

William C. Hubbard Conference on Law and Education

CONFERENCE PROCEEDINGS

StanfordLawSchool

Deborah L. Rhode

Center on the Legal Profession



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ON MARCH 25-26, 2024, Stanford Law School, the Deborah L. Rhode Center on the Legal Profession, and the American Bar Foundation hosted the 2nd biennial William C. Hubbard Conference on Law and Education. Held at Stanford Law School, the conference was both retrospective and prospective. Attendees reviewed two decades of findings from the landmark “After the JD” research project, celebrated the newly released capstone book, [*The Making of Lawyers’ Careers*](#), and explored emerging research questions and possible trajectories for future investigations.

Here, we summarize the discussion and present the short papers submitted by panelists.

About Stanford Law School

Stanford Law School is one of the nation’s leading institutions for legal scholarship and education. Its alumni are among the most influential decision makers in law, politics, business, and high technology. Faculty members argue before the Supreme Court, testify before Congress, produce outstanding legal scholarship and empirical analysis, and contribute regularly to the nation’s press as legal and policy experts. Stanford Law School has established a model for legal education that provides rigorous interdisciplinary training, hands-on experience, global perspective, and focus on public service, spearheading a movement for change.

About the Deborah L. Rhode Center on the Legal Profession

The Deborah L. Rhode Center on the Legal Profession (Rhode Center) is an academic center located at Stanford Law School. Founded in 2008 by Stanford Law Professor Deborah L. Rhode, the Rhode Center is a leading voice in the scholarly and policy debates on the present and future challenges facing the legal profession. The Rhode Center’s mission is to build a civil justice system that is more equitable, transparent, and accessible. The Center is a vivid example of the unique role law schools can play to connect theory with practice and translate scholarly research into real-world impact to benefit both the profession and the public.

About the American Bar Foundation

The American Bar Foundation (ABF) is an independent research institute for the empirical, social-scientific study of law. Based in Chicago, Illinois, and primarily supported by the American Bar Endowment and the Fellows of the ABF, a network of over 16,000 legal professionals nationwide, the ABF is dedicated to rigorous, objective, non-partisan research on law, legal processes, and legal institutions. The ABF’s distinguished interdisciplinary faculty-in-residence includes many of the nation’s foremost socio-legal scholars, whose work informs and guides scholarship and policy around the globe. Through its diverse research projects, programming, fellowships, and publications, the ABF seeks to foster both a dynamic intellectual community among its resident scholars and richly generative intellectual conversations throughout the socio-legal field.

CONFERENCE WELCOME

Professor and Dean Emeritus Paul Brest

Stanford Law School Professor and Interim Dean Paul Brest offered the following opening remarks:

Welcome to all of you, and to the American Bar Foundation for their sponsorship, to the authors of this magnificent book, *The Making of Lawyers' Careers*, and to Stanford Law School Professors and Co-Directors of the Deborah L. Rhode Center on the Legal Profession Nora and David Freeman Engstrom.

This long project has resulted in this capstone work, and this is only the beginning. Looking at the book and the papers submitted for this conference, I observe a rather pessimistic view of the social stratification in the profession and in law school. I'm not a Pollyanna, but I have a more optimistic view. My comments are not based on my work as a scholar, or a Dean, but rather as a participant and observer of the legal profession for 60 years. I am pretty sure that I have a longer experience as a lawyer than anyone in this room.

I want to look further back to the time when legal education achieved its current status. The move in the direction of what Elizabeth Mertz and her colleagues call "hierarchy" stems from making training of lawyers part of the academy, and not a separate trade school. When law became part of the academy, it adopted the same merit-based standards as the other areas of the academy. I doubt that anyone wants to turn back the clock – divorce the training of lawyers from the academy – I'm not sure that would reduce stratification.

I've seen three major changes since I started off at law school and all of them have had the effect of reducing stratification: (1) the emergence of clinical legal education, (2) the broadening of legal scholarship into new areas, and (3) the diversification of the student body.

First, on the emergence of clinical legal education. When I was a law student, clinical education was limited to the moot court competition. Today, it's a part of the law school curriculum. Not only has this improved students' education, but I would guess that it's reduced stratification in the profession.

Second, legal scholarship has expanded to encompass disciplines that simply were not thought of as part of legal education when I was in law school. If you look around law schools today, you see faculty who are combining law with social sciences, with economics, with history. And I think that has attracted a more diverse group of faculty than the purely doctrinal work that was the stock and trade when I was student. The critical race theory that emerged during the 1980s, remains a diversifying force in the legal academy and produces students with a different, even subversive view, of legal education.

And finally, the diversity of the student body itself. My 1L class at Harvard Law School was entirely white, and almost entirely male. My wife, who was a year behind me, was one of only thirty women. When I began my career at Stanford, the faculty was all white and male. You look at the law school today, and the demography is just radically different; nothing like it was. There's further to go, especially in view of the recent decisions in *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. UNC*.¹

At the time that we celebrate this immense accomplishment of *The Making of Lawyers' Careers* and all the work that has been done, I want to remind all of us that we are not starting the dark ages. We are starting on a foundation that has shown tremendous improvement in the last 50 years. So thank you all for being here and I look forward to engaging discussions and debates over the next day and a half.

¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

The Making of Lawyers' Careers: Authors and readers

Celebrating the publication of *The Making of Lawyers' Careers*, highlighting the key insights from the research, and inviting commentary and discussion of the project, its methodology, results, and impact.

AUTHORS

- **Ronit Dinovitzer**, Professor of Sociology, University of Toronto; Faculty Fellow, American Bar Foundation
- **Bryant Garth**, Affiliated Research Professor, American Bar Foundation; Distinguished Professor of Law Emeritus, University of California at Irvine School of Law
- **Robert L. Nelson**, Director Emeritus and the McCrate Research Chair in the Legal Profession, American Bar Foundation; Professor of Sociology and Law, Northwestern University

READERS

- **Elizabeth Chambliss**, Henry Harman Edens Professor of Law, University of South Carolina Joseph F. Rice School of Law
- **Robert W. Gordon**, Professor of Law, Emeritus, Stanford Law School

Professor Robert Nelson, one of the co-authors of the book, began the panel by surfacing a core insight of *The Making of Lawyers' Careers*: while lawyers' careers are rooted in the traditions and hierarchies of the legal profession, individual members of the profession exercise agency as they move through their careers.

Influenced by Jack Heinz and Pierre Bourdieu, the book analyzes the intersection of structure and agency in legal careers, focusing on social capital and its connection to social change.² The project was national in scope, based on geographic market rather than law school. It was also longitudinal, following lawyers over twenty years, and multi-method, combining surveys with in-depth interviews.

² Jack Heinz, with Edward Laumann, was an author of the highly influential Chicago study of the legal profession published in 1982. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982). The thesis of the Chicago study was that the profession was divided into two hemispheres depending on the types of clients they represent (corporations or people), with a strong hierarchy and little crossover between the two hemispheres. The hierarchy is entrenched in law school, with graduates of elite schools generally serving corporate clients and graduates of lower-tiered schools serving individuals and small businesses. Pierre Bordieu was a French sociologist who developed the theory of "social capital" to assess how an individual develops and deploys power through social engagement. Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241 (J. G. Richardson ed., 1986).

The results are multi-faceted and illuminating. First, there is striking evidence that the corporate sector has increased its domination of the legal market, contributing to economic inequality across the profession. Large- to mid-size business clients are the primary recipients of legal services (40% of lawyer time). Solo practices, small firms, and the government command a substantially smaller share of earnings than their share of lawyers. This has exacerbated the overall economic inequality across the profession and contributes to increasing economic inequality over the course of lawyers' careers.

Strong social hierarchies persist in the modern legal profession. For instance, lawyers from more privileged personal backgrounds have considerably more prestigious careers and more economic opportunities, including because there is a direct linear relationship between the tier of law school a student attends and the educational and professional background of his/her parents. And, the odds of being an equity partner in a law firm are much higher for graduates from a top ranked law school.

Race also plays a significant role in defining opportunity in the profession. Thirty percent of respondents to the *Making of Lawyers' Careers* survey work in firms with no racial or ethnic minorities. While managing partners complain that they cannot recruit or retain lawyers of color, the evidence shows that the lack of diversity is built into the structure of elite firms. Black lawyers are particularly impacted, lacking mentorship, client succession, training, and also experiencing more discrimination.

Despite these challenges, satisfaction within the legal profession remains high, with differences in satisfaction levels across law school tiers.

Professor Nelson summarized: "Ultimately, the book illuminates the continuing relevance of Heinz and Laumann's 'two hemispheres thesis:' client size continues to drive inequality. Underneath the surface, there are profound differences in experience and opportunity based on race, gender, and class. Further, while lawyers deploy their social capital to gain agency in their careers, they can create fluidity across these structural hierarchies, but they ultimately reproduce them."

Professor Ronit Dinovitzer emphasized that a major advantage of the After the JD study is that it studied lawyers over decades. The study shows that, while most law school graduates start their career at a law firm, over the course of their careers, many move out of firms and into business. The study helps us understand career development over time, including by focusing on elite law school graduates and large law firms.

Further, the study shows that legal career trajectories are very dependent on demographic background. Equity partners in elite law firms remain very white (94 percent) and very male (76 percent). This is a reproduction of social class status: elite law equity partners also reported the highest scores for their father's occupational status. There are also very gendered effects: while 77 percent of women go into state government, only 24 percent become equity partners. For graduates of lower ranked schools, legal education and the profession are pathways to upward mobility.

Looking at the big picture, we can say that shifts in hiring have yielded increases in the number of women and minorities who join various firms. But over time, those individuals tend to leave, and we still see the reproduction of old systems. There is still value to new lawyers across demographics of starting a career in a large law firm, but lawyers of color are not making equity partner in the same way. While this is an area for further research, it appears that increased diversity among associates allows firms to believe they are meritocratic, but in the long run, they are not.

Why are we not seeing more disruption of this? We accept the hierarchy as meritocratic, especially as we see firms hiring more diverse classes. This inequality in careers is perpetuated because attrition is part of the system: many elite law graduates do not want to be partners and part of the draw into the system is the possible pathway from a law firm and into business. Firms continue hiring large entering classes and lose people over time naturally.

Comments on the book were provided by Professor Robert Gordon and Professor Elizabeth Chambliss.

Professor Gordon observed that the book's persistent theme on the class stratification of the profession is not new. Throughout history, there has always been a small sliver of lawyers at elite firms distinguished by the fact that they practiced before the highest state and federal courts. These lawyers were generally children of the upper middle class. While the stratification story is an old one, the study gives further insight, showing, for example, that class position is strongly correlated with whether the father possesses a graduate degree.

Beyond this, the book adds insights into solo practitioners. The study shows that this area of the legal profession is very diverse, and the practice is financially precarious. Solo careers often look like pinballs, with little control and coherence. Successful solo practitioners take advantage of relationships, sometimes leaning on ethnic networks.

Professor Gordon noted two areas of particular interest. First, the study shows that public interest legal jobs are also highly stratified, with federal government jobs open to graduates of elite schools, and state government jobs as options for middle-tier law school graduates. Further, women and people of color are overrepresented in public interest jobs. He expressed the hope that future studies will look more deeply at the prosecutorial career path and the path into politics.

