

# A LIBERAL THEORY OF LEGAL EDUCATION

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## A LIBERAL THEORY OF LEGAL EDUCATION

Eli Wald\*

*Law schools have a reputation, and are often criticized, for being liberal. Yet, their reputation notwithstanding, law schools are traditional, orthodox institutions, teaching and instilling in students a version of the law devoid of justice and morality. One might be tempted to assume law schools merely reflect the conservatism of the legal profession, which generally serves the interests of powerful clients and sustains the status quo, but this account does not withstand scrutiny. Law schools and law professors are relatively insulated from the intense competitive pressures of the market for legal services. Whatever the explanatory power of lawyers' usual excuses for ignoring justice and morality—"the adversary system made me do it," or "clients made me do it"—they do not apply to and do not explain the conduct of law professors. This Article makes three points. First, it explains how law schools are orthodox and why they continue to be a-liberal in the twenty-first century, preaching a great divorce between law and justice and morality although they have the power and ability to become more liberal. Second, it argues that law schools must be more liberal, that is, they must pursue a model of legal education which integrates law, justice, and morality. Third, the Article advances a liberal model of legal education and responds to several criticisms of it.*

## INTRODUCTION

This is a challenging time for law schools. As they grapple with the mounting cost of legal education and its consequences for students,<sup>1</sup> the challenges of adjusting to online and remote teaching in the aftermath of the Covid pandemic,<sup>2</sup> the rise of artificial intelligence (AI),<sup>3</sup> and the new landscape

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1. Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH L. REV. 89, 103–113 (2021); *id.* at 111–12 (“[T]he high cost of legal education excludes students due to their socioeconomic status.”); Etienne C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. ON POVERTY L. & POL’Y 287, 328 (2022) (“[T]he high cost of law school tuition and consequent high debt that students must assume can pressure students to pursue high-paying corporate jobs over public interest careers.”); Eli Wald, *The Access and Justice Imperatives of the Rules of Professional Conduct*, 35 GEO. J. LEGAL ETHICS 375, 405 (2022) (“[T]he high and rising cost of legal education . . . de facto excludes college graduates from lower socioeconomic classes from law schools and drives graduates carrying significant student loan debt into the corporate hemisphere and large entity clients and away from the individual hemisphere.”).

2. See Christian B. Sundquist, *The Future of Law Schools: Covid-19, Technology, and Social Justice*, 53 CONN. L. REV. ONLINE 1 (2020); Kia H. Vernon, *Zooming Through Law School: Lessons Learned from Remote Learning During the Covid-19 Pandemic*, 65 ST. LOUIS U. L.J. 717 (2021); Zoe Niesel, *Seismic Shifts: Post-Covid Legal Education and the Profession*, 15 ELON L. REV. 81 (2023).

3. John Bliss, *Teaching Law in the Age of Generative AI*, JURIMETRICS (forthcoming 2024); see also Joe Regalia, *Generative AI and the Future of Legal Education*, NEV. LAW., Oct. 2023, at 8; Ronald M. Sandgrund, *Who Can Write a Better Brief: Chat AI or a Recent Law School Graduate?*, COLO. LAW., July/Aug. 2023, at 24.

of post-affirmative action admissions,<sup>4</sup> law schools find themselves between a rock and a hard place. From the left, law schools are being criticized for failing to pursue a progressive agenda, grounded in instilling in students critical skills with which to tackle the status quo.<sup>5</sup> From the right, law schools are being accused of the exact opposite, adopting a radical critical race agenda and failing to teach their students how to be lawyers.<sup>6</sup> Who is right (no pun intended), who is wrong, and what law schools ought to do about it are the questions answered in this Article.

Law schools and law professors have a reputation for being liberal. Because law professors have ample autonomy and independence, as well as academic freedom and tenure, and because they have much sway over the curriculum and culture of law schools, one might have expected law schools to be bastions of liberalism or even progressive thought. This reputation explains the right-wing critiques.

This Article shows, however, that in reality law schools are orthodox and *a-liberal*, that is, indifferent to liberal values, such as justice, equality, fairness, and access to legal services for those who cannot afford to pay. Establishing the a-liberal agenda of law schools reveals a lot. To begin with, it refutes the conservative critique of legal education. Some law schools may offer elective critical coursework, but they are not progressive hotbeds. Next, the orthodox identity of law schools explains the left-wing critique of legal education by showing that law schools are not progressive institutions. Surprisingly, however, the a-liberal identity of law schools also helps undermine the left-side criticism of legal education. Law schools ought not become antiracist institutions, although they should certainly introduce students to critical (and conservative) skills, methodologies, and ideologies of lawyering, including antiracism. Rather, what a-liberal law schools need to do is become more liberal, instilling in students a commitment and passion for justice, equality, fairness, and increased access to legal services for all.

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4. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); Steven A. Ramirez, *Foreword: Diversity in the Legal Academy After Fisher II*, 51 U.C. DAVIS L. REV. 979 (2018); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).

5. See Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 13 (2023).

6. See, e.g., Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05#:~:text=The%20core%20idea%20is%20that,in%20legal%20systems%20and%20policies> [<https://perma.cc/U7BN-3RVG>]; Karen Sloan, *Law Professors 'Cold Calls' Spur Heated Debate*, REUTERS (Sept. 28, 2023, 11:25 AM), <https://www.reuters.com/legal/litigation/law-professors-cold-calls-spur-heated-debate-2023-09-26/> [<https://perma.cc/4EFW-T7D3>] (“The whole point of what we do in law school is to train people to be agile minded like a lawyer . . . I really don’t understand the idea that you should opt out of interacting with the faculty in a dynamic and spontaneous way.”) (quoting Adam Mortara, the lead trial lawyer for Students for Fair Admissions in the *SFFA v. Harvard* case and a lecturer at the University of Chicago Law School).

What to do next—how to become more liberal—requires understanding why law schools are a-liberal. While compelling historical arguments abound, explaining how and why law schools became a-liberal in the nineteenth and early twentieth centuries, this Article explains for the first time the a-liberal realities of legal education in the twenty-first century. Specifically, it explains how and why after the demise first of formalism and then of the formalist-realist functionalist approach to legal education, “new liberalism” came to dominate the mainstream thinking of law schools, resulting in the *banality of a-liberal indifference*. Law professors, having bought into the admittedly alluring orthodoxy of new liberalism’s mix of individual rights, formal equality, and equating the public interest with the aggregate of private interests, have little incentive to be, act, and instill in their students liberal values. The Article concludes by proposing a model of legal education based on liberal values, complete with a blueprint for law schools to put it in place.

The Article is organized as follows. Part I establishes that the liberal reputation of law schools does not withstand scrutiny. It begins by showing that law schools follow a traditional curricular model, which teaches the “great divorce” between law and morality and justice, and which features an orthodox, adversarial, individually based, competitive culture outside of the classroom. This traditional model, initially explained by formalism’s belief in and need to establish law as an independent science separate and distinct from morality and justice, could have been revised after law schools wrestled control over legal education from apprenticeships and “reading law.” Alas, Part I shows that the realist debunking of formalism resulted in a functionalist approach, which ushered in the teaching of public law and of clinical education but did not result in the reintegration of law, morality, and justice; and that the critical debunking of the functionalist approach opened the door to new liberalism, a seductive theory of moral individual rights, which integrated a version of morality into law, while continuing to exclude justice considerations. After demonstrating how late twentieth century and early twenty-first century challenges and practice developments have undercut new liberalism’s promise, Part I concludes with an analysis of the reasons for law schools’ continued a-liberal stance, a phenomenon the Article dubs the banality of a-liberal indifference.

Part II advances a liberal model of legal education. It starts with a blueprint for a bold curricular and cultural liberal reform of law schools, distinguishes it from current conservative and left-side posturing, and ends by responding to some likely critiques of the proposed model.

## I. THE LIBERAL FAÇADE OF LAW SCHOOLS

Most law professors are politically liberal.<sup>7</sup> Their political convictions inform their professional views and values; liberal professors teach classes expressing liberal points of view, write liberal law review articles espousing liberal legal arguments,<sup>8</sup> and serve within and outside of law schools supporting and advancing liberal organizations and causes.<sup>9</sup> Indeed, some law professors are progressive, holding views that are generally understood to be left of mainstream liberalism, identifying, for example, as critical scholars, critical race theorists, and feminists. And while one should not exaggerate the liberal stance of most law professors—they are generally graduates of select few elite law schools hailing from privileged backgrounds and lean Democratic, which historically has not necessarily been particularly liberal<sup>10</sup>—they are certainly perceived to be liberal.<sup>11</sup>

Moreover, the liberal attitudes of law professors are not limited to their teaching, scholarship, and service. Tenured and tenure-track professors, whose two-third votes are usually required to obtain a coveted tenure-track appointment, effectively serve as gatekeepers into legal academia, and tend to hire liberal law professors.<sup>12</sup> Moreover, although faculties do not control the appointments of deans, they do have a significant say over these hirings, and they tend to vote for the appointment of liberal deans.<sup>13</sup> In turn, liberal deans tend to preside over liberal administrations, for example, appointing liberal Appointments and Admissions Committees and hiring liberal admissions officers, resulting in the recruitment and matriculation of liberal law school

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7. Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018); Brian Z. Tamanaha, *The Failure of Critics and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL'Y REV. 309, 327 (2013).

8. See Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015).

9. John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1182 (2005).

10. See, e.g., *The New Deal Realignment*, INST. FOR SOC. RSCH. AT UNIV. MICH. (2024), <https://www.icpsr.umich.edu/web/pages/instructors/setups/notes/new-deal.html> [<https://perma.cc/5WEZ-CEZV>].

11. Mike Stetz, *Are Law Schools Too Liberal?*, NAT'L JURIST (Oct. 20, 2022, 2:22 PM), <https://nationaljurist.com/prelaw/prelaw-news/are-law-schools-too-liberal/#:~:text=schools%20were%20apprehensive%20about%20sharing%20their%20views%20in%20class.&text=who%20disagree%20with%20him%20in,apprehensiveness%20has%20turned%20to%20scorn.&text=label%20themselves%20%E2%80%9Cwoke.%E2%80%9D%20Studies,liberal%20side%20of%20the%20divide> [[perma.cc/77VK-99WU](https://perma.cc/77VK-99WU)].

12. James C. Phillips, *Political Discrimination and Law Professor Hiring*, 12 N.Y.U. J. L. & LIBERTY 560, 561 (2019).

13. See Bonica, *supra* note 7; see also *AALS Report Details the Career Pathways, Responsibilities, and Challenges Facing Law School Deans*, ASS'N OF AM. L. SCHS. (2022), <https://www.aals.org/about/publications/newsletters/aals-news-spring-2022/aals-report-the-american-law-school-deans-study/> [<https://perma.cc/G8JA-QARZ>] (finding that women headed 41% of law schools in 2020, compared to 18% in 2005; 31% of the law schools in 2020 had deans who were people of color or Hispanic, compared to 13% in 2005).

classes.<sup>14</sup> Before the United States Supreme Court heavily curtailed race-based affirmative action in law school admissions,<sup>15</sup> while enrollment was very much concerned with candidates' credentials with an eye toward rankings and prospects of passing the bar exam, admissions were generally regarded as liberal, regularly utilizing affirmative action policies.<sup>16</sup>

One would have thought that, left to their own devices, liberal law professors and liberal deans would push a liberal agenda for legal education, cultivating an appreciation, passion, and commitment to justice, equality, access to legal services, and the rule of law.<sup>17</sup> One would have expected legal academia to be in the forefront of the quest for equality, justice, and access.<sup>18</sup>

Law schools and their professors certainly maintain a façade of liberalism. In addition to recruiting liberal faculties and students and producing liberal scholarship espousing liberal values, many law schools have recently hired Equality, Diversity, and Inclusiveness (EDI) administrators, regularly sponsor EDI talks and programs, house clinics that often pursue the causes of underrepresented clients seeking justice, and regularly offer a variety of liberal and progressive elective coursework.<sup>19</sup> These liberal commitments are reflected in law schools' accreditation standards, which have recently been amended to require that law schools provide training and education to law students on bias, cross-cultural competency, and racism.<sup>20</sup>

*A. Law Schools' Historical Orthodox Model: Formalism, Realism, and the  
Functionalist Approach*

Perhaps surprisingly, their reputation notwithstanding, law schools are anything but liberal institutions. In fact, quite the contrary, they foster and feature what has been called an orthodox approach to legal education.<sup>21</sup> This, to be clear, does not mean that law schools preach conservative values in the traditional political way. Most do not. In fact, they seemingly teach no values at all, purporting instead to teach students the neutral "science" of law. As

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14. See *AALS Report*, *supra* note 13.

15. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

16. Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 241 (2008).

17. See *infra* notes 126–30 and accompanying text, defining and discussing liberal values in legal education.

18. Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1079 (2011); Toussaint, *supra* note 5, at 1.

