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Kim D. Chanbonpin  
*The John Marshall Law School*

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# CRISIS AND TRIGGER WARNINGS: REFLECTIONS ON LEGAL EDUCATION AND THE SOCIAL VALUE OF THE LAW

KIM D. CHANBONPIN\*

## INTRODUCTION

The news about law schools is bad. College graduates are being discouraged from attending because most will exit with significant debt load and no guarantee that they will be able to obtain employment profitable enough to offset the investment in their education. Because fewer students are seeking admittance and class sizes are shrinking, tuition-dependent law schools are facing a financial crisis. In response, crisis managers have proffered solutions steeped in the buzzwords of neoliberal economic policies. Austerity, consumer-oriented servicing, and other corporate tropes have lately become the new norms in law school management. However, the superficial logic of these policies belies the radical restructuring of legal education currently taking place, as well as, I argue, a broader assault on the law's central role in promoting social goods.

The prevailing law school crisis narrative is peopled with the following cast of stock characters: crusading administrators, recalcitrant faculty, and disillusioned students. Administrators who struggle to rein in spending on faculty salaries and other fixed costs. Faculty who are uninterested in change, preferring instead to write esoteric scholarship and to teach using the same methods first introduced by Harvard's Dean Langdell in 1890. And students who face bleak employment prospects upon graduation, and are desperate to learn only what they might need to pass the bar exam and to launch, practice-ready, into the working world. According to the prevailing crisis narrative, each group represents mutually exclusive and oppositional interests.

However crude these archetypes, tensions between faculty and students exist and are exacerbated by highly-stylized classroom interactions mediated by the Socratic dialogue. In this environment, students often experience performance-related stress, embarrassment, and frustration. These

\* Associate Professor, The John Marshall Law School. My thanks to Blair Pooler and Mary Lu Cole, two of my former Criminal Law students, for their research assistance. I would also like to thank Professor Francisco Valdes for providing his helpful comments on a draft of this Essay.

anxieties are heightened in settings where the subject matter regularly exposes students to graphic descriptions of violent events, like the Criminal Law classroom. As a response, students have begun agitating for advance content notices (or "trigger warnings") to alert them to potentially disturbing course content. Thoughtful educators have voiced their opposition to the use of trigger warnings in the classroom, citing the consumerist attitude and sense of entitlement that appear to drive student demands for these classroom concessions.<sup>1</sup> Faculty are concerned that students who require trigger warnings to mediate their educational experience will ultimately be poorly prepared for professional careers and personal lives which will undoubtedly be infected with violence of all sorts—misogyny, homophobia, and racism, among them.<sup>2</sup> Many faculty also perceive these demands as a threat to academic freedom.<sup>3</sup> From this vantage point, it is easy for law faculty to view their students as adversaries when, in actuality, students have little power compared to the real threat—the unchecked corporatization of legal education.

This Essay begins by understanding the law school crisis through the framework of disaster capitalism. This framing uncovers the ways in which reformers are taking advantage of the current crisis to restructure legal education. Under the circumstances, faculty may reasonably read the contemporaneous student-led movement to require trigger warnings in the classroom as an assault on academic freedom. This reading, however, clouds the water. Part II attempts to clear the confusion by decoupling the trigger-warning movement from the broader phenomenon of law school corporatization. Trigger-warning demands might alternatively be read as a student critique of traditional law school pedagogy. Especially in the first year, the role of faculty is to indoctrinate students in a system of dispassionate analysis where subjective experiences and emotional reactions have

1. See, e.g., Marcie Blanco, *9 Feminist Arguments Against Using Trigger Warnings in Academia*, MIC.COM (May 23, 2014), <http://mic.com/articles/87283/9-feminist-arguments-against-using-trigger-warnings-in-academia>; Tressie McMillan Cottom, *The Trigger Warned Syllabus*, TRESSIEMC (Mar. 5, 2014), <http://tressiemc.com/2014/03/05/the-trigger-warned-syllabus/> ("the 'student-customer' movement is the soft power arm of the neo-liberal corporatization of higher education"); Sarah Roff, *Treatment, Not Trigger Warnings*, CHRON. OF HIGHER EDUC. (May 23, 2014), <http://chronicle.com/blogs/conversation/2014/05/23/treatment-not-trigger-warnings/>.

2. See McMillan Cottom, *supra* note 1.

3. Elizabeth Freeman et al., *Trigger Warnings Are Flawed*, INSIDE HIGHER ED (May 29, 2014), <https://www.insidehighered.com/views/2014/05/29/essay-faculty-members-about-why-they-will-not-use-trigger-warnings> (last visited Jan. 10, 2015) (outlining several reasons for treating the trigger warning movement with skepticism, including concerns that pre-tenured and non-tenure-track faculty, along with faculty of color, queer faculty, and faculty who teach gender/sexuality studies, critical race theory, and in the visual and performing arts will be most vulnerable to student complaints about triggering course materials).

no place. In this light, the trigger warning debate offers an opportunity to fundamentally alter the learning process by inviting students to become partners in the production of knowledge by allowing them to reclaim power in the classroom. Attending to student concerns facilitates robust discussions where the assigned materials are thoroughly dissected and debated, a result that ultimately benefits everyone in the classroom. Part III proposes that law school is still a good option for those students who are interested in both rigorous intellectual exercise and developing the practical skills necessary for the effective representation of clients. This discussion lays the foundation for a reflection on a broader question—the role of law in a democracy. Although the U.S. legal system falls short of perfect justice and equality, lawyers ought to be vigilant when confronted with market demands that would force law and society to cede ground to powers that represent solely private interests.

### I. CLOUDING THE WATER: CRISIS AND TRIGGER WARNINGS

Journalist Naomi Klein defines disaster capitalism as “orchestrated raids on the public sphere in the wake of catastrophic events, combined with the treatment of disasters as exciting market opportunities.”<sup>4</sup> In her 2007 book, Klein documented numerous examples in the preceding three decades when, after some disaster caused national governments and their citizens to experience the shock of an economic crisis, outside advisors intervened, offering free-market-based crisis solutions. Experts presented neoliberal economic policies—including austerity and the privatization of government services—as the only rational solutions to the economic crises occasioned by the respective disasters. In this manner, neoliberalism<sup>5</sup> took hold in South Africa after apartheid, in Iraq in the days after President Bush declared a War on Terror, and in New Orleans after the levees broke. The shock of each underlying crisis made it easier for free market ideologies to be planted, take root, and thrive.<sup>6</sup> In the words of the American Enterprise Institute, a conservative think tank, “[Hurricane] Katrina accomplished in a

4. NAOMI KLEIN, *THE SHOCK DOCTRINE* 6 (2007).

5. For succinct descriptions of neoliberalism, see David Singh Grewal & Jedediah S. Purdy, *Introduction: Law and Liberalism*, 77 L. & CONTEMP. PROBS. 1 (2014) (impact on the law and legal systems); Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD ED. REV. 425, 444 (2002) (impact on higher education).

6. “Only a crisis—actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes the politically inevitable.” MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* ix (1982).

day . . . what Louisiana . . . reformers couldn't do after years of trying."<sup>7</sup> Once planted, neoliberal ideology has enjoyed a presumption of legitimacy so potent that it effectively forecloses discussion of any alternatives to its orthodoxy.<sup>8</sup> The disaster capitalism model is also useful in understanding the current state of legal education.

Law schools are, according to observers, in the throes of an economic crisis.<sup>9</sup> Wall Street firms have ceased hiring large classes of junior associates directly out of law school, complaining that recent law graduates do not have the skills necessary to survive in competitive corporate practice.<sup>10</sup> Their multinational-corporation clients are unwilling to pay for junior associates to learn on the job.<sup>11</sup> Because the pool of six-figure starting salaries has dried up, talented candidates are foregoing law school in favor of more lucrative possibilities in business, finance, or high tech. Recent degree holders are graduating with an average of \$100,000 of debt with far fewer options to obtain work and repay their educational debts.<sup>12</sup> Law schools across the country have experienced several successive years of declining enrollment,<sup>13</sup> and the all-time low number of LSAT test takers<sup>14</sup> means that schools cannot reasonably expect those numbers to rebound any time soon.