Second, the study produces a “curious sociological finding” that elite lawyers are the most liberal even though their clients are overwhelmingly corporate. Elite lawyers' liberalism tends to be more social than financial, and liberalism declines as careers continue. Further, elite firm lawyers provide most of the pro bono service for the bar and have high participation in community organizations and other public service opportunities.

On the question of pathways for future research, Professor Gordon noted the lack of research into the substance of lawyers' work and the question of whether in the whole, lawyers' work does more good

than harm in our society. What do lawyers do for clients, especially large corporate clients, and is that a net social good? The general accounts of what lawyers do are glossy and laudatory: Lawyers represent clients and that is, on its own, beneficial to society. But the fact is that most people are not represented, so what are the positive effects? Are there positive effects merely from the idea of an adversarial system?

Professor Elizabeth Chambliss observed that the book provides three theoretical frameworks to answer the question of why we should study the careers of lawyers. In her comments, Professor Chambliss focused on the takeaways from these frameworks.

First, we care because we are lawyers and have an obligation to understand our profession. The central insights here are that the profession is stratified between corporate and personal services, that law school is a significant predictor of legal career, and that significant racial and gender gaps persist.

Second, there is a human capital framework to answer the question. Legal theory is a source of sociological analysis: Actors deploy social capital to compete for success. This framework focuses on the social construction of hierarchy within the legal field. Here, lawyers are an example of more generalized power dynamics (also at play in banking and management consulting), and we are interested in the dynamics by which the structures are replicated.

The third framework is that of political and economic theory. Here, we think about the power of the profession relative to other actors in the state. What is the relationship between lawyers' private and public commitments, and how do lawyers collectively retain their power and authority relative to other groups? We learn that lawyers lean Democratic and learn that lawyers spend only 1 percent of their time doing pro bono work.

Professor Chambliss stressed that all three of these ways of reading this book are focused on the corporate sector. The corporate sector, which is at the top of the stratification, dictates much of the structure of the profession and the book is primarily interested in access to, and experience within, the corporate sector.

Professor Chambliss suggested that more research focus on the personal services sector and, particularly, the effective demise of the personal services sector on lawyers' status. Access to justice work has shifted away from focusing on lawyers to focusing on clients and their families. When we ask, from the client perspective, "why study lawyers" the answer is to improve client services. From that perspective, the profession is in trouble. The characterization of "two hemispheres" is a misnomer – the vastly greater percentage of lawyers' work is concentrated on corporate clients. There is significant economic inequality between lawyers who serve corporate clients and lawyers who serve people or small businesses. And most Americans have virtually no access to legal services.

Professor Chambliss emphasized that this concentration poses a threat to the legitimacy of the profession. She acknowledged that this could be perceived as crisis rhetoric and that many may argue that the

profession can absorb these challenges or change as needed. But Professor Chambliss said she believes a change is coming because the potential for disruption is very strong. From an internal perspective, the demise of the “People Law” sector challenges lawyers’ collective commitment to public service. Pro bono may no longer be the currency of public interest. Professor Chambliss queried how lawyers’ attitudes to new service providers and regulatory reform might relate to their sector of the legal services market, noting that it seems likely that solo and small firm practitioners are likely less open to reforms than corporate lawyers.

Sociologically, Professor Chambliss interpreted the increased segmentation as posing a challenge to the definition of the legal field. Does it make sense, theoretically, to consider personal services and corporate services as part of the same field for sociological study? The corporate sector is well suited to sociological study because it is tightly organized and structured. The solo/small firm sector is more difficult because it is more messy and less well-organized. And now, this sector has become the center of access to justice work. Access to justice research is focused on how different models of service delivery reach clients – not on lawyers’ careers. We need to draw more scholarly attention to the “People Law” sector.

Finally, Professor Chambliss observed that public faith in the courts is at an all-time low. Economic inequality is increasing, and state courts are filled with child support, debt collection, and eviction cases. Leading scholars of the profession and access to justice are partnering with advocacy groups to challenge the professional monopoly, and we need to meet this activity with more and better research and scholarship.

The following discussion focused primarily on the historical academic focus on lawyers working within elite law firms and whether that focus should shift. Professor Gordon concurred with Professor Chambliss’s observations on the importance of the personal services sector, particularly in light of the great transformation that seems to be coming in this area.

Professor Norman Spaulding asked whether we should still be thinking about elite law firms as the top of the profession. He argued that a strong case could be made that in-house counsel now sit at the top of the profession. Also, there is more diversity in in-house positions, and it is a possibly more hospitable environment. He also wondered whether there might be a similar calculation to government practice. Ideologically minded attorneys are moving to government practice because they see the power in becoming a judge or attorney general. If we expand our view of in-house counsel and government lawyers as centers of professional power, we may see more diversity.

New Directions in Legal Research: The Key Questions

QUESTIONS PRESENTED: What are two key questions researchers should be asking about the future of legal services? Why are those two questions so important? And, how might research into those questions most productively proceed?

- CHAIR** ■ **Deborah R. Hensler**, Judge John W. Ford Professor of Dispute Resolution, Stanford Law School
- PANELISTS** ■ **Benjamin Barton**, Helen and Charles Lockett Distinguished Professor of Law, University of Tennessee College of Law
- **Matthew Clair**, Professor of Sociology, Stanford University
- **David Freeman Engstrom**, LSVF Professor in Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession, Stanford Law School
- **Shaun Ossei-Owusu**, Presidential Professor of Law, University of Pennsylvania Carey Law School

Professor Deborah Hensler opened the discussion by asking the panelists to describe what they identified as their first key question.

Professor Benjamin Barton responded that researchers should be asking whether nonlawyers can safely provide legal services to consumers. He noted that, for a long time, we have had a set of rules and regulations that forbid the unauthorized practice of law (“UPL”). Now, as jurisdictions begin to change those rules, what can we learn about the quality of legal services from new providers? The easiest version of this research might be analyzing legal complaints from consumers in jurisdictions that have relaxed those restrictions, comparing complaints about non-lawyer providers with the complaints made to bar regulators about lawyers. A rough look at what data is available publicly indicates that there is no increase in consumer harm from these new providers. We could also do a qualitative study to see the substance of the complaints.

Offering a spin on Professor Barton’s contribution, Professor Matthew Clair responded that his first question is who will provide legal services in the future. If we look within contemporary courts and other legal settings, we see a lot of nonlawyer advocates. But stepping back, we need to look at what is bringing people to court in the first place and allow for the presence of nonlawyer advocates, including

social workers, mediators, and paralegals. The fact is that these legal providers will have more of an impact in marginalized populations, including communities of color and rural communities, because these are the communities least able to access a lawyer. Where are these advocates effective? Where do they fall short? What are the disparities across race, gender, and class?

Professor David Freeman Engstrom said that, in his view, the key questions to be answered concern the role of technology, and particularly artificial intelligence (“AI”). To better understand how technology will ripple across the landscape, we need to carve the legal system into an “upper” and “lower” precinct. In the lower precinct, we often see a represented, institutional plaintiff against a self-represented litigant. The modal case in the United States right now is a debt collection action. The key question in the lower precinct is whether direct-to-consumer legal technologies will ever serve a considerable proportion of consumers? Or will some degree of human assistance always be required to serve these consumers well? The answer may turn on what types of technology courts will build, and how they’ll relax restrictions on nonlawyer legal services.

Engstrom explained that courts face a “make or buy” question. They can make their own technological solutions by creating end-to-end digital pathways for litigants. The construction of these pathways requires significant technological expertise and capacity. But it could solve a big problem going forward which is the “sea of junk” problem – that, as technology and AI are increasingly integrated into the dispute resolution system, there will be a lot of poor-quality information in the marketplace. In this context, “make” has real advantages. On the other hand, if courts choose to “buy” necessary technology, they will need to forge partnerships with quality tech providers – but, for these providers, UPL enforcement is a real threat.

According to Engstrom, the regulatory reform issue raises further questions. Currently, some states are relaxing UPL laws to allow nonlawyer community justice workers (“CJWs”) to furnish legal services, if the CJW is overseen by a legal aid organization. If this is successful, what are the implications for these technology questions in the courts? Should we be focused on building technology that expands legal aid’s reach rather than focusing on serving consumers directly?

Professor Shaun Ossei-Owusu responded that his broad question is: What are the dimensions of the political economy of public interest lawyering? The narrower question is: What are the key factors that shape the political and economic landscape that defines how public interest lawyers do their work? This is a chronically underfunded – and under-studied – segment of the bar. He noted that, while there is some research into these questions, we need far more post-Covid analysis that accounts for the major changes in American social life.

Professor Hensler then turned to methodology. How, she asked, might one answer the questions identified above.

Kicking off the discussion, Professor Clair noted that an easy way to study the impact of nonlawyer advocates would be to use administrative data because there are already a lot of nonlawyer advocates in those tribunals. Surveys should also measure client satisfaction, legal consciousness, and legal empowerment.

Professor David Engstrom described the Rhode Center's partnership with the Los Angeles Superior Court, the largest trial court in the country. The research team is testing the make-or-buy question by first attempting a "make" solution and testing it in a real-world context to get a better sense of how valid our perceptions and assumptions are. The micro question is how to institutionalize any of these tools into a complex bureaucracy. If this question can be treated as an empirical question, we can get better insight into how this actually works. The goal of the project is to bring our academic view and active, applied research to create a playbook that works for Los Angeles and will work for other courts.

Professor Ossei-Owusu responded that, to better understand the economic dynamics of public interest lawyering, we should look at funding sources and conduct in-depth interviews with leaders of public interest groups to understand how they navigate the constraints of funding, looking at places where public interest is being well-funded versus poorly funded. He would also want to consider how law firm pro bono interests impact these dynamics.

The discussion with the audience considered both methodological and moral challenges around the growing role of nonlawyers in the provision of legal services. Professor Nora Freeman Engstrom agreed with Professor Clair and observed that nonlawyer advocates in non-Article III federal courts offer real research opportunities, including potentially for randomized controlled trials comparing lawyers and nonlawyer advocates. Professor Barton cited work by now-Dean Anna Carpenter and her colleagues which looked at every Administrative Law Judge case in a particular court and coded for if a lawyer was present.³ The results showed that, where no one was present to assist, individuals were negatively impacted. Individuals with assistance were positively impacted, but critically, that positive effect was the same regardless of whether a lawyer or non-lawyer provided assistance.

Professor Hensler noted that, as we try to assess the value of nonlawyer representation, a significant concern is how to ensure we are comparing apples to apples. When looking at complaint data, for example, we may not see a difference. But are the parties who have used lawyers or nonlawyers *themselves* different? What if people who use nonlawyers also, on average, are less likely to complain? We need to look at the nature of the parties, the claims, and the actors—and try to hold all those constant—before we start doing a comparative analysis.

