BRIDGING THE TWO CULTURES: TOWARD TRANSACTIONAL POVERTY LAWYERING

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As U.S. society emerges from the COVID-19 pandemic that decimated Black and Brown communities and law schools reexamine their curricula after the summer of 2020, a moment of interest convergence has emerged: the need for legal education to matter for Black and Brown livelihoods. This Article proposes a concrete measure for meeting this moment. Informed by CUNY School of Law's lawyering seminar and building upon scholarship long calling for a paradigm shift toward a transactional understanding of social justice – especially Professor Susan R. Jones's work – this Article calls upon law schools to leverage their positions and resources toward Black and Brown economic recovery. Specifically, the Article proposes that law schools do so by requiring their students to enroll in a transactional poverty law seminar and clinic instructing students toward assisting socially and economically disadvantaged small businesses with applications for capitalization and finance. With such a course, law schools can become centers of what Professor Jones terms "action research," assisting the flow of assets to populations historically locked out of capital, most recently with the pandemic economic stimulus programs. It also would serve to enlighten privileged law students on the stark exclusions within the U.S. market economy and initiate socially and economically disadvantaged law students into transactional practice. Through advancing mutual benefit about this principle of double discovery, the course would serve to bridge the gap between the two Americas as well as the silos of litigation and transactional lawyering.

* Associate Professor of Law, CUNY School of Law. The author wishes to thank Leah Archibald and Natalie Vichnevsky of Evergreen Exchange for their invaluable comments on my drafts, my sister Stephanie Louis for her guidance informed by the struggles of Black women business owners, my CUNY Law colleagues Carmen Huertas-Noble, John Whitlow, Fareed Nassor Hayat, Ramzi Kassem and mentors Sheryl L. Orr of Morgan, Lewis & Bockius LLP and Marty Needelman, formerly of Brooklyn Legal Services Corp. A, for their inspiration, insight, example, and tutelage, the students in my CUNY Law Business Associations and Lawyering Seminar II courses whose courage as first-generation lawyers highlighted the necessity of this proposal, Susan R. Jones, Paul R. Tremblay, Lynnise E. Phillips Pantin, and Alicia Alvarez, whose decades of scholarship are the foundation of this dream, and my fiancée Suzannah Herbert, without whose support and assistance this Article would have been impossible.

I. INTRODUCTION

As U.S. society emerges from the COVID-19 pandemic and law schools reexamine their curricula after the tragedies of 2020,[1] this Article proposes a concrete measure for the moment. Building upon scholarship long calling for a paradigm shift toward a transactional understanding of social justice – above all, Professor Susan R. Jones's masterful oeuvre[2] – this Article proposes that law schools advance this understanding by leveraging their positions and resources. Specifically, law schools should mandate that students enroll in a poverty law transactional skills and representation course requiring students to engage with small businesses' struggle to secure money.

What justifies so provocative an idea amid the tremendous competition for law school time and resources? The following observation provides a preliminary answer. Whether one is enthusiastic,[3] critical,[4] or just a realist about this,[5] the United States is a society committed to private enterprise.[6] This commitment presents an opportunity. There remain billions in aid,[7] especially in distressed areas, [8] from the bipartisan, cooperative federalism spigot that all levels of government turned on to preserve small business assistance programs.[9] After so

[1] *See*, *e.g.*, INTEGRATING DOCTRINE AND DIVERSITY ix, xii (Nichole Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell & Genevieve B. Tung eds., 2021) (citing murders of Ahmaud Arbery, Breonna Taylor, and George Floyd as reinforcing the long-overdue need for law schools and law faculty to transform thinking and operations toward inclusion and for sustained curricular change).

[2] *See infra* Section II.A (summarizing this scholarship).

[3] *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1982) (arguing that the U.S. free market system is a precondition for political freedom).

[4] *See, e.g.*, Matthew Desmond, *Capitalism*, *in* THE 1619 PROJECT: A NEW ORIGIN STORY 201 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021) [hereinafter "NEW ORIGIN STORY"] (observing that the U.S. is marked by a "peculiarly brutal version of capitalism" whose origin is the system of enslavement).

[5] *See, e.g.*, BENJAMIN C. WATERHOUSE, THE LAND OF ENTERPRISE: A BUSINESS HISTORY OF THE UNITED STATES 1–2 (2017) (arguing that U.S. history is effectively business history).

[6] *See, e.g.,* 15 U.S.C. § 631(a) (Small Business Act declaration that the essence of the American economic system of private enterprise to be free competition).

[7] *See* Natalie Walters, *SBA Pleads for More Emergency Loan Applicants, After Rejecting Scores of Business Owners*, DALLAS MORNING NEWS (Aug. 30, 2021), https://www.dallasnews.com/business/banking/2021/08/30/sba-pleads-for-more-emergency-loan-applicants-after-rejecting-scores-of-business-owners/.

[8] Natalie Walters, *If Your Business Is in a Low-Income Area, the SBA Has Billions Left Over in Forgivable COVID-19 Aid for You*, DALLAS MORNING NEWS (June 21, 2021, 6:00 EST), https://www.dallasnews.com/business/banking/2021/06/21/if-your-business-is-in-a-low-income-area-the-sba-has-billions-left-over-in-forgivable-covid-19-aid-for-you/.

[9] *See*, *e.g.*, Jeanne Sahadi, *What's in the $1.9 Trillion Rescue Plan for Small Businesses*, CNN Money (March 25, 2021, 5:39 EST), https://www.cnn.com/2021/03/10/success/rescue-plan-small-businesses-feseries/index.html.

many businesses faced the end because of pandemic closures,[10] there is much cause for hope: the emergence of startups, many in Black communities, imputable to the government stimulus.[11] Even where pandemic stimulus and recovery programs have stopped receiving applications,[12] there remain obligations and possible forgiveness under such programs to be sorted out.[13] And this largely leaves out two emerging opportunities whose implications are still yet unclear: the billions in aid for building and contractor small businesses associated with the Bipartisan Infrastructure Bill enacted in November 2021,[14] and the movement among some jurisdictions to enact public banks better suited to finance recovery for small businesses.[15]

Yet, taking advantage of these opportunities presents a familiar problem. Accessing otherwise available aid has eluded those small businesses – disproportionately poor, Black and Brown[16] like the victims of the pandemic itself – that are not organized in a manner finance capitalism recognizes.[17] To contextualize this problem, it helps

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[10] Iman Ghosh, *34% of America's Small Businesses Are Still Closed Due to COVID-19. Here's Why It Matters*, WORLD ECONOMIC FORUM (May 5, 2021), https://www.weforum.org/agenda/2021/05/america-united-states-covid-small-businesses-economics/).

[11] Quoctrung Bui, *Small Businesses Have Surged in Black Communities. Was It the Stimulus?*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/upshot/stimulus-covid-startups-increase.html.

[12] *See, e.g.*, Andy Medici, *SBA's PPP Is Closed. Here's the Status of Its Other Grant and Loan Programs*, THE BUSINESS JOURNALS (June 2, 2021, 8:56 EST), https://www.bizjournals.com/bizjournals/news/2021/06/02/sba-ppp-loan-grant-fund-small-business.html.

[13] *See* Walters, *supra* note 8; *see also* 15 U.S.C. § 636m (providing for loan forgiveness by application where a small business must prove that it used the federal loan for qualifying payroll with supporting documentation). The statute specifies documentation to be submitted, and provides that no loan can be forgiven without an application. 15 U.S.C. § 636m(e)(1)–(4), (f).

[14] Rhett Buttle, *Bipartisan Infrastructure Deal a Great Start: The Build Back Better Framework Could Further Lift Small Businesses*, Forbes (Nov. 8, 2021, 12:40pm), https://www.forbes.com/sites/rhettbuttle/2021/11/08/bipartisan-infrastructure-deal-a-great-start-the-build-back-better-framework-could-further-lift-small-businesses/?sh=48ea44e15c0d. This legislation will fund small businesses because it will fund construction firms, which are overwhelmingly small businesses. *See* Gregory W. Brown, Sarah Kenyon & David Robinson, *Filling the U.S. Small Business Funding Gap* 3 (2020), https://www.sbia.org/wp-content/uploads/2021/04/Kenan-FundingGap_02042020.pdf. (over 80 percent of construction employees are employed by small business firms).

[15] *See, e.g.*, S1762-A, 2020-20121 Reg. Session, Sponsor's Mem. (N.Y. 2021) (citing, as a model, North Dakota's public bank through which pandemic loans were made); AB-1177, 2020-2021 Reg. Session, Leg. Counsel's Digest (CA 2021) (same).

[16] For a discussion of whether a business entity can have a race aside from that imputed by certain government certifications, see Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006) (arguing that corporations can have a racial identity as a matter of law and that they should be recognized as such where connected to a legally cognizable harm).

[17] *See, e.g.*, CLAIRE KRAMER MILLS & JESSICA BATTISTO, FEDERAL RESERVE BANK OF

to understand that the federal government largely got out of making direct loans to small businesses in 1998,[18] instead delivering assistance through organs of finance capitalism such as private banks.[19] As discussed during the 2020 and 2021 Congressional hearings on small businesses and pandemic relief, this dynamic has locked out small businesses that lack either knowledge of these loans,[20] or the necessary relationships with those banks traditionally hostile to smaller enterprises.[21] And even where the small businesses have knowledge, the application materials are so complex and cumbersome as to lock out small businesses unable to afford an accountant or lawyer.[22] Indeed,

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NEW YORK, DOUBLE JEOPARDY: COVID-19'S CONCENTRATED HEALTH AND WEALTH EFFECTS IN BLACK COMMUNITIES 1 (August 2020), https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses (noting 41 percent and 32 percent drops, respectively, in Black and Latinx small business ownership from February through August 2020, compared to 17 percent drop for white small business owners); Ivette Feliciano & Connie Kargbo, *Why Minority-Owned Businesses Are Struggling to Get PPP Loans*, PBS NEWS HOUR (June 20, 2020, 5:19 EST) https://www.pbs.org/newshour/show/why-minority-owned-businesses-are-struggling-to-get-ppp-loans (describing inability of Black small businesses to obtain Paycheck Protection Loans for lack of required documentation); Marva Babel, *Opinion: Will the City Step Up for Black and Latinx-Owned Small Businesses?*, CITY LIMITS (August 19, 2020), https://citylimits.org/2020/08/19/opinion-will-the-city-step-up-for-black-and-latinx-owned-small-businesses/ (describing denial of an economic injury disaster loan because of poor credit, which was the product of being unable to get bank financing in the first place). *See also* Vitolo v. Guzman, 999 F.3d 353, 371 (6th Cir. 2021) (Donald, J. dissenting) (describing Congressional hearings where, before enacting American Rescue Plan of 2021, Congress heard testimony that, within general historical discrimination in the banking industry, Black and Brown entrepreneurs have had specific difficulty accessing business capital, where lenders require more documentation from minority applicants but approve loans less often and for lower amounts).

[18] CONG. RESEARCH SERVICE, SMALL BUSINESS ADMINISTRATION: A PRIMER ON PROGRAMS AND FUNDING 8 (2022) (explaining that the SBA stopped issuing direct business loans primarily because the subsidy rate was "10 to 15 times higher" than the subsidy rate for its loan guaranty programs), https://sgp.fas.org/crs/misc/RL33243.pdf. *See also* Ben R. Craig, William E. Jackson III & James B. Thompson, *Credit Market Failure Intervention: Do Government Sponsored Small Business Credit Programs Enrich Poorer Areas?*, 30 SMALL BUS. ECON. 345, 350 (2008).

[19] *See* Ben Popken, *Why Are So Many Black-Owned Small Businesses Shut Out of PPP Loans?*, NBC NEWS (April 29, 2020, 6:24 EST), https://www.nbcnews.com/business/business-news/why-are-so-many-black-owned-small-businesses-shut-out-n1195291 (quoting Mehrsa Baradaran's observation that PPP program uses banks as middlemen).

[20] *Long Lasting Solutions for Small Business Recovery: Hearing Before H. Comm. on Small Business*, 116th Cong. 17 (2020), https://www.congress.gov/116/chrg/CHRG-116hhrg41297/CHRG-116hhrg41297.pdf (statement of Brett Palmer, President, Small Business Investor Alliance).

[21] *Id*. at 10 (statement of Lisa D. Cook, Professor, Michigan State University); *Supporting Small and Minority-Owned Businesses Through the Pandemic: Hearing Before the H. Subcomm. on National Security, International Development and Monetary Policy and H. Comm. on Fin. Services*, 117th Cong. 8 (2021), https://www.congress.gov/116/chrg/CHRG-116hhrg41297/CHRG-116hhrg41297.pdf (statement of Gary L. Cunningham, President and CEO, Prosperity Now).

[22] *Paycheck Protection Program: Loan Forgiveness and Other Challenges: Hearing*

one reason why so much money remains undistributed is that qualifying small businesses have been denied because of faulty applications.[23] So to seize the opportunity, small businesses require advice and assistance.[24] Because of the specific challenges to accessing aid as just identified, compounded by judicial hostility to giving vulnerable groups a legislative leg up,[25] small businesses depend upon lawyers to bridge the gap to resources.

