is the need to break students away from the tendency to adapt existing understandings to legal subjects, and toward "thinking like a lawyer." In addition, where the subject matter is sufficiently complex and some areas of the course are divergent, the "transfer" function could easily prove a distraction or unnecessary in the learning process. A problem sequence in administrative law might consider a similar factual scenario for the rulemaking process and quasi-judicial decision making, where it would be more important to illustrate the differences between the two. On the other hand, my comment in this regard may be overcome by recognizing that the intent of Nathanson's "transfer" element is not to enable transfer of prior knowledge webs as much as to enable the repetitive application of the learned problem solving strategies.

83. This project does not require students to collaborate on their research or presentation. This project could be modified by having student groups choose one of their residences for the project, or even by using teacher-selected local properties.

problem that they may face as clients.[84] Among other things, students face the difficult but essential question of whether, given the restrictions and process involved, it would be feasible to pursue the project at all.[85]

One important consideration for this problem concerns its location in the syllabus. When the problem is introduced later in the course, students will have been exposed to the basic concepts of land use regulation and the structure of land use codes, and they can be expected to exhibit a grasp of the materials. When introduced later, a teacher's expectations can be considerably higher, and the work products can be more sophisticated. If offered earlier in the course, this problem may cause frustration with the concepts and legal sources involved. I prefer assigning this project earlier in the semester, however, because it forces students to recognize that land use regulations are pervasive—a realization that captures their attention and interest—and requires them to pay attention to the regulatory character of the subject matter.

In either event, to complete this problem, students collide with and interpret permissible land uses under local zoning codes, parking requirements, signage regulations, home occupation ordinances, and occasionally, conditional or special use standards. In addition to engaging in statutory construction, students draft their memoranda and defend their conclusions in a manner typical of the law school learning process. If students do not raise the question on their own, they may be asked to consider the benefits of the regulatory scheme versus the interference that such a scheme would cause on an unfettered right to the use of private property (a central question in land use law).

From an administrative perspective, the benefits of this exercise include that the problem is straightforward and easy to

84. In land use law, the obvious means of accomplishing this goal is the students' own *property uses*: identify the property "owned" by students, and engage the students in determining what uses to which the property can be legally employed.

85. *See* BABCOCK, *supra* note 68, at 93 (describing that "the gulf in most zoning cases [is] between the cost of presenting a good case and the value to the clients of a successful result"). Although certain dilemmas have been consistently raised by students in this problem (e.g., Are the crosswalks suitable? Will my office generate too much traffic? Will my large neon sign be allowed?), some relevant dilemmas have arisen which, depending on one's perspective, may illustrate the point of the problem or illustrate the need for more definition in the assignment (e.g., locational concerns, such as access to restaurants, compatibility with neighborhood, and problems with future expansion).

manage. The factual scenario is clear and realistic (indeed, it is "real"). The problem requires students to become familiar with research sources and methods applicable to the subject matter.[86] In the process of finding a solution, students exercise an introductory understanding of the structure of land use regulations and the effect of restrictions on businesses, their locations and operations, and confront the reasons for those restrictions.[87]

A significant payoff from this problem is, of course, the presentation. Whether the classroom dialogue goes shallow or deep, students can be offered a reflective opportunity to view their classmates as something other than competitors. As students hear about and engage their classmates' findings, they are compelled to recognize the relevance of context in law and compare their own opportunities to those of others, to consider both the advantages of unrestricted rights to use land and the disadvantages of such vested rights in their neighbors, to recognize disparities in the values represented in local codes, and to question the basis for distinctions among particular land uses. More inquisitive students may wonder about social or political conditions influencing the applicable regulations or may begin imagining the impacts of comprehensive changes in the law.

