

ROUNDTABLE ONE
THE ESSENTIAL ENVIRONMENTAL LAW CURRICULUM

Keith Hirokawa,* Steph Tai, and Elizabeth Kronk Warner⁺**

I. IN 2020, THE ABA’S COMMISSION ON THE FUTURE OF LEGAL EDUCATION FOUND THAT LAW SCHOOLS ARE “PREPARING THE NEXT GENERATION OF LEGAL PROFESSIONALS FOR YESTERDAY RATHER THAN FOR TOMORROW.”¹ WHEN IT COMES TO LAW SCHOOL ENVIRONMENTAL LAW CURRICULUM, DO YOU THINK THIS IS TRUE? AND IF SO, IN WHAT WAYS?

Dean Kronk Warner:

I think the answer is yes and no. Traditionally, the focus in environmental law—at least how I was taught when I was in law school—was this focus on litigation-based strategies and also on federal environmental law. I think that, when we solely focus on those two issues, that goes to the critique we saw from the ABA.² Any time you are talking about litigation, oftentimes that means that there’s been a failure to find a way forward through collaboration, although certainly litigation has its relevant place. Of course, as we all know, the federal government has not had any significant innovation in the environmental space since 1990.³ So, to continually refer to federal environmental statutes, I think, really limits us in the field.

* Associate Dean for Research and Scholarship and Professor of Law, Albany Law School; M.A. 2003, University of Connecticut; LL.M. 2001, Lewis and Clark Law School; J.D. 1998, University of Connecticut.

** Professor of Law, University of Wisconsin-Madison Law School; J.D. 2000, Georgetown University Law Center; Ph.D. 1997, Tufts University; B.S. 1992, Massachusetts Institute of Technology.

⁺ Dean and Professor of Law, University of Utah S.J. Quinney College of Law; J.D. 2003, University of Michigan Law School; B.S. 2000, Cornell University.

¹ Commission on the Future of Legal Education, *Principles for Legal Education and Licensure in the 21st Century*, AM. BAR ASS’N 3 (2020), <https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cfile-principles-and-commentary-feb-2020-final.pdf> [hereinafter ABA Principles].

² See *id.* (criticizing the American system of legal education and its failure to respond to modern challenges).

³ See Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101–13109 (1990); see also *1990 Clean Air Act Amendment Summary*, U.S. EPA (last updated Dec. 8, 2021),

In response—and what we are starting to see in law schools—is a focus on alternative skills; no longer focusing solely on those litigation-based skills, but also things like collaboration. At the University of Utah Wallace Stegner Center for Land, Resources and the Environment, we have the Environmental Dispute Resolution Center where we have been working on developing those skills and helping students to understand that oftentimes, although certainly not always, environmental challenges can be looked at and addressed through collaboration.⁴ For example, in Utah, one of our big challenges in 2020 was the rise of “Zoom Towns.” Zoom Towns in Utah have been on the rise because everybody wants to come to Utah because they can telework, and they want to be right outside of Zion National Park.⁵ This puts huge environmental stresses on many of our communities around these beautiful natural places. We have been working on collaborating with the relevant stakeholders in the existing townships to come up with some solutions.

Legislative solutions are another option. That is something I always talk to my students about when I teach at the intersection of Indian and natural resources. State legislatures and Congress have been our friends in many instances. Sometimes going to the legislature, whether that means the state or the federal legislature, can be really helpful.

I think we also need to focus and shift our curriculum to consider state and local government solutions. I, too, am really excited about what the Biden Administration is doing—but certainly we have learned from the past four years that we cannot rely on the federal

<https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary> (describing the “progressive and creative new themes” that the CAA was amended to include in 1990).

⁴ *Wallace Stegner Center: Environmental Dispute Resolution Program*, S.J. QUINNEY COLL. OF L., <https://sjquinney.utah.edu/stegner-center/edr/> (last visited May 19, 2022).

⁵ See Stacy Young, *The Slovenly Wilderness: Anatomy of a Zoom Town*, CANYON CNTY. ZEPHYR (Mar. 31, 2021), <https://www.canyoncountryzephyr.com/2021/03/31/the-slovenly-wilderness-anatomy-of-a-zoom-town-by-stacy-young/>; see also Lisa Potter, *The Rise of ‘Zoom Towns’ in the Rural West*, UNIV. OF UTAH: @THEU (Oct. 14, 2020), <https://attheu.utah.edu/facultystaff/the-rise-of-zoom-towns-in-the-rural-west/>.

government and that there is a lot of great work to be done. Tribes, for example, have been hugely innovative in the area of environmental law.⁶ There is a lot that we can learn from tribes that can be helpful to other communities.

We also, of course, need to make sure that our students are familiar with rulemaking processes and know how to engage in those processes. I know that when I was in practice, the comment period was as important as the litigation period because if you did not set up that excellent record in the comment period, you were doomed to fail in the litigation period.

Last, but not least, I want to emphasize the importance of race and environmental justice. I have been overjoyed by the recent executive orders recognizing the importance of race and the intersection between race and the environment.⁷ I applaud the Administration for that, but we need to talk more openly about race and how, especially in our environmental and natural resources communities, these two things really intersect. I think it is important that we acknowledge that our community, those of us who teach in this field, is overwhelmingly not diverse. And so, talking about how we can bring diversity into the community and the classroom is really helpful. Overall, I think it is about how to incorporate skill-building into our classes.