But another longstanding problem speaks to the second meaning of this Article's title, and further justifies this wild an idea. Like C.P. Snow said of scientific knowledge in his "Two Cultures" lecture,[26] it is absurd that in a society championing private enterprise,[27] anyone should graduate from law school unable to help clients navigate it. The resulting unfamiliarity reflects the phenomenon of law school graduates regarding the stuff of participating in private enterprise – the drafting of basic contracts and response to applications – to be a complete mystery.[28] So, as much as criminal law clinicians can make a similar claim that, in a carceral society,[29] criminal law representation should be mandated, at least students are taught basic litigation skills

Before H. Comm. on Small Business, 116th Cong. 11 (2020), https://www.congress.gov/116/chrg/CHRG-116hhrg41293/CHRG-116hhrg41293.pdf (statement of Ashley Harrington, Director of Federal Advocacy and Senior Counsel, Center for Responsible Lending).

[23] *See* Walters, *supra* note 8 (quoting Veronica Pugin, Senior Adviser to the U.S. Small Business Administration's Office of Capital Access, that applications were rejected because of mistakes).

[24] *Id.*

[25] *See, e.g.,* Vitolo v. Guzman, 999 F.3d 353 (6th Circuit 2021) (granting preliminary injunction against enforcement of application preference in favor of socially and economically disadvantaged businesses under Restaurant Revitalization Fund in American Rescue Plan of 2021); Blessed Cajuns, LLC v. Guzman, 4: 21-CV-0067, Dkt. No. 18 (N.D. Tex. 2021) (order granting same relief); Holman v. Vilsack, 2021 WL 2877915 (W.D. Tenn.) (granting preliminary injunction against portion of American Rescue Plan allocating debt relief to socially disadvantaged farmers and ranchers); Faust v. Vilsack, 2021 WL 2409729 (E.D. Wisc.) (same). For more on the Restaurant Revitalization Fund, *see infra* note 229 and accompanying text.

[26] For a summary of Snow's 1959 "Two Cultures" Rede Lecture at the University of Cambridge, see Lawrence M. Krauss, *An Update on C.P. Snow's Two Cultures*, SCIENTIFIC AMERICAN (September 1, 2009), https://www.scientificamerican.com/article/an-update-on-cp-snows-two-cultures/.

[27] *See supra* note 6.

[28] *See* CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 2 (2d ed. 2008) (observing that, in contrast to litigation assignments, first year firm associates typically approach transactional assignments with fear because law schools do a woefully inadequate job of preparing non-litigation lawyers to perform the most fundamental tasks expected of them).

[29] *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 12–28 (2016) (observing that the "contemporary atrocity of mass incarceration in America" is the product of both Republican and Democratic lawmakers, having emerged from the apex of liberalism, the Great Society).

applicable in criminal court. Indeed, it is impossible to conceive of a law school graduate wholly unfamiliar with briefing and memorandum writing. But the same cannot be said of transactional lawyering skills: there remain too many law graduates completely unable to produce, or advise a client on, a transactional document, and wholly lacking even an elementary understanding of finance.[30] This problem is only compounded where students inclined to use their degrees for public service graduate with a narrow understanding of "poverty lawyering" as litigation,[31] wholly uninformed of the resources and programs existing to relieve poverty through market activity.[32] Thus, in a market society, there exists a critical need to bridge law students from the insular litigation world to the larger market society in which they will practice, a rift that runs through the "two Americas" of privilege and disadvantage.

So, the case for a mandatory course is that it will fulfill both needs under a "double discovery"[33] principle: that of the needy to participate in a market society and that of law students needing to be well-rounded. This Article explains how and why such a mandatory course can do both in two additional sections. In Section II, the Article sets forth the details of the proposed transactional poverty lawyering modelled on the City University of New York (CUNY)'s lawyering program and substantively informed by the scholarship of Professors Susan R. Jones, Paul R. Tremblay, Lynnise E. Phillips Pantin, Alicia Alvarez, and Carmen Huertas-Noble reframing transactional law as poverty relief. Section II does this in four subsections. Subsection A provides the context and vision informing the course by

30 For this reason, the National Conference of Bar Examiner's Multistate Performance Test (MPT), now administered as part of the bar examination in all but six jurisdictions, tests students' ability to compose a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, or statement of facts, among others, based on materials provided. For more information on what the MPT tests, see *Multistate Performance Test: Preparing,* NATIONAL CONFERENCE OF BAR EXAMINERS, https://www.ncbex.org/exams/mpt/preparing/ (last visited December 16, 2021). For the jurisdictions administering the MPT, see *Multistate Performance Test,* NATIONAL CONFERENCE OF BAR EXAMINERS, https://www.ncbex.org/exams/mpt/ (last visited August 1, 2021).

31 *See* Andrew Hammond, *Poverty Lawyering in the States, in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 216–20 (Ezra Rosser ed., 2020) [hereinafter HOLES IN THE SAFETY NET] (summarizing empirical research of scholars Catherine Abinston, Laura Beth Nielsen, Deborah Rhode, and Rebecca Sandefur to frame poverty lawyering as involving litigation as well as administrative and legislative advocacy).

32 This concerned has been expressed by Paul Tremblay. *See* Paul R. Tremblay, *Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups*, 23 CLIN. L. REV. 311 (2016) [hereinafter "Tremblay 2016"].

33 As a former employee of Columbia University's Double Discovery Center, I understand this phrase to convey mutual benefit: symbiotic enrichment from exposure to prestige and to community. *See History*, THE ROGER LEHECKA DOUBLE DISCOVERY CENTER, https://ddc.college.columbia.edu/about/history (last visited December 16, 2021).

providing an overview of the transactional poverty lawyering scholarship of Professors Jones, Tremblay, Pantin, Alvarez, and Huertas-Noble, and its meaning for practice. Subsection B takes up the question of why this scholarship has not yet transformed the notion that social justice lawyering is litigation. It posits that concerns rooted in racial capitalism and resource triage are the likely reason. It then provides a preliminary answer to these objections by explaining how the proposed course would not transgress them. Subsection C further avoids this objection by elaborating the course structure within Section A's visionary framework. Subsection D explains the rationale behind its proposed design and the opportunities it affords, illustrating a "double discovery" among small businesses owners, law students coming from privilege, and law students hailing from backgrounds like microentrepreneurs'. It ends with a brief conclusion.

II. The Proposal: A Transactional Poverty Lawyering Seminar

What would the course serving the goals stated in Section I look like? This Article's proposal is straightforward. It calls for a two-semester practice seminar structured like CUNY School of Law's lawyering seminar, which prepares students to practice law in the service of human needs[34] (and in CUNY Law's top-ranked clinical educational program[35]) with simulations aiming to teach lawyering skills in context.[36] Substantively, the proposed course would prepare students to assist small businesses with applications for government assistance. As such, its content is informed by Professor Susan R. Jones's vision of transactional lawyering as poverty relief set forth in her decades of masterful scholarship on microenterprise[37] and practiced in George

[34] *Our Mission & Vision,* CUNY School of Law, https://www.law.cuny.edu/about/ (last visited December 16, 2021).

[35] *See The Lawyering Program*, CUNY School of Law, https://www.law.cuny.edu/academics/lawyering-program (last visited December 16, 2021); *Clinical Programs*, CUNY School of Law, https://www.law.cuny.edu/academics/clinics (last visited December 16, 2021); Joseph A. Rosenberg, *Confronting Clichés in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills*, 12 SMU Sci. & Tech. L. Rev. 19, 22 (2008) (describing aim and function of lawyering seminar course); Lawyering Seminar: Volume I Revised Custom Edition xv (Susan Markus, ed. 2016) (describing pedagogical insight informing the course); Lawyering Seminar: Volume II Revised Custom Edition xiii (Susan Markus, ed. 2016) (same).

[36] *See* Rosenberg, *supra* note 35, at 22 (describing how, through a semester-long simulation, students are initiated into the legal profession to "learn a variety of lawyering skills: fact gathering, legal analysis, creating persuasive legal arguments, writing (and re-writing) a variety of legal documents culminating in a memorandum of law, and a mock oral argument").

[37] *See infra* Section II.A generally. *See also* Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 J. of Affordable Hous. & Cmty

Washington University School of Law's small business clinic which she leads.[38] It also draws from the writings of Professors Paul Tremblay, Lynnise E. Phillips Pantin, Alicia Alvarez, and Carmen Huertas-Noble on the aim and structure of a transactional poverty course. Because appreciating this vision is essential to understanding the course design, this Article first elaborates such in subsection A. Then in subsection B, it takes up the question of why these scholars' vision has not yet displaced the equation of social justice lawyering with litigation. It proposes that two forces have prevented this: the theoretical issue of racial capitalism and the more practical concern of resource triage. To address these two concerns, it provides some preliminary answers framing how we should understand the course, thus advancing subsection C's discussion of course details. This discussion ends with subsection D, which explains the design rationales of the course and elaborates its benefits.

A. Transactional Poverty Lawyering: The Vision of Professors Jones, Tremblay, Pantin, Alvarez, and Huertas-Noble

Since the 1990s, George Washington University School of Law Professor Susan R. Jones has been the U.S. legal academy's foremost and prolific scholar of transactional lawyering as a form of poverty relief.[39] Her extensive scholarship[40] has advanced a vision of transactional poverty lawyering organized around two consistent themes.

First, Professor Jones has centered her argument in the landscape for poverty relief in the neoliberal age,[41] perceptively anticipating sociopolitical trends. In this account, Reagan-era funding cuts for civil legal services litigation and poverty programs generally rendered transactional work a more efficient and impactful use of limited resources than litigation for individuals.[42] Then "welfare reform," or the common term for the era marked by Congress's passage of the Personal Responsibility and Work Opportunity Reconciliation Act of

DEV. L. 213 (2005) [hereinafter "Jones 2005"].

[38] *See infra* notes 52–57 and accompanying text.

[39] *See* Kristin Glen Booth, *To Carry It On: A Decade of Deaning After Haywood Burns*, 7 N.Y. CITY L. REV. 7, 59–60 (2006) (describing Professor Jones as "the nation's foremost legal authority on micro-enterprise as an economic self-sufficiency strategy and author of numerous guidebooks for anti-poverty activists").

[40] *See Susan R. Jones,* THE GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW, https://www.law.gwu.edu/susan-r-jones (last visited December 16, 2021).

[41] For a description of the neoliberal age's features, see Etienne C. Toussaint, *Dismantling the Master's House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337, 358–60 (2019).

[42] Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLIN. L. REV. 195, 205 (1997) [hereinafter "Jones 1997"].

1996,[43] further compelled poor people to seek microenterprises and microlending[44] to survive with self-employment.[45] This is because "welfare reform" not only tied eligibility for welfare to being employed, which included self-employment, but also pushed families toward employment possible only with opportunities that small businesses uniquely provide.[46] In other terms, it represented public policy encouraging "economic self-sufficiency" that drove people toward small business work.[47] Almost a decade later, a global economic downturn and a global economy further accentuated transactional lawyering as the way low-income communities can fulfill the need to improve their economic conditions through business development.[48] Lest we misunderstand the problem to have arisen from a particular crisis, the larger trends of globalization, rapid technological advancements, and the growth of social entrepreneurship enabled lawyers to combat poverty in ways not prevalent or imagined during Lyndon Johnson's war on poverty.[49] All these new methods are transactional: supporting community economic development (CED) businesses, microbusinesses, minority small businesses, and social entrepreneurs.[50]

The takeaway is that specific legal services funding cuts inaugurated an economic paradigm; they do not stand as a mere political aberration.[51] In this new paradigm, the only way for poor people to

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[43] *See, e.g.*, Ezra Rosser, *Introduction*, *in* HOLES IN THE SAFETY NET, *supra* note 31, at 4–5.

[44] Both of these terms are functionally coextensive with the definition of "small businesses." *See, e.g*., Susan R. Jones & Amanda Spratley, *How Microenterprise Development Contributes to CED*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 380 (Roger A. Clay, Jr. & Susan R. Jones eds., 2004) (defining a microenterprise or microbusiness as "'any type of small business that has fewer than five employees and is small enough to benefit from loans of under $35,000'") (quoting Association for Enterprise Opportunity, *Microenterprise Development in the United States: An Overview*, MICROENTERPRISE FACT SHEET SERIES 1 (2005)); SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT 6 (2004) (defining a microloan as a loan of $500 to $35,000 made to the very small businesses that are microenterprises).

[45] Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 256 (2004) [hereinafter "Jones 2004"].

[46] *See id*.

[47] *See id*. at 252.

[48] Susan. R. Jones & Jacqueline Lainez*, Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 87-88 (2013).

[49] Susan R. Jones, *Alleviating Poverty – What Lawyers Can Do Now*, 40-AUG HUM. RTS. 11 (2014) [hereinafter "Jones 2014"].

[50] *Id.* at 12–14.

