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# PUSHING BACK AGAINST LANGDELL

Emily Zimmerman\*

Legal education is dominated by the study of court opinions.<sup>1</sup> Court opinions are the product of litigation. Therefore, legal education is necessarily focused on the law as it arises in the context of litigation. This focus on litigation is particularly intense in the first year of law school when students, in general, take a required slate of courses that focus predominantly on reading opinions. Moreover, the required first-year legal research, writing, and analysis courses typically focus on writing analytical memos in a litigation context (a lawsuit or a potential lawsuit) and trial or appellate briefs in court cases.

This focus can have detrimental consequences for law students. First, law students may come to believe that the vast majority of disputes result in and are resolved by litigation, which is not the case. Second, law students may believe that the vast majority of law practice is litigation-focused, which is also not the case. Third, law students may develop a skewed view of the world, in which situations and relationships (both business and personal) are destined to end in catastrophe<sup>2</sup> and breakdown.

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<sup>1</sup> See Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBS. 5, 6–7 (1995) (briefly discussing the case method of legal pedagogy, including the foundational role of Christopher Columbus Langdell); see also ROBERT STEVENS, LAW SCHOOL 52 (1983) (“The case method, although not an original creation of Langdell’s, became known as his by virtue of his determined and systematic application of the approach.”) (footnote omitted).

<sup>2</sup> Or, at least, injury of some sort.

In light of concerns that have been raised about the well-being of law students,<sup>3</sup> it is worth considering whether the litigation focus of the first-year law school curriculum is in part responsible for some of the mental health challenges that some law students experience.<sup>4</sup> In reality, situations and relationships do not always end in catastrophe and breakdown, and disputes do not always end in litigation. However, one would certainly not know this from the first-year curriculum, which immerses students in studying the law through the lens of litigation.<sup>5</sup>

The use of court opinions to study the law and learn legal analysis may be an entrenched part of law school pedagogy—particularly first-year law school pedagogy. However, there are ways in which we can push back against the dominance of litigation. Moreover, there are manageable ways to push back that do not require upending law school pedagogy (although that still remains an option).

As an initial matter, professors should be transparent about the litigation focus of individual courses and the first-year curriculum and the potential consequences of

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<sup>3</sup> See, e.g., Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 117, 137–38 (2016).

<sup>4</sup> See Peter H. Huang & Corie Rosen Felder, *The Zombie Lawyer Apocalypse*, 42 PEPP. L. REV. 727, 740 (2015) (discussing law student distress and raising the “possibility” that “law school teaches learned pessimism by teaching law students to think about what can go wrong for their clients”). Other scholars have also noted changes that occur in law students during the first year of law school and suggested causes for these changes. See, e.g., Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 436 (2005) [hereinafter Winick, *Using Therapeutic Jurisprudence*] (discussing changes in first-year law students and stating that “[t]he Socratic method, although undeniably beneficial in analytical training, often produces a form of ethical relativism and even cynicism about right and wrong”); see also *id.* at 475–76 (“Traditional legal education has relied too much on the case method as its principal teaching technique, has overemphasized the teaching of advocacy skills, and ha[s] deified the adversary system as the preferred mode of dispute resolution. As a result, law school frequently indoctrinates students with a view of lawyering characterized by adversarialness.”).

<sup>5</sup> Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189, 202 (2002) [hereinafter Winick, *The Expanding Scope*]. Such a pervasive reliance on cases in the first year of law school might also promote a “culture of critique,” which might contribute to diminished well-being among law students. See David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 264 (1999) (“In our culture of critique, opposition and debate are the preferred methods of resolving conflicts and of solving tough problems.”); see also Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 51 (2001) (“The Socratic teaching method—employed especially in large, first-year classes—cultivates and encourages adversarial thinking by emphasizing zero-sum situations. The students’ adversarial skills are honed by withstanding questioning from skeptical interrogators.”).

this focus.<sup>6</sup> Professors should explain to students the reasons for studying court opinions and the limitations of relying so heavily on court opinions. Professors should remind students that most relationships do not end in litigation, most situations do not end in catastrophe, and most disputes are resolved in ways other than litigation. Professors should talk with students about both the limitations and benefits of litigation, encouraging students to consider when litigation is not the most constructive way to solve a problem and when litigation might be the most advantageous avenue for redress.<sup>7</sup> Professors should talk with students about the financial cost of litigation and access to justice issues and make sure students understand that civil litigation is beyond the financial means of most individuals. Professors should also talk with students about the psychological, time, and relationship costs of litigation (even where litigation is financially viable).<sup>8</sup>