19. *AALS Report*, *supra* note 13 (finding that 79% of law school deans spent significant time on diversity, equity, and inclusion initiatives); Toussaint, *supra* note 5, at 45–47.

20. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024 (AM. BAR. ASS'N 2023).

21. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 252 (1978) [hereinafter Cramton, *Ordinary Religion*]; see also Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 512 (1987) [hereinafter Cramton, *Beyond the Ordinary Religion*].

Professor Robin West elegantly and persuasively explains, the orthodox agenda of law schools is rooted in their past.<sup>22</sup> As law schools rose and began to systematically replace the old apprenticeship system of reading law, they immersed themselves in formalism.<sup>23</sup> Law was a science, and its teaching belonged in universities. Legal principles could be discerned from adjudicated appellate cases, collected in casebooks, and taught to law students using the Socratic method. Importantly, law was an independent body of knowledge, separate and distinct from moral philosophy and its terms of art, such as right, wrong, and justice. Rules of law were to be derived from decided cases by distinguishing the holding (the *ratio decidendi*) from the nonbinding portions (the *obiter dicta*), not by discussing equality and justice.<sup>24</sup>

This agenda was pushed through the formal law school curriculum, teaching “law” and ignoring justice, and through the informal or hidden curriculum of law schools.<sup>25</sup> “While teachers naturally emphasize what they are attempting to teach—the formal curriculum—the total learning environment influences what students learn. Ethics, in particular, is primarily taught by example.”<sup>26</sup> Moreover,

The development of ethical attitudes is probably more affected by the hidden curriculum than by the formal curriculum: the example of teachers and administrators in the handling of issues and people; the implication by students that matters *not* included in the formal curriculum are unimportant to lawyers; and the powerfulness of the student culture in affecting attitudes toward grading, examinations, competition, status and “success.”<sup>27</sup>

The formal curriculum’s rejection of justice and morality and emphasis on the “law” taught through the Socratic method were supported by the hidden curriculum’s cultivation of competitive individualism. “The atomistic character of the student’s work in law school,” reasons Cramton, further drove students away from thinking about, let alone internalizing, justice considerations.<sup>28</sup>

Much professional work involves cooperative activity, but law school does little to assist a law student to work effectively as a member of a team. The competitive environment of law school tends to pit each student against all others and, not surprisingly, feelings of isolation, suspicion, and hostility develop among students. Knowledgeable observers comment that law

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22. See ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 73–75 (2014).

23. *Id.* at 70.

24. *Id.* at 26.

25. Cramton, *Ordinary Religion*, *supra* note 21, at 252.

26. *Id.* at 253.

27. *Id.*

28. *Id.* at 262.

students become more isolated, suspicious, and verbally aggressive as they progress through law school.<sup>29</sup>

This formalist approach, pursued inside and outside of the classroom, was vital for establishing and securing the standing and status of law schools as independent institutions monopolizing legal education.<sup>30</sup>

Realism, by questioning formalism's scientific aspirations and asserting that the "law is what the judge had for breakfast,"<sup>31</sup> presented an opportunity to integrate law and values, morality and justice. Alas, this was not to be. Realism had a significant impact on legal education, including fostering the teaching of public law subject matters such as constitutional law and administrative law, now staples of the standard curriculum and of clinical legal education.<sup>32</sup> But it did not lead to the integration of law, justice, and morality. Instead, a formalist-realist functional approach emerged in law schools, consisting of four elements: "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place."<sup>33</sup> In other words, this emerging orthodoxy replaced formalism's law-as-science attitude with realism's skeptical, instrumental approach, while retaining formalism's hidden curriculum and belief in legal positivism. Instead of ushering in a new era of law and justice, the functionalist approach implied that talk of justice and morality ought to be questioned, doubted, and rejected. Thus, the first opportunity to reintegrate law and values was squandered.

All of this—the orthodoxy of legal education—is, literally, old news. Writing in 1978, Cramton concluded that "[m]odern dogmas entangle legal education—a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry."<sup>34</sup> Adding that "[w]e will neither understand nor transform these modern dogmas unless we abandon our unconcern for value premises," Cramton asserted:

If all law and truth are relative, pressing one's own views on others would be arrogant and mischievous. But if there is really something that can be called truth, beauty or justice—even if in our finiteness we cannot always agree on

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29. *Id.*

30. WEST, *supra* note 22, at 79; *see generally* ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1987).

31. Dan Priel, *Law is What the Judge Had for Breakfast: A Brief History of An Unpalatable Idea*, 68 *BUFF. L. REV.* 899, 899 (2020).

32. WEST, *supra* note 22, at 74.

33. Cramton, *Ordinary Religion*, *supra* note 21, at 248.

34. *Id.* at 262.



what it is—then law school can be a place of searching and creativity that aspires to identify and accomplish justice.<sup>35</sup>

The late 1970s and 1980s featured a second opportunity to reintegrate law and values. From the left, critical scholars were deconstructing the law, exposing the mechanisms by which it legitimated hegemony and calling for the law to become more just.<sup>36</sup> From the right, law and economics scholars advocated for the law to incorporate the values of wealth maximization, efficiency, and welfare economics.<sup>37</sup> Different as these agendas were, and they were literally at “war,”<sup>38</sup> the law seemed on the cusp of reintegrating values into its midst.

### B. *Law Schools’ Orthodox Model 2.0: “New Liberalism”*

The sources of the ordinary religion of law schools are threefold: “intellectual trends in the general culture surrounding the law schools; the formal law school curriculum; and the informal or hidden curriculum.”<sup>39</sup> In her canonical *Law, Rights, and Other Totemic Illusions*, West describes the intellectual legal trend that took law schools by storm in the 1970s and 1980s, what she called “new liberalism”<sup>40</sup> and others have subsequently dubbed neoliberalism.<sup>41</sup> Like formalism, new liberalism insisted that law is autonomous from politics. Unlike realism’s instrumentalism, however, new liberalism insisted that law is “rich in moral content,”<sup>42</sup> and replaced the realist skepticism with a new religious-like commitment to the rule of law.<sup>43</sup> Specifically, the new liberal theory claimed that individual legal rights impose moral obligations; that moral rights secure compliance through obedience; that moral rights are not the product of law but instead “inhere” in the individual; and that while moral rights are human in the sense that they are not divine, they are made by no identifiable human hand.<sup>44</sup> New liberalism’s devotion to individual rights reintroduced

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35. *Id.* at 263.

36. WEST, *supra* note 22, at 81–83.

37. *Id.*

38. See William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175, 175 (2001); Richard A. Epstein, *Let “The Fundamental Things Apply”: Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1295 (2002).

39. Cramton, *Ordinary Religion*, *supra* note 21, at 252.

40. Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 838 (1986).

41. See, e.g., Toussaint, *supra* note 5. Although, as Professor Robert Gordon explains, liberalism in the United States has had a distinctive capitalist bend, new liberalism with its core values of moral individual rights, formal equality, and emphasis on the rule of law can be distinguished from neoliberalism, characterized by commitment to capitalism, privatization, corporatization, and entrepreneurialism. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

42. West, *supra* note 40, at 838.

43. *Id.* at 839–41.

44. *Id.*

morality into law, while continuing to reject justice considerations as integral to the rule of law.

This new legal theory quickly rose to dominance, establishing itself as the new orthodoxy of legal education. This new secular gospel was, however, far from intuitive. In a world in which few read law review articles,<sup>45</sup> it was surprising that a legal theorist, even one as prominent as Ronald Dworkin,<sup>46</sup> a leading proponent of new liberalism, could have such an impact on legal education, especially given that Dworkin's new liberalism was not a theory of legal education.<sup>47</sup>

Dworkin's legal theory meshed well with several trends in the general and legal cultures surrounding law schools. New liberalism rose to prominence and was inspired by the Warren Court's jurisprudence, featuring individual rights and the rule of law as both a commitment to and a path forward for a better, more equal society under the law.<sup>48</sup>

Over the last 150 years or so, enlightened American legal opinion has adhered with remarkable fidelity to what, in broad conception, looks like a single set of notions about historical change and the relation of law to such change. Stated baldly, these notions are that the natural and proper evolution of a [progressive] society . . . is towards the type of liberal capitalism seen in the advanced Western nations (especially the United States), and that the natural and proper function of a legal system is to facilitate such an evolution.<sup>49</sup>

While critical and conservative perspectives prevalent in the 1970s and 1980s questioned the relationship between law and social progress, new liberalism provided lawyers and law professors the means of holding on to the belief that "[l]aw' and 'society' are separate social categories, each describable independently from the other but related to each other through various mechanisms of causal linkage,"<sup>50</sup> and, more importantly, that adherence to individual rights and the rule of law constitute "an objective, determined,

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45. See, e.g., Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 932 (1990) ("[T]he overwhelming majority of [law review] articles are noted not by the courts or legislatures, but by one another.") (emphasis omitted).

46. Gregory Bassham, *Freedom's Politics: A Review Essay of Ronald Dworkin's Freedom's Law: The Moral Reading of the American Constitution*, 72 NOTRE DAME L. REV. 1235, 1235 (1997) ("Ronald Dworkin is America's leading philosopher of law—arguably the greatest philosopher of law this country has ever produced."); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1187 (2002) ("The most famous critic of positivism is, of course, Ronald Dworkin, whose place in the history of philosophy and legal theory has been secured largely by his criticisms of positivism and his attempt to develop a viable alternative.").

47. As West documents thoroughly, other prominent scholars, including Owen Fiss, Lawrence Tribe, and Charles Fried, contributed to new liberalism. West, *supra* note 40, at 838–41.

48. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 2 (1993); Jack M. Balkin & Reva B. Siegel, *Introduction to THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009).

49. Gordon, *supra* note 41, at 59 (footnote omitted).

50. *Id.* at 60.

progressive social evolutionary path,”<sup>51</sup> toward “the gradual liberation of the individual from the shackles of [oppression].”<sup>52</sup>

Long after law schools have secured their hegemony over legal education, they have continued to adhere to their model of legal education, which looks a lot like it did in Langdell’s days.<sup>53</sup> Although law schools’ early formalistic agenda was in part about establishing and securing professional status, standing, power, and monopoly, it resulted in an orthodox, conservative model. The demise of the formalist-realist functionalist approach created an opportunity to reintegrate morality and justice into law, only to be rejected by new liberalism and its commitment to moralistic individual rights. Not only did new liberalism belittle justice, it cultivated moral relativism, individualism, and, once students graduated to become lawyers, deference to paying clients asserting their rights at the expense of the public good.<sup>54</sup> Law students arriving in law schools, in part motivated by a desire to “save the world,” and pursue “justice,” were taught instead to “think like a lawyer,” arguing both sides of every point so they can effectively advocate for clients’ rights. There were no “right” and “wrong” positions to be taken, just legal positions, to be determined by paying clients asserting their “moral” rights.<sup>55</sup> Moreover, students were encouraged to become lawyers who were nothing more than mouthpieces for clients, empowering them to act like Holmesian bad people constrained only by the law.<sup>56</sup> Clients alone were to determine the objectives of the relationship, and lawyers were insulated by the principle of nonaccountability, pursuant to which they were not morally responsible for the objectives they helped bring about.<sup>57</sup>

Such rights-based, client-centered orthodoxy was embraced not only in theory but in practice by lawyers. Lawyers proudly describe their role as a three-legged stool. They are representatives of clients, officers of the legal system, and “*public citizen[s] having special responsibility for the quality of justice.*”<sup>58</sup> In reality, however, during the course of the twentieth century, lawyers have gradually come to understand their role and practice it primarily as representatives of clients, with few or no obligations to the public and public interest.<sup>59</sup>

51. *Id.* at 61.

52. *Id.* at 62.

53. See STEVENS, *supra* note 30.

54. See Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J. L. ETHICS & PUB. POL’Y 281, 389 (2018).

55. *Id.*

56. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 410 (2011) [hereinafter Wald & Pearce, *Making Good Lawyers*].

57. See MODEL RULES OF PRO. CONDUCT r. 1.2(a), (b) (AM. BAR ASS’N 2023); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 41; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672–75 (1978).

