



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

2010

Reflections on Success and Failure in New Governance and the Role of the Lawyer

Lisa T. Alexander

Texas A&M University School of Law, ltalexander@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

Lisa T. Alexander, *Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 Wis. L. Rev. 737 (2010).

Available at: <https://scholarship.law.tamu.edu/facscholar/772>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact sphillips64@law.tamu.edu.

WISCONSIN LAW REVIEW SYMPOSIUM AFTERWORD

PART III: REFLECTIONS ON SUCCESS AND FAILURE IN NEW GOVERNANCE AND THE ROLE OF THE LAWYER

LISA T. ALEXANDER*

Part III: Reflections on Success and Failure in New Governance and The Role of the Lawyer	737
Introduction	737
A. Success and Failure in New Governance	738
B. The Role of the Lawyer	741
C. The Implications for Legal Education	746
Conclusion.....	748

INTRODUCTION

At the conclusion of this Symposium, Professor Louise Trubek commented that among the myriad topics addressed by scholars, very little was said about the role of the lawyer in new governance. While there is some early scholarship discussing the role of lawyers in new governance,¹ substantial work remains to be done in outlining and describing the role of lawyers in a new governance world.²

* Lisa T. Alexander, Assistant Professor of Law, University of Wisconsin Law School. Special thanks to Elizabeth Mertz and to my research assistant, Kyra Olds, for their assistance with this Afterword. I also owe thanks to David and Louise Trubek for inviting me to serve as a member of the Organizing Committee for this Symposium.

1. See, e.g., Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555; Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245 (2009); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) [hereinafter Sturm, *Architecture of Inclusion*]; Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277 [hereinafter Sturm, *Workplace Equity*]; Symposium, *Lawyering for a New Democracy*, 2002 WIS. L. REV. 271; Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575.

2. See Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 348–49 (2009) (arguing that lawyers, and public interest lawyers in particular, are

Significantly, more has been said about the role of courts,³ but the lawyer remains a rather shadowy figure in much new governance scholarship—shorn of his or her traditional role, but left with little guidance as to how to proceed in a new world.

While the recent global economic downturn and the change in power in U.S. government force us to reexamine the efficacy of new governance approaches to public problem-solving and regulatory reform, the contributions of Symposium participants affirm that new governance will likely continue to be with us in the not-so-distant future. Thus, there is a continuing need to clarify the lawyer's role in new governance. This Afterword begins that task by (1) reassessing the core normative goals of much new governance jurisprudence and practice, analyzing and critiquing the limited role for lawyers envisioned in this field; (2) positing how lawyers should proceed in a new governance world while still advancing distributive justice; and (3) analyzing the implications of these changes for legal education. The Afterword concludes by outlining further scholarly work that must be done to help lawyers navigate in a new governance regime.

A. *Success and Failure in New Governance*

“New governance” is a term that seeks to categorize, describe, and interpret an increasingly broad range of new developments in

often peripheral to new governance practice and that new governance scholars must work toward articulating new, or at least reinvented, roles for lawyers).

3. See, e.g., Mark Dawson, *Transforming Into What?: New Governance in the EU and the “Managerial Sensibility” in Modern Law*, 2010 WIS. L. REV. 389; Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance: A Response to Liebman and Sabel’s Approach to Reform of Public Education*, 28 N.Y.U. REV. L. & SOC. CHANGE 319 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007); Kenneth A. Armstrong & David M. Trubek, *The Role of the European Court in Public Law Litigation: Destabilizing Social Sovereignty and Mandating Alternative Processes*, Paper Presented at the University of Wisconsin Law Review Symposium: Transatlantic Conference on New Governance and the Transformation of Law (Nov. 20–21, 2009) (on file with author); Tamara Hervey, *“Adjudicating in the Shadow of the Informal Settlement?”: The European Court of Justice, “New Governance” and Social Welfare*, Paper Presented at the University of Wisconsin Law Review Symposium: Transatlantic Conference on New Governance and the Transformation of Law (Nov. 20–21, 2009) (on file with author); Katharine G. Young, *Courts as Catalysts for Economic and Social Rights: South African Revisions on a New Governance Theme*, Paper Presented at the University of Wisconsin Law Review Symposium: Transatlantic Conference on New Governance and the Transformation of Law (Nov. 20–21, 2009) (on file with author).

