

# “The Play of Those Who Have Not Yet Heard of Games”: Creativity, Compliance, and the “Good Enough” Law Teacher

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*In a tantalising way, many individuals have experienced just enough of creative living to recognize that most of the time they are living uncreatively, as if caught up in the creativity of someone else, or of a machine.*

—D. W. Winnicott<sup>1</sup>

## I. Introduction

Every year, a colleague and I choose four students from the top 10% of our law school’s third-year students. Our job is to supervise them as they create the appellate record and bench brief for the moot court competition that our school hosts each spring. Their job is to create a larger-than-life hypothetical that gives rise to novel legal issues that call for novel arguments—in essence, to play, to make believe. Mainly, they can’t; they have lost the knack of play. They are baffled by this change in the rules, this abolition of rules. “But there are no cases on point,” they object patiently to our proffered suggestions, or “all but one of the circuits reject that argument,” or “no court has ever so held.” After a while, they get into the spirit of the enterprise to the extent of playing with narrative, creating fact patterns based on highly inventive wrongdoing. But playing with ideas comes harder to these very smart authority junkies, and that’s a shame, because it’s through play that we find creative solutions and new directions.

Some lawyers come to playing with ideas on their own, those who love thinking about the law. And some learn through mentors or in the process of writing a law review note or moot court brief or working in a clinic. But if there is creative thinking out there in the law offices and courts of our country, it is present not, in the main, because law school does a good job of teaching that skill. Not surprisingly, employers of new law graduates believe we could be doing a better job of turning out creative thinkers.<sup>2</sup>

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<sup>1</sup> D.W. Winnicott, *Creativity and its Origins*, in *Playing and Reality* 87 (2d ed., Routledge 2005).

<sup>2</sup> See e.g. Sacha Pfeiffer, *Was Time for a Change*, The Boston Globe (May 7, 2006) (available

I'm all the more distressed by my third-year students' fear of flying because as a teacher of basic legal skills to first-year students, I reward obedience to the rules with A's and I sanction non-compliance with lower grades. I have done so now for almost twenty years. In approximately the words of Pogo Possum, I have met the enemy, and I am it.<sup>3</sup> Worse still, I have known it for a long time.

I used to tell myself that my strictness is mitigated by the freewheeling Socratic dialogue in my students' doctrinal courses, but I'm less sure about this than I used to be.<sup>4</sup> I have also told myself—and this is probably true—that without a substantial knowledge base and without traditional analytical skills, it is difficult for students to think useful new thoughts about the law.<sup>5</sup> It is also true, however, that once these skills are mastered, they in fact may master the student, who finds it nearly impossible to think creatively and critically about the law, to have new ideas about it.

To some extent, the solution to this problem lies in recognizing it, in communicating candidly to students the paradoxical nature of an education that threatens to destroy their ability to engage in the very activity it should prepare them for. Surely, a competent lawyer must be able to recognize, tolerate, and even thrive on paradox. But is notice enough? Do we have a responsibility to do more to ensure that we are not sending highly skilled drones into the practice of law? If so, what would that “more” look like?

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at <http://www.boston.com/business/articles/2006/07>) (reporting a review of the Harvard Law School curriculum responding to a perceived need to prepare students for practice in which “the ability to think creatively and innovatively” can be as important as an academic grounding in the law, noting employers' complaints that graduates lack creativity, and suggesting problem-based legal education).

<sup>3</sup> In the eponymous comic strip created by Walt Kelly, Pogo famously said (on Earth Day in 1971, referring to polluters) “We have met the enemy and he is us.” Kelly derived that pronouncement from his 1952 introduction to *The Pogo Papers*, where he wrote “there is no need to sally forth, for it remains true that those things which make us human are, curiously enough, always close at hand. Resolve, then, that on this very ground, with small flags waving and tiny blasts of tiny trumpets, we shall meet the enemy, and not only may he be ours, he may be us.” Mrs. Walt Kelly & Bill Crouch, *The Best of Pogo* 224 (Simon & Schuster 1982).

<sup>4</sup> See *infra* at n. 41 and accompanying text.

<sup>5</sup> See e.g. Hollee S. Temple, *Using Formulas to Help Students Master the “R” and “A” of IRAC*, 14 Persps. 129, 129 (2006) (considering the contention that “by valuing rigid rules above all else, the traditional law professor has slowly destroyed the spirit of law students who once prized innovative thought,” and concluding “that while the formalistic nature of doctrinal teaching may indeed be too rule-focused, legal writing and skills professors operate in a different, distinct universe [where] . . . students, most fresh from undergraduate writing experiences that prized both length and obfuscation, need a template to help them transition into the legal setting, where supervisors and judges expect practitioners to adhere to the IRAC . . . format”).

These are problems that I have been thinking about and writing about these past 15 years<sup>6</sup>—all the while teaching students in their first year to toe the intellectual line and then trying to convince them as upper-class students to think new thoughts about the law. Recently, I've been led to consider these issues in a different light. That light is cast for me by the work of developmental psychoanalyst D.W. Winnicott.

Although he founded no school or movement of his own, Donald Winnicott was one of the past century's most influential psychoanalysts, both as a theorist and as a practitioner.<sup>7</sup> He is most usually associated with the British "object relations" school of developmental psychology.<sup>8</sup> A pediatrician turned psychoanalyst, he is best known as the coiner of two of the most famous phrases in the literature of child-rearing—the "good enough" mother and the "transitional object."<sup>9</sup> Increasingly, however, these and others of his ideas have been taken up outside his field, even in the seemingly remote disciplines of law and legal scholarship.<sup>10</sup>

When I first began to read Winnicott, two major and related themes in his work interested me particularly: first, his notion of "good enough" caregiving and second, his understanding of the role of play in the lives of infants and adults, the relationship of play to creativity, and the consequences of the absence of play.<sup>11</sup> The more I read Winnicott, however, the more I was

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<sup>6</sup> See e.g. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993).

<sup>7</sup> Some important works are D.W. Winnicott, *The Family and Individual Development* (Van Nostrand Reinhold 1968); *Playing and Reality* (2d ed., Routledge 2005); *Home is Where We Start From: Essays by a Psychoanalyst* (Tavistock 1985).

