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## Teaching Federal Courts Where Outcomes Matter: A Curricular Conjecture

Richard A. Matasar  
*New York Law School*, [rmatasar@nyls.edu](mailto:rmatasar@nyls.edu)

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**TEACHING FEDERAL COURTS WHERE OUTCOMES MATTER:  
A CURRICULAR CONJECTURE**

RICHARD A. MATASAR\*

INTRODUCTION

Asking a law school dean who is a former full-time faculty member to talk about teaching is like asking the conductor of a symphony to reflect on his or her days as a musician. Whatever the truth, he or she remembers skills that were extraordinary, imagines recapturing days as a virtuoso, and recalls past orchestras as far superior to the one now being molded. Regardless of how musicianship has evolved, the conductor assumes that picking up the instrument again would be a snap; of course he or she could play with great proficiency, and teach the young ones a thing or two. But, conductors rarely keep up with their instruments. Rather, they shift their focus from individual instruments and bits and pieces of music they once had mastered to the sound of the whole; they care about how disparate talents work together to make a glorious sound.

Like the conductor, the law school dean—especially one who has been “deaning” for nearly 20 years—has fond (and almost certainly inflated) views of past skills. But in moments of quiet reflection, this dean has to wonder if his memory is tainted (or even if he has a working memory) because the world has changed and past glories are now well-faded.

When I received the invitation to write for this issue of the *Saint Louis University Law Journal*'s issue on Teaching Federal Courts, I wondered immediately if the editors had failed in finding authors and instead kept making calls until they located a washed up former scholar now engaged in other work. But they assured me that they intentionally sought out my views. So, in keeping with my metaphor, this Essay is about the symphony called a law school curriculum and the place the course in Federal Courts plays in making beautiful music!

In the spring of 1980, before joining the University of Iowa College of Law's faculty, the dean asked me what courses I would like to teach. I gave

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\* Dean and President, New York Law School. B.A. University of Pennsylvania, 1974; J.D. University of Pennsylvania, 1977. The author has taught the Federal Courts course over twenty-five times since 1980. He claims that he will soon understand what he is teaching!

him a wish list that included Federal Courts—a course I desperately wanted to teach. I knew it was a long-shot, since the law school had two outstanding senior faculty members in the field whose scholarship was tremendous and who owned the course. Much to my surprise, however, I was told that I would be teaching the course. It turned out that both colleagues were visiting elsewhere and that I was the only other volunteer. Instantaneously I was a Federal Courts teacher.

Looking back, I wonder why I wanted to teach Federal Courts. I had done well in the course in law school, but not as well as I had done in other courses. I was a federal court of appeals law clerk, but most of the cases on which I worked involved substantive law and the jurisdictional issues were arcane and often uninteresting. As a lawyer, I plowed the substantive fields of antitrust law, commercial litigation, and even civil rights law, but recall only fleeting glances at the core issues of the course in Federal Courts. My attraction to the course was unmoored in any deep ideological commitment, although as a child of the Warren Court, the Civil Rights movement, the anti-war movement, and post-Watergate mistrust of the Executive Branch, I was primed for seeing the course as a progressive's tool to improve justice. No, on reflection, none of these mattered that much: I was attracted to study lawyer's law—the intellectual puzzles that fascinate insiders, but are virtually unintelligible to lay people. I was excited to follow in the footsteps of the stars who invented the course, and sure that my scholarship in the field could tilt the world to becoming more just.<sup>1</sup>

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1. I did the usual run of articles concerning a wide variety of Federal Courts topics. See Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter when Law is Politics?*, 89 MICH. L. REV. 1499, 1500 (1991) (suggesting that placing an author's personal views into Federal Courts scholarship and discussing those of the Court would improve the scholarship and perhaps the jurisprudence); Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from Boyle's Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990) (reviewing the Supreme Court's flawed intervention into common law liability rules in cases involving government contractors); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987) (showing the flawed nature of the Supreme Court's understanding of Section 1983 as it applies to personal immunity); Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986) (suggesting that the adequate and independent state grounds doctrine had no constitutional basis and placing the doctrine into the wider range of procedural common law doctrines); Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) (outlining the various doctrines and recommending that they be collapsed into one category—supplemental jurisdiction); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399 (1983) (suggesting that the constitutional limits of supplemental jurisdiction are broader than the common nucleus test). Like many scholars, this led me to write a poorly selling Federal Courts casebook. See ROBERT N.

In my law school days, Federal Courts was the course for the law review, for the future professors of America club, for the law clerks to be, and for the folks who talked substance all day long—during meals, while playing basketball, and when going out with friends. It was the course for the whiz kids, the gunners, the academic nerds, and the social activists. It was the course for folks with a social agenda. It was the course in which the Supreme Court made real decisions under the cover of procedure. It was the place where world views collided. It was the place in which seemingly banal conflicts masked the battleground for major ideological warfare. In short: it was the most desirable spot in the curriculum.

Hence, it was a surprise to me that in their invitation to write for this issue, the editors of this *Journal* suggest that “the Federal Courts class has been referred to as an ‘intellectual backwater.’” What has happened since 1980? Where do the cool kids hang out now? Is there hope for Federal Courts jocks that we can make a comeback in the years ahead? Who cares?

I argue in this Essay that the world of legal education has indeed changed substantially over the last 28 years, that student expectations have shifted, that the academy has shifted its attention elsewhere, that the employment world is much less interested in lawyer’s law than in private law, and that all courses in the curriculum may be intellectual backwaters, unless we understand these trends, respond to them, and recast our courses. Despair not brothers and sisters in the Federal Courts family: in this regime, our course is an ideal forum to respond to these trends.

