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Beyond The 'Resiliency' and 'Grit' Narrative in Legal Education: Race, Class and Gender Considerations

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BEYOND THE ‘RESILIENCY’ AND ‘GRIT’ NARRATIVE IN LEGAL EDUCATION: RACE, CLASS, AND GENDER CONSIDERATIONS

CHRISTIAN B. SUNDQUIST

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I. INTRODUCTION

Law schools have been struggling to adapt to the “new normal” of decreased enrollments and a significantly altered legal employment market.¹ Despite the decrease in traditional attorney jobs, as well as the speculation that artificial intelligence systems such as “ROSS”² will displace additional jobs in the future,³ there still remains a significant gap in legal services available to the poor, middle class, and immigrants.⁴ The integration of social justice methodologies in the classroom thus has become critically important to the future of legal education and the practice of law.

Many commentators on the future of legal education have argued that today’s law graduates (often younger and with less life experience) simply lack the “grit” and “resiliency” required to succeed in the new entrepreneurial legal landscape.⁵ Motivated by

1. See, e.g., Peter C. Alexander, *Law School Deans and “The New Normal,”* 46 U. TOL. L. REV. 251 (2015).

2. See ROSS INTELLIGENCE, www.rossintelligence.com/ (last visited May 28, 2017).

3. See, e.g., Dan Mangan, *Lawyers Could Be the Next Profession to Be Replaced by Computers*, CNBC (Feb. 17, 2017), www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html; see also RICHARD & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* (2016).

4. See, e.g., Columbia Law School Human Rights Institute and Northeastern University School of Law Program on Human Rights and the Global Economy, *Equal Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Including Immigration Proceedings*, US HUMAN RIGHTS NETWORK 1 (July 2014), web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal_access_to_justice_-_cerd_shadow_report.pdf.

5. See, e.g., The Supreme Court of Ohio 2016 Student to Lawyer Symposium, *The Resilient Professional: Learning How to Rebound, Adapt & Thrive* (Oct. 21, 2016); Caroline Adams Miller, *Do You Have the Right Kind of Grit to Succeed?*, LAW PRACTICE TODAY (June 14, 2016), www.lawpracticetoday.org/article/right-kind-grit-succeed/; Andrew J. McClurg, *‘Grit and Grind’ Your Way to Success in Law School*, AMERICAN BAR ASSOCIATION: FOR LAW STUDENTS (July 14, 2016), <http://abaforlawstudents.com/2016/07/14/grit-and-grind-your-way-to-success-in-law-school/>; The ABA Commission on Women in the Profession, *The Grit Project: Program ToolKit*, AMERICAN BAR ASSOCIATION, www.americanbar.org/groups/women/initiatives_aware

the embrace of “grit” and “resiliency” principles by charter schools and public schools,⁶ the argument is made that legal education should adapt to inculcate such skills in our students.

The narrative on modifying legal education to produce entrepreneurial students with resiliency and “grit,” however, often has a troubling class and race-regarding dimension. This Essay argues that the “grit” reform initiative has the potential to rationalize future disparities, by shifting the focus from responding to the continuing impact of poverty and identity bias on student outcomes to bolstering individual character traits and resiliency. Our country has a long and troubling history of adopting such post-oppression “distancing moves” in order to discount the effect that systemic bias has on inequality, including disparate legal outcomes, by focusing solely on personal responsibility and individual deficit.⁷ The “grit” and “resiliency” narrative, by way of example, has been regularly deployed the past two years to silence the voices of students protesting systemic racism and sexual violence at colleges and law schools throughout the nation.⁸ While there is certainly a need for future law students to be thoroughly prepared to succeed in the ever evolving techno-legal marketplace, a focus on modifying legal education to promote “grit” and “resiliency” seems misplaced at best, and dangerous to future social justice efforts at worst.

II. PUBLIC EDUCATION AND THE TROPE OF PRIVATE RESPONSIBILITY

The modern pedagogical focus on “grit” and “resiliency” developed during the bi-partisan effort to reform public education.⁹

ds/grit.html (last visited Mar. 22, 2017) Emily Zimmerman and Leah Brogan, *Grit and Legal Education*, 36 PACE L. REV. 114, 142-44 (2015).