[51] *See* Jones 1997, *supra* note 42, at 195 (noting a national political trend away from government entitlements and toward personal responsibility and economic self-suffi-

avail themselves of resources is through self-employment. Accordingly, lawyers interested in poverty relief must be able to guide poor people in accessing such; and helping them draws on upon transactional skills.

The second theme of Professor Jones's vision relates to the efficiency point of the first. This theme is relying on a law school's clinical educational program to fulfill the social justice mandate of transactional work. It is unsurprising that a clinician – and one running the nation's oldest transactional law clinical program, the George Washington University Small Business Clinic/Community Economic Development Project (GWUSBC)[52] – would think this. But Professor Jones's scholarship points to how this fit is substantive.

First, though *all* startups require legal assistance that they typically cannot afford,[53] clinics such as hers limit their representation to microbusinesses.[54] Part of the pedagogical reason for doing so is to provide students with an opportunity to explore issues of class while learning transactional lawyering skills.[55] The opportunity comes because representing microbusinesses exposes students to a range of low-income to working- or middle-class clients, serving to challenge the students' preconceptions about who is poor.[56] Precisely because legal education seeks to inculcate a critical interrogation of lawyers' role in American society,[57] a space where future lawyers engage while still students remains the most effective manner of raising such consciousness.

Second, clinics are a practical way of providing essential assistance that microbusinesses critically require but would forego due to financial constraints.[58] This is so not merely because clinical assistance is free to small business owners, but also because clinics take place in environments especially adapted to assisting clients with alleviating poverty. Institutions of higher learning such as law schools are centers

ciency); Susan R. Jones, *Further Consideration: The Importance of Microenterprise in Community Development Law*, *in* SUSAN D. BENNETT, BRENDA BRATTON BLOM, LOUISE A. HOWELLS & DEBORAH S. KENN, COMMUNITY ECONOMIC DEVELOPMENT LAW: A TEXT FOR ENGAGED LEARNING 172 (2012) (imputing interest in small businesses as vehicles for job creation and self-employment to structural economic shift moving the nation from a manufacturing to a service economy, among other factors).

52 This clinic was founded in 1997. *See* Jones 1997, *supra* note 42, at 208.

53 Jones 2004, *supra* note 45, at 255.

54 *See* Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 J. OF AFFORDABLE HOUS. & CMTY DEV. L. 213 (2005).

55 Jones 1997, *supra* note 42, at 208.

56 *See id.* at 209.

57 Jones 2004, *supra* note 45, at 259.

58 *See id*. at 269 (nothing that microentrepreneurs cannot afford to pay for legal assistance in the start-up phase and so would probably go without such or engage in legal self-help).

of "action research," where they probe solutions to poverty through active exploration of social problems.[59] This dimension of clinics allows them to accomplish two critical functions: meet immediate need on the ground through the provision of quality legal assistance but also help build up an apparatus of poverty abolition through such action research.[60] With that detachment proper to academic spaces, law schools can accumulate and organize data from interacting with clients embellishing just how much "'homelessness and poverty are, for our era, the equivalent of slavery and segregation: institutions that blight and stunt human life, causing misery, illness, and death.'"[61] This, in turn, allows law schools to use knowledge gained from representation to push for the enactment of programs solving the underlying problem. Such solutions must be programs expanding assets for poor people, since income and asset creation must be a fundamental part of modern antipoverty work given their centrality to wealth creation.[62] This possibility can get lost where assistance is provided in another space not oriented toward "the bigger picture."

Professor Jones is not alone in her conception of transactional law as a means of poverty relief and social justice work. Here, four scholars are highlighted along with one additional article especially pertinent to the topic. Fellow clinical Professors Paul R. Tremblay, Lynnise E. Phillips Pantin, Alicia Alvarez, and Carmen Huertas-Noble have consistently written of poverty lawyering along Professor Jones's vision. Their perspectives simply differ on points of emphasis. Professor Tremblay's scholarship has emphasized the need for retail transactional lawyering – "transactional work performed for businesses or social enterprises that need it to survive or succeed"[63] – as a genuine means of social justice poverty lawyering more liberating and rebellious than litigation.[64] He has argued that transactional lawyering is a sound use of scarce resources when it has this focus.[65] His former colleague Professor Lynnise E. Phillips Pantin has fully argued for transactional clinics to have a social justice imperative, reinforcing this Article's contention by arguing that "[b]usiness lawyers are vital to

59 Jones 2014, *supra* note 49, at 11.

60 *See id.* at 12.

61 *Id*. (quoting Susan R. Jones, *Dr. Martin Luther King Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH U. J.L.& POL'Y 39, 48 (2005)) (internal citation omitted)).

62 *See id*.

63 Paul R. Tremblay, *Social Justice Implications for "Retail" CED*, 27 J. OF AFFORDABLE HOUS. & CMTY DEV. L. 503, 504 (2019) [hereinafter "Tremblay 2019"].

64 *See* Tremblay 2016, *supra* note 32. "Rebelliousness" refers to the thesis of Gerald Lopez's seminal text, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

65 *See* Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J. L. & POL'Y 11 (2015) [hereinafter "Tremblay 2015"].

achieving economic justice because they can close the income gap by assisting individuals to achieve their business and economic goals."[66] Thus, Professor Pantin regards the work of transactional clinics as "finding ways to address the economic results of discriminatory policies,"[67] a legacy of which she has identified in another Article as the disparity in entrepreneurship between whites and people of color.[68]

Agreeing with Professor Tremblay's rebellious lawyering conception of transactional lawyering,[69] Professor Alvarez has argued that transactional law work can serve this goal so long as community lawyers select clients whose work addresses issues of poverty and who strive to ameliorate poverty's consequences as well as to develop initiatives to reduce and eliminate poverty.[70] My colleague Professor Huertas-Noble has taken this argument one step further by arguing that transactional community economic development (CED) lawyering must advance a specific entity – democratizing and redistributive unionized worker-owned cooperatives – to achieve the poverty-relieving and empowering claims of transactional lawyering.[71] As discussed later, since the proposed seminar for the course this Article advocates would not promote this form, it may be odd to include her vision here as an inspiration. The reason for doing so is that her scholarship reinforces the broader theme of conceptualizing liberation in transactional terms. Not leaving this social justice capacity to the mere realm of ideas, Professor Huertas-Noble guides students in the representation of these entities in CUNY Law's Community and Economic Development Clinic.[72]

The other work to be mentioned in this section on the vision is

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[66] Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 205–06 (2017) [hereinafter "Pantin 2017"].

[67] *Id.* at 210.

[68] *See* Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 422, 438–41 (2018) [hereinafter "Pantin 2018"].

[69] *See* Alicia Alvarez, Susan Bennett, Louise Howells & Hannah Lieberman, *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Neighborhood Problem Solvers*, 23 CLIN. L. REV. 577 (2017).

[70] *See* Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do with Them?* 34 FORDHAM URB. L.J. 1269, 1281 (2007) [hereinafter "Alvarez 2007"].

[71] *See* Carmen Huertas-Noble, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of* Colors *and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLIN. L. REV. 255 (2010) [hereinafter "Huertas-Noble 2010"]; Carmen Huertas-Noble, *Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools to Address Income Inequality*, 22 CLIN. L. REV. 325 (2016) [hereinafter "Huertas-Noble 2016"].

[72] *See* Natalie Gomez-Velez, *CUNY Law School's Community-Based and Community-Empowering Clinics*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 682 (Samuel Estreicher & Joy Radice, eds. 2017) [hereinafter "BEYOND ELITE LAW"]. Professor Huertas-Noble's work has led to her being inducted in the Cooperative Hall of Fame. *See* COOPERATIVE HALL OF FAME, https://www.heroes.coop/carmen-huertas-noble.

Rebecca Nieman's recent article, a remarkable point of consilience. Like this Article, Professor Nieman advocates for using transactional instruction in the classroom as a point for bridging the justice gap.[73] Specifically, she proposes that students receive an experiential pedagogy addressing a poverty-law socialization that narrows the justice gap.[74] In contrast to this Article, however, Professor Nieman contends that community college business students, and not lawyers, need to be socialized in a poverty law view of the field with the goal of their providing free services.[75] She recommends this strategy on grounds of efficiency and pragmatism since the vast majority of students exposed to business concepts will not become lawyers, but rather will themselves be the people struggling to build up small businesses.[76]

B. Why Transactional Lawyering Is Not Yet Social Justice Lawyering

1. Two Objections: Racial Capitalism and Resource Triage

Despite the observant scholarship of Professors Jones, Pantin, Tremblay, Alvarez, and Huertas-Noble, the fact remains that transactional lawyering is still not yet a standard element of curricula emphasizing liberation from poverty.[77] To be clear, the problem is not that law school curricula lack transactional clinics. On the contrary, these abound, with virtually all law schools now offering at least one, in a dramatic change from when Professor Jones first began writing about them.[78] Rather, it is that social justice law continues to privilege litigation as the means to radical transformation, generally eschewing the transactional understanding.[79] Transactional lawyering is still principally about producing "practice ready" students rather than conscientious ones.[80] As another face of this problem, even law school curricula seeking to instill consciousness of, and conscientiousness

[73] Rebecca Nieman, *Expanding the Paradigm in the Business Law Curriculum: Bridging the Access to Justice Gap for Small Business Starts in the Classroom*, 27 WIDENER L. REV. 1 (2021).

[74] *See id*. at 9–11.

[75] *Id*. at 15 (citing Marc Lampe's research).

[76] *Id*. at 15–16, 20.

[77] *See* Tremblay 2016, *supra* note 32, at 312; Pantin 2017, *supra* note 66, at 179 ("Yet, contrary to the ways public interest litigation is viewed . . . the transactional aspect of lawyering whereby clients are represented outside the courtroom is rarely thought of as a mechanism to bring about justice."); Hammond, *supra* note 31 (reporting research that poverty lawyers engage in litigation and legislative advocacy).

[78] Paul R. Tremblay, *The Emergence and Influence of Transactional Practice Within Clinical Scholarship*, 26 CLIN. L. REV. 375, 378–79 (2019).

[79] *See id.* at 315–17; Pantin 2017, *supra* note 66, at 178.

[80] *See* Pantin 2017, *supra* note 66, at 176 (citing Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 234–35 (2012)).

about, poverty omit the transactional dimension of doing so.[81] Why is this the case? This Article posits that social justice law's coolness toward transactional lawyering is the product of two principles.

The first is theoretical, and flows from reflection on scholarship about the function of transactional lawyering. A recent article by civil rights litigators whose work supports social justice movements faults lawyers for perpetuating systems of oppression by applying laws that "commodify land, defend the acquisition of private property, and uphold racial capitalism."[82] It urges attorneys, in light of the COVID-19 pandemic and other crises including police killings of Black people, to cease "ignor[ing] or underplay[ing] the ways in which the legal system and profession uphold racial capitalism and white supremacy."[83] This does not expressly denounce transactional lawyering as such, but deeper reflection on what "racial capitalism" means brings out the tension.

A recently published volume of articles identifies capitalism to explain the plight of Black and Brown communities in the United States.[84] The collection specifically equates capitalism with racial capitalism, holding that the generation of wealth through market activity depends upon exploitation and disregard of people deemed to be labor.[85] The determination of who is consigned to labor emerged from racial subjectification, a process which, according to Robin D.G. Kelley's encapsulation of Cedric Robison's scholarship, involved the transposition of the feudal European hierarchy marginalizing the Irish, Jews, Roma, Slavs, etc. to people of African descent.[86] Racial

[81] In general, law schools do little to develop applicants who are motivated to serve others; but even where they do this, it is primarily a litigation-based focus. *See* Zoe Niesel, *Putting Poverty Law into Context: Using the First Year Experience to Educate New Lawyers for Social Change*, 76 N.Y.U. ANN. SURV. AM. L. 97, 107–13, 122–28 (2020) (describing status of poverty lawyering in law school curriculum and discussing St. Mary University School of Law's approach, which introduces poverty law through orientation exercises for issue spotting).

[82] Tifanei Ressl-Moyer, Pilar Gonzalez Morales & Jaqueline Aranda Osorno, *Movement Lawyering During a Crisis: How the Legal System Exploits the Labor of Activists and Undermines Movements*, 24 CUNY L. REV. 92, 110 (2021).

[83] *Id.* at 120–21.

[84] *See* Destin Jenkins & Justin Leroy, *Introduction: The Old History of Capitalism*, *in* HISTORIES OF RACIAL CAPITALISM 3 (Destin Jenkins & Justin Leroy eds., 2021) ("[C]apital has not historically accumulated without previously existing relations of racial inequality, a process that intensifies and creates racial distinctions through capitalism's inherent dispossessions and naturalism inequities produced by capitalism.").

[85] *See* Angela P. Harris, *Foreword: Racial Capitalism and Law, in id*. at vii ("Racial subjugation is not a special application of capitalist processes, but rather central to how capitalism operates.").

