

IMAGINING THE OPEN ROAD

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INTRODUCTION

I first read a draft of Nancy Leong’s Article, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream* (“Open Road”),¹ while my law school was preparing to host a conference on race and criminal justice.² To our great fortune, Professor Leong accepted our invitation to present this thoughtful paper. I now have re-read the Open Road to write this response paper while additionally considering Articles by David Segal, Stanley Fish, and others debating aspects of legal education—in particular, the role of faculty scholarship.³ My repeated engagements with the Open Road confirm that it contributes beautifully to legal education as the sort of scholarship praised by Professor Fish: academic inquiry into a “purposive . . . vision” for the project of law.⁴

In this brief response paper, I first will summarize my understanding of the Open Road. Next, I will assess the value of Professor Leong’s Article in the context of recent debate about the relationship, or tension, between academic scholarship and education for the practice of law. In the end, I embrace the Open Road, not only as high-level scholarship, but as a virtue in legal education.

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1. 64 FLA. L. REV. 305 (2012).

2. The conference, titled “Race and Criminal Justice in the West,” was held in connection with the Washington State Task Force on Race and Criminal Justice. For information on the conference, see *Conference Addresses Role of Race in Criminal Justice System*, Gonzaga University School of Law, http://www.law.gonzaga.edu/News-and-Events/2011_race_justice_conference.asp (last visited Jan. 14, 2011). For the Preliminary Report of the Task Force, see Robert S. Chang, *Preliminary Report on Race and Washington’s Criminal Justice System*, 87 WASH. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1966113> (last visited Jan. 14, 2011).

3. See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>; Stanley Fish, *Teaching Law*, N.Y. TIMES (Dec. 12, 2011), available at <http://opinionator.blogs.nytimes.com/2011/12/12/teaching-law/>.

4. Fish, *supra* note 3.

I. THE OPEN ROAD TO THE AMERICAN DREAM

The Open Road centers on the iconic image of the unfettered roadway as a path to freedom and self-determination. One of the unique aspects of the Open Road is its sources. Although Professor Leong does cite some traditional legal authorities, she works largely with an “eclectic” selection of “cultural texts.”⁵ These texts include, in just a small sampling, literature such as *On the Road*,⁶ *The Adventures of Huckleberry Finn*,⁷ and *Fear and Loathing in Las Vegas*;⁸ movies such as *Crash*,⁹ *Zombieland*,¹⁰ and *Thelma and Louise*;¹¹ web sites such as “Stuff White People Like;”¹² commentary by comedians such as Chris Rock;¹³ and music by artists such as Ice Cube,¹⁴ Jackson Browne,¹⁵ and Chamillionaire.¹⁶

Through these texts, Professor Leong builds her thesis from an open road narrative. “Few manifestations of the American dream,” Professor Leong asserts, “can match that of the open road.”¹⁷ This dream amounts to “the possibility, in short, of forging a better, happier, richer, and more fulfilling life.”¹⁸ As a cultural metaphor and physical means of travel, the open road “represents both the promise of the American dream and its fulfillment.”¹⁹ The open road fundamentally “symbolize[s] escape, material and spiritual fulfillment, camaraderie, and of course,

5. Leong, *supra* note 1, at 309. Professor Leong notes that in her effort “to be as open and democratic as the road itself in [her] use of authority,” she does not distinguish “between ‘high’ and ‘low’ cultural texts.” *Id.*

6. *Id.* at 311, 313; *see also*, JACK KEROUAC, *ON THE ROAD*, Part 2, Chapter 3 (Viking Press 1957).

7. Leong, *supra* note 1, at 324; *see also* MARK TWAIN, *HUCKLEBERRY FINN* (1885).

8. *Id.* at 316, 319, 335; *see also* HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM* (1972).

9. Leong, *supra* note 1, at 333–34, 336; *see also* *CRASH* (Lions Gate Films 2004). Professor Leong discloses, “I really did not like *Crash* . . . and obviously *Brokeback Mountain* should have won the Academy Award.” *Id.* at 333 n.123.

10. Leong, *supra* note 1, at 314, 318; *see also* *ZOMBIELAND* (Columbia Pictures 2009).

11. Leong, *supra* note 1, at 320–21, 348; *see also* *THELMA AND LOUISE* (Metro-Goldwyn-Mayer 1991).

12. Leong, *supra* note 1, at 322–23; *see also* *STUFF WHITE PEOPLE LIKE*, at stuffwhitepeoplelike.com (last visited Jan. 23, 2012).

13. Leong, *supra* note 1, at 338–40, 350; *see also* Chris Rock, *How Not to Get Your Ass Kicked by the Police*, <http://www.youtube.com/watch?v=uj0mtxXEGE8> (last visited Jan. 23, 2012).