Professor Norman Spaulding stated that he is grappling with the following question at every level, including the empirical one: Why are we assuming that an actor other than a lawyer is part of the solution? If people could afford a lawyer, they would probably get a lawyer. There is a kind of noblesse

3 Anna E. Carpenter, Alyx Mark & Colleen Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 LAW & SOC. INQUIRY 1023 (2015).

oblige in the entire framework that it is acceptable to operate in a two-tiered system: If we believe lawyers are the best option, then why are we agreeing that we need to find a second-best option. What would the universe look like if we spent more time looking at how to get everyone a lawyer – we’re not looking at getting people lawyers, we’ve decided that lawyers are part of the problem.

Professor Clair responded that a significant portion of the literature starts from the premise that lawyers are, in fact, better. In a world where there is a lack of access to legal services, a lot of work shows that lawyers are better for clients. But there could be a third way: can we bolster the work that lawyers are doing *with* nonlawyers?

Professor David Engstrom responded that Professor Spaulding’s comment underscores how important this question is and at what an interesting moment we find ourselves. Civil *Gideon* is a valuable ideal. But there just are not enough lawyers to meet the need. The lack of lawyers is one response. Another notes that there is no way to erase market-based inequalities (meaning money buys procedure) in these courts. If that is the case, then maybe the question is not about trying to expand access but instead trying to reorganize the entire adversarial system.

Professor Ossei-Owusu noted that there are some questions emerging from this discussion. In Washington, the state authorized independent paraprofessionals. Is there enough interest from potential providers to do this work? How does salary and ability to earn a living factor in? How will facility with technology factor into the ability of technology to impact access?

Professor Nora Engstrom returned to Professor Spaulding’s point and noted that a key area of study could be to look at the medical analogue. In the medical realm, doctors now provide a declining percentage of care; allied legal professionals, such as physicians’ assistants and nurse practitioners, increasingly provide services. And, we now have good empirical evidence, in the medical arena, showing the quality of services provided by ancillary professionals. As we think about lawyers and nonlawyers, we should think about other professions that have gone through a similar fracturing.

Professor Hensler commented that, in the medical context, there is some consensus about what the outcomes should be – what tests should have been done, what drugs should have been provided. But it is less clear what outcomes in the legal profession are or should be in any particular context. Particularly on the civil side, what is better is not always clear. With debt collection, maybe it means that a defendant has a little more time before a debt needs to be collected, but the debt is still owed. Professor Hensler noted people really care about the process they receive. We should consider that the people we are talking about – the people who have legal needs to be addressed – have a set of concerns that go beyond the formal legal context. Professor Nora Engstrom observed that the research on nurse practitioners also shows that patients care about *how* they are treated, not just whether they are “cured.”

Professor Chambliss, responding to Professor Spaulding, argued that the evidence shows that people would *not*, in fact, choose lawyers in many cases – they don’t trust lawyers, they don’t know them, and they want assistance from someone they know. We need to be thinking about what people want. It is not just cost that keeps people from choosing lawyers. I too worry about deregulation, but there are solutions, such as community justice workers, that seek to embed legal problems solvers into communities.

Professor Mark Suchman highlighted two political economy tensions. First, the question of quality versus monopoly. Even in the medical sphere, two years of math are required to become a physical therapist. How do we stop at the right point on the quality continuum without undermining access? Second, access versus capacity. There is a large access to justice crisis in the asylum context, but there are not enough judges; the limits on judges create a separate choke point, even for those who can enter the system. We need to think about the system’s capacity –and whether the system could handle the influx of claimants, if there were greater access.

Professor Hensler returned to the panelists to give a final thought about their research questions.

Professor Barton asked how good AI might be at providing legal advice. This could be easy to test through a randomized trial with some people getting AI-generated legal advice and some not. Right now, because the current version of the technology still has some bad pitfalls, this could be a dangerous route. But if we give the technology more time, we may be able to conduct this kind of research. A more promising path now would be to work with technology non-profits like Upsolve to create products in frontier areas.

Professor Clair asked what will sustain legal service providers through their careers? We need research along two dimensions. First, we ought to think about what sustains nonlawyer advocates’ careers. Why do they decide to join legal organizations? Why does a social worker go to a legal aid organization and not a hospital? Second, we should study prospective lawyers and law students before they set foot in a legal classroom to better understand who stays in the profession and who leaves. What demographic characteristics are implicated in these choices? There are many who are critical of the profession, particularly after the Trump presidency and George Floyd. There is a perception that the profession could alleviate these crises but also that it is perpetuating these crises.

Professor David Engstrom said there are many interesting questions about how AI may alter the industrial organization of law in the upper precincts of the profession. Much of what first- and second-year associates do can now be done by AI. This will probably reduce leverage, but it raises interesting questions about many other aspects of law firm business. How do you train young lawyers? How do you inculcate them with good litigation judgment? Beyond this, there are significant distributive questions. Litigation is already unequal, even in the upper precincts. Maybe AI will level the playing field. But others believe that AI could further slant the playing field. It takes access to data to make good AI tools, and a lot of data on case outcomes is in the hands of repeat players and no one else. Walmart, for

example, has built predictive tools for outcome analysis in slip and falls and employment litigation. Another question is how elite law firms respond to these changing pressures. We see some big law firms beginning to think about how to shift, at least in part, from service to product and looking to productize what they do. Whether this is the beginning of a trend and whether it augurs Big Law dipping into “People Law” remains to be seen.

Professor Ossei-Owusu said that he is particularly interested in the relationship between law school debt and public interest. What is more preferable *ex ante*: public loan forgiveness or tuition remission? Loan Repayment Assistance Programs (“LRAPs”) are worthy of more empirical attention. They have been criticized by different sectors of the American Bar Association (“ABA”). What are the differences between law school LRAPs, and what factors influence donors’ decisions to fund these programs? Who at the law school is in charge of overseeing these programs? What are best practices for long-term sustainability and replicability? And more basically, how effective are these programs?

Mental Health in the Profession: A Critical Examination

QUESTION PRESENTED: What do we know, and what do we need to know, about mental health and substance abuse in the legal profession?

CHAIR ■ **Diego Zambrano**, Professor of Law, Stanford Law School

PANELISTS ■ **Joseph Bankman**, Ralph M. Parsons Professor of Law and Business, Stanford Law School

■ **Ronit Dinovitzer**, Professor of Sociology, University of Toronto; Faculty Fellow, American Bar Foundation

■ **Mickey Trockel**, Professor of Psychiatry and Behavioral Sciences, Stanford University School of Medicine

Professor Diego Zambrano opened the discussion by observing that the dominant narrative, within the profession and more broadly, is that the profession suffers from twin crises of mental health and substance abuse. But empirical research may not support this narrative. This panel seeks to dig into the question of what the research really shows about whether and how lawyers suffer from mental health disorders, including anxiety and depression, and substance abuse.

Professor Joe Bankman, who is both a law professor and clinical psychologist, explained that when he started working in this area, he gave credence to studies that suggested that lawyers had worse mental health than other professions and the general public. But he noted that most of those studies were based on self-reporting by lawyers and had very low response rates. By contrast, a 2021 study by Yair Listokin and Raymond Noonan, which analyzed data culled from the National Health Interview Survey, administered by the United States Centers for Disease Control, tells a different story.⁴ This study found that lawyers had about the same rates of mental health disorders as similarly educated professionals. Further, Listokin et al. report that lawyers have a lower rate of suicide than the average professional. However, lawyers have more problematic use of alcohol than similarly educated counterparts. In sum, lawyers are generally quite satisfied.

Professor Dinovitzer agreed that, though many have sounded the alarm concerning a mental health “crisis” in the legal profession, in fact, when it comes to diagnoses for depression, for instance, lawyers

⁴ Yair Listokin & Raymond Nonnan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Survey*, 18 J. EMPIRICAL LEGAL STUD. 4 (2021).

are about average. However, regardless of whether there is a crisis, there are well-being challenges in the profession. What explains how those challenges are expressed and distributed?

Professor Dinovitzer elaborated that there is a status health paradox: People with higher social status suffer higher stress. In the legal profession, those working in elite law firms work more, have more trouble balancing home life, and report higher levels of depression. However, once you control for stress exposures (work hours and work/life conflict), then where you work no longer matters in your likelihood to have mental health challenges. Thus, it is not the *fact* of a law firm, but rather the way work is structured in the law firm. Further, there are no statistically significant differences based on race for the occurrence of mental health issues. However, women across all models reported higher levels of depression.

Dr. Mickey Trockel, a professor and Director of Evidence-Based Innovation at the Stanford School of Medicine whose work focused on understanding and measuring physician well-being and organizational culture, observed that, in medicine, they have learned that wellness matters for performance. Physicians make fewer mistakes and have better outcomes (e.g. lower number of days that patients require to recover) when they are feeling well.

According to Dr. Trockel, mental health conditions such as depression and anxiety are different from burnout. Burnout is not a mental health condition; it is an occupational syndrome. In 2014, in a national survey, physicians were just over 50% more likely to have significant symptoms of burnout. Pandemic caused numbers to rise – about 63% showed symptoms of burnout. Many of the same factors that contribute to burnout are present in both law and medicine: busy work, drudge work, and a persistent lack of control. Addressing these kinds of factors can help to reduce burnout. The most important domain to address is the culture of the profession, including the actions leaders take and how we treat each other at work. In the medical culture, we see two factors where physicians are most at risk for burnout: self-condemnation and putting work needs before personal needs.

Professor Dinovitzer noted that the After the JD study found that lawyers' lack of control over time impacted their personal relationships. From starting their careers through advancement, there is a lack of autonomy over work and time.

Professor Zambrano asked the panel to comment on how we move forward in this debate. How should we approach these discussions with young lawyers? Professor Bankman said that it is important to emphasize strengths and opportunities to gain resilience. There are many opportunities to become stronger over the course of one's career. Instead of telling people that a life-in-law is going to be awful, we should be telling them about opportunities to grow and improve their lives and careers.

Dr. Trockel asked how much of our idea of a "mental health crisis" in the profession is the result of prevalence inflation? Studies have shown that physicians who emphasized the negative parts of their work had perceived stress scores that increased and stayed high. Contrastingly, the group that empha-

sized positive aspects had their scores go down and stay down. Dr. Trockel's research has found that it is important to target professional fulfillment as a positive aspect of work.

Professor Zambrano asked how we can strike the right balance in encouraging students to access mental health resources but not overplaying the emphasis? Dr. Trockel's research has found that our communications become a problem when we only focus on negative things.

An audience member observed that the social psychology of happiness and meaning research shows us that if you have purpose and meaning, you will still be satisfied (if not happy). So that seems to show that maybe we should not study happiness, but purpose and meaning. On the question of mental health, generally and in the profession, should we rather be teaching people how to get through difficult times and find purpose and meaning?

Professor Bankman noted that the law school initiatives on mental health and positive mindset have not had the impacts we had hoped. Dr. Trockel responded that, of the positive psychology interventions, the one likely to have the most impact is probably interpersonal gratitude.