<sup>8</sup> Where Freud had focused on the sexual instinct of the infant (and adult), the object relations school focused on the "relational matrix" of "subject and object, of the infant and its mother." Briefly put, object relations theorists—notably Melanie Klein, John Bowlby, and Winnicott himself—"translated psychoanalysis from a theory of sexual desire into a theory of emotional nurture." Adam Phillips, *Winnicott* 8, 10 (Harv. U. Press 1988).

<sup>9</sup> The classic transitional object is, of course, an infant's "blankie." Such an object is the child's "first not-me possession," about which "we agree never to make the challenge to the baby: did you create this object, or did you find it conveniently lying around?" The child's employment of a transitional object is "the child's first use of a symbol and the first experience of play." Winnicott, *The Location of Cultural Experience*, in *Playing and Reality*, *supra* n. 1, at 130.

<sup>10</sup> See e.g. Anne C. Dailey, *Developing Citizens*, 91 Iowa L. Rev. 431 (2006); Barbara Stark, *The Practice of Law as Play*, 30 Ga. L. Rev. 1005 (1996); Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 Law & Psychol. Rev. 5 (2000); Nomi Maya Stolzenberg, *Bentham's Theory of Fictions—A "Curious Double Language,"* 11 Cardozo Stud. L. & Lit. 223 (1999); see also Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 184–86 (Random House 2006) (drawing on Winnicott's "true self/false self" dichotomy).

<sup>11</sup> Because I am not a psychologist, there is every chance that despite my best efforts, I have taken these ideas out of context in this essay, misunderstood or misapplied them. Perhaps all I have done is to borrow unfamiliar vocabulary to describe the familiar. Nonetheless, the risk seemed worth taking.

further drawn to him by something beyond, yet inextricable from his ideas: he was a superb stylist, a writer who combined great subtlety with engaging freshness. His prose is a joy to read; characterized by what Adam Phillips calls “shrewd ingenuousness,” it is free of “dreary earnestness” and “mystifying jargon.”<sup>12</sup> Phillips hears echoes of novelist E. M. Forster and poet Stevie Smith in Winnicott’s style, which he notes “has its roots in the English romanticism of Wordsworth, Coleridge and Lamb (and has illuminating parallels, odd though it may seem, with the essays of Emerson and the work of William James).”<sup>13</sup> Indeed, there are unmistakably Wordsworthian passages in Winnicott’s work—for example, his reference to “the native honesty which so curiously starts in full bloom in the infant, and then unripens to a bud.”<sup>14</sup>

This essay is an attempt to see what as a lawyer, law teacher and, more particularly, as a writing teacher, I might usefully take from Winnicott the theorist, the professional, and the writer.

## II. Good enough mothers and good enough law teachers

Winnicott is most widely known for the term “good enough mother.” While this coinage has comforted numberless women living in the parallel universes of family and career, “good enough” is not easily defined because it describes process, not attributes. Because Winnicott’s own descriptions are allusive rather than precise, his meaning is often better intuited than parsed. (Indeed, as one psychology student put it, “You can only really understand Winnicott if you already know what he is saying.”<sup>15</sup>) But whatever he meant by “good enough,” Winnicott did not mean “approximately o.k.,” “in the ballpark,” “average,” or “better than nothing.” On the contrary, his “good enough” is a high standard—a “good enough” mother is one who is emotionally attuned and precisely responsive to the needs of her infant. Indeed, the good enough mother is (paradoxically) so responsive that she knows instinctively when and for how long to abandon the child in order to foster its development through separation without traumatizing the child by her absence.<sup>16</sup>

Winnicott himself saw the relationship of the good enough mother and her child as a model for the relationship of psychotherapist and patient; other writers have extended the analogy to the relationship of “good enough”

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<sup>12</sup> Phillips, *supra* n. 8, at 13.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> D.W. Winnicott, *Why Children Play*, quoted in Madeleine Davis & David Wallbridge, *Boundary and Space: An Introduction to the Work of D. W. Winnicott* 8 (Brunner/Mazel 1981).

<sup>15</sup> Davis & Wallbridge, *supra* n. 14, at x.

<sup>16</sup> See Donald W. Winnicott, *The Maturation Process and the Facilitating Environment* 145 (The Hogarth Press 1965).

teachers and their students, even to law professors and their students.<sup>17</sup> Indeed, Winnicott's ideas about what is "good enough" may have especial relevance to law teachers, because, as one article has noted, the unique newness of law school—unlike other graduate schools, it is a new start, not a continuation—casts law students into a needy infancy of sorts.<sup>18</sup>

[I]nfant lawyers feel just as helpless and bewildered at the start of their legal life as actual infants do and are nearly as vulnerable and inarticulate. They sleep little and cry a lot. They demand feeding, yet their digestive systems are very delicate; everything must be watered down into gruel. Then they have to be patted on the back or they are miserable. And what do they do with everything you have carefully prepared? Spit it back up, undigested.<sup>19</sup>

Just as the good enough mother responds to the developmental moment of her child, the "good enough" law teacher responds to the needs of students as they develop from novice learners to expert learners, providing a safe space in which opposites are always in equilibrium—insecurity with reassurance, new with familiar, paradox with certainty. According to the authors of *Developmental Perspectives on the Law School Experience*, in order to facilitate the law student's development, the good enough teacher's classroom should provide safety, stimulation, and engagement.<sup>20</sup> Safety means "a demonstrated assurance that risks can be taken[,] . . . that it is acceptable to be dependent, in the sense of not knowing, not being entirely in control or correct. One can be a work in progress without facing humiliation."<sup>21</sup> Stimulation requires the "appropriate degree of challenge[,] . . . 'a mixture of toughness and empathy that is difficult to achieve or sustain' . . . ." <sup>22</sup> Finally, engagement, "passionate and compassionate attention . . . models affiliation and fosters empathic connections with others that will support . . . involvement in life and in law."<sup>23</sup>

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<sup>17</sup> See e.g., Coleburn & Spring, *supra* n. 10; Derek Pigrum, Paper, *Das Gegenwerk and the Notion of the "Good Enough Teacher"* (Phil. Educ. Socy. Gr. Brit., Oxford U., March/April 2005) (copy on file with author) (analogizing the good enough mother, who "enables the child to acquire the symbolic function and a sense of its separate identity by both promoting and relieving the sense of insecurity that the child experiences in the space created between the infant and herself," to the good enough teacher, who "promotes the insecurity involved in acquiring and internalizing competencies. . . while at the same time providing a framework of support").