In addition, professors should talk with students about how focusing on litigation might impact them psychologically, both in ways that students might be conscious of and in ways that students might not be conscious of. Professors should tell students that focusing so much on court opinions in their first year of law school can give them a warped perspective on the world.<sup>9</sup> Professors should remind students that disputes and breakdowns are not the inevitable results of relationships and that

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<sup>6</sup> See Emily Zimmerman & Casey LaDuke, *Every Silver Lining Has a Cloud: Defensive Pessimism in Legal Education*, 66 CATH. U. L. REV. 823, 868 (2017). The present Essay further develops some ideas that were briefly raised in this previous article.

<sup>7</sup> Winick, *The Expanding Scope*, *supra* note 5, at 202 (“Although litigation has often been seen as the antithesis of preventive lawyering, litigation sometimes is necessary.”).

<sup>8</sup> *E.g.*, Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 691 (1982) (noting “the economic and emotional toll which always accompanies litigation”); *id.* at 695 (noting that litigation can be “stressful, frustrating, time-consuming, expensive, and frequently unrewarding for the client”); Winick, *The Expanding Scope*, *supra* note 5, at 192 (noting the “clients’ stress, anxiety, and other negative emotional reactions that the litigation process can frequently produce”); *id.* at 192–93 (noting that litigation is “costly, risky, and stressful”); *id.* at 202 (“[T]he high cost, lengthy delays, emotional stress, and moral challenges of participating in litigation make it a singularly inappropriate method of dispute resolution for most clients.”); Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 456 (“Litigation is costly, involves lengthy delays, is unpredictable, and produces extreme stress that can be emotionally debilitating and injurious to the client’s business and personal affairs.”).

<sup>9</sup> Other professors have noted changes in law students from the beginning to the ending of the first year of law school. See Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 ST. THOMAS L. REV. 483, 486 (2005) (“I have . . . watched what we do to our students as we teach them in the first year, and I have anecdotal if not systematic knowledge of the way we change the way they think, as we go from September to May. In some ways the change is astonishing. In some ways, it is truly distressing.”); see also *id.* at 491 (noting how the first year of law school constricts “law students’ frames of reference”).

all situations do not end in harm (physical, financial, or psychological), contrary to the impression that one might get from the first-year curriculum. Students should understand that most disputes are resolved without the involvement of lawyers, much less resorting to litigation, and that litigation is generally a last resort, not a first option. Furthermore, professors should highlight that litigating is not the only way to be a lawyer; there are many types of law practice that do not involve litigation<sup>10</sup> and that have the goal of promoting constructive relationships and the avoidance of disputes and litigation.<sup>11</sup>

In addition, when professors study court opinions with students, students can be given the opportunity to develop alternatives-to-litigation counterfactuals.<sup>12</sup> These counterfactuals can explore ways in which conflicts giving rise to litigation could have been avoided in the first place. These counterfactuals can also explore ways in which conflicts giving rise to litigation could have been resolved without resorting to litigation (either with or without the involvement of lawyers).

Taking time to develop these counterfactuals serves several purposes. Discussing alternatives to litigation demonstrates to students that law school is not solely concerned with litigation and the law as it develops through litigation. Taking time to discuss alternate narratives can also help remind students that all relationships do not necessarily involve conflict that ends with litigation. In fact, while all relationships might involve some conflict to one degree or another, the vast majority of these conflicts do not result in litigation.

Developing alternate narratives can help students see how conflicts could be avoided and could help students see how conflicts, when they arise, could be resolved without litigation.<sup>13</sup> Students can see that many alternatives to litigation do not involve lawyers at all. Other alternatives might involve lawyers who counsel clients in a way that will avoid litigation and facilitate the avoidance and resolution of

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<sup>10</sup> Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 430 (“[M]ost lawyers will not be litigators.”).

<sup>11</sup> See Brest, *supra* note 1, at 7 (“In some instances, the very fact that litigation ensued signals a failure of . . . lawyers’ judgment or skill.”).