B. Turning the Classroom into an Exercise: Understanding Zoning Districts and the Land Use Process

In a different type of problem exercise, areas of the classroom can be drawn into districts in which the uses of particular seats are regulated and restricted by their locations. The

86. In addition to case law and statutory schemes, a wealth of relevant supplementary materials is easily accessible through the Internet or in local community development and planning departments. With the flurry of Geographical Information Systems innovations and technology introduced in educational institutions and governmental agencies, comprehensive plans, zoning maps, and development codes are typically available online. Also, given that planning staff at the local development and planning departments can, and often will, provide insightful guidance, I have required students to consult with local planning staff to foster an understanding of the various bureaucratic components of the practice.

87. The potential of this problem may differ depending on the context. For instance, in a class attended by a less homogeneous student body, the different types and levels of protection for residential areas (principally, between areas zoned for apartments versus single-family sprawling developments) can be examined to illustrate the various value judgments made about lifestyle and neighborhood character, the influences of tax base, and economic considerations at the local government level.

classroom is mapped in a way to depict public uses (e.g., windows, doors, blackboard, and professor's podium) and private areas (e.g., seats), transportation corridors (e.g., walkways), or even utility easements (e.g., electrical outlets and internet connections). Students are relegated to their designated seats and their activities restricted by the hypothetical zoning ordinance.

The zoning ordinance might define a number of different use classifications, the types of which will be limited only by the creativity of the professor. Several district designations are imaginable, including a cum laude district (where the students in all seats so designated will receive the grade of "A"), a participation district (where all students are required to answer every question asked by the professor), a transient district (where the students arriving late sit), and an industrious district (where students are allowed to multi-task, use cell phones, and access the Internet). Each designation is defined by its purpose, and permissible and prohibited uses are identified according to the particular zone.

After a few teacher- or student-initiated code enforcement actions for particular violations (e.g., "Turn off your computer and raise your hand!"),[88] groups of students may be offered opportunities to establish or change the applicable land use restrictions with the goal of maximizing the value of their seats. Not surprisingly, applications from students typically concern computer use, participation, and snacking, but the exercise has also engendered applications for operation of a concession stand—an application that was denied with extreme prejudice—and snack preparation. The ordinance could allow for variance, special, or conditional use applications as well as provide a process for zoning amendments, including both textual or map changes. The ordinance could also be left vulner-

88. My typical *Notice of Violation* contains the following language:

> You are hereby on notice that your actions are taken in violation of the Zoning Ordinance for Room 107 for engaging in the following activities: _____. Cease and desist each and all of the above-referenced activities. Failure to cease actions taken in violation of the Zoning Ordinance will result in further prosecution to the fullest extent of the law, including, but not limited to, a 1/3 grade reduction for each violation.
>
> Appeal of this Notice may be had by exclaiming, while standing, "No Way!" Any appeal, if timely filed, may be heard at the regularly-scheduled meeting in Room __, or at any time thereafter as may be convenient to the Board of Adjustment. Failure to file a timely appeal will constitute a waiver of any and all rights of review and will result in the conclusive presumption that this Notice is binding and enforceable.

able to attack, both for its substantive choices and under the procedures employed, and students could be encouraged to raise these challenges in the simulated setting.[89]

Conservative goals in this exercise include an illustration of the basic components of a zoning scheme, including how a jurisdiction may be divided into use districts based on the character of permissible uses and the separation of incompatible uses, that some properties (seats) may be more valuable according to one's preferences, and how a local government might provide for flexibility in the administration of its zoning scheme. The problem encourages students to question the goals in a comprehensive approach to zoning, to consider their own perspectives on the compatibility of different land uses, and to inquire into the process by which applicable restrictions might be amended or changed.[90] A more aggressive teacher might use this exercise to illustrate the political nature of applicable procedural frameworks or the intended and unintended consequences of land use controls, including the basis

89. These lessons could be explored by adopting classroom-enabling legislation addressing the zoning power and process, and perhaps even a recording act for seat owner identification, the functional equivalent of a seating chart, could be used.

