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The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome

Amy D. Ronner

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The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome

Cover Page Footnote

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THE LEARNED-HELPLESS LAWYER: CLINICAL LEGAL EDUCATION AND THERAPEUTIC JURISPRUDENCE AS ANTIDOTES TO BARTLEBY SYNDROME

Amy D. Ronner*

In four parts, this interdisciplinary Article connects literature, therapeutic jurisprudence, and clinical legal education. Part I examines Herman Melville's Bartleby, a story about a withdrawn Wall Street scrivener who responds to his employer's commands with four words—"I prefer not to." Although Bartleby and his colleagues toil away in the mid-nineteenth century, we can neither dismiss Melville's law office as some curio of an antediluvian past predating the abolition of the separate chancery court nor relegate it to an oldfangled time when Wall Street cranked on without computers, e-mail, faxes, and the Internet. Melville's Bartleby, with his "pallid" scrivener, although a product of a gone century, falls squarely within the present campaign to reform legal practice and make it a better place for new lawyers.

Part II suggests that Bartleby is surely no hero, but rather the proverbial victim of a dehumanizing work place. In order to really explain what has sucked the very life force out of the pale scrivener, this Article integrates into the fabric of its analysis some basic tenets of therapeutic jurisprudence, which is a relatively new field of legal study that has already had an impact on the courts and on nearly all

* Professor of Law, St. Thomas University School of Law; J.D., 1985, University of Miami; Ph.D. (English Language and Literature), 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College. Before becoming a lawyer, I taught English and American literature at the University of Michigan and University of Miami. I would like to dedicate this Article to Professor Larry Ritchie, who helped me set up my in-house appellate litigation clinic, made my life a joy, and insisted that all clinicians come into law school as first-class citizens on the tenure track. I would like to thank my research assistant, Gail Hamaty-Bird, for her help, along with the best law library gurus, Karl Gruban and Kathleen Brown, because this Article could not have been born without them. I would also like to thank my assistant, Mariela Torres, for her support and help with not only this, but also with all of my articles and books. In addition, I thank my wonderful husband, Michael P. Pacin, M.D., for his support of a wife who spends an inordinate amount of time writing behind closed doors. Further, I would like to thank Professors Bruce Winick and David Wexler for introducing me to therapeutic jurisprudence and for guiding me on such an enlightened course.

areas of the law. This Article shows how the Wall Street office in Melville's story epitomizes what therapeutic jurisprudence scholars decry as an antitherapeutic arena that engenders drones, like Bartleby, who become voiceless, invalidated, and learned helpless.

Part III, making a partial detour from the nineteenth century to today, anatomizes what are the distinct common denominators between Bartleby's Wall Street tomb and contemporary law firm culture. In essence, both treat human beings as machines, construct impenetrable walls, and spawn insatiable hunger. Part IV draws upon the author's experience as a founder and director of an in-house appellate clinic in which third year law students represent indigent clients in actual cases before appellate courts. Narrative is used to show how clinics can incorporate not just the principles of therapeutic jurisprudence, but also lessons from Melville's Bartleby. Such clinics can teach students to recognize Bartleby syndrome, detect the symptoms of learned helplessness, and fend off the very thanatotic forces that pulverized Melville's scrivener. In turn, such graduates can learn to demand and even create future work places that aspire not to mint Bartleby clones in the form of invalidated, voiceless, and depressed lawyers.

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**THE LEARNED-HELPLESS LAWYER:
CLINICAL LEGAL EDUCATION AND THERAPEUTIC
JURISPRUDENCE AS ANTIDOTES TO BARTLEBY SYNDROME**

INTRODUCTION

In Melville's *Bartleby*, a lawyer, believing the scrivener in his Wall Street office suffers from an "excessive and organic ill,"¹ says: "[w]hat I saw that morning persuaded me that the scrivener was the victim of innate and incurable disorder. I might give alms to his body; but his body did not pain him; it was his soul that suffered, and his soul I could not reach."²

Bartleby is about a withdrawn Wall Street scrivener who responds to his employer's commands with four words—"I prefer not to." This Melville masterpiece, first published in two 1853 issues of *Putnam's Monthly Magazine*, reappeared three years later in his *Piazza Tales*, a collection of short stories.³ It was written a year after Melville's *Pierre* flopped and at a time when the great author, frustrated with his own failures, felt hopelessly entombed in an unexcep-

¹ Herman Melville, *Bartleby*, in BILLY BUDD, SAILOR AND OTHER STORIES 1, 24 (Frederick Busch ed., Penguin Books 1986) [hereinafter *Bartleby*].

² *Id.* at 25.

³ See M. Thomas Inge, *Preface to BARTLEBY THE INSCRUTABLE: A COLLECTION OF COMMENTARY ON HERMAN MELVILLE'S TALE "BARTLEBY THE SCRIVENER"* 9 (Thomas Inge ed., Archon Books 1979) [hereinafter *A COLLECTION*]; Nicholas Ayo, *Bartleby's Lawyer On Trial*, 28 ARIZ. Q. 27, 27 (1972); Todd F. Davis, *The Narrator's Dilemma in "Bartleby the Scrivener": The Excellently Illustrated Re-statement of a Problem*, 34 STUDIES IN SHORT FICTION 183, 183 (1997); Robert E. Morsberger, *"I Prefer Not to": Melville and the Theme of Withdrawal*, 10 UNIV. COLL. QUARTERLY 24, 24 (1965); Allan Silver, *The Lawyer and the Scrivener*, 48 PARTISAN REV. 409, 409 (1981); Christopher W. Sten, *Bartleby the Transcendentalist: Melville's Dead Letter to Emerson*, 35 MODERN LANGUAGE QUARTERLY 30, 30 (1974); William P. Sullivan, *Bartleby and Infantile Autism: A Naturalistic Explanation*, 3.2 BULLETIN W. VA. ASS'N COLL. ENG. TEACHERS 43 (1976).

tional career.⁴ It is for this reason that many critics believe the story is at least in part autobiographical.⁵

Melville's *Bartleby* is conceivably one of the most enigmatic characters in all of American literature. In fact, libraries abound with books, treatises, and articles by scholars, literary critics, lawyers, and psychologists, all of whom, in a manner reminiscent of Melville's narrator, struggle to decipher the scrivener's strange "disorder."⁶ This Article does not entirely discount those dissections of *Bartleby* and surely does not purport to be the one accurate read of this famous short story. It does, however, suggest that many *Bartleby* critics, questing for cryptic messages, have blinded themselves to what is concededly uncharacteristic of Melville—namely, unobfuscated candor.

In *Bartleby*, Melville has neither "hidden the ball" nor interred his message in allegory. Unlike some of his other fiction, particularly his maritime adventures, like *Moby Dick* or *Billy Budd*, *Bartleby* is not crammed with symbolism, metaphor, or biblical allusion. In this urban tale, Melville gets right to the nitty-gritty and tells us verbatim what *Bartleby* is about—namely, work in a law office.

Although *Bartleby* and his fellow scriveners toil away in the mid-nineteenth century, we can neither dismiss Melville's law office as some curio of an antediluvian past predating the abolition of the

⁴ See Davis, *supra* note 3, at 183; Thomas P. Joswick, *The "Incurable Disorder" in "Bartleby the Scrivener,"* 6 DELTA 79 (1978); Morsberger, *supra* note 3, at 24; Lewis Mumford, *Melville's Miserable Year*, in A COLLECTION, *supra* note 3, at 57-60. See also *infra* notes 40-45 and accompanying text (giving the autobiographical perspective on *Bartleby*).

⁵ See *infra* notes 40-45 and accompanying text (explaining the autobiographical theme in *Bartleby*).

⁶ *Bartleby*, *supra* note 1, at 25. See also *infra* Part I.B ("The *Bartleby* Scholars").

separate chancery court nor relegate it to an oldfangled time when Wall Street cranked on without computers, e-mail, faxes, and the Internet. Rather, the veritable genius of *Bartleby* is its transcendent timelessness and capacity to speak to us in today's vernacular.

In fact, Melville's story might just be the most important assignment for all lawyers. It is no secret that in recent years, numerous articles, fictional works, and memoirs have launched an attack on what Professor Patrick Schiltz has denominated "[t]he most unhappy and unhealthy [profession] on the face of the earth."⁷ While, according to Schiltz and others, there are multiple reasons why physical and mental illness, along with depression, anxiety, alcoholism, divorce, and suicide plague the legal profession, a predominant culprit is the increasing demand for long work hours that swallow time from personal and family life.⁸ Just last year, Stanford Law School students made news when they sent a letter to one hundred of the nation's largest law firms protesting what the American Bar Association has coined as "the time famine" and requesting better working conditions for associates.⁹

⁷ Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 871 (1999).

⁸ See *id.* at 874-95; MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AM. SOC'Y 87 (1999); WILLIAM R. KEATES, PROCEED WITH CAUTION: A DIARY OF THE FIRST YEAR AT ONE OF AMERICA'S LARGEST, MOST PRESTIGIOUS LAW FIRMS 129-30 (1997); CAMERON STRACHER, DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR 1 (1998); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 149-50 (2004); Scott Turow, *The Billable Hour Must Die: It Rewards Inefficiency. It Makes Clients Suspicious. And it May Be Unethical*, 93 A.B.A. J. 32, 32 (2007). See also *infra* Part III (exploring further the literature criticizing the law factories of today).

⁹ G. M. Filisko, *Students Aim For BigLaw Change: Group's Protest Letter Results in Only One Meeting—But One That Mattered*, 93 A.B.A. J. 28 (2007). See also A.B.A., THE REPORT OF AT THE BREAKING POINT: A NAT'L CONFERENCE ON THE EMERGING CRISIS IN THE

Melville's *Bartleby*, with his famished scrivener, although a product of a gone era, falls squarely within the latest campaign to reform the legal practice. At the very least, every law school curriculum should include *Bartleby* and do so at the very time when students are actively engaged in the job hunt, testing out summer clerkships, and trying to map out careers.

In four parts, this Article broadly proposes that Melville's Wall Street saga should be incorporated into legal education. More specifically, I suggest that *Bartleby* the scrivener can help us create more meaningful law school clinics, ones which not only give students skills to practice law, but also the wisdom and insight to avoid having future employers grind them down into *Bartleby* husks.

Part I of this Article, approaching *Bartleby* for what it is—a true work of art—summarizes not just the plot, but also the more popular critical theories about its meaning. It is here that I question a few of the popular theories about *Bartleby* along with those commentators who contend that the scrivener is just a passively-resistant activist in the transcendentalist era or simply a Marxist insurgent against capitalism.¹⁰

Part II suggests that Melville's *Bartleby* is surely no hero who merely serves to debunk the myth of free agency in a laissez faire economy by preferring not to do anything but advocate for the oppressed worker. Rather, he is the proverbial victim of a dehumaniz-

QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRM AND CLIENT SERVICES 3 (1991). See also *infra* notes 233-41 and accompanying text (discussing how the critics of today's firms try to facilitate change).

¹⁰ See *infra* notes 73-75 and accompanying text (summarizing the Marxist perspective on *Bartleby*).

ing work place. In order to really explain what has sucked the very life force out of the pale scrivener, here, I turn to some basic tenets of therapeutic jurisprudence, which is a relatively new field of legal study that already has had an impact on the courts and on nearly all areas of law.¹¹ The bedrock of therapeutic jurisprudence is that the law often “function[s] as a kind of therapist or therapeutic agent” and that “legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences.”¹²

While therapeutic jurisprudence is generally applied to the legal process itself and its impact on the individual, its principles can shed light on the effect conditions in the workplace have on employees. The Wall Street law office in Melville’s story epitomizes what

¹¹ See generally *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds. 1991) (applying therapeutic jurisprudence to various issues in mental health law); *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter *JUDGING IN A THERAPEUTIC KEY*] (consisting of essays describing the newly emerging problem solving courts and how therapeutic jurisprudence principles are at work in the courts); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter *LAW IN A THERAPEUTIC KEY*] (consisting of an anthology of therapeutic jurisprudence articles in a variety of legal contexts); BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997) (showing how therapeutic jurisprudence can help us understand and restructure mental health law); *Special Issue on Therapeutic Jurisprudence*, 37 CT. REV. 1-69 (2000) (consisting of a collection of articles on how therapeutic jurisprudence can affect the court and judicial decisions); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (1999) (applying therapeutic jurisprudence to criminal justice); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence*, Miranda and Juveniles, 71 U. CIN. L. REV. 89, 92 (2002) (applying therapeutic jurisprudence to juvenile justice); Amy D. Ronner & Bruce J. Winick, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 499-502 (2000) (applying therapeutic jurisprudence to appellate practice). See also *infra* Part II.A (discussing the principles and application of therapeutic jurisprudence).

¹² Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997).

therapeutic jurisprudence scholars decry as a toxic atrocity; it is an antitherapeutic arena that engenders drones, like Bartleby, who become voiceless, invalidated, and stripped of volition.¹³ Bartleby himself is not just paradigmatic of the law office automaton, but he practically prefigures the condition that psychologist Martin Seligman called “learned helplessness.”¹⁴

In Part III, which makes a partial detour from nineteenth century Wall Street to today, I focus on the attributes of most large firms. Within this category I, of course, include those small firms and other offices that emulate the big law factories. After all, I am quite familiar with that world. Before returning to academia, I practiced for about seven years in an environment that at times resembled Melville’s Wall Street office and one that even hatched cadaverous Bartleby clones. Here I incorporate some of the recent literature criticizing our present-day law firm culture, supply paradigms from my own dabble in private practice, and extract some of the common denominators between *Bartleby’s* putative “snug retreat” and contemporary law firm culture.¹⁵

Part IV, modulating from gloom to hope, draws from this author’s experience as a founder and director of an in-house appellate clinic in which third-year law students represented indigent clients in

¹³ See *infra* notes 87-95 and accompanying text for a discussion of voice, validation, and voluntary participation; see also Part II.B (applying the theories of voice, validation and voluntary participation to Bartleby’s degeneration).

¹⁴ MARTIN E.P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* xvii (W.H. Freeman and Co. 1992); see also *infra* notes 131-35 and accompanying text (discussing “learned helplessness”).

¹⁵ *Bartleby*, *supra* note 1, at 4.

actual cases before appellate courts.¹⁶ Here I attempt to show how clinics can incorporate not just principles of therapeutic jurisprudence, but also a *Bartleby* tutorial, which can help us make legal education into a more effective antidote to the very forces that manufacture depressed, learned helpless lawyers.

This Article concludes with a reexamination of Melville's narrator and his professed inability to reach what ails his apoplectic scrivener. Here I inject optimism by describing how the narrator's experience with *Bartleby* inspired psychological and spiritual growth.¹⁷ I ultimately suggest that a good clinical legal education, one that includes therapeutic jurisprudence and *Bartleby* as a mentor, can foster an analogous awakening for lawyers and law students, renovating the actual practice of law—and what could be better than that? After all, law practice is the very destination of many of our cherished law students.

I. *BARTLEBY* AND THE SCHOLARS

In *Bartleby*, Melville portrays an antitherapeutic work place that divests human beings of voice, validation, and voluntary participation, and promotes learned helplessness.

¹⁶ Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, in CLINICAL ANTHOLOGY READINGS FOR LIVE-CLIENT CLINICS 89 (Alex J. Hurder et al. eds., 1997). See generally Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 868-874 (1996) [hereinafter *Candor and the Sandbag*] (discussing more extensively the in-house appellate litigation clinic). See also *infra* Part IV (describing the formation and goals of my in-house appellate clinic, along with the principles of therapeutic jurisprudence and *Bartleby* lessons it incorporated).

¹⁷ See *infra* notes 330-37 and accompanying text (describing the growth of Melville's lawyer and how *Bartleby* inspired such changes).

A. The *Bartleby* Story

Melville's story takes place on Wall Street in the 1850s. Before we ever meet the inscrutable Bartleby, we are introduced to our "rather elderly" narrator, who is "one of those unambitious lawyers who never addresses a jury" and has a reputation of being an "eminently *safe* man."¹⁸ Because he adhered throughout his life to the adage "the easiest way of life is the best," our lawyer, shunning both conflict and "public applause," hides in the "cool tranquility of a snug retreat."¹⁹

Our narrator is not the prototype of the heroic litigator of today's television and film, the one who mesmerizes juries with passionate closing arguments, who triumphs over insurmountable odds, who fearlessly leaps into treacherous trenches, who fights for justice and betters the human condition. Rather, Melville's lawyer, a bachelor, is the passive devotee of the status quo, who earns a nice living doing sterile work with a "snug business among rich men's bonds, and mortgages, and title-deeds."²⁰

Because Melville's story, of course, predates word processors, computers, copy machines, and even typewriters, our narrator uses two scriveners, nicknamed Turkey and Nippers, hired to sit and copy documents. Our lawyer also employs a gopher, Ginger Nut, who runs errands and does odd jobs. Due to an increase in business, as well as Turkey's drinking bouts and Nipper's chronic indigestion, rendering each unproductive for a good part of the day, the lawyer

¹⁸ *Bartleby*, *supra* note 1, at 3-4.

¹⁹ *Id.* at 4.

²⁰ *Id.*

decides on more help and advertises for a third scrivener.

In response, there appears Bartleby—"pallidly neat, pitiably respectable, [and] incurably forlorn."²¹ The narrator, apparently satisfied with Bartleby's credentials, hires him and installs him in a corner of the office in front of a window that "commanded . . . no view at all."²² At first, Bartleby works incessantly like a machine, doing an "extraordinary quantity of writing" with "no pause for digestion."²³ In a short time, however, the honeymoon ends and Bartleby becomes uncooperative, declining aspects of his job (like proofreading) by replying "I would prefer not to."²⁴

As the narrator tries to secure obedience, Bartleby becomes increasingly withdrawn, passively resistant, and totally smitten with his mantra, "I prefer not to." When the narrator asks Bartleby to go to the post office, he replies, "I prefer not to."²⁵ When the narrator asks Bartleby to get Nippers in the next room, he replies, "I prefer not to."²⁶ Progressively, Bartleby's nihilistic retorts and "cadaverous" presence disrupt the office and demoralize the other employees.²⁷

There is a crucial turning point in the story. When on Sunday, the narrator unexpectedly pops into his office en route to church, he discovers that Bartleby is actually living there and storing his meager life's possessions under and within the desk. After experiencing a range of emotions, from "pure melancholy . . . sincerest pity . . . [and]

²¹ *Id.* at 11.

²² *Id.*

²³ *Bartleby*, *supra* note 1, at 12.

²⁴ *Id.* at 13.

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ *Id.* at 21, 26.

fear . . . to repulsion,” the narrator plans to interrogate Bartleby Monday morning to discover details of his past, and then perhaps, after doling out severance pay, fire him.²⁸ The next day, the scrivener again refusing to interact, dodges his employer’s questions by chanting “I prefer not to.”²⁹ The perplexed narrator, however, does not try to dismiss Bartleby immediately.

Shortly thereafter, when Bartleby stops doing the only thing he has been doing—the copying—the narrator asks him to secure another “abode” and even offers to help and pay him.³⁰ Bartleby, however, fixes himself in the office and simply prefers not to leave. Later, when all other attempts at ouster fail and the scrivener’s “immovable” presence begins to detriment the lawyer’s business and reputation, the narrator ostensibly solves the problem by evicting himself: the lawyer quits his own office, leases new quarters, and tries to leave Bartleby behind.³¹

But, as it turns out, the ploy does not yet expunge Bartleby from the lawyer’s life. After the move, the new lawyer, who now occupies the old Wall Street space, pays the narrator a visit to vent about Bartleby: “you are responsible for the man you left there. He refuses to do any copying; he refuses to do anything; he says he prefers not to; and he refuses to quit the premises.”³² When the narrator can offer no aid, the new Wall Street tenant boots Bartleby from his space. The scrivener, however, clings to the building staircase and

²⁸ *Bartleby*, *supra* note 1, at 21-24.

²⁹ *Id.* at 25-26.

³⁰ *Id.* at 29.

³¹ *Id.* at 35.

³² *Id.* at 38.

sleeps in front of the door.³³

When eventually the new Wall Street tenant again visits the narrator and begs for rescue, the narrator capitulates a little by returning to his old haunt and trying once again to reason with Bartleby. He offers to help Bartleby find a new job and even goes so far as to invite Bartleby to come home with him to live. But all of these entreaties fail: Bartleby predictably responds, “No: at present I would prefer not to make any change at all.”³⁴

Fearing negative publicity and also out of sheer exasperation, the narrator flees, leaves town, and sojourns in the country. Upon his return, the narrator learns that the police have removed Bartleby from the old building and have dumped him in the Tombs, the New York City prison. The lawyer, then visiting Bartleby there, makes one last attempt to reach him and provide for him. But Bartleby essentially shuns his ex-employer and ends up starving himself to death.³⁵

In a species of postscript, the narrator, still pondering the Bartleby mystery, has stumbled upon “one little item of a rumor,” which he discloses to us.³⁶ Apparently, in his past, Bartleby had worked as a subordinate clerk in the Dead Letter Office at Washington, but had been forced out by administrative change. The narrator conjectures, “[w]hen I think over this rumor, hardly can I express the emotions which seize me. Dead letters! does it not sound like dead men?”³⁷ The story closes with the lamentation, “Ah, Bartleby! Ah,

³³ *Bartleby*, *supra* note 1, at 39.