BREAKOUTS

The conference participants then separated into breakout session to discuss two questions and returned to share key insights:

- **Do you agree that the questions identified by the panelists across all three panels are key for the profession to address? Why or why not?**
- **What other keys questions might you identify and why should they feature prominently in a research agenda for legal education and the legal profession?**

The groups identified a number of additional key questions researchers may want to address:

On additional research in the vein of After the JD:

- What else can be done with the After the JD project data, and specifically, focusing on in-house counsel, public lawyers, judges? What can we learn about their career paths? How do we measure the status of lawyers?
- How can cross-national comparative research reveal deeper understandings of the U.S. legal system? How is the legal profession in India, Europe, etc. organized?
- Should law firms provide funding to pro-bono legal services? Are they doing that?

On the role of the profession and the political and social good:

- Do lawyers do good? Can we measure some of the negative externalities that occur out of lawyers' work?
- How do we empower young lawyers to speak up in the face of the profession's complicity with loss of life (opioids, etc.)?

On the regulation of legal services:

- Do we analyze professional rules and ethics at the level of the legal profession? At the organizational level? Should lawyers provide any training on these issues?
- Can the legal profession regulate itself?
- How can we keep track of the impact of rule reforms, including allowing nonlawyer ownership, in the United States?
- Can we conduct an analysis of antitrust claims against state bars and UPL laws?

On legal education:

- Are law schools inspiring learned professionals?
- How should law schools, or other schools, think about the education and training of nonlawyer legal practitioners?

On generative AI:

- How to measure the ideal role of GenAI? What models of certification should we adopt for GenAI? What models should courts adopt for GenAI? Should there be more research into the “sea of junk” (i.e., suboptimal outputs from AI interventions)?

Empirics and data:

- How do we empirically measure the value of legal services, both to different client groups and to society more generally?
- Research into how we can allow data to be disseminated to consumers impacted by the data? Rather than having national summaries of data available, think about more localized summaries that impact specific communities?

The Many Faces of Legal Education

HON. GOODWIN LIU

Associate Justice, California Supreme Court

I'm honored to be speaking here at the William C. Hubbard Conference on Law & Education — named for one of the giants in the legal profession, my friend and colleague William Hubbard. The promotional video about this conference begins with David Houghton saying, “William C. Hubbard is one of those guys in our profession [who] makes everyone else proud to be a lawyer.” I couldn't agree more, having known William for many years and working together on the ALI Council and, more recently, as members of the American Academy of Arts and Sciences. His passion for justice and fundamental decency exemplify all that is good in our profession, and it's what we try to teach our students every day.

Thank you to Stanford Law School, the Rhode Center, and the American Bar Foundation for hosting this conference and for inviting me to give the keynote address. Thank you also to all of the Fellows of the American Bar Foundation, Executive Director Mark Suchman, and to Mark's predecessor Ajay Mehrotra. And, as always, great thanks to Bill Neukom. I am honored to be an Affiliated Scholar of the American Bar Foundation.

I want to congratulate the ABF team on the publication of *The Making of Lawyers' Careers*: Bob Nelson, Ronit Dinovitzer, Bryant Garth, Joyce Sterling, David Wilkins, Meghan Dawe, and Ethan Michelson. There has never been, and there might never be, a longitudinal study of lawyers as ambitious and insightful as *After the JD*, which began shortly after I graduated from law school in 1998. I owe special thanks to Meghan Dawe, who has contributed to my own work on Asian Americans in the legal profession, as have Bob Nelson and Bryant Garth. And I am especially indebted to David Wilkins and his Center on the Legal Profession at Harvard, where I'm honored to be a research fellow.

My talk today is titled “The Many Faces of Legal Education.” I chose the word “faces” for its many meanings. The first is the many faces or *facets* of what a legal education can and should consist of. What are the vital components of a legal education for the 21st century?

Second, the many “faces” of legal education is meant to conjure the increasing diversity of our students and, to a lesser degree, our faculties. This has been a phenomenon from coast to coast, with the total incoming class last fall comprised of 40% students of color, the highest percentage for the third year in a row, and 56% women, also the highest percentage in history. How will these demographics change our schools and our profession?

Third, the many “faces” also made me think about the many *phases* of legal education. How has legal education evolved over the years? Short answer: not very much. And how must it evolve to meet our society’s challenges both now and into the future? Challenges that include, in the immortal words of Donald Rumsfeld, not only the “known knowns,” but also the “known unknowns” as well as “unknown unknowns.”

Let me begin with a few thoughts on the faces or facets of a legal education for our time. What should that consist of?

First and fundamental are the core competencies of lawyering: legal research and analysis, the ability to apply law to facts, legal writing, oral proficiency. This is the bread and butter of the curriculum, and the basic model has been relatively stable for a long time and will continue to be, notwithstanding AI.

One notable change is that since the Great Recession of the late 2000s, law firms have put a higher premium on “practice ready” graduates, and law schools have responded with an expansion of clinics, externships, policy labs, and other forms of experiential education. Clinical education that began in the 1970s as legal services for the poor has morphed into a vast array of offerings. Harvard, for example, has no fewer than 49 clinics today, covering human rights, cyber law, religious freedom, veterans, animal law, immigration, election law, and much more.

Alongside this trend are recent initiatives in several jurisdictions to create pathways to licensure other than the standard bar exam. Just the other week, the Washington Supreme Court approved two new licensing pathways based on supervised, hands-on legal work and submission of a portfolio of work. Oregon adopted a similar apprenticeship pathway last year, and such proposals are being considered in Utah, Minnesota, and California. Some of these proposals emerged in the wake of the pandemic, which prompted new thinking about whether paper-and-pencil tests are the only way to assess the ability to practice law.

Second, in addition to core lawyering skills, ethics and professional responsibility have or should have a key role in legal education. A quick scan of the headlines shows how important ethical issues are in sustaining public confidence in the rule of law, and this is an indispensable part of continuing education, including for judges.

Ethics are an absolute baseline, but I have included “professional responsibility” as a separate item. This term encompasses a wide range of ideas, though perhaps none is more important than facilitating access to justice. Educating students for our profession strikes me as inseparable from educating them on whom our profession serves.

Some law schools have adopted pro bono service requirements, and the State Bar of California urges lawyers to do 50 hours of pro bono work each year. These are fine initiatives, but as Gillian Hadfield and others have explained, even if every lawyer did 100 additional hours of pro bono work a year, it

would barely make a dent in the total unmet legal needs of poor people, let alone average Americans. Our students need to know this. They need to know something about the economics of the legal profession, as well as Bill Neukom's work in documenting the justice gap and David Engstrom's work on high-volume civil adjudication, a new Principles project of the ALI. We should ask our students to ponder what innovations inside and outside the profession, including AI and other technologies, can truly address the justice gap.

Beyond these fundamentals, I would add three ideas that should be part of legal education in some form. It is important that students learn something about the law's relationship to the economy or law as the infrastructure of distribution. It is commonplace to think of markets and private ordering as "natural," but lawyers know this is not accurate. Lawyers are on the front line in writing the rules for our economy, and judges too play a role. See, e.g., *United States v. Apple*, filed last Thursday. This is a lot of what lawyers do.

In addition, it is important that students understand the role of law in safeguarding democracy. As a judge, I've had the honor of swearing a lot of young people into the bar, and I often note that the legal profession, unique among professions, requires an oath to support and defend the Constitution. This seems almost too basic to mention, but the issues are far from simple. They include the perennial question of where law ends and where politics begin, a question never more urgent than it is now. And they include the role of law and lawyers in channeling disagreement in our diverse and polarized society. It is said that we should teach our students not what to think but how to think. I would suggest we also teach our students how they, as lawyers, might perform that same educative function for our citizenry. This implicates recent controversies about free speech and orthodoxy, which I'll return to in a moment.

Finally, it is important that students grapple with the role of law as an expression of cultural or societal norms. A classic example of this is the necessary interrogation of who is the fictive "reasonable person" under the law: what norms of behavior, upbringing, education, class, or identity are packed into such a term? Equally important is the role of law in elevating narratives about certain communities or histories, while obscuring or delegitimizing others. Here I am thinking of the criminal law and family law as areas especially prone to framings with an "us" and a "them." The direction of inquiry is sociological, historical, often empirical, and our students should have some facility with those modes of understanding the law.

By now, you might wonder if I'm a paid spokesperson for the ABF or the Law and Society Association. The fact is that many schools, including Stanford, strive to teach the full range of these concepts, and I am simply naming them as explicit anchor points for legal education going forward.

Let me turn now to the other "faces" of legal education — the makeup of our students — and then suggest some implications for the facets of legal education just discussed.

In the 2020 study of law school enrollment I co-authored, we found that women are now 56 percent of fall enrollment. In the fall of 2019, the Editors-in-Chief of the law reviews at the top 16 law schools were

all women, and women held half or more of the Editor-in-Chief positions in each of the five previous years.⁵ Minority students now make up almost 40 of first-year law students. However, women, African American students, and Hispanic students are disproportionately enrolled in lower-ranked schools with lower rates of bar passage and postgraduation employment. Thus, the seemingly positive trends in first year law school enrollment may have limited impact on increasing the overall diversity of the profession. The recent United States Supreme Court decisions finding that affirmative action practices violate the Equal Protection Clause of the 14th Amendment of the United States Constitution will create significant additional challenges for increasing the gender and racial diversity of the profession.⁶

An additional empirical challenge is raised by the increasing number of students who identify as multi-racial, up 65 percent from 2011 to 2019. This, combined with the number of students for whom race or ethnicity is unknown (decline to state), could lead to undercounting of racial groups.

When it comes to diversity in an educational setting, we should also be curious about the ideological makeup of our students. For this, we can look to a dataset of over 19,000 federal clerks assembled by Adam Bonica, a political scientist here at Stanford, and several collaborators.⁷ They assigned an ideology score to each clerk based on his or her political donations, which are publicly reported (Database on Ideology, Money, and Elections (“DIME”)). The data show that liberal clerks greatly outnumber conservatives. The ratio is about 3-to-1 liberal to conservative. When these data are disaggregated by gender, we see that the ideological skew is even more extreme among women. There are quite few women who are conservative among federal clerks.

Now, what do these data on law clerks tell us about the makeup of law students overall? Well, these data do not tell us much about students across all 200 law schools in America because as you might expect, law clerks tend to come disproportionately from a subset of schools. But if you look at these data by school, you see that the liberal skew is fairly consistent throughout the top schools, with a few schools like Chicago, Virginia, and Duke having a higher share of conservative clerks.

In this study, it turns out that law clerks are slightly more liberal than other lawyers, but it is still the case that lawyers overall generally skew liberal. (And, by the way, I would bet a nickel that if these data were updated to today, they would show for a host of reasons that it is conservative students, not liberals, who are more likely to clerk.) In any event, my overall point, which is no surprise, is that the students at many if not most law schools skew liberal, and the magnitude is significant.

I want to wrap up by connecting these data to some broader observations about the current context and what it might mean for legal education. It is well documented that public trust in our major institutions

⁵ Miranda Li, Phillip Yao & Goodwin Liu, *Who’s Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. 613 (2020).