[86] Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOSTON REVIEW (Jan. 12, 2017) http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism.

capitalism also links police oppression of such people to the capitalist imperative of protecting white property.[87] Inexorably, the analysis leads to a simple conclusion that capitalism must be abolished to accomplish racial justice since "race came into being to justify the social dynamics of capitalism."[88]

A racial capitalism lens also impugns the beneficial function of the corporate form. In an article entitled, "Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property,"[89] Amanda Werner uses the lens provided by Cheryl Harris's *Whiteness as Property*[90] to argue that the corporate form itself is a manifestation of privileged white property. Specifically, Werner argues that many of the privileges associated with the corporate form emerged at around the same time as the forms of white property Harris writes about in her seminal article.[91] Its association with whiteness led to the corporation being transformed from "state-governed entities to independent actors protected against state intervention."[92] This leads her to contend that, for its ostensible availability to all, the corporate form is only useful as a protective device when scaled with wealth and resources that white people possess.[93] Otherwise, it provides little benefit.

The upshot of all this is that there is cause for doubting whether Black and Brown people can be liberated through participating in free markets or going corporate. This doubt is based on historical observations fomenting a suspicion that racial underclass is capitalism's intended effect, and not simply the product of its absence.[94] In the language of those who theorize racial capitalism, marginalization and poverty represent the system working as intended.[95]

This is where social justice conflicts with transactional lawyering. Since transactional lawyering legitimizes capitalism at some level, even if by engagement, it prescribes market activity as a liberating course. Undoubtedly, transactional poverty lawyers, whether as part of the CED movement, the sharing economy, or the emerging field of

87 *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 3 N.Y.U L. REV. 405, 449–52, 472 (2018) (imputing policing's role in keeping Black people powerless in terms of capital, land, and political power to racial capitalism).

88 Jenkins & Leroy, *supra* note 84, at 15.

89 Amanda Werner, *Corporations Are (White) People: How Corporate Privilege Reifies Whiteness as Property*, 31 HARV. J. RACIAL & ETHNIC JUST. 129 (2015).

90 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

91 *See* Werner, *supra* note 89, at 144.

92 *Id*.

93 *Id*. at 145.

94 *See* Desmond, *supra* note 4, at 209 (arguing that widespread racialized wealth disparities are the intended product of low-road capitalism)

95 *Id.*

social enterprise, criticize the dominant system and its ability to meet social need.[96] But such lawyers must accept the premise, enshrined in the Small Business Act, that free enterprise, as such, is a path to social and economic equality.[97] Thus, some affirmation of capitalism is an unavoidable aspect of transactional lawyering. And if capitalism is thought to be the incompatible with oppressed people's welfare, then transitional lawyering must go down with it.[98]

The second reason why transactional lawyering is sidelined flows from the first. Modern poverty law regards social and economic marginalization as the product of servitude and discrimination, the archetypal forms being what Black and Brown people have suffered over the course of U.S. history.[99] As such, poverty law practitioners have tended to regard the goal of poverty lawyering as meeting brutal need through judicial and legislative constitutionalism triggered by administrative and legislative advocacy and litigation.[100] A goal of this work seems to be the preservation of minimal entitlements as a means of liberty and social democracy[101] by making Jeffersonian republicans of us all.[102]

Holding this goal, social justice lawyers have avoided advancing capitalist self-help as the solution to marginalization. Even Dean Spade's pandemic-era exposition of mutual aid – or the practice of collective coordination to meet each other's needs[103]– reflects this skepticism. At first, Spade's book roots the practice of mutual aid in

96 *See*, *e.g.*, JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES 84 (2012) (arguing that private agreements are the building blocks of a sharing economy for sustainability as it will not be brought by legislation or solutions from large organizations and businesses); Toussaint, *supra* note 41, at 358–60.

97 *See* 15 U.S.C. § 631(f)(1)(A) through (E) (Congressional finding in SBA statute that participation in a free enterprise system by socially and economically disadvantaged persons can improve their conditions).

98 *See* Pantin 2017, *supra* note 66, at 202–03 ("Representing microenterprise clients, small business, and other for-profit clients in a law school legal clinic is often perceived as advancing notions of capitalism, moving away from what is traditionally thought of as lawyering in the public interest; it is rarely thought of as facilitating the integration of social justice into the law school curriculum.")

99 *See, e.g.*, Jones 2014, *supra* note 49, at 12.

100 *See* Hammond, *supra*, note 31.

101 *See* HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME xl (2020) (citing Franklin Delano Roosevelt's "Economic Bill of Rights" as illustrating the New Deal's recognition of the relationship among economic security, political power, and democratic governance).

102 *See* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlement*, 13 HARV. J.L. & PUB. POL'Y 28 (1990) (arguing for minimal entitlement as a means of ensuring that everyone has a stake in society).

103 DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 15 (2020).

Black communities' long self-help tradition,[104] a point seemingly linking social justice and self-help. But even with this historical framing, Spade expressly cautions mutual aid projects from being co-opted by the privatizing neoliberal project that seeks to replace a social safety net with volunteerism and that proposes "social justice entrepreneurship" instead of justice.[105] Acknowledging that mutual aid and volunteerism overlap in critiquing certain social service models and in holding voluntary participation in care and crisis work to be necessary, Spade distinguishes mutual aid from privatization and volunteerism on their animating principles.[106] Mutual aid exists because public services are "exclusive, insufficient, punitive, and criminalizing."[107] By contrast, privatization seeks to dismantle public services, serving to further wealth concentration.[108] And so, mutual aid is fundamentally a social movement tactic building solidarity toward dismantling a capitalist system that exploits and maldistributes social resources.[109]

Though absent from Spade's work, the word capturing the spirit of a nuanced approach occurs throughout the literature: triage.[110] Even where one affirms the self-help tradition as a legitimate form of social liberation, there remains the question of what the ultimate goal is and, accordingly, to which use scarce resources should be put, and toward which ends.[111] Many in the struggle feel that transactional law is not the best use of scarce lawyering resources because the goal is to build from meeting people's immediate needs represented by the scourges of eviction, deportation, and other such harms. Meeting these urgencies demands legal resources such as litigation and mutual aid.[112] Still more trenchantly, other scholarship has contended that assistance of welfare-receiving microentrepreneurs is a waste since they do not fit the profile of those likely to receive a loan or who know how to use one to create wealth.[113] For instance, Rashmi Dyal-Chand and

104 *Id*. at 18.

105 *Id.* at 58–60.

106 *Id*. at 60.

107 *Id.*

108 *Id*.

109 *Id*. at 20.

110 *See* Tremblay 2015, *supra* note 65, at 32–36 (using a triage lens for social justice); Anthony V. Alfieri, *Things Fall Apart: Hard Choices in Public Interest Law*, 31 GEO. J. LEGAL ETHICS 335, 341–44 (2018) (describing legal services organizations' triage practices generally).

111 Tremblay 2015, *supra* note 65, at 32.

112 The empirical research Hammond cites to seems to bear this view. *See* Hammond, *supra* note 31. On the point about mutual aid's capacity to address these bogeys, see SPADE, *supra* note 103, at 38–40.

113 *See* Louise A. Howells, *The Dimensions of Microenterprise: A Critical Look at Microenterprise as a Tool to Alleviate Poverty*, 9 J. OF AFFORDABLE HOUS. & CMTY DEV. L. 161 (2000).

James V. Rowan have argued that because success in business requires a risk-taking that presupposes social and financial capital which poor people lack, any attempt to transform poor individuals into entrepreneurs is doomed to fail.[114] Thus, engaging with the aim of creating entrepreneurs – or agents of a privatizing order intent on destroying them – is an exercise in spinning wheels. Worse still, it is aimlessness that fritters away vital resources and energy.

2. A Preliminary Response to the Objections

Like with any serious critique, the two abovementioned social justice objections to the notion of transactional poverty lawyering cannot simply be dismissed with a turn of phrase. For the claims that engaging in transactional poverty lawyering is being complicit with oppression or waste proceed from socio-historical complexities which cannot be adequately treated in this Article. Nonetheless, this section indicates directions of responses toward ensuring that weighty considerations do not justify inaction.

Any response to the first point must acknowledge the argument's cogency and force. The data that critical legal studies scholars have marshalled to argue for racial capitalism is so overwhelming as to persuade. Taking Professor Cheryl Harris's seminal article referenced in Werner's work as an example,[115] the authority adduced in support of that thesis makes it very difficult to hold the U.S. understanding of property as race-neutral. It is an overwhelming account tracing the intimate connection between race and freedom that rightly justifies Werner's extension of whiteness as property to the corporation.[116]

Still, it is not clear why a theoretical question – whether capitalism can ever be reconciled with liberation[117] or whether the corporation must always be another manifestation of white privilege[118] – should discourage the pursuit of practical measures. If, as noted above,[119] there is money that a Black or Brown person owning a small business can get simply by being better organized, it is unclear why anyone should discourage folks from helping them get it. Such refusal is especially odd when *both* those denouncing the system as unjust and

114 Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory of Community Economic Development*, 42 HOFSTRA L. REV. 839, 859–66 (2014).

115 *See supra* notes 89–93 and accompanying text.

116 *See* Werner, *supra* note 89.

117 *See, e.g.*, ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2016) ("Contrary to Karl Marx, there is nothing about capitalism that leads inexorably to mounting economic insecurity and widening inequality.").

118 *See supra* notes 89–93 and accompanying text.

119 *See generally* Section I *supra*.

those defending the economic system as merit-based and fair acknowledge that access to capital is determinative,[120] and that many Black and Brown folks have not enjoyed access because of structural racism.[121]

What makes such a refusal extra odd is its inconsistency with poverty lawyers' approach to other "welfare," in the sense of means-tested public assistance.[122] To crystallize the analogy, scholarship has long noted that welfare benefits exist largely to uphold the capitalist system. For example, in historian Asa Briggs's telling, Otto von Bismarck, the putative inventor of the Western welfare state, enacted such legislation for the conservative purpose of creating subservience to the state, thereby delaying class warfare and making social democracy less attractive to workers.[123] Similarly, Franklin D. Roosevelt is conventionally thought to have enacted the New Deal as a means of upholding the basic American system of free enterprise during a unique crisis; he did not thereby intend to inaugurate a new socialist era.[124] And yet, seeking government benefits has not been thought to be inconsistent with advocating for social change. On the contrary, a recent article on the emerging legal architecture for social change has recognized social entrepreneurial tendencies of newer organizations, ones that take not only government funding but also *private funding* to reduce dependency and exercise greater freedom.[125] From this, one can extrapolate an axiom that there is no inconsistency with organizing for the eventual downfall of an oppressive system while conscientiously and instrumentally availing oneself of its concessions.

A separate and commensurately principled answer to this charge is to cite scholarship suggesting a longstanding tradition of Black and Brown entrepreneurship around the world that problematizes the racial capitalism account. To take one example, in his essay introducing the 2018 volume, *Entrepreneurship in Africa: A Historical Approach* – "the first scholarly volume devoted solely to African entrepreneurial

120 *See, e.g.*, Eli Wald, *Success, Merit, and Capital in America*, 101 MARQ. L REV. 1 (2017) (arguing that succeeding in America is a function of hard work, individual effort, and merit but also economic, social, cultural, and identity capital that enhances performance is misrecognized as merit).

121 *See* Pantin 2018, *supra* note 68, at 429–41.

122 *See* Hammond *supra*, note 31 (describing what poverty lawyers do).

123 *See* Asa Briggs, *The Welfare State in Historical Perspective*, 2 EUR. J. SOC. 221, 248–49 (1961).

124 *See* Peter Canellos, *What FDR Understood About Socialism That Today's Democrats Don't*, POLITICO (August 16, 2019), https://www.politico.com/magazine/story/2019/08/16/democrats-socialism-fdr-roosevelt-227622/.

125 Luz Herrara & Louise G. Trubek, *The Emerging Legal Architecture for Social Change*, 44 N.Y.U REV. OF L. & SOCIAL CHANGE 355, 380 (2020) (noting a turn toward entrepreneurship among radical lawyers).

histories"[126] – Moses Ochonu contends that "precolonial and colonial Africa was home to a variety of incipient and transitional capitalisms."[127] These capitalisms reflected a "malleable mix of communalism and systems of wealth accumulation, status acquisition, property ownership, and entrepreneurial invocation."[128] Thus, it is quite possible that the spirit of Black entrepreneurship and property ownership in the United States – both amid Black descendants of enslaved people and recent Black immigrants from African societies like those Ochonu references – reflects a long cultural lineage rather than an imposition during captivity.