³⁴ *Id.* at 41.

³⁵ *Id.* at 42-45.

³⁶ *Id.* at 46.

³⁷ *Id.*

humanity!”³⁸

B. The *Bartleby* Scholars

Many historians, literary scholars, philosophers, psychiatrists, psychologists, and lawyers have tried to decipher *Bartleby*, and almost all of them prefer not to take Melville at his word that this is a story about a Wall Street law office.³⁹ While it is virtually impossible to exhaustively cover the copious *Bartleby* scholarship, in the interest of organization, it can be sorted into six categories. These perspectives, all of which have at least a kernel of truth, bear on this Article.

First, there are the biographers who essentially see *Bartleby* as an autobiography during a tragic era in the author’s life. As biographer Lewis Mumford points out, at the time of *Bartleby*, Melville was bombarded with disappointments: “he was to learn the truth of Hamlet’s observation: misfortunes come not singly but in battalions. Melville sought for a consular appointment in the South Seas.”⁴⁰ After powerful friends and relatives did some “assiduous canvassing” on his behalf, he was not selected.⁴¹ Subsequently, he had his hopes dashed again when he was rejected for still another suitable niche, a consulship at Antwerp.⁴²

On top of that, Melville’s literary career took a dive when a fire in the offices of Harper, his publisher, conflagrated the plates of

³⁸ *Bartleby*, *supra* note 1, at 46.

³⁹ See, e.g., Leo Marx, *Melville’s Parable of the Walls*, in A COLLECTION, *supra* note 3, at 84, 86 (“The subtitle, ‘A Story of Wall Street,’ provides the first clue about the nature of the society.”).

⁴⁰ Mumford, *supra* note 4, at 57.

⁴¹ *Id.*

⁴² *Id.*

Melville's novels and copies of his book.⁴³ As Mumford explains, Melville's "books were put out again by Harper, but perfunctorily: they had lost their original momentum."⁴⁴ In the aftermath of the disaster, nothing really attained great critical or commercial success.⁴⁵

Such biographers see *Bartleby* as a byproduct of redundant defeat. As Robert E. Morsberger sums it up, critics read *Bartleby* as "an allegory of Melville's own life" and equate the scrivener's "I prefer not to" with "Melville the writer's refusal to maintain literary popularity by compromising, by writing what the public wanted instead of following his own deeper quest for truth."⁴⁶ Further, they link *Bartleby*'s work in the Dead Letter Office with "Melville's approximately thirty-two year silence from prose fiction after the public's rejection of his work because of the difficulties of *Moby Dick* and the ambiguities of *Pierre*."⁴⁷

⁴³ *Id.* at 58.

⁴⁴ *Id.*

⁴⁵ Mumford, *supra* note 4, at 58.

⁴⁶ Morsberger, *supra* note 3, at 24.

⁴⁷ *Id.* There are quite a few commentators that have linked *Bartleby* with Melville's life and mindset at the time. See, e.g., JOHN CARLOS ROWE, THROUGH THE CUSTOM-HOUSE: NINETEENTH-CENTURY AMERICAN FICTION AND MODERN THEORY 119 (The Johns Hopkins University Press 1982) (discussing how "Bartleby seems to reflect Melville's own skepticism about the significance or originality of any writing"); Ayo, *supra* note 3, at 27 writes the following:

The biographical interpretation of *Bartleby* usually not only compares Melville with the scrivener who prefers not to copy, but also draws parallels with such details of the story as Bartleby's eyestrain and Melville's eye trouble, the *dead letters* and Melville's unpopular manuscripts, and even with the *flames* that consume the post office letters and the fire "that gutted the quarters of his publisher, Harper's, in the year the story was written, destroying the plates of all his novels, and almost all the printed copies of his books."

Richard Chase, *A Parable of the Artist*, in A COLLECTION, *supra* note 3, at 78, 81 (suggesting that "[t]he short stories of this period of Melville's life are personal and introspective."); Joswick, *supra* note 4, at 79 (discussing how "many twentieth-century readers have tried to resolve the enigmas of 'Bartleby' by finding in this remarkable story a bitter commentary on

A second, but related group of critics, noting the connections between *Bartleby* and Melville's tribulations, view the story more broadly as allegory condemning a society that shuns creativity and entombs artistic genius.⁴⁸ This autobiographical perspective and its allegorical offshoot, of course, make sense. Because most artistry—not just Melville's—is rooted at least to some extent in experience and not infrequently springs from personal anguish, it is not difficult to find parallels between an author's life and his or her work. Also, there exists a natural affinity between *Bartleby*, an office servant slaving away, and the plight of any being, bereft of free expression and conscripted into tasks that spell monotony and bare survival. Thus, since it is not unremarkable to say that squelched office drones and artists are kindred spirits, then the autobiographical and artistic allegorical perspectives on *Bartleby* have a certain ring of truth.

Third, there are historical sleuths that look beyond the author for the source of the story. Some of these, more intrigued with the *Bartleby* narrator, suggest he is based on actual lawyers, like Melville's father-in-law, Chief Justice Shaw,⁴⁹ or Melville's brother,

Melville's fate as a writer in America.”).

⁴⁸ See Chase, *supra* note 47, at 81 (“Melville was thinking of himself as an artist and trying to understand the artist’s relation to his society.”); Marvin Felheim, *Meaning and Structure in “Bartleby,”* in A COLLECTION, *supra* note 3, at 115 (discussing how some commentators see “Bartleby [as] represent[ing] not just Melville but the nineteenth-century American artist in conflict with his environment.”); Marx, *supra* note 39, at 85 (suggesting that “‘Bartleby’ is not only about a writer who refuses to conform to the demands of society, but it is, more relevantly, about a writer who forsakes conventional modes because of an irresistible preoccupation with the most baffling philosophical questions”); Richard J. Zlogar, *Body Politics*, in “Bartleby”: *Leprosy, Healing, and Christ-ness in Melville’s “Story of Wall Street,”* 53 NINETEENTH-CENTURY LITERATURE 505, 505 (1999) (explaining the interpretation that “holds that *Bartleby* signifies a literary artist who refuses to produce the popular fiction demanded of him by a commercial society—the type of artist that Melville saw himself to be when he faced professional rejection for turning to more philosophical themes”).

⁴⁹ See, e.g., BROOK THOMAS, CROSS-EXAMINATIONS OF LAW AND LITERATURE 165-66

Allan, a Wall Street lawyer.⁵⁰ Although Melville depended on Shaw for financial support, he never felt quite at ease with the judge and was somewhat conflicted about his brother as well.⁵¹ Such mixed feelings corroborate what no reader can fail to detect in *Bartleby*—namely, the author’s ambivalence toward his own “eminently safe” narrator.⁵²

Still other such critics, more fixated on the prototype of the scrivener, point to one of Melville’s acquaintances, like Eli James Murdock Fly, who once served as apprentice in the law office of Melville’s uncle, or Peter Gansevoort, who dwindled into an invalid after writing endlessly for another New York lawyer from dusk to dawn.⁵³ They also surmise that *Bartleby* is based on Melville’s

(1987) (suggesting that we should not “identify the lawyer in the story with Shaw” despite the similarities, but rather see “Shaw’s opinions [as] giv[ing] us access to a way of thinking familiar to Melville, a way of thinking that helped to shape American law as it transformed itself to meet the needs of a rising market economy”); Ayo, *supra* note 3, at 28 (discussing the biographical theorists that connect the lawyer in *Bartleby* to Lemuel Shaw, Melville’s father-in-law and Chief Justice of the Massachusetts Supreme Court); Lewis Leary, *Introduction: B Is For Bartleby*, in A COLLECTION, *supra* note 3, at 16 (discussing the theory that Shaw is the source for the Wall Street lawyer); John Stark, *Melville, Lemuel Shaw, and “Bartleby,”* in A COLLECTION, *supra* note 3 at 166, 169 (discussing how critics connect *Bartleby* with Justice Shaw, and in particular, Shaw’s jurisprudence, which “made it more difficult for persons to win suits against businesses that had injured them” and enabled “businesses [to] invest more in expansion.”).

⁵⁰ See, e.g., Ayo, *supra* note 3, at 28 (discussing the critics who believe that the lawyer in *Bartleby* derives from Melville’s brother Allan, who practiced on Wall Street); Leary, *supra* note 49, at 16 (discussing the view that Melville’s brother who practiced on Wall Street was the source of the lawyer in *Bartleby*).

⁵¹ See Ayo, *supra* note 3, at 28 (“Though Shaw was generous in financial support of the Melville family, the novelist never felt comfortable with the judge.”); Mumford, *supra* note 4, at 60 (discussing the tension between Melville and family members, like brother Allan or father-in-law Shaw, who “inevitably became a little impatient” with the struggling writer); Stark, *supra* note 49, at 167 (discussing the theory that “Melville by portraying Shaw as the lawyer dramatizes his ambivalence about his father-in-law.”).

⁵² *Bartleby*, *supra* note 1, at 4.

⁵³ See Felheim, *supra* note 48, at 115 (discussing Melville’s meeting with Fly and the possibility that he is a source for the scrivener); Leary, *supra* note 49, at 15 (summarizing such theories about the source of the character of *Bartleby*).

friend, George Adler, a philologist-translator, whose agoraphobia necessitated his lock up in an asylum.⁵⁴ Such theories, however, probably boil down to a vanilla proposition that what makes the odd scrivener so plausible is the fact that his creator was personally acquainted with those afflicted with analogous derangement.

Others scour literature and philosophy to find the inspiration for *Bartleby* and some accredit Thoreau for Melville's motif of passive resistance. For example, Lewis Leary has said, "Thoreauvians, quick to discover their man continually alive in book and field and forest, have recognized the Walden wanderer unmistakably mirrored young Bartleby's 'passive resistance' a touchstone not to go unnoticed, foreshadowing Mahatma Gandhi's awesome philosophy and the militant quietism of Martin Luther King."⁵⁵ Others tout Emerson as a more likely influence: for example, Christopher W. Sten suggests that a comparison of Emerson's "The Transcendentalist" with *Bartleby* demonstrates that Melville used "Emerson's idealist for his portrayal of the incommunicative Bartleby and Emerson's materialist . . . for his portrayal of the Wall Street lawyer."⁵⁶ Still others point to

⁵⁴ See LEON HOWARD, *HERMAN MELVILLE: A BIOGRAPHY* 18 (1951). See also Felheim, *supra* note 48, at 115 (discussing the theory that Melville's Bartleby is connected with "the unfortunate condition" of Melville's friend, Adler); Leary, *supra* note 49, at 16 (discussing the fate of Adler, the philologist-translator, and how it was connected to Bartleby).

⁵⁵ Leary, *supra* note 49, at 14. See also Morsberger, *supra* note 3, at 25 (stating that "it seems almost inevitable that Melville had Thoreau's work distinctly in mind, as well as the work of other Transcendentalists."); Egbert S. Oliver, *A Second Look at "Bartleby," in A COLLECTION*, *supra* note 3, at 61, 63 (suggesting that "the germ of the character Bartleby came not from Melville's searchings of his own relationship to society or from any bitterness in his hardening heart but from an external contemporary source, namely, Thoreau's withdrawal from society"); THOMAS, *supra* note 49, at 175 ("Like Thoreau's passive resister, Bartleby undermines the authority of someone he seems to serve."); Cf. Robert Zaller, *Melville and the Myth of Revolution*, 15 *STUDIES IN ROMANTICISM* 607 (1976) (suggesting that the lawyer's sole function is to provide a context for rebellion).

⁵⁶ Sten, *supra* note 3, at 32.

Dickens's *Pickwick Papers*, particularly the interplay between Sam Weller and Pickwick in Fleet Prison;⁵⁷ or James A. Maitland's *The Lawyer's Story*, a novel serialized in 1853, also narrated by a lawyer saddled with a melancholy copyist;⁵⁸ or Matthew Arnold, who admittedly excluded *Empedocles on Etna* from his new collection of poems because its bleakness impaired "poetic enjoyment;"⁵⁹ or Jonathan Edwards, Puritan minister and theologian, and Joseph Priestly, chemist and free-thinking Unitarian, who effectually "predict[ed] the absurdities of precisely such a being as *Bartleby*."⁶⁰

Such proffers are intriguing and illuminate *Bartleby* to some extent, but this is not due to the fact that Melville was some artistic anomaly who shopped the bookshelves and pirated from others. The

⁵⁷ J. Don Vann, *Pickwick And "Bartleby,"* 6 STUDIES IN AMERICAN FICTION 235-36 (1978) (claiming that Melville read Dickens' *Pickwick Papers* and recorded it in his journal).

⁵⁸ See *id.* at 235 (discussing *The Lawyer's Story* as a possible source for Melville's *Bartleby*); see also Johannes Dietrich Bergmann, "Bartleby" and *The Lawyer's Story*, 47 AM. LITERATURE 432, 433 (1975) ("Like 'Bartleby, the Scrivener,' *The Lawyer's Story* is a successful New York lawyer's first-person narration of his interest in and involvement with an unusual, 'extra' scrivener.").

⁵⁹ See Daniel Stempel & Bruce M. Stillians, *Bartleby The Scrivener: A Parable of Pessimism*, 27 NINETEENTH-CENTURY FICTION 268, 268-69 (1972) (suggesting that "[s]hortly after Arnold wrote [his] condemnation of the literature of futility, *Bartleby the Scrivener* appeared . . . [And] [t]hrough one of the ironic coincidences of literary history, Melville's story exemplifies every one of the gloomy traits which Arnold had listed as fatal to 'poetic enjoyment' . . ."); see also MATTHEW ARNOLD, *Preface to First Edition of Poems*, in POETRY AND CRITICISM OF MATTHEW ARNOLD 203, 204 (1961).

What then are the situations, from the representation of which, though accurate, no poetical enjoyment can be derived? They are those in which the suffering finds no vent in action; in which a continuous state of mental distress is prolonged, unrelieved by incident, hope, or resistance; in which there is everything to be endured, nothing to be done.

Id.

⁶⁰ Allan Moore Emery, *The Alternatives of Melville's "Bartleby,"* 31 NINETEENTH-CENTURY FICTION 170, 172 (1976) (suggesting that "[t]he narrator of 'Bartleby' is acquainted with the treatises of Edwards and Priestly"). Thus, Melville gives us a "vital clue to the philosophical context within which [he] meant his tale to be read." *Id.* See also Walton R. Patrick, *Melville's "Bartleby" and the Doctrine of Necessity*, in A COLLECTION, *supra* note 3, at 144.

similarities probably exist because Melville, like most great writers, read voraciously and was not impervious to precursors and contemporary thought.⁶¹ It is, moreover, apodictic that what distinguishes true art is its universality, and thus, just about everything of elite stature will inevitably bristle with literary allusion and inspire a modicum of déjà vu.

A fourth coterie of *Bartleby* scholars, mindful not of the literary or philosophical references but more of its biblical underpinnings, approaches the story as religious allegory. Walter E. Anderson, noting how the narrator fruitlessly strives to extend Christian charity to a suffering soul, suggests “Christ’s commandment that we be our brother’s keeper, while not the moral of the story, is a central issue.”⁶² Some critics have likened the narrator to Judas,⁶³ Pontius Pilate,⁶⁴ or Nicodemus;⁶⁵ and some have connected *Bartleby* with Job,⁶⁶

⁶¹ See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 5 (Oxford University Press 1979) (arguing that “[p]oetic history . . . is held to be indistinguishable from poetic influence, since strong poets make that history by misreading one another, so as to clear imaginative space for themselves.”).

⁶² Walter E. Anderson, *Form and Meaning in “Bartleby The Scrivener,”* 18 *STUDIES IN SHORT FICTION* 383, 383 (1981). See also Steven Doloff, *The Prudent Samaritan: Melville’s “Bartleby, the Scrivener” as Parody of Christ’s Parable to the Lawyer,* 34 *STUDIES IN SHORT FICTION* 357, 357 (1997) (summarizing the various biblical and spiritual theories); Hershel Parker, *The “Sequel” in “Bartleby,”* in *A COLLECTION*, *supra* note 3, at 164 (“While the scrivener’s precise motivations are impenetrable, the narrator’s frustration with him has become analogous to any nominal Christian’s confrontation with someone behaving in Christlike absoluteness, not according to the commonsense values of this world.”).

⁶³ See, e.g., William Bysshe Stein, *Bartleby: the Christian Conscience,* in *A SYMPOSIUM: BARTLEBY THE SCRIVINER* 104 (Howard P. Vincent ed., The Kent State University Press 1966) [hereinafter *A SYMPOSIUM*]; see also Doloff, *supra* note 62.

⁶⁴ See, e.g., Alexander Eliot, *Melville and Bartleby,* 3 *FURIOSO* 11, 11, 15 (1947). See also Doloff, *supra* note 62.

⁶⁵ See, e.g., Graham Nicol Forst, *Up Wall Street Towards Broadway: The Narrator’s Pilgrimage in Melville’s “Bartleby the Scrivener,”* 24 *STUDIES IN SHORT FICTION* 263, 264-65 (1987); see also Doloff, *supra* note 62.

⁶⁶ See Maurice Friedman, *Bartleby and the Modern Exile,* in *A SYMPOSIUM*, *supra* note 63, at 75, 76; see also Doloff, *supra* note 62.

Cain,⁶⁷ or the Wandering Jew.⁶⁸ For Richard J. Zlogar, Bartleby is “a leper, the quintessential outcast in the rigid Mediterranean world of Christ’s time, [who] searches out the one man who can cleanse him.”⁶⁹ But still others equate Bartleby with Christ himself, who is deprived of the absolute charity that Christian ethics strictly mandate.⁷⁰

Undoubtedly, Melville spices his story with biblical passages and images of Christ, but these do not conquer the story or become its theme per se. In *Bartleby*, a boss hires a moribund worker and then must figure out how to deal with it. Through the crisis, Bartleby catalyzes the narrator’s psychological and spiritual growth both as a human being and lawyer.⁷¹ As discussed more below, the story’s theological brush strokes serve to emphasize the very magnitude of the lesson that Bartleby imparts to a lawyer whose whole life has been about cranking out work, making money, and hiding in an emotionless cocoon.⁷²

The fifth and sixth perspectives on *Bartleby*, the Marxist and the psychological, respectively, are the ones most germane to this Article. There are those who insist that the story depicts political and

⁶⁷ Forst, *supra* note 65, at 267. See also Doloff, *supra* note 62.

⁶⁸ Forst, *supra* note 65, at 265. See also Doloff, *supra* note 62.

⁶⁹ Zlogar, *supra* note 48, at 529.

⁷⁰ See H. BRUCE FRANKLIN, *THE WAKE OF THE GODS: MELVILLE’S MYTHOLOGY* 127-28, 132-33, 151, 190 (1963). See also Anderson, *supra* note 62; Doloff, *supra* note 62 (summarizing biblical theories); Zlogar, *supra* note 48, at 506 (discussing various interpretations, including the one that equates Bartleby with Christ).

⁷¹ See *infra* notes 338-39 and accompanying text (discussing the theory that Bartleby was the catalyst for the lawyer’s spiritual and emotional development).

⁷² See *supra* pp. 21-23 (describing the world and aspirations of the pre-Bartleby lawyer). See also *infra* notes 342-45 and accompanying text (describing the state of the post-Bartleby lawyer).

ideological tensions in the workplace, and, as David Kuebrich states, the story is “a stunningly original analysis of employer-employee relations that stands as [a] fit culmination and enduring witness to [the] indigenous antebellum tradition of radical political economy.”⁷³ Others, cordoning Melville directly to his contemporary, Karl Marx, see the scrivener as a rebel against the capitalist world, one in which “the alienated worker who, realizing that his work is meaningless and without a future, can only protest his humanity by a negative assertion.”⁷⁴ Such theories, of course, belabor the obvious—namely, the tussle between master and servant in an airless office. But what is more telling is that Melville chose not to set his story in a factory or some pedestrian shop, but instead chose a dreary Wall Street law office.⁷⁵

⁷³ David Kuebrich, *Melville's Doctrine of Assumptions: The Hidden Ideology of Capitalist Production in "Bartleby,"* 69 NEW ENG. Q. 381, 384 (1996).