7. KLEIN, *supra* note 4.

8. Grewal & Purdy, *supra* note 5, at 5–6. See also PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN (2014).

9. See generally Philip G. Schrag, *MOOCs and Legal Education: Valuable Innovation or Looming Disaster?*, 59 VILL. L. REV. 83, 111–13 (2014) (describing the economic crisis facing most law schools).

10. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

11. See, e.g., Amanda Becker, *Howrey Law Firm Shifts Pay, Development of Entry-Level Attorneys*, WASH. POST, Apr. 26, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042303429\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042303429_pf.html); Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC, July 21, 2013, <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries>; Maria Zilberman, *Associate Training Goes From Ad Hoc to All-In*, RECORDER, July 18, 2014, <http://www.therecorder.com/id=1202663868377/Associate-Training-Goes-From-Ad-Hoc-to-Allin>.

12. See Brian Z. Tamanaha, *How to Make Law Schools Affordable*, N.Y. TIMES, May 31, 2012, <http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html>. But see, Debra Cassens Weiss, *Are 2016 Law Grads in Luck? New Stats Say Lawyer Jobs will Exceed Graduates this Year*, A.B.A. J. (Nov. 19, 2014), [http://www.abajournal.com/news/article/are\\_2016\\_law\\_grads\\_in\\_luck\\_new\\_stats\\_say\\_lawyer\\_jobs\\_will\\_exceed\\_graduates/?utm\\_source=maestro&utm\\_campaign=weekly\\_email&job\\_id=141119AS&utm\\_medium=email](http://www.abajournal.com/news/article/are_2016_law_grads_in_luck_new_stats_say_lawyer_jobs_will_exceed_graduates/?utm_source=maestro&utm_campaign=weekly_email&job_id=141119AS&utm_medium=email) (detailing results of a Bureau of Labor Statistics report, which predicts that demand for lawyers will exceed supply by 2016).

13. See Karen Sloan, *ABA Releases Details of Law Schools Enrollment Declines*, NAT'L L. J. (Mar. 3, 2014); *Three-Year Applicant Volume Graphs*, L. SCH. ADMISSION COUNCIL (2014), <http://www.lsac.org/lsacresources/data/three-year-volume>.

14. See *LSATs Administered—Counts and Percent Increases by Admin and Year*, L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/lsacresources/data/lsats-administered> (last visited Jan. 12, 2015).

In the midst of this crisis, law schools have become the target of news media,<sup>15</sup> the practicing bar,<sup>16</sup> disgruntled graduates,<sup>17</sup> and even law school insiders.<sup>18</sup> Critics of law school name a litany of transgressions—failure to provide practical skills for new attorneys, increased student tuition to finance irrelevant scholarship, a glut in the legal services market—and lay those sins at the feet of law schools and the academic workers who staff them.<sup>19</sup>

The crisis has prompted demands for reform, and while the proposed solutions are still very much in contest,<sup>20</sup> neoliberal tropes such as austerity, efficiency, outcomes, and consumer-oriented servicing have become a priori organizing principles.<sup>21</sup> Policies and programs based on the assumption that these values are neutral and objective dominate the discourse of reform. Also at this juncture, law schools have seen a trend towards appointing deans with law practice or business backgrounds but little to no prior experience in higher education.<sup>22</sup> “Today’s law dean is reminded dai-

15. See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html>; Jordan Weissmann, *Pop! Goes the Law School Bubble*, ATLANTIC, Mar. 20, 2012, <http://www.theatlantic.com/business/print/2012/03/pop-goes-the-law-school-bubble/254792/>.

16. For examples from the practicing bar, see ROBERT MACCRATE ET AL., ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

17. For an example of a website hosting frequent posts from former law students, see generally ABOVE THE LAW, <http://abovethelaw.com/> (last visited Jan. 12, 2015).

18. PAUL CAMPOS, DON’T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR’S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK (2012); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012). See also Brian Z. Tamanaha, *Is Law School Worth the Cost?*, 63 J. LEGAL EDUC. 173, 176 (2013) (noting that a substantial number of law school graduates do not earn enough money in their post-law school jobs to make regular payments on their law school loans).

19. Antonin Scalia, 2014 Commencement Exercises at the William & Mary Law School: Reflections on the Future of the Legal Academy 8 (May 11, 2014), <https://law.wm.edu/news/stories/2014/documents-2014/2014WMCommencementSpeech.pdf> (presenting arguments against shortening the length of legal education to two years, but concluding “[if] and what that happens, the shrunken faculties will have only themselves to blame”).

20. Law teachers have not been mute to concerns raised by law school critics. The Society of American Law Teachers (SALT), the Clinical Legal Education Association (CLEA), the Association of Legal Writing Directors (ALWD), and the Legal Writing Institute (LWI), have individually and collectively worked on improving accreditation standards and have supported outcome measures that evaluate the success of a legal education by the core competencies that every lawyer should have at graduation. See *Notice and Comment*, A.B.A., [http://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment.html](http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html) (last visited Jan. 12, 2015).

21. See, e.g., REPORT AND RECOMMENDATIONS AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, A.B.A. (Jan. 23, 2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).

22. See Board of Editors, *Introduction: Essays by Dean David F. Levi and Chancellor Jack M. Weiss*, 70 LA. L. REV. 911 (2010); Jack M. Weiss, *A Causerie on Selecting Law Deans in an Age of*

ly that he or she is at the helm of an *enterprise* and that, perhaps above all else, the dean's success or failure will turn on his or her ability to function as an *entrepreneur*.<sup>23</sup> Under this new model, the dean is a business manager whose role is to balance the books and ensure the "successful economic performance of the school."<sup>24</sup>

Following Klein's model, the economic crisis fueled by bad press about law schools has created an entry point for opportunists to fundamentally alter the culture and the delivery of a legal education.<sup>25</sup> For example, law schools have begun experimenting with the production of on-line courses as a part of distance education packages marketed to students both inside and outside of the host institution.<sup>26</sup> Many of these courses are pre-recorded and offered on an asynchronous basis.<sup>27</sup> These on-line courses require significant expenditure of time and resources at the outset of the enterprise, but are potentially quite remunerative for the school as a future revenue stream.<sup>28</sup>

Contrast on-line courses with one of the most significant reforms in legal education—the experiential learning mandate.<sup>29</sup> Clinics and skills courses directly address concerns that law graduates lack practical skills upon graduation.<sup>30</sup> These courses provide students with live-client interac-

*Entrepreneurial Deaning*, 70 LA. L. REV. 923, 930 (2010). Chancellor Weiss became the head of the Louisiana State University Paul M. Hebert Law Center in 2007 after a long career in law practice.

23. Weiss, *supra* note 22, at 924 (emphases in the original). For Giroux, "[t]he overt corporatization of university leadership makes clear that what was once part of the hidden curriculum of higher education—the creeping vocationalization and subordination of learning to the dictates of the market—has become an open and defining principle of education at all levels of learning." Giroux, *supra* note 5, at 439.

24. Weiss, *supra* note 22, at 931.

25. The 2014–15 Accreditation Standards provide guidance for distance education. Standard 306(e) allows law schools to provide up to fifteen credit hours for J.D. coursework that is delivered primarily through synchronous or asynchronous instruction over, for example, the Internet. See A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 306(e) (2014) [hereinafter ABA STANDARDS].

26. Schrag, *supra* note 9, at 113–14; Karen Sloan, *Massive, Free Online Courses Catch on With Law Schools*, NAT'L L. J. (Sept. 10, 2013), <http://www.nationallawjournal.com/id=1202618794783> [hereinafter Sloan, *Free Online Courses*]. Standard 306 addresses distance education and allows students to obtain a maximum of fifteen credit hours through courses delivered in this way. See ABA STANDARDS, *supra* note 25, at Standard 306.

27. See Sloan, *Free Online Courses*, *supra* note 26.

28. See Schrag, *supra* note 9, at 92–93 (describing Harvard University's interest in MOOCs as a "venture capital" type of investment"); Mark Dubois, *How MOOCs Will Transform Law as We Know It*, CONN. L. TRIB., Dec. 10, 2012, <http://www.ctlawtribune.com/id=1202580897450/How-MOOCs-Will-Transform-Law-As-We-Know-It?slreturn=20150012215333>.