Professor Tai:

I want to also emphasize skills training. I think that the way the pandemic has forced many of us to teach—which is online—has actually opened me up to different possibilities in terms of teaching skills. I have shortened my lecture period. I have added breakout rooms where the students come up with issues and they negotiate positions with each other through negotiation and collaboration exercises.

⁶ Amber Aumiller, *The Intersection of Tribal and Environmental Law*, UNIV. OF UTAH: SUSTAINABILITY (Jan. 6, 2020), <https://sustainability.utah.edu/the-intersection-of-tribal-and-environmental-law/>.

⁷ See Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) (creating, in part, an interagency council to promote the Biden Administration's policy of securing environmental justice); see also Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (stating that racial inequity is persistent in the nation, and actions must be taken to systematically remove barriers to equal opportunity).

I have also had students revise group documents. For example, I recently did a drafting exercise addressing changes to the Clean Air Act's New Source Review permitting program.⁸ The exercise asked them, "what would you do if you wanted to more deliberately address climate change?" The students had a lot of different kinds of things to say, such as "modify[ing] the list of considerations available in establishing NAAQS to include 'combating climate change' and 'creat[ing] a new Title VII that addresses it specifically and explicitly so that the current Supreme Court cannot miss the intention.'" I think taking into account all these different types of technology can help us incorporate some of the skills training, even in the context of a regular sort of lecture-type classroom.

Professor Hirokawa:

Building on Dean Warner's and Professor Tai's comments, I think one of the interesting things is how the pandemic, in an unanticipated way, made a lot of us have to learn the technology that a lot of these students have grown up on. In line with the ABA Commission's idea,¹⁰ we have to start teaching with the resources we have, not the resources we used to have. There's been this sort of fortunate adaptation with our technology, which I think is great.

I think there are a couple of additional things—that maybe we were not thinking about before—that we can think about now. One of them is that federal environmental law does not need to be thought of as a foundational or prerequisite course for the rest of our environmental courses. Given how broad and diverse the practice of environmental law is¹¹ and how environmental law has become and is

⁸ See 40 C.F.R. §§ 51.160–51.1314 (2020) (identifying the various changes in the New Source Review Program).

⁹ Kelly Meyerhofer, *UW-Madison Professors Consider Urging UW Foundation to Divest from Fuel Companies*, WISC. ST. J., (Feb. 1, 2021) https://madison.com/news/local/education/university/uw-madison-professors-consider-urging-uw-foundation-to-divest-from-fossil-fuel-companies/article_514e881b-a8f2-57cf-b950-5ff12d1cc5fa.html (demonstrating student concerns about climate change).

¹⁰ ABA Principles, *supra* note 1.

¹¹ See e.g., Ashley Harvey, *Could You Already Be Practicing Environmental Law?*,

becoming something a little more pervasive throughout practice rather than a specialty,¹² it is something we are thinking about.

We can also rethink what counts as environmental law. There are different players that find environmental laws relevant, and there are the different ways that common law and statutory law have become central to the practice of environmental lawyers. In addition, there are unanticipated ways that we find environmental issues arise. And, of course, our job is to open up the students' eyes to see those issues, whether it is financial planning and tax or recognizing that a lot of land-use lawyers can be practicing environmental law for their entire careers without even breathing federal environmental statutes.¹³ In sum, rethinking the different subject matters that go into an environmental law curriculum might not be a bad idea.

The other thing I would add is that for our future environmental lawyers, we might think about more education in science. What are the core issues future environmental lawyers need to know to be more effective than we have been? Some of those things include a better understanding of how to communicate with experts and a better understanding of why certain policies might work and might not.

II. WHAT ARE THE THREE OR FOUR ENVIRONMENTAL LAW COURSES YOU WOULD OFFER AT YOUR LAW SCHOOL? HOW WOULD YOU CHOOSE THEM AND WHY?

Professor Tai:

This is a difficult question because we have these fundamental courses that cover established environmental law and natural resources law. They cover the Environmental Protection Agency, Department of Interior, Department of Agriculture, and possibly others. I think it is

AM. BAR ASS'N,
https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/environmental-law/could-you-already-be-practicing-environmental-law/ (last visited May 19, 2022).

¹² *Id.*

¹³ See e.g., *Zoning and Land Use*, JUSTIA, <https://www.justia.com/real-estate/home-ownership/owning-a-home/zoning-and-land-use/> (last visited May 19, 2022) (detailing different areas of land-use law including state- and municipal-level laws).

helpful to know these core statutes.¹⁴ But, I agree that they could be reformulated. I can imagine a school that has some kind of synthesized course that keeps these core statutes as part of the curriculum.

But I also once saw a survey of mid-career practicing attorneys in terms of subject areas that they encountered in their work.¹⁵ Environmental law was actually one of the top ones; not the primary core subject area, but peripheral to many of the things that people were doing.¹⁶ I think having that foundational environmental law introduction is something that would be great in terms of exposing students who might not be intending to be core environmental lawyers, but might come across it in practice in terms of disclosures or in terms of real estate transactions.