<sup>18</sup> See Coleburn & Spring, *supra* n. 10, at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (quoting Julius Getman, *In the Company of Scholars: The Struggle for the Soul of Higher Education* 184 (U. Tex. Press 1992)).

<sup>23</sup> Coleburn & Spring, *supra* n. 10, at 31.

### III. "The play of those who have not yet heard of games"

The notion of "good enough" and its implications for law teaching and lawyering initially led me to Winnicott, but as I read him and some of his commentators, I was equally drawn to his understanding of play and playing. Winnicott came to believe that healthy individuals develop in infancy through play facilitated by the "good enough" mother.<sup>24</sup> Play itself is experienced as taking place neither in "external reality" nor in "inner psychic reality,"—but rather, in a third place, what Winnicott called a "potential space" between the two.<sup>25</sup> This potential space is an area in which the individual confronts and negotiates the paradoxes of subject and object, inner and external reality. The individual may only meaningfully engage in play when she may start and stop at her option and when she is in a safe "holding environment," an environment providing the "sense that one is held; that there is a safety net present rather than the hard concrete of the circus floor; that one won't be dropped, physically or metaphorically; that one can experience oneself and be oneself."<sup>26</sup>

"Play" in Winnicott's sense is an inventive "free play" of ideas and feelings engaging the whole individual—it is emphatically not playing games with rules or conventions; thus, he calls it "the play of those who have not yet heard of games."<sup>27</sup> Playing is first and foremost a mental state: "To get the idea of playing, it is helpful to think of the *preoccupation* that characterizes the playing of young children. The content does not matter. What matters is the near withdrawal state, akin to the *concentration* of older children and adults."<sup>28</sup> Play takes an infinite number of forms. Winnicott's examples include a two-year-old child using a piece of string in different ways<sup>29</sup> and an adult connecting random passages of poetry.<sup>30</sup>

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<sup>24</sup> Winnicott describes the process thus:

The mother adapts to the needs of her baby and of her child who is gradually evolving in personality and character, and this adaptation gives her a measure of reliability. The baby's experience of this reliability over a period of time gives rise in the baby and growing child to a feeling of confidence. The baby's confidence in the mother's reliability, and therefore in that of other people, and things, makes possible a separating-out of the not-me from the me. At the same time, however, . . . separation is avoided by the filling in of the potential space with creative playing, with the use of symbol, and with all that eventually adds up to a cultural life.

D. W. Winnicott, *The Place Where We Live*, in *Playing and Reality*, *supra* n. 1, at 147.

<sup>25</sup> *Id.* at 144.

<sup>26</sup> Simon Grolnick, *The Work and Play of Winnicott* 34 (Jason Aronson 1990).

<sup>27</sup> Winnicott, *The Place Where We Live*, in *Playing and Reality*, *supra* n. 1, at 135.

<sup>28</sup> Winnicott, *Playing: A Theoretical Statement*, in *Playing and Reality*, *supra* n. 1, at 69 (emphasis in original).

<sup>29</sup> *Id.* at 56–58.

<sup>30</sup> Winnicott, *Playing: Creative Activity and the Search for Self*, in *Playing and Reality*, *supra* n. 1,

Winnicott saw play as a lifelong necessity of the healthy and creative individual. “It is in playing and only in playing that the individual child or adult is able to be creative and to use the whole personality, and it is only in playing that the individual discovers the self.”<sup>31</sup>

For Winnicott, play in this sense is the ground of both culture and creativity.<sup>32</sup> Just as the transitional object exists between the me and the not-me and play is experienced in the potential space between inner psychic and external reality, so creativity exists between originality and tradition.<sup>33</sup> “The potential space between baby and mother, between child and family, between the individual and society or the world . . . can be looked upon as sacred to the individual in that it is here that the individual experiences creative living.”<sup>34</sup> Importantly, Winnicott’s notion of creativity is not that of “successful or acclaimed creation,” but rather, “a coloring of the whole attitude to external reality.”<sup>35</sup>

That lawyers and law students need play, that good lawyers know the value of play, and that law students (especially first-year students) get virtually no play time in law school<sup>36</sup> are insights elegantly developed by Barbara Stark in her article *The Practice of Law as Play*.<sup>37</sup> According to Stark, play in Winnicott’s sense “provides an outlet for tension[,] . . . structures social interaction[,] . . . provides an opportunity to practice skills and work through problems . . . [and] enriches experience in that it ‘helps give us a fuller sense of our own personal and bodily being . . . and . . . enhances drive satisfaction.’ ”<sup>38</sup> For adults in general and lawyers in particular, play is salutary in that it enables them

to maintain paradox—to tolerate and accept apparent contradictions—just as play enables the infant to maintain the paradox of “me” and “not me.” The ability to maintain paradox is

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at 76–86.

<sup>31</sup> *Id.* at 72–73.

<sup>32</sup> “The place where cultural experience is located is in the *potential space* between the individual and the environment. . . . The same can be said of playing. Cultural experience begins with creative living first manifested in play.” Winnicott, *Playing: A Theoretical Statement*, in *Playing and Reality*, *supra* n. 1, at 135.

<sup>33</sup> *Id.* at 134.

<sup>34</sup> *Id.* at 139.

<sup>35</sup> Winnicott, *Creativity and its Origins*, in *Playing and Reality*, *supra* n. 1, at 87.

<sup>36</sup> “Play time” in this sense refers only to activities directly related to the study or practice of the law, as distinguished from (equally necessary) recreational activities unconnected with law.

<sup>37</sup> Stark, *supra* n. 10.