58. MODEL RULES OF PRO. CONDUCT preamble cmt. 1 (AM. BAR ASS’N 2023) (emphasis added).

59. Contrast ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 342 (1964) (finding that Wall Street lawyers primarily identified themselves as guardians of society) with Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 431–

The reasons for this state of affairs are complex. Some argue that lawyers have always served the interests of powerful clients and the status quo while claiming as a rhetorical ploy to be public citizens,<sup>60</sup> while other scholars explain that lawyers used to be and held as a professional ideal the role of a lawyer–statesperson, an intermediary of sorts between powerful interests and the people.<sup>61</sup> Putting aside the century-old debate of whether law practice is a profession or a business,<sup>62</sup> most agree that, since the second half of the twentieth century, the practice of law and the role of lawyers at least within the corporate hemisphere has undergone significant changes, resulting in what Professor Anthony Kronman calls the “lost lawyer.”<sup>63</sup> As a result of the significant increase in the number of lawyers in the United States and increased competition with lawyers overseas, increased competition in the market for legal services and the demise of longstanding stable ties with clients, the increased specialization of law practice and the rise of in-house counsel, many lawyers have lost their seat at the clients’ decision-making tables.<sup>64</sup> They are no longer able to act as lawyer–statespersons, giving holistic advice and counsel grounded in practical wisdom to clients. Instead, they are increasingly subject-matter experts, who understand their role and are perceived by their clients as partisan, around-the-clock service providers.<sup>65</sup> This gradual sea-change has led to the dominance of a professional ideology known as the “standard conception” of law practice, pursuant to which lawyers are primarily advocates for client interests, who owe few secondary obligations to the legal system and the public.<sup>66</sup>

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32 (1985) (observing that large firm lawyers generally do not serve as independent counselors for their clients); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 505 (1985) (findings that large firm lawyers do not act as “guardians of the law,” but are instead primarily committed to their clients’ interests).

60. See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 216–19 (2019).

61. On the lawyer–statesman ideal, see Robert W. Gordon, *Lawyers as the “American Aristocracy”: A Nineteenth-Century Ideal that May Still Be Relevant*, 20 STAN. LAWYER, Fall 1985, at 4–7; Robert W. Gordon, *The Citizen Lawyer - A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1176 (2009); Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731 (2017).

62. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953); Warren E. Burger, C.J., *The State of Justice: Remarks at the Midyear Meeting of the American Bar Association* (Feb. 12, 1984), in A.B.A. J., Apr. 1984, at 63.

63. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

64. KRONMAN, *supra* note 63.

65. *Id.*

66. Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 641 (2016) [hereinafter Wald & Pearce, *Being Good Lawyers*].

Irrespective of whether one subscribes to the “we are a profession in a constant crisis” school of thought,<sup>67</sup> the paradigm shift,<sup>68</sup> “crisis” mode,<sup>69</sup> or to the more cynical “lawyers are upset about losing their monopoly” account,<sup>70</sup> one thing is clear. The traditional excuse of lawyers for why they play an amoral role is some version of “the system made me do it,” for lawyers who practice within the confines of the adversary system, namely litigators and trial attorneys,<sup>71</sup> or “the client and competitive pressures made me do it.”<sup>72</sup> Scholarly attempts to advocate a theory of law practice grounded in human dignity,<sup>73</sup> or justice,<sup>74</sup> have been met with a shrug.<sup>75</sup> Practicing lawyers retort that such accounts fail to appreciate what lawyers do. Either because they believe in the adversarial system, or because they are subject to immense competitive pressures in the market for legal services, lawyers are increasingly content to assert non-accountability and hide behind serving clients’ objectives.

This state of affairs, to be clear, does not describe all lawyers. Just as there are liberal and progressive law professors who have dedicated their professional lives to advancing liberal values in legal education, there are liberal and progressive lawyers who have spent their professional lives advancing justice, equality, and fairness while advancing the rule of law.<sup>76</sup> Yet, for many lawyers, “the system/client made me do it” is the standard excuse for being amoral.

New liberalism provided lawyers with a new sympathetic way to understand and justify their client-centered role. Pursuant to the new theory, client-centered representation was not a form of “selling out,” abandoning the public interest, or trying to define the public interest as nothing more than the aggregate of paying clients’ private interests.<sup>77</sup> Instead, it was about commitment to autonomy, individual rights, and the rule of law. It was about empowering clients to pursue their autonomy through the assertion of individual moral rights, subject to the law, and it had the potential to replace old paternalistic

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67. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) (“Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar.”).

68. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

69. Wald & Pearce, *Being Good Lawyers*, *supra* note 66.

70. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 191 (1999).

71. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966). John Dzienkowski has compellingly argued that the adversary system ideology and excuses have been imported into transactional and other non-adversarial contexts. See John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 49–50 (1996).

72. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613, 614 (1986).

73. See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007).

74. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

75. Wald & Pearce, *Being Good Lawyers*, *supra* note 66, at 627.

76. Including generations of civil rights advocates, public interest lawyers, cause lawyers, and rebellious lawyers.

77. Wald & Pearce, *Being Good Lawyers*, *supra* note 66, at 604.

approaches to law practice in which lawyers “told” clients what to do instead of listening to their clients.<sup>78</sup> Moreover, lawyers were not amoral; rather, they were helping clients assert their moral rights.

The theoretical-academic and practical-lawyerly love affair with new liberalism became a self-sustaining prophecy. Lawyers, now armed with a moral rights-based justification to explain their client-centered role, felt empowered to demand that law schools focus on training law students to become client-serving lawyers in the name of supporting moral rights and the rule of law.<sup>79</sup> In the twenty-first century, this push was aided by an unexpected academic ally. In response to a slew of studies, including Carnegie’s *Educating Lawyers*, which argued that law schools do a fine job of teaching law students how to think like lawyers but a poor job of training them to acquire the necessary practice skills and instilling in them the professional identity of lawyers,<sup>80</sup> law schools have purported to respond with numerous experiential learning and formation of professional identity initiatives.<sup>81</sup> This well-intended critique of legal education has counterintuitively resulted in two harmful consequences. It cemented the mistaken belief that law schools do a fine job training 1L law students to think like lawyers, the very training that teaches moral relativism, the belittling of justice and equality considerations, deference to paying clients, and hard-core individualism.<sup>82</sup> Put differently, the emphasis on skills training and identity formation has legitimized and diverted attention from what law schools do worse—ignoring and undercutting justice.

Next, law schools’ quick fix to the skills-training and identity-formation challenges has been to keep their old model intact and relegate this “new” work to “second-class,” non-tenured colleagues, such as clinicians, writing instructors, and externship directors.<sup>83</sup> Law schools could and should, of course, engage in good faith discussions about how to best meet the needs of their students, including their skills-training and identity-formation challenges. Perhaps the tenured and tenure-track faculty is not well-positioned to meet

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78. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213, 213 (1991).

79. Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685, 687 (2021).

80. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); see also William M. Sullivan, *Professional Formation as a Social Movement*, 23 PROF. LAW. 26, 27 (2015).

81. See Jerome M. Organ, *First-Year Courses/Programs Focused on Professional Development and Professional Identity Formation: Many Flowers are Blooming*, PD Q., Aug. 2017, at 24, 25. See generally Neil Hamilton, *The Major Transitions in Professional Formation and Development from Being a Student to Being a Lawyer Present Opportunities to Benefit the Students and the Law School*, 73 BAYLOR L. REV. 139 (2021); Neil Hamilton, *The Next Steps of a Formation-of-Student Professional Identity Social Movement: Building Bridges Among the Three Key Stakeholders – Faculty and Staff, Students, and Legal Employers and Clients*, 14 U. ST. THOMAS L.J. 285 (2018); Neil Hamilton, *Law Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6 (2013).

82. Wald, *supra* note 79, at 697.

83. Organ, *supra* note 81; Wald, *supra* note 79, at 689.

some of these needs. Still, by sticking to the traditional model of tenure-track faculty and “adding on” what seems like “secondary” commitments taught by “second-class” members of the law school community, legal education continues to send a clear message to students through its hidden curriculum about what is valued and what is not at law schools.

This well-intended experiential push has reinforced in turn a full-on retreat from engaging with justice, equality, and access in and outside of law school classrooms and the curriculum.<sup>84</sup> What started as a formalistic side effect, an implied belittling of justice as the price law schools had to pay to establish law as an independent science and law schools as legitimate university institutions, has become an explicit indifference in the name of value-pluralism, tolerance, and inclusiveness. Law schools and law professors increasingly ignore justice, equality, and fairness discussions because these have become “difficult,” “political,” “polarizing” topics on which reasonable people can reasonably disagree.<sup>85</sup> Taking any kind of a position on the merits of what is “just” and “unjust” risks angering those who disagree and coming across as intolerant and exclusionary.<sup>86</sup>

This explicit retreat from a commitment to engage with students on justice, equality, and fairness, now explained in part by a commitment to train law students to practice law serving clients’ moral interests and rights, is a serious mistake, one I elsewhere describe as a “wrong turn” in legal education.<sup>87</sup> Our inability to agree on what is just in particular circumstances does not negate the importance of seeking just solutions. The difficulty of the task does not mean it is not important. Especially in a day and age in which polarization and name-calling seem to be on the rise, lawyers must model and law schools must teach law students how to respectfully engage, and sometimes disagree, on the merits.

Finally, law schools’ love affair with new liberalism has been further sustained, counterintuitively, by their well-intended, seeming commitment to EDI.<sup>88</sup> Once again, perhaps grounded in best intentions, law schools’ common practice of appointing EDI officers and launching EDI talks and activities may have resulted in counterintuitive outcomes. By retaining the core model of legal education presided over by tenure-track professors and “adding-on” an EDI apparatus staffed with “second-class” citizens, law schools have sent an unintended message to their communities about the true value of EDI efforts.

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84. Wald, *supra* note 79, at 702.

85. *Id.*

86. Wald, *supra* note 1.

87. Wald, *supra* note 79.

88. Robert J. Razzante & Breanta Boss, *DEI in the Legal Profession: Identifying Foundational Factors for Meaningful Change*, 2022 UTAH L. REV. 785, 798 (2022); Phyllis C. Taite & Nicola Boothe, *Teaching Cultural Competence in Law School Curricula: An Essential Step to Facilitate Diversity, Equity, Inclusion in the Legal Profession*, 2022 UTAH L. REV. 813, 815 (2022); Alexa Chew & Rachel Gurvich, *Saying the Quiet Parts Out Loud: Teaching Students How Law School Works*, 100 NEB. L. REV. 887, 892–93 (2022); Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 277–79 (2021).

Worse, they played right into “lecturing to the choir” and simplistic stereotyping of who is participating in what activities and why, allowing interested students and faculty members to opt into EDI activities and disinterested and indifferent community members to generally opt out or continue their passive posture toward EDI.

Thus, new liberalism took the “clients made me do it” traditional excuse and turned it on its head, making client-service and advocating for clients’ individual rights the celebrated centerpiece of law practice and of legal education.

### C. *The New Liberalism Excuse in the Twenty-First Century*

Alluring as new liberalism has been for lawyers and law professors, it has become increasingly and visibly divorced from practice realities in the late twentieth century and early twenty-first century.

In the late twentieth century, new liberalism turned a blind eye to who clients and lawyers were and have become, that is, to the realities of the two hemispheres of the legal profession, the individual and corporate spheres.<sup>89</sup> While deference to and empowerment of clients was arguably desirable and plausible in the individual hemisphere, in which the paradigmatic client was an individual vulnerable to the state and their lawyer,<sup>90</sup> it was increasingly problematic in the corporate hemisphere, in which powerful sophisticated clients pursued business interests. In this latter sphere, deference to clients has become not means of empowering autonomy and individual rights but wealth maximization, sometimes in direct conflict with justice, equality, and the public interest.<sup>91</sup>

The point, to be clear, is not to technically debate whether corporations have and can assert rights. Irrespective of whether corporations are mere legal persons or whether they have rights, corporations, by definition do not have *moral, individual* rights. In terms of new liberalism, moral rights do not *inhere* in corporations because they are not moral corporal individuals but legal fictions.<sup>92</sup> Put differently, even if for whatever policy reason corporations should be allowed to assert legal rights, their doing so pulls the moral rug from underneath

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89. On the individual and corporate hemispheres of the legal profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 127–34 (1982) (finding that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably); JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 30–31, 44 (2005) (documenting that lawyers work in two fairly distinct hemispheres—individual and corporate—and that mobility between these hemispheres is relatively limited).

90. David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in 2 *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 70–79 (Austin Sarat et al. eds., 1998).

91. Wald, *supra* note 79.

92. *Id.* at 701–02.



new liberalism's constitutive characterization of individual rights as moral rights.<sup>93</sup>

Moreover, by the late twentieth century, orthodox legal education had consistently ignored the well-documented primary problem of law, lawyers, and the practice of law in the United States: insufficient access to legal services.<sup>94</sup> Once again, the point here is not to rehash the details and consequences of insufficient access, important as they are. Rather, it is to assert that deference to clients and their objectives no longer makes compelling moral sense when paying clients are predominantly corporate entities and well-to-do individuals, while most Americans are priced out of the “market” for legal services.<sup>95</sup> One simply cannot rest on the excuse of moral rights, which inhere in individuals, when most American individuals do not have access to lawyers and law and do not assert their rights under the law.