## I. EXPECTATIONS—STUDENTS, FACULTY, EMPLOYERS, REGULATORS

### A. *Students*

Since the memory runneth not, most law schools have adopted fairly uniform curricula. The first year and large enrollment upper-level classes come in fairly discrete subject matter boxes like: contracts, property, torts, civil procedure, criminal law, constitutional law, income tax, corporations, evidence, and so on. Most students take courses within the canon, both in public and private law courses. Upper-level electives reflect the substantive law interests of the faculty, with advanced courses in subject areas studied in the first-year and finally in seminars exploring even more esoteric areas of those subjects.

Beginning in the 1970s, many law schools extensively augmented these substantive courses with skills courses—clinics, simulations, legal writing and

research, externships—and all schools established “values” courses like professional responsibility, legal profession, professionalism, and similar courses. Whatever the content of the overall curriculum, however, most students expected their schools to cover the basics and have some upper-level opportunities for research and writing.

Whether doctrinal, skills, or values courses, the full curriculum historically has been the sum of faculty interests. Whether coherent or not, whether fulsome or not, whether tilted to private or public law, students expected no more than what the school offered. Moreover, schools had little incentive to do much more. Neither the employment market nor a school’s students demanded more. Lawyers were expected to be generalists, and the conventional wisdom called for an eclectic education—a smattering of information from several subject areas.

Students have substantially different expectations today. Weaned on a My Amazon, My University, MySpace world, they come believing that their education should be relatively customizable. If a course is not in the curriculum, it can and should be added. If it is not taught at the school, it can be imported through distance learning. If the course is taught only every other year, it should be made available annually. If the faculty has no expert in the area, one should be hired.

Further, students have come to expect that the curriculum should be training them to become desirable employees, with subject matter expertise in the fields most in demand in the employment world. This emerging preference for specific knowledge reflects changes in practice in which ultra-specialization occurs and in which the emergence of important practice settings—financial services, securities law, intellectual property, real estate law, taxation, and so on—have made deep, specialized knowledge increasingly important. Students, therefore, now demand that their schools develop curricular niches in which they can “major.” They have come to expect that there should be centers and institutes that will issue certificates of expertise to their students that respond to employers’ needs, and that the curriculum should be useful. In short, students want the curriculum to reflect their interests (or those of the practitioner world)—not those of the school, the faculty, or the administration. They want a transcript that can be translated into something valued by the employment market.

Given these increasing student demands, the Federal Courts course has become merely one of many upper-level subjects. A law school’s leading students now distribute themselves much more disparately throughout the curriculum. While judicial clerkships still hold an allure for many students, who benefit tremendously from studying Federal Courts, the salary gap between clerkships and law firm associate jobs has grown so wide that many law students go directly into practice, avoid clerking, and begin to receive the salaries they need to manage the debt they have accumulated while studying

law. Finally, the Federal Courts course has no special allure to activist students—especially as the Supreme Court has undone so much of the jurisdictional framework that made the course a hot bed for change-oriented students. In a world of centers and institutes, the course has no natural home. It is simply one course among many options, heavily historically laden, and often with no immediate pay-off in knowledge that can be turned into specialized information that the employment market values highly.

### *B. Faculty*

There have been extraordinary changes in the composition of the faculty that have made it difficult to fulfill these emerging student expectations. Faculty once came in a fairly uniform size—lawyers from first-rate law schools (with a law review credential, a federal court clerkship, and a job at a high-end private practice or government agency), focused on substantive law (and sometimes law reform through clinics), teaching by Socratic dialogues (or most often monologues), occasionally doing problem sets, and even more rarely sampling literatures of allied disciplines. Course work depended on appellate cases, and the implicit message was that one learned law through reviewing litigation. Even private law courses focused on transactions gone bad, assuming that studying the ensuing litigation would reveal how and why the deal failed.

The Federal Courts course flourished in this regime. Many faculty members desired to teach the course to strut their doctrinal chops. The course played to their strength—as lawyers’ lawyers. And, it allowed them to show off the connections between Federal Courts and many other public law courses. Even those not teaching the course recommended the course to students as a stern test of their abilities—a course in which they would be tested against the best of the best of the student body (or at least the law review folks priming for their clerkships!).

Today, law schools are mini-universities with economists, sociologists, psychologists, philosophers, literature scholars, MBAs, and countless other disciplines represented. Many new faculty members have not worked at a traditional legal job—eschewing legal employers for fellowships, graduate legal programs, and research jobs. Most have had extensive publications before becoming professors. Few focus primarily on doctrine.

These multi-disciplinary scholars bring perspectives that often implicitly (and sometimes explicitly) suggest that law itself is relatively hollow, that doctrine is inherently incoherent, that influences external to the law—social conditions, ideology, economic behavior—better predict the law than legal principles. Even traditional lawyer/scholars, especially those from top ranked law school programs who have studied with the most outstanding multi-disciplinary scholars, are seduced by the call of other literatures and scholarship. They too focus their courses on many disciplines other than the

inherent logic of doctrine to present superior explanations for the problems their courses raise than those offered by traditional case and language parsing.

The rise of these intellectual skills has broadened legal scholarship and greatly improved our understanding of the law. It has led every law student and faculty member to reach for greater knowledge from multiple sources to better understand the place of doctrine. In so doing, however, it has reduced the importance of any single body of law and has suggested that there are many ways to understand the development of any body of law—through problems, through case studies, through stories, through clinics, through review of actual transactional documents (especially those in successful deals that do not end in litigation), through sociology, through economics, and so on. The appellate case, while of interest as an artifact of law, is just one of many signals of law's meaning. In this environment, Federal Courts, no more or less than any other course, is just a lens to understanding the complicated nature of law and policy.