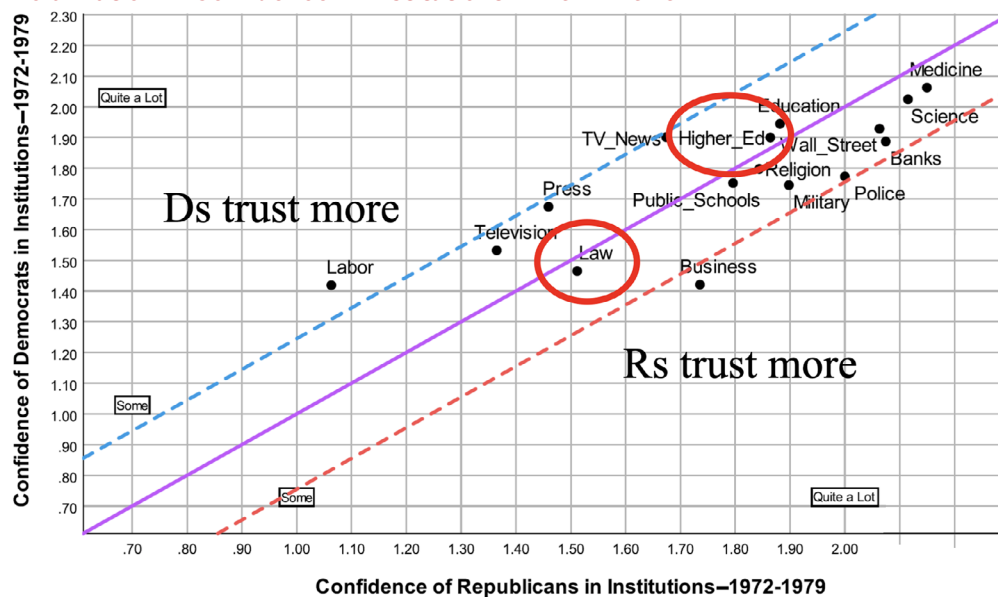
⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

⁷ Adam Bonica et al., *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 96 (2017).

has been declining. An article published last fall by Henry Brady and Thomas Kent in *Daedalus* shows the declining trust across various institutions, including government, business, banking, and Wall Street.⁸ Higher education has fared better than other institutions, although there is a noticeable decline starting in the 2000s.

It's tempting to chalk these data up to recent battles over free speech, wokeness, or “diversity, equity, and inclusion”. But the decline and polarization of public trust has occurred within a larger frame. This graph (Figure 1 below) shows average confidence in various institutions from 1972 to 1979.

Polarization in Confidence in Institutions in 1972-1979



Polarization in Confidence in Institutions in 2010-2021

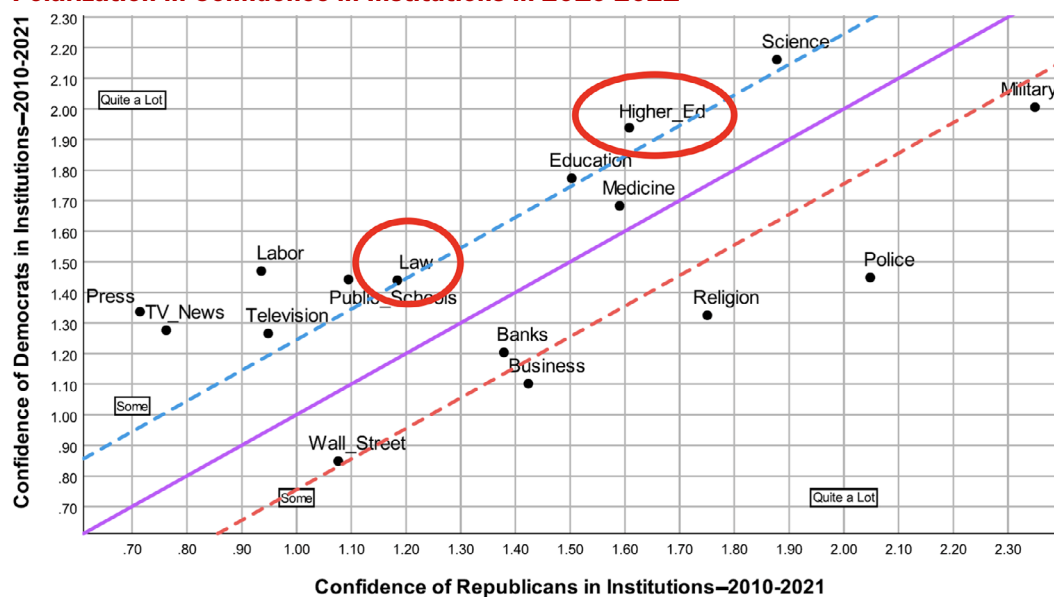


Figure 1
Brady & Kent (2022)

⁸ Henry Brady & Thomas Kent, *Fifty Years of Declining Confidence & Increasing Polarization in Trust in American Institutions*, 151 DAEDALUS 43 (2022).

The purple line is where institutions would be if Democrats and Republicans had equal confidence. The dotted red line shows where an institution would be if Republicans had a quarter point more confidence than Democrats, and vice versa for the dotted blue line. In the '70s, the dots cluster around the purple line toward the upper right, indicating high confidence and fairly little polarization. Two exceptions are labor, which Democrats trusted more, and business, which Republicans trusted more. Law was almost directly on the purple line, as was higher education.

Forty years later, most institutions have moved toward the bottom left of the graph, indicating a decline in confidence. And every institution, except for banks and medicine, now sits on or beyond the blue and red lines, indicating polarization. Despite conservative gains in the courts, law has shifted past the blue line, as has higher education, indicating left-right polarization.

This polarization has occurred alongside a major realignment of voting behavior based on education, the so-called “diploma divide.” The work of the economist Thomas Piketty and his collaborators, based on troves of voting data from twenty-one Western democracies over a 70-year span, shows that the gap between college-educated and non-college-educated voters in the U.S. who vote Democratic has flipped over that period. In 1948, the share of college-educated voters supporting the Democratic candidate for President was 20 points lower than the share of non-college voters. In 2016, it was the reverse: the share of college-educated voters voting Democratic was 13 points higher than the share of non-college voters. In 1960, John F. Kennedy won white voters without a degree but lost white college graduates by a two-to-one margin. In 2020, Joe Biden won white college graduates but lost white voters without a degree by a two-to-one margin. A complete inversion.

You can probably think of specific issues or candidates that might explain this trend. What’s interesting is that the same thing has happened in many other Western democracies, with more educated voters gravitating toward left-wing parties, especially green parties, and less educated voters moving rightward, especially toward anti-immigration parties. This appears to be a general phenomenon, across national contexts. And this polarization based on education is evident even after controlling for income.

This is the world our students will inherit. And the question is: how can we prepare our students to discharge their important roles as lawyers — as sworn guardians of the rule of law — in the present context? How can the facets of legal education be made relevant to the challenges we face now and for the foreseeable future?

Let me end with three ideas for discussion. The first is centering pedagogy as a regular topic of inquiry among law faculty. I know, from my years as an associate dean, that most law professors are good at teaching. But I also know that today, more than some faculty feel cautious in the classroom, unsure how to tackle tough topics, even fearful that they are one errant comment away from being doxxed or canceled — and many students feel the same. This is not a posture conducive to education, and certainly not the education of lawyers. But there are strategies for creating more open and trusting environments,

and many faculty are using them. One problem is that we do not have mechanisms or a general culture of learning from one another about teaching. We have dozens of faculty workshops on scholarship, but few if any on pedagogy. Indeed, the only time I know of faculty visiting each other's classrooms is during tenure or pre-tenure review.

What if we evolved a regular practice of faculty observing each other's teaching, not to evaluate but to learn and get ideas? What if we had regular faculty discussions, within and across subject areas, about tips and techniques, or specific issues that have come up — in the same way that physicians or other professionals discuss cases with colleagues? I tried a version of this last fall at Harvard Law School, where I teach an annual seminar on major issues in constitutional law. About 20 colleagues participated in a workshop I organized to explore how to teach tough topics, and it was illuminating. Colleagues discussed how they teach issues like rape or affirmative action, how they manage classroom dynamics, how they build trust among students, how they sequence topics in their syllabus, how they use technology to make connections and bridge divides. I know I learned a few things, and I think others did too.

The fact is that students are learning not only *what* we teach, but also *how* we teach. And if we can model how to tackle tough topics — how to *have the discussion* as opposed to win the argument — maybe they can use that learning to lessen the divides in our society.

Second, I think it is time to rethink DEI. My views on this have evolved over time, but I am worried we have reached a point where DEI, as a matter of perception and reality, means diversity, equity, and inclusion for some but not others. And I say this as someone who has devoted my life's work as a scholar and a judge to advancing DEI.

I am not sure what paradigm should come next, but we cannot ignore the fact that DEI has come to be associated with what some conservatives and others might call “favored minorities.” And we cannot ignore the fact that in an educational setting, the ideological skew among students and faculty carries real risks for the project of fostering intellectual diversity.

My concern is that a significant portion of society does not see its people, values, or concerns reflected in places of higher learning, including law schools. And I think cracking this nut is absolutely vital for building public confidence in education, expertise, and the rule of law.

Finally, I wonder if it is time to consider making a course on the American Legal Profession part of the required law school curriculum. I am not generally one for adding requirements, and perhaps this could be an augmentation of existing courses on ethics or professional responsibility, which are required. The point is that there is something deeply important about our students learning what they are getting themselves into when they decided to become lawyers. There is something important about interrogating the norms of our profession, its culture and practices, its economics, its inequities, its role in society, its aspirations and its shortcomings.

We have a wide corpus of knowledge, including this remarkable book, to guide us. And let me be clear that I propose this self-conscious reflection on our profession not in the spirit of self-flagellation, but rather to honor the reasons most if not all of us decided to become lawyers. In commencement speeches, the one piece of advice I give students is to keep a copy of their law school application essay in the top drawer of their desk, wherever they go in their careers, and to read it from time to time, and ask how their work is or is not aligned with what motivated them to become a lawyer. I can think of no better place than here — at the William Hubbard Conference on Law and Education — to suggest we pose this question, starting in law school, not just as individuals, but collectively, as a profession.

Thank you very much.

From Legal Education to Legal Careers: Building and Funding Research that Matters

QUESTION PRESENTED: In light of the changes in the legal profession, how might past or future (empirical/data-based) research inform beneficial reforms in legal education?

CHAIR ■ **George Triantis**, Charles J. Meyers Professor of Law and Business,
Stanford Law School, Senior Associate Vice Provost of Research, Stanford University

- PANELISTS** ■ **Meera E. Deo**, The Honorable Vaino Spencer Professor of Law,
Southwestern Law School;
Director, Law School Survey of Student Engagement at Indiana University-Bloomington;
Affiliated Faculty, American Bar Foundation
- **Fiona Trevelyan Hornblower**, President and CEO, NALP Foundation
- **Elizabeth Mertz**, John and Rylla Bosshard Professor Emerita,
University of Wisconsin Law School; American Bar Foundation
- **Aaron N. Taylor**, Senior Vice President and Executive Director,
AccessLex Center for Legal Education Excellence

Aaron Taylor, Senior Vice-President and Executive Director of AccessLex Center for Legal Education Excellence, was unable to attend the conference. Professor Mark Suchman presented Mr. Taylor's paper with his permission. The paper highlights several ways the current law school structure and pedagogy negatively impact aspiring lawyers from underrepresented backgrounds and makes several concrete recommendations for change. For example, Mr. Taylor suggests that law schools' reliance on LSAT scores is misplaced. Instead, schools should look at changes in undergraduate GPA. This has been shown to be as predictive or more predictive than LSAT scores and should yield less disparity across groups. In law school, Mr. Taylor observes that students from underrepresented groups are more likely to be dismissed from law school for poor academic performance. Mr. Taylor posits the traditional Langdellian pedagogical approach to legal education, and particularly the lack of multiple opportunities for assessment and feedback over time, as a possible key source of this impact. He cites a 2017 study at the University of Minnesota law school which showed that students who were given multiple formative assessments throughout the semester outperformed peers who were subjected to the traditional pedagogy and the effects were most significant for students who entered the school with below-median test

scores.⁹ He urges additional similar studies be performed across multiple schools.