Finally, by the late twentieth century, a majority of American lawyers were practicing in teams, in large, mid-size, and small law firms.<sup>96</sup> The Socratic method's emphasis on individual preparation, performance, and evaluation of students cultivated a hardcore competitive individualistic ethos among law students, a zero-sum approach in which the success of one was dependent in part on others doing poorly.<sup>97</sup> This was not only inconsistent with the values of justice, fairness, and equality, it was also increasingly inconsistent with practice realities of lawyers, many of whom work in teams, not as solo practitioners.<sup>98</sup>

The practice realities of the two hemispheres of the legal profession, the chronic unequal, insufficient access to legal services, and the changing organizational and institutional nature of practice arenas are phenomena that law schools did not create and are unable to control. Yet, in the face of a changing landscape of clients, lawyers, and the practice of law, law schools remained committed to their orthodox agenda, notwithstanding the fact that the very reasons for their formalistic model—securing standing and status—and for their new liberalism model—securing individual rights for clients—no longer applied with compelling force.<sup>99</sup> What began, perhaps, as a model grounded in best intentions (and self-interest) has become an anachronistic,

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93. *Id.*

94. DEBORAH L. RHODE, ACCESS TO JUSTICE 79–102 (2004); Wald, *supra* note 1, at 404; Wald, *supra* note 18, at 1102.

95. See generally Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

96. In 1995, about 47% of lawyers in private practice were solos, and 53% practiced in firms. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION 25 (1995). In 1960, by contrast, 64% of lawyers in private practice were solos. *Id.* at 7.

97. Wald & Pearce, *Making Good Lawyers*, *supra* note 56, at 423.

98. See generally David B. Wilkins, *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010) (arguing that not only do lawyers practice in teams, but clients increasingly want lawyers to be members of their teams as opposed to mere agents).

99. See WEST, *supra* note 22, at 185–187.

out-of-date mode for legal education divorced from practice realities, serving an orthodox agenda.

Three twenty-first century trends further undermine the appeal and promise of new liberalism. First, the Roberts Court, especially since the appointment of three conservative justices by President Trump, has arguably become an anti-rights institution, stripping women of their right to privacy<sup>100</sup> and indicating that it might reconsider and strip the rights of LGBTQ+ individuals.<sup>101</sup> Indeed, even if the jurisprudence of the Roberts Court could be understood not as rights-stripping but as rights-expanding by acknowledging, for example, the rights of fetuses and the religious rights of individuals, the significant stripping down of the rights of many undermines the core foundation of new liberalism—moral individual rights.

Second, the tragic killing and mistreatment of Blacks at the hands of police officers throughout the United States and the ongoing sexual harassment and mistreatment of women by sexual predators have caused critics to doubt whether continuing to view these repeated events through the lens of individual violation of rights is accurate and effective.<sup>102</sup> Some Black Lives Matter and #MeToo activists have argued that although victims have certainly experienced grave violations of their individual rights, the number and nature of the offenses imply that part of the problem, and perhaps solutions to it, might be systemic rather than individual.<sup>103</sup> Irrespective of how one resolves these complex questions, they taint the promise and allure of new liberalism.

Finally, since the early 2000s, as the number of students of color at law schools has consistently increased, commentators have documented their feelings of alienation and frustration, above and beyond “the hunger pangs of learning to think like a lawyer.”<sup>104</sup> As Professor Toussaint explains,

Unconsciously held beliefs about the morality of law in relation to the lived experiences of historically marginalized populations can manifest in implicit biases, racial anxieties, and stereotype threats in the classroom that hinder the learning experience for impacted students. Outward manifestations of such prejudice or bias, in the form of macro- or micro-aggressions, can disorient students, negatively impacting them on a biological, cognitive, emotional, and behavioral level. Such “cognitive disruption,” can negatively impact student performance outcomes, reifying existing stereotypes and biases.<sup>105</sup>

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100. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

101. *Id.* at 332 (Thomas, J., concurring).

102. *See, e.g.*, Linda S. Greene et al., *Talking about Black Lives Matter and #MeToo*, 34 WIS. J.L. GENDER & SOC’Y 109, 141 (2019).

103. *Id.*

104. Toussaint, *supra* note 5, at 17.

105. *Id.* (citing and discussing Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 161–68 (2018)).

Yet, despite all of these challenges, new liberalism continues to dominate legal education.

*D. The Banality of the A-Liberal Model of Legal Education*

Legal education's basic model, well into the twenty-first century, resembles the same agenda law schools have been pursuing since the nineteenth century. The heart and soul of the model is the 1L year, in which tenure-track law professors teach law students to think like lawyers, that is, to ascertain the law via an individualized Socratic method (softened as it may be),<sup>106</sup> belittling justice and equality considerations while prioritizing the interests of paying clients at the expense of the public interest and those who cannot afford to pay for lawyers. This orthodox approach is enhanced by the hidden curriculum, including its individualized and atomistic teachings, which further drive students away from justice considerations by throwing them into a competitive zero-sum game. Upper-classes and electives cement the basic model's approach. Electives, even critical classes and coursework introducing students to rebellious and movement forms of lawyering,<sup>107</sup> unintentionally legitimize the status quo by sending the message that law, to begin with, is a formal conservative affair which needs to be deconstructed as a secondary effort by those who choose to do so.

The result is an a-liberal model of legal education, one which proclaims fidelity to liberalism, moral individual rights, and the rule of law, but in reality advances a client-centered ideology for paying clients while neglecting and delegitimizing commitments to justice, fairness, and equality.

Tenure-track professors willingly partake in this a-liberal exercise. Apparently content with the traditional model of legal education and the status quo, they primarily teach their required and upper-level classes, increasingly fewer credits spread across fewer days,<sup>108</sup> and publish their liberal-leaning law review articles and books,<sup>109</sup> legitimizing the exclusion of justice, equality, and access from legal education. Worse, by modeling hardcore individualism of "just doing the job and nothing more" (the job being teaching almost exclusively alone and writing mostly alone), they dissuade and undo their students' tentative commitments to justice, cooperation, and teamwork.

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106. See Duncan Kennedy, *Liberal Values in Legal Education*, 10 NOVA L.J. 603, 614 (1986) (describing modified Socratic method, for example, by allowing students to "pass" when they are called on).

107. Alexi Freeman & Lindsey Webb, *Yes, You Can Learn Movement Lawyering in Law School: Highlights from the Movement Lawyering Lab at Denver Law*, 56 HOW. HUM. & C.R. L. REV. 55, 58–61 (2020).

108. Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 316 (2012); see also Brian Leiter, *What are Standard Law School Teaching Loads These Days?* BRIAN LEITER'S LAW SCHOOL REPORTS (Apr. 26, 2022), <https://leiterlawschool.typepad.com/leiter/2022/04/what-are-standard-law-school-teaching-loads-these-days.html> [<https://perma.cc/DZY5-FH24>].

109. Chilton & Posner, *supra* note 8.

All of this, incidentally, has gotten worse during and after the Covid pandemic. Throwing law schools into eighteen months of virtual teaching and learning environments, Covid has undermined legal education's (admittedly problematic) out-of-the-classroom culture.<sup>110</sup> Students who did not come into the building for a year and half have subsequently gotten used to coming to class but then leaving, not participating in the rich culture of law school activities, organizations, talks, and culture, setting up a tentative but lamentable precedent for new law students. Faculty members have similarly become accustomed to showing up to teach and leaving thereafter, undermining the culture of law schools. The deterioration of law school culture is not a new phenomenon and Covid did not create it,<sup>111</sup> but it did accelerate the phenomenon. Tenure-track law professors, in particular, play a central role in the culture of law schools, because unlike law students who are transitioning through for three years, they are the constant actors in the building. In this context, their passive role in the aftermath of Covid—not leading and modeling proactive participation in the life of the community—is enough to undermine the cultural fabric of law schools.

One might wonder whether undermining the competitive atomistic culture of law schools might be a desirable thing, perhaps even a welcomed disruption,<sup>112</sup> but unfortunately this is unlikely. Covid has not merely undermined a particular law school culture but has accelerated the demise of law school culture itself, including potential alternatives to the dominant orthodox atomistic culture.<sup>113</sup>

Why do liberal leaning law professors participate in an a-liberal model of legal education? In the face of realist challenges to formalism, law schools adopted the functionalist approach. In response to critical challenges to the functionalist approach, law schools adopted the new liberalism model. In the face of the demonstrated a-liberal shortcomings of the new liberalism model of legal education, why not revise or adopt a different model, one which engages with morality beyond the moral rights of individuals, and which includes justice considerations?

Notably, lawyers' traditional excuse—the clients made me do it—powerful or questionable as it may be, does not apply to law professors. Law professors are not primarily practicing lawyers, and law schools are not for-profit law firms. Legal education simply does not feature the intense set of competitive pressures

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110. See Timothy Casey, *Reflections on Legal Education in the Aftermath of a Pandemic*, 28 CLINICAL L. REV. 85, 91 (2021); see also Mark A. Cohen, *Post-Pandemic Legal Education*, FORBES (Aug. 13, 2020), <https://www.forbes.com/sites/markcohen1/2020/08/13/post-pandemic-legal-education/?sh=629f9c2675d2> [<https://perma.cc/A8GA-75MC>].

111. See Casey, *supra* note 110; see also Cohen, *supra* note 110.

112. Casey, *supra* note 110, at 90.

113. See *id.*

increasingly defining law practice.<sup>114</sup> To be sure, law schools are ranked and, in that sense, face some competitive pressures as institutions, but the pressures they face are radically different than law firms.<sup>115</sup> Even treating law students as consumers and acknowledging the business purpose of law schools,<sup>116</sup> as long as law schools continue to confer the necessary credentials for admission into the practice of law (the J.D. degree), rank law students for the hiring pleasure of potential employers, and train law students to think like lawyers, law students have no reason to challenge the specific model of legal education.

Moreover, tenure-track law professors, unlike lawyers, have, by definition, ample job security. They are not subject to the demands and pressures of meeting billable expectancies and books of business targets or the risk of being de-equitized or seeing their compensation decrease.<sup>117</sup> They are not subject to the whims of powerful clients in an increasingly competitive marketplace. In short, if they only wanted to, tenure-track law professors could be as liberal as they wanted to be, and law schools could be liberal bastions, leading the fight for greater justice, equality, and access for all. But they do not, and they cannot blame the adversary system or clients for being amoral and a-liberal.

Tenure-track law professors have a cushy job. They get paid, relatively speaking, a lot of money, more than most university professors, and do relatively little work. They do not teach a lot, compared to their counterparts in other departments, and many do not research, write, or publish a lot.<sup>118</sup> Moreover, they have tenure, so they face few consequences for not working hard.

That is, importantly, not to say that law professors are innately lazy or underachieving. Quite the contrary, most tenure-track law professors are graduates of elite law schools, former clerks, and increasingly graduates of master and doctorate programs.<sup>119</sup> Becoming a tenure-track law professor is hard, competitive, and prestigious. Indeed, whereas in the past getting tenured was, relatively speaking, a relaxed affair—one had six years to write three full-length law review articles while displaying competency in the classroom as a

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114. See MILTON C. REGAN, JR. & LISA ROHRER, *BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM* (2021).

115. See *id.*

116. See Toussaint, *supra* note 5, at 9–10, 32.

117. See generally Eli Wald, *A Thought Experiment About the Academic “Billable” Hour or Law Professors’ Work Habits*, 101 MARQ. L. REV. 991 (2018).

118. See Orin Kerr, *Law Faculty Productivity Over Time*, WASH. POST (Feb. 18, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/18/law-faculty-productivity-over-time/?utm\\_term=.0498e581f3d8](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/18/law-faculty-productivity-over-time/?utm_term=.0498e581f3d8); see also Orin Kerr, *Law Faculty Productivity at Different Career Stages*, WASH. POST (Jan. 14, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/14/law-faculty-productivity-at-different-career-stages/?utm\\_term=.c00899e5dec1](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/14/law-faculty-productivity-at-different-career-stages/?utm_term=.c00899e5dec1).

119. See Kevin R. Johnson, *Bringing RaceXGender Equality to the Unequal Profession*, 51 SW. L. REV. 200, 205–07 (2022); see also Heather A. Haveman & Ogi Radica, *Educational Background and Stratification in the Legal Academy: Invasion of the Body Snatchers. . . Or More of the Same?*, 21 J. GENDER RACE & JUST. 91 (2017).

teacher—in recent years the tenure clock has shortened and intensified.<sup>120</sup> While at some law schools one can safely seek promotion to tenure after publishing three full-length law review articles in less than six years, at other schools there are cultural pressures to publish many more than three articles and place them well.<sup>121</sup> Be that as it may, once a law professor gets tenure, usually no more than six years after joining a faculty, the job becomes relatively easy and flexible. A liberal person with a track record of working hard and satisfying career markers like getting tenure could seemingly take advantage of the light workload and flexibility to pursue liberal commitments. But most law professors do not, for two related reasons.