⁷⁴ Louise K. Barnett, *Bartleby as Alienated Worker*, 11 STUDIES IN SHORT FICTION 379, 379 (1974) (“Given a system committed to profits, the only alternative to working under such demeaning conditions is death.”). See also Patricia Barber, *What if Bartleby Were a Woman*, in THE AUTHORITY OF EXPERIENCE: ESSAYS IN FEMINIST CRITICISM 212 (Arlyn Diamond & Lee R. Edwards eds., The University of Massachusetts Press 1977) (seeing the male scrivener as a female typist, we can detect not only sexual tension but disparity of power in the work place); THOMAS, *supra* note 49, at 165-66 (seeing *Bartleby* as criticism of the myth of free agency in laissez faire principles of contract in the mid-nineteenth century); Robin West, *Invisible Victims: A Comparison of Susan Glaspell's Jury of Her Peers, and Herman Melville's Bartleby the Scrivener*, 8 CARDOZO STUD. L. & LITERATURE 203, 204 (1996) (explaining that the story “aim[s] to make more visible the suffering of . . . employees in certain kinds of labor markets”); Michael Zeitlin, *Bartleby is Dead*, 24 CAN. REV. AM. STUD. 113, 116 (1994) (“[T]hose like Bartleby who, as Marx would put it, have ‘nothing to sell but their labour’—is being pressed into the urbanized working classes of an industrial society, or, as in Bartleby’s case, being pressed out of that working class altogether and so into oblivion.”).

⁷⁵ West, *supra* note 74, at 227.

There is no need to view the office worker as a stand-in for the maimed factory worker, injured by a machine for which, under the auspices of the fellow-servant rule, the employer need not take responsibility. Office work is the subject matter of the story, and the subject of its implicit political critique.

Id.

The sixth perspective on *Bartleby*, which is predominantly psychological and at times, Freudian, is also applicable here. Most of these commentators diagnose the scrivener. For example, for William P. Sullivan, *Bartleby* is autistic.⁷⁶ Sullivan believes that “in *Bartleby* Melville described a person manifesting behavior it is now possible to identify as infantile autism in the adult phase” and explains that “*Bartleby* in every way fits the pattern of a reasonably successful, coping, autistic adult, whose tragedy is that he almost succeeded in finding the structured environment and understanding personal supervisor he needed.”⁷⁷ Although Morris Beja does not rule out autism, he labels the disorder schizophrenia:

More specifically, I believe, [*Bartleby*] displays the symptoms and behavior patterns of “schizophrenia, catatonic type, withdrawn.” He is detached, withdrawn, immobile, excessively silent, yet given to remarks or associations that do not make sense to others, depressed, at least outwardly apathetic and refraining from all display of ordinary emotion, possibly autistic, and compulsively prone to repetitive acts or phrases (“I would prefer not to.”).⁷⁸

According to Beja, *Bartleby* eventually becomes his surroundings,

⁷⁶ Sullivan, *supra* note 3, at 44.

⁷⁷ *Id.* See also Nancy Blake, *Mourning and Melancholia in “Bartleby,”* 7 DELTA 155, 158 (1978) (*Bartleby*’s “silence is not the punctuation of speech. It is the white silence of the autist[ic] which puts speech into question”).

⁷⁸ Morris Beja, *Bartleby & Schizophrenia*, 19 MASS. REV. 555, 557 (1978). See also Robert E. Abrams, “*Bartleby*” and the *Fragile Pageantry of the Ego*, 45 ENGLISH LITERARY HISTORY 488, 489-91 (1978) (applying Freud’s theories to *Bartleby*, who “exhibits the equanimity of a dreamer amidst the outrageousness of his acts even in broad, bustling day.”); Ted Billy, *Eros and Thanatos in “Bartleby,”* 31 ARIZ. Q. 21, 21 (1975) (“‘*Bartleby*’ serves as the literary objectification of Melville’s intense awareness of the psychological trauma of fragmentation, anxiety, and alienation. And behind it all lies the source of psychic disequilibrium—a dead, blank wall—the void of nothingness.”).

mutating into the very wall that he so relentlessly ponders.⁷⁹ In fact, it does not really matter what name we pin on Bartleby's condition, whether it be schizophrenia or autism. What does matter is, as discussed below, Bartleby turns into the human embodiment of his suffocating Wall Street context.⁸⁰

Seeing *Bartleby* as a study of mental illness is interesting, but does not really help us get to the bottom of the mystery. In fact, the narrator himself tells us this when he plays therapist and fruitlessly tries to isolate and treat Bartleby's "incurable disorder."⁸¹ Since neither Melville nor the narrator ever give Bartleby's syndrome a name, the author is telling us that here nomenclature is irrelevant. Rather, Melville hopes that we, the readers, will think with our hearts, empathize with the plight of a suffering soul, and learn to recognize what is devouring Bartleby, so that we can effectively stave off that monster of our own working lives.

II. THERAPEUTIC JURISPRUDENCE AND *BARTLEBY*

Therapeutic jurisprudence, a relatively new movement in the law, focuses on healing and the promotion of individual well-being. In a book applying therapeutic jurisprudence to judges, the founders of therapeutic jurisprudence, Professors Winick and Wexler, explain:

Therapeutic jurisprudence focuses our atten-

⁷⁹ Beja, *supra* note 78, at 568 ("As Bartleby lives and ends his life facing walls, we may keep in mind . . . the danger of the 'tendency to become what one perceives.'").

⁸⁰ See *infra* Part II.B. (discussing Bartleby's degeneration).

⁸¹ *Bartleby*, *supra* note 1, at 25. See also Henry A. Murray, *Bartleby and I*, in A SYMPOSIUM, *supra* note 63, at 23-24 (describing Bartleby as a "mythic figure who deserves a category in his own name" and "credit[s] Mr. Melville with the discovery of the Bartleby complex.").

tion on the traditionally under-appreciated area of the law's considerable impact on emotional life and psychological well-being. Its essential premise is a simple one: that the law is a social force that can produce therapeutic or antitherapeutic consequences. The law consists of legal rules, legal procedures, and the roles and behaviors of legal actors, like lawyers and judges. Therapeutic jurisprudence proposes that we use the tools of the behavioral sciences to study the therapeutic and antitherapeutic impact of the law, and that we think creatively about improving the therapeutic functioning of the law without violating other important values.⁸²

This interdisciplinary movement was born when its founders tied the tools of behavioral sciences to mental health law.⁸³ Later, therapeutic jurisprudence branched out to practically every other area, including criminal, juvenile, and personal injury law.⁸⁴ Quite recently, clinical legal education has embraced therapeutic jurisprudence,⁸⁵ and has even started to secure a niche in another interdisciplinary field—that of law and literature.⁸⁶

⁸² JUDGING IN A THERAPEUTIC KEY, *supra* note 11, at 7.

⁸³ *Id.*

⁸⁴ *Id.* (“[T]herapeutic jurisprudence soon found easy application to other areas of the law—criminal law, juvenile law, family law, personal injury law—and has now emerged as a therapeutic approach to the law generally.”). *See also supra* text accompanying note 11 (giving examples of how therapeutic jurisprudence scholarship has expanded and touched multiple areas of the law).

⁸⁵ *See generally* Symposium, *Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, 17 ST. THOMAS L. REV. 403 (2005). The Honorable Chief Justice Barbara J. Pariente gives the introduction which discusses how the symposium issue on clinical legal education and therapeutic jurisprudence can “help show . . . how attorneys and legal educators are revising our traditional notions of lawyering.” *Id.* at 406.

⁸⁶ *See* The Honorable Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 108 (2004) (showing how therapeutic jurisprudence can shed light on Melville's novella); Amy D. Ronner, *The Crucible, Harvard's Secret Court, and Homophobic Witch Hunts*, 73 BROOK. L. REV. 217, 238, 241, 268-69 (2007) (applying therapeutic jurisprudence to Arthur Miller's *The Crucible* and

A. Therapeutic Jurisprudence

Core tenets of therapeutic jurisprudence can give us some access to the enigma of Bartleby. Therapeutic jurisprudence scholars believe that there are three prime ingredients of a therapeutic experience, which have been called “ ‘the three Vs’: namely, a sense of voice, validation, and voluntary participation.”⁸⁷ So far, much of the literature on “the three Vs” focuses on the therapeutic potential of judicial proceedings and builds on empirical studies dealing with how parties experience litigation.⁸⁸

The studies conclude “that when individuals participate in a judicial process, what influences them the most is not the result, but their assessment of the fairness of the process itself.”⁸⁹ For example, Tom Tyler, a social psychologist and proponent of the psychology of criminal justice, has explained that when individuals feel the system

the savage purge of homosexuals from Harvard in the 1920s); Amy D. Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession*, 40 J. MARSHALL L. REV. 41, 46 (2006) (employing therapeutic jurisprudence to analyze Raskolnikov’s obsessive need to confess in *Crime And Punishment*).

⁸⁷ Ronner, *Songs of Validation, Voice, and Voluntary Participation*, *supra* note 11, at 93-96 (discussing “ ‘the three V’s’: namely, a sense of voice, validation, and voluntary participation.”). See Ronner & Winick, *supra* note 11 at 501-02 (discussing how proceedings with voice, validation, and voluntary participation can promote mental health); Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, 37 CT. REV. 64, 64-66 (2000) (analyzing how “the three V’s” can be at work in appellate proceedings).

⁸⁸ See *supra* text accompanying note 87 (discussing articles dealing with therapeutic jurisprudence in the context of litigation and appeals). See also Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 865 (1993) (discussing the detrimental effects of unfair procedures in criminal sentencing); Amy D. Ronner, *Punishment Meted Out for Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 472-73 (1999) (discussing how unfair procedures in sentencing can engender disrespect for the law and a sense of helplessness); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 443-44 (1992) (focusing on the psychological consequences of commitment hearings).

⁸⁹ Ronner, *Songs of Validation, Voice, and Voluntary Participation*, *supra* note 11, at 93; see also Gould, *supra* note 88, at 865; Tyler, *supra* note 88, at 437.

has treated them with fairness, respect, and dignity, their behavior improves and they tend to become healthier in their everyday lives.⁹⁰

A true therapeutic process invites its participants to “hav[e] a sense of ‘voice,’ or an opportunity to tell their story Equal with voice is ‘validation,’ or the feeling that [someone, usually a tribunal] has really listened to, heard, and taken seriously the [individual’s] stor[y].”⁹¹ When individuals emerge with a sense of voice and validation, they tend to see the process as less coercive.⁹² That is, they

⁹⁰ Tyler, *supra* note 88, at 437 (“[T]he [primary] impact of participating in a judicial hearing . . . is the person’s evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome. Such respect is important because it has been found to influence everyday behavior toward the law.”). See Gould, *supra* note 88, at 865 (“[Those] who have experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and are less likely to accept judicial decisions.”); see also E. ALLAN LIND & TOM TYLER, *THE SOC. PSYCH. OF PROCEDURAL JUSTICE* 1 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 83-84, 118 (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3-4 (1990); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 952 (1990); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 45-46 (1999) (discussing the role of counsel in civil commitment hearings and the therapeutic possibilities).

⁹¹ Ronner & Winick, *supra* note 11, at 501; Ronner, *Songs of Validation, Voice, and Voluntary Participation*, *supra* note 11, at 94-95; Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1158 (1997). See also Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 56 (2000) (stressing “the need for the tribunal to listen fully to all the concerns of the participants, and to recognize the value of such expression”).

⁹² Work by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion have found that people do not feel coerced “even in coercive situations such as civil commitment when they perceive the intentions of state actors to be benevolent and when they are treated with dignity and respect.” Winick, *supra* note 90, at 48; see BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* 149-50 (2005) (discussing the psychological effects of coercion versus voluntary choice); Nancy S. Bennett et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295, 297 (1993) (documenting patient accounts of the morality of mental hospital admissions); William Gardner et al., *Two Scales for Measuring Patients’ Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307, 318-19 (1993) (presenting patient experiences with coercion in mental hospitals); Steven K. Hoge et al., *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT’L J. L. & PSYCHIATRY 167, 178-79 (1997) (exploring the role of coercion in hospital admissions procedures); Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVES GEN. PSYCHIATRY 1034,

feel as if they have voluntarily participated in shaping the result. Therapeutic jurisprudence instructs that the sense of participating voluntarily is paramount. When individuals feel they voluntarily partake in a process, they function better and even alter destructive behavior patterns. It is, of course, quite basic that people tend to flourish when they can exercise preferences or at least feel they have an active role in influencing their own destinies.⁹³

Conversely, an antitherapeutic arena is one without the “three Vs”—without voice, validation, and voluntary participation. Keri Gould, who has studied these concepts in the context of individuals charged with crimes, has concluded that those who felt coerced and “experienced a legal procedure that they judged to be unfair . . . had less respect for the law and legal authorities and [were] less likely to accept judicial decisions.”⁹⁴ Such feelings not only tend to jeopardize an individual’s rehabilitation, but can also engender what is called “learned helplessness,” which promotes apathy, arrests change, and makes individuals simply give up.⁹⁵

B. Voiceless, Invalidated, and Involuntary Bartleby

Bartleby is the voiceless, invalidated, and involuntary man. The scrivener’s decomposition must be understood in a holistic con-

1036-37 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT’L. J. L. & PSYCHIATRY 249, 255-57 (1995) (exploring the nexus between coerced admission and justice).

⁹³ See Ronner & Winick, *supra* note 11, at 501-02 (describing the importance of voluntariness in the legal process); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755-68 (1992) (stressing the psychological importance of choice).

⁹⁴ Gould, *supra* note 88, at 865.

⁹⁵ See SELIGMAN, *supra* note 14, at xvii (defining learned helplessness); see also *infra* text accompanying notes 111-131 (discussing the final stages of Bartleby syndrome).

text. Before we ever meet the scrivener, the narrator introduces us to his domain. He states, “I seldom lose my temper; much more seldom indulge in dangerous indignation at wrongs and outrages.”⁹⁶ In short, he is someone that does not want to emote; to him, it is the equivalent of an undesirable loss of control.

The lawyer, however, ostensibly digresses here when he tells us that the new state constitution has eliminated what was to be his cherished prize, his position as Master of Chancery, which he had “counted upon [as] a life-lease of the profits.”⁹⁷ It is here, when he lets loose, “permit[s] himself to be rash” and passionately reveals a “sudden and violent abrogation,” that he pulls back, reigns himself in, regains control, equates pain with a mere “premature act,” and then antiseptically shifts gears with the “[b]ut this is by the way.”⁹⁸ Here the narrator’s stream of conscious ejaculation replicates what he aspires to be—someone that contains anger, represses feelings, and forbids outbursts. For him, emotion simply has no place in his efficient fiefdom.⁹⁹

Ironically the narrator somehow attracts employees who derail him in attaining his goal of efficiency in a cocoon of sterile, dispassionate torpor. Ginger Nut, a peripheral character, who is the “cake and apply purveyor” for the office, gobbles up “various sorts of nuts” and stashes shells in his desk drawer.¹⁰⁰ Turkey has a drinking

⁹⁶ *Bartleby*, *supra* note 1, at 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Kuebrich, *supra* note 73, at 398 (“[T]he characters in “Bartleby” have been shaped by various economic requirements, inducements, and threats to assume without question that emotion is taboo in the workplace.”).

¹⁰⁰ *Bartleby*, *supra* note 1, at 10.

problem and thus, dons a morning face “of a fine florid hue” that changes into a “blaz[ing] . . . grate full of . . . coals” after lunch.¹⁰¹ Post-lunch, not only was Turkey’s productivity “seriously disturbed for the remainder of the twenty-four hours,” but what apparently rangles the boss most is that this servant becomes a little too human, “too energetic” with “a strange, inflamed, flurried, flighty recklessness of activity about him.”¹⁰² The narrator explains that when Turkey’s face “flamed with [that] augmented blazonry, . . . [h]e made an unpleasant racket with his chair; spilled his sand-box; in mending his pens, impatiently split them all to pieces and threw them on the floor in a sudden passion.”¹⁰³ Through Turkey, noise and imperfections trespass into the chambers.

Nippers, who is a “rather piratical-looking” man, with “oily” clothes and a stench of “eating houses” was similarly irksome.¹⁰⁴ He, as “the victim of two evil powers—ambition and indigestion,” displayed a disconcerting “impatience” with his “duties of a mere copyist,” and even had the audacity to rebel by performing “the original drawing up of legal documents.”¹⁰⁵ His indigestion also dashed his stabs at self-composure, giving him “an occasional nervous testiness and grinning irritability, causing the teeth to audibly grind together over mistakes committed in copying.”¹⁰⁶ As the narrator complains, Nippers emitted “unnecessary maledictions, hissed, rather than spo-

¹⁰¹ *Id.* at 5.

¹⁰² *Id.* at 5-6.

¹⁰³ *Id.* at 6.

¹⁰⁴ *Id.* at 7-8.

¹⁰⁵ *Bartleby*, *supra* note 1, at 7.

¹⁰⁶ *Id.*

ken, in the heat of business” and because he endured “continual discontent with the height of the table where he worked,” he spent the day endlessly nudging it.¹⁰⁷ Nippers, like Turkey, infects the office with foibles and agitation.

The narrator takes comfort in the fact that since Nippers’ quirks were “mainly observable in the morning” and Turkey’s “paroxysms” occurred in the afternoon, he never had to contend “with their eccentricities at one time.”¹⁰⁸ He is nevertheless displeased with his own inability to accomplish his top priority—that of purging his chambers of all deviance, odors, noises, fits, and eruptive feeling. When the new scrivener first presents himself, the narrator assumes that “motionless” Bartleby, who is “pallidly neat, pitiably respectable, incurably forlorn” and has “so singularly sedate an aspect,” shares his agenda: he anticipates that Bartleby will help instill that desired anesthetization and neutralize “the flighty temper of Turkey, and the fiery one of Nippers.”¹⁰⁹ But as it turns out, what actually occurs in that supposed “cool tranquility of a snug retreat,”¹¹⁰ calls to mind an old adage: “be careful, you might get what you wish for.” The plot unfolds in four stages as Bartleby progressively dries up and perishes. Through this, Melville shows us where monotony, marginalization, and passionlessness ultimately take us and what they produce.

In stage one, Bartleby appears to be the penultimate machine:

¹⁰⁷ *Id.* at 7-8.

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Bartleby*, *supra* note 1, at 4.

he, assigned not to draw up documents but to simply copy them, does “an extraordinary quantity of writing,” from “sun-light” to “candle-light” and does not even appear to break for meals.¹¹¹ Although the narrator has sought out just such a formula—productivity minus feeling—he is not satisfied with stage-one Bartleby. It piques the boss that Bartleby does not appear “cheerfully industrious,” but simply labors “silently, palely, [and] mechanically.”¹¹² But because his work is tedious, monotonous, and repetitive and does not require creativity, decision making, or input, stage-one Bartleby does not and cannot dissemble. That is, he presents himself exactly as he is—a voiceless, colorless, yet stable appliance.

In stage two, Bartleby descends from voicelessness to isolation and invalidation. As the narrator explains, “it is . . . an indispensable part of a scrivener’s business to verify the accuracy of his copy, word by word.”¹¹³ While this task too is a “dull, wearisome, and lethargic affair,” it entails interaction with others.¹¹⁴ The process, in a manner reminiscent of law review members proofing articles, requires one scrivener to recite from the copy while the other matches it with the original. It means that servants must sit in physical proximity of one another and actually speak to and hear each other. When the narrator asks Bartleby to participate, Bartleby refuses to relinquish “his privacy,” and “replied, ‘I would prefer not to.’”¹¹⁵ In so

¹¹¹ *Id.* at 12.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Bartleby*, *supra* note 1, at 13. For Melville, communion with the human race is crucial and a spiritually uplifting component of life. See, e.g., HERMAN MELVILLE, *MOBY-DICK OR THE WHALE* 172 (vol.2, Constable and Company Ltd. 1922) (describing the manipulation of

doing, Bartleby rejects bonding, and rebuffs what appears to be one of the rare instances in that office where he can speak and be heard, even if that little exchange is only about words on a dull document.

In a later episode, the boss assembles Turkey, Nippers, and Ginger Nut in a little row, each with a document in their hands, and once again beckons Bartleby to participate.¹¹⁶ Here too, Bartleby, refusing to leave his “hermitage” or “bachelor’s hall,” says “I prefer not to.”¹¹⁷ Then, when the narrator demands an explanation and asks, “Will you not speak? Answer!,” Bartleby replies, “I prefer not to.”¹¹⁸ In so doing, Bartleby indicates that he is not merely voiceless, but also void of any and all will to commune with others. Stage-two Bartleby, who is not just voiceless and invalidated, has deteriorated to the point at which he has expelled all incentive to even have a voice and be heard.