<sup>12</sup> For a brief discussion of counterfactuals, see Tshildzi Marwala, *Rational Counterfactuals* (Apr. 8, 2014), <https://arxiv.org/pdf/1404.2116.pdf> [<https://perma.cc/R8BZ-2FHB>]. The present Essay takes perhaps a broader view of what constitutes a “counterfactual” than some might take.

<sup>13</sup> Re, *supra* note 8, at 691 (“Lawyers should be taught how to avoid litigation, just as they are taught how to conduct successful litigation.”); *id.* at 695 (“Too often too many lawyers assume that litigation is the only means of resolving disputes.”).

disputes.<sup>14</sup> Moreover, even in the context of litigation, the ability to generate creative solutions can assist both lawyers and their clients in settlement negotiations.<sup>15</sup>

Students will have a more well-rounded, healthier, and realistic view of both relationships and the role of lawyers. Students will see that lawyers can have a role to play not only in the breakdown of relationships but also in advising clients to avoid disputes and avoid the resolution of disputes through litigation. In other words, lawyers can be involved in promoting and maintaining relationships, rather than only being involved when relationships break down and end up in litigation. Thus, students might have a more positive, holistic view of the role they can play in their clients' lives.<sup>16</sup> Students who do not want to be litigators will see that there is a place for them in the legal profession,<sup>17</sup> and students who do want to be litigators will see

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<sup>14</sup> See *id.* at 696 (“In their capacities as conciliators and negotiators, lawyers fulfill their classic role as healers, rather than promoters of conflict.”). In discussing the limitations of relying on cases, Dauer notes, “[w]e might be able to see in that case the kind of stuff that does not work, but we cannot see—or show our students—from that pathology alone very much at all about the kind of stuff that does work, because the kind of stuff that does work does not make it into the cases.” Dauer, *supra* note 9, at 494.

<sup>15</sup> See Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 459 (“Settlement will avoid further litigation that is always costly, risky, and stressful, and the techniques of engaging in settlement discussions and convincing clients of their value are important Preventive Law tools that every lawyer should possess.”); Winick, *The Expanding Scope*, *supra* note 5, at 192–94 (discussing preventive law and settlement); see also *id.* at 203 (“Litigation . . . is not an occasion for abandoning the preventive law process, but simply is one of a number of facts of life that must be dealt with by the preventive lawyer. These facts can be addressed in ways that minimize future problems and provide the client with an improved holistic understanding of and more creative solutions for the dispute in which [the client] is involved.”).

<sup>16</sup> While a lawyer’s role may involve anticipating pitfalls, students should be encouraged to see how lawyers can help their clients avoid those pitfalls. Professors can also help students become self-aware about how lawyers’ professional role as anticipators of pitfalls on their clients’ behalf might impact lawyers’ outlook on life generally. See Seligman, Verkuil & Kang, *supra* note 5, at 41 (“The ability to anticipate a whole range of problems that non-lawyers do not see is highly adaptive for the practicing lawyer. . . . The qualities that make for a good lawyer, however, may not make for a happy human being.”).

<sup>17</sup> See Wexler, *supra* note 5, at 265–66 (noting that approaching problems from a less adversarial perspective “may also increase the pool of problem-solving talent” because “[i]n a culture of critique, those who do not thrive on a steady diet of criticism or confrontation may drop out of—or never choose to enter— . . . law”); see also *id.* at 276 (“Efforts are underway to introduce therapeutic jurisprudence—and other models that are alternatives to the argument culture—into law schools, and judicial, and legal practice settings. The hope . . . is that bringing an explicit ethic of care into law practice will . . . begin to attract to the legal profession many who have opted out of practicing in a culture of critique.”) (footnote omitted).

that their role will encompass much more than advocating in court on behalf of their clients.<sup>18</sup>

Developing alternatives-to-litigation counterfactuals can help students think both large-scale and small-scale regarding ways to avoid disputes and resolve disputes when they do occur. Students can think about systemic causes of conflict and ways to prevent or remedy them. Students can also think about causes of conflict and ways to avoid them on a smaller-scale level (for example, interpersonal).