First, adopting a true liberal model of legal education would be hard. Like many Americans in general and lawyers in particular, law professors are wed to the new liberalism belief that the law is the pathway to social progress achieved through client-centered advocacy for individual rights; and that legal education is playing its role in pursuing justice by preparing law students to practice law as new liberalism advocates.<sup>122</sup> Admitting this well-intending model is problematic and a-liberal is hard because it means acknowledging that law schools and their law professors may be part of the problem and may play a role in sustaining the traditional status quo, including injustices. Law professors, however, are famous for their love-hate relationship with the practice of law: while the practice of law provides law professors a job—there would be no law schools if there was no legal profession—law professors are fond of ridiculing the practice of law in part exactly because it is orthodox and advocates for the powerful, elite, corporate interests, and powers that be.<sup>123</sup> Admitting the fallacy of this core distinction and accepting responsibility for participating in this a-liberal exercise is asking law professors to do a lot.

Relatedly, challenging the new liberalism dogma would be hard because it would question not only the role of law professors but also how they got to hold their elite, elevated position. Part of the mystique of individualism, atomism, and hard work is its celebration of merit.<sup>124</sup> Justice and the rule of law are served when all assert their moral individual rights. Secure in the dream of moral rights and its promise of equal opportunity for all, individuals are free to work hard and succeed based on merit and hard work. This dream applies to tenure-track law professors as well. Like everybody else in the new liberalism dream, law professors had an equal opportunity to succeed, guaranteed by their moral rights. They worked hard, and through their grit and merit earned their

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120. See Adam Chilton et al., *Rethinking Law School Tenure Standards*, 50 J. LEGAL STUD. 1 (2021).

121. See *id.*

122. See Gordon, *supra* note 41.

123. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C.L. REV. 105, 107–08 (2010).

124. See Eli Wald, *Success, Merit and Capital in America*, 101 MARQ. L. REV. 1, 52–55 (2017).

elite status, position, power, compensation, and relatively light workload. For law professors to question the dogma of new liberalism is to question their very status, the very legitimacy of their success. That is a tall order.<sup>125</sup>

Finally, admitting the a-liberal qualities of legal education would be hard because the alternatives to it are not alluring or straightforward. Committing to introducing and teaching students conceptions of justice, in a day and age in which we often disagree about the meaning of justice in particular circumstances, is hard. Teaching to agree to disagree and the meaning of contested reasoning is hard, much harder than preaching the alluring new liberalism dream.

Second, law professors are generally amoral and a-liberal because of a path-dependency, namely, the institutional design of law schools. They face incentives and inhabit a culture that fosters the status quo, passivity, and indifference. There is, simply put, little reason to rock the boat and do more than the minimum expected of tenure-track law professors. More accurately, there is little incentive to do more than what the traditional job description requires: teaching, writing, and doing some service to the law school community, such as committee service. Those who choose to do more, actively pursuing justice, equality, fairness, access, and promoting the rule of law other than via the assertion of moral individual rights, do so on their own initiative and personal drive. Moreover, not only are there no institutional incentives or rewards to be more liberal, but the traditional model provides incentives not to do so: any time commitment to liberal causes may be perceived as a reason or an excuse as to why one is not writing, or not writing more. And any such commitments may interfere with one's teaching and teaching evaluations, leading to negative reviews from students who do not share the commitments.

Thus, the amorality and a-liberalism of law professors is explained by a straightforward, even banal reason. Tenure-track professors can discharge their job description fairly easily, doing relatively little work for a great compensation. They are generally even free to take advantage of their "free" time to engage in other side gigs, such as consulting. They have no institutional reasons to be or to act more liberally, and, in fact, they have implied disincentives for doing so. The justice, equality, fairness, access, and rule-of-law work, as well as the EDI work, has been relegated under the traditional model to "second-class" citizens

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125. Questioning the roots of one's elevated status and standing is never easy. Ta-Nehisi Coates argues, for example, that a significant obstacle in the pursuit of a more racially just America is the difficulty of mainstream Caucasians acknowledging that their American Dream has been built on the backs of Blacks. *See generally* TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015). Injustice prevails in the U.S., asserts Coates, because while Caucasians get a chance to pursue the American Dream, "[f]ear is omnipresent for blacks," *id.* at 14, constituting the foundation of the culture of the streets, their streets. *Id.* at 24. "Fear ruled everything around me, and I knew, as all black people do, that this fear was connected to the Dream out there, to the unworried boys." *Id.* at 29. Of course, concedes Coates, "[v]ery few Americans will directly proclaim that they are in favor of black people being left to the streets." *Id.* at 33. Yet, "a very large number of Americans will do all they can to preserve the Dream." *Id.* In this sense, concludes Coates, "the Dream rests on our back." *Id.* at 11.

in the law school community. For tenure-track law professors, engaging meaningfully in such work risks more than the murmuring of “why is s/he not writing more?” It risks undermining and destabilizing one’s professional standing and prestige, tarring one’s first-class citizenship with second-class attributes. It is simply easier and safer, not to mention less demanding, to be a-liberal.

## II. A BLUEPRINT FOR A MORE LIBERAL MODEL OF LEGAL EDUCATION

A liberal legal education is a cornerstone of a liberal legal profession, itself an essential ingredient of a liberal democracy. Legal liberalism here does not denote a political affiliation and is not contrasted with political conservatism. Nor is it a shorthand for what Professor William Simon has called the “predispositions” of legal liberalism, such as the “ideas conventionally associated with the Warren Court, the ACLU, the NAACP Legal Defense Fund, Ralph Nader, and the legal aid and public defender movements.”<sup>126</sup> Rather, legal liberalism here means apolitical values, such as justice, equality, fairness, access to law and lawyers, and a commitment to the rule of law, as opposed to a particular conception of justice, equality, or fairness.<sup>127</sup> Indeed, in the American context, liberalism includes and is consistent with so-called conservative values such as capitalism.<sup>128</sup> Pursuant to this conception of legal liberalism, the rule of law stands apart from society—divorced from the political economy—as an expression of “legal,” not ideological, views.<sup>129</sup> It is a procedural rather than a substantive account of legal liberalism, grounded in discourse and argumentation.<sup>130</sup> A liberal legal profession, accordingly, is one that is committed to these liberal values, one which views lawyers as three-legged stools, not only representatives of clients but also officers of the legal system and public citizens with a special responsibility to the quality of justice.<sup>131</sup> A liberal legal education, in turn, is one that is committed to introducing law students and instilling in them a lifelong commitment to these values. In this sense, a liberal legal education is an apolitical, unmitigated desirable good.

At the risk of stating the obvious, the primary purpose of law schools is to prepare students for the practice of law. This preparation includes teaching students ways of thinking and reasoning (“like a lawyer”), mastering knowledge (the law), acquiring skills, and internalizing the values of lawyers. As long as

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126. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 130 (2004).

127. See, e.g., Cass R. Sunstein, *Why I Am a Liberal*, N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/opinion/cass-sunstein-why-liberal.html> (offering an account consisting of thirty-four apolitical claims or components of liberalism.).

128. See Gordon, *supra* note 41; Sunstein, *supra* note 127.

129. See ZENON BANKOWSKI & GEOFF MUNGHAM, IMAGES OF LAW 9 (1976).

130. See generally Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

131. MODEL RULES OF PRO. CONDUCT Preamble cmt. 1 (AM. BAR ASS’N 2023).



what it means to be a lawyer includes being a “public citizen [with a] special responsibility for the quality of justice,”<sup>132</sup> law schools must introduce students to conceptions of justice in practice and prepare them to identify and address instances of injustice, not as part of a standalone public purpose but rather as part and parcel of their core pedagogical mission of training students to be lawyers.

For a generation or two, law professors (and lawyers) believed, with some plausibility, that the new liberalism model of legal education, centered around training lawyers to be advocates for asserting clients’ rights, embodied what it means to be a liberal, including the pursuit of justice through securing individual rights and the rule of law.<sup>133</sup> They bought into the alluring new liberal dogma, which not only promised to help advance the arc of justice, but also conveniently implied that law professors were good, just people doing good, just work, deserving of their status, handsome compensation, and relatively light workload. The evidence gathered over the last half century or so, however, discredits this wonderful new liberalism dream. In the face of the demonstrated a-liberal shortcomings of legal education and its unintended rejection of justice considerations, the current orthodox model must be challenged.

The solution is clear. Law professors ought to adopt a revised, liberal model of legal education, one which includes systematic incentives to become engaged in, or at least not have disincentives to, justice, equality, and access work.

#### *A. A Model of Liberal Legal Education*

The longstanding core of legal education is the 1L class, in which law students learn to “think like a lawyer.”<sup>134</sup> Over the course of the year students typically enroll in civil procedure, constitutional law, contracts, criminal law and procedure, property law, torts, and legal research and writing.<sup>135</sup> The basic thinking is that this coursework introduces students to common law, case-by-case adjudication as well as to codes, statutes, and secondary legislation and sources.<sup>136</sup> The coursework is usually taught from casebooks featuring excerpted appellate court decisions.<sup>137</sup> Using the Socratic method, students learn to identify and master the elements of legal doctrines, discern material facts and apply them, and reach legal conclusions following the holdings of the cases. Over the course of the year, students learn to master legal reasoning, making arguments on both sides (plaintiff and defendant, petitioner and

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132. *Id.*

133. *See* Simon, *supra* note 126.

134. *See* SULLIVAN ET AL., *supra* note 80.

135. *See id.*

136. *See id.*

137. *See id.*

respondent, etc.) within the bounds of the law.<sup>138</sup> The legal research and writing class highlights legal research and writing skills.

Law schools are generally proud of the work they do with 1Ls learning to think like lawyers. Critics generally agree, praising law schools for instilling in law students the “intellectual paradigm” of law practice and calling on them to improve and refine their skills and formation of professional identity paradigms in the 2L and 3L years.<sup>139</sup> Law schools have responded, adding to the traditional mix of upper-level doctrinal courses (for example, administrative law, corporations, evidence, intellectual property, trusts and estates), electives (such as critical legal studies, critical race theory, feminism, jurisprudence, law and economics, legal history), clinical offerings, and experiential opportunities, including internships and externships.<sup>140</sup>

### 1. *A Liberal Curriculum*

This traditional model is fundamentally flawed, especially its well-regarded 1L cornerstone. The 1L year teaches and instills in students two central wrong insights: first, that there is a great divorce between legal reasoning, principles, and outcomes on the one hand and moral reasoning and justifications, including justice, equality, and fairness, on the other hand; and second, that there is a cardinal ordering between these two distinct sets of knowledge and reasoning, with legal reasoning on top and moral reasoning below. This hierarchy is apparent on the face of the curriculum. Law and legal reasoning are taught for a year, throughout the 1L year, prioritized to be introduced and mastered in the first year of law school. Justice, equality, fairness, and moral reasoning are never taught unless one chooses to take an elective during the less urgent second and third years of law school. Justice, equality, and fairness are marginalized and belittled, cast aside as pre-law intuitions that are not how lawyers think and reason.<sup>141</sup>

The cardinal order—law (devoid of justice considerations) above, justice below—is further cemented in upper classes. Law students are encouraged to take additional “law” and “bar classes,” such as corporations and trusts and estates, in preparation for the bar exam, whereas classes on justice, equality, and fairness are unavailable on most course catalogs. Students may choose to enroll in “critical” coursework, such as critical race theory and feminism, which end up unintentionally further legitimizing their own secondary nature: students

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138. *See id.*

139. *See id.*

140. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law School*, 122 DICK. L. REV. 551, 776 (2018); Allison Korn & Laila L. Hlass, *Assessing the Experiential (R)evolution*, 65 VILL. L. REV. 713 *passim* (2020).

141. Wald, *supra* note 79, at 687.

learn from the curricular design that first comes the law, and only then come critiques and deconstructions of it.<sup>142</sup>

The main faults of the 1L year are instituting the great divorce of law from justice, equality, and fairness, and ordering the former above the latter, but these are not its only shortcomings.<sup>143</sup> By teaching 1Ls primarily from casebooks excerpting appellate decisions, law schools introduce an implied litigation bias into the curriculum. The point here is that most lawyers are not trial attorneys or litigators, giving students an inaccurate sense of the practice of law and the work of lawyers.<sup>144</sup> Notably, by focusing on appellate decisions, law schools imply that most important issues get decided by litigation, an absolutely wrong and misleading assumption. The vast majority of cases are settled and plea-bargained, not decided by courts,<sup>145</sup> and there are powerful forces and patterns that decide what cases settle and get appealed.<sup>146</sup> As importantly, many meritorious claims never get filed.<sup>147</sup> Focusing on appellate decisions distorts the universe of parties, claims, and dispute resolution.

Relatedly, focusing on appellate decisions masks the fact that most of litigation is driven by paying clients and those who can pay (and wait) for the appellate process. But most Americans are priced out of the market for legal services, a fact that some law students never learn about.<sup>148</sup> Hidden in the entire 1L curriculum is a paying-clients bias, which shapes, informs, and distorts the law and legal reasoning 1Ls learn.