29. ABA STANDARDS, *supra* note 25, at Standard 303(a)(3) (requiring that each student must satisfactorily complete six credit hours in an experiential course or courses).

30. See *The Impact of Law School Debt on the Delivery of Legal Services*, ILL. STATE B. ASS'N (June 22, 2013), available at

tion and repeated opportunities to practice lawyering skills such as “interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”<sup>31</sup> Yet experiential learning is expensive.<sup>32</sup> Unlike large lecture classes, where as many as 100 students can fill a hall, clinics require highly individualized attention for each student,<sup>33</sup> necessitating low student-to-faculty ratios. What is good for legal education does not necessarily match corporate goals of austerity and efficiency.

The increased corporatization of legal education can also be witnessed in the American Bar Association (ABA) Council of the Section of Legal Education and Admissions to the Bar’s (Council’s) new focus on output measures, in particular those accreditation standards dealing with bar passage rates and job placement.<sup>34</sup> In a setting where best practices for legal education are dominated by extrinsic measures, a law degree becomes a commodity and students are its consumers. For the student-consumer, law degrees come with a hefty price tag,<sup>35</sup> and in this consumer transaction, students come to expect a reciprocal level of customer service and attention. And as consumers, students assert the power to dictate the content and other particulars of their legal education.<sup>36</sup>

The recent crisis in legal education is just a lagging indicator of the radical changes that have been taking place on undergraduate campuses for

<http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%202013-8-13.pdf>; Catherine L. Carpenter et al., *Interim Report of the Outcome Measures Committee*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR (May 12, 2008), available at [http://www.albanylaw.edu/media/user/celt/outcome\\_measures\\_final\\_report.pdf](http://www.albanylaw.edu/media/user/celt/outcome_measures_final_report.pdf).

31. ABA STANDARDS, *supra* note 25, at Interpretation 302-1.

32. See, e.g., Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 191–92 (2012) (naming the development of clinical legal education as a central contributing factor to the increased cost of law school).

33. See ABA STANDARDS, *supra* note 25, at Standard 303(a)(3)(i)–(iv) (outlining the learning outcomes and competencies that a student must demonstrate after completing the six-credit experiential learning requirement).

34. *Id.* at Interpretation 301-6 (bar passage); *id.* at Standard 509 (required disclosures, including employment outcomes 509(2)(b)(7)). Cf. STUCKEY ET AL., *supra* note 16; WILLIAM J. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Found. for Advancement of Teaching 2007); Carpenter et al., *supra* note 30.

35. See Campos, *supra* note 32, at 206 (estimating that law graduates in 2014 will incur about \$165,000 in debt).

36. See, e.g., Robert E. Toone & Catherine C. Deneke, *Student-Consumers: The Application of Chapter 93A to Higher Education in Massachusetts*, BOS. B. J. (Sept. 18, 2013), available at <http://bostonbarjournal.com/2013/09/18/student-consumers-the-application-of-chapter-93a-to-higher-education-in-massachusetts/> (reporting on the increasing number of lawsuits filed by students under Massachusetts’s consumer protection law).



at least the last thirty years.<sup>37</sup> At the university level, administrators have replaced tenured faculty with a growing class of adjunct professors, whose cost is cheap and whose employment is contingent.<sup>38</sup> Staffing classrooms with adjunct professors is cost-efficient and convenient because adjuncts do not have the status or job security that comes with tenure. But because most adjunct law faculty are engaged in active law practices, they cannot offer the same commitment to teaching and advising for which full-time faculty are responsible.<sup>39</sup>

Tenure, according to critics, is an immovable obstacle that prevents law schools from exercising agility in a time of economic crisis.<sup>40</sup> Standard 405, which has been interpreted by the ABA as requiring tenure for a substantial majority of the full-time faculty,<sup>41</sup> currently remains intact.<sup>42</sup> But during its last two comprehensive review periods, the ABA Council seriously considered proposals to eliminate tenure.<sup>43</sup> Attacks on tenure coupled

37. Henry A. Giroux, *Beyond Dystopian Education in a Neoliberal Society*, FAST CAPITALISM (2013), [http://www.uta.edu/huma/agger/fastcapitalism/10\\_1/giroux10\\_1.html#sdendnote3anc](http://www.uta.edu/huma/agger/fastcapitalism/10_1/giroux10_1.html#sdendnote3anc) (drawing connections between increasing wealth disparity in the United States, decreased public spending on education, high student debt, and a decline in faculty governance to a general commercialization of education).

38. See Debra Cassens Weiss, *Adjunct Law Prof: A Low-Paying Job, if You Can Get It*, A.B.A. J. (Sept. 30, 2010, 12:25 PM), [http://www.abajournal.com/news/article/adjunct\\_law\\_prof\\_a\\_low-paying\\_job\\_if\\_you\\_can\\_get\\_it/](http://www.abajournal.com/news/article/adjunct_law_prof_a_low-paying_job_if_you_can_get_it/) (noting that adjunct law faculty receive a small stipend for their teaching, ranging in the low four-figures). Cf. Corey Kilgannon, *Without Tenure or a Home*, N.Y. TIMES, Mar. 27, 2014, [http://www.nytimes.com/2014/03/30/nyregion/without-tenure-or-a-home.html?\\_r=0](http://www.nytimes.com/2014/03/30/nyregion/without-tenure-or-a-home.html?_r=0) (recounting the story of “Homeless Prof.,” Mary-Faith Cesaroli).

39. See ABA STANDARDS, *supra* note 25, at Standard 404(a) (listing the responsibilities of full-time faculty).

40. See, e.g., Giroux, *supra* note 5, at 439; Letter from Henry S. Bienen, President Emeritus, Nw. Univ., to Hulett H. Askew, Consultant on Legal Educ., A.B.A. (Apr. 14, 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/4\\_09\\_university\\_presidents\\_statement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/4_09_university_presidents_statement.authcheckdam.pdf); Jennifer Smith, *Law-School Professors Face Less Job Security*, WALL ST. J., Aug. 11, 2013, <http://online.wsj.com/news/articles/SB10001424127887323446404579006793207527958> (quoting Boston University School of Law Dean Maureen O’Rourke: “The problem is, the fixed costs we have sit in tenured faculty. . . . I understand the need for academic freedom. . . . But as an industry we have a need for flexibility that we just don’t have right now.”).

41. ABA STANDARDS, *supra* note 25. During the recent comprehensive review process, individual members of the Section noted that Standard 405 does not explicitly require tenure.

42. Karen Sloan, *ABA Council Abandons Bid to Drop Tenure Requirement*, NAT’L L. J. (Mar. 17, 2014), <http://www.nationallawjournal.com/id=1202647168997/ABA-Council-Abandons-Bid-to-Drop-Tenure-Requirement?slreturn=20141019100009>.

43. Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, NAT’L L. J. (Aug. 12, 2013), <http://www.nationallawjournal.com/id=1202614832071/ABA-Panel-Favors-Dropping-Law-School-Tenure-Requirement?slreturn=20141108144539>; Karen Sloan, *Is Law Faculty Tenure In or Out? ABA Can’t Decide*, NAT’L L. J. (Apr. 29, 2013), <http://www.nationallawjournal.com/id=1202598008023/Is-Law-Faculty-Tenure-In-or-Out-ABA-Cant-Decide-> Not all law faculty have the opportunity to seek tenure. Standard 405 establishes an expectation that full-time faculty members have tenure or will be hired on the tenure-track, but it maintains a three-tiered hierarchy. Clinical faculty and legal writing faculty are on separate tracks and are not accorded equal status. Standard 405(c) provides, in relevant part, a separate track for clinical faculty:

with shrinking budgets has demoralized faculty and weakened faculty governance, raising additional concerns about diminished academic freedom.<sup>44</sup>

In this environment, student entreaties to professors to provide trigger warnings to alert them to potentially disturbing course content can be perceived as yet another assault on academic freedom. The term “trigger warning” is at the center of an ongoing controversy in higher education today. National news media<sup>45</sup> have published articles describing a new student movement, which demands that professors post warnings on course syllabi and assigned material if either contains potentially troubling subject matter. The scope of the students’ demand, it seems, is boundless. The *New York Times* reported that Oberlin College professors received a guide, which instructed: “Triggers are not only relevant to sexual misconduct, but also to anything that might cause trauma. Be aware of racism, classism, sexism, heterosexism, cissexism, ableism, and other issues of privilege or oppression.”<sup>46</sup> News that not only Oberlin, but also Rutgers University;<sup>47</sup> George Washington University; the University of Michigan; and the University of California, Santa Barbara (UCSB) had considered or even implemented university-wide trigger warning policies was reported in media outlets across the world.<sup>48</sup> The majority of the resulting commentary has been

“A law school shall provide to full-time clinical faculty members a security of position reasonably similar to tenure . . . .” The status of legal writing faculty, meanwhile, is addressed in Standard 405(d): “A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary . . . .” ABA STANDARDS, *supra* note 25.