governance, regulatory reform, and public problem-solving.⁴ New governance clearly encompasses familiar recent governance innovations such as privatization, devolution, decentralization, public-private partnerships, and stakeholder collaboration, yet new governance seems to be more than simply the sum of those innovations. While new governance has many monikers,⁵ and defies precise definition, there is a coherence underlying the broad range of scholarship in this Symposium that gives us a sense that “we know it when we see it.” Yet, because so many Symposium contributors present both successful and failed examples of new governance, we are forced to examine how success or failure in new governance is determined. What constitutes the success or failure of a particular new governance experiment seems to depend both upon the worldview, or *Weltanschauung*,⁶ of the scholar who analyzes it, as well as the scholar’s sense of the overall normative objectives of new governance reform.

Professor Amy Cohen confronts this issue directly in her Symposium contribution. She explores new governance theory’s normative core and posits that distributive justice is an implied normative objective in much new governance scholarship.⁷ A review of the scholarship in this Symposium affirms her observation. For example, some contributors to this Symposium compare new governance experiments favorably with previous unsuccessful regulatory reform efforts, which were mired in litigation, excluded a

4. See Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1, 2 (Gráinne de Búrca & Joanne Scott eds., 2006) (“In a practical sense, the concept of new governance results from a sharing of experience by practitioners and scholars across a wide variety of policy domains which are quite diverse and disparate in institutional and political terms, and in terms of the concrete problem to be addressed. Yet in each case, the common features which have been identified involve a shift in emphasis away from command-and-control in favour of ‘regulatory’ approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature.”).

5. See Sturm, *Architecture of Inclusion*, *supra* note 1, at 268 n.83 (“The language of ‘new governance’ scholars includes democratic experimentalism, empowered participatory governance, a structural approach, legal pragmatism, reflexive law, and an open method of coordination.”).

6. “*Weltanschauung*” is a word from German philosophy that means “a comprehensive conception or apprehension of the world especially from a specific standpoint.” *MERRIAM-WEBSTER DICTIONARY*, <http://www.merriam-webster.com/dictionary/weltanschauung> (last visited Feb. 1, 2010).

7. See Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 *WIS. L. REV.* 357, 387 (“The term ‘bracket’ could indicate that new governance architects are unwilling to advocate for particular social objectives, but they nonetheless believe that through the expansive frameworks of accountability they design, individuals will use reason to improve organizations and advance the ends of distributional equity.”).

broad range of stakeholders, or failed to produce positive outcomes; these contributors judge success on the basis of greater potential accountability and distributional equity.⁸ In contrast, other scholars view many new governance experiments as enabling co-optation, opportunism, and sham participation, which often lead to an inequitable distribution of the benefits of reform; these scholars' assessments are based on their focus on the parties who are excluded from the decision-making tables of new governance, or who are disempowered in such deliberations.⁹ A norm of distributive justice does seem to be at the core of both conclusions. Scholars view a new governance experiment as promising or troubling because it either enhances or diminishes participation and redistribution.

If distributive justice is the key normative objective that distinguishes successful new governance experiments from other more problematic types of regulatory reform (i.e., command-and-control, new public management, networked governance, negotiated rulemaking, or privatization), then the question remains whether the institutional design of many new governance experiments can be perfected to better achieve distributive justice. As the Symposium contributions reveal, many regulatory reform efforts contain new governance practices, or are cloaked in the language and terminology of new governance, yet their institutional design fails to achieve this central normative objective of distributive justice.¹⁰ These numerous examples cannot simply be dismissed as aberrations, for they clearly

8. See, e.g., Armstrong & Trubek, *supra* note 3; Allison Christians, *Networks, Norms, and National Tax Policy*, Paper Presented at the University of Wisconsin Law Review Symposium: Transatlantic Conference on New Governance and the Transformation of Law (Nov. 20–21, 2009) (on file with author); Joanne Scott & William H. Simon, *The Challenge of Regulating Carbon Offsets (in the European Union)*, Paper Presented at the University of Wisconsin Law Review Symposium: Transatlantic Conference on New Governance and the Transformation of Law (Nov. 20–21, 2009) (on file with author). See also Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 524 (2009) (describing current new governance developments in child welfare as promising improved performance); Sturm, *Architecture of Inclusion*, *supra* note 1, at 271–86 (explaining a successful new governance project in the area of workplace gender equity).