Finally, the 1L curriculum sends the wrong message to students about practice realities. The coursework suggests that law, in its basic form, consists of general legal doctrines one must master, such as contracts, property law, and torts. This is misleading. Law has grown increasingly specialized over the last century or so.<sup>149</sup> Hardly any lawyer would practice criminal law and draft contracts or litigate torts and practice property law.<sup>150</sup> Teaching all of these subjects in the 1L year is thus misleading.

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142. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2004).

143. Borrowing, of course, from C.S. LEWIS, *THE GREAT DIVORCE* (1945).

144. Eli Wald, *Resizing the Rules of Professional Conduct*, 27 *GEO. J. LEGAL ETHICS* 227 *passim* (2014).

145. J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 *N.Y.U. L. REV.* 59, 61 n.2 (2016).

146. Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 137 (1974).

147. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 *S.C. L. REV.* 443, 449 (2016); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 *N.C. L. REV.* 605 (2018); see also Nora Freeman Engstrom, *She Stood Up: The Life and Legacy of Deborah L. Rhode*, 74 *STAN. L. REV. ONLINE* 1 (2021).

148. Wald, *supra* note 1, at 449; Hadfield, *supra* note 95.

149. Jason Coomer et al., *The Attorney as Knowledge Worker*, 68 *TEX. B.J.* 794, 795 (2005).

150. Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 *GEO. J. LEG. ETHICS* 429, 468 (1990).

Commentators, the author of this Article included, have previously suggested minor tweaks to the 1L curriculum.<sup>151</sup> Implicitly buying into the “if it ain’t broke, don’t fix it” mantra, or, more accurately, into the “1L curriculum is great” belief, critics suggested adding a legislative class or adding a course about lawyers’ practice realities.<sup>152</sup> This was, and is, a mistake.

To debunk the falsehood of the great divorce of law from justice and legal reasoning from moral reasoning, the 1L curriculum must include courses on justice, equality, and access to legal services. “Learning to think like a lawyer” must entail these cornerstones, which every student takes, not as elective add-ons like critical race theory in upper classes.

First, consider justice. Professor Michael Sandel at Harvard University has long taught a celebrated class called Justice, now readily available online.<sup>153</sup> The course description reads like a standard law school class: “Justice explores critical analysis of classical and contemporary theories of justice, including discussion of present-day applications. Topics include affirmative action, income distribution, same-sex marriage, the role of markets, debates about rights (human rights and property rights), arguments for and against equality, dilemmas of loyalty in public and private life.”<sup>154</sup> Justice may be a cornerstone of Harvard College’s liberal education, but it must also be a required 1L class at every law school. The course description adds that “[t]he principal readings for the course are texts by Aristotle, John Locke, Immanuel Kant, John Stuart Mill, and John Rawls.”<sup>155</sup> Nothing wrong with these fine philosophers, but the required 1L class can replace them with excerpted cases deciding such controversies, applicable law, case studies, and applied readings from legal scholars.

Notably, taking the opposite approach to law schools’ recent retreat from engaging with justice out of deference for value pluralism, the Harvard class states that “[t]he course invites learners to subject their own views on these controversies to critical examination.”<sup>156</sup> Justice does not promise easy solutions or broad consensus. Instead, it promises to teach students different conceptions and understandings of justice and encourages them to critically examine their own views. This is what a required class on justice during the 1L year must do. Sandel’s Justice for college students can thus serve as a template for a revised justice course for law students.

Of course, there is nothing particularly unique about Professor Sandel’s Justice class. It is but one example of a justice class law schools can develop and

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151. See SULLIVAN ET AL., *supra* note 80; Wald & Pearce, *Making Good Lawyers*, *supra* note 56, at 444.

152. Including, admittedly, Wald & Pearce, *Making Good Lawyers*, *supra* note 56, at 444.

153. Justice, Course Description, Harvard University, <https://pll.harvard.edu/course/justice> [<https://perma.cc/2WK6-3HSK>].

154. *Id.*

155. *Id.*

156. *Id.*

adopt for their own justice cornerstone. The takeaway here is that law schools must introduce law students to justice considerations early and prioritize them, as an integral part of what it means to be and think like a lawyer, instead of pretending and instituting the great divorce of law from justice as the natural and inevitable state of affairs. If lawyers are truly three-legged stools, acting as “public citizen[s] [with a] special responsibility for the quality of justice,”<sup>157</sup> then law students must learn about justice and how to practice as public citizens from day one at law school, including not only spotting injustices and exploring theories of justice, but learning to identify and address instances of injustice in the practice of law, how to talk to clients about justice, how to advise clients about just and unjust objectives, and how to respond when clients decide to act lawfully but unjustly.

Second, consider equality. Equality is a cornerstone of the American Dream, which is based on the equal opportunity to work hard and advance based on merit,<sup>158</sup> and of every adequately defined legal system and the rule of law. And yet, it is an ideal and a work in progress rather than a reality. Nobody denies that inequalities have long prevailed and continue to impact American private and public lives. Yet, law schools do not tackle equality (and inequality) head on, front and center, and in detail during the 1L year, beyond some limited aspects in constitutional law, sending the implied message that our ongoing quest for greater equality is somehow different and less important than the law. Equality, like justice, must be a pillar of the 1L curriculum, meriting its own required class, covering both conceptions of equality (such as formal and substantive equality), instances of inequality (such as gender, racial, class etc.), and possible remedies in a variety of contexts.

Finally, the 1L curriculum must include a course about access to legal services.<sup>159</sup> Once again, the issue is not merely the inherent importance of access: In a highly regulated liberal democracy, first-class citizenship depends on understanding the law, such that one can exercise one’s autonomy on an informed basis within the bounds of the law.<sup>160</sup> Since the law is complex, however, first-class citizenship depends on access to lawyers who can explain the law and advise the legal means by which one can pursue one’s objectives.<sup>161</sup> Rather, the issue is that the majority of Americans are priced out of the market for legal services and cannot afford a lawyer.<sup>162</sup> Some Americans are litigating meritorious claims *pro se*. Moreover, the *pro se* epidemic is but the tip of the iceberg, because many potential causes of action and entitlements go unfiled

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157. MODEL RULES OF PRO. CONDUCT Preamble cmt. 1 (AM. BAR ASS’N 2023).

158. Wald, *supra* note 124, at 15.

159. RHODE, *supra* note 94, at 79–102.

160. Pepper, *supra* note 72, at 617.

161. *Id.*

162. Wald, *supra* note 1, at 449.

and unclaimed.<sup>163</sup> Thus, to teach law students that in general paying clients bring claims and assert their rights and those claims get litigated is to distort reality and the operation of our legal system and to form the professional identity of students on false pretenses.

A required 1L class on access to legal services can explore the scope of access in the corporate hemisphere and causes for insufficient access in the individual hemisphere, study past and contemporary solutions including legal aid societies, the Legal Services Corporation, public defender offices and court appointed lawyers, contingency fees, class actions, mass litigation and small claims courts, pro bono, pre-paid group legal services, and, more recently, deregulation efforts and the introduction of AI and legal technicians and other non-lawyer providers of legal services.<sup>164</sup> The course can also examine the impact and consequences of insufficient access to legal services. Insufficient access is arguably the most pressing and widespread problem challenging our justice system. To pretend otherwise, or worse, ignore the problem, is to mislead students and ill prepare them for the practice of law.

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163. Sandefur, *supra* note 147, at 449.

164. See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 264, 273 (Deborah L. Rhode ed., 2000); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 *IND. L. REV.* 23 (2000).

Thus, a liberal 1L curriculum may look like this:

TABLE 1:

	<b>A Typical A-Liberal 1L Curriculum</b>	<b>An Alternative Liberal 1L Curriculum</b>
<b>Fall</b>	Civil Procedure Contracts Criminal Law & Procedure Legal Research & Writing (Legislative Interpretation)	Contracts <b>Equality</b> <b>Justice</b> Legal Research & Writing (Legislative Interpretation)
<b>Spring</b>	Constitutional Law Property Law Torts (Legal Profession) Legal Research & Writing	<b>Access to Legal Services</b> Civil Procedure Criminal Law & Procedure (Legal Profession) Legal Research & Writing

A liberal 1L curriculum would in turn inform the design of the 2L and 3L curriculum. Traditional 1L courses bumped out of a liberal curriculum, such as constitutional law, property law, and torts, might, if they withstand scrutiny, be taught in the 2L year, along with clinical offerings or lawyering skills, the law governing lawyers, and other core doctrinal classes such as administrative law, corporations, evidence, family law, and trusts and estates. The 3L year would offer opportunities for further subject-matter specialization, as well as the acquisition of additional lawyering skills, via clinical offerings and externships.

Although anchoring the 1L curriculum and the entire law school curriculum in justice, equality, and access coursework would constitute a significant step in the direction of making legal education more liberal, this change would not be enough. Additional changes would have to be made to the curriculum and to the law school experience outside of the classroom.

In terms of the curriculum, every course must include meaningful analysis of justice, equality, and access considerations. This, to be clear, does not mean

an “add-on” discussion at the end of an otherwise traditionally taught unit. Rather, justice, equality, access, fairness, and rule of law considerations ought to be integrated holistically into every class in a sensible and reasonable manner, depending on the context and circumstances of each class. Criminal law and criminal procedure, for example, can include analysis of mass incarceration and its disproportionate impact on people of color.<sup>165</sup> Civil procedure can include exploration of access and insufficient access considerations and some remedies in contexts such as class actions, as well as discussions of class inequality, the haves and the have-nots.<sup>166</sup> Property law can address issues of past misappropriations and racial-based discrimination, etc. These gradual, organic changes to the curriculum of every course will be time-consuming, but the overhaul of the curriculum must start now. Giving justice, equality, and access their rightful place in the 1L curriculum will send a strong message to incoming law students about the importance of these liberal values for every lawyer, but it alone will not do. Every class must in an appropriate fashion reaffirm the underlying message that justice, equality, and access consideration must meaningfully inform legal analysis and the law.

Understanding justice, equality, and access to legal services as holistic underlying values of a liberal legal education also holds the practical key to reform. In the near future, justice, equality, and access classes can be taught through the lens of traditional classes. Classes like Justice: The Criminal Law Example; Equality through the Lens of Property Law; or Access to Legal Services: The Civil Procedure Experience can help law schools and law professors transition the curriculum as they begin to develop the more permanent justice, equality, and access cornerstones of the 1L curriculum.

## 2. *A Liberal Out-of-the-Classroom Culture*

So much of the law school experience takes place out of the classroom in extracurricular activities like journals, student organizations, moot court competitions, and research work for professors; in attending and participating in talks, events, and law school sponsored activities; and in building social capital while in the building, for example, seeking law professor mentors who can help guide and shape one’s legal career.<sup>167</sup> Law professors must model and embody a commitment to a liberal law school culture dedicated to justice, equality, fairness, access, the rule of law, and the public good. This would require rethinking and reimagining law professors’ job descriptions and roles.

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165. Wald, *supra* note 1, at 423.

166. See Galanter, *supra* note 146.

167. See generally Cramton, *Beyond the Ordinary Religion*, *supra* note 21; Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 521–22 (2007) (arguing that significant implied teaching happens outside of the curriculum, in the shadow of the dominant culture of law schools).



To begin with, law schools must undo their implied yet systematic embrace of individualism, atomism, and competitiveness. This, to be clear, does not mean that law schools cannot and should not assess and grade their students, nor does it mean that they must abandon the Socratic method completely, replacing it with all teamwork assignments. It does mean, however, that individual performance in a stressful, zero-sum environment, graded on a curve, should not be how law students exclusively understand and experience law school. A growing body of knowledge explains how law schools can become more relational, respectful, affirming institutions.<sup>168</sup> Law professors, especially tenure-track professors, must abandon the dismissive attitude they show to this body of work, produced in great part by non-tenure-track colleagues and by tenure-track colleagues at non-elite law schools, and incorporate its insights.

Next, law schools must not only dismantle their old hidden curriculum but affirmatively replace it with a model which embraces and demonstrates justice considerations and transparency as part of their commitment to providing all students a substantively equal opportunity to succeed.<sup>169</sup> Unequal cultural capital endowments—understanding the innerworkings of complex institutions, in this case law school—mean that right off the bat some students are better positioned to succeed than others.<sup>170</sup> All students know to attend classes, but not all students know about out-of-the-classroom activities and events. Formal transparency, for example, providing each student with a “law school manual,” is unlikely to effectively address the impact of unequal cultural capital endowments. Some students may simply ignore such a manual exactly because they do not know what they do not know, others may be overwhelmed by it and find it hard to take advantage of. A commitment to providing students with a substantively equal opportunity to succeed would entail assigning each student, starting in the 1L year and continuing throughout law school, with a law professor mentor, who can help inform and guide students through law school.