For example, in the fall semester of 2021, my students researched a memorandum assignment involving a tenant who rented out her apartment for the weekend on an Airbnb-type online platform.<sup>19</sup> The tenant's ex-boyfriend broke into the apartment (with a key that he still had) and robbed and assaulted the subtenants. The tenant had previously broken up with her boyfriend after he started using illegal drugs after losing his job as a teacher and pushed her during an argument. In the last class of the semester, the students worked in small groups to brainstorm alternatives to the scenario. Students were asked to identify ways in which the break-in could have been prevented and ways in which the couple who were the victims of the break-in could resolve their dispute with the tenant without resorting to litigation.

After the students worked in small groups to develop these alternate narratives, we debriefed what they came up with. Options discussed in the debriefing included that the tenant could have changed the lock on her apartment door or asked her landlord to change the lock on her apartment door. Another suggestion was that the tenant could have waited to list her apartment for rent until more time had passed

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<sup>18</sup> On a related note, Professor Winick suggested the importance of students seeing that they can practice law in a way that is consistent with their values:

Rather than stripping away their values, as the Socratic method sometimes does, leaving a values vacuum that contributes to deprofessionalization and a cynicism about ethical standards, we need to remind law students about their moral vision and ask them to build a professional life for themselves that is congruent with it, rather than detached from or even alien to it. Only then will they be happy, self-fulfilled people, satisfied professionals, and effective lawyers.

Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 476; *see also id.* ("Our students need to know that they can become the kinds of lawyers they dreamed about being.").

<sup>19</sup> My Legal Methods colleagues and I contributed to the design of this assignment, but I was not the originator of the assignment. My colleague, Professor Amy Montemarano, originated this assignment. For this assignment, the students had to analyze premises liability and statute of limitations issues in connection with a potential lawsuit against the tenant by the subtenants.

after her break-up. The debriefing was also an opportunity to consider whether there were any larger-scale issues raised by the scenario, for example, the loss of the ex-boyfriend's job or his substance use issues.<sup>20</sup>

This exercise was a very manageable way to address the litigation focus of the course and could be easily integrated into other courses as well. I also encouraged the students to think about alternatives to disputes and litigation as they read cases in their other classes, even if their professors did not explicitly give students time to consider and discuss these alternatives in class.

Discussing alternate narratives in which disputes did not arise or were resolved without resort to litigation can promote law students and law professors thinking more deeply and broadly about the role of law and lawyers.<sup>21</sup> It can also encourage students to think about ways in which the law and lawyers can promote the maintenance of healthy relationships (both business and personal).<sup>22</sup> There is more to being a lawyer—even if one is a litigator—than representing a client in court.<sup>23</sup> Lawyers need to explore their clients' interests and goals and counsel their clients about more than only litigation (and litigation may be the last thing a client wants to pursue).<sup>24</sup> Thinking about alternatives to litigation can help students practice their

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<sup>20</sup> The scenario also raises issues regarding domestic violence, which could be explored with students.

The scenario involving the tenant was the students' second memorandum assignment of the semester. The students and I did a similar exercise in connection with their first memorandum assignment, which involved a law firm missing a filing deadline in connection with a lawsuit. My Legal Methods colleagues and I contributed to the design of this memorandum assignment, but I was not the originator of the assignment. Professor Alison Julien originated this assignment. For the alternate narrative exercise in connection with this memorandum assignment, the students brainstormed ways that the missed deadline could have been avoided. I have also done a version of the counterfactual development exercise with my students in the spring semester of Legal Methods, which focuses on persuasive writing and oral advocacy. This exercise can also provide an opportunity to surface professional responsibility issues. For example, if a student suggests conduct of an attorney that would be unethical or violate the law or rules of professional conduct, then that can provide a teachable moment for class discussion.

<sup>21</sup> See Brest, *supra* note 1, at 8 (“[A] good lawyer must be able to counsel clients and serve their interests beyond the confines of [the lawyer’s] technical expertise—to integrate legal considerations with the business, personal, political, and other nonlegal aspects of the matter.”).

<sup>22</sup> See Re, *supra* note 8, at 693 (noting that with preventive law, “[t]he effort should be to prevent or avoid both the dispute as well as the possible lawsuit”).