44. Giroux, *supra* note 5, at 444.

45. See Jenny Jarvie, *Trigger Happy*, NEW REPUBLIC, Mar. 3, 2014, <http://www.newrepublic.com/article/116842/trigger-warnings-have-spread-blogs-college-classes-thats-bad> (citing the vast media coverage).

46. Jennifer Medina, *Warning: The Literary Canon Could Make Students Squirm*, N.Y. TIMES, May 18, 2014, <http://www.nytimes.com/2014/05/18/us/warning-the-literary-canon-could-make-students-squirm.html>. The guide has since been rescinded. *Warning: College Students, This Editorial May Upset You*, L.A. TIMES, Mar. 31, 2014, <http://www.latimes.com/opinion/editorials/la-ed-trigger-warnings-20140331-story.html>.

47. Philip Wythe, *Trigger Warnings Needed in Classroom*, DAILY TARGUM, Feb. 18, 2014, [http://www.dailytargum.com/opinion/columnists/philip\\_wythe/trigger-warnings-needed-in-classroom/article\\_cecbf732-9845-11e3-a65e-001a4bcf6878.html](http://www.dailytargum.com/opinion/columnists/philip_wythe/trigger-warnings-needed-in-classroom/article_cecbf732-9845-11e3-a65e-001a4bcf6878.html). While Wythe, a sophomore English major, advocated that Rutgers University professors adopt a “trauma trigger warning safety system,” his position was moderate. “The discomfort caused by these novels, while honored, should never act as a justification for universal censorship. By restricting educational access to controversial material, our educational system suffers as a whole—preventing students from reading works that truly question our society and culture.” *Id.*

48. See, e.g., Donald Downs, *Trigger Warning: Education may Contain Traces that Trouble*, AUSTRALIAN, July 7, 2014, <http://www.theaustralian.com.au/higher-education/trigger-warning-education-may-contain-traces-that-trouble/story-e6frgcjx-1226978057947>; Alison Flood, *US Students Request ‘Trigger Warnings’ on Literature*, GUARDIAN (UK), May 19, 2014, <http://www.theguardian.com/books/2014/may/19/us-students-request-trigger-warnings-in-literature>; Ruth Fowler, *The Trouble with Trigger Warnings*, AL-JAZEERA AM., June 1, 2014,

critical of the student-led movement.<sup>49</sup> A not uncommon reaction to these demands was to blame maladjusted students who, sheltered by their helicopter parents for much of their lives, required prophylactic measures to keep them safe on university campuses.<sup>50</sup>

The notion of providing advisory notices to alert audiences to potentially disturbing content is not new, although the term “trigger warnings” may be. Warnings about potentially disturbing content have existed in a variety of settings for some time now. Advisory notices are a common feature of news and entertainment media.<sup>51</sup> In this context, though the term is new, trigger warnings are hardly *sui generis*. What has become uniquely controversial in the last few months, however, is the use of trigger warnings in university course syllabi and in other higher education settings. In February 2014, student leaders at UCSB passed a policy resolution that encouraged professors to include trigger warnings in the syllabi for courses that contain triggering content.<sup>52</sup> Furthermore, the resolution urged professors of any such course to “not [] dock points from a student’s overall grade for being absent or leaving class early if the reason for the absence is the triggering content.”<sup>53</sup>

In light of the current corporatization trends in higher education, student demands for trigger warnings can be reasonably perceived as yet an-

<http://america.aljazeera.com/opinions/2014/6/trigger-warningsbooksptsdhighereducation.html> (with the tag-line “Why adding disclaimers to books with disturbing content is an indulgent American impulse”).

49. Anne Neal, *Colleges are Paralyzed by the ‘Heckler’s Veto’*, N.Y. TIMES, Oct. 17, 2014, <http://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto>.

50. See, e.g., Laurie Essig, *Trigger Warnings Trigger Me*, CHRON. OF HIGHER EDUC. (Mar. 10, 2014), <http://chronicle.com/blogs/conversation/2014/03/10/trigger-warnings-trigger-me/> (“rather than retreating into a world where our courses are reduced to viewings of *My Little Pony*, let’s all put on our big-girl panties . . . and face that world together”); Alan Jacobs, *On Academic Helicopters*, NEW ATLANTIS (May 19, 2014, 12:00 PM), <http://text-patterns.thenewatlantis.com/2014/05/on-academic-helicopters.html> (helicopter parents).

51. *Film Ratings*, MOTION PICTURE ASS’N OF AM., <http://www.mpa.org/film-ratings/> (last visited Jan. 12, 2015) (film); *Parental Controls*, RECORDING INDUS. ASS’N OF AM., [http://www.riaa.com/toolsforparents.php?content\\_selector=parental\\_advisory](http://www.riaa.com/toolsforparents.php?content_selector=parental_advisory) (last visited Jan. 12, 2015) (music); *Understanding the TV Ratings*, TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/ratings.htm> (last visited Jan. 12, 2015) (television).

52. Jennifer Medina, *Warning: The Literary Canon Could Make Students Squirm*, N.Y. TIMES, May 18, 2014, <http://www.nytimes.com/2014/05/18/us/warning-the-literary-canon-could-make-students-squirm.html>. See also Nikki Calderon & Derek Wakefield, *A Resolution to Mandate Warnings for Triggering Content in Academic Settings*, UNIV. OF CAL. SANTA BARBARA (Feb. 25, 2014), <http://www.as.ucsb.edu/senate/resolutions/a-resolution-to-mandate-warnings-for-triggering-content-in-academic-settings/>; Bailey Loverin, *Trigger Warnings at UCSB*, DAILY NEXUS (Mar. 11, 2014, 10:15 AM), <http://dailynexus.com/2014-03-11/trigger-warnings-at-ucsb/> (an op-ed penned by the UCSB student who proposed the resolution). The UCSB policy would encourage, but not require, professors to provide trigger warnings on a variety of subjects for any materials shown, distributed, or discussed in the classroom. It does not cover homework or outside reading.

53. See Calderon & Wakefield, *supra* note 52.

other threat to academic freedom. Academic freedom means, in part, that faculty have discretion in selecting and arranging course materials to meet learning objectives.<sup>54</sup> Any mandate to include prescribed language infringes on a faculty member's autonomy in the classroom. On the other hand, many components of a syllabus are established by customs that are widely accepted. It is typical for syllabi to include reading assignments and details about office hours, for example. Trigger warnings are different, however, because if required for any course which covered controversial topics or challenging materials, faculty might decide to eliminate certain assignments altogether.<sup>55</sup>

Student activism has given the issue of trigger warnings recent public attention, but professors have already been using different forms of content advisories or alerts (whether or not they label them "trigger warnings") in their classes.<sup>56</sup> I know that I do. My commitment to doing so came after I received feedback from a student who had taken my Criminal Law class and related that, during the sessions when we covered the topic of sexual assault, she<sup>57</sup> felt as if she was being forced to relive her own traumatic

54. See AM. ASS'N OF UNIV. PROFESSORS, ON TRIGGER WARNINGS (Aug. 2014), available at <http://www.aaup.org/report/trigger-warnings>.