This overlooked perspective casts doubt on the argument, itself critiqued in Nancy Fraser's 2019 essay delivered as an address to a meeting of the American Philosophical Association,[129] that capitalism must necessarily be regarded as exploitative. *Pace* accusations of Stockholm syndrome or "mental colonialism," the existence of native capitalist societies antedating mercantile capitalism and the colonial era reinforces the notion that capitalist activity itself may not be inherently problematic. Or, to put it in terms from this literature, not all entrepreneurship has been "capitalist" in the Western sense of Joseph Schumpeter's framing.[130] Around the world, there are conceptions of entrepreneurship centered on the social, liberating, and eudemonic function of market activity that transactional poverty lawyers can help socially disadvantaged entrepreneurs advance.[131]

To the second challenge about what resources should be put toward transactional poverty law, I offer a similarly practical answer. It suffices to say that these concerns are allayed by following Professor Jones's recommendation and assigning law students instead of admitted attorneys to work with microbusinesses.[132] As stated above, law student assistance with translation, navigation, and drafting/assem-

126 Moses E. Ochonu, *Introduction: Toward African Entrepreneurship and Business History*, *in* ENTREPRENEURSHIP IN AFRICA: A HISTORICAL APPROACH 29 (Moses E. Ochonu ed., 2018).

127 *Id*. at 13.

128 *Id*. at 26–27 (rejecting the positions of Julius Nyerere articulated in JULIUS NYERERE, UJAMAA: ESSAYS ON SOCIALISM (1968) and George Ayittey in GEORGE B. N. AYITTEY, INDIGENOUS AFRICAN INSTITUTIONS (2d ed. 2006)).

129 Nancy Fraser, *Is Capitalism Necessarily Racist?*, POLITICS LETTERS (May 20, 2019), http://quarterly.politicsslashletters.org/is-capitalism-necessarily-racist/.

130 *See* Ochonu, *supra* note 126, at 19 (contrasting the communal African understanding of entrepreneurship from what he earlier describes as Schumpeter's individualistic Western view of the entrepreneur as a single-minded catalyst, a destroyer of orders to bring about innovation).

131 *See id.* at 20. *See also* Huertas-Noble 2016, *supra* note 71, at 82 (citing the Spanish Mondragon network of worker-owned industrial cooperatives as example of scalability with that democratic and liberating entity form).

132 *See* Jones 1997, *supra* note 42, at 205.

bling makes a real difference to securing capital and revenue, and the students receive sufficient training by their second year to do this work with seminar guidance and clinical supervision. Because the needed work involves both advising and paperwork,[133] it follows that it is work all law students can be engaged in doing. By contrast, the standard litigation clinic representing low-income clinics facing loss of rights, liberty, and essential benefits[134] which detractors may argue is a better use of attorneys' time is not the sort of thing all law students can manage. To be clear, law students can litigate, as the existence of litigation clinics establishes. But the time commitments and strain of litigation, especially that involving high stakes, militate against litigation being the basis for a required course. As exercises in paperwork or counseling, transactional lawyering is that front in the struggle for justice better tasked to law students.

C. Elaborating the Mandatory Course: The Transactional Poverty Lawyering Seminar

The foregoing discussion of racial capitalism and resource triage properly frames how the course should be considered. It would be a streamlined practical business associations course with a social justice agenda: to help marginalized people secure small business public assistance. In terms of the vision discussed in subsection A, like Professor Jones's clinic at George Washington Law and what Professor Pantin's scholarship calls for,[135] the proposed seminar would teach law students that transactional lawyering that allows them to help needy folks.[136] In the United States, that means serving microbusinesses and their owners[137] and getting them the finance on which their success turns.[138] But to make sure that satisfies the double discovery principle,

[133] This is also true of welfare-dependent microentrepreneurs. I would generally concede Howells's point that such folks are unlikely to receive a loan based on how the programs operate, and the structural racism of finance capitalism, stated in the sources discussed earlier. *See* note 18 *supra*. However, such microentrepreneurs can at least benefit from receiving counseling and assistance with licenses toward any sort of lawful and achievable business undertaking, even a "side hustle" involving street vending. For the benefit of that assistance, see generally MARGARET SHERRARD SHERRADEN, CYNTHIA K. SANDERS & MICHAEL SHERRADEN, KITCHEN CAPITALISM: MICROENTERPRISE IN LOW-INCOME HOUSEHOLDS (2004); David Gonzalez, *$20,000 For a Permit? New York May Finally Offer Vendors Some Relief*, N.Y. TIMES (Jan. 29, 2021, updated Jan. 30, 201), https://www.nytimes.com/2021/01/29/nyregion/street-vendors-permits-nyc.html.

[134] Tremblay 2019, *supra* note 63, at 390.

[135] *See supra* notes 55, 56, and 67 and accompanying text.

[136] *See supra* notes 54 and 55 and accompanying text.

[137] *See id.*

[138] *See* Pantin 2018, *supra* note 68, at 452 ("[R]esearch shows that capital is the number one predictor of a startup's success. Undercapitalized businesses are more likely to fail than businesses receiving optimal levels of startup capital because they suffer from lower

the proposed course differs from Professor Jones's and CUNY Law's in being a required course with more modest ambitions (unlike Professor Jones's clinic) that is prescribed for second year students (unlike CUNY School of Law's lawyering seminar). It would have two components.

1. The Seminar Component

The first component would be a seminar with three modules aiming to teach students how small businesses can obtain capital and secure operating revenue. As a mandatory course, it would not cover other aspects of running a small business discussed in guidebooks such as intellectual property matters, renting or buying space, or hiring employees.[139] The seminar's rigorous focus on poverty business law, and the most critical aspect of financing them,[140] would justify such an omission since none of those topics advances this bottom line. But as an additional pedagogical justification, at least students are exposed to the theory of these legal areas in other required courses (property) or electives (labor and employment), albeit in a way seldom very useful for practice. By contrast, no other place in the law school curriculum aside from transactional clinics so much as exposes students to the law of small business finance.

To teach business law financing, the course would have students deconstruct everything related to a standard application for the main form of federal small business assistance: the general 7(a) loan program administered by the United States Small Business Administration (SBA).[141] The SBA administers three forms of small business financing: debt, contract, and equity programs.[142] But the course would teach transactional poverty law through 7(a) loan application materials for two reasons. First, loans are the most common form of small business financing.[143] Second, being more comprehensive than

sales, profits, and lack of employment.")

[139] *See*, *e.g.*, LEONARDO BUFF, THE LAW (IN PLAIN ENGLISH) FOR SMALL BUSINESS (5th ed. 2019); THE AMERICAN BAR ASSOCIATION, LEGAL GUIDE FOR SMALL BUSINESS: EVERYTHING YOU NEED TO KNOW ABOUT SMALL BUSINESS, FROM START-UP TO EMPLOYMENT LAWS TO FINANCING AND SELLING (2d ed. 2010).

[140] *See supra* note 66 and accompanying text.

[141] *See* 15 U.S.C. §§ 633(d), 636(a)(9) (within the statute creating the SBA, establishing in the U.S. Treasury revolving funds that finance loan, contract, and private equity/investment programs and elaborating reasons for which SBA may issue assistance); 13 C.F.R. § 120.1 (providing that SBA administers the loan assistance); 13 C.F.R. §§ 107.300 and 107.1100 (providing that the SBA grants licenses under the private equity/investment program and also provides loans and guarantees to licensees).

[142] *See* BENNETT ET AL., *supra* note 51, at 135–47.

[143] FEDERAL RESERVE BANKS OF ATLANTA ET AL., SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON EMPLOYER FIRMS 24, https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report. *See also* Brown et al., *supra*

the federal 7(m) microloan program that seems more pertinent,[144] the 7(a) loan program is a better teaching device. The 7(a) loan application requires a statement of the history and nature of the business, the amount and purpose of the loan, the collateral offered for the loan, current financial statements, historical financial statements (or tax returns if appropriate) for the past three years, IRS tax verification, a business plan, and personal histories and financial statements from principals of the applicant.[145] For an ordinary business, this amounts to filling out and collating a packet of forms outlined in a checklist on the SBA's website.[146] The central form mentioned in the checklist is SBA Form 1919, the borrower information form.[147]

The educational benefit of studying that form is that an application for any financing, no matter to whom lodged, requires the same basic stuff. The prospective lender or investor always wants to know who is asking for what, how much, why, and whether the applicant will allow the lender or investor to make money off the arrangement or deliver the goods and services acquired.[148] In other words, the financier will always perform its due diligence.[149]

Accordingly, through the use of one form in the 7(a) loan packet, the first module would cover elementary business concepts relevant to filling it out.[150] These are concepts such as assets and liabilities, debt, equity, collateral, profit, loss, return on investment, taxes, and associated vocabulary such as maturity, amortization, and security (with all its permutations). The module would modestly aim to familiarize students with the fundamentals, exposing them to model financial statements and business plans with an aim of teaching basic financial literacy. From another perspective, this module would simply initiate students into Article 9 of the Uniform Commercial Code (UCC)'s framework, which allows students to understand "assets" and "collat-

note 14.

144 The 7(m) microloan program is more pertinent because it has a more explicitly inclusionary purpose. The SBA statute provides that that microloans exist to assist capable women, low-income, veteran, and minority entrepreneurs to operate successful businesses, to assist small businesses in areas lacking credit due to economic downturns, to fund loans to nonprofit organizations which, in turn, fund or assist the populations targeted under this program, and to fund a welfare-to-work initiative helping means-tested benefit recipients start a new business and get off such benefits. *See* 15 U.S.C. § 636(m)(1)(A).

145 13 C.F.R. § 120.191.

146 *SBA Loan Programs for Small Businesses 7(a) Loan Application Checklist*, available at https://www.sba.gov/sites/default/files/2021-01/7a_Loan_Application_Checklist.pdf.

147 *SBA Form 1919, SBA 7a Borrower Information Form for Use with All 7(a) Programs* (rev. Sept. 2020), available at https://www.sba.gov/sites/default/files/2021-07/Form%201919_10-21-2020-rev.pdf [hereinafter "SBA Form 1919"].

148 *See* Craig et al., *supra* note 18, at 348.

149 *See* Fox, *supra* note 28, at 130 for a description of due diligence.

150 *See* Craig et al., *supra* note 18, at 2.

eral" – or things financers would want to take a security interest in – as all valuable things listed in Article 9's definition of "goods."[151]

This minimalism can be justified with a full-throated invocation of the need to overcome lawyers' innumeracy,[152] but the module would settle for mere familiarity. So long as students understand what a small business must show, recognize the limitations of their own competence, and, most critically, understand that government resources exist to help think through and document basic finance, then the module will have accomplished its goal. To that end, the module should end with a note about places where small businesses can receive help understanding basic financing: the SBA small business development centers (SBDCs) located throughout the United States offering counseling and preparation assistance.[153] For instance, a course in New York City should include a presentation on all counseling resources available through New York City's Department of Small Businesses Services at Business Solutions Centers.[154]

From the description of this module, the question emerges of who will teach students these business basics. At law schools within university systems, this module would afford a happy opportunity for interdepartmental collaboration with business professors, a practice that transactional law calls for.[155] But since the module would only aim at the basics – an even more pared-down version of what a business organizations casebook summarizes[156] and what a popular book *for law students* covers[157] – any properly trained legal instructor can do it.

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151 U.C.C. § 9-102(44) (AM. L. INST. & UNIF. LAW COMM'N).

152 *See*, *e.g.*, Theresa A. Gabaldon, *Doing the Numbers: The Numerate Lawyer and Transactional Law*, 3 AM. U. BUS. L. REV. 63, 65–65 (2014) (arguing that lawyers require basic facility with numbers because their ability to provide legal advice depends on this).

153 *See* 13 C.F.R. §§ 130.100 (overview of SBDCs), 130.320 (location requirements), and 130.400 (services provided). The SBA's website also includes a tool to find one's local SBDCs. *See Find Location Assistance,* U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/local-assistance/find?type=small%20Business%20Development%20Center&address=11101&pageNumber=1 (last visited February 3, 2022).

154 Services available at New York City's Business Solution Centers include help with minority and women-owned business certifications and contracting, connection with business courses and legal services, explanation of government rules and regulations, and help with applying for funding to launch or grow a business. *See Businesses,* NYC SMALL BUSINESS SERVICES, https://www1.nyc.gov/site/sbs/businesses/businesses.page (last visited February 3, 2022). Business Solution Centers can be found at *Center & Partner Locations*, NYC SMALL BUSINESS SERVICES:, https://maps.nyc.gov/sbs/ (last visited February 3, 2022).

155 *See* Jones 2004, *supra* note 45, at 249 ("Business advisors stress the importance of early legal assistance to entrepreneurs and the need for help with business planning, marketing, financing, advertising, and exploitation of the business' intellectual property. In spite of the reality that entrepreneurs require intervention from multiple professionals, many law schools devote insufficient time to teaching across disciplines.").

156 *See, e.g.*, WILLIAM K. SJOSTROM, JR., BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 743–51 (2016).

157 *See, e.g.*, RICHARD W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR

Frankly, any lawyer with the sort of basic training that schools like CUNY Law give their lawyering seminar or orientation instructors – one who simply has read a guide on starting a business such as those which states typically offer[158] – should be able to convey these concepts.