9. See, e.g., Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 241–42; Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441, 443; see also Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 174–76 (2009) (describing the participation of public housing residents in Chicago's public housing reform process which failed to empower residents and equitably distribute the benefits of reform).

10. See sources cited *supra* note 9.

incorporate some of new governance theory's principal tenets and mechanisms, and these experiments are justified by policy-makers and academics alike in new governance terms.

An institutional design that facilitates meaningful participation and distributive justice seems to be the key in assessments of whether regulatory reform efforts that contain new governance elements have been successful or unsuccessful. As Professor Gráinne de Búrca suggests in her contribution to this Symposium, perhaps the necessary conditions for achieving distributive justice are: "(1) the broadest possible degree of stakeholder participation compatible with effective decision-making, and (2) effective and informed monitoring."¹¹ But this definition still leaves us with some important questions. For example, what rights or legal entitlements are essential elements of the design? Are procedural rights that can be enforced by courts a necessary precondition for all new governance experiments, or only for those experiments where there are substantial power imbalances between participating stakeholders? Do some experiments also require substantive rights that provide stakeholders formal legal recourse if a particular new governance experiment does not distribute resources as promised? Is resort to courts via consent decrees or enforceable legal rights a necessary precondition for any new governance experiment to be successful and to resolve distributional inequities? These questions raise an additional and related question about what roles lawyers can or should play in new governance reform experiments to advance distributive justice.

B. The Role of the Lawyer

While some new governance scholars, particularly in the U.S., discuss the role of lawyers in new governance,¹² it remains a relatively underdeveloped aspect of new governance theory. This largely stems from new governance scholars' view of traditional legal approaches, such as litigation, arbitration, or hard bargaining, as limited in their ability to foster cooperation and collaboration or to solve problems.¹³ New governance theorists posit that recent changes in governance strategies and problem-solving approaches will bring about a

11. Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 235.

12. See *supra* note 2 and accompanying text.

13. See Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 137, 149 (2006) (explaining that traditional "hard law" approaches have proved inadequate in many instances and that new governance approaches allow learning and feedback and create alliances).

transformation of law, and of the role of lawyers in society.¹⁴ Thus, new governance proponents avoid placing lawyers in their traditional roles, instead envisioning them in new roles that substantially depart from the traditional adversarial model of litigation that is so prevalent in legal education and in cultural representations of the law.

New governance theorists instead assert that new phenomena—such as globalization, devolution, decentralization, privatization, and the growth of the non-profit sector—force lawyers to develop new skills and to engage in different practices such as collaboration, facilitation, mediation, data management, compliance, benchmarking, and a host of other skills.¹⁵ These skills and practices are not the classic skills of the litigator or even of the transactional lawyer. The litigator's role is usually conceptualized as adversarial, and the transactional lawyer is often envisioned as a bargainer or a transaction cost engineer.¹⁶ New governance scholars assert that the realities of new governance in practice require lawyers to develop new capacities, to collaborate with other professionals, and, thus, to move away from their traditional roles.

Yet, this shift in the lawyer's role, from adversary to collaborator, complicates his or her ability to ensure that distributive justice is occurring in any new governance project. If the lawyer abdicates the more traditional adversary role, or fails to view litigation as one alternative tool among many, then it may be difficult for the lawyer to challenge any power imbalances that exist between stakeholders in any given new governance reform experiment. Further, if—in favor of expediency—a new governance experiment intentionally lacks formal procedural or substantive rights, and contains only non-binding initiatives, then a lawyer may have insufficient leverage to bolster the

14. See Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 395–96 (Gráinne de Búrca & Joanne Scott eds., 2006) (defining the “transformation thesis” and explaining why they are drawn to it); see also de Búrca & Scott, *supra* note 4, at 9 (“The transformation thesis argues that new governance has demanded, and will increasingly demand, a re-conceptualisation of our understanding of law and of the role of lawyers.”).