55. *Id.* ("if [politically controversial topics] are associated with triggers, correctly or not, they are likely to be marginalized if not avoided altogether by faculty who fear complaints for offending or discomfoting some of their students"). See also Freeman et al., *supra* note 3; Jack Halberstam, *Triggering Me, Triggering You: Making Up is Hard to Do*, BULLY BLOGGERS (July 15, 2014), <https://bullybloggers.wordpress.com/2014/07/15/triggering-me-triggering-you-making-up-is-hard-to-do/> (using the word "censorship" to measure the harms associated with trigger warnings).

56. Kate E. Bloch, *A Rape Law Pedagogy*, 7 YALE J.L. & FEMINISM 307, 316 (1995) ("In beginning the in-class preface, I acknowledge the challenge of discussing rape law, a subject that evokes profound personal reactions."); *id.* at 316 n.50 ("It has been my practice to explicitly acknowledge, in light of the statistics on sexual violence, the likelihood that one or more members of the class has been a victim of that violence."). Explaining why she engages in this routine practice, Professor Bloch explains: "some students may not anticipate that the study of rape law will produce powerful responses. A preface alerts these students to the potentially explosive dynamic that commentary, including their own, may trigger." *Id.* at 316 n.51. Participation in Professor Bloch's rape and sexual assault classes is voluntary and she does not penalize students for failure to attend these scheduled classes. *Id.* at 329. See also Joshua Dressler, *Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Virtue) of Courting Controversy*, 48 ST. LOUIS U. L.J. 1143, 1162 n.67 (2004). In response to an incident involving two male students getting into a fistfight after class one year, Professor Dressler experimented with a warning to his class the following year. Those students criticized this action as chilling of free speech and treating them like children. Professor Dressler has not used an in-class warning since then. He does, however, allow students to skip or to leave class. *Id.*

57. The evaluation form did not disclose the student's biological sex or gender identity, but I have made the conscious decision to refer to this student with female pronouns. While it is statistically probable that the student was female—one out of five women in college survive attempted or completed sexual assaults—it is also possible that this student was a male. One out of every thirty-three men is the victim of an attempted or completed sexual assault. See PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3 (Nov. 1998), available at <https://www.ncjrs.gov/pdffiles/172837.pdf>; Glenn Kessler, *One in Five Women in College Sexually Assaulted: The Source of this Statistic*, WASH. POST, May

rape. In her evaluation of my course, the student identified precisely what she experienced as the cause for her re-traumatization. She was underprepared for the turns that our classroom discussions would take, in particular, for the unexpectedly extreme positions that her classmates would take in relation to the prosecution and punishment of rape offenders. The student was also very specific in suggesting a preventative cure; what she required was a “heads-up,” some prior notice that the classroom discussions on these days were anticipated to be more emotional and contentious than others. I currently utilize trigger warning interventions not just before I teach classes on rape law, but at multiple points during the semester.<sup>58</sup>

My aim is not to convince law teachers that they should adopt the same practice. Rather, I want to explore this issue as one who believes that it is necessary to continue to teach rape and other challenging topics in an atmosphere that is attentive to the intellectual and psychological well-being of our students. The response that faculty provide to student requests for trigger warnings needs to be carefully considered because I believe this moment presents an opportunity for law teachers to begin dismantling the hierarchy of traditional legal education.<sup>59</sup> Permitting ourselves to hear and address student concerns regarding their uncertain footing in the classroom need not be understood as a capitulation to the consumerist mentality promoted by neoliberal reforms. There is an alternate reading to the trigger-warning debate: far from being weak or unable to cope, students are engaged in a serious critique of traditional law school pedagogy.

1, 2014, <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/05/01/one-in-five-women-in-college-sexually-assaulted-the-source-of-this-statistic/>. See also I. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1261 (2011) (calling attention to and criticizing U.S. society’s general indifference to male victims of rape).

58. In the aftermath, I decided to include multiple advisory notices in my syllabus, on the web-based course site, and in class. The notices are both general and specific. The general notices advise students that the subject matter and cases which they will read during the course of the semester are often violent and emotional, and also provide information about free and reduced cost psychological counseling services:

From time to time, the cases we study in Criminal Law may trigger past or current trauma due to personal experiences with crime. JMLS provides free and reduced cost counseling services.

At any time you may feel the need, I encourage you to seek assistance from the JMLS counselors, your friends and family, or me.

General Notice (n.d.) (on file with author). In the syllabus, on the day the rape and sexual assault module begins: “\*\*This class will require intense student participation. Please remember the course ground rules on professionalism, respect, and accountability.\*\*” Kim D. Chanbonpin, Course Syllabus: Criminal Law (Spring 2014) (on file with author).

59. Cf. SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 470 (2012) (describing the practice of classroom justice, in part, as “a critical approach that recognizes traditional law school teaching is intentionally oppressive and hierarchical”).

## II. CUTTING THE ISSUE<sup>60</sup>

Traditional law school pedagogy is characterized by its valorization of impartial and dispassionate analysis. Trigger warnings upset the stability of the classroom by demanding that individual and personal experiences with crime, law, and social policy should be recognized as making significant contributions to the learning process. Trigger warnings are a means of making visible and apparent the hidden assaults on students waged by “objectivity.” Instead of being a tool of corporatization reform models, trigger warnings are actually themselves a critique of neoliberalism because they directly challenge myths of neutrality and objectivity. In this sense, the discussion engendered around the topic of trigger warnings provides an opportunity for law faculty to fundamentally alter the classroom dynamic by inviting students to become partners in the production of knowledge.

In law school, students are taught that emotional responses should be sublimated in deference to rational, dispassionate analysis. Law students are instructed and trained to see all sides of a legal issue, and to articulate both the strengths and weaknesses of those varied positions. Learning how to “think like a lawyer” is a rite of passage, and each new first-year batch is especially susceptible to lure of the analytical legal method. Students are in constant competition with each other, and the dominant culture of law school encourages students to succumb to the new social norms that control their interactions inside and outside of the classroom, lest they be left behind.<sup>61</sup> Success in law school depends on an individual student’s ability to create objective distance between self and the subject matter. Reading appellate cases and discussing them in class through the professor’s use of the Socratic dialogue encourages students to sift legally significant facts from irrelevant details and to rely on abstractions to identify doctrine. These developing analytical skills are then tested and honed in the classroom through the Socratic dialogue. In a typical classroom, however, there is very little true dialogue. Instead, faculty and students are pitted against each other in a “lopsided format and [imbalance] of knowledge [that] affords little opportunity to debate in any meaningful sense.”<sup>62</sup>

60. In their manual for citizen-activists, the authors of *Organizing for Social Change* draw a clear line between “problems” and “issues.” The former are challenges that need to be addressed while the latter are solutions to those challenges. They assert that choosing the issue is a critical step in organizing a social movement, defining “cutting the solution” as “deciding how to frame the issue in a way that will gain the most support.” Kim Bobo, Jackie Kendall & Steve Max, *ORGANIZING FOR SOCIAL CHANGE* 22–23 (3d ed. 2001).

61. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515 (2007).

62. SpearIt, *supra* note 59, at 478.

Numerous studies have established that the legal method taught to students in the first year has the consistent and predictable effect of neutralizing a student's incoming moral intuitions, eventually replacing this subjective approach to dispute resolution with a preference for viewing all legal issues from an objective standpoint.<sup>63</sup> The absorption rate of, in Professor Elizabeth Mertz's terms, "legal epistemology (i.e., distinctively legal ways of approaching knowledge)" is quite high and only those who successfully adopt this new method of approaching knowledge will continue past the first year.<sup>64</sup>

In inculcating the values of detached, objective analysis, the legal method taught in law school also has the effect of alienating students from themselves. Legal epistemology emphasizes that dispassionate, neutral argumentation is the standard of analysis to which they ought to aspire. But for many students, particularly women and students of color, their lived experience is not easily divorced from the cases they study in class. As one female student at Columbia University wrote:

The rape unit was the first time I have ever felt so keenly the disconnect between law in theory and law in practice. I highly doubt I was the only student in the room who could offer some personal experience to the class. In fact, I know I was not. Yet I did not open my mouth once. Nor did anyone else, save the inevitable cold call. There we sat, discussing that in New Jersey a simple thrust satisfies the force element.<sup>65</sup>

Studying law is an emotive experience and many students find it difficult to participate in the classroom as disinterested observers. One out of four female college students will be the victim of some form of attempted or completed sexual assault during their college career.<sup>66</sup> A study published in 2011 concluded that 37.4 percent of female survivors of rape were first

63. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

64. *Id.* at 3.