<sup>23</sup> See Winick, *The Expanding Scope*, *supra* note 5, at 190–97 (discussing preventive law in the context of litigation); see also *id.* at 191 (“I suggest that all lawyers, whether they think of themselves primarily as lawyers counseling their clients in the law office, as litigators, or as both, can and should understand the preventive law model and apply it in their practice.”).

<sup>24</sup> See Re, *supra* note 8, at 689 (noting “the crucial role that the legal counselor can play in *avoiding* controversy and in *resolving* disputes *without resorting to litigation*”); *id.* at 690–91 (“The lawyer, when

creative thinking skills to help them be better counselors to their clients,<sup>25</sup> as well as both problem-avoiders and problem-solvers.<sup>26</sup>

Thinking about alternatives to litigation can also help students identify ways that lawyers can promote their clients' well-being (including mental well-being).<sup>27</sup> In the field of psychology, which traditionally focused on mental illness, positive psychology arose to study human "thriving."<sup>28</sup> Similarly, in the field of law, therapeutic jurisprudence explores the law's "therapeutic potential,"<sup>29</sup> and

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acting as a *counselor*, performs a function that is extremely beneficial to society, in that effective legal counseling minimizes the likelihood of conflict between parties by stabilizing relationships and promoting understanding and cooperation. . . . In the role of counselor, the lawyer serves as an instrument of peace."); *see also* Brest, *supra* note 1, at 8 ("[G]ood lawyers bring more to bear on a problem than legal knowledge and lawyering skills. They bring creativity, common sense, practical wisdom, and that most precious of attributes, good judgment.").

<sup>25</sup> *See* Re, *supra* note 8, at 696 ("Our law schools must bear the initial responsibility for training lawyers to be good counselors."); *see also id.* at 692 (with preventive law, "the counselor offers advice and assistance that is intended to help clients conduct their affairs in a manner that will avoid controversy and litigation"); *id.* at 693 (with preventive law, "the legal counselor seeks to avoid controversy and litigation by offering to the client the services of a thoughtful adviser, a careful planner, and a skilled negotiator"); *id.* at 694 (noting that preventive law also includes "the process of private dispute resolution—the process of settling existing disputes through negotiation, conciliation and compromise"); Brest, *supra* note 1, at 8 ("At the core of the lawyer's role as counselor are the skills of questioning and listening to a client with an attitude of sympathy and detachment, while attending to the client's emotional as well as intellectual needs—all with the aim of helping clarify the client's objectives and helping [the client] choose the best means of achieving them."); *id.* at 9 ("A good lawyer can assist clients in articulating their problems, defining their interests, ordering their objectives, and generating, assessing, and implementing alternative solutions. This demands multifaceted problem-solving and decisionmaking skills, which in turn require a multifaceted approach to teaching.").

<sup>26</sup> *See* Dauer, *supra* note 9, at 491 ("[I]n my experience, students have less ability to identify problems with affective dimensions and less ability to invent [creative] solutions after a year or so in law school than they did before."); *id.* at 494 ("All in all, I suspect we are creating closed frames of reference for our students, with the effect of confining creativity and numbing sensitivity."); Winick, *The Expanding Scope*, *supra* note 5, at 204 ("All lawyers need to understand how to avoid and settle disputes on behalf of their clients. . . . All lawyers should be creative problem solvers who help their clients avoid legal difficulties and litigation whenever possible.").

<sup>27</sup> *See* David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *PRACTICING THERAPEUTIC JURISPRUDENCE* 45, 48 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) (suggesting that lawyers consider the psychological impact of legal actions on their clients).

<sup>28</sup> Martin E.P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 *AM. PSYCH.* 5, 5 (2000).

<sup>29</sup> Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 438 ("Therapeutic Jurisprudence explicitly values the psychological well-being of the client, and recognizes that the legal interaction will produce inevitable psychological consequences for him or her. In the ways they deal with their clients, lawyers thus inevitably are therapeutic agents."); Winick, *The Expanding Scope*, *supra* note 5, at 189 n.3

preventive law considers how lawyers can help their clients “accomplish their goals in ways that avoid[ ] future legal problems.”<sup>30</sup> Therapeutic and preventive approaches to law practice often work in concert: “The Therapeutic Jurisprudence/Preventive Law model of lawyering involves both practical law office procedures and client counseling approaches and an analytical framework for justifying emotional well-being as an important priority in legal planning.”<sup>31</sup> Identifying ways that lawyers can help their clients avoid litigation can promote lawyers’ role in their clients’ well-being, which reflects the concerns of therapeutic jurisprudence and preventive law.<sup>32</sup>