15. For example, as Professor Louise Trubek in her study of the role of public interest lawyers in recent health care advocacy efforts explains, “[t]he lawyer has moved from the role of adversary in the legislature, courts, and agencies to a collaborator engaged in a series of alliances to develop and implement policy.” Trubek, *supra* note 1, at 586. See also Sturm, *Workplace Equity*, *supra* note 1, at 332 (describing “the importance and the promise of lawyers as intermediaries, problem solvers, institutional designers, and information entrepreneurs”).

16. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 243 (1984) (arguing that if what a business lawyer does has value, “a transaction must be worth more, net of legal fees, as a result of a lawyer's participation”).

bargaining position of marginalized stakeholders. The most optimistic new governance scholars envision positive collaboration as an essential element of new governance practice.¹⁷ Unfortunately, such scholars underestimate the extent to which stakeholders in any given reform experiment may be in conflict regarding the goals of reform. Some new governance scholars do recognize that lawyers may need to retain some traditional legal strategies, techniques, or public-law elements in order to ensure accountability,¹⁸ but even in these accounts formal law elements are often subordinate to more non-binding and collaborative practices.

Increasingly, some scholars chide new governance theorists for their conception of the lawyer as facilitator or collaborator, rather than as advocate.¹⁹ Since furthering distributive justice inherently means navigating conflicts regarding the allocation of money, goods, benefits, or power, a lawyer who completely relinquishes his or her adversarial posture may not have the tools to ensure that distributive justice occurs.²⁰ The new governance elements of collaborative stakeholder participation may only then serve as a form of sham participation to legitimate reform projects whose true main objectives are to benefit powerful interests.

In his article, *When New Governance Fails*, Professor Douglas NeJaime argues that the potential pitfalls that cause lawyers who abdicate their traditional roles for less binding new governance

17. See Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 848 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006)) (describing new governance scholarship as having a “vision of collaboration and inclusive participation”).

18. See, e.g., Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 293 (Gráinne de Búrca & Joanne Scott eds., 2006); Sabel & Simon, *supra* note 3, at 1016; Scott & Sturm, *supra* note 3, at 571.

19. See NeJaime, *supra* note 2, at 329 (outlining professional and representational objections to new governance from a lawyering perspective); see also Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 337–38 (2007) (describing problems with the conception of lawyers in Susan Sturm’s study of the University of Michigan’s ADVANCE workplace gender equity reform project program).

20. I make this claim well aware of the limitations of rights themselves in promoting social justice and social change. Formal legal rights are not sacrosanct and I am aware of the significant work exploring the limitations of rights. See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002). However, I submit that participatory rights, and in some cases substantive rights, may help to increase the accountability of new governance regimes particularly when there are substantial power inequities between participating stakeholders.

techniques are so great that new governance approaches should be viewed not as a totalizing alternative to traditional techniques, but rather as “a contingent model of cause lawyering that complements, rather than replaces, other (and specifically litigation-focused) models.”²¹ Thus, while lawyers must incorporate new governance strategies into their arsenal, they cannot fully abandon traditional techniques or they may be unable to ensure that the benefits of any reform process are adequately distributed among all stakeholders.

Professor NeJaime’s argument essentially favors a hybrid approach to new governance that gives significant primacy to traditional law approaches.²² The concept of hybridity, as developed by some new governance scholars, “acknowledges the co-existence and engagement of [traditional] law and new governance, and explores different ways of securing their fruitful interaction.”²³ As outlined by Gráinne de Búrca and Joanne Scott, hybridity has different dimensions: fundamental/baseline hybridity, instrumental/developmental hybridity, and default hybridity.²⁴ Scholars whose work exhibits a fundamental/baseline hybridity approach are most skeptical of the virtues of an unrestrained form of new governance.²⁵ According to the fundamental/baseline approach, legal rights and entitlements are fundamental to any new governance experiment and they provide a baseline “below which experiments in new governance cannot take us.”²⁶ Instrumental hybridity “posits recourse to new governance techniques as an instrumental means of developing or applying existing and traditional legal norms.”²⁷ Examples from the EU include legally binding framework directives that are broad, but binding, and use new governance processes for their elaboration and implementation.²⁸ In the case of default hybridity, legal rules represent “a default penalty” applicable only when the reform experiment fails to conform to its stated demands and goals.²⁹