Thus, I also think some kind of environmental transactions course would be really useful. This course could help synthesize some of the things that Dean Warner raised,¹⁷ which includes starting to collaborate. I teach a class in Advanced Contracts where students write research papers based on different types of areas on contracts. Many of the students have written about sustainable contracting, and it'd be nice to have a course that teaches methodical approaches for this. It would be especially helpful for students who might end up representing companies that want to make their brand in that area. And so that's another area. So, I guess I'm for definitely including something that covers the core statutes. But I'm also for having a synthesized class that contains some kind of transactional kind of work. And I actually think—and this is a shout out to Hope Babcock here¹⁸—providing some kind of experiential training is really, really important. And you know it since—I know that you already have

¹⁴ See, e.g., Clean Water Act, 33 U.S.C. §§ 1251–1252 (1948); Clean Air Act, 42 U.S.C. §§ 7401–7671 (1963); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1963); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1787 (1976).

¹⁵ Mike Hammell, *Updated: Growing Legal Practice Areas for Lawyers in 2019 and 2020: From Blockchain to Cannabis Law*, LAWFUEL, <https://www.lawfuel.com/blog/growinglegalpracticeareas/> (last visited May 19, 2022).

¹⁶ See *id.* (describing the many different forms environmental law work can take).

¹⁷ See *supra* Part I.

¹⁸ Faculty Profile of Prof. Hope Babcock, GEORGETOWN L., <https://www.law.georgetown.edu/faculty/hope-babcock/> (last visited May 19, 2022).

another roundtable to talk about that.¹⁹ But I think experiential training is super important to any kind of environmental law.

Dean Kronk Warner:

Researchers, such as Professor Deborah Merritt at the Ohio State University, studying the bar exam have found that most law school graduates and newer lawyers can learn new areas of doctrinal law.²⁰ What is really important during their time in law school is to learn legal skills, as it is much more difficult to learn skills after graduation.²¹ So, building on this idea of the importance of teaching and assessing skills in law school, all of my suggested classes would incorporate substantial skills components.

I think if we focus on requiring skills-based classes, it matters less what's happening nationally in terms of who's in the presidency, because then our students can pivot—as they're forced to—depending on who's overseeing federal agencies.

Following the importance of developing a cohort of environmental and natural resources classes that focus on skills, I would next go back to the idea that it's also really important to talk openly about the intersection between these issues and race, because for me, all of this comes back to race. It really does. For example, here in Salt Lake City, we have an air pollution problem and it's our Latinx

¹⁹ See *Vermont Law School to Host Virtual Roundtable Series on the Future of Environmental Legal Education*, VT. L. SCH. (Jan. 19, 2021), <https://www.vermontlaw.edu/news-and-events/newsroom/press-release/vermont-law-school-host-virtual-roundtable-series-the-future> (announcing a series of roundtable discussions featuring faculty panelists from law schools across the U.S. and addressing “a different phase of student development: from in-class doctrinal courses, to creative and critical thinking skills, to clinical and experiential work”).

²⁰ Deborah Jones Merritt & Logan Cornett, *Building A Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 6 (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf (explaining that the research suggests that “new lawyers do not rely upon a static set of legal rules and skills carried into the workplace[,]” instead, knowledge evolves continuously during their early practice years).

²¹ See *id.* at 12 (explaining that cognitive skills like communication, research, legal analysis, and critical thinking are critical competencies for practicing law, whereas knowledge of specific legal principles and memorization is much less important).

and lower socio-economic communities that are disproportionately impacted by the air pollution.²² There's a lot of intersections there and having an understanding of race and how it informs these issues, I think is incredibly important.

Professor Hirokawa:

I couldn't agree more with everything that was said. Picking up on one of the issues raised by Dean Warner, I think it is important to build time into the curriculum to think about perspective and approach. Considerations that we need to take into account include scale and fragmentation, comprehensive schemes, racial disparity, economics, ethics, and cultural values, all of which provide effective framing opportunities. Taking the time for students to work through what some of these different frameworks are helps, because the analysis really changes how we look at environmental law.

I teach a seminar where we think about different constructs of nature.²³ I like to think it pushes the students to frame the issues and injuries differently, which might be especially important in an era of climate change when we are constantly recasting environmental challenges and controversies so we can construct new pathways to justice. I think that is an important course, although I defer to Professor Tai on some of the foundational materials that students need to understand how we have practiced law in the past.

I also think that local environmental law is an important subject for helping students to get their heads around the way things happen on the ground, and the very different conversation that we have when

²² See *Salt Lake City Environment Equity Report*, ABC OUR AMERICA, <https://ouramericaabc.com/equity-report/salt-lake-city/environment> (last visited May 19, 2022) (showing that Latinx and Black communities have higher respiratory and cancer risks caused by air pollution in the Salt Lake City region); see also Lisa Potter, *Persistent Inequitable Exposure to Air Pollution in Salt Lake County Schools*, UNIV. OF UTAH (May 15, 2020), <https://attheu.utah.edu/facultystaff/persistent-inequitable-exposure-to-air-pollution-in-salt-lake-county-schools/> (announcing a study that explored social disparities in air pollution, and found persistent social inequalities in Salt Lake County).