The classroom zoning ordinance on which this exercise is based may be found at the website for the Albany Law Center for Excellence in Teaching (CELT): http://www.albanylaw.edu/sub.php?navigation_id=1817. The Center serves as a web-based clearinghouse for material on teaching and curriculum development, legal education reform and the ABA accreditation revisions based on the "Student Learning Outcomes" movement. CELT also hosts the "Best Practices for Legal Education" Blog.

90. This exercise has drawn an excellent level of participation and engagement. More importantly, it has drawn interest in applying the fundamentals of land use law. One memorable group of students sought a rezone of their seats into a zoning classification that they had entirely created: the students proposed an "inebriate district." The applicant students drafted, filed, and presented a petition for a zoning amendment. Somewhat spontaneously, students from neighboring zones challenged the proposal on spot zoning grounds, arguing about the general health, safety, and welfare of a comprehensive zoning scheme, and were even rebuffed on claims that their concerns were merely those of NIMBY (Not In My Backyard) neighbors. Although the proposed zoning amendment was ultimately rejected in a contentious hearing, the problem offered the students an opportunity to apply the subject matter in drafting, preparing the evidentiary materials gathered for their proposal, soliciting testimony in support, responding to opposition, and organizing their presentation.

A second remarkable result of this exercise was the development of a market for seats based on the relative values of particular permissible uses. Some students were more interested in being unrestricted in their uses than they were in securing a high grade. Students attempted to secure better negotiating positions by requesting rezones to more or less restricted designations. Although the market development was unexpected, remained undeveloped, and was (unfortunately) not reproduced in subsequent years, the mere possibility suggests that the exercise can be taken much further. See generally Shorstein, *supra* note 20, for a more successful example, similar to these results.

for allocating rights in land uses, the economic impacts of land use planning, the disparities between needs and allocation, or the relationship between property value and political influence.

One perceived difficulty with this problem might be that the notion of classroom zoning seems so hopelessly hypothetical—indeed, it is as much a board game as a professional experience—that students would be left unable to identify the lesson, unimpressed by the demands and incentives of the scheme, or otherwise reluctant to participate.[91] In truth, I have felt these fears, among others, throughout each trial of the exercise. I have been consistently impressed, however, by active, creative, and impassioned classrooms. In the first place, the connection between the effect of classroom restrictions on students' interests and the operation of land use regulation is an easy one to make, particularly when students realize that they have little freedom to do anything without obtaining a permit through the permitting process. In addition, as the project progresses and students begin to collaborate, incorporate the reading material into their problem-solving approaches, and engage the mechanics of land use law in this open and inclusive classroom dialogue, students take an interest in practicing law within the zoning scheme. These classes seldom finish on time.

I have experimented with this problem both as a one-class exercise and in a more sustained manner, taking class time over a span of several weeks to include many parts of the local land use process. The advantage of the longer exercise is that it provides a context for the organic development of student sophistication concomitantly with the creation of a regulatory scheme. In one longer example, the class elected a city council to convene legislative hearings on whether to adopt zoning regulations at all, to consider different versions of the scheme, to debate the legitimate purposes that might be achieved in a classroom zoning regulation, to identify those classroom uses that might be reasonably regulated by zoning, and to deter-

91. Every semester, I have been confronted by one student whose participation seems contingent upon the enforceability of the grading scheme set forth in the zoning districts, as well as whether his possible failure to appeal code enforcement actions would result in a grade reduction. Perhaps coincidentally, this student has failed to follow the procedural rules for perfecting an appeal of code enforcement, and has spent a disproportionate time in the transient district.

mine how to so regulate. Subsequently, student-initiated proposals prompted debate over the feasibility of subdivisions in the classroom—specifically, concerning the feasibility of allowing subdivisions of individual seats—as well as some creative zoning classifications. The class was then faced with the shift from legislative process to a quasi-judicial decision-making forum as students filed permit applications for particular uses and scrambled to incorporate procedural rules and the need to maintain an administrative record. A clerk was appointed to accept applications and keep minutes of the hearings.