In my earlier work, *Stakeholder Participation in New Governance*, I also asserted that hybrid approaches which give primacy to traditional

21. NeJaime, *supra* note 2, at 327.

22. *See id.* at 363 (“In this sense, successful rights-claiming litigation might, in some ways, be a necessary but not sufficient condition for successful New Governance practice.”).

23. *See de Búrca & Scott, supra* note 4, at 6.

24. *See id.* at 6–9.

25. *See id.* at 7.

26. *Id.*

27. *Id.* at 8.

28. *See id.*

29. *See id.* at 9; *see also* Karkkainen, *supra* note 18, at 304 (discussing the concept of the penalty default in environmental regulation).

legal elements should be used in new governance experiments involving traditionally marginalized groups.³⁰ Such an approach may empower traditionally marginalized stakeholders in new governance deliberations.³¹ This suggestion reflects a fundamental baseline approach to hybridity. A robust role for both procedural and substantive rights in new governance regimes that involve traditionally marginalized groups may be necessary for any participating lawyer to advance an equitable distribution of the benefits of reform. In contrast, default hybridity is more appropriate when similarly situated professionals are participating in stakeholder collaborations, or when parties are equally dependent upon one another, such that meaningful and equal deliberation is possible.

The more frequent use of fundamental/baseline hybridity in new governance experiments that involve traditionally marginalized groups will require lawyers to use a broader range of legal strategies depending on the dynamics of a given reform experiment. Initially, perhaps, soft-law³² approaches consistent with new governance practice can be used, but there must be a backdrop of both participatory rights and perhaps in some cases substantive rights, which lawyers or stakeholders can enforce if participatory and distributional inequities arise during the process. Under this conception, new governance approaches do not transform our understanding of traditional law; rather, traditional law is used to transform new governance practices and to help new governance experiments ensure full and fair participation and distributional equity.

Even though fundamental baseline hybridity approaches may be of great help in new governance experiments that involve traditionally disempowered groups, there may be some problems that simply cannot be remediated through new governance techniques. Perhaps the power imbalances between participating stakeholders are so significant that the kind of empowered collaborative participatory deliberation idealized in much new governance jurisprudence is simply not possible. Perhaps the conflict between the participating parties and individuals is too great for meaningful participatory deliberation. Unhappily, as new governance approaches become increasingly popular in regulatory reform, it becomes more difficult to shield any problem-solving process from new governance methods and elements. It also becomes increasingly difficult to ensure that the institutional design of any given new

30. See Alexander, *supra* note 9, at 185.

31. See *id.* at 123.

32. See David M. Trubek et al., "Soft Law," "Hard Law," and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 65 (Gráinne de Búrca & Joanne Scott eds., 2006) (defining "soft law" as non-binding directives).

governance experiment, and the lawyers who support and implement it, are oriented towards distributive justice. As private lawyers supporting profit-maximizing organizations become increasingly involved in new governance reform, their professional orientation may cause them to maximize the gains of their clients even at the expense of other stakeholders. While new governance *jurisprudence* may require that new governance experiments strive for distributive justice, ensuring that such conditions are manifest in actual new governance practice proves more difficult. Therefore, a hybrid approach that gives primacy to some traditional and substantive rights-claiming strategies may be necessary to promote distributive justice.