²³ See generally *Environ Law, Policy & Ethics*, ALB. L. SCH., <https://www.albanylaw.edu/programs-courses/courses/environ-law-policy-ethics> (last visited May 19, 2022) (describing one of Professor Hirokawa's courses that examines the foundational ideas behind environmental and natural resource law).

we are discussing environmental issues in a community versus on a nationwide scale. It is a different vocabulary and a different set of values that go into it, besides the cultural aspects and the identity and sense of place and community that go into why we do environmental law. We can certainly run our students through a lot of those ideas and have them work through the issues, causes, and effects in a local class.

III. WE HAVE DISCUSSED THE IMPORTANCE OF EQUITY AND JUSTICE AND SKILLS-BASED LEARNING, WHAT OTHER THEMES ARE CRITICAL FOR A CHANGING ENVIRONMENTAL LAW CURRICULUM?

Dean Kronk Warner:

One of my pet peeves is that tribes are rarely included in a discussion of environmental and natural resources. As mentioned earlier, many tribes are developing innovative regulations within this space, but rarely are tribal contributions considered when looking at “solutions” to environmental and natural resource challenges.²⁴ As separate sovereigns existing within the United States, tribes can be exceptionally valuable partners in addressing challenges facing society today. Tribes have control over approximately 56 million acres.²⁵ We are a significant portion of the population—especially in the West—and yet we tend to be invisible. Anybody who is going to work in environmental natural resources—especially if you are going to be west of the Mississippi—must know about tribes and tribal environmental law. So that is just my platform, and I’m sticking to it. You probably heard me say it before, but I think in general, a very basic understanding of Indian law is really helpful to anyone who wants to practice environmental and natural resources law.

Professor Hirokawa:

I would like to build on something Dean Warner and Professor Tai said about practice-ready and professional skills. In my

²⁴ See generally Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUMBIA J. ENV’T L., 42, 43–45 (2014) (explaining the various ways that tribal governments exercise sovereignty in environmental law, and the importance of studying it).

²⁵ U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFS., PROCEDURAL HANDBOOK: GRANTS OF EASEMENT FOR RIGHT-OF-WAY ON INDIAN LANDS 87 (2006).

course, State and Local Environmental Law, I have invited wetlands professionals to join the class in the field and show us how to perform wetland delineations. That was pretty interesting stuff, to work our way through the Army Corps Wetlands Manual and see if we can understand how it works.²⁶ That was a pretty helpful exercise and I think it accomplishes many things. I always like to ask the consultant, “who is the most important person in the room?” And, of course, the students always are surprised when the consultant does not identify lawyers. But, you know, little things like that end up giving a good perspective on the role of the lawyer in the process.

We also do a lot of scenario-based projects, where a developer in the community allows us to use their property and pretend to develop it. Students are assigned “clients” from among the various stakeholders. We work our way through the application and regulatory review process. This requires developing an administrative record that includes public comments, habitat reports, and wetlands reports, so that the students can dig into them and engage both the law and the “facts.” We meet for negotiations and hold several hearings. But seeing the different steps of the process gives students opportunities to think about what competency means at different stages. How are they supposed to play a lawyer’s role in this process?

I also make sure to get race into the dialogue throughout the curriculum. A lot of people have been doing it for a long time, and some people are just starting. But it is great that the conversation is taking such a central role in how we are designing the curriculum.

Dean Kronk Warner:

If I could just build on that one point and then also address another issue. We all can’t be experts in everything. For example, I have never lived in New York City. I do not know what it is like to do environmental justice in New York City. So, for me to be able to teach it, it would be somewhat limited. Conversely, I have all my experience

²⁶ See generally *Corps of Engineers Wetlands Delineation Manual, Wetlands Research Program Technical Report Y-87-1*, ENV’T LAB’Y, U.S. ARMY CORPS OF ENGINEERS vii (Jan. 1987) (describing the technical guidelines and methods of a multiparameter approach to wetlands delineation, for purposes of Section 404 of the Clean Water Act).

in Indian country. So, I think one of the things that we keep going back to is this theme of technology—building on Professor Hirokawa’s point. We can collaborate a lot more. For example, maybe Professor Tai could come in and teach a class about her appellate experience. One of the things I really love about our environmental and natural resources law community is that we tend to be close; let’s rely on each other for each other’s skills and try to figure out ways to leverage these new technological skills that we have to build better classes in general, which I think goes to Professor Hirokawa’s point. We do not have to all be generalists and experts on everything. We also do not have time to do that.

I’ll just raise one more issue and that concerns the question of: “If somebody is going to take one environmental class, what do you want them to take?” One of the things that the University of Kansas School of Law does is a quick and dirty survey class for business organization that is three credits. But then if you want to do a really deep dive, you can do a four-credit business associations class that covers the same material but also goes deeper.²⁷ We might consider something similar for environmental law. For somebody who just wants to know where the litigation or the compliance pitfalls are, here is your survey class. But for the person who really wants to practice in this area, here is a deep dive.