14. Leong, *supra* note 1, at 346–47; *see also* Ice Cube, *It Was A Good Day*, *THE PREDATOR* (1993).

15. Leong, *supra* note 1, at 317; *see also* JACKSON BROWNE, *Running on Empty*, on *RUNNING ON EMPTY* (Asylum 1977).

16. Leong, *supra* note 1, at 339–40, 347–48; *see also* *CHAMILLIONAIRE, Ridin’, on THE SOUND OF REVENGE* (Universal/Chamilitary 2006).

17. Leong, *supra* note 1, at 351.

18. *Id.* at 309.

19. *Id.* at 307.

possibility.”²⁰

In this open road narrative, “[t]here is little place for the law.”²¹ Rather, “[t]he law and the agents charged with its enforcement represent forces of structure and convention, precisely the forces that we strive to cast off by journeying the open road.”²² A traffic stop thus takes us from the transcendence of the open road to the “mundane” and the law’s “focus[] on minutiae.”²³ The traffic stop confines the traveler, treats freedom of movement as suspicious, and “fractures the camaraderie so essential to the narrative of the open road.”²⁴ Also, the traffic stop robs the traveler of power: “it forces relinquishment of control over one’s destiny for the immediate future.”²⁵ As a result, the “traffic stop shatters [the] illusion” of “unlimited possibility” found in the open road narrative.²⁶

Access to the open road narrative, however, is limited by race. The open road narrative itself is racialized as “white,” Professor Leong observes.²⁷ And, “[i]n stark contrast to the whiteness of the open road narrative, the traffic stop narrative is raced black.”²⁸ Professor Leong does not attempt to prove these claims with empirical data. Instead, Professor Leong explores the perception of a racialized road through her chosen cultural texts. These texts establish that “suspect racial groups” are “almost entirely excluded from the narrative of the open road,” and thus from “participating in an important part of the American dream.”²⁹ Professor Leong identifies several discrete “imaginative” harms resulting from this inequality, which she synthesizes as “racial disparity in wellbeing.”³⁰

The Open Road does not prescribe a legal solution to assure equal access to the open road. Instead, Professor Leong presents the movie *Harold and Kumar go to White Castle* as a cultural metaphor for “gradual yet profound deracialization of the road through incremental cultural shift.”³¹ This shift, inspired by “[t]he stories we tell through our films and our literature . . . might engender cultural change and democratize both literal and imaginative entry to the open road.”³²

20. *Id.* at 317.

21. *Id.* at 318.

22. *Id.*

23. *Id.* at 329.

24. *Id.* at 333.

25. *Id.* at 335.

26. *Id.* at 337.

27. *Id.* at 309.

28. *Id.* at 341.

29. *Id.* at 344.

30. *Id.* at 342.

31. *Id.* at 351; *see also* HAROLD & KUMAR GO TO WHITE CASTLE (New Line Cinema 2004).

32. Leong, *supra* note 1, at 351.

II. THE VIRTUE OF THE OPEN ROAD

The Open Road excels and enlightens as “law and humanities” scholarship.³³ Yet, I reviewed the Open Road during a surge in debate about whether law schools effectively prepare lawyers for actual “lawyering.”³⁴ Debate about the proper goals and methods of legal education is far from new,³⁵ but the realities of the modern legal market and student debt have imbued this debate with a sense of urgency, if not crisis.³⁶ The debate focuses, at least in part, on a perceived “‘scholarship’ regime”³⁷—where law schools waste student tuition, compromise student learning of “law,” and limit the legal market itself by prioritizing overly-theoretical faculty scholarship that is divorced from the practice of law.³⁸

33. The Open Road recently was profiled on the Law and Humanities Blog. See Christine Corcos, *The Open Road and the Traffic Stop*, L. & HUMAN. BLOG, <http://lawlit.blogspot.com/2011/09/open-road-and-traffic-stop.html> (Jan. 14, 2012, 12:26 PM). The one real flaw I could identify in the Open Road is the limited role of *motorcycles* in the open road narrative. Professor Leong does include motorcycle-themed cultural movies such as *Easy Rider*, but without acknowledging the role of motorcycles. When referencing modes of travel, Professor Leong highlights only “our obsession with cars.” Leong, *supra* note 1, at 312; see also *EASY RIDER* (Columbia Pictures Corp. 1969). As a devoted rider for most of my life, I must defend motorcycles’ place with cars in the open road narrative.

34. See, e.g., Segal, *supra* note 3.

35. See, e.g., Earl Martin & Gerald Hess, *Developing a Skills and Professionalism Curriculum—Process and Product*, 41 U. TOL. L. REV. 327, 328–33 (2010) (reviewing major reform proposals over the previous thirty years); see also Clarke Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1063 (1986); Michael Coper, *Educating Lawyers for What? Reshaping the Idea of Law School*, 29 PENN ST. INT’L L. REV. 25, 39 (2010); Francis J. Mootz, *Vico, Llewellyn, and the Task of Legal Education*, 57 LOY. L. REV. 135 (2011) (discussing how law school teaching is insufficiently rhetorical).