6. Zimmerman and Brogan, *supra* note 5, at 142.

7. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1644-45 (2008) (Professor Cho’s seminal article on the phenomenon of “post-racialism” in the law in part analyzes how “personal responsibility” and “deficit” narratives have been used as “distancing moves” to conceal the roots of racial inequality).

8. Parul Sehgal, *The Profound Emptiness of Resilience*, N.Y. TIMES MAGAZINE (Dec. 6 2015), www.nytimes.com/2015/12/06/magazine/the-profound-emptiness-of-resilience.html; Conor Friedersman, *Free Speech is No Diversion*, THE ATLANTIC (Nov. 12, 2015), www.theatlantic.com/politics/archive/2015/11/race-and-the-anti-free-speech-diversion/415254/; see also George Leef, *Emotional Coddling Doesn’t Help College Students- It Hurts Them*, THE NATIONAL REVIEW (Nov. 10 2016), www.nationalreview.com/corner/442076/university-student-protests-donald-trump-election-coddling (criticizing the “emotional coddling” of college students).

9. See PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* (2012); Rachel M. Cohen, *Teaching Character: Grit, Privilege, and American education’s obsession with novelty*, THE AMERICAN PROSPECT (Apr. 10, 2015), <http://prospect.org/article/can-grit-save-american-education>; see Arne Duncan, *The Charter Mindset Shift: From Conflict to Co-Conspirators: Secretary Arne Duncan’s Remarks to the National Alliance for Public Charter Schools 2013 “Delivering On the Dream” conference*, U.S. DEPARTMENT OF EDUCATION (July

The enhanced focus on developing such resiliency in students was part of a broader effort to incorporate the private market principles of competition, individual responsibility/accountability and choice into the remodeling of public education.¹⁰ Rather than promoting educational equity by utilizing federal grant block in-aid power to equalize school funding and respond directly to the class and race based roots of the “achievement gap,” the modern federal education framework re-envisioned the federal role as merely cultivating the market properties of public education.¹¹ Under this approach, class and race-based differences in educational outcomes were viewed as less a symptom of structural inequalities and systemic bias than as the result of a broad market failure to help such students become “grittier” and more “resilient,” while facilitating competition between public and quasi-public schools (charters) in order to provide parents with greater school choice.¹²

The modern approach to education, as embodied by the No Child Left Behind Act of 2001, the Race to the Top Act of 2009, and the Every Student Succeeds Act of 2015, however, has been thoroughly criticized as exacerbating class and race-based educational inequality while leading to a disturbing re-segregation of our public schools.¹³ In particular, as I have argued elsewhere, the current neo-liberal approach to public education forgoes our society’s constitutional responsibility under *Brown v. Board* to affirmatively ensure equal educational outcomes by obscuring the race and class dynamics of educational inequality.¹⁴ The danger in such an approach to public education is that it risks normalizing class and race-based disparities by viewing them as failures of character, personal responsibility or personal deficit.¹⁵

2, 2013), www.ed.gov/news/speeches/charter-mindset-shift-conflict-co-conspirators (former Education Secretary Arne Duncan discussing the need for public education reform initiatives to inculcate “non-cognitive skills . . . like grit and self-regulation” while lamenting that “ourschools still have a long way to go in developing . . . replicable means of cultivating grit and resilience.”).

10. See DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS 34, 262-63, 297 (2014); Nora Brunelle, *Political Education: An Analysis of the Policy and Politics Behind Utah’s Opposition to No Child Left Behind*, UTAH L. REV. 419, 430 (2006) (noting that the NCLB “relies on free-market principles of competition.”).

11. Christian B. Sundquist, *Positive Education Federalism: The Promise of Equality after Every Student Succeeds Act*, 68 MERCER L. REV. 351, 352 (2017).

12. See No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2015); Race to the Top, American Recovery and Reinvestment Act of 2009, § 14005-6, tit. XIV (2015); Every Student Succeeds Act of 2015, 114 P.L. 95, 129 Stat. 1802 (2015); see also *Focus on Character*, KIPP, www.kipp.org/ou-approach/character (last visited Mar. 27, 2017) (a famous charter school organization, which lists “grit” as one of seven core principles of its approach to building character in students).

13. See, e.g., Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J. L. & POL’Y 117, 145 (2012); Sundquist, *supra* note 11.