IV. LET’S SAY YOUR LAW SCHOOL HAD THE GOOD FORTUNE TO BE GRANTED A SMALL AMOUNT OF FUNDS TO IMPROVE THE ENVIRONMENTAL PROGRAM. WHAT WOULD YOU LIKE TO SEE CHANGED TO HELP PREPARE STUDENTS FOR TOMORROW? WHAT WOULD YOU PRIORITIZE?

Dean Kronk Warner:

Money is always the rub, and most of our schools are even in worse situations now after COVID because our universities are bleeding money. But if I had some “extra” money, I would really like to come up with some fellowships or some funding to build on this idea of interschool classes. Dean Hari Osofsky (Northwestern)

²⁷ *Courses*, UNIV. OF KAN. SCH. OF L., <https://law.ku.edu/academics/courses> (last visited May 19, 2022).

mentioned this in the comment thread, to talk about issues and how they differ across the country.²⁸

For example, in an environmental justice class, we might be able to combine the experiences of someone like, Professor Rebecca Bratspies (CUNY), who could talk about her experiences in New York City,²⁹ and I could talk about my experiences in Indian country, and maybe Dean Osofsky could come in and talk about her experiences with energy justice. Such a collaborative class could be a wonderful learning opportunity for students. The assessment piece of it would be difficult, but I think such a collaborative class could be very interesting and beneficial to students. So, I would be really interested in investing in that. And then also growing clinical and experiential opportunities. They are expensive because in a good clinical experience, you have no more than eight students per instructor. But I would love to do an environmental justice clinic and focus on that type of work. So, if I had a small amount of money, those are some things I would be interested in doing.

Professor Tai:

If I had some money, I would like to have someone help accumulate deep materials for exercises. I am really, really into negotiation exercises, rulemaking exercises, and others. Part of that takes a lot of research. You need research to develop the core materials to give information to the students in a way that is not overwhelming—edited down, just accessible. It would be really great to have money dedicated to doing that.

The other thing, too, is that money could be used to hire an administrative assistant to host some place for us to crowdsource group exercises. I would love that. I think that we could probably do that in a Google Doc with a lot less oversight and maybe it would be crazy. But, send me an email afterwards and I am willing to put together some Google site that will be haphazardly updated because I am haphazard, and we can put examples of group exercises we have done that have been successful for students. They can be short ones or they could be

²⁸ Written comment from Dean Hari M. Osofsky, Nw. Pritzker Sch. of L.

²⁹ *Rebecca Bratspies*, CTR. FOR URB. ENV'T REFORM, CITY UNIV. N.Y. SCH. L. https://cuer.law.cuny.edu/?page_id=667 (last visited May 19, 2022).

long ones, where people have accessible background documents. This would be a clearinghouse of exercises that include rulemaking, transactional work, and all of this other stuff; it would be fantastic. It would be nice if there was money for someone else to do it, but I can do it haphazardly, administered through Google Docs if we want.³⁰

Professor Hirokawa:

I have little to add to those great ideas from Dean Warner and Professor Tai, but I think I saw Professor Karrigan Bork (UC Davis) in the guest list here. I want to give a shout out to him and say, if I had a little bit of money, I might consider a fleet of kayaks or more insurance for the law school to cover more field trips. Professor Bork's field study course covers in-depth issues on the ground. I cannot stress enough the importance of getting out and touching the dirt to really prepare students to practice in this area of law. Students have reported a real feeling of ownership of the learning process from getting out and looking at a pasture, engaging in a dialogue of what has to change to get to a completed development, and thinking about how values are going to be transformed for that land over time. The little bit of money that could cover a fleet of canoes or kayaks could facilitate that.

Dean Kronk Warner:

I love that.

V. LET'S TALK ABOUT ASSESSMENT AND GRADING. DO YOU THINK THAT THERE IS A CORRELATIVE ASSESSMENT AND GRADING THAT SHOULD GO ALONG WITH THE NEW SETS OF COURSES AND PEDAGOGY THAT WE ARE DISCUSSING?

Professor Tai:

I'm just going to say I hate law school grading and especially at our school where the grading curve is in our faculty rules and the faculty rules are part of our regulations. They are basically like regulations that we are subject to because we are a state school and reformulating them is very, very difficult and kind of horrendous. I

³⁰ Professor Tai created this crowdsourced database through Google Drive. To access or contribute, please email tai2@wisc.edu.

don't know what else to do about this. I think there is maybe a differential kind of thing between state schools, which have less flexibility, and private schools, which have more flexibility in terms of reformulating grading schemes.

I also think the grading schemes can raise difficulties in terms of experiential learning, and in terms of students feeling like they are getting an appropriate grade for the amount of work they put in.

Dean Kronk Warner:

I would say overall, this is not something specific to environmental law professors. On the whole, law schools are really bad at assessment.³¹ It is because of, first of all, as Professor Tai alludes to, the grading curve. Our grading curves are not pedagogically sound.³² They are not there for pedagogical reasons. They are there for employers to help measure students against each other. Second, many of us have never been trained in how to assess and grade—and the ABA has been trying to move us that way, but we still have a lot to learn.³³ But I think a lot of us have never sat down and said: “What are my learning objectives? What do I want the students to come out with? And what assignments and assessment rubrics am I using to accomplish those objectives and/or goals?” So, there is this misalignment. I will admit that this is really hard to do, and I do not have the answer. But I think in order to accomplish that, we need to sit back and have a discussion about the use of the grading curves for all the reasons that Professor Tai articulated, but also to think hard about

³¹ See generally Pradeep Dubey & John Geanakoplos, *Grading Exams: 100, 99, 98, . . . or A, B, C?*, 69 *GAMES & ECON. BEHAV.* 72 (May 2010).