Decades ago, newly minted professors were advised to find a first-year course in which they could excel. Because so many of them came from corporate practices, they were encouraged to show breadth and an understanding of public law and policy issues. This encouraged the growth of public law courses like Federal Courts. Today, with so many senior faculty members well-versed in public law, those courses are well-covered in the curriculum. Today, with many new faculty members not having had substantial practice experience (and with many more potential faculty members remaining in practice to reap the rewards of lucrative private practices) advisors often recommend that new faculty members have some private law course on their list of prospective courses. This also may reflect the aging professorate, consisting of those in their 50s–70s, children of the last great boom in law school hiring, students of the civil rights revolution, no longer subject to mandatory retirement, who crowd the public law courses, including Federal Courts. Coupled with the stable (or sometimes decreasing) demand for the course, there is no strong push today to expand the number of sections of the course.

The emerging law faculty of the modern law school—highly educated theoreticians with less practice experience, commitments to other disciplines, comfortable with graduate models that prefer teaching by other than the case method, and used to the idea that graduate schools have departments—band together in research and policy centers that mirror other graduate schools. These specializations are a boon to students seeking to build expertise and have given rise to the growth of intellectual property, corporate, taxation, international law, and other centers. None of these require the Federal Courts faculty to play. Similarly, the litigation-oriented faculty members have built clinics, public interest programs, and dispute resolution centers, in which Federal Courts is a useful course, but not a primary focus.

Finally, but never last in our hearts, are the politics of the course in Federal Courts. The last forty years have seen a rightward move by the Supreme Court. Much of the subject matter of the Federal Courts course—the Tenth and Eleventh Amendments, federal question jurisdiction, separation of powers—has been redefined, with retention of authority by an increasingly conservative Court to shape the law, with the Court’s deep mistrust of Congress, and with the Court’s redistribution of power to the states (at least when they might be sued by those seeking to enforce federal rights). At the same time, the Federalist Society has emerged as a major force in the academy and in the world—with many Federalist scholars teaching Federal Courts, Administrative Law, Constitutional Law, and other public law courses. These conservative scholars have a loyal following among students, but still rank as a substantial minority in our predominantly liberal schools. In that environment, it is no wonder that the course’s popularity may have decreased (while the devotion of the remaining members of the faith may be as strong as ever).

### C. Employers

The “gap” between what law school teaches and what the practice world demands of new lawyers has existed (or existed in the minds of some) for decades. Schools proclaim their independence from the “practice” of law, disdain bar pass courses,<sup>2</sup> and take comfort in providing legal liberal arts training to their students.<sup>3</sup> Firms express the desire that graduates should be

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2. In recent years, schools have faced pressure from their regulators (and their students) to teach students to pass the bar examination. This has led schools to hire specialists in bar preparation and look to commercial vendors to assure that their graduates can be admitted. Whether they like it or not, schools—if not faculty members—have begun to embrace courses that will help students become lawyers.

3. There are many reasons schools are not more focused in directly training students in practical lawyer skills. As parts of research universities, law schools have an important scholarly mission that is non-vocational. Most full-time, non-clinical faculty members, even those with extensive practice backgrounds, do not “practice” law. See Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 631 (2004) (“In the last two decades of the twentieth century, however, many law professors apparently moved even further from the world of practice.”). Their knowledge of current practice specialties, specific techniques used by lawyers, and the structure of employment settings is often out-of-date. See *id.* at 623 (“Although I stayed in touch with many practicing attorneys, including former colleagues, classmates, students, and lawyers in my community, I personally had not engaged in the practice of law in any meaningful way since 1982 . . . . I was bothered by the fact that I knew law practice had to have changed in twenty years . . . .”). Whatever their practice backgrounds, law professors spend most of their time understanding how law has come to be, how it might evolve, and how it ought to evolve. Lawyers spend their time acting instrumentally—using law to help clients achieve their goals. These differences in mission are almost certain to assure that some gap exists between school and the practice. The real question is how large the gap is and whether the gap is dysfunctional.

more practically trained and that they be able to hit the ground running.<sup>4</sup> However much these positions suggest a gap between legal education and practice, the reality is that over the last twenty-five years, large law firm employers<sup>5</sup> and schools have maintained a strong working relationship. Schools continue to teach without specifically satisfying employers' complaints; employers continue to hire the schools' graduates, sufficiently satisfied that they are educable in the more practical aspects of becoming a lawyer.<sup>6</sup>

Whatever might have been true of large firm hiring, however, has rarely been the case with other legal employers. Where large firms have ignored the courses students have taken,<sup>7</sup> other employers look carefully at students'

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4. For decades, employers have groused about the impractical education received by their new attorneys, bemoaning their naiveté about the business world, their horrible writing and research skills, their preference for short-cuts, and their woeful lack of understanding of law firm economics.

5. For most law schools—whether sensible or not—the lore of large firm hiring has set the tone for understanding what skills, knowledge, and values their students need to be employable. See Paula A. Patton, *Large Law Firms and Their Role in the Educational Continuum of Lawyers*, 33 *FORDHAM URB. L.J.* 233, 234 (2005) (using statistics to describe the lore of large law firms among new law school graduates). Most law students (and probably most law professors) act as if most students will graduate and go to work at a large firm. Most law students act as if they will be at the top of their class when they graduate and therefore have a choice to join a large firm. Of course, ninety percent of all students will not be in the top ten percent of their graduating class (and are not likely to join big law). As discussed below, for most employers other than large law firms, the gap between employer needs and school training is critically important, and the employers focus much more attentively on what training students have had in school. The relationship between these employers and the law school may supplant the current regime.

6. The hiring decisions of large law firm employers have subtly reinforced the stability of this arrangement. Large firms have chosen new lawyers primarily from high-prestige schools, which often have the most theoretical curricula. They have hammered the point home by focusing offers primarily on students with the highest grades, regardless of the courses they have taken in school. Finally, while they have rarely treated clinical education, legal writing expertise, or course concentrations as disqualifying potential new lawyers, large firms rarely count such educational experiences as significant pluses in their hiring decisions.