<sup>38</sup> *Id.* at 1009 (quoting Grolnick, *supra* n. 26, at 34). Stark does not discuss Winnicott’s equation of play with creativity. Her focus is on the role of play in the individual student’s development and well-being; mine here is on the role of play in educating the creative “good enough” lawyer and the consequences of its near-total absence in legal education.



central to the practice of law. It enables lawyers to entertain inconsistent theories, to tolerate uncertainty, to see the ambiguity in an open-and-shut-case, and to transform a stark win-lose dichotomy into a dazzling array of options.<sup>39</sup>

Of law students, Stark writes that they

need play more than they did in college, and they get less. Students need play more because law school demands massive integration—of doctrine and its application within each class; of different analytical frameworks and processes among classes; and ultimately, of the student's inner reality and the outer reality of law school and the legal world beyond. It is through this multilevel, multi-stage process of integration that the student who enters law school transforms herself into the lawyer who emerges.<sup>40</sup>

Although class discussions in the traditional Socratic mode might seem like free-wheeling intellectual play, they are not always experienced that way by students. First, students cannot freely start and stop the process at their option, as playing requires. Second, the environment is far from a safe “holding space”—students learn, sometimes painfully, that even where there is no one right answer, there are endless wrong or (worse) irrelevant answers (theirs). Finally, the student's questions are often no more respected than her answers, because they are almost invariably turned to the teacher's purpose. Indeed, the very appearance of open-ended inquiry, of intellectual playfulness, that Socratic discussion presents makes the experience all the more disappointing.

Teachers tell students that it is the law's openness, its indeterminacy, that assures their future livelihood and makes it possible to effectuate change within the system. But to many students, the initial experience of that indeterminacy feels like swinging high above “the hard concrete of the circus floor” without a net.<sup>41</sup>

Stark does not discuss first-year legal writing classes, but there is little or no room for play in the traditional courses like those I teach, with their emphasis on the fixed structure of syllogisms and paradigms, with the imperative of citation to authority, and the fixed route to an answer even when there is more than one correct answer.

Outside of the classroom, activities like law review, moot court, and clinical programs (especially the last), have some play-like aspects, but they are

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<sup>39</sup> Stark, *supra* n. 10, at 1010.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1012 (quoting Grolnick, *supra* n. 26, at 34).



available only after the first year, and even then, not available to all students. I would add, with respect to law review, that by the time students accepted onto a journal have the opportunity for the creative play that finding a thesis for their scholarly notes or comments provides, students have too often become seasoned paraphrasers unable to play.

Moreover, according to Stark, even in law review, moot court, and clinical activities, “the student player is not in control of the play. Instead, its pace, parameters, and goals are all set by an external authority. . . . [In addition,] there is no holding environment.”<sup>42</sup> In short, the distance to the circus floor may not be so great as in the classroom, the tent may be smaller, and the floor may be less hard, but there is still no net. Sometimes moot court occasions the hardest falls for playing students, especially in schools with one-L tryouts. The exciting opportunity to play advocate turns out to have rules that the student can’t get right no matter how she tries.

One of the rare forms of pure play in law school is experienced when students create fund-raising performances in which they make fun of the law, their school, their teachers, and themselves. But only those happy few students of extrovert temperament and with a bit of artistic training who are willing to both risk disapproval (typically minimal since it’s “all for a good cause”) and take time away from their studies are eligible for this experience.

With respect to law students, Stark concludes,

The curtailment of play in law school puts one of the most important lawyering skills—that is, the ability to maintain paradox—beyond the reach of most students, at least temporarily. This ability is not quickly or easily acquired. As Winnicott notes, “To control what is outside one has to do things, not simply to think or to wish, and doing things takes time. Playing is doing.” . . . [The law] draws on deeply rooted values . . . but at the same time, each case exposes more . . . ambiguity. Each lawyer argues that resolution of that ambiguity in her client’s favor is required by the same deeply rooted values . . . relied on by the other lawyer to support the opposite conclusion . . . . The lawyer unable to maintain paradox is unable . . . to truly grasp the law.<sup>43</sup>

Fortunately, Stark continues, once out of law school and in practice,

many lawyers find—or carve out—a niche . . . which allows them some control over the pace of their work and provides an acceptable holding environment . . . . Once this niche is found . . .

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<sup>42</sup> Stark, *supra* n. 10, at 1015.

<sup>43</sup> *Id.* at 1015–16 (quoting Winnicott, *Playing: A Theoretical Statement*, in *Playing and Reality*, *supra* n. 1, at 55).

lawyers discover that practice offers wonderful possibilities for play. Indeed, the practice of law not only allows play, it demands it.<sup>44</sup>

Stark's two examples of lawyer play are role playing and storytelling. Good lawyers role play in order to understand the "motivations, interests, and perspectives" of the parties, of opposing counsel, of the court, "to negotiate the terrain between these multiple realities."<sup>45</sup>

It is an internal, intermittent exploration, over the course of the case. . . . Like a child at play, the lawyer conjures up other selves. . . . The lawyer adept at this sort of play is the lawyer whose deep, sometimes startling insights often provide the key to intractable disputes.<sup>46</sup>

Storytelling is another form of play that good lawyers engage in, finding the core narrative that will inform their work on a case.

A litigator . . . must shape the facts into a coherent and compelling story. She must transform mountains of documents—or, conversely, a bare record—into a story that rings true, that accounts for the facts, and that is amply supported by them. The story must be flexible enough to accommodate new facts as the case unfolds, but firm enough to resist an adversary's attempt to turn it against her client. . . . [T]he stories emerge as the case evolves, shifting and changing as new facts are discovered and new theories considered.<sup>47</sup>

In addition to Stark's two related examples of role play and storytelling, I would add another important form of play in which creative practitioners engage—play in which ideas rather than plot and characters are manipulated at will. Anything can be analogized or contrasted or equated to anything. Boundaries—between civil and criminal, between law and economics—dissolve. There is no one to disapprove, to note dismissively that no court has ever so held. With no responsibility to espouse one idea, the lawyer can play flirtatiously with many.<sup>48</sup>

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<sup>44</sup> Stark, *supra* n. 10, at 1017. The lawyers Stark describes are those "who put in long hours because they love what they do—because practicing law gives them the kind of profound satisfaction they once knew as children deeply immersed in play. They like winning cases and making money, of course, but for them practice itself is rewarding—not always, but enough of the time for them to feel lucky in their choice of work." *Id.* at 1005. Their "holding environment" can be a quiet hour alone in the office, back from court or at the end of the day. It can be a solitary walk or run, a museum visit, or even a long shower. *Id.* at 1019.