65. Lane Feler, *Reconsidering Rape: Experience as the Life of the Law*, MORNINGSIDE MUCKRAKER (Feb. 24, 2014), <http://morningsidemuckraker.com/reconsidering-rape-experience-as-the-life-of-the-law/>. The New Jersey case referenced is *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992): "[P]hysical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful."

66. Jamie P. Hopkins & Kristina Neff, *Jurisdictional Confusion that Rivals Erie: The Jurisdictional Limits of Campus Police*, 75 MONT. L. REV. 123, 131 (2014). See also Melissa J. Himelein, *Risk Factors for Sexual Victimization in Dating: A Longitudinal Study of College Women*, 19 PSYCHOL. WOMEN Q. 31, 41 (1995) (conducting a study on sexual assault of college women).

The Department on Education recently released a list of fifty-five colleges and universities under a Title IX investigation for allegations that those schools fail to adequately address reports of sexual assault and sexual harassment on their campuses. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), available at <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

raped between the ages of 18–24.<sup>67</sup> Despite the frequency of the crime, victims of sexual assault regularly fail to report their attacks. Because of the phenomenon of under-reporting, students who have survived sexual assault may not have told any persons in positions of authority, if they have told anyone at all.<sup>68</sup> Regrettably, silence about rape outside of the classroom is often repeated inside the classroom.

Sociology professor Amanda Konradi asserts that the silence and non-participation of students who have had personal experiences with sexual assault is “a pedagogical issue.”<sup>69</sup> Konradi examined the silencing effect that occurs when rape or sexual assault is taught in undergraduate classes, and concluded that student silence results from “a perceived lack of safety and power in the classroom.”<sup>70</sup> Listening to other students’ unchecked cavalier attitudes about rape or sitting through a professor’s lecture in which sexual assault is made abstract or sanitized by objective language places students into a defensive posture where silence becomes a defense tactic.<sup>71</sup>

Compounding the problem, many law professors are reluctant to teach rape.<sup>72</sup> Some refrain from doing so specifically because of the personal anguish that a public discussion on the subject can cause to rape survivors in the classroom.<sup>73</sup> This reluctance is an acknowledgment that teaching

67. MICHELLE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 44 (2011), *available at*

[http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) (a project of the National Center for Disease Control and Prevention, National Center for Injury Prevention and Control). Men are more likely to be victimized when they are very young. *See* HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 4 (July 2000) (“Based on the NIBRS data, the year in a male’s life when he is most likely to be the victim of a sexual assault is age 4 . . .”). Of all sexual assault victims under the age of twelve, twenty-seven percent of them were male. *Id.* at 12.

68. Amanda Konradi, *Teaching About Sexual Assault: Problematic Silences and Solutions*, 21 TEACHING SOC. 13, 15 (1993). Men face specific challenges that contribute to their silence. “Male survivors who fear being thought deviant, specifically homosexual, may remain silent to avoid detection.” *Id.* at 15.

69. *Id.*

70. *Id.* at 15–16 (“[C]lassrooms are power-laden spaces in which each of our students is situated socially.”).

71. *Id.*

72. *See* Jennifer M. Denbow, *The Pedagogy of Rape Law: Objectivity, Identity and Emotion*, 64 J. LEGAL EDUC. 16, 16–18, 23 (2014) (citing James J. Tomcovicz, *On Teaching Rape: Reasons, Risk, and Rewards*, 102 YALE L.J. 481, 483 (1992)). *See also* Bloch, *supra* note 56, at 311 (noting that the second edition of the LaFave and Scott treatise on Criminal Law does not contain a section on rape); Michelle Madden Dempsey, *Teaching Rape: Some Reflections on Pedagogy*, VILL. L. REV. (2008), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1601490](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601490); Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992); Michelle Oberman, *Getting Past Legal Analysis . . . Or How I Learned to Stop Worrying and Love Teaching Rape*, 45 CREIGHTON L. REV. 799, 800 n.4 (2012); Jeannie Suk, *The Trouble with Teaching Rape Law*, NEW YORKER, Dec. 15, 2014, <http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>.

73. Tomcovicz, *supra* note 72, at 504.



rape law is fraught with hazards for law teachers. Certainly, when I read the negative student comment in my course evaluation,<sup>74</sup> I felt deeply disappointed in my ability to control the class discussion in a manner that made all students feel safe and respected, despite my best efforts. Nevertheless, I strongly believe that a course on Criminal Law must include a unit dedicated to rape. I teach rape law each year not only for the pragmatic reason that the subject is tested on the Multistate Bar Exam, but because of the insights about law, society, and culture that first-year students can glean from studying the development of rape law over time.

Importantly, rape cases are not the only ones that might have an emotional impact on a student, and we cannot avoid all hard topics. Very early in the semester, for example, I teach *Commonwealth v. Howard*,<sup>75</sup> for the proposition that failures or omissions to act may occasion criminal liability.<sup>76</sup> In *Howard*, a mother appealed her involuntary manslaughter conviction for the death of her five-year-old daughter. Although the direct cause of the child's death was a violent beating perpetrated by the mother's boyfriend, the prosecution pursued a criminal case against the mother under the theory that the mother's failure to intervene to prevent the boyfriend from hurting the child was criminally culpable. The boyfriend had been "regularly beat[ing] the child and subject[ing] her to various forms of sadistic abuse" for weeks prior to the fatal incident.<sup>77</sup> Holding that the mother's "failure to protect the child was a direct cause of her death, and that such failure was reckless or grossly negligent under the circumstances," the Pennsylvania Superior Court affirmed the defendant's conviction.<sup>78</sup> The doctrine of omission liability is a straightforward one—if some special relationship exists between the defendant and the victim of the crime, the defendant actually knows of the facts giving rise to her duty to act, and the defendant is physically capable of acting, a failure to act will result in criminal liability.<sup>79</sup>

The "lesson" of omission liability in *Howard*, however, obscures the mother Darcel Howard's lived reality. When I teach *Howard*, it is not difficult to locate a student who will voice passionate support of the result in the case. That passion is typically tied to a disdain for the defendant-mother, who, in many students' eyes, has breached both the legal and moral

74. See *supra* notes 57–58 and accompanying text.

75. *Commonwealth v. Howard*, 265 Pa. Super. 535 (1979) (as excerpted in CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW, CASES AND MATERIALS* (3d ed. 2014)).

76. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993).

77. *Howard*, 265 Pa. Super. at 675.

78. *Id.* at 676.

79. So long as the mens rea and causation elements of the crime are also met.

duty of care that a parent owes her child. When I suggest that the mother may not have intervened to prevent the abuse to her child because she may have feared that her boyfriend's rage would be redirected at her, students frequently respond that the mother should have left the abusive situation. These students do not understand that leaving an abusive partner is never easy.<sup>80</sup> Their classmates who are domestic violence survivors might be able to disabuse them of these assumptions.<sup>81</sup> I do not mean to suggest that survivors of violence are the only authentic voices in these conversations, nor do I mean that survivors should feel obligated to speak from their own experiences, but I do think that the classroom should be a space where all students feel that they have the option to speak.