Notably, as students engaged in envisioning and creating the classroom community, the public/private tensions were explored, students quickly came to understand and capitalize on the different characteristics of legislative and quasi-judicial decision making, and participation was exceptional and fun. Most importantly, however, the result of the exercise has consistently been one of eager interest, particularly with inquiries into the strategies for gaining approval in zoning hearings, the appropriate methods of opposition, the legal remedies that may be available, and, ultimately, mastery of the subject matter.

C. Doing It on Their Own: Practicing Land Use Law as a Learning Experience

Although the first two problems provide a relatively informal and flexible experience, student understanding culminates in an enculturating, collaborative attempt to apply their knowledge in resolving actual problems faced by actual people. Accordingly, a third type of problem in a land use class might be one which engages students in an actual land use controversy.[92] This exercise can draw from each of the general design elements: it may be authentic but "messy" as a real world problem; it may require collaborative discovery and problem solving; it may require application of the topics; and, by assigning a variety of problems among student groups, students may come to "own" the solutions and engage in a professional problem-solving process.

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92. *See* STUCKEY ET AL., *supra* note 1, at 144 ("Whether the case is historical or ongoing, the use of actual cases can enhance students' understanding of law and law practice.").

For the advocacy project, students are assigned into groups to represent the interests of particular, identified clients in case simulations. If possible, cases should come from local jurisdictions to allow students the opportunity to observe the project site for themselves, making the assignment less hypothetical and academic. Problem materials are taken from an existing administrative record, typically omitting the briefs of opposing parties and superfluous or repetitive materials in an effort to ensure that the record is manageable but challenging. In order to provide current (local ordinances and comprehensive plans change!) and interesting controversies for the students, new controversies should be chosen every year.[93]

Consistent with the PBL objectives, groups are expected to become professionals on the issues presented in these hearings by employing lawyering skills: factual diagnosis; legal analysis; interpretation of regulatory, statutory, and case law; application of law to the facts; and dialectical skills in written and oral advocacy. Groups are responsible for acting as lawyers by educating the decision maker(s) on the applicable rules of law (and policy reasons behind those rules) in a land use process and persuading the decision maker(s)[94] that the application of law to the circumstances favors their client's position. Problem management and final performance also informs the professor on the extent to which students have grasped the context in which these controversies arise.

By using actual cases, the dilemma is not as much providing an authentic experience as providing one which connects the course topics and the problem in a manner that is sufficiently broad and generalizable. Not all actual cases will offer the same complexity, connection to the course topics, or significance to the field. Some students will gain deep insight into the tension between religious practices and local exclusionary efforts; others will focus on local environmental priorities and state or federal preemption; and others will become experts on

93. Among other things, new cases decrease the likelihood that the appellate review, if pursued, would have been completed prior to the final project completion date.

94. Given the role that this realistic assignment plays in the learning experience, I have typically sought the aid of local land use players (e.g., city council members, hearings officers, planners, building officials, and attorneys) to adjudicate at oral argument. The purpose of the invitations has been to increase the students' feelings of self-importance and self-awareness in the process by making the presentation element more realistic and demanding. On the whole, their presence has added to the students' excitement and performance in the experience.

takings, transportation corridors, nonconforming uses, or even particular local administrative procedures. As a matter of course, fairness concerns may arise. This dilemma is mitigated by giving attention to the agency record to insure the success of the process. As Morgan anticipated, "The most serious difficulty in using the problem method is that issues of broad importance can get lost in the details of a problem."[95] In reviewing and editing the record, the retention or exclusion of particular materials, and even creation of additional materials,[96] should be done in a manner directed toward the course goals and problem-solving objectives.

Even while authenticity is a goal, the realities of the lawyering process preserved in the problem[97] must be balanced with other design elements in the PBL model.[98] For instance, teach-

95. Morgan, *supra* note 6, at 418.

96. Obviously, an agency record which includes an applicant's or opponent's legal memoranda could undercut the PBL discovery process. Although such materials could have some educational value, and students would enjoy seeing such a memorandum, it would not allow students the freedom to perform their own identification or analysis of the problem, discovery of solutions, research of the subject matter, or, ultimately, student ownership of the problem-solving process.