<sup>45</sup> *Id.* at 1018.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1018–19.

<sup>48</sup> One litigator describes this process thus:

Sherlock Holmes solves problems that Scotland Yard cannot when he sits in his armchair and thinks. There are some things we can do to help us think more productively. Just as it is better sometimes to skim than to read, so it is often better

#### IV. Compliance: “Caught up in the creativity of someone else, or of a machine”

There is no quarreling with Stark’s conclusion that traditional methods of teaching law, and, indeed, the very enterprise of legal education itself, militate against play. Even though she also is correct that some lawyers and law students will nevertheless always find ways to play in Winnicott’s sense, I think it would be selling our students and our profession short to accept, as Stark appears to do, that three years of studying the law will be an almost entirely play-free zone.

The impetus for this conviction came as I continued to read Winnicott, and particularly, from his description of what happens when individuals are deprived of play: without play, life is compliance. Indeed, for Winnicott, “the opposite of play is not work, but coercion.”<sup>49</sup> He believed that play was necessary to healthy development, that without play, infants tended to become compliant, unhappy individuals. Indeed, Winnicott believed that play was necessary for the development of the individual’s “true self,” and that play deprivation fostered the dominance of a compliant “false self.”<sup>50</sup> Without play, there is no “creative apperception” of reality, only rote, often sullen, obedience to the authority of what is.

It is creative apperception more than anything else that makes the individual feel that life is worth living. Contrasted with this is a relation to external reality which is one of compliance. . . . Compliance carries with it a sense of futility for the individual and is associated with the idea that nothing matters. . . . In a tantalising way, many individuals have experienced just enough of creative living to

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to flirt playfully with problems than to obsess upon them. And we need to learn to listen to our intuition . . . [to] our minds trying to communicate something we already dimly sense.

Tom Galbraith, *The Joy of Motion Practice*, 24 Litig. 15, 16–17 (No. 2, 1998).

<sup>49</sup> Phillips, *supra* n. 8, at 145.

<sup>50</sup> In healthy individuals, the true self provides “the feeling of being real,” while the false self, rather like a press secretary, “mediates the relationship between the True Self and the world, making it possible for the True Self to come into its own.” Winnicott, *Ego Distortion in Terms of True and False Self*, in *The Maturation Processes and the Facilitating Environment*, *supra* n. 16, at 143. Winnicott’s true self/false self dichotomy has been criticized by some writers within and without the psychoanalytic community as overly schematic and normative. Such critics tend to see the self as an entity with different aspects in need of integration. See generally Paul Horwitz, *Uncovering Identity*, 105 Mich. L. Rev. 1283, 1289–91 (2007). Yet even his critics concede that Winnicott’s conception of the false self “resonates for people who suffer from the experience of forcing themselves into a lifetime of contrived accommodation.” *Id.* at 1289–90 (quoting Sharone Abramowitz, *Killing the Needy Self: Women Professionals and Suicide (A Critique of Winnicott’s False Self Theory)*, in *The Impact of New Ideas: Progress in Self Psychology* vol. 11, 177, 181 (Arnold Goldberg ed., The Analytic Press 1995)).

recognize that for most of their time they are living uncreatively, as if caught up in the creativity of someone else, or of a machine.<sup>51</sup>

In brief, Winnicott's "theory includes a belief that living creatively is a healthy state, and that compliance is a sick basis for life."<sup>52</sup> Believing as he did that play was a life-long necessity,<sup>53</sup> Winnicott was convinced that its absence had negative implications not just for individuals, but for society as well.

Looked at in this light, the consequences of accepting that three years of legal education will be in the main three years of learning compliance seemed problematic indeed. It is not pleasant to think that my students see themselves, in Winnicott's nightmarish description, "living uncreatively, as if caught up in the creativity of someone else, or of a machine."<sup>54</sup> On the other hand, I told myself that this dark view is based on the theories of a developmental psychoanalyst. Our students are adults, not infants.<sup>55</sup> And law exists to be complied with, not toyed with. It is the ultimate grown-up game with life-or-death rules and in this is unlike other academic disciplines. Indeed, after a quarter century as a lawyer, it is with a sense of transgression that I write the word "play" in this essay.

## V. Fighting "the temptations of acquiescence"

Despite such attempts to dissuade myself, I continue to find the play/compliance paradigm and its implications for legal education compelling and to believe that the good enough law teacher, especially good enough first-year legal writing teachers, must find ways to integrate play into the curriculum. Here are some of my reasons.

First, in several important respects these are times of more than usual change for lawyers, times that require more than the usual capacity for creative problem solving. The Internet increasingly forces us to think again, and differently, about many areas of the law. In addition, practitioners in many areas must be able to cope in an international, even global, context.

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<sup>51</sup> Winnicott, *Creativity & its Origins*, in *Playing & Reality*, *supra* n. 1, at 87.

<sup>52</sup> *Id.* at 88.

<sup>53</sup> Indeed, throughout his life, Winnicott devoted every Saturday entirely to play. Interview with Clare Winnicott, in Peter L. Rudnytsky, *Rank, Winnicott, and the Legacy of Freud* 182 (Yale U. Press 1991).

<sup>54</sup> Certainly, this is a good description of how I felt for most of my own time in law school.

<sup>55</sup> As one commentator puts it, "[t]he students who come into our law schools are adults who have decided to spend a tremendous amount of time and money preparing to enter a profession. We show the greatest respect for their individual autonomy if we deny ourselves the comfort of trying to make them happy and teach them what they came to learn: how to think like lawyers." Ann Althouse, *A Skull Full of Mush*, N.Y. Times (Feb. 20, 2007) (available at <http://select.nytimes.com/2007/02/20althouse>)

Moreover, equally serious challenges to familiar rules come across disciplinary borders.