Nurturing a space for dialogue inside the classroom, counterintuitively, means focusing on what is happening inside the classroom, not on how to make the experience more objective. For survivors of rape and other forms of violence, these classroom discussions are not merely academic. Konradi calls for "an approach to teaching about sexual assault that respects the emotional nature of the topic and increases survivors' feelings of trust and safety in the classroom."<sup>82</sup> As she notes, "[N]ew ways of seeing are often accompanied by discomfort"<sup>83</sup> and "explaining that some discomfort is inherent in the learning process demystifies learning and exposes it as mental work."<sup>84</sup> Using trigger warnings as one method of making students "mentally prepared" for intense classroom discussion positively redirects the energy that otherwise would be expended in trying to maintain calm and composure.<sup>85</sup> As law professors, we try to elicit class discussion by sometimes making provocative or even outrageous statements. Students

80. See Lauren E. Crais, *Domestic Violence and the Federal Government*, 6 GEO. J. GENDER & L. 405 (2005) (describing the cultural inadequacies of the federal Violence Against Women Act having a disparate impact on women of color and immigrant women); Adele Morrison, *Challenging the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061 (2006); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L. REV. 1331 (1997) (discussing the prevalence of departure killings, intentional homicides perpetrated when an intimate partner seeks to leave an abusive domestic situation).

81. See Rishi Iyengar, *After Ray Rice Video, Twitter Takes a Stand With #WhyIStayed and #WhyILeft*, TIME (Sept. 9, 2014), <http://time.com/3307109/twitter-ray-rice-domestic-violence-abuse-whyistayed-whyileft/>. In February 2014, Baltimore Ravens running back Ray Rice punched his now-wife, Janay Rice, into unconsciousness while they were riding an elevator. In September 2014, surveillance footage from the elevator was released and prompted passionate reactions from the public. After many flabbergasted commentators questioned Janay Rice's decision to marry her abuser after she had experienced this abuse, survivors of domestic violence responded with a Twitter campaign dubbed #WhyIStayed. Beverly Gooden, the creator of the hashtag explained: "Leaving was a process, not an event. And sometimes it takes awhile [sic] to navigate through that process." *Id.*

82. Konradi, *supra* note 68, at 15.

83. *Id.* at 19.

84. *Id.* at 20.

85. *Id.* at 14.

are often eager to take the bait. Recognizing these class dynamics requires us to be cautious and to moderate what is said in class, as well as to highlight or provide a voice that goes left unheard.

Mental health experts have cautioned that trigger warnings are not a panacea. It is impossible to predict what exactly will “trigger” trauma.<sup>86</sup> In my view, however, trigger warnings are not mechanisms for avoiding emotion, but are tools to aid in contextualizing it. Responding to requests for trigger warnings is about adopting mechanisms to facilitate full student participation and engagement with the subject material. Many campuses have counseling and support services available for free or at reduced cost.<sup>87</sup> Advance warnings that contain information about available support resources on campus provide students with autonomy and agency, with the goal of empowering students to be able to engage with challenging subject matter, like rape and sexual assault.

Making trigger warnings available on course materials is one way for students to reclaim power. The student-led call for their use creates an opportunity for faculty to thoughtfully curate the classroom as a democratic space “where students gain a public voice and come to grips with their own power as individuals and social agents.”<sup>88</sup> With content advisories, students can decide for themselves whether to attend class or how to participate in classroom discussions. While some students may decide to avoid certain course material or to forego participation altogether, trigger warnings make those choices theirs. Syllabi containing content advisories could also include details about the possible repercussions of making this choice.<sup>89</sup> Ideally, trigger warnings provide students a necessary heads-up, an opportunity to mentally prepare for a challenging classroom discussion.

Rape, murder, racism, and persistent social and economic inequality are all necessary topics of discussion in a complete legal education. If lawyers are to continue to be professionals who serve the public, confront injustice, and, through the rule of law, work for progressive social change, law students should be exposed to these harsh realities during law school.

86. Freeman et al., *supra* note 3 (“Flashbacks, panic attacks, and other manifestations of past trauma can be triggered by innocuous things: a smell, a sudden movement, a color.”); Roff, *supra* note 1 (writing as a psychiatrist and a former professor).

87. ROBERT P. GALLAGHER, NATIONAL SURVEY OF COLLEGE COUNSELING CENTERS 4 (2014), available at [http://www.collegecounseling.org/wp-content/uploads/NCCCS2014\\_v2.pdf](http://www.collegecounseling.org/wp-content/uploads/NCCCS2014_v2.pdf) (reporting that twenty dollars was the mean fee for personal counseling services on college campuses).

88. Giroux, *supra* note 5, at 432.

89. For example, a trigger-warning accommodation does not mean that students can expect to completely avoid exposure to the subject. For instance, I frequently test rape and sexual assault fact patterns on my exams. All of my past essay questions are available for students to review, however, and serve as a reminder that material on the syllabus is testable.

Acknowledging this does not mean, however, that law faculties should not also provide better support systems for those students. Faculty and students can work together towards common goals that ultimately benefit all in the classroom.

### III. THE AUDACITY OF COMMON GOALS

Without a doubt, law school is a training ground for the elite. It is an institution where the dominant values of the privileged classes are inculcated and reproduced through legal education, which itself is a process of acculturation that socializes students in the ways of legal professionals.<sup>90</sup> As such, it requires indoctrination into the established norms of the practicing bar and the social and economic elite from where most lawyers originate. A law degree symbolizes that one has successfully absorbed the lessons provided in what Professor Lucy Jewel calls a “socially qualified teaching and learning”<sup>91</sup> space.

Law school is also, however, a potential site of resistance to established norms. Some law students still have the audacity to believe that a legal education offers them the knowledge, skills, and tools with which they can challenge injustice and work for social change. In promoting notions of fair outcomes and stability, traditional legal pedagogy does not provide a satisfactory answer to persistent inequality or race- and class-dependent outcomes in the justice system. Students look to law professors to help shepherd them through the hazards posed by doctrinal problems such as the Rule Against Perpetuities as well as on-campus interviews hosted by equity partners representing large law firms. A law teacher’s responsibility, therefore, is to provide her students with the substantive knowledge they will need in order to pass the institutional barriers to academic and professional success. But in addition, a law teacher must also help students cultivate a transformative vision that allows them to see

90. LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 521–22 (2007); Lucille Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 1 (1998).

91. Jewel, *supra* note 90, at 1155 (citing PIERRE BOURDEIU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 163–64 (1990)).

through invisible structures that prevent obstacles to progressive legal and social change.<sup>92</sup>

Despite these challenges, a legal education is a valuable one.<sup>93</sup> Law school matters because the law (still) matters. As critical race theorists have long asserted, although justice and fairness are not actually equally distributed to all, those ideals still matter.<sup>94</sup> Rights discourse is not meaningless for those who have been denied rights by the law.<sup>95</sup> Orders of protection from the family court are necessary tools of survival for targets of domestic violence.<sup>96</sup> Lawful status means something to undocumented immigrants, refugees, and asylum seekers.<sup>97</sup> Regulation of the financial sector means something. After \$300 million in lobbying efforts felled the Glass-Steagall Act in 1998, decades-old regulations separating banks from investment firms and insurance companies were eliminated.<sup>98</sup> The unregulated environment created huge profit incentives for those new firms to engage in extremely risky behavior.<sup>99</sup> Their risk-taking created huge profits for investment banks and resulted in year-end bonus windfalls for bankers, but ultimately led to the global financial meltdown of 2008.<sup>100</sup> The goal of

92. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 1, 9 (1989) (invoking the image of multiple consciousness which "will allow us to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge"); W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* (1903) (introducing the concepts of African American double-consciousness and the veil).

93. Michael Simkovic and Frank McIntyre have demonstrated the continuing financial value of a law degree over time, but what I mean here is a value beyond money. See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014).

94. See also LANGSTON HUGHES, *LET AMERICA BE AMERICA AGAIN* (1994), available at <http://www.poets.org/poetsorg/poem/let-america-be-america-again>.

95. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1992).

96. See Debra Pogrud Stark, *What's Love Got to Do with It? Confronting Judicial Nullification of Domestic Violence Remedies*, 10 NW. J. L. & SOC. POL'Y 7 (2014).

97. Immigrants who receive legal representation are far more likely to obtain favorable results in immigration court than those who do not have lawyers. See ANDREW I. SCHOENHOLTZ ET AL., *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* 53–54 (2014); Laura Meckler & Ana Campoy, *Children Fare Better in U.S. Immigration Courts if They Have an Attorney*, WALL ST. J., July 16, 2014, <http://www.wsj.com/articles/children-fare-better-in-u-s-immigrant-courts-if-they-have-an-attorney-1405531581>.