7. See Donna Gerson, *Small Firms Seek Qualities Beyond Grades*, *STUDENT LAWYER*, Feb. 2005, at 5, 5. Such firms have not paid much attention to specific courses, preferring law school performance over specific course training, prestigious schools over more practical schools, and training at the firm over reliance on clinical teaching. Firms were satisfied with this approach, because they were willing to absorb high training costs. Thus, they often would rotate new lawyers through many practice areas before requiring them to choose a specialty. They would overstaff matters in order to let new attorneys learn from more experienced lawyers. Senior lawyers would train junior lawyers, who would apprentice for many years before then taking on their own responsibility to train new lawyers. Eventually, each lawyer would learn the art of practicing law. In this model, large employers have expected little from schools, other than that they not damage prospective new employees—a kind of “first, do no harm” mentality.

choices.<sup>8</sup> Where large firms have absorbed training costs by paying for substantial associate training programs, other employers cannot absorb such costs.<sup>9</sup> Where large firms have been satisfied with smart students who learned to “think” like a lawyer,<sup>10</sup> other employers want graduates who also can “act” like a lawyer.<sup>11</sup> Simply put, the accommodation between law schools and large firms that allows them to each go their own way does not work as well for employers who truly need practice-ready graduates.

For many years, law schools and their students alike ignored what most legal employers wanted and instead maintained the status quo that privileged faculty choices and passed on to employers a significant training responsibility. This is no longer the case. First, schools are no longer ignoring the needs of the bulk of legal employers outside of “big law” that ultimately hire most of their graduates. Students have accumulated extraordinarily high debt. Their employment is not only critical to their health but also to the health of the school that depends on a steady stream of new students willing to take on high debt to gain a legal education. Attentiveness to employer needs is becoming especially important as each school competes with others to place students, and employers can pick and choose students from comparable schools. Second, even large private law firm employers no longer uncritically accept students who possess nothing but generic skills. As a partner in one large Manhattan firm told me: “We now give them three months to show that they can add value. Three months. If they cannot demonstrate that they can do something

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8. *See id.* Because most legal employers cannot hire exclusively from the most elite law schools and do not hire primarily from the top ten percent of the class of other schools, they have always searched for more than apparent natural legal talent. Instead, they carefully scrutinize courses that students have taken. This has been especially important to legal employers that specialize in certain practice areas. Trusts and estates firms like to see graduates who have taken advanced courses in that area and in tax law. Family practitioners prefer those students who have studied family law, children’s rights, elder law, etc. Criminal prosecutors and defenders look for those with some criminal justice knowledge. Litigation firms like moot court and trial advocacy students. For these employers, *what* a student does in school matters as much as *how* the student has done.

9. This is not to say that governmental agencies, small firms, and other legal employers ignore training their new lawyers. They too rely on mentors to train younger lawyers. They also support continuing education efforts by their lawyers. Unlike large law firms, however, most legal employers cannot pass on the cost of training to clients or absorb the costs as overhead.

10. The Federal Courts course thrived in this environment. The course always emphasized neat doctrinal puzzles, case anomalies that allow inconsistent precedents to stand next to each other. The course also resides in the happy memories of many big firm senior partners who studied with the course giants—Hart, Wechsler, Frankfurter, and the like—who taught at leading law schools. And, like any common initiation rite, the course was shared from one generation to the next.

11. For such employers, the Federal Courts course holds no special allure. Federal litigation is more the exception than the rule in their practices, and clients often have specific substantive needs that go beyond the ability to parse complicated legal doctrine.

in that time, they are gone. We simply do not have the time, money, or energy to train them.” If large firms begin to ask for more, schools surely will provide it.

In the emerging employment market, firms will value law school graduates who “know” things. They still will seek students from the “best” schools and with the highest grades, but in the buyer’s market of legal employment, all things being equal, they will prefer those who can immediately make an impact: students who have concentrations in substantive areas, who understand finance, who understand business, and who can manage complex litigation. In the context of the emerging employment market, the Federal Courts course is not useless, but it provides little boost.

#### D. Regulators

The American Bar Association Section on Legal Education and Admissions to the Bar (which is governed by its Council) is the accreditation organization approved by the United States Department of Education that regulates law schools. The Council consists of lawyers, judges, members of the public, and representatives of the law schools who share responsibility for assuring that approved law schools operate their programs “consistent with sound legal education principles.”<sup>12</sup> A school follows such principles if “it is being operated in compliance with the Standards [established by the Council].”<sup>13</sup>

Over the years, the Council has deferred to curricular choices of individual law schools; its primary requirement is that “[a] law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”<sup>14</sup> It goes on to require “instruction in the substantive law” and values and skills (including “legal analysis and reasoning, legal research, problem solving, and oral communication”) which are “generally regarded as necessary to effective and responsible participation in the legal profession.”<sup>15</sup> The means of fulfilling these basic requirements are left primarily to the schools.<sup>16</sup>

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12. ABA SECTION OF LEGAL ED. AND ADMISSION TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 4, Standard 101 (ABA 2008–2009) [hereinafter ABA STANDARDS].

13. *Id.*

14. *Id.* at 19, Standard 301(a).

15. *Id.* at 21, Standard 302(a)(1)–(2).

16. *See id.* at 19, Interpretation 301-2 (“A law school may offer an educational program designed to emphasize certain aspects of the law or the legal profession.”); *id.* at 22, Interpretation 302-2 (stating that instruction in professional skills need not be limited to any specific skill or list of skills because “[e]ach law school is encouraged to be creative in developing programs of instruction”).