36. See e.g., Maulik Shah, Note, *The Legal Education Bubble: How Law Schools Should Respond to Changes in the Legal Market*, 23 GEO. J. LEGAL ETHICS 843, 843 (2010) (stating that due to the recession, recent law graduates are struggling to pay back loans due to the difficulty in finding employment); William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble*, A.B.A. J., Jan. 2012, at 30, 32, available at http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills (noting that 85% of recent law school graduates face the challenge of paying back an average of \$98,500 in student loans while entering a declining job market); David Segal, *For Law Schools, A Price to Play the A.B.A.’s Way*, N.Y. TIMES, Dec. 18, 2011, at BU1, available at <http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html> (exploring the high cost of accreditation for both law schools and law students).

37. Dan Markel, *Nostalgia and the Search for Nuance in Critiques of Legal Education*, PRAWFSBLAWG (Jan. 26, 2012, 5:50 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/11/on-the-topic-of-scholarship-and-lawyering-inspired-by-segals-nyt-bile-pile-ive-mostly-refrained-from-weighing-in-but-one-of.html> (quotation omitted).

38. See Segal, *supra* note 3; N.Y. Times, *Answers to Reader Questions about Law School*, N.Y. TIMES ECONOMIX (Dec. 20, 2011, 11:08 AM), <http://economix.blogs.nytimes.com/2011/12/20/answers-to-reader-questions-about-law-school/>; see also Neil H. Buchanan, *In Defense of Teaching about Old Things—and In Defense of Teaching and Writing*, DORF ON LAW (Nov. 23 2011) <http://www.dorfonlaw.org/2011/11/in-defense-of-teaching-about-old-things.html> (noting that

Therefore, I decided to consider what the Open Road contributes to the project of legal education beyond its qualities as theoretical scholarship. For, indeed, the Open Road does not deliver much concrete “law.” The Open Road is a concept piece, exploring “imaginative” injuries resulting from racial bias within an iconic vision of the American dream. Professor Leong supports her thesis with sources that match an English-Lit course with lineups from the Grammys and the MTV Movie Awards³⁹ and offers *Harold and Kumar go to White Castle* as a metaphor for cultural change.⁴⁰

Does the Open Road thus typify the kind of “chin-stroking scholarship” that prioritizes “the theoretical over the useful” decried by critics like David Segal?⁴¹ Not in my view. On the contrary, I believe the Open Road represents part of the best of what a law school can offer to its real-world constituents, because I cannot envision a model of comprehensive legal education where law faculty of different experiences and disciplines do not challenge us to imagine the full range of human experience.

Whatever the law does, it intimately affects the lives of real people. The law is not static, nor is it wholly objective—it provides a template for humanistic problem-solving. In one case, for example, the law might prove clear, but unjust. In another case, the law might prove indeterminate and subject to wide-ranging interpretation. In yet another case, the law might prove clear and unmovable, but a client needs counsel on what path to choose under the law. Law schools thus cannot educate solely about existing doctrine and how to plug it into legal documents or arguments and expect that lawyers will serve as much more than Google search buttons for law. Law schools need to challenge students and lawyers to identify the relationship between law and people, to question whether that relationship works, and to re-envision that relationship if it does not.

Professor Fish raised a similar point in his recent Article, *Teaching Law*, when he wrote that the “practice of law is more than a technical/strategic exercise”—it is “an enterprise that is purposive.”⁴² Law faculty therefore must question the purpose of law to ensure that its purposive function is not ignored in the learning process.⁴³ Professor Fish identified the import of these purposive inquiries to legal education:

the Segal article, as discussed at note 3 and accompanying text, will “be highly influential . . . because it feeds the established narrative about woolly-headed academics *versus* put-upon students”).

39. See, e.g., Leong, *supra* note 1 at 333, 340.

40. *Id.* at 314, 350–51.

41. See Segal, *supra* note 3.

42. Fish, *supra* note 3.

43. See Amanda C. Pustilnik, *It Keeps Students Thinking*, N.Y. TIMES (Dec. 16 2011), <http://www.nytimes.com/roomfordebate/2011/12/15/rethinking-how-the-law-is-taught/the-socratic-method-keeps-the-student-thinking> (explaining that under the traditional Socratic method, “[c]lasses start with questions, not answers,” to “guide[] students from easy certainties to appropriate inquiry as they learn lawyering skills”).