In stage three, Bartleby begins to tropologically lean toward death. He refuses to venture out or leave his cell, and when his boss asks him to run an errand or go into the next room, he says, “I would prefer not to.”¹¹⁹ Bartleby, who never dines and is apparently barely subsisting on a “handful of ginger-nuts,” is also essentially starving

the Whale’s sperm before it is sent to the try works). Melville states:

I squeezed that sperm till a strange sort of insanity came over me; and I found myself unwittingly squeezing my co-laborers’ hands in it, mistaking their hands for the gentle globules. . . . I was continually squeezing their hands, and looking up into their eyes sentimentally. . . . Come; let us squeeze hands all round; nay, let us all squeeze ourselves into each other; let us squeeze ourselves universally into the very milk and sperm of kindness.

Id.

¹¹⁶ *Bartleby*, *supra* note 1, at 14.

¹¹⁷ *Id.* at 14, 22.

¹¹⁸ *Id.* at 15.

¹¹⁹ *Id.* at 19.

to death.¹²⁰ When, on a Sunday morning the narrator stops into his chambers, he discovers that Bartleby is effectually homeless and making the office into his shelter.¹²¹ Not only that, Bartleby, who has forsworn most personal effects, except for “a blanket; . . . a blacking box and brush; . . . a tin basin, with soap and a ragged towel;” and “an old bandanna handkerchief” banking a little money, ostensibly hungers for impoverished nonexistence.¹²² Intuiting what are decidedly suicidal proclivities, the narrator begins to append death words to Bartleby, describing him as “cadaverous[],” as an “apparition,” as “Marius brooding among the ruins of Carthage,” as one with “dead-wall reveries,” as “the last column of some ruined temple.”¹²³

Therapeutic jurisprudence harmonizes with common sense. One such principle is that healthy people thirst for human contact and seek out a sense of “voice” or an opportunity to share stories with others.¹²⁴ And because individuals wish to be heard and acknowledged, therapeutic jurisprudence praises and cultivates listening skills.¹²⁵ Significantly, in *Bartleby*, the narrator unwittingly practices

¹²⁰ *Id.* at 16.

¹²¹ *Bartleby*, *supra* note 1, at 21-22.

¹²² *Id.* at 22-23.

¹²³ *Id.* at 21, 23-24, 30. For Melville, the deterioration of the once deific Marius ironically parallels the disintegration of worker Bartleby. See generally Plutarch: Caius Marius—The Internet Classics Archive (John Dryden trans., 75 A.C.E.), http://classics.mit.edu/Plutarch/c_marius.html; ADRIAN GOLDSWORTHY, IN THE NAME OF ROME: THE MEN WHO WON THE ROMAN EMPIRE 113-36 (Weidenfeld & Nicolson 2003); WILHELM IHNE, THE HISTORY OF ROME 4-5, 8 (Longmans, Green, & Co. 1882).

¹²⁴ See *supra* notes 87-95 and accompanying text (discussing voice, validation, and voluntary participation).

¹²⁵ See Michael D. Clark, *A Change-Focused Approach for Judges*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 11, at 140, 147 (advocating the use of therapeutic techniques by listening, along with “perceived empathy, acceptance, warmth, and self-expression” which can bring about positive behaviors). See also *supra* note 91 and accompanying text (discussing listening and validation).

a little therapeutic jurisprudence by attempting to grant the scrivener voice and validation—an opportunity to tell his story and be heard. This too aborts, as Bartleby “prefer[s] not to” share anything about himself or his past.¹²⁶ Not only is Bartleby voiceless and invalidated, but he is likewise drained of any need to acquire or regain what has been lost. Beyond even that, he has jettisoned the faculty of reason: in a “mildly cadaverous” retort to his boss he conveys that he “would prefer not to be a little reasonable.”¹²⁷

Eventually, Bartleby ceases his only remaining activity, informing the narrator that he is permanently retiring from copying.¹²⁸ At this juncture, all that Bartleby has left is his ability to negate with his mantra, “I prefer not to.” But he goes even further than that by negating the negation itself: he undermines his own “preference” to not work, by not quitting and staying “immovable in the middle of the room” like an “intolerable incubus.”¹²⁹ The stage-three Bartleby ousts reason, conversation, fresh air, food, housing, property ownership, and labor. Finally, the only thing he has left, his hollow incantation of “I prefer not to,” is nullified as well. Bartleby, the near corpse, prefers not to act on his only conceivable preference, that of abdicating the Wall Street workplace.

In stage four, Bartleby is numb and then dead. When the narrator abandons his own office, Bartleby becomes even more limp and apoplectic—“the motionless occupant of a naked room.”¹³⁰ He lets

¹²⁶ *Bartleby*, *supra* note 1, at 25-26.

¹²⁷ *Id.* at 26.

¹²⁸ *Id.* at 28.

¹²⁹ *Id.* at 35-36.

¹³⁰ *Id.* at 38.

his severance pay drop to the floor and has zero reaction when all of the surrounding furniture is hauled away. The scrivener, as a desiccated husk, exemplifies a condition that psychologist, Martin Seligman, has labeled “learned helpless.”¹³¹

In his study, Martin Seligman identifies the ingredients of learned helplessness: “[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome.”¹³² Seligman gives accounts of his experiments on animals who were subjected to pain that they could neither control nor avoid. Unlike those in the control group with a means of escaping the agony, the helpless subjects eventually stopped eating and became limp and paralytic.¹³³ Seligman parallels “learned helplessness” in animals and in human beings: when human institutions or procedures resemble the animal laboratory that engenders learned helplessness, they too promote “the expectation that no voluntary action can control the outcome,” and that all such efforts are useless.¹³⁴

¹³¹ See SELIGMAN, *supra* note 14, at xvii-xviii.

¹³² *Id.* at xvii.

¹³³ *Id.* at 42-44 (describing how uncontrollable shock produced more anxiety in rats and resulted in the “breakdown of a well-trained appetitive discrimination”). See also *id.* at 44 (“[H]elplessness is a disaster for organisms capable of learning that they are helpless. Three types of disruption are caused by uncontrollability in the laboratory: the motivation to respond is sapped, the ability to perceive success is undermined, and emotionality is heightened.”).

¹³⁴ *Id.* at xvii. See also *id.* at 31 (discussing how “[h]elplessness is a general characteristic of several species, including man”); Gould, *supra* note 88, at 873 (“The amotivational system takes over when a person perceives ‘that there is no relationship between behaviors and rewards on outcomes. Perceived competence, self-determination and self-esteem tend to be extremely low. People who are amotivational feel helpless, incompetent and out-of-control.’”) (quoting Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications of Mental Health Law*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 11, at 33).

Stage-three Bartleby was just a hair's breath away from learned helpless and his oblation, "I prefer not to," was all that was left of his volition. Stage-four Bartleby, however, plummets deeper into the abyss. When the boss evacuates his office, Bartleby is bereft of an audience and of directives to disavow, which ejects him into emptiness and black catatonia. When the narrator visits his old building and again offers to find Bartleby work, and even give him a home, the near cadaver appears stiff and "stationary," and prefers nothing but unadulterated oblivion.¹³⁵

Subsequently, when the narrator locates the scrivener in the Tombs, Bartleby, even more suggestive of one of Seligman's victims, looks starved, disengaged, and apoplectic. In stage four, Bartleby drops dead in the Tombs, huddled at the base of a wall, like a wasted laboratory rat. As such, the voiceless, involuntary, and invalidated path leads only to the grave.

III. BARTLEBY'S OFFICE AND TODAY'S LAW FIRM

Law students tend to either dislike Bartleby or simply banish him from their consciousness. As Carrie Menkel-Meadow explains:

Why would any law student "identify" with Bartleby, the (eventually) homeless, almost speechless, and seemingly powerless worker stuck on the lower rungs of the labor hierarchy of the nineteenth century? This is precisely why most students go to law school—to be more than Bartleby. They aspire to be self-actualizing professionals, who choose their own work, who make a sufficient living in order to have a fine home and car and to take vacations, and who have

¹³⁵ *Bartleby*, *supra* note 1, at 40-41.

some semblance of control over their lives. Certainly the modern law student and lawyer would never choose to live at the office.¹³⁶

Menkel-Meadow predicts that many of our graduates will “soon learn about the proletarianization of the professional class,” which is a subject that has sired its own body of scholarship.¹³⁷ In a recent *ABA Journal* article, Scott Turow, focusing on litigators, decries a “life increasingly [lived as] a highly paid serfdom—a cage of relentless hours, ruthless opponents, constant deadlines and merciless inefficiencies” and suggests that “people as smart and dedicated as we are can do better.”¹³⁸

It is also hard to ignore two unsettling books, one by William R. Keates, describing almost two years in “one of the largest, most prestigious law firms in the country,” that left him “burned out and completely dissatisfied with practicing law.”¹³⁹ Another by Cameron Stracher, giving a blow-by-blow account of newly minted lawyers with “the long hours, the haggard faces, the missed dates” and cracking voices trying to explain to loved ones why coming home for dinner is no longer an option.¹⁴⁰

Adding to this growing genre is a superb article by law professor, Patrick Schiltz, who attributes professional ills, like poor health, depression, anxiety, mental illness, alcoholism, drug abuse,

¹³⁶ Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film And Television, and Ethical Choices Regarding Career and Craft*, 31 *MCGEORGE L. REV.* 1, 8 (1999).

¹³⁷ *Id.* at 11.

¹³⁸ Turow, *supra* note 8, at 36, 37.

¹³⁹ KEATES, *supra* note 8, at v.

¹⁴⁰ Stracher, *supra* note 8, at 12.

divorce, and suicide, to a sweatshop culture, one especially prevalent in the big firms where “the purported non-monetary advantages . . . either do not exist or are vastly overstated.”¹⁴¹ Schiltz, who like other graduates, was “burdened by heavy student loan debt, . . . sick of living in ‘genteel poverty’ . . . [and] looked forward to making real money for the first time in [his] life,” enlisted in such a firm and eventually marched out, “giv[ing] up a ton of money in return for work that was more enjoyable and less stressful.”¹⁴²

Schiltz is, of course, correct that economic pressure prods graduates into such places. He, moreover, detects what I myself have seen in the course of my fifteen years as a law professor: namely, that law schools, whether intentional or not, transmit the “subliminal message” that “‘[r]eal’ lawyers work in large firms representing corporate and affluent clients.”¹⁴³ It is true that the institution, like the media, implicitly glamorizes the large firm into sex, glitz, and power. Here I confess, regretfully, at times my own students accord me undeserved respect for the sole reason that I ostensibly flourished in such a venue for more than half a decade. At the same time, they are inclined to undervalue some wiser, worthier, more courageous colleagues, who have sacrificed underpaid years of their lives to more meaningful work in public service.

Bartleby is literature that can help dispel some myths that have sustained such a law firm culture. Brook Thomas has said that

¹⁴¹ Schiltz, *supra* note 7, at 898.

¹⁴² *Id.* at 925, 951.

¹⁴³ *Id.* at 925 (quoting Henry Rose, *Law Schools Are Failing to Teach Students To Do Good*, CHI. TRIB., July 11, 1990, at 17).

Melville's story is not just a daguerreotype of the "alienated worker," but rather "Bartleby functions in the story to alienate us from . . . the type of thinking that in retrospect we can recognize as legitimizing the existence of an alienated work force."¹⁴⁴ If we can abide by what Thomas sees as a salutary goal, then what can help us get there, or rather help "alienate" ourselves from the kinds of forces that pulverized Bartleby, is to truly see how Melville's Wall Street office resembles contemporary law factories. After all, both Bartleby's "tomb" and today's big firms not only make human beings into machines, but also construct walls and spawn insatiable hunger.

A. Human Machinery

Both Melville's Wall Street office and today's law firms treat human beings like machines. In *Bartleby*, the narrator has a purely utilitarian view of his servants.¹⁴⁵ Turkey, Nippers, and Ginger Nut, whose real names have been supplanted by nicknames predicated on their office idiosyncrasies, have no identities outside of the work place. For the narrator, they, and later Bartleby, are just tools that help make him money.

In Keates' *Diary* of his first year in the law firm, his bosses similarly have a purely utilitarian take on their associates. Keates described how Brad, his supervising attorney, wanted to "lock [him] in a room" for the weekend so that he could "walk out on Monday with

¹⁴⁴ THOMAS, *supra* note 49, at 165.

¹⁴⁵ See generally Mordecai Marcus, *Melville's Bartleby As A Psychological Double*, in A COLLECTION, *supra* note 3, at 107, 110 (calling the office a "world of mildly smug self-satisfaction and mechanical behavior").

the finished presentation.”¹⁴⁶ After “having realized a simple truth: Brad doesn’t give a s**t about me, as long as I get the work done,” Keates felt he was morphing into a cadaver:

I had a full night’s work ahead of me (despite Brad’s change of mind) and returned to my office. As if things weren’t bad enough, Brad called me at about 8:00 p.m. and dumped more work on me. When I got off the phone, I slumped down in my chair, overwhelmed with work. I felt like I was being buried alive and wished I were someone else.¹⁴⁷

“[T]ired, frustrated, bitter, and . . . fed up,” Keates felt exploited and stripped of life.¹⁴⁸

In Melville’s law office, the employees are all noticeably aberrated. The narrator tolerates this, but not out of real kindness or compassion. Rather, he believes that giving them a little space to vent will stimulate productivity and profit.¹⁴⁹ The lawyer in fact tells us that he indulges Turkey’s “eccentricities” because he is “a most valuable person to [him],” and that Nippers, “like his compatriot . . . was a very useful man to [him].”¹⁵⁰ Interestingly, quite a few Melville scholars have noticed that the lawyer’s microcosm is populated with doppelgangers, or as Stanley Brodwin suggests, “Nippers and Turkey are half men, each one efficient for half a day, together mak-

¹⁴⁶ KEATES, *supra* note 8, at 121.

¹⁴⁷ *Id.* at 121-22.

¹⁴⁸ *Id.* at 122.

¹⁴⁹ Barnett, *supra* note 74, at 381 (noting that the narrator “realizes that self-interest will be served by charitable indulgence. When his scriveners assert their individuality and unconsciously rebel against their dehumanized labors, he tolerates the resulting eccentric behavior because it is still profitable to his business to do so.”).

¹⁵⁰ *Bartleby*, *supra* note 1, at 6, 8.

ing only one day of economic—and, in a fully Marxian sense—alienated existence.”¹⁵¹ The lawyer, who accepts that “[w]hen Nippers *was on*, Turkey *was off*,” sees them not as intact beings, but rather as interlocking cogs in the capitalistic engine.¹⁵²

It is undeniable that such doppelganger syndrome is an aspect of law firm culture. In many large firms, there are these “half-men” that conjoin into one crank shaft. In the firm in which I worked, typically there were these symbiotic pairs in which one lawyer, the rain-maker (usually a partner) pulled in business and the other, an underling, more of a scrivener (typically an associate) did the actual grunt work. The institution tended to depreciate the worker bee, viewing him or her as the fungible component.

In his book, Stracher describes the New York office of Crowley & Cavanaugh, a firm with ninety-seven partners and 205 associates, as a factory where “a minor obsessive/compulsive disorder was practically a job requirement,” he elaborates:

There was the lawyer who lost one hundred pounds by drinking only liquids for several months. Another who kept color-coded files on every woman he dated. A third who literally ate McDonald’s garbage from the bags stacked on the sidewalks. A fourth who brought a fax machine with her to the hospital delivery room.¹⁵³

¹⁵¹ Stanley Brodwin, *To The Frontiers of Eternity: Melville’s Crossing in “Bartleby The Scrivener,”* in A COLLECTION, *supra* note 3, at 178. See also Marcus, *supra* note 145, at 107 (suggesting that Bartleby is a “psychological double for the story’s nameless lawyer-narrator”); Zlogar, *supra* note 48, at 524-25 (noting there is “a pattern of seesawing independence whereby one character assumes the role or function of another, or two characters’ fortunes reciprocally rise and fall. The most obvious example of this motif is the ‘natural arrangement’ between Turkey and Nippers.”).

¹⁵² *Bartleby*, *supra* note 1, at 10 (emphasis added).

¹⁵³ STRACHER, *supra* note 8, at 32.

Stracher, analyzing the mindset, explains that such disorders are ignored as long as the expendable hirelings get the hours billed, crank out documents, and enable the more prized partners to drive great cars, live in McMansions, pay alimony to ex-spouses, and join prestigious country clubs.

In Melville's Wall Street office, the work is tedious and the boss knows it. He states, "[c]opying law-papers [is] . . . proverbially a dry, husky sort of business" and the only other task of verifying the accuracy of a copy, "is a very dull, wearisome, and lethargic affair."¹⁵⁴ It is a sterile place that banishes thought, creativity, and autonomy.

Melville uses contrast and irony to underscore the stifling, tomb-like nature of the office. Melville's narrator enjoys the political sinecure of judge of the New York Court of Chancery, a tribunal, which in the eighteenth century aimed to ensure natural justice and essentially integrate ethics, morality, conscience, flexibility, and feeling into the law.¹⁵⁵ Ironically, chancery is nascent in the very sentiments the boss repels: for him, the equitable post is just about a reliable stream of cold cash.¹⁵⁶

¹⁵⁴ *Bartleby*, *supra* note 1, at 10, 12.

¹⁵⁵ See Kuebrich, *supra* note 73, at 399 ("The original purpose of the system of chancery was to supplement the regular judicial system and to temper and correct the rigidity of written law by allowing for the imposition of judgments based upon natural law and conscience."); THOMAS, *supra* note 49, at 172 (discussing how "[i]n the eighteenth century, equity consisted of a system of substantive rules that could be appealed to ensure 'natural justice' " and how "[i]n the nineteenth century the concept of equity was positivized so that it was turned into a set of procedural remedies."). See also Irving Adler, *Equity, Law and Bartleby*, 51 SCI. AND SOC'Y 468 (1987-88).

¹⁵⁶ See Kuebrich, *supra* note 73, at 399 ("Although the lawyer deplores the termination of the [chancery] court, he demonstrates no righteous concern for the well-being of the citi-

In a similar paradox, the narrator mentions Byron, “the metesome poet,” who would probably rebel against the task of verifying a “law document of, say five hundred pages, closely written in a crimping hand” and displays a bust of Cicero directly behind his own desk.¹⁵⁷ Although such references to Byron and Cicero have perplexed *Bartleby* scholars, it is quite plain what they are doing in the story.¹⁵⁸ Specifically, the passionate, romantic poet and equally creative Roman orator and statesman, both of whom are blessed with eloquence and imagination, contrast with the copyists who silently plod away at transcription, which is dry and prosaically uninspired.¹⁵⁹

In Stracher’s book, the work itself is also lifeless and plodding. As a law graduate from Harvard, Stracher believes that few law students, especially the elite, begin with dreams of toiling away in one of the large law plants. Instead, graduates typically envision more creative and meaningful pursuits, “like the ACLU or the Center for Constitutional Rights—liberal organizations that defend a woman’s right to choose, equal access to political representation,

zenry but simply bitterness at being personally deprived of a ‘life-lease of the profits.’”) (quoting *Bartleby*, *supra* note 1, at 4); Thomas, *supra* note 49, at 172-73; West, *supra* note 74, at 207 (“We should not . . . confuse the equitable tilt of Chancery for a similar inclination in the narrator . . .”).

¹⁵⁷ *Bartleby*, *supra* note 1, at 12.

¹⁵⁸ See, e.g., Emery, *supra* note 60, at 184-85 (pointing out that the bust of Cicero, the “eminent barrister” is “in one sense, grossly out of place in the narrator’s office” because Cicero “maintained, in fact, that without a measure of fellow feeling unadulterated with self-love there could be no virtue of any kind”).

¹⁵⁹ See West, *supra* note 74, at 207-08, stating:

What this “story of Wall Street” is about . . . is not the bonds and mortgages themselves, (and much less, the holders of the bonds and mortgages) but the individuals charged with the mechanical aspects of the work required to produce those bonds and mortgages: the scribes who copy, and re-copy, and re-copy, in longhand, the requisite documents, some of them hundreds of pages long.

[and] free speech.”¹⁶⁰ Such students, however, tend to skid off that altruistic, Byron-Cicero path “by their second year, when interviewers . . . swarm onto campus waving stacks of cash, dinners at expensive restaurants, and nights at a posh hotel.”¹⁶¹

Once recruited, Stracher, like Melville’s scriveners, finds himself isolated and entombed, “sitting on a box in [a] warehouse, the air stinking of mildewed cardboard, miles from another human being.”¹⁶² His work, like that in *Bartleby*, spells suffocation as he “spend[s] the greater part of [his] associate life producing documents, reviewing documents, arguing about documents.”¹⁶³ He sums it up:

Long days, late nights, my labors chewed up and spit out by senior associates without comment. It’s an apprenticeship, to be sure, but so far no one’s taken much time to teach me anything. The work I’ve done feels superfluous: databases that aren’t used, research memos that disappear into someone’s file drawer, briefs that are reconstructed from whole cloth. Hard work is one thing, make-work an entirely different matter.¹⁶⁴

For Stracher, while such Sisyphean tasks are divorced from his talent and training, they provide no stimulation, no potential for growth, and no sense of accomplishment. They are also all-consuming because the associate, like *Bartleby*, ends up literally living in the office.