Further, underrepresented groups are less likely to pass the bar. We have little evidence that bar exams do what they are supposed to do: ensure competent lawyers. But few jurisdictions have defined minimum competence. How can we rely so heavily on a test for an undefined standard, particularly when it has such disparate impacts?

Fiona Hornblower, President and CEO of the NALP Foundation, identified three areas that would benefit from deeper research: (1) Identifying the causes and effects of law school career decision-making. Why do students pivot? (2) What are the potential impacts of AI on legal careers? (3) How do we expand law school participation in research so that we have more data.

The NALP Foundation performs an annual study of law school alums three years after graduation (point at which folks understand their skills and competencies they need, and to evaluate how law school prepped them for their employment). There is a divergence between what students think they will go into in law school and where they ultimately go. There are very good reasons that law students can make pivots – maybe they take a course and decide they want to go into a specific subject matter, that’s great. But if externalities are forcing students away from career paths that they want to pursue, research is needed to better understand and address this. There is a consistent and potentially alarming pattern of mobility. Two-thirds of recent law grad have already held two or more positions showing high level of mobility at early stage of careers. The Foundation asked the class of 2020, to identify the reasons for shifts. Key responses included financial reasons, fit concerns, or a different practice area.

How did graduates evaluate their legal education? They give a high value for PR, and teamwork and most are satisfied with litigation and associated legal skills and legal ethics. They are less satisfied with business skills and law practice management skills (project management, client relationship). Respondents say experiential education is necessary to develop skills, and also helps students define areas of professional service in which they are interested. Graduates who go into public interest draw a direct line between experiential classes and their career path.

Other factors may be at play. Educational debt is a likely significant factor for many. Many graduates face enormously high levels of debt (over \$100,000). Law school is an economic shackle for many, and the shackles are heavier for graduates of color. White graduates have an average of \$93,000 in debt, and graduates of color have an average of \$133,000. The levels of debt do not significantly impact graduates’ job satisfaction, but they do impact job choice. Another significant factor that could be impacting the mobility of law students is the on-campus interviewing process (“OCI”). This process is moving earlier and earlier and takes talent out of the market at a very early stage. Students are having to make decisions based on very little information and exposure.

⁹ Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139 (2017).

On the impact of generative AI, the NALP Foundation recently held a conference with law firm hiring partners. The emerging theme was that AI will reduce the number of positions available and potentially impact other legal jobs. If these jobs disappear, will law schools reduce class size? The hiring partners agreed that law schools teaching students how to leverage AI will have a market advantage.

Finally, on enhancing law school engagement with research, Ms. Hornblower observed that more data is better. The NALP Foundation wants to identify the barriers for law schools to participating in research. NALP realizes that many entities ask for different kinds of data at different times – and these requests become burdensome. NALP is working to develop opportunities for researchers to collaborate and centralize data collection.

Professor Meera Deo has spent the past two decades researching vulnerable populations in the profession. Professor Deo responded to the earlier discussion on mental health in the profession, noting that even assuming the rates of mental health issues in the legal profession are similar to other professions, we should question whether we should decline to proactively address it. She noted that her research on law students may provide different insights.

Professor Deo's research, using Law School Survey of Student Engagement, found that 50% percent of law students are managing high stress levels in law school. The percentage increased to 55% percent in 2023. Meanwhile, 87% of students are managing anxiety. Most law school students do not see their schools as doing much to help them manage their stress and anxiety.

Professor Deo proposed a method to alert law students and lawyers to hazards of mental health and the practice. Specifically, she recommends that the ABA introduce standard 303(d) to require law schools to train students on how to improve wellness at least twice during legal education. Further, she proposes that state licensing bodies should designate one hour of existing MCLE requirements to focus on wellness. Then we should gather data on the impacts and assess whether these kinds of interventions are having a positive impact.

Professor Elizabeth Mertz began her comments with a quote from Deborah Rhode, Stanford Law Professor and founding Director of the Rhode Center observing that “law schools cannot be value neutral on questions of values.”¹⁰ Professor Mertz added that she believes that empirical work can help us understand how to expand law school curricula and cultures in the face of changing values.

The After the JD study adds to Professor Rhode's insight that the curricula, culture and path dependency that begin in law school contribute to the reproduction of hierarchies that persist throughout the practice. After the JD also documented the particular implications of the intersections of race, gender, and class.

Professor Mertz's research is affectionately known as the “After Tenure” project and looks at law faculty.

¹⁰ Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 451 (2013).

The third phase of the study is happening now and focused on language and voices of law professors. The first phase was a random sampling of law professors. Phase two was structured interviews with 100 people who had participated in the survey.

The study has found areas of strong agreement among professors. They care deeply about students, teaching, and academic freedom. But a simple pattern emerged around race and gender. Where professors disagreed on an issue, women of color were always at one end of the spectrum, while white men were at the other. White women and men of color moved around in between these two ends. In earlier publications, we observed the same pattern around how people viewed tenure and the tenure process. White men felt it was fair; women of color did not.

Prior research regarding perceptions of having a voice within the law school institution showed that women of color felt they had less of a voice. In a newer analysis, we have looked at answers on questions of value. White men valued traditional hierarchical values (e.g., achieving high grades, etc.) while all other respondents valued more democratic values (e.g., producing students to serve communities, promoting demographic diversity). In elite institutions, the disparities were more pronounced: People tended to lean toward traditional hierarchical values, except for women of color who tended to lean away from them. Further, faculty of color were more likely to do public interest work. Professor Mertz asked how it can be that people doing the most work to legitimately pursue democratic goals are facing a deficit model in terms of how they are assessed for advancement.

The audience discussion focused on law school responses to student mental health and wellness. Professor Barton asked Professor Deo how she would design a law school wellness program to fit the guidelines she outlined in her proposal. Professor Deo responded that she teaches a class on wellness and legal education that gives students the opportunity to think through challenges and try different wellness techniques.

Professor Hensler commented that, while she is sympathetic to the concerns expressed by those engaged in the wellness movement, she wonders whether it encourages students to turn inward and focus on their own problems, when, arguably, many are sitting in a place of privilege. Perhaps a way to address this is to integrate learning and engagement with the wellness of clients and disputants in the system.

Professor Nora Freeman Engstrom noted that she has concerns about mandating wellness programs because of studies we have seen about potential negative impacts. She referenced a 2023 study of students who went through the WISE program in Australia and had *higher* rates of depression than those who did not.¹¹ Professor Deo agreed and cautioned against poorly structured programs.

Professor Spaulding responded to Mr. Taylor's paper noting that, when thinking about the democratic deficits of the current law school structure, so much depends on the solutions. For example, when we think about grade reform from a historical perspective, we see that Charles Langdell implemented blind grading for an egalitarian purpose.

¹¹ Lauren J. Harvey et al., *Investigating the Efficacy of a Dialectical Behaviour Therapy-Based Universal Intervention on Adolescent Social and Emotional Well-Being Outcomes*, 169 BEHAV. RSCH. & THERAPY (2023); Ellen Barry, *Are We Talking Too Much About Mental Health?*, N.Y. TIMES, May 6, 2024 (compiling research).

Going Forward: Challenges, Opportunities, Responsibilities

QUESTIONS PRESENTED: What is the biggest challenge confronting the legal profession today? What can and should be done to respond? How do you view lawyers' responsibilities today and how do they differ than in the past?

CHAIR: ■ **Nora Freeman Engstrom**, Ernest W. MacFarland Professor of Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession, Stanford Law School

PANELISTS ■ **William C. Hubbard**, Dean, University of South Carolina Joseph F. Rice School of Law

■ **Daniel B. Rodriguez**, Dean Emeritus and Harold Washington Professor, Northwestern Pritzker School of Law

■ **Norman W. Spaulding**, Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Stanford Law School

■ **Honorable Diane P. Wood**, Senior Circuit Judge, U.S. Court of Appeals for the 7th Circuit; Director, American Law Institute; Senior Lecturer in Law, University of Chicago Law School

After Professor Nora Engstrom welcomed the panelists, Dean William Hubbard launched the discussion with the observation that the biggest challenge facing the profession is the recession of the global rule of law. To understand this challenge, we need to understand the definition of the rule of law: "A durable system of laws, institutions, norms, and community commitment that delivers four principles: accountability, just law, open government, and accessible and impartial justice."

Dean Hubbard focused his comments on the last principle: accessible and impartial justice. The world needs neutrals who reflect the community they serve. The legal system, therefore, needs diversity if we expect members of the community to have trust and confidence in that system.

The World Justice Project measures what is happening with the rule of law across 142 countries and jurisdictions worldwide. The World Justice Index assigns each country a score across eight factors and forty-four subfactors.

The United States ranks 26 out of 142 countries overall but is in the bottom half of high-income countries. The U.S. performs the best on open government and the worst on fundamental rights and civil

justice. The U.S. does well on the right to information, complaint mechanisms, and publicized laws, but performs badly on equal treatment and absence of discrimination, impartiality of the criminal justice system, accessibility and affordability of civil justice, and the absence of discrimination in civil justice.

Globally, the rule of law receded in the majority of countries last year. Dean Hubbard observed that it is easier for the rule of law to decline quickly rather than increase quickly. The U.S. rule of law started declining in 2016. There was some recovery in 2022 but generally we remain under 2020 levels and decreased again in 2023.

Professor and Dean Emeritus Daniel Rodriguez focused on process and institutions during his remarks. It is to be assumed that any serious reform requires institutions to mobilize actions. But at present, in the United States, we are gravely disappointed by our institutions. Professor Rodriguez called for institutional reform to drive change.

According to Professor Rodriguez, we, as individual lawyers and legal educators, can generate research proposals and can foment those ideas in advocacy in scholarship. But we face profound collective action problems, and the institutions which should be leading mobilization to act are instead impeding action. Specifically, those institutional leaders of the ecosystem of legal services regulation, including state bars, courts (and the judges who lead them), judges associations, legal education organizations, and the ABA, are failing to lead desperately needed change and innovation.