Continuing with SBA Form 1919 as our guide – particularly pages 2, 3, and 9 soliciting information on the entity's owners[159] – the second module would cover basic topics such as principles of agency, the four scaling advantages of the corporate form,[160] and the distinction between ownership and control. In other terms, the second module would aim to convey basic and applied business associations law, the sort that the bar examination aspires to test.[161] Because this discussion would explain blackletter literature on the tradeoffs involved in doing business through unincorporated versus incorporated forms instead of elaborating the vagaries of corporate governance, it is again something that any professor can teach with basic training. The objective of this second module would be to help students understand a conclusion: that the majority of small businesses, which are currently sole proprietorships,[162] would be better organized as corporations or limited liability companies since this preserves risk and offsets liability.[163] To highlight the social justice dimension here, this discussion would

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LAW STUDENTS (4th ed. 2006).

158 For an example, see NEW YORK DIVISION OF SMALL BUSINESS & TECHNOLOGY DEVELOPMENT, STARTING A BUSINESS IN NEW YORK STATE: A GUIDE TO OWNING AND OPERATING A SMALL BUSINESS 24–30 (April 2019), https://esd.ny.gov/sites/default/files/NYS-SMALL-Business-Guide042019.pdf) [hereinafter "NYSBG"].

159 *See SBA Form 1919*, s*upra note* 147, at 2, 3, and 9.

160 The four scaling advantages are "[the] easy transferability of shares, limited liability, specialized and centralized management, and a perpetual existence separate from their shareholders." KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 33 (2007). Another work counts five such advantages, the four mentioned above as well as investor ownership. *See* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH § 1.1, at 1 (3d ed. 2017).

161 This topic is currently being considered as part of the National Conference of Bar Examiners (NCBE) Next Generation Bar Examination initiative. As a member of that initiative's Content Scope Committee, I am aware of the NCBE's commitment to having the bar exam better aligned with what newly licensed lawyers will encounter in practice. For the author's membership on that committee, see *Announcing NCBE's Consent Scope Committee*, NATIONAL CONFERENCE OF BAR EXAMINERS (June 22, 2021) https://nextgenbarexam.ncbex.org/announcing-ncbes-content-scope-committee/. For more on the Content Scope Committee's work on modernizing business associations topics in particular, see *Content Scope Committee Begins Developing Test Content Specifications*, NATIONAL CONFERENCE OF BAR EXAMINERS (AUGUST 11, 2021), https://nextgenbarexam.ncbex.org/content-scope-committee-begins-developing-test-content-specifications/.

162 *See* Brown et al., *supra* note 14, at 3.

163 *See* JEAN L. BATEMAN, ADVISING THE SMALL BUSINESS: FORMS AND ADVICE FOR THE LEGAL PRACTITIONER 99–100 (2007).

acknowledge why it is that most small businesses are not so established: the inability to pay formation costs.[164] To use a local example crystallizing this problem, one barrier to a New York small business organizing itself as a limited liability company is the state's publication requirement.[165] As of 2017, meeting this requirement cost $600–$1,500,[166] an amount that can be prohibitive for *any* startup small business, let alone one run by poor people.

The third module would cover the landscape of corporate finance law from the standpoint of small businesses. It would place SBA Form 1919 within the context of all the government finance programs mentioned above, including those capitalizing small businesses through government contracts[167] and facilitating private investment.[168] For comprehensive coverage, it would add a brief discussion of securities law for small businesses, largely crowdfunding equity.[169] At first blush, this seems to be a module requiring real expertise, as these contract and investment funding programs are a universe unto themselves. But

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164 STEVEN R. GERSZ, NEW YORK BUSINESS ENTITIES 3-3 (2012); Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act*, 2001 COLUM. BUS. L. REV. 381, 383–84 (2001) (observing that most businesses are unincorporated sole proprietorships, which are found in underdeveloped, poor communities challenged by limited capital, poor access to insurance coverage, limited training, and unsophisticated legal and technical skills); Michael Spadaccini, *The Basics of Business Structure*, ENTREPRENEUR (March 9, 2009), https://www.entrepreneur.com/article/200516.

165 *See* N.Y. LTD. LIAB. CO. § 206 (McKinney 2021). To complete formation and afford an entity the right to do business in New York, the fact of its existence must be published in two newspapers, with affidavits of such publication filed with the state within 120 days of filing the entity's certificate of formation.

166 *See* Jenny Odegard, *What's the Deal With New York's LLC Publication Requirement?*, FORBES (September 6, 2017, 2:34 P.M.), https://www.forbes.com/sites/jennyodegard/2017/09/06/whats-the-deal-with-new-yorks-llc-publication-requirement/?sh=5f1673d857a2.

167 The statutory authority for these programs is Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)). The program specifics are elaborated in regulations such as 13 C.F.R. §§ 125.2, 125.3 (2021) (general contract loan programs) and 13 C.F.R.§§ 127.100, 127.101, 127.200, 127.300 (2021) (programs that help small businesses certified as economically disadvantaged women-owned small businesses, or simply as women-owned small businesses, have an equal opportunity to participate in federal contracting).

168 This is the Small Business Investment Company (SBIC) program under Titles I and III of the Small Business Investment Act of 1958, codified at 15 U.S.C. § 661 *et seq.* and 15 U.S.C. 681 *et seq.*, respectively. The program stimulates private investment with a *quid pro quo* mechanism where the government offers a private investment company a license rendering it exclusively eligible for leverage in the form of a government market for its debentures or preferred equitable securities. In exchange, the company must maintain its license by making loans, issuing debt securities, equity securities, or guarantees to small businesses, or purchasing small businesses' securities through and from an underwriter, at an amount totaling at least 20 percent of its capital (with certain exclusions) within eighteen months of its last fiscal year end. *See* 15 U.S.C. § 683(g) (authorizing SBA to guarantee or pay "in order to encourage [SBICs] to provide capital and equity to small businesses"); 13 C.F.R. §§ 107.50 (definition of "leverage"), and 107.1100(a) (specifying forms of leverage); 13 C.F.R. § 107.590(a) (2021).

169 The regulation on crowdfunding is set forth at 17 C.F.R. Part 227 (2021).

they are simply more government programs and incentives similar in form to the public assistance programs that are uniquely stigmatized and derided as "welfare" or "entitlements."[170] To put this in concrete terms, understanding the applicable "law" requires review of regulations and government guidebooks – often, the same guidebooks as can be relied upon to learn business law.[171] The task of teaching this module is considerably simplified when the professor appreciates that the take-away point of this discussion is another conclusion: for the purposes of obtaining financing, a small business is better off organized as a corporation. For that form involves instruments – resolutions and stock certificates – with which organs of finance capitalism are more familiar. But, again highlighting the social dimension, corporations present more complicated compliance costs, including franchise taxes and the requirement to hold annual meetings.[172]

Aiding in the instruction is the understanding that the seminar would not be a lecture. Like with CUNY Lawyering Seminar, the lessons of each module would be reinforced with assignments and exercises requiring students to review and engage with the instruments associated with each topic. So, as they work through the 7(a) application loan checklist, students would be assigned reading involving how best to review documents: in module 1, portions of debt instruments such as notes and security agreements; in module 2, formation articles and certificates, bylaws, shareholder agreements, operating agreements, minutes, resolutions, and written consents; and in module 3, stock or membership certificates, supply contracts, and invoices. These exercises would provide two added benefits of general interest. Reinforcing the seminar's standing as an applied business associations course, it would prime students for analysis like that tested on the Multistate Performance Test.[173] And they would introduce students to "due diligence," as the review of such instruments is what attorneys in law firms do as part of transactional representation.[174] Course instructors should emphasize this latter point toward further demystifying transactional work.

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170 *See* HERSHKOFF & LOFFREDO, *supra* note 101, at xli.

171 For example, states have similar financing programs. New York has a comprehensive guide on its programs published as the New York Small Business Guide. *See* NYSBG, *supra* note 158. And like the SBA, New York has a tool guiding individuals on how to find lenders. *See Alternative Lenders Directory,* NEW YORK EMPIRE STATE DEVELOPMENT, https://esd.ny.gov/lender-directory (last visited February 3, 2022).

172 *See* GERSZ, *supra* note 164, at 2–41.

173 *See supra* note 30 for a discussion of the Multistate Performance Test.

174 *See* FOX, *supra* note 28, at 130 (describing due diligence).

2. The Clinic Component

The proposed course most significantly departs from Professor Jones's approach in its second component, the clinic. It too would be a practice clinic where students would advise and represent micro-capitalized small business owners[175] on their transactional needs. But because the course would be required, it must have a narrower scope than the wide array of matters – commercial leases and intellectual property matters, for example – on which students in GWUSBC advise clients.[176] Consistent with its minimalist goal, the clinic would center on helping small businesses form and capitalize by obtaining monetary government assistance, assisting with every necessary component for receiving such. Only walk-ins or referrals from local SBDCs raising the issue of money would be assigned to clinical students.[177]

For many clinicians, this proposed clinic course might seem a waste of time or resources since, anecdotally, many report the experience of never having encountered someone requiring help with a loan application. It is difficult to explain a negative, or why people do not seem to apply. So, this Article operates on the assumption that advertising a law school's availability to assist with solely obtaining funding would induce people to seek assistance. This assumption is a fair conclusion to draw from the points discussed in Section I, where many small businesses have left available funding on the table because of unmet need, and a sort of learned helplessness that prevents folks from even bothering to ask.[178]

The clinic would put students to work on bridging the gap between resources and small business owners who lack information on what is available or how to get it.[179] To concretize this work, students would help by translating (both in the literal and figurative sense) and assembling grant and financing applications such as the 7(a) and 7(m) loans, or even small business investment documents, building on what they learned during in the seminar. In connection with the financing application, they would also help clients with drafting formation and finance instruments, and other legal documents needed to obtain debt

175 Professor Jones reports that, in 2005, her clinic only accepted for representation very small businesses comprised of one to five people with less than $35,000 in start-up capital. *See* Jones 2005, *supra* note 37, at 213–14. This Article affirms the basic concept of limiting representation to the neediest small businesses but imagines that law schools will differ on the standards based on local realities.

176 *See id*.

177 Under the SBA regulation, SBDCs are required to utilize institutions of higher education to provide services to the small business community. *See* 13 C.F.R. § 130.340(a).

178 *See supra* notes 20–21 and accompanying text.

179 *See id*.

or equity financing or to ensure regulatory compliance to be eligible for financing. To this end, aiding small businesses to apply for business permits and licenses also would be within the scope of services, especially as some jurisdictions provide research aids to assist with compliance requirements.[180] The goal of working on such certificates would be to help complete finance application documents, not to engage in the sort of complex formation discussions raising tax issues which SBDCs are better equipped to help with. Consistent with the minimalism theme, this Article imagines that students' role would be to document the outcome of a consultation with an SBDC representative. The students would not themselves be the consultants.

Continuing with the theme of minimalism, the Article adds another limitation to this clinic: unlike with Professor Jones's version, students would not help businesses negotiate commercial leases.[181] The reason for this omission is resource management. Frankly, a business lacking sufficient capital cannot lease anything; though, of course, government financing programs do allow loan funding to be used for renting property.[182] And in jurisdictions like New York, there is already help with this: government programs funding practitioners to assist with such.[183]

Overall, the scope limitations are justified by the clinics' spirit, meeting the concerns raised by racial capitalism and resource triage. References to instrument drafting should not obscure the main thrust of students' role: to help poor small business owners navigate bureaucracy or connect with other resources, not unlike what court navigators do in New York City Housing Court for unrepresented individuals[184] and what is contemplated by the Community Navigators Program funded by the American Rescue Plan of 2021.[185] Above all,

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180 New York offers such aid through its Business Express checklist tool. *See Business Express,* NEW YORK STATE, https://www.businessexpress.ny.gov/ (last visited on February 3, 2022). New York City also has a similar tool, known as the Business Wizard. *See Opening or Operating a Business in NYC,* NYC BUSINESS, https://www1.nyc.gov/nycbusiness/wizard (last visited on February 3, 2022).

181 *See* Jones 2005, *supra* note 37, at 214.

182 *See, e.g.*, 13 C.F.R. § 120.120(a).

183 For example, New York City has such a program, known as the Commercial Lease Assistance Program. *See Commercial Lease Assistance,* NYC BUSINESS, https://www1.nyc.gov/nycbusiness/article/commercial-lease-assistance-program (last visited February 3, 2022).

184 For a brief description of the New York City Housing Court's Court Navigator program, see Rebecca L. Sandefur & Thomas M. Clarke, *Roles Beyond Lawyers: Summary, Recommendations, and Research Report of an Evaluation of the New York City Court Navigators Program and Its Three Pilot Projects* 3 (Am. Bar Found., December 2016), http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf.

185 *See* 15 U.S.C. § 9013(a)(3) and (b) (establishing the Community Navigators

if students in a mandatory clinic do nothing more than simply accompany small business owners in the struggle – if, in the words of a business incubator, they are nothing more than a "warm body" of encouragement[186] in an environment where they have space to engage in Professor Jones's "action research"[187] – then they will have done exactly what this Article proposes.