97. For example, particular problems might compel the professor to serve the local government as both planner and attorney. When approaching the professor in her planner capacity, students can be encouraged to seek information deemed necessary to the case.

98. In line with the professional push toward alternative methods of dispute resolution in this area of law, one might consider adapting this model to the identification and implementation of alternative solutions to land use problems. *See, e.g.*, Edith M. Netter, *Using Mediation to Supplement Zoning Hearings*, LAND USE L. & ZONING DIG., Oct. 1992, at 3, 4. The opportunities will be present. On several occasions, student teams have attempted to negotiate settlement packages which included altering development plans, additional mitigation measures, and even forgoing certain phases or elements in the projects. Students have also questioned whether the adversarial process would further their clients' interests, pointing to the potential gains of collaborative efforts among the parties. The students were, in effect, asking for an alternative process to resolve the dispute, where commitment to the adversarial process could commit client resources to a lose-lose process. Of course, I was ecstatic to witness these student innovations and the creativity employed to complete the problem, the student ownership of the problem-solving process, and the attention given to client needs.

The difficulty may be that fostering these student innovations invokes other practical complexities: my course did not include specific coverage of ADR or development economics. Although allocating class time to introduce alternative dispute resolution and development economics (the types of realistic development-cost scenarios that might be acceptable to clients) requires reorganization of the syllabus, the students should be exposed to the types of economic feasibility analyses which play a role in project design and development, the importance of timing, the costs of delay, and (of course) the business priorities which conflict with the litigation alternative. As with the perspectives of biologists, engineers, and planners, lessons in alternative resolution techniques and basic development economics could be as challenging as they are essential to the land use course. This discovery, which I would likely have overlooked outside of my students' problem-solving vigor, lends itself as an additional per-

ers might struggle with whether to allow the introduction of new evidence onto the record. This variation exposes students to a more realistic process in which they are encouraged to assess the evidence on the record, identify gaps in their respective cases, and consider the facts needed, the types of evidence which would demonstrate those facts, the types of experts (if necessary) who could provide such facts, and what such expert testimony might entail.[99] Despite the benefits of such a variation, both the expected difficulties (e.g., possible disparate comfortability and prior experience with legal process that students may bring to the class) and unexpected difficulties (e.g., students actually retaining engineers to provide testimony during final hearings) may exacerbate the problems of both time and effort expended in exploring witness examination techniques.

As a PBL opportunity, an advocacy problem can expose students not just to the tools they will employ as attorneys, but also to the challenges faced in becoming critical and effective attorneys.[100] Students work collaboratively to identify legal issues presented in hypothetical factual scenarios, consider the authority (and limitations thereon) of the decision maker based on administrative law principles, and determine the best argument to achieve a favorable result, given the particular needs of the respective client. The problem provides opportunities for legal research and writing and allows students to practice oral advocacy as they engage the process of land use decision making. In addition, although the assessment of how well students perform in the land use hearing process may entail some difficulty in applying subjective standards, the students' understanding of the type of advocacy involved will help give content and meaning to the legal tools that they employ in the problems.

In spite of the practical challenges (faced by this and other PBL courses), the actual problem engages the students in en-

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suasive basis for PBL teaching: it can improve the teacher's perspective on the subject matter and fundamental knowledge needed.

99. As Babcock noted, "Zoning litigation is expensive because it is conducted almost exclusively through the use of expert testimony." BABCOCK, *supra* note 68, at 94.