Professor Rodriguez focused first on the ABA, and specifically the House of Delegates and the Section on Legal Education, Admissions and the Bar. The House of Delegates has its own power, its own authority, and its own traditions – it is unclear whether it “speaks for the ABA.” But it is clear that has not been a positive force for innovation; time after time, when the opportunity has presented itself to speak on policy pertaining to the profession, it has let us down. For example, on the reform of Model Rule of Professional Conduct 5.4, the House of Delegates passed a resolution to specifically oppose any reform to Rule 5.4 to allow investment by nonlawyers in legal businesses. The resolution was not based on any empirical research or evidence about the benefits of Rule 5.4 or negative impacts of possible reform. One does not need to be an advocate to say that that the ABA *should* be a fulcrum of data-driven authority on potential policy reforms for the legal services market. But it is not. State bars have not been much better in encouraging empirically driven policy making in the public interest.

The Section on Legal Education, Admissions, and the Bar has undue regulatory authority. In this case, the ABA Council on Legal Education twice recommended the repeal of Section 503 which requires that law schools use a valid and reliable admissions test and effectively forces law schools to use the GRE and LSAT. No other professional organization requires schools to use a particular admissions test for admission. Twice the proposal was rejected in the House of Delegates. One organization’s fingerprints have been on this particular outcome. The Law School Admissions Council (“LSAC”) has repeatedly beaten back attempts at reform. These institutions are failing our profession and the public. We need to

give a serious hard thought to how institutions in the legal profession are serving us or undermining us in attempts to reform.

Professor Norman Spaulding stated that the biggest challenge he sees emerges from issue convergence between liberals and conservatives on major issues such as access to justice and role differentiation. In access to justice, the narrative has emerged that generative AI is coming, and we need to use it to make access to justice a reality. Liberals and conservatives are increasingly agreeing on this narrative. But we need to think about tech companies and regulation. Tech companies do not have fiduciary duties to courts or clients to increase access to justice. Yes, there are benevolent outcomes that could happen. But there are also countervailing concerns. For example, debt actions are a major concern of the access to justice community and courts. But digital architectures based on fast solutions that don't inform parties of their rights are just accelerated debt collection systems. For example, we can look at online alternative dispute resolution or ODR. ODR systems are efficient fund collection methods. Those funds are necessary to state court budgets. We need to acknowledge that court administered systems for access to justice can prevent transparency and undermine rights. All technological artifacts have value systems. The point is that technology architecture requires certain structures that have power and authority while meaningful access to justice decentralizes power from authority. We should not water down regulatory structures in the name of access to justice.

According to Professor Spaulding: The left and right also seem to be converging on the role of lawyers, specifically that ideology should replace a commitment to law as the primary role indicator. It doesn't take many lawyers who have abandoned their work for ideological processes to begin the decay of the system. There are serious problems with labor that divides self from role in ways that play into social hierarchy and naked self-interest. Social movement studies show that diverse coalitions are required to create effective social change. Our profession needs to be able to make pluralism work. And as law schools, we need to train skills for role differentiation.

Judge Diane Wood returned to the question of legal education. The gap between those who have access to the finest lawyers in the country and the majority of people who go without any help at all has been a theme of this conference. For those with access, the system works. And we have been training our students to be those lawyers and to represent companies like the airline companies, the asbestos companies, and the pharmaceutical companies. And what are we teaching? In civil procedure, for example, we are teaching the Federal Rules of Civil Procedure. But we know that most of the civil legal action is happening to regular people in state courts. This is a disconnect from what we are teaching.

There is a giant population of underrepresented people, poor and middle class. We are not training our students to be aware of how to meet the legal needs of those people. Instead of thinking about how to train the lawyer, perhaps we should shift our focus to a client-oriented perspective. What do we need to do to expose, to sensitize, students to clients? We can learn from schools of social work – need to think about holistic means of meeting clients' needs. Social work school teaches students to meet clients where

they are. Law schools should be able to do this. They should be able to do more than just one course in law and responsibility, or a class in law and poverty. This change needs to be integrated into everything we're doing. In property, for example, classes should talk about people who *don't* have much, not the haves.

Year in and year out, we're told that something like 85% of the need is not being met. We need to rethink the legal profession itself from one that is a bounded cartel to one that is a complex of people. Maybe the most complex legal problems need to be solved by someone with a law degree, but probably not all problems. As a policy matter, we need to think more broadly not only about lawyers, but about legal helpers. We have state supreme courts that have zealously drawn a line about UPL laws. Which tasks in the legal arena need to be done by someone that has a JD, which can be delegated? The task can be under a lawyer's supervision – delegation is common in the medical profession. We aren't going to solve this problem until we attack the institutional structure and rethink how to provide services across a range of providers. We need to teach students skills that are relevant to people not being served by the system.

The key question is this: Should we think about this as the "right to counsel," or the availability of help. And what are the implications of these labels? For example, in the criminal context, you have the right to a lawyer, and it should be effective assistance of counsel. Contrast habeas cases, which are considered to be civil. If a habeas petitioner has a lawyer who promises to file a brief on March 26, 2024, and the lawyer blows the deadline, there is no remedy. If there's no right to counsel, there's no right to effective assistance of counsel and that can leave people worse off. If we're going to go the route of greater accessibility of counsel, we need to address this problem at the same time.

Judge Wood observed that both federal and state courts are inundated with pro se litigants. In the 7th Circuit, two-thirds of the appellate docket are pro se. This is the tip of the iceberg. Many pro-se people lack time, money, and sophistication to try to use the legal system at all. The legal system is not a legal system that serves a huge proportion of the legal need. Judge Wood urged the solutions to start in law school, with the curriculum. There are many solutions needed but I believe we need to start in law school. We cannot just spend all the time teaching students about federal court cases and civil procedure. We have to get students thinking about the legal system itself.

Professor Nora Freeman Engstrom observed that this conference has run on parallel tracks. On the one hand, speakers have discussed the role of lawyers in the profession. By and large, that's been a pretty happy story. Overall, people are pretty happy with their choice to be a lawyer. But the other conversation is about lawyers as against society, how we are doing at making legal services more readily available. There, the profession is doing quite poorly. Is it necessarily zero sum? To have a world where lawyers are relatively satisfied, do we need to buffer lawyers with a professional monopoly that's wreaking havoc on society writ large?

Judge Wood noted that there are contexts in which lawyers leverage nonlawyer providers (e.g. firms that leverage many paralegals), and there are state efforts to authorize and regulate new providers. Maybe there is a positive sum game here.

Professor Rodriguez questioned whether the issue convergence on access to justice is being perceived, rightly or wrongly, as anti-lawyer. Rhetorically, assuming that it is being perceived that way, lawyers will see it as zero sum. But we aren't going to live in a deregulatory dystopia. There are many different forms of regulation. It may, yes, take away the assumption of lawyers as a totally self-governing profession. At a minimum, lawyers doing access to justice need to communicate the opportunities. Unless we can show and communicate that, the institutions will not be on our side.

Professor Spaulding responded that he worries about false dichotomies. We're asking why lawyers aren't doing more. But from a historical perspective, we have systematically defunded the Legal Services Corporation for 40 years. Of course, in that landscape, you can say "how are we going to meet those needs?" But that perspective is shaped by failure of public subsidies. The problem is not that we can't solve this problem without lawyers. One good class action lawyer can make a significant difference for multiple people. *Lassiter* did not dismantle *Civil Gideon*; it just discouraged lawyers from trying to make the fact-specific showing to meet *Lassiter's* strict test.¹²

Professor Chambliss pushed back on Professor Spaulding's concerns about a two-tiered justice system. The recent developments around community justice workers, particularly in Alaska, are focused on the value of trusted members of the community to help increase meaningful access. These are not lesser providers; often, they are more engaged and knowledgeable with the community they serve. Professor Spaulding said he did not disagree. While he is comfortable with social service organizations not engaged in the practice of law helping address the fallout from legal problems, his concerns are really when the push for nonlawyer service providers connects with profit motives.

Dean Hubbard observed that, as leaders, we need to reform UPL laws, identify functions that non-lawyers can perform, and unleash an army of folks that can provide a modicum of assistance to people facing life altering legal issues. In Washington, major barriers were put up for their licensed paralegal role ("Limited License Legal Technician" or "LLLT"). LLLTs were required to have two years of study, a large number of supervised hours, and could only offer services in limited areas. We need to extend the ability of people who are committed to social justice to be connected with people who need help. Lawyers often say, "you're taking business from me." But these lawyers won't take the cases – not just certain state bars. No business is being taken away from lawyers when 90% of family court litigants are not represented. The push for reforming the ban on nonlawyer ownership (Model Rule of Professional Conduct 5.4) may have gotten in the way of doable actions we can take. Some people won't talk about

¹² *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18 (1981) (finding that the Due Process Clause of the Fourteenth Amendment did not require North Carolina to provide Abby Gail Lassiter with counsel in a proceeding to permanently and irrevocably terminate her parental rights).

any reform if you're talking about nonlawyer ownership.

Judge Wood suggested that the model of small claims court is understudied and may offer insight into better addressing legal needs. There might be a way that we could make a more user-friendly system for people with small claims, perhaps through limited assistance from a trained person. One generally does not need a graduate of Stanford Law School for that level of help.

CONFERENCE CLOSING REMARKS

PROFESSOR MARK SUCHMAN

I would like to close this conference by reflecting on the core themes of the After the JD project and then expanding from those themes to consider the future of research discussed over the past two days.

The first theme addresses the importance of continuity in research, reflecting the scope of the After the JD project which followed people over a 20-year period. The second theme is the importance of empiricism in research. The third theme is the focus on the legal profession, which has always been a central theme of the research of the American Bar Foundation. The project also has theoretical themes: the heterogeneity of the legal profession is one. The profession looks quite different across two distinct hemispheres. And the theme of field contestation: the individual agency and institutional structure that impacts people as they build a career in the legal profession.

And there's one more implicit theme: The large law firm as the commanding height of the profession. Many concerns of the After the JD project are centered on the large law firm. One question for us in this room is "what happens after After the JD?" The question is whether large law firms are still the commanding height of the profession. Large law firms may be losing ground to general counsels and perhaps to lawyers in state and federal government. Who will be the custodians of the legal profession in a world where large law firms are no longer able to maintain their own position as the leader of the profession?

There are three big challenges moving forward. First, the cost of representation versus the quality of representation. On one side, what is a delivery model for legal services that can provide adequate representation for large numbers of people who are currently unrepresented? On the other, does the system have the capacity to absorb and handle a larger number of well-represented litigants? We can think about it in terms of the medical trilemma of cost versus quality versus access.

Second, we face a significant challenge based in the low status of the sector serving individual people: personal plight practice is lower status. Elite law schools have very little interest in advising students they should seek to work in the personal plight sector. There is a supply-side analysis of access to justice and a demand-side analysis. The supply-side analysis considers how to supply more sources of legal help for people, lawyers and perhaps others. The demand side thinks about how we structure social systems to avoid disputes in the first place. Instead of thinking about a bigger band aid, the demand-side thinks about making a smaller wound.

Where do we go next? There is intellectual and research importance to the question of access to justice, including developing alternative means of providing legal representation and finding methods to reduce the need for legal representation. My plea is to think systematically and longitudinally about these

problems. We need to think about career pathways, re-professionalization, and re-stratification. We also need to think about resistance and backlash to change.