While the rules sometimes prefer a particular pedagogy<sup>17</sup> or group of law teachers,<sup>18</sup> overall the regulatory regime has permitted schools to choose for themselves what their schools will teach, in what order courses will be taught, who will do the teaching, and what skills graduates should possess. Rather than micromanaging the precise nature of these matters, the Standards focus on verifiable and relatively objective input measures as stand-ins to assure that schools are adequately training their students.<sup>19</sup> Hence, the rules outline admissions rules,<sup>20</sup> bar passage guidelines,<sup>21</sup> library conditions,<sup>22</sup> and terms and conditions of employment for law school teachers.<sup>23</sup>

This regime is under some stress today. With the urging of the Department of Education, legal education is now asking whether input measures are enough. Instead, the Council is asking whether schools should be measured on their outputs—what they produce, whether students know anything, whether they can pass the bar examination, whether they are employed, whether they can add value for their employers, and whether they adequately serve clients. These outputs themselves may be assessed against the larger purposes the school purports to serve: the public interest, the interests of scholarly

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17. See ABA STANDARDS, *supra* note 12, at 21, Standard 302(a)(3) (requiring “writing in a legal context, including at least one rigorous writing experience in the first year”); *id.* at 23, Interpretation 302-9 (requiring a law school to give every student “instruction in the history, structure, values, rules, and responsibilities of the legal profession” and instruction in the Model Rules of Professional Conduct); *id.* at 21, Standard 302(a)(4) (requiring schools to offer “substantial instruction in . . . professional skills”); *id.* at 22, Standard 302(b)(3) (requiring schools to provide students with substantial opportunities for “small group work through seminars, directed research, small classes, or collaborative work”); *id.*, Standard 302(b)(2) (requiring schools to provide opportunities for “student participation in pro bono activities”).

18. See *id.* at 23, Interpretation 302-6 (“A law school should involve members of the bench and bar in [its values] instruction. . .”).

19. See, e.g., *id.* at 24, Standard 304(a) (prescribing the length of the calendar); *id.*, Standard 304(b) (outlining the number of hours of instruction that must be offered).

20. *Id.* at 38, Standard 501(b) (“A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar.”); *id.*, Standard 502(a) (“A law school shall require for admission to its J.D. degree program a bachelor’s degree, or successful completion of three-fourths of the work acceptable for a bachelor’s degree . . .”); *id.* at 39, Standard 503 (“A law school shall require each applicant . . . to take a valid and reliable admission test to assist the school . . . in assessing the applicant’s capability . . .”).

21. See *id.* at 19–21, Interpretation 301-6 (detailed calculations for assessing whether schools adequately prepare students for the bar examination).

22. See ABA STANDARDS, *supra* note 12, at 46, Standard 606 and Interpretations (outlining collection requirements for schools).

23. See *id.* at 32, Standard 401 (“A law school shall have a faculty . . . [that] possess[es] a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.”); *id.*, Standard 402 and the following interpretations (requiring a full-time faculty sufficient to fulfill the Standards); *id.* at 35, Standard 405 (setting forth terms and conditions for various faculty members).

advancement, the improvement of social justice, and similar missions. In this emerging model of legal education, traditional deference to faculty preference may give way to verifiably useful outcomes. Together with changing student attitudes and evolving practice requirements, the current era of curricular planning, with its delegation to faculty preferences, may be coming to an end.

The question this Essay addresses is whether the course in Federal Courts will regain its luster in the world of legal education as that world changes rapidly in the years to come? Or will the course even more firmly be considered a dead letter?

## II. IMAGINING AN OUTCOMES-BASED CURRICULUM

As discussed above, several forces are coming together to disrupt traditional law school curricula. Mere faculty preference, tempered by theory and multi-disciplinary influences, is under siege by market forces. First, students are demanding greater customization, specialization, and utility in their courses. Second, employers are looking for greater expertise from law school graduates, especially in areas of private law that are growing in the private sector. Third, regulators are increasingly focused on student outcomes that are the result of the school's choices. If faculty preference diminishes in importance, it remains to be seen how a curriculum will develop and how it should develop in the years to come.

Keeping with the metaphor that begins this Essay: until recently, the law school has been a jazz group, with lots of solo artists, unconstrained by a band leader, content to riff individually and off of each other, occasionally sharing a common melody. The demands of the emerging legal culture may require more discipline, like that of a classical orchestra, under the leadership of a strong conductor like . . . the dean?!<sup>24</sup>

With the advent of a stronger governing requirement for accountability in outcomes, strong student demands for greater coherence and training (fueled by employers), and a sense that local control has increasingly ignored the needs of students, it is quite likely that the curriculum of tomorrow will be much more directive of particular outcomes: students' knowledge, skills, and values, traits that employers will find useful, and ways that are clearly related to the missions of each school. In tomorrow's orchestra, the conductor may

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24. This dean is a captive of his own instrument and therefore likens traditional curricular planning to the federal system: the students play the roles of state citizens, the faculty plays the role of the states, the central administration plays the role of the federal government, and the regulatory regime plays the role of the constitution. For most of the last twenty-five years, states/faculty have been on the rise and the states/faculty have been relatively unconcerned with the "rights" of their citizens/students. The constitution/regulatory regime has been read loosely and has imposed relatively few constraints on the states/faculty, and the federal government/central administration has not tried to substitute its judgment for local choices.

push for greater influence over the repertoire and will seek more structure of the program.

A. *High Level Considerations*

I have previously argued<sup>25</sup> that the choice by a student to study law might best be likened to an investment decision—the student borrows funds, invests them in the belief that the training he or she will receive will return on that investment, and chooses a school that provides an adequate return on that investment. Under this model, the school must manage wisely, avoid self-dealing, always begin by taking account of student needs, and place faculty and manager preferences below those of other stakeholders whose investments support the school (and the good life of its faculty, administration, and staff). In short, the managers of the school must act as fiduciaries for those stakeholders—especially the students. I argue that failure to do so places the school (as well as the entire legal education industry) at risk, especially if students perceive that the value of the education they have received does not warrant the debt they have incurred in obtaining it.<sup>26</sup> The first consideration of revising law school curricula, therefore, must be to focus on students' needs (or those of the employers who drive student demand).