¹⁶⁰ STRACHER, *supra* note 8, at 3.

¹⁶¹ *Id.* at 3-4.

¹⁶² *Id.* at 130.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 110-11.

Bartleby's boss does not just claim "power" over his workers, but sees them more precisely as property. In fact, one of the big things we know about Melville's lawyer is his whole world revolves around property. That is, he deals with "rich men's bonds, and mortgages, and title-deeds," and adulates the very emblem of aristocratic wealth, John Jacob Astor.¹⁶⁵

Melville's narrator, for whom Astor's name "rings like unto bullion," does not hire his copyists, but "ha[s]" them.¹⁶⁶ Turkey is chattel, likened to a horse. When in a spurt of ostensible generosity, the narrator tosses Turkey a coat in hopes of "abat[ing] his rashness and obstreperousness of afternoons," he finds that "too much oats are bad for horses," that "precisely as a rash, restive horse is said to feel his oats, so Turkey felt his coat."¹⁶⁷ Nippers, who dresses with pizzazz, is equated with furniture, something that "reflect[s] credit upon [] chambers."¹⁶⁸ And while each servant is allotted his own tiny turf, even that belongs to the narrator, who does not hesitate to rummage through Ginger Nut's or Bartleby's desk drawers.

When Bartleby shuts down, the lawyer sees him as a fizzled possession that "ha[s] now become a millstone to [him] . . . useless as a necklace" or as "harmless and noiseless as any of [his] old

¹⁶⁵ *Bartleby*, *supra* note 1, at 4. For discussions of John Jacob Astor, see Kuebrich, *supra* note 73, at 398-99 (explaining how Astor made his millions and acquired his vast property through assertion of dominion over the urbanized working classes of industrial society); Sten, *supra* note 3, at 35 ("In addition to the lawyer's self-interestedness and the dependence of his imagination upon money even for metaphor, what is revealed here is his adulation of Astor's wealth and power"); Zeitlin, *supra* note 74, at 113, 116 (discussing the significance of Astor in Melville's narrative as being a "sign" of a Marxian exploitation of Bartelby, who represents the working class).

¹⁶⁶ *Bartleby*, *supra* note 1, at 4-5.

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Id.* at 8.

chairs.”¹⁶⁹ At one point, the lawyer shoots questions at Bartleby: “[w]hat earthly right have you to stay here? Do you pay any rent? Do you pay my taxes? Or is this property yours?”¹⁷⁰ Through this, the narrator implicitly informs Bartleby that his copyists own no property because they *are* property. When the narrator eventually evacuates the office, all of the furniture is dragged out and Bartleby is just superfluous chattel left behind.

In many firms, managers tend to transmit debilitating messages to its Bartlebys, who endure crushing workloads and experience loss of control over their lives. They, like Melville’s lawyer, see the workers as property to be used, depleted, and discarded at will. But Melville’s nineteenth century lawyer does not just resemble the dictators in the contemporary terrain described by Keates and Stracher, but actually reminds me of a partner, who once supervised me at a large firm in Miami, Florida.

After I, the appellate lawyer, did the work in a high profile appeal, we won and overturned a large judgment against our client. Delivered to my office that day was something rare, a token of appreciation from the client in the form of a gift basket chock full of wines, cookies, chocolates, biscuits, pâtés, pastries, gourmet coffees, caviar, and fine cheeses. Almost the instant the news of such sumptuous bounty spread amongst the ranks, my boss stomped over to my “snug retreat,” pushed open the door without knocking, and confiscated the cherished prize. On his way out, he said, “[t]his belongs to me. And, by the way, don’t forget that you do too.” Perhaps I should have

¹⁶⁹ *Id.* at 29, 35.

¹⁷⁰ *Id.* at 33.

said, “I prefer not to.”

B. Walls

Melville’s office and today’s law firms are full of walls. In fact, Melville’s story is set on “Wall” Street and is all about walls.¹⁷¹ On one level, the walls are partitions between people, particularly between classes of master and servant. The narrator points this out when he informs us that the “folding doors divided my premises into two parts, one of which was occupied by my scriveners, the other by myself.”¹⁷² In his office, moreover, there are figurative boundaries between the workers themselves. That is, Turkey, Nippers, and Ginger Nut have no real ties to one another while each labors away in lonely solipsism. The only time the cast of scriveners appear to convene is to participate in that dreary task, verification of copy.

While the employees cannot boast of any heartfelt bonds with each other, Bartleby, who refuses to leave his “bachelor’s hall” behind the screen, epitomizes extreme, frigid hermitism.¹⁷³ He prefers not to join with the others to examine copy, prefers not to converse, prefers not to share intimate details of his past, and prefers not to go out and socialize. What makes him the disturbing “incubus” in the law office is that he hyperbolically prefigures what his cronies unconsciously fear they too will become—cold mutants, alien to the

¹⁷¹ Although Leo Marx, *supra* note 39, at 86, believes that “[t]he subtitle, ‘A Story of Wall Street,’ provides the first clue about the nature of the society . . . [as a] commercial [one], dominated by a concern with property and finance. . . . But the designation has a further meaning . . . [because] [t]he walls . . . hem in the meditative artist and for that matter every reflective man.” For Marx, “the actual floor-plan of [the] chambers” is extremely important, it signifies the artistic struggle of Melville himself. *Id.*

¹⁷² *Bartleby*, *supra* note 1, at 11.

¹⁷³ *Id.* at 22.

human race.¹⁷⁴

In his book, Stracher sees his firm in a similar vein—as a walled venue of inexorable estrangement:

Most of all, I remembered the coldness of law firm life. The contempt with which Charlie held younger associates. Caroline's unfocused assignments. Jensen's fair-weathered support. I remembered Jay's competitiveness and Daniel's inhuman work schedule. . . . What I didn't remember were any close friendships I had forged, any attempt among the lawyers to connect.¹⁷⁵

Stracher turns to Marx, who “postulated that a capitalist economy alienated man from the product of his labor.”¹⁷⁶ Stracher concludes that “[l]aw was just another job where the worker felt disconnected from his work” and that the big corporate firm substantiated the Marxist postulate by “pitt[ing] lawyers against each other in the struggle for partnership, isolate[ing] lawyers in the library and their offices, [and] tend[ing] to weed out the sociable and genial.”¹⁷⁷ In essence, institutions, like the law office in *Bartleby*, erect bulwarks that impede alliances.

The large firm in which I worked interposed similar barriers. It discouraged friendships amongst associates within the firm that conceivably derived from an at least subliminal fear that the proletariat would unite for an insurrection that could loosen the chains, destabilize the hierarchy, and jeopardize partner bonuses. On my very

¹⁷⁴ *Id.* at 36.

¹⁷⁵ STRACHER, *supra* note 8, at 213.

¹⁷⁶ *Id.* at 213-14.

¹⁷⁷ *Id.* at 214.

first day, my supervising partner indicated that he frowned on my fraternization with other young lawyers in the firm. A friend of mine in another firm, however, had it a little more rigid. His firm actually issued a rule prohibiting the associates from doing lunch together. As such, it deemed walls to be not merely advisory, but strictly mandated.

In *Bartleby*, the walls serve to foster Melville's analogy between the law office and a prison or tomb. One end of the lawyer's chambers "looked upon the white wall of the interior of a spacious sky-light shaft . . . [a] view [that] might have been considered rather tame than otherwise, deficient in what landscape painters called 'life.'"¹⁷⁸ At the other end, "windows commanded an unobstructed view of a lofty brick wall, black by age and everlasting shade."¹⁷⁹ This wall was actually "pushed up to within ten feet of [his] window panes."¹⁸⁰ What the lawyer depicts here is a black box.

Melville suggests that the narrator is not blameless. The lawyer not only sustains the prison, but actually worsens it by building little cells within the prison. With respect to his new inmate, the lawyer "assign[s]" Bartleby a corner which "commanded . . . no view at all" and there was a wall "[w]ithin three feet of the panes."¹⁸¹ A little light, however, seeped in and the lawyer, apparently not content with the extant enclosures, decides to confine the scrivener even more by procuring a screen to "entirely isolate Bartleby from [his]

¹⁷⁸ *Bartleby*, *supra* note 1, at 4-5.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 11-12.

sight.”¹⁸² It is here “behind his screen” that Bartleby at first toils away but then throws himself into one of the profoundest “dead-wall reveries.”¹⁸³

The lawyer, who is cognizant of the unhealthiness of the office, does nothing to fix it. When Bartleby initially stops copying, he conjectures that Bartleby’s work “by his dim window . . . might have temporarily impaired his vision.”¹⁸⁴ Although the lawyer swipes at the symptom by putatively granting his servant a little abstinence from writing, he does not try to remedy the malady’s lightless, lifeless cause and like a warden, maintains the status quo.

While the Wall Street office equals prison, Bartleby becomes an effectual prisoner there. As Leo Marx points out, “[i]n Wall Street Bartleby did not read or write or talk or go anywhere or eat any dinners (he refuses to eat them in prison too) or, for that matter, do anything which normally would distinguish the free man from the prisoner in solitary confinement.”¹⁸⁵ Later, the prison simile solidifies when Bartleby is dumped in the Tombs, a situs essentially no different from his Wall Street abode. Here, as in Wall Street, Bartleby “stand[s] all alone in the quietest of the yards, his face towards a high wall.”¹⁸⁶ When the narrator tries to persuade Bartleby (or rather himself) that things are fine, that the place is not “so vile,” and ejaculates “[l]ook, there is the sky, and here is the grass,” Bartleby responds, “I

¹⁸² *Id.* at 12.

¹⁸³ *Bartleby*, *supra* note 1, at 24.

¹⁸⁴ *Id.* at 28.

¹⁸⁵ MARX, *supra* note 39, at 97.

¹⁸⁶ *Bartleby*, *supra* note 1, at 43.

know where I am.”¹⁸⁷ For Bartleby, this is just another Wall Street jail.

After Bartleby dies, the narrator learns that Bartleby might have once been a “subordinate clerk in [a] Dead Letter Office” where “letters speed to death.”¹⁸⁸ While, as discussed below, the lawyer evolves to some extent, at least enough to bewail the tedium of that rumored job of “continually handling . . . dead letters, and assorting them for the flames,” he still fails to detect the striking similarity between the Dead Letter Office and his own Wall Street tomb.¹⁸⁹ In essence, Melville drafts what was Bartleby’s resumé: his early “pallid hopelessness” amongst “dead letters” or “dead men,” then his “cadaverous” imprisonment on Wall Street, and finally his “wasted” demise on the “cold stones” in the Tombs.¹⁹⁰ What the lawyer fails to realize is the sameness of each stint and how his own Wall Street office redundantly replicates the other walled contexts.

Today’s new lawyers also feel trapped in a world of walls. On a literal level this manifests itself in what is the cookie-cutter law firm decor, the cubicles for support staff and lawyers, all of whom feel shackled to their desks. But the real misery, as Schiltz explains, is attributed to the nostalgic loss of a life outside of the compound:

Every hour that lawyers spend at their desks is an hour that they do not spend doing many of the things that give their lives joy and meaning: being with their spouses, playing with their children, relaxing with their friends, visiting their parents, going to movies,

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 46.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 45, 46.

reading books, volunteering at the homeless shelter, playing softball, collecting stamps, traveling the world, getting involved in a political campaign, going to church, [and] working out at a health club.¹⁹¹

His admonitions, aimed primarily at those students that aspire to work in big firms, corroborate what Keates portrays in his own account of such a place, in which new lawyers, who routinely are sentenced to “60 to 100-hour workweeks,” feel as if they “live to work.”¹⁹² For him, “[a]part from the sheer fatigue of working gruesome hours, [there is] a zero-sum gain relationship between . . . work and . . . social life,” so much so that associates become as isolated as Melville’s scrivener, without “leisure activities and [a] social life.”¹⁹³ Tragically, many new lawyers feel as if they cannot break out of such jails and some, like Bartleby, even jettison the will to do so. Keates describes a rat-trap where the exploited feel hamstrung because they need a high salary to meet financial obligations.¹⁹⁴ For them, there is seemingly no egress.

While it appears that Bartleby has chosen the law office as his place to starve himself to death, he is not permitted to exercise even that choice. Melville is essentially telling us that the office is such a total lockup that it deprives Bartleby of the only thing that he seeks as escape—namely suicide. Bartleby later discovers that the actual Tombs, which is less of a prison than the lawyer’s office, at least

¹⁹¹ Schiltz, *supra* note 7, at 895.

¹⁹² KEATES, *supra* note 8, at 62.

¹⁹³ *Id.* at 62-63.

¹⁹⁴ See *id.* at 126 (explaining how lawyers often “purchase expensive items . . . to fill voids created by their jobs) (emphasis omitted).

grants him that modicum of freedom to die. In a haunting parallel, Stracher, recalls an associate at a firm, who at first “tried to jump through his firm’s windows, but they did not open.”¹⁹⁵ The associate, like *Bartleby*, left the hermetically sealed tomb to kill himself elsewhere; he ended up “leap[ing] to his death from his apartment balcony.”¹⁹⁶

C. Insatiable Hunger

Both Melville’s Wall Street office and today’s law firm are worlds of insatiable hunger. In *Bartleby*, the workers are obsessed with eating and drinking.¹⁹⁷ In fact, Turkey, Nippers, and Ginger Nut are named after food or libation.¹⁹⁸ Ginger Nut, the boy slave, secures food for the others and he himself binges on nuts. Turkey drinks until his face “blaze[s] like a grate full of Christmas coals” and Nippers, who suffers from indigestion, stuffs himself with gingernuts, cakes, and apples.¹⁹⁹

But in spite of all this consumption, the workers are still hungry and thirsty. The narrator explains, because “[c]opying law-papers [was] proverbially a dry, husky sort of business, my two scriveners were fain to moisten their mouths very often with Spitzen-

¹⁹⁵ STRACHER, *supra* note 8, at 200.

¹⁹⁶ *Id.*

¹⁹⁷ Cf. ROBERT N. MOLLINGER, *PSYCHOANALYSIS AND LITERATURE: AN INTRODUCTION* 87 (1981) (“Life, then, on Wall Street becomes eating on Wall Street, and the story no longer seems to be just sociological but also psychological. The characters in the story are hungry; this fact gives meaning to their relationships which draw on a psychological, developmental stage of early childhood.”); Blake, *supra* note 77, 157-58 (“*Bartleby* rarely speaks. Nothing comes out, but nothing goes in either because *Bartleby* is anorexic. The refusal of nourishment could represent a nostalgia for an original satisfaction not yet differentiated from the self.”).

¹⁹⁸ See MOLLINGER, *supra* note 197, at 85 (describing the story as “a feast of food”).

¹⁹⁹ See *Bartleby*, *supra* note 1, at 5-10.

bergs.”²⁰⁰ That is, because their work was dull and bland, they craved spice in their lives and “gobble[d] up scores of these [very spicy] cakes, as if they were mere wafers.”²⁰¹ When Turkey commits the rash blunder that almost gets him fired, that of “moistening a ginger-cake between his lips, and clapping it on to a mortgage, for a seal,” he is passive-aggressively telling his master that while you are all about mortgages and property, we are all about food and unrequited hunger.²⁰²

While the Wall Street cast of ravenous characters eat so often that it actually makes them sick, *Bartleby* is literally fasting to death. At first, the lawyer deludes himself that *Bartleby* is simply feasting on work, or as he puts it, “[a]s if long famish[ed] for something to copy, [*Bartleby*] seemed to gorge himself on my documents. There was no pause for digestion.”²⁰³ Then the lawyer conjectures that although *Bartleby* probably survives on gingernuts, he has not absorbed that into his system because he remains bland.²⁰⁴ Eventually, the lawyer realizes that *Bartleby* “never visited any refectory or eating house” and that “his pale face clearly indicated that he never drank beer like Turkey, or tea and coffee even, like other men.”²⁰⁵ In the end, although the prison grub-man, Mr. Cutlets, unsuccessfully tries to feed him, abstinence is what claims *Bartleby* in the end.

Today’s law firm is also about food and insatiable hunger.

²⁰⁰ *Id.* at 10.

²⁰¹ *Id.*

²⁰² *Id.* at 11.

²⁰³ *Id.* at 12.

²⁰⁴ *Bartleby*, *supra* note 1, at 17.

²⁰⁵ *Id.* at 24.

Stracher describes a new lawyer in his firm as “anorexic” while he himself continually endures hunger pangs.²⁰⁶ The firm, like Melville’s Wall Street office, revolves around bingeing. For the associates, toiling through the night, the sole reprieve issues in the form of an “accordion file of menus” and the right to have feasts dropped into the conference room.²⁰⁷ As Stracher illustrates:

[T]he room fogs immediately with the smell of garlic. . . . We tear into the bags, pulling out sealed aluminum vessels and white cardboard boxes. We sort through the dishes, shuffling them like pucks across the table. Wilson spills a sack of plastic cutlery that clatters onto the rosewood. Howie distributes diet Cokes. When all is arranged, we dive into the food, a glorious moment of silence while we take our first bites.²⁰⁸

The young lawyer, “star[ing] intently into [his] dumplings,” describes the “warm smell of Chinese food” as the “common goal.”²⁰⁹ Similarly, in Keates’ firm, the associates, who work practically nonstop, are famished and engorge food deliveries.²¹⁰ As Keates explains, while doing dull document review, “it’s hard not to overeat. Meals are the only thing we look forward to.”²¹¹

²⁰⁶ STRACHER, *supra* note 8, at 32 (“Her impossibly thin wrists poke from the sleeves of her blazer like pipe cleaners with fingers.”).

²⁰⁷ *Id.* at 40.

²⁰⁸ *Id.* at 41.

²⁰⁹ *Id.*

²¹⁰ KEATES, *supra* note 8, at 87.

²¹¹ *Id.* at 90.

[P]eople started getting hungry and we ordered an unbelievable amount of food from a number of restaurants. I’m amazed at the amount of food we ate, and the voracious way we ate it. We were hungry, but we were doing more than eating. We had been cooped up for 2 weekend days, our noses to the grindstone, and we needed some sort of relief. With meals as the only justifiable break, we attacked our food—our only

In *Bartleby*, the thirst and hunger represents social, psychological, and spiritual deprivation. No matter how much or how often Turkey, Nippers, and Ginger Nut imbibe, they cannot fill the void and get the nourishment they really seek. This is because what they crave are not goblets, gingersnips, cakes, or apples, but rather something essential, yet intangible—namely, voice, validation, and voluntary participation in the very decisions that define their lives.

Significantly, Melville's lawyer's chambers is a venue of squelched ambition. While in *Bartleby* all of the chomping workers ache to rise above their stations and loosen the shackles of menial labor, the boss just paternalistically humors this: he lets Turkey knight himself the "right-hand man" and attributes Nippers' suffering to "diseased ambition."²¹² Because Nippers is bored with "the duties of a mere copyist," the lawyer indulges his little charade of drawing up original legal documents and of "receiving visits from certain ambiguous-looking fellows in seedy coats, whom he called his clients."²¹³ Ginger Nut, whose father was a "car-man, ambitious of seeing his son on the bench instead of a cart, before he died," is delivered to the lawyer.²¹⁴ The narrator, however, feeds such hopes by giving the lad his official task of fetching sweets and by assigning him his very own desk. In essence, the lawyer scatters a few morsels here and there, but never delivers a balanced meal.

The Wall Street office is also zapped of spiritual content.

source of pleasure—with a vengeance.

Id. at 137.

²¹² *Bartleby*, *supra* note 1, at 7, 8.

²¹³ *Id.*

²¹⁴ *Id.* at 10.