100. There may be a real difference between the teaching of objective *skills* and the hope to foster *skillfulness*. *See* David F. Cavers, *"Skills" and Understanding*, 1 J. LEGAL EDUC. 395, 396 (1949). Yet, consideration of lawyering skillfulness can be an illuminating element in problem design and management. The addition of advocacy as an element of problem solving clearly allows students to engage skillfulness as an element of the problem-solving process.

thusiastic and sophisticated learning. Students engage the subject matter in a challenging, interesting, and enlightening experience, exercising skills previously undiscovered. Students learn that, after "representing" a client as a lawyer in the land use process, the subject matter is not so difficult after all: the regulations are accessible, the process is workable, and the impacts of lawyers in the land use process are tangible. Most importantly, however, as students perform in actual land use problem-solving exercises, they learn to approach problem solving as lawyers, rather than as law students.

D. Final Observations About Teaching Through Problems

In general, I have found the PBL approach to law teaching persuasive because of its learner-centered approach, because students benefit from engaging law itself, and because PBL teaching allows teachers to use more of the story *behind* appellate decisions to confront the law we find in appellate decisions. Of course, there may be no need to champion these reasons as the most persuasive: as Nathanson explains, "Whatever rationale is used for teaching problem solving . . . students learn, and are motivated to learn, by working on problems."[101] Likewise, McElroy contends that:

> students who are engaged and involved in the classroom, who are encouraged to participate in simulation exercises, who are challenged and critiqued in concrete ways beyond the typical Socratic dialogue, are more likely to synthesize key legal concepts, to remember what they learn, and to apply what they learn in the law school classroom to legal practice.[102]

My experience of teaching through problems supports the same conclusions.

Although my reflections on PBL teaching have been woven into the foregoing discussion of the PBL method and its application in a land use law course, a few additional comments might be made regarding the circumstances of PBL classrooms. A first observation relates to PBL's relationship to other teaching methods: although many PBL applications may

101. Nathanson, *supra* note 27, at 327–28. Nevertheless, a few additional points might be made that are noted, but perhaps underappreciated, by teachers.

102. McElroy, *supra* note 43, at 636.

appear innovative, PBL is essentially another response to the common need of teachers to produce class participation. Like Socratic methods, teaching law through problems is simply a form of forced participation.[103] As in Socratic models, students in PBL courses are forced to read and talk about law, to analyze and reason in a relatively intentional environment, and to develop and redefine their own thought processes as the course and dialogues progress. These similarities emphasize that both models are intended as participatory tools to engender and redefine in students the capacity for critical and legal reasoning. Yet, PBL classrooms encourage an entirely different type of participation. At least, PBL diverges from other teaching methods by encouraging participation in a low-risk setting[104]: a substantial amount of PBL participation occurs outside of the professor's vision, as students work through problems with their peers and colleagues. More importantly, although students are required to attend and participate in a PBL course, the *type* of participation required of students may disguise, or even transform, the indenture: because students are problem solving, rather than memorizing, their solutions (and the means by which they discovered those solutions) become entirely their own work. As a result, PBL participation may feel more voluntary to students.

Second, participation in PBL courses serves pedagogical goals in a different manner. PBL exercises allow students the opportunity to make mistakes—to commit both grave and insignificant errors as they (perhaps unwittingly) illustrate their confusions with the subject matter and lack of confidence in the process. This can be frustrating to law students, who seem characteristically intent on finding the single, correct, black-letter law answer to every question asked of them. However, any initial tensions that may be created by the exercises quickly subside as students come to enjoy experimenting with successful and unsuccessful strategies and interpretations. Students are ultimately allowed to embrace this opportunity to navigate the mess and discover the meaning and limits of legal

103. Hawkins-León, *supra* note 10, at 12 ("The Problem Method forces a certain level of student participation and responsibility," but also noting that this approach "may prevent students from operating at a 'sub-professional level.'").