For example, social and cognitive science poses challenges to foundational assumptions of our legal system like the efficacy of jury instructions and the soundness of criminal convictions based on confessions or eyewitness identification.<sup>56</sup> Indeed, the insights of cognitive science not only require new thinking about the behavior of fact-finders and litigants, but also require us to revise and expand our notion of “thinking like a lawyer” to go beyond pure reason to include emotional skills like empathy and reflectiveness. We need to understand that good problem-solving involves the whole person. As Coleman and Spring note,

the legal profession has not assimilated the insight offered by cognitive science that emotion plays a vital, critical role in normal adaptive reasoning. Because of the very complexity of human perception, emotion is needed to assist in sorting through information and exercising judgment about life situations, legal and other. Reason and emotion are melded in human cognition; our reasoning strategies are bond [sic] up with our feelings, for better or worse. . . . [N]othing resembling so called pure reason is met in human life except in cases of pathology. Moreover, without the development of emotional skills such as empathy, reflectiveness, and tolerance of disappointment . . . conflict resolution is impossible. . . . [I]t is time for the legal profession to update its conception of “thinking like a lawyer” to encompass a central goal of developmental maturity—reflective, empathic engagement, with neither reason nor emotion in exile.”<sup>57</sup>

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<sup>56</sup> See e.g. *United States v. Hall*, 165 F.3d 1095, 1119 (7th Cir. 1999) (Easterbrook, J., concurring) (“Much of the adversarial system rests on empirical propositions that may be investigated and sometimes refuted, through scientific means. Consider, for example the proposition . . . that jurors understand and follow the instructions given by the court. It may be that jurors don’t understand legalese, or if they understand the instructions, don’t follow them. . . . Or consider cross-examination. Jurors may believe that witnesses who hesitate, perspire, or fidget during cross-examination are hiding the truth . . . [despite] the (weak) correlation between lying and the appearance of discomfort on the stand.”); *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296–97 (7th Cir. 1990) (“An important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate and do not fade with time. . . . [A]ccuracy of recollection decreases at a geometric rather than arithmetic rate . . . accuracy of memory is not highly correlated with the recollector’s confidence; and memory is highly suggestible—people are easily ‘reminded’ of events that never happened, and having been ‘reminded,’ may thereafter hold the false recollection as tenaciously as they would a true one.”)

<sup>57</sup> Coleman & Spring, *supra* n. 16, at 23–24 (quoting Stanley I. Greenspan, Beryl L. Benderly & Lawrence Merloyd, *The Growth of the Mind* 237 (Addison-Wesley Publ. 1997) and citing Antonio R. Damasio, *Descartes Error: Emotion, Reason and the Human Brain* 168 (G.P. Putnam 1994)).

Because play engages the whole person across the boundaries of reason and emotion, indeed, permitting no boundaries, it has an important role in a revised notion of thinking like a lawyer, something that the most creative lawyers have always known intuitively.

Second, and perhaps most important for me, the rote compliance that the absence of play promotes is especially pernicious as law students learn to write. The law is nothing more or less than words written down, in judicial opinions and in legislation, in memoranda, briefs, and opinion letters. When writing is an act of compliance, the result is sterile and inauthentic.

James Boyd White has explored this connection between intellectual compliance, or as he puts it, “acquiescence,” and inauthentic legal writing. “[M]ore fully than we should wish,” he writes, our minds are “full of a repertoire of standard moves, received ideas and images, ways of thinking and writing . . . acquired by imitation from those whose approval matters.”<sup>58</sup> He goes on to say that “[t]he temptations of acquiescence are present whenever we speak or write; resisting them means the struggle to emerge as a mind saying something true or real or valuable, something you can really mean, in the law and in the rest of life.”<sup>59</sup> Acquiescent writing is “conclusory writing, cast in terms that bury argument and thought in one’s premises, reducing it all to a set of unargued assertions.”<sup>60</sup> In contrast,

The key element present in good legal writing, missing in bad legal writing, is a certain kind of life: the life of the mind, of thought and argument, that is generated by the recognition that we live in a world in which there are many valid things to say, many points of view, with which it is the task of the legal mind to come to terms.<sup>61</sup>

The “life of the mind” that White describes sounds much like play in Winnicott’s sense—there are no rules, no authority figures to please, just the writer playing with multiple perspectives in the potential space between psychic reality and external reality. In the introduction to one of his most original papers, Winnicott thus describes his own writing process.

I shall not first give an historical survey and show the development of my ideas from the theories of others, because my mind does not work that way. What happens is that I gather this and that, here and there, settle down to clinical experience, form my own theories, and then, last of all, interest myself to see where I stole what. Perhaps this is as good a method as any.<sup>62</sup>

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<sup>58</sup> James Boyd White, *Meaning What You Say*, in *Law in the Liberal Arts* 136 (Austin Sarat ed., Cornell U. Press 2004).

<sup>59</sup> *Id.* at 137.

<sup>60</sup> *Id.* at 124.

<sup>61</sup> *Id.*

<sup>62</sup> Phillips, *supra* n. 8, at 16 (quoting D. W. Winnicott, *Primitive Emotional Development*, in

In short, Winnicott resisted White's "temptations of acquiescence." He played with ideas,<sup>63</sup> "gathering this and that," integrating new experiences into older ideas and coming up with fresh theses—and when he was done, he acknowledged his debts. In *Playing and Reality*, Winnicott notes that the "interplay between originality and the acceptance of tradition [i]s the basis of inventiveness" and that "in any cultural field *it is not possible to be original except on a basis of tradition*. Conversely, no one in the line of cultural contributors repeats except as a deliberate quotation, and the unforgivable sin in the cultural field is plagiarism."<sup>64</sup> Thus, it is in the potential space between psychic and outer reality that the playing mind of the writer manipulates originality and tradition to create fresh ideas and resist the temptation of acquiescence.

One final reason why I think that play has a place in first-year skills training is that play works. Like the Moliere character realizing he has been speaking prose all his life, I realized that the techniques that most help upper-class students writing law review notes or seminar papers to find something fresh to say—practicing freewriting and keeping reading journals—are in fact play in Winnicott's sense.<sup>65</sup>

For all these reasons, there is no doubt in my mind that the good enough teacher of basic legal skills should integrate some play into the first-year curriculum in an effort to discourage rote compliance. The harder question, of course, is how to devise and integrate activities that have the essential characteristics of play while encouraging the intellectual rigor that, if not the be-all-end-all of thinking like a lawyer, is certainly inseparable from it. Thinking hard is not the opposite of thinking creatively.

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*Collected Papers: Through Paediatrics to Psycho-Analysis* 145 (Tavistock 1958)).