Students' needs vary widely by school and by rank within the school. Thus, curricular reform may look very different at high-prestige schools with strong brand name value where every student has extraordinarily high entry credentials. Students' needs also may be very different at lower-priced schools or those serving a limited geographical area, where students incur less debt or have modest expectations. In such instances, the schools might retain a traditional curricular approach, confident that students will be satisfied by what is offered and comfortable in the expectation that the market will still provide employment opportunities when they graduate. However, for the bulk of American law schools, with neither brand name appeal nor low cost, the school must change in order to improve student outcomes and better satisfy the needs of employers and their clients. I am most concerned with such schools.

Such schools will seek to differentiate themselves from one another. Failing to do so places them at the risk that they will lose students to other schools that better describe the value proposition for their schools' graduates, or to less expensive schools, or to other equally generic schools that are ranked higher. Given these risks, each school will seek to clearly define its curricular goals, assess every course as to whether it furthers those goals, and build the teaching and scholarly mission to fulfill that purpose. Each school then must

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25. See Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67 (2008).

26. *Id.* See Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y. L. SCH. L. REV. 465 (2004).

measure student outcomes to see if its curricular goals have helped students to achieve their employment and other objectives. Finally, each school should promote its curricular choice to students and employers who share their vision of the skills, knowledge, and values that the school believes are important.

*B. Teaching Federal Courts in an Outcomes-Based Curriculum*

It is not my purpose in this Essay to universalize the Federal Courts course in all curricula and at all law schools. Rather, I focus on a mythical law school program at Outcomes University, a school that is deeply concerned with its students' outcomes, whose faculty members share an outcomes focus, and whose dean is a former Federal Courts scholar who still loves his subject matter and who sees the course as critical to outcomes education. The Essay concludes with a conjecture about the special role that the Federal Courts course might play at Outcomes University School of Law.

What would an outcomes-based law school curriculum look like? It would begin with a commitment by the school to define the traits its graduates should possess and engineer those traits into the school's program, both in the classroom and out. Much of this work has been done in the seventeen years since publication of the MacCrate Report.<sup>27</sup> I write here about issues that go beyond the standard knowledge, skills, and values that directly flow from MacCrate; instead, I focus on specific outcomes that the legal market might prefer or need.

1. What the Market Prefers

Below, I describe some general traits valued by the market that ought to inform law school curricula.

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27. See ABA, SECTION OF LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). This report, commonly referred to as the MacCrate Report to honor its chairperson, Robert MacCrate, sets forth a vision of the skills and values that all new lawyers should seek to acquire. The so-called SSV (Statement of Skills and Values) would require the following ten skills and four values. *Skills*—problem solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. *Values*—provision of competent representation; striving to promote justice, fairness, and morality in one's own practice; striving to improve the profession; and professional development. *Id.* at 135–221. I have detailed the myriad effects of the MacCrate Report and the great progress that has been made in legal education to implement its recommendations. See Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395 (2003). I write above about the next generation of curricular issues that schools must confront.

a. Effective Lawyers Are Problem Managers

Until they graduate, students rarely appreciate the role that they must take on as a lawyer. Clients seek lawyers to help them avoid problems before they occur or solve them after they have occurred. Therefore, a well-designed law school program would work to produce graduates who can manage problems. They would need to be able to advise a client contemplating a particular course of action about whether that action poses risks—legal or otherwise. Or, after a client has acted, they must be able to evaluate the risks posed to the client of a dispute and how such a dispute might be avoided or decided.

Problem managers need to understand legal doctrine; find or create ambiguity; and argue from facts, from law, and from policy. They must be able to envision the full range of options available to the client and make accurate predictions about legislative, executive, and judicial responses to the client. And, if the lawyer is effective, she or he must be able to envision the effect of the client's actions on its business or ordinary activities—even if there is no real legal risk.

b. Effective Lawyers Have a Fully Stocked Tool Belt

Every law school graduate should have full facility with the tools of our profession—from effectively researching and writing, to understanding doctrine, to conducting an interview, to counseling a client, to negotiating, to using legal technologies, to understanding law firm economics, and so on. Many of these skills are currently taught in isolation from one another. Most would be better taught in classes integrating substantive subject areas and skills—through projects, externships, or problems.

c. Effective Lawyers Must Have Interpersonal Skills

Effective lawyers all know how to listen well. They can hear a specific client story, understand how it fits into a general framework (legal, business, and ethical), draw upon knowledge to evaluate the story and recommend how to deal with it, and move back to the client's specific situation. Every good lawyer must know how to work well with other lawyers/team members and with colleagues from other disciplines. They must be able to work with adversaries and outside authorities (like judges, legislators, bankers, etc.). They must be able to work on teams in all positions—at the bottom of the hierarchy, in the middle, and at the top. They must learn to work on deadline. They must be comfortable with being held accountable for their own failures and for those of their team. They must be able to bounce back after facing adversity. In short: they need high levels of emotional intelligence.

d. Effective Lawyers Network and Market

Effective lawyers understand that they are in a personal services business in which clients must choose them over alternative service providers. This suggests that they must constantly network—connecting themselves to others both inside and outside the law. They must volunteer in their communities. They must be visible contributors to social good. They must demonstrate that they offer unique value to those who might use their services. In short, they understand that they are participants in a market and must compete with others in offering a rather generic product that is best distinguished by *who* provides the service, rather than by *what* service is provided.