14. Sundquist, *supra* note 11, at 368-369.

15. *Id.*

The popularization of “grit” and “resiliency” approaches to education arose in this milieu, with proponents arguing that obstacles to education could be overcome if students were only taught to take greater personal responsibility for their learning—that is, to become “grittier” and “more resilient” in the face of adversity.¹⁶ A modern adaptation of the classic post-Civil War Horatio Alger myth of “bootstraps” American individualism,¹⁷ the grit and resiliency narrative thus seeks to “individualize responsibility for social conditions and life chances” while emphasizing teacher accountability.¹⁸ Indeed, the narrative of grit and resiliency “has emerged as education’s magic mantra” in recent years.¹⁹

The promise of “grit” and “resiliency” educational initiatives, however, has not been empirically demonstrated in the law school context, with the few studies that have tackled the issue finding no statistically relevant association between one’s “grit scale” score and achievement.²⁰ Indeed, there has been massive resistance to the modeling of public education around “grit” and “resilience” principles from education advocates, researchers and teachers unions.²¹ The grit and resiliency narrative has largely been criticized as failing to acknowledge the primary impact that underlying poverty and racial discrimination has on the achievement gap.²² Illinois State University Education Professor Venus W. Evans-Winters observes that “[t]heories of resilience . . . assume that there are no structural impediments to getting ahead, which ignores dynamics of race, gender, class, culture [and] imply that disadvantages that affect one’s chances of success are individual and can be overcome with individual effort.”²³ Similarly,

16. See, e.g., ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016); Angela Duckworth, Christopher Peterson, Michael D. Matthews & Dennis R. Kelly, *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOCIAL PSYCHOL. 1087, 1087-88 (2007); Marsha Speck, Martin Krovetz, *Student Resiliency: Towards Educational Equity*, 23 AMERICAN SECONDARY EDUCATION, 22-25 at 113; PAUL TOUGH, *HOW CHILDREN SUCCEED* (2013); Katherine R. Von Culin, Eli Tsukayama & Angela Duckworth, *Unpacking Grit: Motivational Correlates of Perseverance and Passion for Long-Term Goals*, 9 J. POSITIVE PSYCHO. 306 (2014).

17. See generally Noiliwe M. Rooks, *The Myth of Bootstrapping*, TIME MAGAZINE (Sept. 7, 2012), <http://ideas.time.com/2012/09/07/the-myth-of-bootstrapping/>.

18. See generally J. Saltman, *The Austerity School: Grit, Character, and the Privatization of Public Education*, 22 SYMPOKE 41, 44 (2014).

19. See Sehgal, *supra* note 8.

20. See Zimmerman and Brogan, *supra* note 5, at 139-145 (the authors observed that the “results of our research project did not support our hypothesis that grit would be positively correlated with law school GPA, as well as undergraduate GPA and LSAT score” while advocating for “future research” on grit).

21. See generally Saltman, *supra* note 18, at 44-45; see also VENUS E. EVANS, *TEACHING BLACK GIRLS: RESILIENCY IN URBAN CLASSROOMS* 25-48 (2011).

22. Saltman, *supra* note 18, at 44-45.

23. Evans-Winter, *supra* note 18, at 38 (reviewing the state of research on resiliency). Professor Evans-Winters also concluded that “current literature [on

University of Massachusetts-Dartmouth Education Professor Kenneth Saltman warns that “[t]he narrative about grit naturalizes poverty and inequality by drawing on biological studies and by stitching them to a neoliberal social Darwinian perspective on the naturalness of markets and individual competition.”²⁴ The danger in modeling public education reform efforts around assumptions of the “grit” and “resilience” of students, then, lies in the risk of normalizing educational disparities by class and race as the natural outcome of an education market whereby individual character is seen as the primary determinant of success.²⁵ In turn, the move to normalize educational inequality can be seen as a move to rationalize the very existence of class and racial inequality.²⁶

III. THE FUTURE OF LEGAL EDUCATION IN THE POST-OPPRESSION ERA

Law schools have long maintained a responsibility to serve the public interest by developing well-rounded attorneys enabled to pursue justice for a diverse range of clients.²⁷ In response to the declining enrollments, revenue, bar passage rates, employment and

resiliency] fails to identify gender and culturally specific resilience-fostering factors. For instance, it may be important to assess the cultural and gender composition of the background of those intervening factors (i.e., faculty or staff of color).” *Id.* at 39.