<sup>63</sup> Indeed, describing how he came to his theory of play, he describes himself as remaining for a long time in a "state of not-knowing," during which he "played about" with concepts and descriptions until at length they took shape. Winnicott, *The Location of Cultural Experience* in *Playing and Reality*, supra n. 1, at 129.

<sup>64</sup> *Id.* at 134.

<sup>65</sup> In freewriting, the writer focuses on a topic for a set period of time—at least fifteen minutes—and writes down anything that comes to mind in stream-of-consciousness fashion, digressing, playing with words, not stopping to edit or polish. When nothing comes to mind, the freewriter writes "I can't think of anything to write" until something does. Something always does. The germinal work on freewriting is Peter Elbow's *Writing Without Teachers* (Oxford U. Press 1973). The ultimate form of freewriting is "invisible" writing, in which the writer turns off the computer screen, thus making editing impossible. Freewriting generates ideas, raw creativity, that the writer can then focus upon and refine. See generally *Nothing Begins With N: New Investigations of Freewriting* (Pat Belanoff, Peter Elbow & Sheryl Fontaine eds., S. Ill. U. Press 1991). Reading journals are similar to freewriting in that they ask the reader to record immediate, uncensored response to a text in addition to taking traditional quote-or-paraphrase notes. Using a double-entry journal (traditional note-taking on right hand pages, reactions on left hand pages) or using different fonts are among the ways writing journals can be kept. See Elizabeth Fajans and Mary R. Falk, *Scholarly Writing for Law Students* 37–38 (3d ed., West 2005).



One complicating circumstance is, paradoxically, that law students typically come to law school as blank slates with respect to the study of the law. Typically, they study the liberal arts, then enter the cloister of the law school. The opportunities to major in “Legal Studies” are relatively few. Some commentators believe that if students came to law school with solid background in legal history and jurisprudence, that is, better educated about the law as “social accomplishment,” they would be better able to learn to use law as “social fact.”<sup>66</sup> Because liberal arts schools mainly do not educate students in the law, it has been argued, once in law school, liberal arts graduates tend to “take law to be something to be manipulated rather than questioned and treat it as ‘fact rather than as a social and moral accomplishment.’ ”<sup>67</sup> Put another way, students who came to law school with a knowledge base could more easily learn to be playful and creative thinkers about the law rather than compliant paraphrasers.

Given the reality that law students mainly come to us with little background in the law, I believe there are a few ways to integrate more play-mindfulness into law school education in general, and in particular into skills training in the first year. Preliminarily, I would level with beginning students about the paradoxical nature of legal education and legal practice. I would tell students on the first day of class that their task in law school is to learn traditional modes of analysis, to learn to use law to further the legitimate interests of a client. This learning cannot be accomplished without discipline, painstaking attention to detail, and a capacity for sustained logical argument. In particular, in a writing course, their central task is to learn to create documents that inform and persuade within the traditional, highly structured genres of office memoranda and appellate briefs. But I would also tell them that they need to bring their whole selves, affect and imagination as well as intellect, to bear on the enterprise of learning, practicing, and making law. They need to begin by thinking about the law, playing with ideas, saying “what if?” They need to be convinced that intellectual rigor and imagination must coexist, even merge. This is not an easy sell. Given the financial pressures so many endure, many of our students understandably want time-tested recipes for success—not what they perceive as experiments in fusion cuisine or make-believe tea parties.

The essential conditions for play are (in a familiar paradox) absolute freedom and absolute security. The person playing must be in sole control yet protected by a holding environment provided by the good enough caregiver. The traditional first-semester legal writing classroom provides the greatest challenge to a teacher seeking to provide enough play space so that

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<sup>66</sup> Austin Sarat, *Situating Law in the Liberal Arts: An Introduction*, in *Law in the Liberal Arts*, *supra* n. 58, at 7.

<sup>67</sup> *Id.* (citing Douglas J. Goodman & Susan S. Silbey, *Defending Liberal Education from the Law*, in *Law in the Liberal Arts*, *supra* n. 58, at 18.

compliance does not become the law student's default reaction.<sup>68</sup> When we teach novice law students how to apply settled rules to settled facts, we risk alienating the free spirits in the class and subjugating the rest. The rules of the game are set, beyond the student's control. At the end of the game, judgment more often than reassurance awaits—a grade, or, at minimum, an only slightly less chilling diagnosis of the student's shortcomings as a legal writer.

Yet the situation is not hopeless. First, R-A-C analysis is a necessary step toward more nuanced and overtly creative undertakings like deciding what the rule should be and what kinds of facts should matter, and this should be emphasized to beginning students as they grapple with the basics. Moreover, basic analysis need not, should not, be a soulless business.<sup>69</sup> Since no human story is ever quite like another, comparison to the facts of previously decided cases provides a space for playful thinking. Indeed, the application phase of rule-based analysis is inherently creative in Winnicott's sense, involving by its nature the "interplay between originality and the acceptance of tradition [that is] the basis of inventiveness. . . ."<sup>70</sup> I think it is important to explain this to students—a colleague of mine has long helped students to distinguish between the "Rule" and "Application" components by explaining that the Rule is fundamentally descriptive, and the Application is fundamentally creative. (Of course, where the Rule statement requires synthesis, that, too, may require some creative thinking.)

One simple way the good enough teacher can provide students with more freedom to think their own thoughts, to put students more in control of play, is to liberate them from the traditional subservient role-play conventions of first-year writing assignments. I think my first writing assignments are not atypical in that they ask students to imagine that they are law assistants or clerks or associates writing a memo for the all-powerful boss (me!). One teacher sees "an incongruity between this fiction and the theoretically supportive environment" of the writing class and contemplates the unpleasant "possibility that requiring students to write for an (absent) supervising attorney is an unconscious effort to train students to work in hierarchical, unsupportive environments,"<sup>71</sup> in short, to habituate them to compliance. Yet novice learners need not feel like serfs. We could just as easily ask students to

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<sup>68</sup> I assume in this essay that the traditional legal writing class, teaching first-semester students how to apply rule to fact and how to embody that analysis in an office memorandum, is basically a good thing. I also believe this to be true. This is of course not the universal view. See e.g. Kate O'Neill, *Formalism and Syllogisms: A Practical Critique of Writing in Law School*, 20 Leg. Stud. Forum 51 (1996).