C. The Implications for Legal Education

These insights have significant implications for legal education. The proliferation of new governance approaches—in the U.S. and the EU, and in a variety of policy arenas—requires that law students become consciously aware of these changes in governance and the power dynamics implicated by these changes. Thus, for new lawyers to be “prepared” in the world of new governance, law students must understand power. This assertion is somewhat antithetical to long-standing approaches to teaching law in the academy. A large majority of first-year law students are subtly inculcated with the idea that law is an ahistorical and apolitical endeavor.³³ The law is above politics. Legal issues can be decided on neutral principles irrespective of the operation of power. Thus, law students early on are subtly encouraged to ignore power.³⁴

Yet, as new governance practice increases the number of stakeholders who may participate in, shape, and determine regulatory goals or problem-solving strategies, power is bound to manifest itself in increasingly complex and unpredictable ways. Law students who will encounter new governance in operation must be trained to identify and to understand how power can operate to undermine representation, honest engagement, or meaningful deliberation. Law students, then, must be taught to recognize power and to respond to it. They must be

33. See David Kairys, *Introduction* to *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1, 1 (David Kairys ed., 1990) (“Law is depicted as separate from—and ‘above’—politics, economics, culture, and the values and preferences of judges.”).

34. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38, 45 (David Kairys ed., 1990) (“The bias arises because law school teaching makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract, and tort, look as though it flows from and is required by legal reasoning rather than being a matter of politics and economics.”).

taught traditional legal techniques as well as new governance approaches, and they must learn how to combine and integrate these techniques to mitigate power struggles and to enhance meaningful collaboration. Prior to practice, law students should be given the opportunity to study and to analyze which legal approaches mitigate power imbalances and promote distributional equity in social reform. Law students should also learn to become aware of how their own power and social positionality affects their representation of clients and causes and their framing of legal and non-legal issues.

All of this is easier said than done.³⁵ It is difficult to envision how to explicitly teach about power within the confines of a three-year legal education. Yet, philosophical and sociological writings about power can be incorporated into traditional curricula in much the same way that theoretical work about law and economics has been incorporated into business and contract law case books. Such readings cannot simply be relegated to courses on the sociology of law, jurisprudence, or new governance. A relational and interdisciplinary approach to teaching law is also critical to prepare students to operate in a new governance regime.

The relational approach would require law professors to increasingly incorporate cases, case studies, problem sets, and newspaper articles that illustrate the interrelationships among different doctrinal areas of law—particularly those areas of law that are normally viewed by lawyers, professors, and students alike as antithetical, unrelated, or disconnected. For example, to be prepared to operate in a new governance regime, professors must help students see connections between business law and public interest law. Business students must learn to view non-profits, cooperatives, LC3s, and a variety of other business and ownership structures as “part of business law.” Legal services lawyers should be encouraged to take tax, bankruptcy, and corporate law. Current events often provide such examples, if one looks broadly enough at the scope of what is relevant to a given course.

Both an inter- and intra-disciplinary approach to legal education is also necessary. As lawyers in new governance collaborations are increasingly forced to collaborate with a wide range of professionals working on multidisciplinary problems such as climate change, energy policy, international investments, health care, and educational and housing reform, lawyers must learn to work with professionals from other disciplines. Many law schools are increasingly embracing interdisciplinarity in their clinical and non-clinical courses. But to prepare lawyers for new governance regimes, law schools must also

35. Notably, in my experience, many law students resist the engagement with complexity that this form of education requires.

embrace intradisciplinarity. Within the field of law itself, specialization has caused law students to view various legal approaches in rather rigid and limited ways. Students believe that if they seek a career as a litigator that they must take certain courses at the exclusion of others. Similarly, students interested in transactional practice are often encouraged to define business narrowly and to take courses that lead to work in a large law firm. However, transactional lawyers are used in a variety of domains. In a new governance regime, the same lawyer must be able to exercise multiple legal skills. The hyper-specialization that currently exists in legal education presents a problem for lawyers who will operate in a new governance world. Perhaps legal educators need to recognize these realities and realign legal education with these changing dynamics.

CONCLUSION

This Afterword only begins to illuminate the important questions that new governance scholars will need to confront as they further conceptualize the role of the lawyer in new governance. New governance scholarship calls out for more in-depth analysis and studies of the role of the lawyer on the ground in new governance practice. If distributive justice is the normative core of new governance jurisprudence and practice, then more thought must be given to how lawyers can advance that goal. This Afterword asserts that lawyers cannot advance the goal of distributive justice in a new governance world by substantially relinquishing their traditional roles. Yet, clearly, new governance in operation will require lawyers to develop new skills and to learn to integrate those new skills with the old skills in a manner that enhances each.