2. Translating Market Needs into the Curriculum

These various market traits suggest specific choices for the law school curriculum. We do many things correctly already. We deliver a full range of doctrinal courses throughout the three years of law school, enough to expose every student to the wondrous variety of legal constraints and regimes that apply to problems their clients will experience. Doing this gives students the ability to diagnose the issues their clients will face and help them formulate an appropriate response.<sup>28</sup> Minimally, schools ought to sustain their legal writing and research classes<sup>29</sup> and continue to offer an expanded number of opportunities throughout the three years of law school. However, most schools probably must greatly expand their lawyering skills offerings<sup>30</sup> in order for

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28. Unfortunately, we do not do much to help students understand that the real world does not come in discreet curricular boxes like Federal Courts, Corporations, Tax, Securities, etc. Rather, most problems mix issues from many areas. Doing a corporate transaction might entail understanding multiple commercial areas of law, anticipating possible choice of law questions in the event of default, understanding options if the deal fails, anticipating bankruptcy issues, contemplating litigation or alternatives, etc. As the curriculum develops in the years ahead, we must anticipate the need for courses to be combined into concentrations—thus providing students with deeper context to understand the law. Further, such concentrations might require students to engage in problem solving that involves drawing from multiple legal subject areas in order to serve client needs. Even more importantly, these problems might involve learning non-legal disciplines like finance, psychology, economics, or the like, in order to best serve the clients' ends. Such problem solving would make much better use of faculty members' multi-disciplinary training than our current "law and" approach.

29. While schools have greatly expanded legal research and writing training over the last twenty-five years, such courses often are treated as separate skills courses, apart from the substantive curriculum. This misses an important opportunity to integrate skills and substantive teaching—especially in the first year, in which most basic legal research and writing skills are taught. There is an emerging trend in legal education to weave research and writing training together with first-year substantive courses to better integrate problem-solving and analysis.

30. This presents a true resources problem for most schools. Skills training is often accomplished in classes with very small student-to-teacher ratios. Offering more of these courses will add greatly to the expense of legal education if we persist in separating doctrinal courses

every student to be prepared to offer immediate value. For most schools, this means additional training in non-litigation skills.<sup>31</sup>

Beyond maintaining what they already do well, every law school must confront its shortcomings, especially in filling out students' needs in interpersonal skills. Schools need a parallel curriculum to deal with professionalism training, interpersonal development, networking, and marketing. At New York Law School, our Office of Professional Development has designed such a program, requiring students to develop connections to several professionals outside the law school, to produce professional writing outside of the law school's official publications, to participate in legal blogs, to join professional organizations, etc. We anticipate having every student develop a working relationship with at least one faculty mentor,<sup>32</sup> who can serve as a life-long reference and coach. The goal is simple: every student's needs must find a home—in the classroom or out—to fully develop his or her professional portfolio.

The upper-level curriculum of the law school must change substantially to help every student develop his or her professional capabilities. Students must learn to collaborate, to work on teams, to work on deadline, to be dependent on some colleagues and responsible for others, to be accountable, to team with

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from skills training. See Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 474, 478–85 (1994). If we integrate more skills training into all of our courses or build non-classroom exercises, Wikis, or other tools for use out of the classroom, we can expand such training at a much lower cost—especially if we use graduates, adjuncts, upper-level students, and others to mentor students in their work. We have experimented with such exercises at New York Law School in our I-Section, a voluntary first-year section in which faculty members and students have committed to the use of technology outside of the classroom to expand student training. Students have been divided into small firms of ten or less to work together on problems, evaluate one another's work, and collaborate with law school graduate mentors in learning more about their subject areas. In addition, faculty members are working together to create a non-classroom "Legal Learning Checklist" of skills and values that are necessary but outside the syllabus for traditional classes. These include learning technology tools and even legal doctrine beyond course coverage.

31. Law school clinics typically work on litigation. At New York Law School, we are also working on collaborative consulting projects, in which faculty members work with students on consulting projects for various clients who might need counseling advice, advice on pending legislation, or the development of testimony before a court, legislature, or agency.

32. The law school already offers a program in which every entering student has a staff member liaison, who helps the student navigate life at the law school. The school also has upper-level Advocates, who work closely as mentors with every first-year student. And each student has a faculty advisor. In the years ahead, the law school will have each faculty advisor do an intake interview with every incoming student advisee to discover their goals and to anticipate their curricular needs. New York Law School claims to offer the Right Program for Each Student. Through the intake interview, which will be shared with the Career Services Office and be available to the student to modify as their goals change, the law school hopes to provide better advising to every student to assure that they in fact take the right program for their goals.

experts from other disciplines, and to produce something worthwhile while still in school. At New York Law School, this has meant the development of Project Based Learning, in which students team with faculty members, experts from outside the law school, and graduates of the law school working in their chosen field to produce a “published” piece of work. This might be a book or an article. But, it also might be a suggested piece of legislation,<sup>33</sup> the creation of a useful document<sup>34</sup> or other materials for a client,<sup>35</sup> or the development of a piece of software.<sup>36</sup> Each project contemplates bringing together substantive knowledge, legal skills, and interpersonal skills to solve a real-world problem.

### 3. Outcomes and Federal Courts

There is an important role for the Federal Courts course to play at our mythical Outcomes University College of Law. It is a course that might be used to fulfill many of the most important market needs identified above.

Federal Courts issues provide excellent opportunities to teach problem management from multiple perspectives. For example, the tension between Article III independence and legislative oversight of the judiciary can be played as a problem of retention of power by the courts or control of excess by the Legislature. The cases on curtailment of jurisdiction or legislative courts provide a wonderful way to explore how the problem is perceived by each federal branch, what risks each faces in trying to control the other branch, and whether there are limits to their warfare. These same cases can be used to illustrate the problems faced by clients in choosing a forum, in dealing with

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33. For example, over the last academic year, a team of New York Law students from our Institute for Information Law and Policy, under the leadership of an Institute faculty member, identified a need for a new corporate structure to deal with “virtual” corporations in an internet-based economy. They conceived of the problem—strangers, with a common business interest, a need for limited liability to create a business, a need for on-line banking, and a need for a corporate home. They conceived of a solution—the virtual corporation. They found a partner—the Attorney General of the State of Vermont. They drafted model legislation, testified before the legislature, and saw the adoption of their law. In this academic year, another group of students and their faculty member will be working on a “virtual corporation” business model.

34. A group of students from the law school’s Justice Action Center, working with a faculty member, devised a *pro se* litigants’ handbook for the housing court. Another group worked on a practice manual for Legal Aid attorneys.