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(“Therapeutic jurisprudence is an interdisciplinary approach to law that calls for analytical and empirical analysis of the impact of law and how it is applied on the emotional well-being of those affected, and law reform designed to minimize law’s antitherapeutic consequences and increase its therapeutic potential.”); *id.* at 190 (noting “therapeutic jurisprudence’s mission of increasing psychological wellbeing through law”); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997) (footnote omitted):

Therapeutic jurisprudence focuses on the law’s impact on emotional life. It is a perspective that recognizes that the law *itself* can be seen to function as a kind of therapist or therapeutic agent. Therapeutic jurisprudence is sensitive to the therapeutic and anti-therapeutic consequences that sometimes flow from legal rules, legal procedures, and the roles of legal actors. Therapeutic jurisprudence is not narrowly confined to the area of mental health law. Instead, it is a therapeutic perspective on the law in general.

See also David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 U. MIA. L. REV. 660 (2021) (providing a thorough introduction to therapeutic jurisprudence).

Professor Yamada also suggests a connection between positive psychology and therapeutic jurisprudence. *Id.* at 748 (“Positive psychology helps to shape aspirational goals in terms of effecting therapeutic outcomes for legal events and transactions, policy design, and a psychologically healthier legal profession.”).

<sup>30</sup> Winick, *The Expanding Scope*, *supra* note 5, at 189; see also Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 439 (“Preventive Law is based on the idea that avoiding legal disputes is inevitably better for the client than costly, time-consuming, and stressful litigation.”); Stolle & Wexler, *supra* note 29, at 27 (“Preventive law is a perspective on law practice that seeks to minimize and avoid legal disputes and to increase life opportunities through legal planning.”). A preventive law approach can also play a role in the context of litigation. Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 458 (discussing “[t]he Preventive Law remedies of declaratory and injunctive relief”); see also Wexler, *The Expanding Scope*, *supra* note 5, at 275 n.80 (“[O]n occasion, litigation itself may serve a therapeutic function.”).

<sup>31</sup> Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 440; see also Yamada, *supra* note 29, at 726 (“TJ [therapeutic jurisprudence] scholars have long recognized the strong connections between TJ and preventive law.”).

<sup>32</sup> See Stolle & Wexler, *supra* note 29, at 28 (lawyers who practice with a therapeutic, preventive law perspective “can be involved in a client-centered practice that seeks to negotiate the legal arena with

Discussing alternate narratives can humanize the parties involved in the court opinions that students read and the situations in which those parties find themselves.<sup>33</sup> Students can explore the possible interests and motivations of the parties and ways in which those interests might have found vindication outside of litigation.<sup>34</sup> Students can also consider the limits of non-litigation alternatives and the types of situations where litigation might be the best option. Exploring the pros and cons of different dispute resolution options demonstrates that litigation is not a foregone conclusion but rather one option—with pros and cons of its own—among many. Humanizing parties and exploring the pros and cons of different options can enliven and deepen cases for students and help students become better counselors for their clients in the future.<sup>35</sup>

Particularly given how litigation-focused the first-year curriculum is, the consideration of alternate narratives should be an integral part of first-year law

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maximum attention to the psychological well-being of clients”) (footnote omitted); Winick, *The Expanding Scope*, *supra* note 5, at 204 (“All lawyers and law students should be taught the techniques and procedures of preventive law and the ‘desk-side manner’ skills that therapeutic jurisprudence brings to the preventive law enterprise.”).

<sup>33</sup> Re highlights the importance of recognizing clients’ humanity noting:

Clients in one’s law office, potentially involved in a legal dispute, should not be regarded as merely names in the caption of a lawsuit. It is important that the legal counselor be sensitive to the personal and emotional problems of clients. Clients are human beings who will appreciate most the legal services which will spare them the trauma of a trial, and the experience of hostility and enmity with persons with whom they have otherwise enjoyed friendly business or other relationships.

Re, *supra* note 8, at 698 (footnote omitted).