104. For discussion on the value of "low-risk" participation in the learning process, see Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk About Law*, 54 J. LEGAL EDUC. 570, 579–80 (2004).

concepts as they analogize their experiences to those of the litigants about whom they read.[105] Of course, the pedagogical value in making mistakes in PBL courses is not dissimilar to the same circumstances under a Socratic examination: the student can be guided toward a better model of legal reasoning, organization, and analysis, and will undoubtedly be offered an opportunity to employ these more sophisticated tools in subsequent attempts. Yet, the PBL process diverges from the Socratic method as it becomes more constructive, allowing students to grasp the linkages between the client's story and legal claims, as well as between the attorney's presentation and the ultimate judicial decision. Moreover, as opposed to students under Socratic fire, PBL students can and do grasp the point and purpose of trying (even when they are uncertain) and making mistakes (even when they are confident).

Finally, given the above and remembering (or at least assuming) that students *choose* to enroll in law school, I have also found that PBL methods push students to engage their education in law with passion for their chosen profession *and* the subject matter—not because students survived a day of Socratic inquiry or scored well on an exam, but because of what they were able to accomplish in the course. PBL teachers generally report active and energetic student participation, students who take pride in legal education as their own achievement, and students who are (at least in my experience) *more apt to defend their problem-based work product against criticism than their exam answers during exam review*. Each of these consequences, I believe, results from the PBL approach: in PBL courses, students can claim their *entire* learning experience as their own. Instead of the creative mnemonic devices and acronyms that students often use to memorize elements of particular legal claims, the artifacts that students take from a PBL course include the experiences of realizing their own methods of critical analysis, their functional understanding of the purposes of such elements, and how they were able to use legal concepts to resolve a legal dispute. I have found that PBL students enjoy retelling their learning experiences and engaging in discussions about what was learned.

105. See generally McElroy, *supra* note 43, for a detailed discussion of this point.

CONCLUSION: DESIGNING A PBL COURSE AND USING PROBLEMS TO TEACH LAW

For years, legal scholarship has hosted an impassioned discussion about the benefits of and challenges to legal education reform.[106] The ambitious projects represented in *Educating Lawyers* and *Best Practices* have reinvigorated the debate with a new sense of urgency to get it right. However, assuming that legal reform will not seriously occasion the withdrawal of doctrinal courses from the curriculum, we should now be discussing the host of legitimate fears and risks of reforming legal education in the doctrinal classroom. We might consider, for instance, whether a curriculum shift in the direction of professional skills might risk trivialization of doctrinal teaching goals as mere information acquisition.[107] The appeal to abandon classroom competition, false hegemonies, and counterproductive role distinctions among class participants may leave students ill-prepared to serve as zealous advocates.[108] And, the reality is that a shift towards clinical and other experiential programs in law school is not likely to resolve one important dilemma that pervades the Socratic classroom (but is not exclusive to the Socratic method): some teachers are simply better at it than others.

As we sift through these challenges, identify new teaching models, and, essentially, reinvent legal education, the PBL approach to law teaching may stand out as an attractive bridge between the old and the new in ways that are exciting, engaging, and flexible enough to accommodate the doctrinal teacher's needs. This Article has suggested that PBL methods enable students to envision—and even accomplish—expertise

106. *See, e.g.*, A Place To Discuss Best Practices for Legal Education, http://bestpracticeslegaled.albanylawblogs.org (last visited Dec. 1, 2009).

107. *See* David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 473 (2001) ("The first stage for legal education should not be described in terms of information delivery. Rather it is about teaching the skills of critical analysis and legal reasoning.").

108. Any resolution to the detriment of competition in the classroom surely cannot be all-or-nothing in its approach. The appropriate question is whether the competitiveness employed in the classroom is functional. Therefore, when Barbara Flagg notes, "I do not find it easy to dismiss [student] discomfort as the inevitable byproduct of an adversarial legal system; too many things that lawyers do require cooperation more than competition," an effective response might be to structure competitive forces, rather than apologize, eliminate, or simply attempt to mitigate the emotional effects of competitive or adversarial problem-solving scenarios. *See, e.g.*, Flagg, *supra* note 21, at 126.