³² See generally Clyde W. Bresee, *On “Grading on the Curve”*, 50 *THE CLEARING HOUSE* 108 (Nov. 1976) (describing different ways in which the “intellectually indefensible” system of grading on a curve is damaging to students and their teachers).

³³ See *2020-2021 Standards and Rules of Procedure for Approved of Law Schools*, AM. BAR ASS'N 27 (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf (establishing the standard that law school faculty “shall possess a high degree of competence, as demonstrated by academic qualification, experience in teaching or practice, teaching effectiveness, and scholarship” such that the school complies with other ABA standards).

it: what our learning objectives are for each class and how we are using our assessments to accomplish those learning objectives. I think that will also get to Professor Tai's point about student frustrations and grading and our disappointment in grading. If we can really say that this assessment, this assignment, will get you to these learning objectives, then it just becomes much more fulfilling. And you can make that argument to the student because there is this clear connection. But it's hard work and I acknowledge that. And that's something I struggle with personally.

Professor Tai:

I think that's a great discussion. I want to add to that, because now this makes me think about what we just talked about in terms of what would we do if we had an unlimited amount of money to dedicate to this. Other disciplines have teaching assistants (TAs). They can pay for TAs to do this sort of intermediate grading, which we law professors cannot due to other time commitments, which is partly why we in our discipline do not do that. (There are a lot of other reasons why we do not do that, too.) But a large part of why we fail to provide intermediate assessments is that we do not have dedicated money for people to do this kind of review. It would be great to have second- or third-year students who have taken the class to go through and help give comments. Then I could assign, say, a FOIA request, or a comment on a regulation. The upper-level students can take a first crack at providing a review and then I could supervise these reviews. Having money to do that would be great. We cannot do that here, but it would be really wonderful. And I think that would really enhance student learning if that was available.

Professor Hirokawa:

I think we are mired in this very complicated situation where grades are not necessarily used to assess performance so much as to get a job. It is not that different for the Bar exam where testing has to meet a certain standard. But the difficulty there is, it is losing student ownership of performance at some point, where the grade is for the grade itself and sort of disconnected from what the students are learning and how hard they try, how well they prepare, and similar issues.

When we are thinking about how to assess experiential learning, breaking it into different components communicates the kinds of skills we want our students to pay attention to. So, for instance, think about a clinical grading rubric that has, let's say, four components: a pre-performance planning component, a performance component, a post-performance correction, and reflection component, and a component for professional responsibility. Ensuring students understand these types of competencies and how they relate to the various components might allow students to better realize these competencies through the learning process and take more ownership of the assessment process than they're doing right now.

I also think that we need to adapt. As much as grading is bad, if we are going to stick with it, we need to adapt grading to the kinds of skills we communicate through our grading rubrics, the expectations we want the students to meet, and what we consider competency, before letting them go out in the world and cause trouble.

VI. QUESTION AND ANSWER SESSION

The following questions were raised by faculty members in the virtual audience during the roundtable. Each question is followed by the panelists' response. Not all panelists responded to all questions.

A. In bringing skills and collaboration into the classroom, do you raise your own stories from your experience? If so, do you worry about alienating students who do not share those views?³⁴

Professor Tai:

I bring up *amicus* brief writing in my classroom. I do it with a lot of caveats. I say, "Look: I participated as an *amicus* in this particular kind of case drafting a particular brief," but I don't judge any students if they hold different views from me, the main thing is that they are able to engage with the topic. And it has worked well. I have had Federalist Society students who are opposed to the position I took in the brief and who still loved my class. So, I think that disclaimer worked.

³⁴ Question from Cale Jaffe, Assoc. Prof. of L., Dir. of the Env't'l L. and Cmty. Engagement Clinic, Univ. of Va. Sch. of L. (Jan. 28, 2021).

I also tell them that part of why I do it is to keep my skill set alive. Drafting briefs is fine, but also just going through the hassle of going through the D.C. Circuit system and uploading the things. Just getting into that nitty gritty kind of stuff and remembering how awful it is and how you have to use a certain type of computer and cannot use some browsers. I think it puts me in the practitioner mindset that is mindful of problems that my students are going to have to face. It is this regular day-to-day sort of aspect of lawyering that we as law professors do not often think about. I want to force myself to see that. I do so through the lens of sort of doing repeated *amicus* briefs. So, I do tell those war stories, but I also incorporate things that are just sort of regular lawyering kind of stories that I think are not necessarily directed towards one particular viewpoint or another.