That said, because uncompensated student labor is immoral, to emphasize educational benefit the clinic should accommodate student comfort and offer them the option of doing paperwork behind the scenes or meeting with clients as suits their comfort level and personalities. There should be enough work – counseling on finance forms with associated paperwork, including applications for assistance, permits, or licenses – that preferences can govern. As in Professor Jones's clinic, they can work in teams.[188] The Article imagines matches of students who like interacting with clients with those who prefer drafting and assembling forms.

In introducing the course, this Article proposes it as a two-semester sequence with a seminar followed by the clinic, but it can be adapted to suit law schools' instructional needs. For example, the entire course can be reduced to one semester three-credit course, where students desiring client work can elect to add the clinical component for two additional credits, in the same way that Professor Jones's clinic allowed for differing credits based on hourly commitments.[189] The Article contemplates further adaptations such as omitting the first module and instead focusing on the law and exercises, or adding a module focusing on nonprofits as small businesses[190] where pedagogically useful. For those students with whom the work resonates, schools should also consider offering an additional summer or semester work-study or paid externship where students can continue doing work, and approach more advance forms of it along the lines of Professor Jones's and Professor Huertas-Noble's clinics,[191] for some modest compensation. The source of this money would be government grants that a law school might receive as a small business development center or under

Program).

186 E-mail from Leah Archibald, Exec. Dir., Evergreen, to Gregory E. Louis, Associate Professor of Law, CUNY School of Law (November 30, 2021, 17:46 EST) (on file with author).

187 For more on what action research means in this context, see *supra* note 60 and accompanying text.

188 *See* Jones 2005, *supra* note 37, at 214.

189 *Id.*

190 Though beyond the scope of this Article, nonprofits qualify for much of the assistance programs mentioned herein.

191 *See* Jones 2005, *supra* note 37; Gomez-Velez, *supra* note 72.

a Community Navigators program.[192]

D. Explaining the Design and Aims of the Course

The description of this proposed seminar course raises questions about its design and its function. There are two design questions, and are taken up first. The first is why the class must be based on small businesses – and the microbusinesses among them – rather than other entities more relevant to "big law" aspirants such as tech startups (outside of those that double as microenterprises).[193] The answer to this is clear: as the program seeks to serve social justice, the point is to have law schools contribute to poverty alleviation within a market economy.[194] This framework foreordains the microbusiness and microentrepreneur as the topics of study and objects of concern given their socioeconomic profile.[195]

That said, using small businesses to inculcate transactional lawyering literacy can also be defended pedagogically. The principal benefit of such is that, in sharp contrast to private entities that are destined for creative destruction,[196] microbusinesses are simple firms. Possessing no more than five employees,[197] microbusinesses present simple principal and agent or principal and independent contractor dynamics that are the stuff of agency law illustrations.[198] As such, small businesses are useful prisms through which the significance of

[192] For the SBDC and Community Navigator funding opportunities, see 13 C.F.R. §§ 130.110 (SBDC service provider definition), 130.410(a) (application procedure for new organizations to become SBDCs), and 15 U.S.C. § 9013(b)(1) (funding of resource partners). *See also* Jones 1997, *supra* note 42, at 208 (mentioning that the GWUSBC was funded as an SBDC); Booth, *supra* note 39, at 25 (mentioning a CUNY Law initiative also supported by such funding).

[193] As an example of tech startups doubling as microbusinesses, consider those participating in small businesses incubators such as Roxbury, Massachusetts's office of Entrepreneurship for All ("EforAll"). This Article distinguishes those from, say, WeWork or similarly situated aspirants who appear to be the audience of Paul A. Swegle's masterful treatise, STARTUP LAW AND FUNDRAISING: FOR ENTREPRENEURS AND STARTUP ADVISORS (2020).

[194] *See generally supra* Section II.A, and especially Tremblay 2015, *supra* note 65, at 44–47 (arguing that goals of clinical legal education and nonprofit missions of law schools may militate in favor of serving underserved communities instead of aspiring tech entrepreneurs, though the latter is permissible).

[195] *See* Jones 2005, *supra* note 37, at 214; Jones 2004, *supra* note 45, at 208–09.

[196] *See* JOSEPH A. SCHUMPETER, CAPITAL, SOCIALISM, AND DEMOCRACY 82–84 (Routledge 1994) (1942).

[197] *See* Clay & Jones, *supra* note 44; R.H. Tipton III, *Microenterprise Through Microfinance and Microlending: The Missing Piece in the Overall Tribal Economic Development Puzzle*, 29 AM. INDIAN. L. REV. 173, 177 (2004).

[198] *See*, *e.g.*, RESTATEMENT (THIRD) OF AGENCY, §§2.03, cmt. c, Illustrations 1 and 2 (using granary owner hiring a manager to illustrate apparent authority); 7.07, cmt. c, Illustrations 1 and 2 (using bail bonder who employs a bond runner to illustrate vicarious liability) (AM. L. INST. 2006).

building blocks such as legal personhood, limited liability, and start-up capital can be concretized for uninitiated students. Put differently, they provide vivid and readily grasped case studies for the practical significance of incorporating, documenting corporateness through minutes and resolutions, memorializing terms through contracts, and applying for licenses and permits. For example, in my business associations course, I demonstrate why doing business as an unincorporated sole proprietorship is so risky with *Smith v. Castaways Diner*.[199] It is a case where a full-time health-care worker, who also happened to own a family diner that was actually run by her husband and mother-in-law, faced sexual harassment tort liability for the vile treatment of a waitress by the diner's cook and busboy, actions about which she knew nothing.[200] Given these risks, if a market society is not yet ready to heed calls for the simplification of legal schemes for small businesses,[201] then law schools in this society must train their students to simplify such schemes for poor people.

And as a final note, if one reason why poverty law in general has been omitted from law school curricula as a distraction from "real law,"[202] approaching poverty from a transactional perspective may perhaps be the way in for everyone. For it satisfies institutions committed to social justice[203] and also those more interested in teaching "real law" as, for the reasons summarized above, students will learn hard skills and be introduced to the market economy framework. These two should satisfy poverty law detractors' desire that students "take serious classes."[204]

The second design question is how the proposed course differs from the typical community and economic development (CED) course many law schools offer.[205] Two things can be said in response.

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199 453 F.3d 971 (7th Cir. 2006).

200 453 F. 3d at 978.

201 *See*, *e.g.*, Muhammad Yunus *How Legal Steps Can Help to Pave the Way to Ending Poverty*, 35 ABA HUMAN RIGHTS 2008 (arguing, among other things, that laws should be simplified and regulatory requirements waived as to poor people to give them access to markets).

202 Niesel, *supra* note 81, at 110–11. *See also* Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1058 (2009) (referencing Justice Antonin Scalia's 2008 address to the Federalist Society where he cautioned students to take "bread and butter classes, not 'Law and Poverty' or other made-up stuff").

203 *See* Pantin 2017, *supra* note 66.

204 Hornstein, *supra* note 202, at 1058.

205 As Susan R. Jones and Roger A. Clay, Jr. state, "There is no single definition of CED, but it generally includes a wide range of economic activities and programs for developing low-income communities such as affordable housing and small business development." Clay & Jones, *supra* note 44, at 3. Alicia Alvarez regards community development legal work as "employing transactional skills in order to represent community groups."

A superficial take is that the proposal does not substantively differ from a CED course. Rather, the proposal would simply serve to adapt CED as a requirement rather than an elective, simplifying it so that it can be universalized. A deeper answer is that CED historically has a broader, more macroeconomic focus than small business preservation, especially depending on which letter in the acronym is emphasized.[206] As such, it has often employed placed-based strategies working with institutions and organizations toward encouraging investment in communities along free market, neoliberal or liberal capitalist lines.[207] This has often rendered that understanding of CED less useful to the sort of direct services transactional lawyering[208] that this Article has argued social justice requires.[209] Thus, in their everyday practice, CED lawyers are often not directly bridging the resource gap for microentrepreneurs; instead, they are assisting other organizations within microentrepreneurs' ecosystem.[210] As a result, the need identified in Section I remains as it is unfulfilled in such other CED courses.

But the most important aspect of the course is how it speaks to the normative question of why students should be engaged in the study and practice of transactional poverty law. To get at the nub of this concern, how does doing so benefit small business owners, law students, and law schools? This Article submits that the course benefit is captured with the principle of double discovery.

On one side of the coin, the community of disadvantaged people in a law school's community benefit from guidance on accessing the massive corporate welfare state. This idea recognizes how, since Nixon's presidency, U.S. public policy has gradually shifted away from the liberal welfare state of need to one subsidizing business.[211] Whereas welfare reform quite intentionally sought to eliminate any federal statutory right to cash assistance for relieving poverty,[212] it remains bipartisan national policy that the United States should "promote the business development of small business concerns owned and

Alvarez 2007, *supra* note 70, at 1275. On the growth of CED courses, see Jones & Lainez, *supra* note 48, at 86.

206 *See* Dyal-Chand & Rowan, *supra* note 114, at 867.

207 *See* Toussaint, *supra* note 41, at 342–43; Huertas-Noble 2010, *supra* note 71, at 257–59.

208 *See generally* Tremblay 2019, *supra* note 63.

209 *See generally supra* Sections I and II.A.

210 *See* Toussaint, *supra* note 41, at 342–43.

211 *See* BENJAMIN C. WATERHOUSE, LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA 2 (2014) (describing the shift); David Brunori, *Where's the Outrage Over Corporate Welfare?*, FORBES (March 14, 2014, 10:09 EST), https://www.forbes.com/sites/taxanalysts/2014/03/14/where-is-the-outrage-over-corporate-welfare/?sh=718100db27dd.

212 *See* HOLES IN THE SAFETY NET, *supra* note 31, at 5.

controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in American economy."[213] As a result, there remains the dynamic discussed in this Article's introduction: abundant resources available for the taking that socially disadvantaged small businesses leave on the table for want of technical assistance.[214] Especially considering the American Bar Association's law school accreditation standards encouraging public service activities for both students and faculty,[215] law schools' assuming the role of providing such technical assistance is a virtual imperative.

Invoking the ABA's public service mandate raises the question of how small business owners can benefit from the help of law schools. After all, federally funded SBDCs provide many services such as those described in the outline without lawyers; instead, services are provided through experts and professionals of various credentials.[216] So why do we need law students? Again, there are both superficial and deeper responses to this question. To put it crassly, law schools offer many more available, flexible, and energetic bodies than SBDCs. Since assisting small businesses with the legal aspects of obtaining and securing capital is not so much difficult as it is tedious – and in many instances it simply involves informing people of resources – it is something that law schools should contribute to societies. As stated above in the discussion of the proposed course,[217] if law students contribute simply by being community navigators – that is, going out into communities and helping small business owners navigate bureaucracy – then they will have advanced the struggle for equity.

The deeper answer is that law schools have the most helpful additional bodies to offer: people trained in the practice of meticulosity and organization.[218] Above all, lawyering is about distilling and order-

213 15 U.S.C § 631(f)(2)(A). *See also* Jones & Lainez, *supra* note 48, at 85–88 (observing that clinics to assist low-income communities through business development self-employment through microenterprises arose in response to welfare reform and economic change).

214 *See supra* notes 17, 19–21.

215 *See* ABA SECT. OF LEGAL EDUC. AND ADMISSION TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS §§ 303(b) (2020) (stating that a law school's curriculum shall provide substantial opportunities to law students for law clinics or field placement(s) and student participation in pro bono legal services, including law-related public service activities); 404(a)(6) (requiring law schools to adopt policies that, *inter alia*, require faculty to engage in service to the public, including participation in pro bono activities).

216 *See supra* note 153 and accompanying text. For a concrete illustration of the services provided by an SBDC, consider the staff of the Brooklyn SBDC. *See Our Team,* BROOKLYN SMALL BUSINESS DEVELOPMENT CENTER, https://www.brooklynsbdc.org/our-team (last visited February 3, 2022).

217 *See supra* Section III.C.

218 *Cf.* Pantin 2017, *supra* note 66, at 205 ("A traditionally marginalized entrepreneur who has little knowledge of the law as it relates to business matters needs to have a well-

ing complex human phenomena into discrete and digestible parts toward a remedy.[219] To draw from the more familiar litigation context, an effective direct examination allows a person to convey what happened in a methodical fashion, allowing for each segment of a story to be digested, analyzed, and indexed with "proof" meeting the social expectations of the audience.[220] In conducting a direct examination, the lawyer does not tell a story. Rather, she orchestrates her client's conveyance of her account in a more orderly and, thereby, more persuasive fashion.[221] This is the exact sort of simple help – translation and tailoring – that businesses ordinarily require.[222] And in view to the application standards, it is precisely the sort of help that determines whether small businesses receive the funding.[223]

Critically, however, law schools contribute the action research mentioned in one of Professor Jones's writings[224] in the course of helping microentrepreneurs. Through the exercise of helping low-income small businesses assemble 7(a) assistance applications only to watch them get denied despite favorable statutory standards,[225] for

trained business lawyer. Legal training at any stage of a business's development is invaluable.").