98. Barry Ritholtz, *Repeal of Glass-Steagall: Not a Cause, but a Multiplier*, WASH. POST, Aug. 4, 2012, [http://www.washingtonpost.com/repeal-of-glass-steagall-not-a-cause-but-a-multiplier/2012/08/02/gJQAuvvRXX\\_story.html](http://www.washingtonpost.com/repeal-of-glass-steagall-not-a-cause-but-a-multiplier/2012/08/02/gJQAuvvRXX_story.html). Cf. Tayyab Mahmud, *Looking Back, Moving Forward: Latin Roots of the Modern Global and Global Orientation of LatCrit*, 12 SEATTLE J. FOR SOC. JUST. 699, 750 (2014) ("Neoliberalism makes increasing recourse to the law to displace social welfare systems through liberalization, deregulation, and privatization, and uses the discipline of expanded markets to remove barriers to accumulation that earlier democratic gains had achieved.").

99. Ritholtz, *supra* note 98.

100. Barry Ritholtz, *What Caused the Financial Crisis? The Big Lie goes Viral*, WASH. POST, Nov. 5, 2011, [http://www.washingtonpost.com/business/what-caused-the-financial-crisis-the-big-lie-goes-viral/2011/10/31/gIQAXISOqM\\_story.html](http://www.washingtonpost.com/business/what-caused-the-financial-crisis-the-big-lie-goes-viral/2011/10/31/gIQAXISOqM_story.html).

neoliberal reformers appears to be the marginalization of the law and lawyers as mechanisms for achieving social justice.

The role of lawyers in U.S. society is central to the provision of justice. When lawyers lose the capacity to effectively manage legal discourse, the discipline will be swallowed by others. The law as a system of social and cultural meaning, supported by the ethics of justice, will become devalued and marginalized, leaving room for the logic of the market to replace it. Although the number of law school applicants continues to decline, the demand for legal services for poor and middle-income individuals and families has never been more profound.<sup>101</sup> In the general downturn on law school campuses, one data point is worth noting: as the total number of law students has declined, the numbers of African American and Latino students has actually increased.<sup>102</sup> Yet, popular voices continue to discourage talented candidates from applying to law school because the majority of graduates will not grasp the “brass ring” of a six-figure starting salary.<sup>103</sup>

What the crisis rhetoric obscures is the neoliberal assault on law and legal institutions as the source and bastion of civil and social rights and a (sometimes admittedly ineffective) bulwark against corporate greed. Law schools, at their best, provide a space for faculty and students to engage in

101. See, e.g., Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 n.1 (2013) (citing studies which conclude that the majority of legal services needs for poor and middle-income earners go unmet).

102. Mike Stetz, *Most Diverse Law Schools*, 2014 NAT'L JURIST 24, <http://www.nxtbook.com/nxtbooks/cypress/nationaljurist1114/#/26> (noting “Blacks and Hispanics make up a greater share of law students, thanks to declining enrollment among Asian and white students”). Cf. Karen Sloan, *Legal Education's Diversity Deficit*, NAT'L L. J. (May 12, 2014), <http://www.nationallawjournal.com/id=1202654682216/Legal-Educations-Diversity-Deficit> (observing only a modest rise in enrollment of students of color). SALT has developed “B.A.-to-J.D. pipeline” programs to increase racial diversity in law schools. See Letter from Soc’y of Am. Law Teachers to the A.B.A. Council on Legal Educ. & Admissions to the Bar (Mar. 5, 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/march\\_2013\\_council\\_meeting/2013\\_march\\_salt\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march_2013_council_meeting/2013_march_salt_report.authcheckdam.pdf). Beyond adding cosmetic diversity to the legal profession, the expectation is that law students of color will maintain a commitment to under-served and low-income communities. See, e.g., N.Y.C. BAR, EMPOWERING TOMORROW’S LEADERS: BEST PRACTICES FOR SUPPORTING DIVERSE LAW STUDENTS DURING LAW SCHOOL AND INTO EMPLOYMENT 4 (Apr. 2014), available at <http://www2.nycbar.org/pdf/report/uploads/20072683-BestPracticesforBuildingSupportingthePipelinettoLegalProfession.pdf>; UNIV. OF TOLEDO, COLLEGE OF LAW: DIVERSITY PLAN 4 (Oct. 2011), available at [http://www.utoledo.edu/law/studentlife/resources/pdf/law\\_diversity\\_plan.pdf](http://www.utoledo.edu/law/studentlife/resources/pdf/law_diversity_plan.pdf); U.S. DEP’T OF HEALTH & HUMAN SERVS., THE RATIONALE FOR DIVERSITY IN THE HEALTH PROFESSIONS: A REVIEW OF THE EVIDENCE 6 (Oct. 2006), available at <http://bhpr.hrsa.gov/healthworkforce/reports/diversityreviewevidence.pdf> (same in medical schools).

103. See, e.g., Michael I. Krauss, *Law School Begins: Here's a Message to the New Crop of 1L's*, FORBES (Aug. 19, 2014, 9:26AM), <http://www.forbes.com/sites/michaelkrauss/2014/08/19/law-school-begins-heres-a-message-to-the-new-crop-of-1ls/>; *Salary Distribution Curves*, NAT'L ASS'N FOR LAW PLACEMENT, <http://www.nalp.org/salarydistrib> (last visited Feb. 5, 2015).

the collaborative production of knowledge, professional identity, and practical skills.<sup>104</sup> In a letter to the ABA Council defending the tenure system at law schools, the Society of American Law Teachers wrote:

A quality legal education requires schools to discuss complex and often controversial problems; to explore these problems in an experiential setting; to use the rules of law but also to question them; and to combine traditional and new approaches to pedagogy. To achieve all of this, law faculty must be free to innovate; to develop and implement missions reflecting the needs of their students; to support, directly and indirectly, access to legal services for the public; and to impress upon students their role as public citizens as they become practicing lawyers.<sup>105</sup>

Law school, like the university, “should [be] a site of critical thinking, democratic leadership, and public engagement.”<sup>106</sup> The public values of ethics, equity, and justice remain central to the mission of legal education and to the practice of law.<sup>107</sup>

## CONCLUSION

The debate on trigger warnings ought to be understood within the larger context of the increasing trend towards the corporatization of higher education. As the roles of the law and lawyers become sidelined in a social system more focused on individual achievement than social progress, diatribes over dialogue, and efficiencies over substantive justice, law teachers have an obligation to reflect on the core values of a legal education. In so doing, this Essay proposes that, although the law is not a perfect system, it is one that maintains a commitment to the public goods of equality and fairness. As such, lawyers and the legal academy must defend the law, even while they challenge it to be a better version of itself. New lawyers entering this imperfect system must be properly nurtured throughout their training and education, and law teachers must remain alert to their students’ changing needs. In this context, incorporating the use of trigger warnings into

104. Carpenter et al., *supra* note 30, at 7–8 (citing Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 12–13 (2002)).

105. Letter from Soc’y of Am. Law Teachers to the Honorable Solomon Oliver, Jr., Council Chairperson & Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., Section on Legal Educ. & Admission to the Bar (Sept. 27, 2013), available at [http://www.saltlaw.org/wp-content/uploads/2013/08/09\\_27\\_2013\\_SALT-Comment-Regarding-Standard-4051.pdf](http://www.saltlaw.org/wp-content/uploads/2013/08/09_27_2013_SALT-Comment-Regarding-Standard-4051.pdf).

106. Giroux, *supra* note 5, at 427.

107. See ABA MODEL RULES ON PROFESSIONAL CONDUCT, A.B.A. pmbl. ¶ 1, available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice”).

classroom discussions is one of many options for law faculty to respond to the concerns of their students.

My decision to use trigger warnings in the classroom was borne out of a desire to provide students with the support necessary to extract the most value out of their legal education. I have concluded that sending early warning signals to alert them to potential difficulties and providing resources for formal and informal counseling is one method for helping them outside of the classroom so that they are prepared to fully engage in the learning process inside of the classroom.