*B. Do you have specific thoughts about how to best organize the field studies mentioned earlier in regard to such things as, what gets covered in the classroom versus what is covered in the field, how assessment is undertaken, and other topics along those lines?*³⁵

Dean Kronk Warner:

I do not necessarily have answers to Jason's excellent questions—our fabulous visiting professor—but I do want to give a shout-out to Dean Osofsky, who was talking about this idea of doing virtual reality field placements because our field experiences can be expensive. It is expensive, for example, to take my students to New York City or to take students from New York City to Utah. If virtual reality field experiences are an option, I would love to hear more. It also addresses some of the cost and disparate racial impacts because some students just cannot simply afford the field placements.

³⁵ Question from Jason Anthony Robison, Visiting Prof. of L., Univ. of Utah S.J. Quinney Coll. of L. (Jan. 28, 2021).

*C. Is anyone at a school which either teaches statistics, policy analysis, or anything that would give students tools to make normative decisions or does anyone incorporate any of those tools into their “regular courses”?*³⁶

Professor Hirokawa:

So, that would be awesome. I do not have a component on statistics in the class, but we do engage in a lot of critical analyses of policies. It is unfortunate that I do not have the background to give them more tools to do that kind of analysis, but I would love to hear about it if somebody has some kind of process they use to teach that.

Professor Tai:

I do not have a specific process to teach that. I got very preliminary notes from the Ninth Circuit Judicial Conference about basic statistics for judges. I try to talk about different forms of critical analysis for scientific studies, but in a much more general way. That said, there actually is floating around somewhere a much more formulated thing about statistics for federal judges, which I think could be repurposed for this purpose.³⁷

Dean Kronk Warner:

Correct me if I am wrong, but I believe George Mason has a program where they pay for you to learn about statistics and how to incorporate statistics into your class.³⁸ Don't they have a paid

³⁶ Question from Howard Katz, Prof. of L., Legal Educator-in-Residence Cleveland-Marshall Coll. of L. (Jan. 28, 2021).

³⁷ See COMM. ON THE DEV. OF THE THIRD EDITION OF THE REFERENCE MANUAL ON SCI. EVIDENCE, COMM. ON SCI., TECH., AND L. POL'Y & GLOB. AFFS, NAT'L RSCH. COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE *xiii–xv* (3d ed. 2011) (describing the Federal Judicial Center's Manual and how it provides tools for “judges to manage cases involving complex scientific and technical evidence” and describes basic principles of major scientific fields).

³⁸ See *Law & Economics Center*, ANTONIN SCALIA L. SCH., <https://masonlec.org/> (last visited May 19, 2022) (explaining the mission of the Law & Economics Center, and the various programmatic and funding opportunities available to legal professionals interested in learning more about law and economics).

workshop that law faculty can go to? I think that might be a good resource too for people who are interested in this type of work.

*D. What do we owe the student who takes only one environmental law class in law school? Do we need a separate course for students who intend to practice in other fields compared to students who want to become environmental practitioners?*³⁹

Professor Tai:

I am going to be a traditionalist and say that is why it is helpful to have that sort of core statute coverage in class, even though it does not really reach everything that is related to the environment. But, if a student is going to take just one class, they are probably taking it because they want to know something about the main regulations or main statutes.

Dean Kronk Warner:

I think that is right. The next question is: How broad and how deep should the coverage go? If the student is taking the survey class, you probably want to be socialized into the world of environmental law, either because you have a general interest or because you want to make sure you are not going to get into trouble somewhere along the line. And so, the goal there can be really to familiarize students with a broad brush of those environmental statutes. Do you stick to just three major statutes, such as the Clean Air Act, Clean Water Act, and NEPA? Or do you broaden it? And that might depend on where you are in the country, and what the needs are.

³⁹ Question from Noah M. Sachs, Prof. of L., Dir. of the Robert R. Merhige, Jr. Ctr. for Env't Stud., Univ. of Richmond Sch. of L. (Jan. 28, 2021).

*E. Do the panelists have any reflections on casebooks or other types of books that you have found valuable assigning, or readings for your students? How do you approach that?*⁴⁰

Dean Kronk Warner:

This is something that we have been really looking into at the University of Utah, just who's writing the casebooks, what's presented—not just in the environmental context but also in constitutional law and others—and what cases are being discussed. I think it is something that we should do a deep dive into and looking into doing some open source. We are calling them “anti-racism readers” as compendiums to the major casebooks. So, if anybody has any interest in that effort in your field, please let us know. That is something that we are working through to make available for free to everybody, open source. We are going to focus on anti-racism to start, but I also know that West Publishing has a small series of developing professional skills that they do,⁴¹ which is literally just to do the skills exercises associated with the various doctrinal classes. If you have a casebook you love, and you do not want to redo your prep, but you want to incorporate skills, I found that this series is another good source.

I've been actively thinking about: who's writing the casebook? What are they covering? How can we at a low-cost include these discussions of what I am really focused on, anti-racism and skills? And so, if anybody has any interest, let us know. That's something that we are working on at the University of Utah. This is the topic of the Utah

⁴⁰ Question from James Salzman, Prof. of L., Univ. of Cal., L.A., Sch. of L. (Jan. 28, 2021).