and professional competency. In addition, as illustrated in the level and nature of class participation reported among PBL teachers, students can and do internalize the understanding needed to solve legal problems, facilitating ownership and understanding of the legal problem-solving process. As Ann Shorstein wrote in explaining her ambitious exercise—the creation of the classroom "Coastal Kingdom" to teach Property Law—"Whether you are creating a kingdom or a corporation, the use of multi-modal teaching tools will make the experience come to life in a way that no casebook can."[109]

The important question is how PBL methods can be best implemented in doctrinal teaching.[110] Yet, at the same time, the point is that we need to think about law school more systemically, and less doctrinally.[111] In answering this question, I would suggest that PBL methods can be explored and implemented in a variety of ways: to supplement the teacher's toolbox, with mixed use of hypotheticals and factual scenarios to deepen student understanding of the materials, or to underlie law teaching as a curriculum choice. The former seems rea-

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109. Shorstein, *supra* note 20, at 817.

110. An important question concerns how to judge the *effectiveness* of PBL methods. Reporting on the effectiveness of a particular teaching method must obviously be in relation to the goals sought by implementing the method. If, as Moskovitz argued, the problem method subsumes the case method of teaching, it would be reasonable to assume that problem-based learners would have an advantage (or would at least be competitive) on law school and bar examinations. *See* Moskovitz, *supra* note 8, at 258–59. Along these lines, empirical research suggests that the problem method may have positive learning impacts, particularly in students at specific levels of verbal ability or based on their interest in the subject matter. Mergendoller et al., *supra* note 34, at 62–64. However, from other disciplines, the suggestion that curriculum and pedagogical choice may have little effect on knowledge base acquired or in clinical performance undercuts the persuasiveness of the method. *See, e.g.*, Jerry A. Colliver, *Effectiveness of Problem-based Learning Curricula: Research and Theory*, 75 ACAD. MED. 259, 266 (2000).

I am not aware of any such sustained study applicable to legal education focusing on the differences in bar passage rates or effective counseling between students learning from the case method and problem method teaching. More importantly, I am not aware of any such study addressing the additional intended benefits of PBL in law school teaching—that PBL students take the acquired knowledge into the practice of law. I (and many others, I would be willing to wager) will be comfortable in the belief that the students' interest and success in the classroom do translate into knowledge acquired, understood, and retained as the students transition into professionals.

111. As Riles and Uchida recently noted, "[T]he core question should be a broader one than simply 'what kind of legal education methods best train future lawyers.' Rather, the core question should be, 'what are the consequences of a certain model of legal education for the nature and distribution of legal knowledge in society.'" Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 4–5 (2009).

sonable enough and may be more palatable for most doctrinal teachers.[112] After all, making the shift to PBL teaching methods can be a major transformation and may take focused adjustment. In addition, it is at least arguable that the various teaching methods need not be seen as fundamentally incompatible.[113] The purposes served by the various teaching methods "are not alternatives. Together, they make up the whole package each of us should be trying to construct."[114] On the other hand, the insights of PBL may demand a more significant transformation in law teaching.

Whether problems are introduced as supplements or as a core teaching method, "[g]one are the times when it was sufficient to merely think like a lawyer—law school graduates need to be able to perform like lawyers."[115] In this context, I would add that "performance" goals include not just the ability to use existing law effectively, but should also include the courage to consider clients' needs, the compassion to consider better laws, and the perspective to understand that such ideals are the responsibility of the profession. By giving students the "opportunity to learn law by using it,"[116] PBL enables teachers to transform even the materials of land use law—complex, multi-jurisdictional, interdisciplinary, and political—into a meaningful experience of critical engagement and discovery.

112. Indeed, as Cavers noted, thinking of PBL as a "panacea" may be unrealistic. *See* David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 455 (1943).

113. Moskovitz, *supra* note 8, at 258.

114. Morgan, *supra* note 6, at 409. In Morgan's view, a minimum criterion for any teaching methodology will be its ability to incorporate and serve a variety of purposes and methods, reflecting the best of what each has to offer. *Id.*

115. Hawkins-León, *supra* note 10, at 2.

116. Cavers, *supra* note 112, at 455.