<sup>69</sup> While it is helpful for students to see that R-A-C analysis resembles a syllogism, they should also understand that it is not in fact a syllogism, because legal analysis concerns itself with probabilities, not with truth. See generally Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Basil Blackwell 1986).

<sup>70</sup> Winnicott, *The Location of Cultural Experience in Playing and Reality*, *supra* n. 1, at 134.

<sup>71</sup> O'Neill, *supra* n. 68, at 71.

imagine that they are drafting a memo for a peer, handing over a case as they go off on parental leave, or on vacation, or leave the firm for a better job. Let them be in charge of the case. It is easier to play when no one is looking (even hypothetically) over your shoulder. The lawyers sitting dreamily in their offices that Stark describes in *The Practice of Law as Play* are highly unlikely to be first-year associates.

Indeed, in order to free students still further to think creatively, one of the first-year assignments could be to write a short judicial opinion. That judges are constrained by precedent does not mean, except on the remotest arid shores of formalism, that their opinions are nothing but rote compliance. Good judicial opinions are crafted in the potential space where originality and tradition overlap. I have long asked students in my upper-class writing courses to write judicial opinions, and in my experience, they often produce the best-written work of their law school careers for this assignment. Part of the assignment is to write a cover sheet in which students explain how they reached their decisions, and these are invariably thoughtful and deeply serious. The simpler first-year version of the exercise could usefully include this feature.

Third, I would try to have at least one assignment in the first year that involves a problem to which there is no clear answer and which engages students' emotions as well as their intellect—for example, a discovery rule defense to a motion for dismissal of a medical malpractice claim on statute of limitations grounds. This would be an ideal type of problem for a judicial opinion exercise.

Finally, I would get first-year students thinking creatively early by giving them a short scholarly writing exercise that would free them to write expressively. The scholarly writing exercise could be an abbreviated “closed universe” case comment. The instructions for the exercise would encourage students to keep a reading journal during the exercise and to experiment with freewriting. This assignment would have the additional benefit of preparing students for the law-review writing competitions that many schools offer at the end of the first year and giving them a foretaste of (and hopefully, a taste for) the scholarly writing they will be expected to do if they are accepted to a journal. It might also make students who are not accepted more likely to consider entering one of the many outside writing competitions available to them after the first year.

Then, in upper-class courses, these introductions to thinking creatively could be built upon in advanced writing courses that include at least one assignment that requires new ideas—a judicial opinion in a matter of first impression, a statute or regulations in an emerging area of the law, or a comment on a controversial decision. Practicums for substantive courses are another way that upper-class students can be encouraged to play with ideas. Two of my colleagues, an Administrative Law teacher and our Writing Specialist, have devised and taught an Administrative Law practicum in which

a dozen or so students play legislators and judges both—they draft a statute, regulations to implement their statute, and a judicial opinion resolving a dispute that the regulations give rise to.<sup>72</sup> This type of practicum could be adapted for other substantive courses.

In addition to providing assignments that provide space for play, and thus for creativity, we need to add playful moments to the writing classroom itself. Role playing and inventing far-fetched hypotheticals are two easy ways to do this. But I think it is important that this play involve *both* students and teacher. When only the teacher plays, it is often just entertainment, or cleverness, or showing off. When only the students are asked to play, the exercise may be infantilizing or humiliating. Winnicott believed that patient and psychotherapist should play together: “[P]sychotherapy is done in the overlap of the two play areas, that of the patient and that of the therapist. If the therapist cannot play, then he is not suitable for the work.”<sup>73</sup> Teaching is of course not psychotherapy, but I think the analogy is meaningful nonetheless.

These are some ways we can encourage play by providing students at least some semblance of the essential condition of control, and thus of freedom. But what of security, the holding environment that is the other essential condition of play? It’s hard to imagine that a teacher obliged to evaluate and grade could provide students with an environment in which it feels safe to play.<sup>74</sup> Yet there is a least one way that the good enough law teacher can foster an atmosphere in which creativity can breathe. That is to encourage the development of the good enough skills of the good enough lawyer rather than holding above students’ heads a standard of unattainable excellence.<sup>75</sup> Too often as teachers we risk giving give the impression that students’ work just can’t measure up. We risk “owning” excellence. I know that my own line-edits and comments (as opposed to genuine corrections) too often convey the message “do it my way.” But no matter how good my way is, it is still just one good way to write that memo or brief—just one good way of ordering the issues or putting the client’s arguments in their best light. The most difficult part of evaluating student work lies in distinguishing between

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<sup>72</sup> See Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 *Leg. Writing* 215 (2007).

<sup>73</sup> Winnicott, *Playing: Creative Activity and the Search for the Self*, in *Playing & Reality*, *supra* n. 1, at 72.

<sup>74</sup> The devil, of course, is in the grading curve. No matter how much as good enough teachers we try to convince students that grades are not the only measure of worth, they still tend to experience getting that “B” as being dropped on the floor. Yet it makes little sense to have first-year skills courses pass-fail while doctrinal courses are graded—the danger that students will undervalue their skills training seems very real.

<sup>75</sup> Like good enough caregivers with infants and good enough psychotherapists with their patients, good enough lawyers are responsive to the evolving needs of the client. Their practice is characterized by perfect responsiveness to the client and appropriateness to the moment—in other words, by that much under-rated and too rare quality called competence.

alternative ways of organizing or analyzing and wrong ways—and in articulating the distinction between the two. Mindful of clarity and fairness and pressed for time, I know that I too often fail to see that a student's different take on an issue is a plausible way of seeing it.

Perhaps some of my suggestions would make it easier for the students I mentioned at the beginning of this essay to imagine new ways of looking at the law, to see new issues, and to construct new arguments. Perhaps in their last year of law school they would be able to play with ideas as Winnicott did instead of merely complying, instead of acquiescing to whatever text pops up on the screen in response to their Lexis and Westlaw queries. Which would mean that I would not get to spend as much time sitting in my office and playing, thinking up suggestions for them. But I think there's a chance it might also make it more likely that they will be lawyers of whom we can be more than proud.