⁴¹ See e.g., *Developing Professional Skills: Environmental Law*, WEST ACADEMIC, <https://faculty.westacademic.com/Book/Detail?id=2904#description> (last visited May 19, 2022) (identifying one book in the Developing Professional Skills series that contains nine exercises designed to develop skills in drafting, client interviewing and counseling, negotiation, and advocacy in environmental law); *Developing Professional Skills, Constitutional Law*, WEST ACADEMIC, <https://faculty.westacademic.com/Book/Detail?id=3263> (last visited May 19, 2022) (identifying another book in the Developing Professional Skills series that includes exercises like drafting client letters, revising legislation, and negotiating settlements over constitutional claims).

Law Review's symposium this year, so we welcome anyone who is interested to please join us on November 5 and 6.⁴²

Professor Tai:

Along these lines, I think it is helpful for us as environmental law professors to keep talking to folks whose core teaching is outside—but adjacent to—environmental law. And in these discussions, we should give them easy ways to incorporate environmental law, especially environmental justice, into their curriculum. I find that a lot of students, for example, at Wisconsin, the students who are interested in all sorts of justice issues will go into criminal law, some civil rights law, and some immigration law. And those classes often act in a standalone kind of way. And I think that figuring out, with other faculty members, synergies between our different teaching areas will do a lot of good in terms of integrating these different curricula into a broader pedagogical arc.

Dean Kronk Warner:

I will offer one of the things I have really noticed in a lot of environmental casebooks is the absence of tribes and we are engaged in creating an anti-racism reading project at the University of Utah, not just for environmental law, but for other areas like constitutional law as well.⁴³ And so if anybody is interested in participating, we want to do it open source. We want to make it free and to provide those kind of anti-racism materials as a complement to your basic casebook.

Professor Tai:

I am going to regret this, but if you all email me, I will add you on the permissions list to create Google Docs that we can all keep editing to just incorporate exercises. I think that, as opposed to readings, exercise is the better way to sort of emphasize environmental

⁴² Univ. of Utah S.J. Quinney Coll. of L., *2021 Lee E. Teitelbaum Symposium - #IncludeTheirStories: Rethinking, Reimagining, and Reshaping Legal Education*, YOUTUBE (Nov. 15, 2021), https://www.youtube.com/playlist?list=PLrfMz_WZNoCYdan3vmmAx9kLLQOBa4o9_

⁴³ *Becoming Anti-Racist*, #SAFEU, UNIV. OF UTAH, <https://safeu.utah.edu/becoming-anti-racist/> (last visited May 19, 2022).

justice and racism concerns. The students can see how this actually applies. I mean, you can read about environmental justice kind of issues in the abstract. I have written papers on them. I'm happy to assign that to them. But I do not think that really gets to them until they actually have to tackle that right in an actual exercise. And so, the more we can incorporate such exercises into their learning, the better. Like I said, I don't know why I am saying this, but, yes, I think it's important to do.

Professor Hirokawa:

I agree with all that. I actually use Professor James Salzman's book,⁴⁴ but I teach outside of the book quite a bit to provide different perspectives, starting this semester with some race readings outside of the book. I love this idea of collaboration with open-source publications, particularly with proper materials and activities to nail some of these things.

Dean Kronk Warner:

The price of entry to Professor Tai's Google Doc is to contribute an exercise, unless you are pre-tenure, you can have free access. Anybody who is post-tenure, you need to submit an exercise. I like it.

*F. What strategies should we use to create collaborative open-source materials that could be used instead of a casebook? Professor Tai's Google Doc certainly seems like a great effort. It seems like this could include some of the materials that help introduce issues in different regions and maybe we create them for different kinds of courses?*⁴⁵

Dean Kronk Warner:

Yes, yes, yes, yes. I have to admit, a year ago, I considered myself a technology Luddite. But, the growth that I have personally

⁴⁴ JAMES SALZMAN, & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY (5th ed. 2019).

⁴⁵ Question from Hari Osofsky, Dean and Myra James Bradwell Prof. of L., Nw. Pritzker Sch. of L.

experienced in the last two years, and what I have seen my faculty be able to do, is tremendous. I want to give a shout-out to Dean Osofsky, who is a great leader in the space. She has been organizing a deans' discussion group. So, one thing is to reach out to your dean to make sure that your dean is part of that group, because that group has been kind of brainstorming ways of doing exactly that.

This has just been a fantastic conversation. Let's work together and let's talk about how we can bring each other into our classes. And now that we have got this technology barrier broken down and the ABA is giving us a little bit more flexibility on what we can do online and in online spaces, let's talk it through. Assessments will always be the rub, but I think it's a really exciting time.

Professor Tai:

I am going to create the Google Doc for any kind of exercise that anyone comes up with. But it would be nice to eventually sort of organize in terms of topics. I have been developing a lot of exercises for an international environmental law casebook that I am one of the co-authors for. And so that's much less what we're talking about here, but still relevant in terms of crowdsourced exercises. It would be nice to sort of have key terms for whatever your exercises are about. As time goes on, if I have the bandwidth, I will try to give more guidance on what these things should look like to make things more uniform. I do not know if I have the bandwidth for that now. I do not know why I just said that I am going to do this right now.

Dean Kronk Warner:

Professor Tai, this is something that I think our team can help you with. I will reach out to you, and we can see how, if at all, we help. We can support.

Professor Tai:

Thank you. Thank you. Sometimes you just say things and then it happens. Thank you!