While the *Bartleby* critics attach great importance to Melville's biblical and Christian allusions, the story does not ripen into pure allegory.²¹⁵ Rather, Melville consciously applies religious references as artistic strokes that serve to hint at what is missing in the Wall Street wasteland. Walter Anderson argues that in *Bartleby*, "[c]apitalism represents the dominant institutionalized form of self-interest. . . . [and] Melville's juxtaposition of Wall Street and Trinity Church (which actually stands at the head of that famous street) marvelously symbolizes the central paradox."²¹⁶ Such a "paradox" is perspicuous when the lawyer, destined one Sunday morning for Trinity Church "to hear a celebrated preacher" is derailed by an impulse to visit his chambers.²¹⁷ When he realizes Bartleby is actually living in the office and sees the crumbs of food in his desk, the narrator envisions a sphere of hunger, desolation, and despair, one which rattles his sense of Christian charity. He, in fact, points this out, exclaiming, "[t]hink of it. Of a Sunday, Wall Street is deserted as Petra; and every night of every day it is an emptiness."²¹⁸

For the scrivener, there is no brotherhood, no God, no house of worship and even Sundays spell desolation, solitude, and emptiness. The lawyer's epiphany triggers similes about abandoned ruins, like Petra and Carthage, which become objective correlatives of the lifeless shell that is both Wall Street and Bartleby.²¹⁹ Later when the

²¹⁵ See *supra* notes 62-72 and accompanying text (discussing the scholarship on Melville's biblical allusions and references to Christ).

²¹⁶ ANDERSON, *supra* note 62, at 386.

²¹⁷ *Bartleby*, *supra* note 1, at 21.

²¹⁸ *Id.* at 22.

²¹⁹ *Id.* at 22-23.

lawyer tries to leave Bartleby, he describes the scrivener fixed in the “deserted room,” like “the last column of some ruined temple.”²²⁰ In essence, Bartleby’s context, the one that births him and ultimately deletes him is a desolate ruin, extricated from faith, communion, and love of God.

Near the end of the story, the lawyer pays a final visit to the Tombs and once again sees hunger and spiritual deprivation. The lawyer, confirming that Bartleby “[l]ives without dining,” murmurs that famous epitaph from Job, “[w]ith kings and counselors.”²²¹ In essence, Melville invites us to compare Bartleby with Job.²²² Job, who endured immense suffering, rejects death as a viable solution. When Job’s wife chastises him for not committing suicide and tells him to “curse God and die,” Job admits that he regrets his own birth, the fact that he “came out of the belly” instead of simply resting in peace with “kings and counselors.”²²³ Despite that, however, Job does not seek his own demise. Job, unlike Bartleby, neither surrenders to despair nor embraces the sanctuary of death.²²⁴ For Job, unlike learned-helpless Bartleby, his spiritual core is still in tact and he, continuing to engage in dialogue with other mortals and with God, ultimately garners reprieve and heals.

²²⁰ *Id.* at 30.

²²¹ *Id.* at 45.

²²² *Bartleby*, *supra* note 1, at 45 (exclaiming that he is asleep with “kings and counselors”).

²²³ *Job* 2:9-3:14. See Brodwin, *supra* note 151, at 189 (Melville’s allusion to Job “though it superficially acts as a quiet benediction and recognition that death levels all—scrivener and king—expands its meaning to a terrifying revelation if we read it in its full context of Job’s anguished lament on being born.”).

²²⁴ See Thomas R. Mitchell, *Dead Letters and Dead Men: Narrative Purpose in “Bartleby, the Scrivener,”* 27 *STUDIES IN SHORT FICTION* 329, 337 (1990).

Keates, discussing the rampant lawyer depression, recalls having drinks with Susan, a third year law student working part-time at the firm. He asked her whether she would be willing to enlist as a permanent associate after graduation. Susan's reply, "I don't know . . . Everybody seems so unhappy," propels Keates into reflections on his "lifestyle" as an associate, one "that was inescapably oppressive" and made him feel "trapped."²²⁵ He admits that "[t]he cumulative effect of serving the firm with blind loyalty around the clock, working in an environment in which [he] had little control, and feeling like [he] was 'selling out' for a paycheck and title were weighing ever more heavily on [him]."²²⁶ Keates essentially admits that he was as hopelessly famished as Tantalus and deeply depressed. Accordingly to Schiltz, such despair is aggravated by what is implicit in practice—the goading of new lawyers to pad time sheets, telling lies, breaking promises, and compromising the only thing they could still claim as their own—namely, their integrity.²²⁷

²²⁵ KEATES, *supra* note 8, at 129-30.

²²⁶ *Id.* at 130.

²²⁷ Schiltz, *supra* note 7, at 917-18.

Let me tell you how you will start acting unethically: It will start with your time sheets. . . . Maybe you will bill a client for ninety minutes for a task that really took you only sixty minutes to perform. . . .

....

And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every three hour research project will go down with an extra quarter hour or so. . . .

....

You will also likely become a liar. A deadline will come up one day, and, for reasons that are entirely your fault, you will not be able to meet it. So you will call your senior partner or your client and make up a white lie for why you missed the deadline. . . .

....

It is no secret, as Schiltz points out, that “[l]awyers . . . think about committing suicide and commit suicide far more often than do non-lawyers,” and an actual study in North Carolina revealed that “11% of lawyers had experienced suicidal ideation at least once a month for the past year.”²²⁸ In fact, I will not forget a certain morning when I was still in private practice. It was the very day that I should have been on top of the world. I had just received one of the largest firm bonuses and acclaim due to my near record-breaking amassing of billable hours. After I parked my new luxury vehicle and traversed the gray lot toward the ashen edifice, a senior partner in his infernal-red Ferrari swerved and almost ran me over. Although I did leap to the side, managing to avert peril in the nick of time, I distinctly remember hesitating and for that thanatotic split second, envisioned myself asleep “[w]ith kings and counselors.”²²⁹

In Melville’s story, the scrivener dwindles into a starved, defunct machine, isolated in the Wall Street prison. Lacking voluntary participation in decisions that shape his life, he becomes voiceless, invalidated, and suicidal. He is reminiscent of the subjects in Seligman’s laboratory, the ones that become limp and perish after being divested of the ability to halt the oppressive conditions that envelope

After a couple years of this, you won’t even notice that you are lying and cheating and stealing every day that you practice law. . . . The system will have succeeded in replacing your values with the system’s values, and the system will be profiting as a result.

Id.

²²⁸ *Id.* at 879-80.

²²⁹ *Bartleby*, *supra* note 1, at 45; see also *supra* notes 222-24 and accompanying text (discussing Job).

him.²³⁰ In his workplace, Keates portrays a constituency of drooping Bartlebys, who likewise “feel trapped . . . [and] believ[e] that they just don’t have viable options.”²³¹ Keates even talks about learned helplessness, concluding that “[a] feeling that you can’t make a substantial impact on your environment no matter how hard you work deprives you of the power over your environment that psychologists believe is crucial to personal satisfaction.”²³² As such, Melville’s Wall Street law office and today’s large firms are veritable clones.

IV. LAW SCHOOL CLINICS: LESSONS IN *BARTLEBY* AND THERAPEUTIC JURISPRUDENCE

The revolution against sweatshops is growing and many of its ring leaders want to make change by applying outside pressure. For example, Professor Schiltz advises law students to eschew big firms.²³³ If, however, such recruits cannot resist, he suggests they cross-examine prospective employers, who tend to “lie in their brochures, . . . lie during interviews, . . . [and] lie to their summer associates.”²³⁴ He endorses “tough questions” at recruitment dinners:

[A]sk them how many times last week they had dinner with their families. And then ask them what time dinner was served. And then ask them whether they worked after dinner. Ask them what their favorite television show is or what is the last good movie they saw. If they respond, respectively, *Welcome Back Kotter* and *Saturday Night Fever*, you will know

²³⁰ See *supra* notes 131-34 and accompanying text (discussing Seligman and “learned helplessness”).

²³¹ KEATES, *supra* note 8, at 123.

²³² *Id.* at 124.

²³³ Schiltz, *supra* note 7, at 943-44.

²³⁴ *Id.*

something's wrong. Ask them about their last vacation. Where did they go? How long did they stay? How many faxes did they send or receive while on vacation? Get some sense of what their lives are like.²³⁵

For Schiltz, "smart consumer[s]" can help students sort the good from the bad.²³⁶

While Schiltz's article speaks to students on the brink of entering the meat market, two Stanford law students spoke directly to the market itself.²³⁷ When they sent out letters to one hundred of the conglomerates requesting better conditions, they received only six responses.²³⁸ One of the students, Andrew Canter, apparently undaunted by the firms' reluctance to address his concerns, is helping to gather data and do rankings based on such factors as diversity, work-life programs, and billable-hour requirements. He aspires "to see law firms on the bottom of [the] rankings understand that they're going to lose talent by remaining on the bottom, and take steps to improve billable hours and attrition rates."²³⁹ He believes that it is feasible to facilitate some reform by warding students, especially the supposed elite, away from the kinds of tombs that Stracher and Keates depict in their books.

It is economic greed that stokes such monster firms, which

²³⁵ *Id.* at 948.

²³⁶ *Id.* at 949.

²³⁷ Filisko, *supra* note 9, at 28.

²³⁸ *Id.* (noting how one "firm's hiring partner called to argue, . . . stressing that it's possible to gauge how a firm will treat its associates by working there during the summer").

²³⁹ *Id.* See also David Gialanella, *Taming The Billable Beast: Three Firms Take Different Approaches to Change By-the-Hour Billing*, 94 A.B.A. J. 30, 30 (2008) (describing how three law firms changed "the billable equation last year in hopes of reducing associate and client dissatisfaction").

feed on a steady diet of expendable young associates, who bill countless hours for the institution until they combust.²⁴⁰ And, of course, outside pressure, like work-life balance ratings and “smart consumers” can conceivably motivate rehabilitation of at least some offenders, who naturally fear losing their pool of sloggers.²⁴¹ There is, however, another way to turn the tide, but it is the sort of thing that works more gradually and from within, and does so by injecting the impetus for change directly into the bloodstream of the beast.

It is no secret that what usually retards progress is lack of education. Our law schools typically neglect to teach students what to expect and demand of future employers. And law students can be pretty clueless: some have never worked at all and some graduate without ever having tasted actual law practice. Still others, who have had externships or brief gigs as summer associates, sometimes emerge with starry-eyed, unduly rosy visions of how their lives as new lawyers will play out. Not all law schools expose students to *Bartleby* or to his Wall Street prison with its human machines, redundant walls, and insatiable hunger. While some of today’s law schools offer classes in therapeutic jurisprudence, they are still in the minority, and even fewer schools sensitize students to the symptoms and causes of learned helplessness.

²⁴⁰ See Schiltz, *supra* note 7, at 901.

Firms make money off associates. That is why it’s in the interests of big firms to hire lots of associates and to make very few of them partners. The more associates there are, the more profits for the partners to split, and the fewer partners there are, the bigger each partner’s share.

Id.

²⁴¹ See *supra* notes 233-36 and accompanying text (describing what Schiltz calls the “smart consumer” approach).

To some extent our infirmities date back at least to Christopher Columbus Langdell, who was the Dean of Harvard Law School from 1870 to 1885 and still has a stronghold on law schools.²⁴² For Dean Langdell, legal education ensued from a scientific study of the law through cases and “consist[ed] of certain principles or doctrines.”²⁴³ One of the things we know about Langdell is he essentially incarcerated himself in the library.²⁴⁴

Professor Jerome Frank, in an early attack on legal education, described it as “too academic and too unrelated to practice.”²⁴⁵ In addition, professor Frank conveys that when Langdell was a law student “he was almost constantly in the law library.”²⁴⁶ Reputedly, Langdell, like *Bartleby*, made his office his home; in fact, it is said he went so far as sleeping “on the library table.”²⁴⁷ Later, in New York, Langdell basically practiced the same way for sixteen years: he preferred not to leave the library and like a scrivener, toiled away in a self-imposed emotionless retreat, one reminiscent of Melville’s *Wall*

²⁴² See Jerome Frank, *Why Not A Clinical Lawyer-School*, 81 U. PA. L. REV. 907 (1933) (discussing how the method of teaching derives from Langdell’s temperament, even more than his ideas); M.H. Hoeflich, *Plus Ca Change, Plus C’est La Meme Chose: The Integration of Theory & Practice in Legal Education*, 66 TEMP. L. REV. 123, 124-40 (1993) (discussing historical models of legal education from the American Revolution to the present); Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 88 (1989) (discussing the advantages of the apprenticeship model, which is better than Langdell’s case-based model); Ronner, *Some In-House Appellate Litigation Clinic’s Lessons in Professional Responsibility*, *supra* note 16, at 863-64 (discussing Langdell’s impact on legal education).

²⁴³ C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

²⁴⁴ See Frank, *supra* note 242, at 907-08.

²⁴⁵ ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AM. FROM THE 1850S TO THE 1980s 156 (1983) (citing Frank, *supra* note 242, at 908-12).

²⁴⁶ Frank, *supra* note 242, at 907.

²⁴⁷ *Id.*

Street office.²⁴⁸ As Frank put it,

The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the “atmosphere” of a case,—everything that is undisclosed in judicial opinions—was virtually unknown (and was therefore meaningless) to Langdell.²⁴⁹

Later, particularly after the Ford Foundation awarded the Independent Council on Legal Education for Professional Responsibility a considerable grant to fund clinics and field work,²⁵⁰ as well as The MacCrate Task Force emphasizing the teaching of actual lawyering skills, more clinics infiltrated the traditional Langdellian curriculum.²⁵¹ Recently, the American Bar Association Council of the Section of Legal Education and Admissions to the Bar adopted a standard, one approved by the ABA House of Delegates, that calls for more skills training in legal education, reinforcing what is now a fully-fledged clinical movement.²⁵² Further, The Carnegie Founda-

²⁴⁸ *Id.* at 908.

²⁴⁹ *Id.*

²⁵⁰ See STEVENS, *supra* note 245, at 230 n.95 (noting that the Ford Foundation granted about six-million dollars to the Independent Council on Legal Education for Professional Responsibility).

²⁵¹ ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, REPORT OF THE TASKFORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (the “MacCrate Report”) (1992), available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>. See Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 430 (2005) (“The new ABA Standards go considerably further by specifically describing the lawyering skills that law professors should teach their students and for the first time requiring that law schools offer their students some form of skills training.”).

²⁵² ABANet.org, Standards for Approval of Law Schools, <http://www.abanet.org/legaled/standards/standards.html> (adopted by the ABA House of Delegates, Feb. 14, 2005). See also Winick, *supra* note 251, at 429 (“The standard includes

tion for the Advancement of Teaching has published a study of the “way that law schools are able to develop legal understanding and form professional identity.”²⁵³ This objective should and will encourage an even greater emphasis on clinical legal education.

More law professors, who head up today’s law school clinics, practicing law alongside students, are discovering therapeutic jurisprudence. The professors find its emphasis on emotions, psychological well-being, imagination, and trust enrich and elevate their teaching and clinical programs.²⁵⁴ I believe that in-house law school clinics are quintessential contexts for imparting lessons from *Bartleby* and incorporating principles of therapeutic jurisprudence. Such clinics can help students not only learn to recognize and avoid learned helplessness, but also to demand and facilitate voice, validation, and voluntary participation in future employment. In turn, such empowered lawyers can and will inevitably have a positive impact on their workplaces and on the profession at large—my own experience tells me so.²⁵⁵

a new requirement that each student, in addition to litigation skills training, must receive substantial instruction in ‘other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.’ ”) (quoting Memorandum from John A. Sebert, Consultant on Legal Education for the Council of the Section on Legal Education and Admissions to the the Bar, to Deans of ABA-Approved Law Schools, University Presidents, Chief Justices of State Supreme Courts, Bar Admission Authorities, Leaders of Organizations Interested in ABA Standards, Deans of Unapproved Law Schools regarding revisions to ABA Standards 302 and 305 5 (Aug. 23, 2004) (on file with Professor Bruce J. Winick)).

²⁵³ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3, 9 (2007).

²⁵⁴ See generally Pariente, *supra* note 85, at 403 (discussing clinical legal education and how it can incorporate therapeutic jurisprudence).

²⁵⁵ See generally Winick, *supra* note 251, at 436-37 stating:

We try to teach our students that to be satisfied professionals and psychologically healthy people, they must, in their professional lives, act congruently with their inner values. Rather than looking externally for

A. The In-House Appellate Litigation Clinic

As a full-time law professor, I founded and supervised an in-house appellate clinic, which typically enrolled about ten to fourteen third-year law students.²⁵⁶ Under the student practice rules, the Florida Supreme Court certified these students as legal interns, which authorized them to appear in any Florida court on behalf of an indigent party.²⁵⁷ Unlike externships, where students are dropped in outside offices, like legal aid, the public defender, or the state attorney, our clinic functioned as an autonomous law firm stationed within the school itself.²⁵⁸

In this two-semester course, I aimed to give each student a chance to work on several appeals and do at least one oral argument. In running the clinic, I had multiple intertwined goals, one of which was to simply teach appellate practice and procedure, expanding the students' grasp of certain substantive areas of law, like evidence, constitutional law, and criminal procedure. The clinic was also de-

validation and truth, as the first year of law school may implicitly teach our students to do, they must discover these within. It is this lack of congruence that sometimes produces stress, anxiety, professional burn-out, depression, alcoholism, and substance abuse.

See also Charles Halpern, *Escape From Arnold & Porter*, 94 ABA J. 33, 34 (2008). Charles Halpern describes how spending a month in Louisiana with the Lawyers Constitutional Defense Committee doing volunteer legal work for the civil rights movement "fundamentally changed" him. *Id.* He explained that he "had glimpsed another kind of law practice, where my work had meaning for me and the larger society, as well as my clients." *Id.* at 34-35.

²⁵⁶ See Ronner, *Candor and the Sandbag*, *supra* note 16, at 868-76 (describing the clinic and giving an overview of its methods and objectives).

²⁵⁷ THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, § 11-1.2(b) (2006), www.floridabar.org/divexce/trtfb.nsf ("An eligible law student may appear in any court or before any administrative tribunal in this state on behalf of any indigent person . . ."); Ronner, *Candor and the Sandbag*, *supra* note 16, at 868.

²⁵⁸ See *Report of the Committee On the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 511, 511 (1992) (defining in-house, live-client clinical education); see also Ronner, *Candor and the Sandbag*, *supra* note 16, at 868-76 (describing in more depth how the in-house appellate clinic operated).

signed to give students a true taste of the process, frustration, and artistry of legal writing in a setting, which, unlike that of moot court, depends on an appellate brief that can have a significant impact on the life of a real human being. The clinic further aspired to not just afford an opportunity to argue a case in an appellate tribunal, but also shed light on the kind of rigorous preparation that is a prerequisite to fine oral advocacy.

On top of the goals of refining technical skills, gaining insight into appellate practice, and applying doctrines and theories gleaned from more traditional core courses, I also wanted our clinic to embrace the tenets of therapeutic jurisprudence, which as Chief Justice Barbara Pariente has said, already has made a discernible difference in diverse spheres.²⁵⁹ These include “unified family courts that emphasize an integrated approach to proceedings that involve children or families, . . . drug courts that promote treatment over incarceration, [] alternative dispute resolution that is an essential element of the mediation programs . . . [and] criminal law practice [with] a focus on client rehabilitation.”²⁶⁰

There is presently a substantial body of scholarship on how therapeutic jurisprudence has changed the way lawyers relate to clients and its influence on the way the legal system treats litigants.²⁶¹ Now there is also literature on how law school clinics can apply therapeutic jurisprudence to foster the health and healing of clients.²⁶²

²⁵⁹ See Pariente, *supra* note 85, at 403.

²⁶⁰ *Id.*

²⁶¹ See *supra* notes 82-86 and accompanying text (discussing therapeutic jurisprudence and how it has branched out into nearly every area of the law).

²⁶² See Pariente, *supra* note 85, at 403 (discussing therapeutic jurisprudence in clinical

There is, however, less coverage of how clinicians can use therapeutic jurisprudence to create a microcosm in which the student-lawyers themselves have voice, validation, and voluntary participation.

Professor Leslie Larkin Cooney, who has addressed this issue, believes that “the application of Therapeutic Jurisprudence to clinical teaching can have far ranging results;” she describes the traditional classroom as the kind of antiseptic domain that would have pleased Bartleby’s boss.²⁶³ Cooney points out that “in the typical law school class, empathy is not something to be tolerated [and] professors frequently reinforce the notion that feelings get in the way of analysis and should be discarded, or at least suppressed.”²⁶⁴ She advocates the incorporation of emotions, empathy, and interpersonal skills right into the course.

I, like Cooney, realized that therapeutic jurisprudence need not be a distinct facet, but can infuse every aspect of the clinical experience. This, in fact, occurred when our clinic accepted a case from the public defenders office, which the students successfully litigated all the way up to the Florida Supreme Court. Because, as others have discovered, narratives are powerful and also compatible with clinics,²⁶⁵ I will rely on story telling to show how, in the context of

legal education and legal skills training).

²⁶³ Leslie Larkin Cooney, *Heart and Soul: A New Rhythm for Clinical Externships*, 17 ST. THOMAS L. REV. 407, 407 (2005). Cooney, however, deals with externships. She “explores the concepts and development of Therapeutic Jurisprudence and outlines the benefits derived from incorporating it in a direct and thoughtful manner into the teaching of an extern law school clinical setting.” *Id.* See *id.* at 413 (discussing how some law professors in traditional classes “squench or suppress” the use of interpersonal skills).