Such questions are prior to the bundle of particulars that make up the content of any corner of legal practice. The answers will suggest and generate arguments, strategies, rules and much else one finds in the pages of legal opinions. But the mere rehearsing of those arguments, strategies and rules will be an empty gesture if underlying the rehearsal is not some strong intuition of the general project that calls them forth.⁴⁴

Similarly, Professor Steven Sheppard has examined the implications of legal education that emphasizes technical skills but not purposive inquiry:

[L]aw students and lawyers are now taught a process and not a purpose for the law The result is an art wholly of technique and no aesthetic This soullessness in the taught law has profound implications for the law itself. Lawyers are given no coordinated and professional sense of why the law demands what it does, or what the law should demand, but instead they are left with only a sense of how it demands or allows what it does. This absence of sense leads to nonsense.⁴⁵

One of my first law professors, Clark Byse, captured this view in his annual introduction to his law students: “[T]here is more to being a lawyer than knowing the ‘law,’ as important as that knowledge is . . . ‘technique without ideals is a menace.’”⁴⁶

Inquiries into the purpose of law may appear abstract, but they are critical real-world stuff for lawyers training for life-long legal practice. Professor Leong’s *Open Road* shares exactly this sort of purposive inquiry into law. In particular, I identified in the *Open Road* at least three important inquiries concerning racially-biased traffic stops.

First, the *Open Road* challenges readers to envision the full range of harms from racially-biased traffic stops to include “imaginative” injuries to a particular vision of the American dream captured in the open road narrative.⁴⁷ Existing criminal procedure law does not recognize these harms as a violation of a legal right, but I see this fact as the point of the *Open Road*. Lawyers in criminal cases often are tasked with seeking remedies for harms to “rights” of some kind. Good lawyers cannot take for granted the established hegemony of legal rights. The *Open Road* challenges the controlling order of rights by asking whether racialization of

44. Fish, *supra* note 3.

45. Steven Sheppard, *Teach Justice*, 43 HARV. C.R.-C.L. L. REV. 599, 599–600 (2008).

46. Clarke Byse, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. REV. 59, 66 (1998) (quoting Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935)).

47. Leong, *supra* note 1, at 342.

the open road narrative injures human experience in unrecognized or undervalued ways that the law *should* recognize. We can answer these questions as “law” only after we diligently have explored the questions themselves, without allowing “[o]ur minds to fill in blanks with what we expect to see.”⁴⁸ This kind of inquiry into legal rights is a significant lesson for law students and lawyers. The Open Road takes readers on an insightful journey through this lesson.

Second, the Open Road questions whether lawyers should unlock the box of traditional legal authority. Professor Leong accesses and defines her vision of the American dream through non-traditional “legal” sources. Yet, many of us incorporate these sources into our daily lives, share them with our family and friends, and remember them over a lifetime.⁴⁹ Professor Leong contrasts these cultural sources with the “dry medium” and “sterile chronology” of traditional legal authority, which “has nothing of the poetry or magic of our best novels and our favorite movies.”⁵⁰ A good lawyer will evaluate whether diverse sources add to an argument, particularly when the subject, such as racial bias in society, may not prove readily accessible to the lawyer’s audience.⁵¹ Professor Leong thus teaches a valuable communication lesson in the Open Road by selecting sources that may cross bridges and reveal the nature and scope of these harms more effectively than statutes or judicial opinions ever could.

Finally, the Open Road asks whether the *law* can remedy these injuries, or whether other solutions might prove more successful—a critically important question for lawyers. Law students too often assume the law can answer all questions if the law is just argued the “right” way. Sometimes, however, a lawyer must advise a client to look elsewhere for answers. Professor Leong suggests a “renaissance in our narratives about the road,” told through “our films and our literature,” as a path toward “incremental cultural shift” and democratization of the open road narrative.⁵² This conclusion thus ends the Open Road with a profound question about racially-biased traffic stops: can we really depend on the law to address this problem, or do we need to re-write the open road narrative ourselves, through an eclectic mix of cultural, non-legal texts?

48. Pustilnik, *supra* note 43.

49. One need only spend a few minutes on Facebook, filled with links to videos, songs, and literature, to verify how important these cultural texts are to individuals’ sense of identity and purpose.

50. Leong, *supra* note 1, at 324.

51. Cf. M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 132 (2009) (examining challenges of teaching race issues to homogenous classrooms lacking minority voices and requiring new narratives to reach more students and “to resist the force of ‘post-racial’ mythologizing”).

52. Leong, *supra* note 1, at 351.

CONCLUSION

I do not know whether Professor Leong had these specific inquiries in mind when she wrote the Open Road. Regardless, Professor Leong's Open Road offers much more than fodder for theoretical discourse. I will assign the Open Road to my students. And not because the Open Road clarifies or proposes any particular legal doctrine that my students can argue in court after they graduate. Rather, I will teach the Open Road because it invites readers to intuit a fuller range of the human experience that informs the purpose of law—an invaluable tool to excellent lawyering. Professor Leong's Open Road stimulates readers to travel down this road to a richer understanding of law, and it stands as a virtue in legal education.