This, to be clear, would not be an “add-on” to law professors’ “main” role of teaching and writing. Rather, law professors must embody a commitment to legal institutions, including law schools and must embody service to the legal profession and the legal community. Their job cannot be nearly exclusively about teaching (solo) and writing (mostly solo), or it will continue to send to law students the wrong and misleading message that the practice of law is a solitary affair focused on attaining individual accolades. This means that law

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168. Wald & Pearce, *Making Good Lawyers*, *supra* note 56, at 404; *see also* William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 U. ST. THOMAS L.J. 331 (2018); Julie Ross & Diana Donahoe, *Lighting the Fires of Learning in Law School: Implementing ABA Standard 314 By Incorporating Effective Formative Assessment Techniques Across the Curriculum*, 81 U. PITT. L. REV. 657 (2020).

169. Wald, *supra* note 124, at 63–66.

170. Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2529–36 (2015).

schools should invest and train their law professors to be effective mentors, track and assess their performance, and reward excellent mentoring. Such an undertaking will reflect commitment to two important liberal goals: access and equality.

The concern about insufficient access to law and lawyers is and should not be limited to clients. To pursue a first-rate legal career, one must cultivate social capital and have access to mentors, law professors included, who can explain the ins and outs of an effective and rewarding career trajectory. Moreover, insufficient and unequal access to mentors is a well-documented cause of inequality in the practice of law. Making partner, for example, is practically impossible, notwithstanding how hard one works and how many hours one bills, without the support of powerful equity partners.<sup>171</sup> Yet, so many associates do not know that, and even when they do, do not know how to go about securing powerful mentors and have unequal access to such powerful actors.<sup>172</sup> The same is true at law schools. Law professors can demonstrate their commitment to access and equality by modeling an effective and successful mentor–mentee relationship, and law schools should institutionally support, monitor, and reward it. Following best mentorship practices, law professors should get to know their student mentees and offer feedback and guidance over shared work and experiences, for example, while students serve as research assistants, as opposed to offering generic advice once a semester over a cup of coffee even if the typical law professor to student ratio means that each law professor would have several student mentees.

Relatedly, law professors should visibly model and embody a commitment to teamwork by on occasion, but not haphazardly, co-teaching and co-authoring with colleagues and with students.<sup>173</sup> Such an undertaking would certainly be “inefficient.” One who co-taught two courses for the same credit of teaching one course alone would likely spend significantly more time preparing for classes. One who co-authored, especially with a student, would likely spend more time than researching and writing the paper by herself or himself. The point, however, is not to increase efficiency or productivity. Rather, it is to instill in students a commitment to professional collaboration, teamwork, mentoring, access, and equality.

Next, law schools should be shining bastions of visible equality when it comes to equal pay for equal work and should generally be at the forefront of visible equality in positions of power and influence for faculty, staff, and

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171. See ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 157 (1988); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1609 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 537–42 (1996).

172. Wald, *supra* note 170.

173. Wald, *supra* note 79, at 711.

students. Law schools' recent visible push to install women and professors of color as deans is a step in the right direction,<sup>174</sup> yet it is not enough and cannot be all law schools do. Once again, law professors and law schools can learn here from the experience of lawyers and law firms. For a while, in-house legal departments at Fortune500 corporations claimed they were in the forefront for the battle for equality, touting the percentage of female general counsel.<sup>175</sup> Further scrutiny revealed, however, that while in-house departments were quick to install a female at the head of their offices, they were much slower to diversify positions of power and influence below the general counsel position, and that the symbolic shift at the general counsel level did little to challenge gender realities at corporate C-suites and boards.<sup>176</sup>

Law schools should learn from the in-house legal departments' experience. They should systematically and thoughtfully engage in efforts to provide all members of their community with an equal opportunity to excel. For faculty and students alike, this means providing equal conditions and opportunities to attain success as teachers and as scholars, and as law students. This would include proactively scrutinizing pay scales to ensure equal pay for equal work and equal opportunities to seek promotion and be installed to chaired positions. It would also include institutional measures to ensure equal opportunities for students to pursue clerkships and leadership positions on journals and student organizations. For example, this would entail faculty members getting involved and helping to put in place equal policies and procedures in journals and student organizations, as opposed to serving as advisors who deal with difficult authors and serving as figure heads.<sup>177</sup> All faculty members should be so involved, closely supervising law schools' organizations and extracurricular activities. Once again, law schools should facilitate and support this effort, track performance, and reward excellence.

Finally, law schools and law professors should visibly demonstrate a commitment to the rule of law by modeling respectful professional exchanges, especially when they disagree. This can be done systematically by sitting on lunchtime law school sponsored panels with colleagues one is likely to disagree with, co-teaching with colleagues one has substantive disagreements with, and co-authoring with those advancing positions one disagrees with. This would also include cultivating and modeling a respectful environment in law schools for all sponsored talks and speakers. In a day and age of populist lawyering, in

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174. See *AALS Report*, *supra* note 13.

175. Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 *FORDHAM L. REV.* 1765 (2020).

176. *Id.*

177. See Gregory S. Parks & Etienne C. Toussaint, *The Color of Law Review*, 103 *B.U. L. REV.* 181, 214–25 (2023).

which name calling and incivility appear to be on the rise,<sup>178</sup> law professors must model and teach respectful interactions.

Visible, persistent commitment to liberal values, including justice, equality, access, fairness, and the rule of law, incidentally, will also guide the admission policies of law schools in the new post-affirmative-action era.<sup>179</sup> For example, law schools committed to justice, equality, and access can systematically assess, in addition to candidates' academic credentials such as college attended, GPA and class rank, and performance on a standardized test such as the LSAT and GRE, life experiences and demonstrated commitment to the values of justice, equality, and access.<sup>180</sup> This would not be a liberal façade designed to allow law schools to informally deploy affirmative action policies. Instead, such admission policies would be part and parcel of an overall organic commitment to pursuing a liberal model of legal education.

### B. *Right and Left Posturing*

On the right, conservative pundits, especially among state legislators who have a say over the funding of state law schools, have recently called for law professors to teach more, get paid less, and be subjected to post-tenure review.<sup>181</sup> Although there is nothing inherently wrong with these proposals, in fact, law professors should work harder, have clearer and more robust job descriptions, and perhaps should be subject to post-tenure review, the current conservative push amounts to little more than posturing, driven by unpersuasive reasons and unattainable objectives.

It is true that over the last couple of decades tenure-track law professors' teaching loads have diminished. Whereas in the past a law professor usually taught twelve credits over two to three days during the semester and was expected to generally be in the building from 9 AM to 5 PM, four to five days a week, current loads are often nine to ten credits a year, sometimes over two days a week, with no clear expectation that one be in the building on off-teaching days.<sup>182</sup> Against this background, the conservative pushback to have law professors teach more or get paid less is not per se unreasonable. Furthermore, while a typical law professor is expected to teach, write, and serve, there is often significant ambiguity about the latter two categories, at least after

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178. See, e.g., Maritza I. Reyes, *Professional Women Subjugated by Name-Calling and Character Attacks*, 23 J. GENDER RACE & JUST. 397, 401 (2020); see also Paul R. Tremblay, *Moral Activism Manque*, 44 S. TEX. L. REV. 127, 128 (2002).

179. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

180. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1010–11 (1996).

181. On post-tenure review, see generally Jayne W. Barnard, *Post-Tenure Review As If It Mattered*, 17 J. CONTEMP. LEGAL ISSUES 297 (2008).

182. See *supra* note 108 and accompanying text.

tenure. One is certainly expected to keep writing, but there is no scrutiny of input over, for example, how many hours a week a professor dedicates to research and writing, and there are lax standards regarding output and quality.<sup>183</sup> Some law professors publish a lot, but many do not. Of course, projects, styles, and attitudes vary greatly, and a simplistic one-size-fits-all approach to assessing scholarly productivity is doomed to fail, but law schools generally know very little about the scholarly habits of their faculties. Some sensible post-tenure review measures designed to illuminate law professors' research and writing habits may be helpful.

Constructive criticism, however, is not what is animating recent conservative posturing. Preoccupied with the liberal reputation of law schools and law professors, with liberal leaning scholarship and, more recently, with the teaching of courses like critical race theory,<sup>184</sup> conservative pundits are trying to punish and censure, not improve, legal education. Ironically, as advocated, such posturing is not going to achieve its goals. Teaching more hours is not going to make law professors become less liberal, teach more "conservative" courses, or espouse less "liberal" opinions in class. Post-tenure review is not going to make law professors write fewer "liberal" or "theoretical" law review articles and books. Recent obsession with critical race theory is factually erroneous (law schools are not progressive institutions) and normatively misguided (offering critical electives is and should be an inherent part of what it means to think like a lawyer and thus of legal education).

More importantly, in and of themselves, such reform proposals are going to do little to advance the liberal goals of justice, equality, fairness, access to legal services, and respect for the rule of law, if only because they have nothing to do with these objectives. As such, recent conservative posturing is inconsistent with a more liberal approach to legal education.

On the left, pundits have been advocating for eliminating the two-class system at law schools, granting all professors similar status and voting rights, including granting tenure to clinical and legal writing faculty members, and closing the significant pay gap between tenure-track and non-tenure-track faculty members.<sup>185</sup>

It is true that law schools feature a two- (or more) class system, in which tenure-track professors enjoy first-class citizenship, complete with job security and high pay, whereas some clinicians, writing instructors, and other teachers have second-class status, often with no job security and significantly less pay

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183. See generally Wald, *supra* note 117.

184. FRANCESCA LÓPEZ ET AL, NAT'L EDUC. POL'Y CENTR., UNDERSTANDING THE ATTACKS ON CRITICAL RACE THEORY 10–11 (2021), <https://files.eric.ed.gov/fulltext/ED616105.pdf> [<https://perma.cc/YK3N-FG5B>].

185. Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353, 357 (2012); Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 304 (2019).

(although context does matter: at some law schools clinicians are on the tenure-track; at others they and writing instructors have long-term contracts with governance rights, excluding only voting on the appointment of tenure-track faculty).

As is the case with conservative reform proposals, there is nothing inherently wrong with these left-side reform suggestions. Granting clinicians, writing and skills instructors job security via long-term contracts and perhaps tenure appropriately acknowledges the intrinsic importance of the work these faculty members perform at law schools. Granting all faculty members some or all governance rights reflects a basic commitment to inclusiveness.

Constructive criticism, however, is not necessarily what is animating recent posturing. Different classes of law professors have different credentials, do different things, occupy different roles, and have different responsibilities. Therefore, reasonably differentiating among different categories of law professors does not imply discrimination, just like differentiating among different tiers of lawyers at law firms does not necessarily imply discrimination. Equity partners, income partners, and associates, for example, do different things and have different roles and responsibilities, which lead to varying levels of status and compensation. One should be mindful of who gets recruited, retained, and promoted to what category and tier, but the mere fact of tiers is not in and of itself discriminatory.

In particular, because research and writing are constitutive features of academic life, the elevated status and pay of those who regularly research and write, as opposed to those who do not, is conceptually justified. Moreover, one of the main justifications for tenure, historically, has been academic freedom, including protecting law professors from retaliation for their published work. This rationale does not apply to those who do not teach and write, although other rationales might: for example, protecting the academic freedom of clinicians who teach in clinics perceived to represent unpopular clients or advance unpopular causes.<sup>186</sup>

Ultimately, universities and their law schools are meritocracies. They have every reason to incentivize and reward excellent teaching, research, publications, service, mentoring, and justice, equality, and rule of law work, including drawing merit-based sensible distinctions between different members of the community who perform and contribute differently to the life of the law school, recent left-leaning posturing notwithstanding. More importantly, in and of themselves, such reform proposals are going to do little to advance the liberal goals of justice, equality, fairness, access to legal services, and respect for the rule of law, if only because they have little to do with these objectives.

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186. Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 OHIO N.U. L. REV. 115, 139–40 (2019).

More recently, progressive thinkers have called on law schools to become progressive, antiracist institutions, including by teaching critical theories and methodologies and introducing students to alternative forms of advocacy, such as public interest, movement, and rebellious lawyering.<sup>187</sup> These critiques of legal education simultaneously demand too little and too much. They demand too little because offering fundamental critical perspectives as secondary electives to only a self-selecting subset of law students is not enough to address the a-liberal bias of legal education. Instead, justice, equality, and access analyses must become part of the core of legal education at the 1L year and throughout the law school experience. And they demand too much because while law schools must introduce their students to conceptions of justice, morality, equality, and access, and explore alternative conceptions of the rule of law, antiracism included, they ought not exclusively pursue and preach a particular account of justice and methods of pursuing it.

### *C. Likely Critiques of the Proposed Liberal Model*

The proposed model of legal education admittedly constitutes a bold departure from the current model law schools have pursued for more than a century. It is likely to be faced with ample criticism.