219 *See*, *e.g.*, Robin Jacobs, *Building Capacity Through Community Lawyering: Circumstances of the Leaders, Small Community Associations, and Their Attorneys*, 24 J. OF AFFORDABLE HOUS. & CMTY DEV. L. 29, 55 (2015) ("Community lawyers simplify and translate rules for their clients, helping them comply and cope with regulatory change."); Justin W. Holloway & Derek A. Shoemake, *What I Learned from My First Year – What to Do and What Not to Do*, 68 DOJ J. FED. L. & PRAC. 141, 148 (2020) (observing that "[t]he best lawyers simplify complex issues into something easy to understand and, often, a single key issue"); Jule A. Oseid, *When Big Brother Is Watching [Out For] You: Mentoring Lawyers, Choosing a Mentor, and Sharing Ten Virtues from My Mentor*, 59 S.C. L. REV. 393, 423–24 (2008) (asserting that a good lawyer shares a good teacher's ability to simplify difficult concepts).

220 *See* MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 2–4 (3d ed. 2008) (describing the trial lawyer's task as making sense of jumbled pieces, classifying them, and marshalling and interviewing such in a manner that leads the trier toward the desired factual conclusions).

221 *See id*.

222 ROGER S. HAYDOCK & PETER B. KNAPP, LAWYERING PRACTICE AND PLANNING 123–26 (3d ed. 2011).

223 *See supra*, notes 17, 19–21, 66, and 145 and accompanying text (elaborating stakes and setting forth application requirements).

224 *See* Jones 2014, *supra* note 49, at 11.

225 For favorable standards, see, for example, 15 U.S.C. § 631(f) and (g), which (1) state that socially and economically disadvantaged people's full participation in the United States' free enterprise system is so essential to improve the national economy's function as to make the amelioration their condition a matter of national interest; (2) recognize that specific groups of people, namely, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian organizations, and other minorities are disadvantaged because of discriminatory practices or similar invidious circumstances over which they have no control; (3) prescribe affirmative action to increase opportunity for such socially and economically disadvantaged groups; and (4) acknowledge that women have found discrimination to be a barrier to their own entrepreneurial endeav-

example, law schools can collect data for two uses. First, data collected on denials contravening the statutory criteria summarized above in Section II.C.1 of this Article can be used in litigation against the SBA and other agencies because the statutory criteria stand as "law to apply" in a dispute.[226] Litigation arising out law school action research on the SBA can perhaps even be conducted by another law school clinic specializing in such administrative law challenges. Second, collected data can be marshalled toward revising programs. SBA loan programs designed for people who cannot obtain credit elsewhere on reasonable terms do not do a great job of subsidizing such businesses.[227] The apparent problem is the loaning criteria the SBA uses, which emphasizes traditional financing metrics such as creditworthiness and requires guarantees. This locks out many of the socially and economically disadvantaged people the programs are designed to help.[228]

As a result, the effort to reform programs to eliminate unhelpful criteria can benefit from the collection of data demonstrating the full extent of the problem. Law schools can lead the effort to collect this data, especially in a moment where reform is ripe. After all, the liberated standards under the CARES Act emergency disaster relief loan programs show that traditional rigidity is eminently dispensable.[229]

Action research can also point to legislative activity that can help advance transactional poverty lawyering. For starters, the need identified should push state and local governments to enact legislation ensuring that law schools and their affiliated nonprofit legal services arms[230] serving as small business development centers may automatically provide legal advice in doing so. This would involve amending jurisdictional statutes that permitted legal practice by unadmitted and

ors, and so also require government activity to remove barriers that women have encountered in accessing capital and other factors of production.

226 "Law to apply" is a reference to the standard the United States Supreme Court established to determine whether judicial review of agency determinations is available under Section 701 of Administrative Procedures Act, 5 U.S.C. § 701. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (holding that this statutory bar on judicial review of matters committed to agency discretion is narrow, governing only where there is no "law to apply").

227 *See supra* notes 17–23 (noting materials reporting on this phenomenon).

228 *See id*.

229 *See, e.g.,* 15 U.S.C. § 9009c(c)(2)(A) (providing, in contrast to 7(a) loan program, a simple application procedure for Restaurant Revitalization Funds involving self-certification under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136, March 27, 2020)).

230 For example, at my current employer, CUNY School of Law, the nonprofit affiliate is Main Street Legal Services, Inc. At my alma mater, Fordham Law School, it is Legal Square Legal Services, Inc. *See* LINCOLN SQUARE LEGAL SERVICES, INC., https://news.law.fordham.edu/lsls/ (last visited October 20, 2021).

unregistered attorneys to allow for work that law school SBDCs would do.[231] Since jurisdictions already recognize exemptions for litigation-type work[232] in response to scholarship arguing for a rethinking the practice of law by nonlawyers for certain categories of activity,[233] action research can help fill a gap for transactional poverty lawyering. More importantly, action research should address the material need, identified in scholarship, to reduce transactional costs to further poor people's access to capital.[234] This would support legislation waiving entity filing fees for those organizations formed and aided by law schools.[235]

But the double discovery does not point to material benefits only. Engaging law students segues to the second discovery, and the other side of the coin. All law students can tremendously benefit from assisting small business owners because doing so socializes them as lawyers, or mediators in a civil society. For law students coming from privilege and preparing for careers as corporate counsel, assisting small businesses provides a unique opportunity to reflect on the equities of the market economy.[236] Beyond anything that can be conveyed through theoretical texts, such students can grasp the quotidian and practical meaning of structural racism and inequity in encountering the basic struggle for economic survival. Especially considering stu-

231 Applied to New York, for example, this would involve amending Sections 478 and 484 of New York's Judiciary Law to clarify that law students assisting small businesses and their owners in law schools (or educational corporations, as New York defines such institutions) are also covered by the statutory exemption to the prohibition against unauthorized legal practice for students practicing law in clinical programs.

232 To again illustrate with a New York example, the state already recognizes an exemption for law students who have completed at least two semesters and who practice as part of an approved program supervised by a legal aid organization or government subdivision. N.Y. Jud. Law §§ 478(2), (3); 484(2), (3)(McKinney 2021).

233 *See* Kate Levine, *Reassessing Unauthorized Practice of Law Rules,* in BEYOND ELITE LAW, *supra* note 72, at 581.

234 *See* Yunus, *supra* note 201.

235 Taking New York as an example, this would involve enacting legislation providing that those small businesses (or a specific subset of them such as microbusinesses) represented by law schools exercising small business development center functions are eligible for the waiver of fees associated with entity formation and regulatory compliance. This legislation would mirror Section 1101(e) of the New York Civil Practice Laws, which waives litigation filing fees for those represented by a civil legal aid or services organization where the document is accompanied by that organization's certification that it has determined the client to be a poor person unable to afford the fees. As adapted to the transactional context, the legislation would amend the Business Corporation Law, Limited Liability Company Law, and all other statutes requiring filing fees in this way: it would provide that where such small businesses are represented by law schools or their nonprofit subsidiaries, they can receive a waiver of filing, formation, and other fees if the filing document is submitted with a certification such as that specified in C.P.LR. § 1101. This would unquestionably include the fees associated with publicizing the filing of a limited liability company.

236 *See* Jones 1997, *supra* note 42, at 207–09.

dents who champion the system, there is hope that such encounters will provoke reexamination and encourage the leveraging of their eventual positions to advocate for access and resources benefitting small businesses.[237] Still more, one can hope that the experience will inspire the reversal of recent trends, and begin to defend small business as a noble economic end, and not merely as a potential for growth.[238]

As for those students standing as peers of the small business owner – as largely working poor or Black or Brown folk coming from the same disinvested and under-resourced communities or marginalized cultures and language groups – doing this work affords two advantages. First, it grants them the immediate opportunity to hone their role as an advisor in the fullest meaning the rules of professional responsibility ascribe to this term.[239] Indeed, in transactional poverty work they enjoy an advantage over their more privileged law school counterparts in being able to readily identify the social, economic, and psychological dimensions of the struggle for basic security.[240] They will shine in the unique role that Charles Hamilton Houston wrote of Black attorneys in the Black community[241] and draw confidence from such. But and even more important from an equity standpoint, the seminar and clinic will initiate these students into the U.S. market society. The seminar will introduce them to concepts with which they might have been unfamiliar, helping to close the privilege gap. And the transactional seminar and clinical work should make them more marketable to law firm business law departments[242] by teaching them skills law firms require.[243] For the clinic design gives these potential

[237] *Id*. (as Jones observed of her students in the GWUSBC).

[238] *Cf*. Benjamin C. Waterhouse, *The Small Business Myth*, AEON (Nov. 8, 2017), https://aeon.co/essays/what-does-small-business-really-contribute-to-economic-growth (arguing that in the 1980s, the Republican Party manipulated the mythology of small businesses to abandon the vast majority that, remaining small, promote competition and preserve local values in favor of elevating the few whose value is in "the[ ] potential to cease to be small businesses").

[239] *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).

[240] *Id*.

[241] "'[The] Negro lawyer must be trained as a social engineer and group interpreter. Due to the Negro's social and political condition . . . the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement . . . . [Moreover, he must act as] business advisor . . . for the protection of the scattered resources possessed or controlled by the group. . . . He must provide more ways and means for holding within the group the income now flowing through it.'" GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 71 (1983) (quoting Charles Hamilton Houston, *Personal Observations on the Summary of Studies in Legal Education as Applied to the Howard University School of Law* (May 28, 1929)).

[242] *See* Jones & Lainez, *supra* note 48, at 98 n. 63 (citing Georgetown University Law Center Professor Michael Diamond).

[243] *See id*. at 100–02 (citing Lisa Penland, *What a Transactional Lawyer Needs to Know:*

employers assurance that first-generation students from disadvantaged backgrounds are nonetheless familiar with the basic vocabulary and building blocks of transactional lawyering. This confidence comes from representing microentrepreneurs since law firm clients are essentially expanded versions of small firms. Ronald Coase's theory of the firm supports this idea, theorizing that public companies in the national and international economies are simply groupings of sole proprietors and partners for the sake of cheaper costs and fewer errors.[244] Thus, indications that such students understand these building blocks reduce the risk of hiring them while preserving their added value of offering perspectives and approaches, ones largely absent in the homogeneous corporate world.[245]

III. Conclusion

Toward the advancement of poverty relief in a market economy, this Article set forth a proposal on how law schools can assist: by instructing all law students on how to be transactional poverty attorneys through a mandatory course. This Article made this proposal in two sections.

First, in Section I, it introduced the social problem this course would help solve as well as the longstanding pedagogical challenge law students' ignorance of transactional practice presents. In Section II, it described the proposed course over four subsections, A through D. In subsection A, it described its inspiration – CUNY School of Law's lawyering seminar and the scholarship of Susan Jones, Paul R. Tremblay, Lynnise E. Phillips Pantin, Alicia Alvarez, and Carmen Huertas-Noble on their vision of transactional poverty lawyering. Then in subsection B, it presented the longstanding obstacle to implementing this vision in law school: the philosophical concern rooted in skepticism that capitalist activity can ever liberate marginalized people and

Identifying and Implementing Competencies for Transactional Lawyers, 5 J. Ass'n Legal Writing Dirs. 118, 124–25 (2008) (noting that transactional lawyers need to master four core skills: (1) knowledge of business associations and ability to draft relevant documents for them; (2) performance of due diligence; (3) negotiation and drafting of contracts; and (4) identification of ethical issues relating to clients and third parties)). *See also* Statchen, *supra* note 80, at 259–60 (in discussing need for pedagogical methods in small business clinics that teach students drafting skills, recognizing use of prepared forms as a sound method of instruction where students have limited time).

244 *See* Ronald H. Coase, *The Nature of the Firm* (1937), reprinted in The Economic Nature of the Firm: A Reader 80 (Louis Putterman ed., 1986) (Coase's classic explanation of why larger firms emerge).

245 On the homogeneity of law firms, see Debra Cassens Weiss, *Diversity "Bottleneck" and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA Journal (February 17, 2021, 12:51 EST), https://www.abajournal.com/news/article/diversity-bottleneck-and-minority-attrition-keep-law-firm-leadership-ranks-white-and-male-aba-survey-says.

a concomitant practical rooted in resource triage. It then sketched preliminary responses to these objections, arguing against leaving resources on the table as the struggle occurs and questioning the narrative that capitalist activity is inherently exploitative or even perceived as such by disadvantaged peoples. It also argued that the assignment of transactional poverty lawyering to law school clinics is an efficient use of scarce resources, overcoming a triage concern. In subsection C, it explained the details and structure of the course as a dual seminar and clinic centering on assisting small businesses with applications for government assistance, thus satisfying the objections outlined in subsection B. Finally, in subsection D, it explained the course's design rationale and function. To make this normative case for why law schools should assist small businesses, it explained such in terms of a "double discovery" principle of mutual benefit and assistance. Under such a principle, small businesses are served with assistance from law students trained in meticulosity and capable of marshalling and provoking legislative resources. In turn, law students are served by observing the struggle, in the case of privileged students, or by receiving professional socializing and skills necessary for big law careers, in the case of nontraditional or first-generation law students.