35. Students and faculty members from the Institute for Information Law and Policy devised a system to help school boards make their information technology purchasing decisions. They pulled together a glossary of legal terms, some common contracting provisions, and some common choices that might be made.

36. Students and faculty members from the Institute for Information Law and Policy, in partnership with the United States Patent and Trademark Office and various technology firms, designed the Peer to Patent website and software that allows peer commentary on proposed information technology patent applications. The software has become so popular that other countries are thinking of adopting it. The students set forth the legal framework AND worked on the code to create the software.

intergovernmental ideological battles, and forum choices. Similarly, the course allows every student to try out most of the legal skills in their tool belt—from conducting a negotiation, to legal research and writing, to advising a client on governmental relations and lobbying, etc. Student projects on Federal Courts topics are legion, especially in law reform areas.<sup>37</sup> In addition to achieving these substantive goals, students in the course can often interact with practitioners and judges who work in or practice before the federal courts,<sup>38</sup> an ideal way to help students learn the networking skills that will make them successful in practice.

Although these types of activities and uses of substantive issues can be made in nearly every course in the curriculum,<sup>39</sup> they provide no special incentive or reason to teach or take Federal Courts. I think that there are two uniquely important, but non-intuitive, doctrinal pillars of the Federal Courts course that make it uniquely valuable as a device to help students frame issues that are critically important to their future client work—whether litigation or transaction-based. Two core issues of Federal Courts—federalism and separation of powers—are played out in myriad doctrinal set pieces: congressional control over the federal courts;<sup>40</sup> legislative courts;<sup>41</sup> the relationship of state and federal courts;<sup>42</sup> federal jurisdiction based on subject matter;<sup>43</sup> and so on.<sup>44</sup> They stand in for many of the most important client

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37. I have even designed a project to develop a software social networking tool that would allow collaboration in multi-district class action litigation by class members who are non-parties—to improve decisionmaking, accountability, and legitimacy of the process.

38. New York Law School is located within a few blocks of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York.

39. Outcomes-based curriculum ought to be the conscious purpose of every course the law school offers.

40. See CLINTON, MATASAR & COLLINS, *supra* note 1, ch. 2. The question of jurisdictional control implicates both separation of powers concerns—control of court jurisdiction by Congress versus inherent constitutional or policy bases for some undisturbed Article III power—as well as federalism issues (to the extent that congressional power assumes retention of state jurisdiction over matters included in Article III). *Id.*

41. *Id.* ch. 2 (raising issues similar to legislative curtailment of federal jurisdiction).

42. *Id.* ch. 4 (separation of powers issues); see *Tennessee v. Davis*, 100 U.S. 257 (1879) (federal officer removal from state courts); *Tarble's Case*, 80 U.S. 397 (1871) (limiting state court habeas jurisdiction).

43. CLINTON, MATASAR, & COLLINS, *supra* note 1, ch. 5. Federal question jurisdiction implicates both separation of powers and federalism issues. For example, the well-pleaded complaint rule illustrates congressional control of lower federal court jurisdiction by leaving a gap between what the constitution permits the federal courts to have jurisdiction over and what was allocated in the Judiciary Act. By the same token, the justifications for this gap suggest a continued reliance on states to manage first decisions on federal defenses—a federalism concern. *Id.* at 356–57.

advising problems a lawyer will face. Federalism is the concern of allocating authority in an organization structure with a central governing body and multiple independent sub-entities. In such structures, all entities are tied together by an agreement that places the central authority in a superior and controlling position on some matters, in a co-equal relationship on other matters, and without authority to interfere on some matters. Similar issues confront nearly every organization—universities and their departments, parishes and central churches, corporations and subsidiaries, various departments of a single business (marketing, communications, sales, manufacturing, etc). The Federal Courts course provides useful case studies in how to allocate decisions among central and subsidiary units and can be useful for the central authority to decide how best to allocate between co-equal units. Similarly, separation of powers describes the struggle between equals; it asks who will exercise final authority and how competing units cooperate with each other. This provides a useful metaphor for decisionmaking between corporate boards and management, between departments of an organization, between cooperative residents, between members of a membership organization, etc. Together, these core Federal Courts concepts can become an interesting way to make students sensitive to the issues in ordinary business organizations as well as governmental entities. They also become a nice way to connect public and private law concepts and make the course relevant for students who are interested in a transactional practice. Minimally, they become a way to market the course as useful to one's colleagues who manage research centers that are drawing enrollments from our course to theirs!

#### CONCLUSION

I began this Essay by musing about the role of a dean in a law review issue dedicated to teaching a single subject, since deans rarely are focused on any single course and are constantly worrying about the whole. As I suggest above, the virtuosi of Federal Courts have long been outstanding soloists, but their music has become more obscure and dissonant to the ears of their student listeners. Moreover, we conductors worry that neither the musicians of Federal Courts, nor any of their colleagues using other instruments, have focused on the sound of the whole. Our listeners are less interested in our experimental sounds or in the intricacies we can produce than they are in melodies they can hum and that they can play throughout their lifetime careers. Students, driven by employers and spurred by our regulators, are pushing the orchestra to

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44. See *id.* ch. 6 (diversity jurisdiction (separation of powers and federalism)); *id.* ch. 7 (supplemental jurisdiction (separation of powers and federalism)); *id.* ch. 8 (removal and abstention (separation of powers and federalism)); *id.* ch. 10 (federal common law (separation of powers and federalism)); *id.* ch. 12 (sovereign immunity (primarily federalism)); *id.* ch. 13 (full faith and credit (federalism)).

conventionality. It is therefore incumbent on all of us to find a way to satisfy their demand and at the same time maintain the fun that we are having producing the music. That we can do by attending to their needs as we play our tune. As a conductor, it becomes my role to make the audience happy, make a glorious sound, and have each instrumentalist enjoy playing. And a one, and a two . . . play on!