<sup>34</sup> Discussing alternate narratives might enable students to better focus their attention on the underlying facts of the case as they consider the circumstances giving rise to the litigation and the parties’ points of view. This point was suggested by a comment from a student in Professor David Yamada’s Law and Psychology Lab course when I had the opportunity to discuss this Essay with the class.

<sup>35</sup> Winick, *The Expanding Scope*, *supra* note 5, at 204 (“A legal profession that masters the art of creative problem solving and avoidance, and that practices with increased sensitivity to the psychological dimensions of the attorney/client relationship and an ethic of care, can do much to change the image of lawyers among our clients as well as our own self-image. If we can transform law into a helping profession in these ways, one that values the lawyer’s role as wise counselor, problem solver and problem avoider, and peacemaker and healer, we can do much to transform the lives of our clients and ourselves and the society in which we live.”).

school courses (and other courses that rely heavily on court opinions).<sup>36</sup> Although some professors may currently include the consideration of alternate narratives in their courses,<sup>37</sup> this inclusion should be a standard part of law school courses that rely heavily on court opinions.<sup>38</sup> These alternate narratives can put litigation and the role of lawyers in perspective—reminding students that, in personal and business relationships, litigation is the exception rather than the rule and that most disputes

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<sup>36</sup> See Re, *supra* note 8, at 696–97 (“The teaching of nonadversarial legal skills needs to be conducted with the same thoroughness and effort which now characterize the teaching of legal advocacy, and the adversary system.”).

<sup>37</sup> Professor Winick, for example, wrote about the use of “the rewind exercise” in one of his classes which was intended to help students focus on ways that lawyers could have helped their clients avoid legal problems (preventive lawyering). As Professor Winick stated:

[T]he rewind technique is empowering for our students because it allows them to see how creative lawyering can be. Rewinding also is a technique that allows students to improve their interviewing and counseling skills because it provides an opportunity for them to see how the interviewing and counseling approach used by an attorney in a particular case or hypothetical failed to succeed and also allows them to think about what alternative approaches could have brought about better results.

Winick, *Using Therapeutic Jurisprudence*, *supra* note 4, at 443.

Professor Winick included a copy of his course syllabus in the appendix of his article. *Id.* at 477–81. The syllabus describes the rewind exercise:

[E]ach student should choose a case they have read in a previous or concurrent law school class and prepare a 1–2 page analysis of what they would have done differently at the outset of the lawyer/client relationship to prevent the dispute that eventuated in the appellate decision they have chosen.

*Id.* at 478.

In addition, when discussing the topic of this paper with some of my colleagues, one of my colleagues, Professor Norman Stein, remembered using a business organizations casebook many years ago that asked students what could have been done to avoid the litigation in the cases included in the casebook.

<sup>38</sup> Certainly, there are other ways in which law schools can help students appreciate how lawyers can help their clients avoid disputes and resolve disputes without litigation. For example, law schools offer courses in counseling and negotiation. However, these courses may not be required of all law students, and these courses, particularly when upper-level courses, do not remedy the litigation-centric nature of the first year of law school whose pedagogy relies so heavily on court opinions. Students can also be given the opportunity to engage in settlement negotiations in other courses. For example, my Legal Methods colleagues and I have given our students the opportunity to engage in settlement negotiations in connection with their motion brief assignments; these negotiations, however, occur in the context of litigation and so do not fully address the prevention or resolution of disputes without the involvement of lawyers or litigation.

are resolved not only without litigation but also without lawyers. Alternate narratives can also help students broaden their view of lawyers' roles, highlighting that lawyers do much more than litigate on their clients' behalf (and, of course, many lawyers never litigate).<sup>39</sup>

While the first-year curriculum could be more drastically modified to rely less on court opinions, integrating the consideration of alternate narratives is a relatively easy way to push back against the dominance of litigation in the law school curriculum, particularly (but certainly not exclusively) in the first year of law school.<sup>40</sup>

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<sup>39</sup> The limits of lawyers' roles can also be explored with students.

<sup>40</sup> *See Re, supra* note 8, at 697 (“[L]egal educators should explore ways of reorienting traditional law school courses to increase the emphasis on the preventive aspects of law so that students will actively think in terms of the prevention of litigation.”).