#### *1. The Infeasibility Critique: Law Students Are Only Here for Three Years*

Skeptics might argue that the proposed model, well-intended as it may be, is too ambitious in the sense that it imagines an unrealistic role and impact for law schools and law professors. Most law students, after all, arrive at law schools as (young) adults and spend only three years at the institution. The notion that law schools might be able to instill in their students an appreciation and passion for the liberal values of justice, equality, and access is optimistic at best, foolish at worst. This critique would be familiar to teachers and scholars writing about formation of professional identity,<sup>188</sup> whose critics assert that it is impossible to form students' identity in three years. It is similar to the apologetic posture of those who retreat from engaging with students over justice, equality, and access considerations and argue that law students arrive at law schools as "complete" adults and that one cannot teach someone to be ethical, moral, or virtuous. Call this the infeasibility critique.

The infeasibility critique fails for two reasons. First, law schools play an important role in the formation of law students' professional careers. Many students enter law school with only an intuitive cursory sense of what lawyers do and what the law is about. They know relatively little about the operation

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187. See, e.g., Toussaint, *supra* note 5, at 57–69.

188. See sources cited *supra* note 81.

and practice of law and do not know what to expect, making them, in the best of ways, impressionable. Indeed, if law schools can do (or believe they do) a good job of training law students to think like lawyers, surely they can do a decent job introducing law students to different conceptions of justice and equality in preparation for their professional journeys as lawyers.

Second and more importantly, the critique is demonstrably false. Law schools already form the professional identity of law students: they instill in their students individualistic, adversarial, competitive, client-centered values, which are amoral and a-liberal.<sup>189</sup> Irrespective of what one makes of these values and this effort, it is simply false that law schools cannot form the professional identity of law students because they do. The question therefore is not *whether* law schools can form the professional identity of law students, it is *how* law schools should form the professional identity of law students. It is not *whether* law schools can instill values in their students, it is *what* values law schools ought to instill.

## 2. *The Cop-Out: The Practice of Law Is A-Liberal*

A related critique focuses not on what happens during law school but rather on what happens after law school. The practice of law, argue critics, is competitive, client-centered, and individualistic. It does not afford lawyers ample or any opportunities to pursue liberal values.<sup>190</sup> For law schools to purport to instill in law students liberal values they are not going to be able to pursue in practice is to mislead them about their future professional lives. Moreover, some commentators take this critique a step further. Building on this descriptive account of law practice, they add that lawyers should not be in the business of trying to advise their clients about liberal values. Lawyers should be mouthpieces for clients, deferring to their objectives and exercise of autonomy.<sup>191</sup>

This critique is a cop-out, descriptively and normatively. Descriptively, it is certainly true that the practice of law has grown increasingly competitive, featuring what scholars of the corporate hemisphere have called an “eat what you kill,” “cut-throat” culture, and that the individual hemisphere can also be intensely competitive.<sup>192</sup> It is also true that some clients have grown powerful and sophisticated and that the dynamic of their relationships with their lawyers has changed, such that they seek increasingly specialized advice that does not

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189. Cramton, *Ordinary Religion*, *supra* note 21, at 248; Wald & Pearce, *Making Good Lawyers*, *supra* note 56, at 415. John Bliss, for example, has documented the public interest drift which takes place at law schools. See John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of “Public Interest Drift” in Law School*, 51 U.C. DAVIS L. REV. 1973, 1975 (2018).

190. See KRONMAN, *supra* note 63, at 2–3; see also Wald & Pearce, *Being Good Lawyers*, *supra* note 66, at 613.

191. See Pepper, *supra* note 72, at 617.

192. MILTON C. REGAN JR., *THE FALL OF WALL STREET LAWYER: EAT WHAT YOU KILL* 7 (2004).



afford lawyers an opportunity to engage on matters of justice and equality in the abstract.<sup>193</sup> Finally, it is true that the daily practice of some lawyers does not lend itself to conversations about justice and equality and that attempting to so engage may conflict with client expectations from their lawyers.<sup>194</sup>

All of this, however, does not mean that the practice of law does not afford lawyers opportunities to identify and address justice, equality, access, and rule of law considerations. Clients sometimes ask lawyers to draft contracts, design transactions, negotiate or bring or defend litigation in situations that do lend themselves to discussions about justice, equality, and fairness. Furthermore, how lawyers conduct themselves in the practice of law on behalf of clients impacts the rule of law and its perception. The issue is not whether liberal values come up on occasion in the practice of law, it is whether lawyers will spot them and how they will react to them.

The traditional model of legal education celebrates teaching law students to issue spot as part of learning to “think like a lawyer.”<sup>195</sup> Issue spotting is about identifying the relevant and applicable legal issues that a client’s situation and objectives trigger. Just as law schools prepare and train law students to spot narrowly construed legal issues, they ought to train students to spot justice, equality, and access issues. Next, just as IRAC teaches students to explain the “rule,” “apply” it, and offer a “conclusion” after spotting the “issue,” it can teach students to explain the relevant conceptions of justice, apply them, and offer relevant advice.

Normatively, the critique is equally unpersuasive. Client autonomy is an important value, but it is not the only value.<sup>196</sup> Similarly, assertion of moral individual rights is an important aspect of lawyering, but it is not the only way of incorporating law and morality. If and when a lawyer reasonably believes that a client’s objective is unjust, unfair, or inconsistent with the rule of law, they ought to discuss their concerns with the client. This, of course, leaves complex issues unresolved, such as what client conduct triggers a duty to say something, what exactly to say, and what to do if the client persists in an unjust course of conduct.<sup>197</sup> Yet the notion that lawyers should be amoral, agnostic about client objectives, and little more than a mouthpiece in the name of client autonomy is a cop-out.

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193. See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010); Wald, *supra* note 175, at 1775.

194. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1580 (1995).

195. See Jamie R. Abrams, *The Deconstructed Issue-Spotting Exam*, 68 J. LEGAL EDUC. 194, 201 (2019).

196. See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. BAR FOUND. RES. J. 637, 639 (1986) (“Pepper appears to have blurred the crucial distinction between the desirability of people acting autonomously and the desirability of their autonomous act.”) (emphasis omitted).

197. Wald & Pearce, *Being Good Lawyers*, *supra* note 66, at 620.

### 3. *But I Teach Contracts!*

Practically speaking, a more daunting objection to the proposed model might be the vested expectations of law professors in their current job description and role. To begin with, law professors who teach and specialize in areas of law considered part of the holy grail of the traditional model, for example, contracts and torts, may understandably feel defensive about their turf. Nonetheless, at its most basic form, this critique can be easily dismissed. Most law professors do not exclusively teach required classes in the 1L year. It would be odd for corporations or family law or trust and estates professors to question the traditional model on the grounds that their subjects are not part of the required 1L curriculum. Professors who teach and research subjects that will be booted out of the 1L curriculum will simply adjust to offering electives or, in the near future, adjust and offer justice, equality, and access courses explored through the lenses of their subject-matter expertise.<sup>198</sup>

More serious would be an objection correctly pointing out that the proposed model of legal education entails a significant departure from the status quo. It aims to redefine the job description and role of law professors from one focused primarily on teaching and writing to one that is committed in equal measures to teaching, writing, and service to the law school community defined in terms of modeling to students commitment to liberal values. Put differently, it aims to take the current job description of law professors, only rhetorically a three-legged stool consisting of teaching, scholarship, and service but in practice scholarship-centric, and make it a true three-legged stool equally committed to teaching, scholarship, and service demonstrably and visibly committed to liberal values. It also aims to position law professors in the forefront of the battle for greater justice, equality and access, modeling not only for law students, but also for practicing lawyers a commitment to service and a transition from empty rhetorical promises to actual delivered goods.

Moreover, the job description envisioned by the proposed model is likely to be significantly more time consuming than the current role of law professors. Although little is known about how hard law professors actually work,<sup>199</sup> the proposed model adds to the current model's expectations of teaching and research significant added time-consuming components of service to students and the law school community, without suggesting any reduction in the teaching loads or scholarly productivity of law professors.

As such, some law professors might be understandably less than enthusiastic about the proposed model. Simply put, it calls on them to work harder, adding new tasks without any added corresponding pecuniary compensation or status recognition. Except for one compelling reason. Putting

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198. See *supra* Part II.A.1.

199. Wald, *supra* note 183, at 991.

liberal values front and center of what it means to be a law professor, and what the job description is, is the right thing to do. Yet, even if some law professors might agree that the proposed model is much superior to the current model and will help graduate students who are better prepared for the practice of law as public citizens with a special responsibility for the quality of justice, getting them to act accordingly is likely to be easier said than done. And since law professors have tenure and enjoy academic freedom, without their willing proactive endorsement, the proposed model will never get off the ground.

#### *4. Path Dependencies and Committee Work, Where Good Ideas Go to Die*

Institutional change is hard to implement, costly, and risky. Law schools, in particular, have generally followed a herd mentality for over a century, following the same traditional model of legal education. Old professional habits, as the saying goes, die hard, and, in the case of law schools, are unlikely to die at all. The changes envisioned by the proposed model could not be implemented by willing administrations alone. They would have to be actively embraced and pursued by the faculty, acting through its committee structures, including the curriculum committee. The process, under the best of circumstances, even if law professors were not asked to adopt a model which expects them to work harder, longer, and master new roles, would likely be notoriously slow and prone to holdout behavior.

Next, transitioning to a more liberal model of legal education is likely to be quite costly, entailing training the faculty to do new tricks and educating and investing in getting the buy-in of all law school constituents, primarily students.

Finally, the transition is likely to be risky. Not only is it going to unnerve faculty and face resistance, but the proposed model is also likely to be misunderstood by commentators outside of legal academia. Although it aims to put apolitical liberal values at the core of legal education, it risks being misconstrued as a political ploy, an attempt by “liberal” law professors to make “liberal” law schools even more liberal.

This critique is well taken. Implementing a more liberal model of legal education is going to be time consuming, slow, and costly. Law schools better get to work.

### CONCLUSION

Lawyers and the legal profession have a liberal reputation but in fact are quite conservative and protective of the status quo and the powers that be.<sup>200</sup> The first thing to do, Shakespeare reminds us, when one wants to throw the

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200. PISTOR, *supra* note 60, at 166–67.

country into chaos is to kill all the lawyers.<sup>201</sup> Part of the explanation for lawyers' amoral stance is that they understand themselves, at least within the confines of the adversary system and increasingly outside of it, to be mouthpieces for paying clients, who alone determine the objectives of the attorney–client relationship. This posture has been justified by new liberalism's commitment to the assertion of moral individual rights as the cornerstone of the rule of law.

These excuses for the passive stance lawyers often take with regard to liberal values, such as justice, substantive equality, fairness, access, and even the rule of law, known as “the system made me do it,” and “the clients made me do it,” do not apply to law professors and law schools, who have no clients and face no competitive pressures to do their bidding. One would have thus expected law schools to be liberal bastions and law professors to be leading actors in the battle for greater justice and equality for all. Surprisingly, law professors are not in the forefront of the quest for a more just society. Instead, law schools pursue an a-liberal model of legal education because, notwithstanding mounting evidence regarding its shortcomings, they continue to buy into the promising allure of new liberalism; because pursuing true liberal values will be hard; and because they have little incentive to pursue liberal values and significant incentives to uphold the status quo.

This Article advances a liberal model for legal education, complete with a revised curriculum and a blueprint for a more liberal law school culture. It also dismisses some likely critiques of the proposed model, acknowledging that the most likely obstacles to reform are likely to be law professors themselves and their reluctance to work harder and expand their job description and role to include stewardship of liberal values.

Yet, there is perhaps a reason for cautious optimism. Advancing justice, equality, fairness, access, and the rule of law is the right thing to do, and law professors have the power to do so. And if law professors need a little push, law students might help them get there. Seemingly unlikely agents of institutional change (after all, law students are only in the building for three years and with mounting debts for their legal education have every incentive to not rock the boat and smoothly transition to paying legal jobs), students and recent law graduates have been in the forefront of demanding change at law schools and law firms.<sup>202</sup> Perhaps their passion can shake up the traditional model of legal education and help replace it with a more liberal alternative.

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201. WILLIAM SHAKESPEARE, HENRY VI, pt. II, act IV, sc. 2, 76–77.

202. See, e.g., Yoonji Han, *Pressure is Mounting on Big Law to Combat Climate Change as 600 Students Pledge to Boycott Paul Weiss for Defending Oil Giant Exxon*, BUS. INSIDER (Oct. 10, 2020, 8:32 AM), <https://www.businessinsider.com/law-students-boycott-paul-weiss-exxon-climate-change-esg-2020-10>; see generally W. BRADLEY WENDEL, CANCELING LAWYERS: CASE STUDIES OF ACCOUNTABILITY, TOLERATION, AND REGRET (2024) (thoughtfully delineating the line between legitimate criticisms of lawyers and legal institutions and inappropriate canceling).