24. Saltman, *supra* note 9, at 51. Professor Saltman further argues that “[g]rit is a pedagogy of control that is predicated upon a promise made to poor children that if they learn the tools of self-control and learn to endure drudgery, they can compete with rich children for scarce economic resources.” *Id.* at 43.

25. Adjunct Professor of Sociology of Education Anundya Kundu argues that “[b]y overemphasizing grit, we tend to attribute a student’s underachievement to personality deficits like laziness. This reinforces the idea that individual effort determines outcomes.” He thus argues that the grit and resiliency narrative allows “educators and policy makers [to] ignore” structural issues by “oversimplif[ing] the problems facing education.” Anundya Kundu, *Backtalk: Grit, overemphasized; agency, overlooked*, 96 THE PHI DELTA KAPPAN, 80 (Sept. 2014). *See also* Saltman, *supra* note 18, at 52 (writing “[g]rit and resilience frame individual and social problems in ways compatible with a politics of austerity that eviscerates the caregiving roles of the state.”); Alfie Kohn, *Ten concerns about the ‘let’s teach them grit’ fad*, WASHINGTON POST (Apr. 8, 2014), www.washingtonpost.com/news/answer-sheet/wp/2014/04/08/ten-concerns-about-the-lets-teach-them-grit-fad (stating “[t]he more we focus on whether people have or lack persistence[...]the less likely we’ll be able to question larger policies.”); David Dency, *The Limits of Grit*, NEW YORKER (June 21, 2016) (“[i]n effect, the children are being held responsible for their environment; low character scores become an accusation against poor kids that they cannot possibly answer.”).

26. *See* Sundquist, *supra* note 11, at 379.

27. *See generally* Standard 206, ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016 (mandating law schools to have a commitment to diversity); Standard 301, ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016 (requiring law schools to have a rigorous curriculum); Standard 302, ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016 (stating that law schools shall produce lawyers with professional competency).

morale associated with the “New Normal” in legal education,²⁸ the narrative of grit and resilience has been co-opted to the law school context by some as a way to better help students succeed in the new techno-entrepreneurial legal landscape.²⁹ While a recent empirical study found no statistically relevant association between “grit and law school academic performance,”³⁰ the concept of “grittiness” and “resiliency” has nonetheless become a faddish prescription for what ails law school curriculum.³¹

Law schools certainly need to be more adept to the changing educational needs of students in a legal market that has been dramatically impacted by technological advancements, globalism, and a redistribution of employment opportunities. We owe our students an obligation to readjust legal pedagogy in a manner that will produce well-rounded attorneys possessing a commitment to serve justice and the diverse public good. All legal educators understandably want their students to be able to persevere through adversity (sometimes even using the terms “grit” or “resiliency” in good faith),³² to work hard to perform well in law school, to “buckle down” while studying for the bar, and to make reasonable sacrifices in the pursuit of professional success. I certainly do. That said, there

28. See Courtney G. Lee, *Changing Gears to Meet the New Normal in Legal Education*, 53 DUQ. L. REV. 39, 41 (2015) (arguing “[t]he course of legal education is changing. Many schools are downsizing, accepting classes with lower credentials, and otherwise adjusting to a decrease in applications and a weak legal economy[...]. It is time to change gears to meet the needs of this ‘new normal.’”).

29. See Zimmerman and Brogan, *supra* note 5, at 116-17 (stating that “grit is understudied in the context of legal education” although finding no empirical relationship between “grit and law school academic performance” in their own study); see also Ann Farmer, *Got Grit? Your Gritty Strength + A Growth Mindset = Success for the Long Run*, AMERICAN BAR ASSOCIATION: PERSPECTIVES (Summer 2014), www.americanbar.org/publications/perspectives/2014/summer/got_grit.html.

30. Zimmerman and Brogan, *supra* note 5, at 116.

31. See generally *The Grit Project*, THE AMERICAN BAR ASSOCIATION, www.americanbar.org/groups/women/initiatives_awards/grit.html; Keith Lee, *Grit and a Growth Mindset*, ABOVE THE LAW (June 13, 2014), <http://abovethelaw.com/2014/06/grit-and-a-growth-mindset/>; Andrew J. McClurg, *‘Grit and Grind’ Your Way to Success in Law School*, AMERICAN BAR ASSOCIATION (July 14, 2016), <http://abaforlawstudents.com/2016/07/14/grit-and-grind-your-way-to-success-in-law-school/>; Alison Frost, *Developing the Grit to Lead*, UNIVERSITY OF CHICAGO, SCHOOL OF LAW (Feb. 3, 2016), www.law.uchicago.edu/news/developing-grit-lead; Zimmerman & Brogan, *supra* note 5; *Building Grit, Tenacity and Perseverance while Teaching Legal Research*, OFFICIAL BLOG OF THE CHARLOTTE SCHOOL OF LAW (Oct. 16, 2014), www.charlottelaw.edu/blog/careers/building-grit-tenacity-and-perseverance-while-teaching-legal-research/.