²⁶⁴ *Id.* at 413.

²⁶⁵ See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (discussing the importance of “legal storytelling” in legal scholarship); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of*

working on this appeal, student lawyers united and essentially built their own firm, which, in stark contrast to Bartleby's Wall Street tomb, functioned without human machines, walls, and insatiable hunger.

B. The *Woodruff* Appeal

*State v. Woodruff*²⁶⁶ began in July 1993 when the police arrested our client and issued multiple misdemeanor tickets: "two for driving under the influence of alcohol (DUI) and causing serious bodily injury, two for DUI with property damage, and one for driving with a suspended license."²⁶⁷ Woodruff, who at that time was represented by the public defender's office, pled not guilty, and the matter was set for trial in county court.

On August 4, 1993, the State filed an information in circuit court charging Woodruff with two counts of DUI with property damage and one count each of DUI with damage to the person, DUI impairment, DUI with excessive blood alcohol level, driving with a suspended license, and DUI after three previous DUI convictions. These charges arose from the [same] incident for which the misdemeanor tickets were issued.²⁶⁸

Feminism and Clinical Education, 75 MINN. L. REV. 1599, 1601, 1630-34 (1991) (describing how personal stories can raise consciousness); Peter Margulies, *The Mother with Poor Judgment And Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 697 (1994) (discussing the value of narrative in learning about difference); Ronner, *Candor and the Sandbag*, *supra* note 16, at 875 (positing that narrative is "an appropriate way of not just talking about, but actually capturing the clinical experience") (citing Margulies, *supra*, at 697)).

²⁶⁶ *State v. Woodruff (Woodruff II)*, 676 So. 2d 975 (Fla. 1996).

²⁶⁷ *Id.* at 976.

²⁶⁸ *Id.* at 976-77.

Because different state attorneys were handling the matters, no one had tried to consolidate the two cases and thus, they had a fiasco on their hands: there were two related pending matters—one in county court and one in circuit court.²⁶⁹

On October 4, 1993, Woodruff filed a notice of expiration of speedy trial in county court because he had not been brought to trial in the ninety-day speedy trial period.²⁷⁰ “Because Woodruff had still not been brought to trial by December 2, 1993, he filed a motion to discharge” in county court.²⁷¹ In the circuit court, Woodruff also filed a motion to dismiss the information on the basis of double jeopardy.²⁷² “[T]he State [responded by] nol-pross[ing] the misdemeanor tickets.”²⁷³ The circuit court then granted Woodruff’s motion to dismiss the information.²⁷⁴

When the State appealed the order dismissing the information, we accepted the case from the public defender’s office. We wrote the briefs, orally argued the case in the Third District Court of Appeal in Miami, Florida, and eventually prevailed.²⁷⁵ The district court concluded that double jeopardy precluded the State from prosecuting Woodruff for the offenses charged in the information.²⁷⁶ The court,

²⁶⁹ *Id.* at 977. As the Florida Supreme Court pointed out, “[h]ad the cases been consolidated by a timely motion of the State or Woodruff, the county court’s jurisdiction over the original charges would have been lost and the circuit court’s [eventual] dismissal of the information would have been void.” *Id.* at 977 n.2. (citing FLA. R. CRIM. P. § 3.151(a), (b) (West 2008)).

²⁷⁰ *Id.*

²⁷¹ *Woodruff I*, 676 So. 2d at 977.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *State v. Woodruff (Woodruff I)*, 654 So. 2d 585, 587 (Fla. 1995).

²⁷⁶ *Id.* at 588.

abiding by two of several independent arguments that we raised in our brief, believed that the offenses charged in the information were the same as those originally filed in county court and the only distinction between them was the severity of punishment.²⁷⁷ The court, agreeing with another one of our points, opined that even if the technical requirements of double jeopardy did not exist, the county court's discharge of the case amounted to an estoppel against prosecution of the related charges in circuit court.²⁷⁸

The state again appealed the decision, but this time to the Supreme Court of Florida, arguing that "neither double jeopardy nor estoppel" governed the case.²⁷⁹ Although the supreme court affirmed the result below, it did so by relying on another separate point. The court preliminarily agreed with the State that the situation did not meet the technical prerequisites for double jeopardy.²⁸⁰

²⁷⁷ *Id.* ("[T]he sole distinguishing factor between the misdemeanor and the felony [was] the severity of punishment" and thus the claim was barred on double jeopardy grounds). Furthermore,

[i]f a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue. . . . If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions.

Id. at 587 (quoting *State v. Rodriguez*, 575 So. 2d 1262, 1266 (Fla. 1991)).

²⁷⁸ *Id.* at 587.

The state correctly asserts that, technically, jeopardy did not attach because no jury was sworn, and no evidence was taken on the discharged offense. . . . "However, since the discharge under the [speedy trial] rule is for failure of state action to timely prosecute, such discharge by the clear language of the rule would rate as an estoppel against prosecution of defendant for the same offenses from which he had been previously discharged."

Id. (quoting *Rawlins v. Kelley*, 322 So. 2d 10, 13 (Fla. 1975)).

²⁷⁹ *Woodruff II*, 676 So. 2d at 977.

²⁸⁰ *Id.*

While there was no technical double jeopardy bar because the defendant was not actually placed in jeopardy, the court found that a speedy trial rule discharge “would rate as an estoppel against prosecution of defendant for the same offenses from which [the defendant] has been previously discharged.”²⁸¹ The court found that the principle of estoppel attached to the misdemeanor offenses contained in the information because these were indeed identical to those that the county court discharged.²⁸²

The court, however, declined to apply estoppel doctrine to the felony DUI offense charged in the information, instead finding that felony DUI is not the same offense as the misdemeanor ticket charges.²⁸³ As such, the court rejected the district court view that “the only difference between the two offenses is the severity of punishment.”²⁸⁴ As the Supreme Court explained, “[f]elony DUI requires proof of an additional element that misdemeanor DUI does not: the existence of three or more prior misdemeanor DUI convictions.”²⁸⁵ For the court, this meant that felony DUI was a completely separate offense and not just a penalty enhancement.²⁸⁶

Although the court declined to adopt the double jeopardy or estoppel reasoning of the court below, it relied on our other basis for affirmance. We asserted that the state could not obtain a felony DUI conviction due to the unique posture of the *Woodruff* case. Pursuant

²⁸¹ *Id.* (quoting *Rawlins*, 322 So. 2d at 13).

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Woodruff II*, 676 So. 2d at 977.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

to Florida law, “a felony DUI conviction is obtained by proving a misdemeanor DUI conviction on the present charge and proof of three or more prior misdemeanor DUI convictions.”²⁸⁷ Because each misdemeanor DUI charge had been discharged, it was impossible for the state to “prove the current misdemeanor DUI conviction” and thus, impossible for the state to prove the charge of felony DUI.²⁸⁸ While not all members of the court agreed, the majority found for our client on this basis.²⁸⁹

C. A Firm Without Human Machines, Walls, and Insatiable Hunger

Our clinic was a firm that employed human beings, not machines. As explained above, one of the causes of misery in *Bartleby's* Wall Street office was the nature of the work itself. It was tedious, consisting of copying, which was a “dry, husky, sort of business” and of verifying copies, which was the same “dull, wearisome and lethargic affair.”²⁹⁰ *Bartleby's* office was a sterile place that repelled feeling, creativity, and autonomy. As also discussed above,

²⁸⁷ *Id.* at 978.

²⁸⁸ *Id.* The court explained that “if Woodruff had been charged with the felony of DUI with serious bodily injury, a different result could have ensued.” *Id.*

²⁸⁹ Justice Wells authoring an opinion in which Justice Overton concurred, concurred in part and dissented in part. *Woodruff II*, 676 So. 2d at 979 (Wells, J., concurring). Justice Wells agreed with the majority that “neither double jeopardy nor estoppel has attached in this case to preclude the State from prosecuting the felony . . . (DUI) offense charged in the information.” *Id.* He also concurred “with the majority that because the felony DUI charge requires proof of an additional element that misdemeanor DUI does not, felony DUI is a completely separate offense and not simply a penalty enhancement.” *Id.* However, he disagreed with the majority’s conclusion that the Florida statute requires “that there be ‘a conviction for the current DUI misdemeanor in order to establish the crime of DUI after three previous DUI convictions.’ ” *Id.* (citing *Woodruff*, 676 So. 2d at 977-78 (majority opinion)). He thus believed that the majority decision conflicted with the court’s earlier statements and ignored the statute’s plain language.

²⁹⁰ *Bartleby*, *supra* note 1, at 10, 12.

Stracher, Keates, and other commentators depict contemporary law firm work as similarly lifeless and drab.²⁹¹

When we accepted the *Woodruff* appeal, the students were initially expecting that I, as their teacher, would extract issues and then methodically divvy up one or two to each student. In essence, they assumed they would be little more than mechanized scribes, sentenced to the Langdellian library stacks with a clearly delineated mission.²⁹² That did not happen.

Rather, we embarked on a brainstorming session in which the students themselves generated all of the issues and policies that could conceivably be involved in the appeal. At first, some students were timid with respect to voicing their opinions and sharing theories. That is, they tended to preface suggestions with, “this may seem silly” or “this might be farfetched” or “it could be a waste of time.” The self-deprecation, however, subsided as I tried to employ active listening and urged the students to do the same with one another. Michael D. Clark, a social worker and consultant to drug treatment courts, advocates the use of therapeutic jurisprudence by all professionals and for him, listening is key.²⁹³ Listening, along with “perceived empathy, acceptance, warmth, and self-expression,” brings out the best in people.²⁹⁴

Through listening in a nonjudgmental way to all student sug-

²⁹¹ See *supra* Part III.A (discussing the parallels between *Bartleby's Wall Street Office* and today's law firms, both being places that rely on human machinery).

²⁹² See *supra* notes 242-55 and accompanying text (discussing Langdell's approach to legal education and law practice).

²⁹³ See Clark, *supra* note 125, at 137.

²⁹⁴ *Id.* at 140. See also Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession*, *supra* note 86, at 102-10.

gestions and even repeating each one aloud, the class began to take off and students became visibly energized—so much so that some could not remain seated. The excitement was not just about the fact that we were the first in-house law school clinic in Florida to go all the way to the supreme court, but also because of the intellectual challenge of the work itself. For example, one student dashed off to research the history of the Double Jeopardy Clause and the policies behind it. Another wanted to learn how the estoppel doctrine first crept into the law, and hoped to unearth the first cases to ever rely on it. Another was interested in exploring the legislative history behind the DUI statutes, and still another was keen on understanding the jurisdiction of, and relationship between, our county and circuit courts. Two other students wished to research the rules of criminal procedure to see if there was anything that could conceivably bolster our client's position. A few others wanted to study Florida's "tipsy coachman doctrine" to ascertain how it might figure into the appeal.²⁹⁵ Also, certain students were more focused on the client himself, on learning of his whereabouts and of seeing if he was participating in any program that could help him with his supposed drinking problem.²⁹⁶

²⁹⁵ Under the "tipsy coachman" doctrine, "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999); see also James A. Herb & Jay L. Kauffman, *Tales of the Topsy Coachman: Being Right for the Wrong Reason: The Topsy Coachman is Alive and Well and Living in Florida*, 81 FLA. B. J. 36, 36 (2007) (discussing the history and application of the doctrine).

²⁹⁶ See Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession*, *supra* note 86, at 50-53 (describing how therapeutic jurisprudence is operating in criminal law and drug treatment programs, and how certain lawyers, like Dallas, Texas attorney John McShane, have built an actual therapeutic jurisprudence criminal law practice). See also Winick, *supra* note 251, at 468-69 (discussing how lawyers "[p]laying . . . an active part in their client's

One of the things I tried to convey from the start of the *Woodruff* case was that there was no such thing as a dumb idea or a waste of time. Essentially, any of their theories, even one that is ostensibly an excursus away from the task at hand, could lead to a golden nugget, an argument or strategy that could further the appeal. In Bartleby's Wall Street prison, the Chancellor, Byron, and Cicero, peered in from the periphery, smirking at the copyist chain gang silently toiling away at their dry and prosaically uninspired work.²⁹⁷ I was more intent on injecting equity, poetry, and creativity right into the heart of our kingdom.

But before venturing forth, it is an opportune time to anticipate what is an understandable knee-jerk response from those who know, and might even be inextricably wedded to the economic realities of law practice. Such critics might exclaim, "how easy for you" and point out that our clinic, serving the indigent, is doing free work. Because we lacked billable hours, the toll of real overhead, or the burden of making payroll, we could obviously indulge in that anomalous luxury of investing tons of time into whatever struck our fancy. Such critics might assert that the way we operated could never migrate into the real world, which revolves around billable hours and money, and which entails clients that not infrequently refuse to pay for all of the time a lawyer has devoted to a project. Such skeptics might add that our excessively thorough *modus operandi* might not even be feasible in a public or governmental office that is deluged

rehabilitation is a new and expanded role for the criminal defense attorney" and how he uses McShane's Dallas, Texas practice as a model in his class).

²⁹⁷ *Bartleby*, *supra* note 1, at 4, 12-13. See also *supra* notes 157-59 and accompanying text (discussing the Chancellor, Byron, and Cicero and their ironic role in Bartleby's office).

with work. In fact, quite a few lawyers in our local public defender's office, drowning in their caseload, admitted they were envious of our ability to put so much time into just one appeal. In short, such critics might even suggest that clinics like ours do students an injustice by leading them to expect a Shangri-La that can never be.

Such contentions are perhaps seductive, but they do not really cast doubt on the therapeutic jurisprudence law school clinic. Although the world operates one way, we *should* know and *need* to know what it is like to function another way.²⁹⁸ It is important for law students to know what kind of work they are capable of if they had all of the time in the world. It is important for law students to know what it feels like to be so truly excited by a legal problem and have the ability to exhaustively pursue it with all of the energy, vigor, and passion in their hearts and souls. They need to know, and should know what it is like to work without economic handcuffs, without the tethers of billable hours.

Professor Winick, a co-founder of therapeutic jurisprudence, coteaches a course, *New Directions in Lawyering*, with clinician Professor Bernard P. Perlmutter, in which the students explore “non-adversarial, psychologically beneficial, and humanistic ways to solve legal problems, resolve legal disputes, and prevent legal difficul-

²⁹⁸ See generally Winick, *supra* note 251, at 429-30 (describing how therapeutic jurisprudence, when integrated into teaching, can show students a different way of practicing, and help change the culture and promote more professionalism and personal satisfaction). See also Halpern, *supra* note 255, at 33-36. Halpern describes how his early work with the Lawyer's Constitutional Defense Committee showed him what it was to practice with meaning. *Id.* Halpern believes this not only gave him the background to reevaluate his career choice of practice in a large firm, but also the impetus to walk out and create the first public interest law firm, the Center for Law and Social Policy. *Id.* These experiences enabled him to become the first dean of the City University of New York School of Law, created to train advocates for the poor and disadvantaged. *Id.*

ties.”²⁹⁹ Winick and Perlmutter are committed to perpetuating “the idealism that most students entered law school with.”³⁰⁰ Winick explains:

Rather than stripping away their values, as the Socratic method sometimes does, leaving a values vacuum that contributes to de-professionalization and a cynicism about ethical standards, we need to remind law students about their moral vision and ask them to build a professional life for themselves that is congruent with it, rather than detached from or even alien to it. Only then will they be happy, self-fulfilled people, satisfied professionals, and effective lawyers.³⁰¹

In essence, Winick is convinced law school can help graduates to be true to themselves, and be “the kinds of lawyers they dreamed about being,” and in turn, be instrumental in ameliorating the culture typically associated with the legal profession.³⁰²

Such idealism is not just some academic pipe dream, but is also shared by individuals who have actually survived and succeeded in the world that Winick equates with a tank of “barracudas” or cage

²⁹⁹ Winick, *supra* note 251, at 433.

³⁰⁰ *Id.* at 476.

³⁰¹ *Id.*

³⁰² *Id.* In their class, Winick and Perlmutter ask their students to imagine that they are suddenly killed in an automobile accident and they are able to participate in their own memorial service. As part of this exercise, they ask the students to write some of the things they would like to hear about themselves. He explains the results:

Virtually all of the students wish to be remembered as hard-working lawyers who help their clients deal with a variety of problems and crises. They were good family members, helpful, contributing members of the community, and well regarded for their professional skills and honesty. It is not their accumulated net worth, the big house they live in, or the fancy automobile they drive that they wish to be remembered for. Rather, it is their good works and integrity.

Id. at 435.

of “pit bulls.”³⁰³ For example, in his article, lawyer-novelist, Scott Turow, calling for the death of billable hours, says that “[w]e have created a zero-sum game in which we are selling our lives, not just our time . . . [and have] foster[ed] an environment that doesn’t provide the right incentives for young lawyers to live out the ideals of the profession.”³⁰⁴ His one wish from “the proverbial genie” is for us to purge the profession of “dollars times hours.”³⁰⁵ But how can that ever happen if no one knows anything different? It is, of course, conceivable that some graduates may exit the clinic, compartmentalize the experience, and then placidly sign on as human machines in some law factory. It is, however, at least a little more plausible that the truly important clinic lessons will travel with students, who will have the incentive and chutzpah to insist that employers not treat them like Turkey, Nippers, and Ginger Nut, and thus, not relegate them to the category of expendable chattel.³⁰⁶ Also, in the event these students ever start their own firms, they are more likely to design environments that are amenable to voice, validation, and voluntary participation.

Unlike the office on Melville’s Wall Street, our little firm was not a world of walls.³⁰⁷ As explained above, in *Bartleby*, walls di-

³⁰³ *Id.* at 476.

³⁰⁴ Turow, *supra* note 8, at 37.

³⁰⁵ *Id.*

³⁰⁶ See Halpern, *supra* note 255 at 37 (explaining how his work with the Lawyers Constitutional Defense Committee planted the seed for his subsequent realization that he deserved something better, which he expressed to his wife: “I don’t want to find myself after another 25 years of law practice, registering another hollow victory, spending my efforts on behalf of a client I don’t give a damn about”).

³⁰⁷ See *supra* Part III.B (describing how Melville’s Wall Street Office and today’s law firms are worlds of walls).

vided master from servant and partitioned the drones from one another. While Turkey, Nippers, and Ginger Nut had minimal interaction with one another, Bartleby became the poster child of isolation and solitude. As discussed above, various commentators have similarly portrayed law firm culture as inimical to the formation of friendships and as hospitable to Bartleby-like loneliness.

Our clinic, however, was all about interaction, bonding, and teamwork. Because of the way the syllabus was designed, students were encouraged to not just fixate on the cases to which they were assigned. Rather, they were expected to address the issues and problems that arose in all pending clinic matters. In short, one student's problem was everyone's problem.

Brief writing, in particular, is an activity that can be quite lonely. But for us, it was definitely a collective enterprise. Although usually two students worked together on every appeal, each of them had to first produce her or his own brief. After students completed satisfactory individual drafts, I met with each team in conference to help them combine their individual products into a team brief. After the creation of the team brief, numerous conferences, and four or five rewrites, there was what we called an "omnibus editing meeting." At this point, all of the clinic students joined in the process. Through this session, our predominant tool was the human ear—we read practically the entire brief aloud and together chopped sections, reorganized arguments, simplified sentences, and replaced passive constructions with the active voice.

In the end, we produced an appellate brief ready for filing and

all of the students in the class took pride in the finished product. It is no secret that legal educators regret that students often do not write well in their traditional classes and tend to attach futility to seminar papers and the like.³⁰⁸ In the clinic, however, legal writing undergoes an apotheosis as students experience firsthand the potential power, artistry, and magic of legal writing. When the clinic year began, students were eager and excited primarily about one thing—the oral argument—which they believed was the crowning glory and their moment of being a “real” lawyer. By the time we began work on the *Woodruff* appeal, most of the students had already written briefs in which they asserted from one to four points and all of them had held in their own hands court orders setting oral arguments that typically allotted them a paltry ten minutes. When these students completed their oral arguments, they almost always felt the clocks had been fast forwarded and they lacked sufficient time to cover it all. That post-oral argument epiphany tended to shed new light on the written product as students took comfort in the fact that their briefs contained well-developed policy arguments or distinguished each and every case that opposing counsel kept touting as indistinguishable and determinative. For them, teamwork gave birth to legal writing that was

³⁰⁸ See John M. Burman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 J. LEGAL EDUC. 447, 450 (1992) (“I had the student in three traditional classes The student consistently wrote C exams. Yet his class participation always indicated a much higher level of understanding. In the clinic, that understanding blossomed.”); Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 654-55 (1993) (arguing that students in clinics place greater importance on their writing because they have more at stake); John P. Frank, *Appellate Litigation Skills Training: The Role of the Law*, 54 U. CIN. L. REV. 129, 129-30 (1985) (“As an employer, often of second year law clerks with little more than a first year of law school, I see about 100 moot court briefs a year drawn from the national student market For research, writing or advocacy they are not worth much.”).

not just about a food pellet being dropped into the Skinner box or about a red grade smeared on a cover sheet. It became something sacrosanct for its potential to impact the life of a real person.