32. See, e.g., American Bar Association Webinar, *Fierce and Gritty: Resilience Training for Lawyers*, AMERICAN BAR ASSOCIATION (Dec. 19, 2016) www.abalcc.org/2016/12/14/fierce-gritty-resilience-training-for-lawyers/ (noting the need to inculcate “resilience competency” in new lawyers); see also *Resilient Lawyers: Teaching well-being in law school*, UNIVERSITY OF WISCONSIN LAW SCHOOL (Dec. 9, 2014), https://law.wisc.edu/newsletter/Features/Resilient_lawyers_Teaching_well_2014-12-04 (describing the practical efforts the University of Wisconsin, School of Law has made for “resilience building” among law students).

remains the troubling risk that the application of the “grit” and “resiliency” public education narrative to law schools will further normalize law school performance disparities by race and class as owing to personal deficit rather than to structural barriers.

The incorporation of the grit and resiliency narrative into the lexicon of legal education is also problematic in that it can be wielded to silence law student activism on pressing social justice issues. Technology and social media have made the disproportionate police shootings of Black men and women much more visible, thus fostering a growing sense of student activism.³³ Many of our students are deeply concerned with injustices they see in our society, and are struggling to find a way to voice their concerns on campus (all the while taking exams, competing in moot court, participating in internships, and other routine law school activities). Our students need our help in having their voice recognized as something that matters, and in fostering important campus-wide dialogue on the role of attorneys in responding to issues of great social concern.

And yet in response to this groundswell of student activism, the language of “grit” and “resiliency” has been used in an effort to silence student protest.³⁴ Indeed, it has been noted that “usage of ‘resilience’ has flared up amid the continuing protests on college campuses” on issues such as #BlackLivesMatter and campus sexual violence.³⁵ Students have thus been ridiculed for their activism, characterized as lacking grit due to “hurt feelings” and having been “robbed of their resilience.”³⁶ Such students simply need to be grittier and more resilient under this narrative, and to focus on their studies rather than on broader social problems. As New York Times columnist Parul Sehgal observes:

By playing down the racism that the students have faced, it’s easier to frame the protests as tantrums, products of brittle spirits, on a continuum with grade grubbing. Somehow, demands for resilience have become a cleverly coded way to shame those speaking out against injustices.³⁷

The “grit” and “resiliency” narrative thus has the potential to normalize racial and other inequalities in legal education while

33. Sehgal, *supra* note 8 (observing that “protests against racism at colleges have gathered momentum”); see also Peter Dreier, *Caught on Camera: Police Racism*, AMERICAN PROSPECT (July 11, 2016), <http://prospect.org/article/caught-camera-police-racism> (noting the “surge in awareness” of “police mistreatment of black Americans” given advances in technology); Elliott C. McLaughlin, *We’re Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015) www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/ (noting the increased media coverage of police shootings of African-Americans).

34. See Sehgal, *supra* note 8; Friedersman, *supra* note 8; see also Leef, *supra* note 8 (criticizing the “emotional coddling” of college students).

35. Sehgal, *supra* note 8.

36. Friedersman, *supra* note 8.

37. Sehgal, *supra* note 8.

silencing student activism, by shifting the focus from structural inequalities which impact student learning to focusing on the individual traits of students as an explanation for failure.

IV. CONCLUSION

Law students today, despite the unfounded “Millennial” stereotypes, are no less gritty or resilient than those of yesterday. Our law students do not need pedagogical reforms aimed at improving their “grit scale” score or resilient tendencies. Rather, legal education must respond to the changing learning needs of students in a rapidly transforming techno-legal landscape by instilling a sense of public service, professionalism, and adaptability while exploring innovative teaching methodologies. Our students, similar to those of the past, simply need to be inspired and impassioned as agents of change in an evolving world of law and justice.