Preparation for oral argument also entailed interaction, bonding, and team work. The clinic students constructed and adhered to a rigorous schedule in which they practiced over a dozen times before me and panels of other clinic students; these practice sessions became heated and even passionate as students confronted tough questions. In our case, as in most appeals, there were facts in the appellate record that blemished our position and also precedent that was arguably inconsistent with our argument. The students learned they could not bury these things or ignore them, but had to face them, deal with them, and even integrate them into their arguments.³⁰⁹

During the *Woodruff* appeal, Paula Park, a journalist, who was permitted to observe a session in which all of the students worked together to prepare a student for oral argument, described the practice panel as “cut[ting] him no slack, challenging him to explain and defend each of his key points.”³¹⁰ Park initially acknowledged that opposing counsel, the assistant in the Attorney General’s office, appeared to have the advantage. As she put it, the assistant, who had “13 years’ experience and more than a dozen supreme court arguments under his belt . . . made a formidable opponent for third-year law students.”³¹¹ When Park actually flew up to Tallahassee to wit-

³⁰⁹ See generally Ronner, *Candor and the Sandbag*, *supra* note 16, at 876-79 (describing how students dealt with negative precedent which ultimately won them the appeal).

³¹⁰ Paula Park, *Passing Orals: St. Thomas Law Students Learn the Way to Get to Tallahassee: Practice, Practice, Practice*, *MIAMI DAILY BUS. REV.*, Feb. 23, 1996, at A14.

³¹¹ *Id.* She also pointed out that “[m]ore formidable still is the court of public opinion,

ness the oral argument in our supreme court, she noticed that the interactions and teamwork had paid off. In her account, she described the clinic student as standing “squarely at the lectern . . . with an experienced orator’s aplomb,” and said that “[w]here the experienced advocate [the assistant in the Attorney General’s office] got ahead of himself and interrupted a justice during a question, the inexperienced student showed polite reticence.”³¹² She also did not fail to notice that Chief Justice Steven Grimes was visibly impressed and ended the session by smiling and telling the student, “[m]ay this court see you again when you’re admitted to the Bar.”³¹³

In Stracher’s exposé of law firms, he tells us that lawyers are “pitted . . . against each other” as they struggle for partnership and that the associates are imprisoned in the library and in their offices, which also thwarts alliances.³¹⁴ While Stracher recalls “coldness,” “contempt,” “competitiveness,” and “inhuman work schedule[s],” he does not remember “close friendships.”³¹⁵ In our wall-free clinic, student lawyers were not battling each other, but instead congealed as a unit striving toward a common goal. They worked together with warmth, respect, and cooperation. They voluntarily attended almost all of the oral arguments and typically waited until the end to applaud and hug their colleague on the courthouse steps. Through this process, they began to link excellence not with outdoing or surpassing

which is encouraging an ever tougher stance on crime.” *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ STRACHER, *supra* note 8, at 214. See also *supra* notes 175-77 and accompanying text (discussing Stracher’s description of the atmosphere in the firm).

³¹⁵ STRACHER, *supra* note 8, at 213.

their peers, but rather with supporting others and forging alliances.

Unlike the office in *Bartleby*, our clinic aspired to be anything but a venue of insatiable hunger.³¹⁶ In Melville's story, the relentless thirst and hunger represented social, psychological, and spiritual deprivation and coexisted with squelched ambition. Critics of today's law firms describe an analogous domain in which food becomes the surrogate for what is truly nourishing—the opportunity for individuals to have voice, validation, and voluntary participation in decisions that affect their lives.

Such critics also point out that new lawyers, who seldom get to leave libraries or document warehouses, only dream of what can never be—going to court, arguing cases, charting their own course. In his book, Stracher bewails the fact that “responsibility [is] bestowed upon associates in dribbles, where the most an associate could hope for was to take a deposition every now and again.”³¹⁷ He admits that although he “wanted to be in the emergency room with the gunshot victims,” he was stuck in a “cubicle filling out paperwork.”³¹⁸ In fact, Stracher tells us about an upcoming trial and how the supervising partner promised to share responsibilities such as the direct examination of a witness. After Stracher gets super-charged and exhilarated about the prospect of questioning a witness at a trial, the partner, straining to appear “genuinely contrite,” coldly reneges on

³¹⁶ See *supra* Part III.C (describing Melville's Wall Street Office and today's law firms as places of insatiable hunger).

³¹⁷ STRACHER, *supra* note 8, at 213.

³¹⁸ *Id.* (“I knew it didn't have to be that way; I had classmates who were in front of juries every day in the District Attorney's office, friends who went to small firms and tried personal injury cases. But I had made one decision, and they had made another.”).

her promise and effectually demoralizes him.³¹⁹

Such demoralization surely should not occur in a law school clinic. When it first became apparent the *Woodruff* case was going up to the Florida Supreme Court, there was an unanticipated silence and even aloofness on the part of the students. When I inquired, I learned that the students somehow believed that I would confiscate the case and steal the garland by arguing it myself. Because such a thing had never occurred in our clinic history, I was quite perplexed and ultimately traced this rumor to a student who had clerked over the summer in a firm and had witnessed such routine happenings there. When it became apparent to the students that their hunger would be sated, and that one of them would indeed do the actual argument, morale escalated considerably.

While firm culture, like Melville's Wall Street world, aspires to thwart off emotion and brand it as unprofessional, therapeutic jurisprudence scholars tout it as the very fulcrum of life itself and of law practice as well. For example, Ingrid Loreen, who writes about her own experience at the Immigration Unit of the Harvard Immigration and Refugee Clinic, admits to having struggled with issues like "display[ing] empathy" and "shar[ing] emotional recognition and support."³²⁰ She recognizes that the traditional law school curriculum and the legal profession tend to deport emotional intelligence and believes that therapeutic jurisprudence, which "obliges advocates to incorporate the emotional into the professional," can help rejuvenate "a

³¹⁹ *Id.* at 218.

³²⁰ Ingrid Loreen, *Therapeutic Jurisprudence and the Law School Asylum Clinic*, 17 ST. THOMAS L. REV. 835, 837 (2005).

profession that suffers disproportionate levels of depression, anxiety, substance abuse, and professional burnout.”³²¹

Loreen’s theories are surely borne out in the *Bartleby* office and in today’s firms, spheres in which workers are famished for emotional connections. While my clinic specialized in appellate work, which tends to have relatively minimal client contact, there were nevertheless plentiful opportunities to encourage students to acknowledge, examine, and express feelings. One such opportunity occurred while we were focusing on the *Woodruff* case. At that time, some students, who worked like no tomorrow on other clinic appeals, ended up losing their own cases. And this indeed is a big deal. Most of my students had enrolled in the clinic with visions of victory and believed they had the Midas touch. For them, receiving their first unfavorable result was painful, and what rubbed this raw, was the fact that while they hurt, others were in the throes of excitement over the upcoming *Woodruff* argument. Also, most of them admittedly heard a voice in their head telling them to be “cool” and “professional,” and reminding themselves that “real lawyers” don’t cry. In fact, the students even hoped that I would corroborate that putatively grown-up anesthesiology. They expected that I would order them to march forth like professionals, act like mature adults, and expel the inappropriate intruder, remorse. Luckily, I remembered something—a box stashed away in my own closet. My father, who had been a lawyer for more than fifty years, had died about a year before I returned to academia. I loved him dearly and his death truly decimated me.

³²¹ *Id.* at 849.

Throughout my life, he used to write me letters. When he died, however, I hid the letters away in a box because the mere sight of them reactivated agony. Motivated by my students' ostensible needs, I unsealed the box and extracted the right letter. It was in our appellate clinic that I for the first time mentioned my father, his death, my grief, and his treasured letters. I then read them an excerpt, which began:

Dearest Daughter:

It appears that the bigger-than-life lawyers belong to the past. The great oratorical styles of a Webster, or a Calhoun, or a Judah Benjamin, or a Lincoln or a Clarence Darrow have given way to the electronic age. . . . But what lends spice and excitement to the profession is its adversary nature. There are victories. And the euphoria that follows a win is the greatest Pay Master. But there are losses too. The feeling of depression that comes in the wake of a loss is an unbearable ordeal of self castigation. Thus, every lawyer has a secret graveyard which is studded with tomb stones of lost causes. There he must visit alone from time to time in his own privacy.³²²

One of many students with tears said, "this is the most important thing that has ever happened in any of my classes." For me, as their teacher, it was the same.

V. CONCLUSION

Melville's *Bartleby* is one of the most enigmatic characters in all of American literature. While many scholars, psychologists, law-

³²² Letter from Walter V. Ronner, New York labor lawyer, to his daughter, Amy D. Ronner (in possession of the author).

yers, and literary critics have tried to solve the mystery, one thing that cannot be denied is that Melville gives us a glimpse at a pallid, lifeless, scrivener in a dehumanizing law office.³²³ That office, in fact, epitomizes what therapeutic jurisprudence scholars see as a toxic sphere that strips individuals of voice, validation, and voluntary participation in decisions that shape their lives.³²⁴ In this office, Bartleby actually devolves into a voiceless, isolated, thanatotic being, so much so that he ultimately mimics the condition that psychologist Martin Seligman once denominated “learned helpless.”³²⁵

Although Bartleby and his coworkers toil away in the mid-nineteenth century, the Wall Street office bears an uncanny resemblance to contemporary law firms, which also treat human beings like machines, build icy walls to estrange people from each other, and spawn that insatiable hunger for true sustenance in the form of voice, validation, and voluntary participation.³²⁶ In Melville’s world, Bartleby is obsessed with his own demise, and our profession is now notorious for its inordinately high suicide rate.³²⁷ Thus, human machines, abundant walls, and insatiable hunger is, to put it bluntly, the very recipe for death.

At present, there is pressure on law factories to change their

³²³ See *supra* Part I.B (summarizing the various theories of the *Bartleby* commentators).

³²⁴ See *supra* Part II (“Therapeutic Jurisprudence and *Bartleby*”); Part II.A (“Therapeutic Jurisprudence”) (discussing voice, validation, and voluntary participation).

³²⁵ See *supra* Part II.B (“Voiceless, Invalidated, and Involuntary Bartleby”) (discussing how Bartleby degenerates into a learned-helpless state). See also *supra* text accompanying notes 95, 126-35 and accompanying text (discussing learned helplessness and applying it to *Bartleby*).

³²⁶ See *supra* Part III (“Bartleby’s Office and Today’s Law Firm”) (describing the similarities between Melville’s Wall Street world and the law firms of today).

³²⁷ See *supra* notes 142, 228-32 and accompanying text (discussing lawyer depression and suicide).

ways.³²⁸ Things like work-life balancing ratings and training graduates to be “smart consumers” can possibly motivate the rehabilitation of at least some offenders, who might fear the loss of talented recruits.³²⁹ Threats and exposure, albeit somewhat potent, are not the only ways to effectuate change. Our law schools need to teach students what to expect and demand of their future employers and they can do this best by giving them an opportunity to actually taste something different. In-house clinics that incorporate principles of therapeutic jurisprudence can show our students what it means to have voice, validation, and voluntary participation and can expose them to a workplace without human machines, walls, and insatiable hunger. Such students can be taught to recognize Bartleby syndrome, detect the symptoms of learned-helplessness, and fend off the kind of forces that pulverized the pallid scrivener.

Like everything else in Melville’s story, even the narrator has ignited controversy. While commentators tend to see him as either a saint³³⁰ or a villain,³³¹ what makes him a fascinating character is the

³²⁸ See *supra* notes 233-41 and accompanying text (discussing pressure on firms to make changes).

³²⁹ Schiltz, *supra* note 7, at 948-49; see also *supra* notes 233-38 and accompanying text (discussing the “smart consumer” approach).

³³⁰ See generally Anderson, *supra* note 62, at 384-85 (summarizing the commentators’ attitudes toward Melville’s lawyer). Several commentators have a positive perspective on Melville’s narrator. See, e.g., *id.* at 386 (“Melville makes the lawyer especially benevolent to show that his limitations emanate not from some correctible failure of insight peculiar to himself, but from the unchangeable conditions of the ‘human creature’”); Alfred Kazin, *Ishmael In His Academic Heaven*, in A COLLECTION, *supra* note 3, at 76 (describing Bartleby’s employer as “good-hearted, mediocre, [and] ineffectual”); West, *supra* note 74, at 206-07 (describing the lawyer as “an amiable and likeable figure” who is “[m]oved by charity and humanitarian impulse”).

³³¹ See generally Anderson, *supra* note 62, at 384-85 (summarizing the commentators’ attitudes toward Melville’s lawyer). Several commentators have a negative perspective on Melville’s narrator. See, e.g., *id.* at 384 (explaining that “many think [of the lawyer as] the story’s selfish villain and the cause of Bartleby’s suffering”); Davis, *supra* note 3, at 188

very fact that he fits neither extreme.³³² He is a flesh and blood human being replete with his own flaws and virtues. While he does indeed appear to substantiate the Marxist beef against capitalism and sustain an airless workplace,³³³ he, like most people, is not impervious to change. In fact, Melville's *Bartleby* is more about the narrator's growth than it is about Bartleby's demise.³³⁴

Several commentators, detecting the parallels between the narrator and scrivener, have posited that they are actually facets of one human being.³³⁵ We learn that the new constitution abolished the

(describing the lawyer as a capitalist that cares about production and expediency, not people); Emery, *supra* note 60, at 182 ("Despite the narrator's frequent recourse to benevolent rhetoric and despite the common critical view which has characterized him as a somewhat befuddled but thoroughly sincere exponent of Christian charity, the alert reader of 'Bartleby' must quickly recognize that the narrator's heart is no more right than his head."); Thomas R. Mitchell, *Dead Letters and Dead Men: Narrative Purpose in "Bartleby the Scrivener,"* 27 STUDIES IN SHORT FICTION 329, 330 (1990) ("[T]he weight of critical sympathy for Bartleby is matched by disdain for the narrator."); Stein, *supra* note 63, at 104-105 (describing the lawyer as having "unscrupulous practices" and being "incapable of moral regeneration").

³³² See Ayo, *supra* note 3, at 28 (explaining that few commentators see the lawyer as either black or white); Kuebrich, *supra* note 73, at 396 ("Melville's point is not that the lawyer is a hypocrite, for hypocrisy implies conscious deception, but that the lawyer is self-deceived by the moral categories developed by nineteenth-century U.S. Christian culture as it accommodated itself to capitalism."); Patrick, *supra* note 60, at 151-52 (discussing those commentators that view the narrator "as a reasonable man of good intentions . . . [who is] a fairly 'normal,' comfortably situated individual").

³³³ See *supra* notes 73-75 and accompanying text (discussing the critics that tie *Bartleby* to Marxist theory).

³³⁴ See Richard Abcarian, *The World of Love and the Spheres of Fright: Melville's "Bartleby The Scrivener,"* 1 STUDIES IN SHORT FICTION 207, 209 (1964) ("The thematic burden of the story, then, is to be found in the changes which the narrator undergoes . . ."); Mitchell, *supra* note 322, at 333 ("The essential irony of the story, in fact, is that by attempting, and failing, to save Bartleby from his fatal isolation, the narrator saves himself. . . . As Bartleby contracts, the narrator expands. As Bartleby withers, the narrator grows. And as Bartleby rejects life, the narrator rejects death."); Patrick, *supra* note 60, at 153 (explaining that through his exposure to Bartleby, the attorney who had never before felt any deeper emotion than a "not unpleasing sadness" has been aroused to a new awareness of the human predicament); Stempel & Stillians, *supra* note 59, at 276 (analyzing how the lawyer "begins to experience the unfamiliar pangs that mark the birth of a new consciousness of suffering . . . [and] sees that there is as much misery as happiness in the world").

³³⁵ See Marcus, *supra* note 145, at 109 ("Bartleby's role as a psychological double is to criticize the sterility, impersonality, and mechanical adjustments of the world which the lawyer inhabits."). See also notes 149-52 and accompanying text (discussing the doppelgangers

narrator's chancery post and a related administrative change eliminated Bartleby's clerkship in the Dead Letter Office.³³⁶ We likewise see that the boss is essentially inextricably connected with his pallid scrivener—so much so that Bartleby, like a component of the lawyer's very self, seemingly defies attempts at ouster.³³⁷

For Melville's narrator, Bartleby is the catalyst for change and he accomplishes this by insinuating himself into the lawyer's consciousness.³³⁸ While the lawyer starts out as an "eminently *safe* man," who seeks "the cool tranquility of a snug retreat" and prefers not to emote, not to lose his temper, not to become rash, and not to "indulge in dangerous indignation at wrongs and outrages," in the course of the story he begins to prefer to defer to his heart.³³⁹ This is because Bartleby gets under his skin and manages to melt the iceberg.

in *Bartleby*).

³³⁶ See Abcarian, *supra* note 334, at 215.

[T]he narrator discloses that subsequent to the events about to be related he lost his comfortable sinecure as Master in Chancery when a new constitution abolished the post. At the end of the narrative we learn that Bartleby lost his clerkship in the Dead Letter Office for precisely the same reasons. And if the coincidence strengthens the parallel, it reverberates in yet another way, for the narrator's loss of sinecure, with all the comfort and security which it signifies, foreshadows the more profound loss which he is to experience when the meaning of Bartleby and his relationship to the scrivener are finally revealed to him.

Id. See also notes 97-99 and accompanying text (discussing the narrator's loss of his Chancery post).

³³⁷ Cf. Marcus, *supra* note 145, at 109 ("The lawyer finally accepts Bartleby's presence as a natural part of his world, and he admits that without outside interference their strange relationship might have continued indefinitely.").

³³⁸ See Abcarian, *supra* note 334, at 215 ("[The lawyer] is increasingly fascinated and disconcerted by Bartleby precisely because Bartleby represents a tendency in himself which, carried to its extreme, destroys the guiding principles of his life."); Marcus, *supra* note 145, at 109 ("Although the humaneness of the lawyer may weaken his symbolic role as a man of Wall Street, it does make him a person to whom the unconscious insights represented by Bartleby might arrive, and who would sympathize with and almost, in a limited sense, yield to Bartleby.").

³³⁹ *Bartleby*, *supra* note 1, at 4.

When Bartleby first stops cooperating, the lawyer starts to feel that he “should have flown outright into a dreadful passion,” and admits that the scrivener, “in a wonderful manner, touched and disconcerted [him].”³⁴⁰ Later, when the lawyer discovers that Bartleby is living in the office, the narrator feels pain and says that “[f]or the first time in my life a feeling of over-powering stinging melancholy seized me.”³⁴¹ This leads him to feel empathy as a “bond of a common humanity [that] drew [him] . . . to gloom.”³⁴²

From that moment on, he endures a repertoire of sensations, from “pure melancholy and sincerest pity” to “repulsion” and then a charitable impulse to help and even love a suffering soul.³⁴³ It is at this juncture that the lawyer confronts what hurts the most—the scrivener’s “excessive and organic ill” and laments the fact that Bartleby’s “soul” was something that he simply could not reach.³⁴⁴ For him, such awareness of his inability to help or heal abrades as his deepest wound, but it also becomes his apex of achievement. The newfound empathy even translates into action as the lawyer, despite redundant rebuffs, offers Bartleby succor, food, shelter, friendship, and comfort. The perplexing exclamation at the end of the story—“Ah, humanity”—constitutes the lawyer’s recognition that he himself, after all, is a member of the not so “snug,” not so “safe” human race.³⁴⁵

³⁴⁰ *Id.* at 14-15.

³⁴¹ *Id.* at 23.

³⁴² *Id.*

³⁴³ *Id.* at 24.

³⁴⁴ *Bartleby*, *supra* note 1, at 24-25.

³⁴⁵ *Id.* at 4, 46. See *supra* note 334 and accompanying text (summarizing some of the commentators that believe that the lawyer/narrator grows in the course of the story because

For us in legal education, Bartleby can likewise serve as a catalyst for change if we too admit him into our consciousness. Bartleby, along with in-house clinics and therapeutic jurisprudence, can teach our students to discern, avoid, and cure the “excessive and organic ill[s]” of practice today.³⁴⁶ Bartleby can also help our graduates demand and even create future offices that “prefer not to” mint learned-helpless lawyers.

of his contact with Bartleby).

³⁴⁶ *Bartleby*, *supra* note 1, at 24.