As far as research projects, we can think more about more “Before the JD” projects. We can think about law school – career sequences aren’t random one steppingstone to another. Career sequences are narratives and stories people tell themselves about how they fit into the world. We can investigate that process as people move into law schools and seek to identify stories beyond big law firm careers. What are the stories about the roles of lawyers in politics? In business?

In conclusion, it’s hard to imagine a future without lawyers (or at least legal practitioners), but who will they be, what will their demographics be, what will their roles be? Where will they practice? What organizations will they practice in? What services will they provide? How will they provide those services?

And then, on the politics of the legal world, why? What is the motivating purpose of the profession? What are the values of the profession? Legal representation can provide a sense of empowerment, of having someone on your side. There may be a value to representation in and of itself. This conference has helped to identify and illuminate these themes and others. I thank you all for participating and look forward to the work that is to come.

PAPERS

**Presented by
Conference Participants**

New Directions in Legal Research: The Key Questions

QUESTIONS PRESENTED: What are two key questions researchers should be asking about the future of legal services? Why are those two questions so important? And, how might research into those questions most productively proceed?

- **Benjamin Barton**

Helen and Charles Lockett Distinguished Professor of Law
University of Tennessee College of Law

- **Matthew Clair**

Professor of Sociology
Stanford University

- **David Freeman Engstrom**

LSVF Professor in Law and Co-Director of the Deborah L. Rhode Center on the Legal Profession
Stanford Law School

- **Shaun Ossei-Owusu**

Presidential Professor of Law
University of Pennsylvania Carey Law School

PROFESSOR BENJAMIN BARTON

**Helen and Charles Lockett Distinguished Professor of Law,
University of Tennessee Knoxville**

“What are two key questions researchers should be asking about the future of legal services? Why are those two questions so important? And how might research into those questions most productively proceed?

I love these questions! And I’m also weirdly grateful to get two bites at the apple. This lets me present a nice narrow and doable topic as well as a bigger picture/maybe less realistic topic. I’ll start narrow:

Research Question One: One of the main arguments against loosening regulation of legal services is the potential harm to consumers.¹ State Supreme Courts, bar associations, and other regulators of lawyers argue that we have a very well-developed market for lawyers that comes with longstanding regulation, so we should all feel comfortable about consumer protection from lawyers. As the argument goes, allowing anyone else to provide legal services would be a comparatively risky proposition.

Before the recent period of state level experimentation in legal services we had limited data to answer this question, but thanks to Utah and Arizona we have a natural experiment where we can gather comparative data about harm to customers. Utah collects (and then reacts) to all customer complaints about their alternative providers of legal services as part of its regulatory sandbox. That data should be available from 2020 forward and it looks like IAALS and others actually have that data in an easily findable format.²

There is a comparison data set, and that is the number and nature of complaints made about licensed lawyers to the Utah Office of Professional Conduct (“OPC”). The OPC already releases data to the public that covers the number of complaints, the number of “cases opened”, the number of lawyers involved in those complaints, and what happened with those complaints.³ We also know the total number of licensed lawyers in Utah and the total number of alternative providers in Utah, so we can do an apples to apples comparison on a per provider basis.

The best and richest version of this project would ask for the underlying complaints in each sector (presumably anonymized by complainant and legal services provider) so we could look at the types of

¹ See, e.g., Christa Theodora Pitzen, *Can Nonlawyers Close the Legal Services Gap?*, 47 LITIG. NEWS, Mar. 3, 2021, (noting the “obvious risk to the public from nonlawyers is if legal services are delivered incompetently The key question ... is: ‘How do we protect the public?’”).

² Logan Cornett & Zachariah DeMeola, *Data from Utah’s Sandbox Shows Extraordinary Promise, Refutes Fears of Harm*, IAALS BLOG (Sept. 15, 2021), <https://iaals.du.edu/blog/data-utahs-sandbox-shows-extraordinary-promise-refutes-fears-harm>.

³ For the various years of reports see *Annual Report Archive*, OFF. PRO. CONDUCT, <https://www.opcutah.org/annual-report-archive/> (last visited Mar. 5, 2025). For an example of a recent report, see OFF. PRO. CONDUCT, 2022 ANNUAL REPORT (2023), <https://www.opcutah.org/wp-content/uploads/2023/11/2022-OPC-Annual-Report.pdf>.

complaints made in each area. This would offer a richer and more contextual dataset, and also allow for a qualitative aspect to measure comparative risk/harm to clients. The secret sauce here is that we would not just claim a low number of complaints under the regulatory sandbox, that has already been done. By comparing lawyers to alternative service providers, we could theoretically put the “potential harm” argument to rest, assuming my guess that there will be many more and more serious complaints against lawyers than there have been against the alternative providers.

Such a finding would also call into doubt the effectiveness of our current, very expensive regulatory system for lawyers. If a relatively bare bones regulatory approach like the Utah sandbox results in *safer* providers than all of the rigamarole associated with lawyer entry and conduct regulation, what does that tell us about the lawyer regulation?

Regulatory complaints are, of course, not the only measure of customer harm. It would also be possible to set a relevant time frame and then figure out the number of legal malpractice actions filed in Utah against Utah lawyers. We could then use the names of the alternative providers allowed under the sandbox and see if any lawsuits have been filed against them. We could not search only for all legal malpractice claims in Utah to gather data on alternative providers because it is not clear that legal malpractice would be the right tort for an alternative provider. Again, the Cadillac version of the project would pull the underlying complaints in the lawsuits to see what the allegations of harm look like to add context and allow qualitative comparisons. We could also look at breach of contract or fiduciary duty claims or state consumer fraud claims.

We could repeat this experiment in Arizona looking at the different alternative providers they allow. We could possibly even consider settings like the Court Navigator experiment in New York City Housing Court (harder because that data would be limited to just one jurisdiction and one type of claim).

The point of the study would be to establish whether these alternative providers are actually safer than lawyers, at least under the regulatory controls present in Utah and Arizona. If it turns out those providers are more dangerous, that would also be useful to know.

Research Question Two: My answer to question one is relatively narrow and involves the sort of research that law professor empiricists are good at doing. Ha ha no such luck with question two.

Here I ask the broadest, and to my mind most pressing question of the moment, how good is the current version of AI at providing legal advice and legal services to ordinary Americans, and how much improvement can we expect in the near term (1-5 years out). I would not even bother to ask about longer term possibilities because the technology is moving so fast that even a near term of 1-5 years requires quite a bit of speculation. A related question would be what, if anything, professors and lawyers in the A2J space can do to improve the answers given by ChatGPT 4 (or other programs) to common legal questions.

There are several ways to empirically measure the current capabilities. The Cadillac version would be a blind randomized study of legal advice. We would find a relatively large sample of unrepresented litigants facing a near term court date for a legal problem like debt collection or eviction. Those litigants would be divided randomly into three groups. Group one would be offered the chance to ask a written question and receive a written answer from a lawyer in advance of their court date. Group two would be offered the same chance, but with a generic generative AI like ChatGPT 4 writing the response. Group three would be offered no additional assistance.

We would require both the lawyers and the AI to deal with written questions and written answers so that the lawyer and the AI program are on the same footing. Allowing the lawyer to talk to the litigants would not be a fair comparison. Then we could compare the results in terms of eviction rates and damages found between the groups to see whether either option makes a difference. Note that this experiment would raise the ethical issue of only helping some of these individuals, and also the potential legal issues of experimenting on human subjects.⁴

An easier comparison to find, but harder to measure comparative quality in, would be to gather questions and lawyer answers from the ABA Free Legal Answers site⁵ and then ask the same question to ChatGPT 4 and compare the answers. The issue here, of course, is how to measure comparative quality/effectiveness.

If you have a lawyer read the answers, the bias towards lawyers will be substantial. For example, when lawyers examined documents on LegalZoom they unsurprisingly found them sorely lacking and in some spots dangerous.⁶ Alternatively, if you asked a typical person who would seek legal answers on a free ABA website, they may have no criteria for deciding which answer is better. Nor would it be easy to do a blind randomized study or to even follow up to discover how the different types of advice played out in practice. This would also compare pro bono lawyer work to generative AI and there is reason to believe that pro bono work may be less detailed and competent than work for paying clients. Even with these caveats, I'd be pretty interested to see what ChatGPT 4 came up with, especially in comparison to advice from a lawyer.

My guess going in would be that the quality of the responses from ChatGPT would vary greatly depending on the level of detail and sophistication shown in the phrasing of the request for advice. I expect that

⁴ See, e.g., *Human Research Protection Program*, UNIV. OF TENN., <https://research.utk.edu/research-integrity/human-research-protection-program/> (last visited Mar. 5, 2025).

⁵ See *ABA Free Legal Answers*, AM. BAR ASS'N, <https://abafreelegalanswers.org> (last visited Feb. 28, 2025). Or, for a state-specific site, see *Tennessee Free Legal Answers*, AM. BAR ASS'N, <https://tn.freelegalanswers.org/> (last visited Feb. 28, 2025).

⁶ Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 541, 552 (2015) ("Rania Combs, who runs a Texas virtual law office and website called Texas Wills and Trusts Law Online, posted a scathing review of LegalZoom's will-writing program. Rob Graham did the same in the *Nevada Lawyer Magazine*. Intellectual property lawyer Kelley Keller shares similar thoughts on LegalZoom's trademark services. Jonathan Sparks offers warnings about using online services for business formation. Bar associations have likewise decried the dangers of UPL by internet providers.").

human lawyers (at least for now) will do a better job “guessing” at what might be helpful based on the question than ChatGPT would be, and thus would offer at least somewhat more helpful advice. That may be wrong though.

The even more exciting project would be to work with a legal aid society and their lawyers to try to customize one of these programs to better address the legal problems a typical poor person might encounter. An alternative to legal aid might be a legal non-profit like Upsolve, which might be a promising (and more aggressive) partner in this project. Again, this would be a longer-term project and could require significant funds and a willingness to be aggressive in terms of possible UPL ramifications, but testing the current capabilities of generic AI seems relatively pointless now, especially given the time lag to publication and the rapid evolution of these technologies.

I recognize that question 2 is less helpful and concrete than question 1. Nevertheless, I think question 2 is more pressing and also more promising in terms of radically changing the market for legal services for the middle class and the poor.

Who Will Provide Legal Services, and What Will Sustain Their Work?

We have been asked to offer two questions that researchers should be asking about the future of legal services, articulate their importance, and sketch how research into these questions might proceed. Given my research interests in examining social inequality in legal institutions and understanding the culture of the legal profession, I offer two related questions: Who will provide legal services in the future, and what will sustain them throughout their careers?

Who will provide legal services in the future, and with what consequences?

For decades, access to justice scholars have examined the impact of nonlawyer advocates and paraprofessionals within the legal system—from paralegals and mediators to social workers and client navigators. Some of these nonlawyer advocates are part of other occupations, such as social work, whereas others are ordinary people who are trained specifically to assist with discrete legal (or sometimes legal-adjacent) tasks, such as client navigators in family court. Existing scholarship on nonlawyer advocates has largely focused on civil or administrative legal settings, such as small claims courts, housing courts, immigration courts, and family courts.

Understanding the work of nonlawyer advocates is important because their work can have unequal consequences. The poor, people of color, and people living in rural areas are more likely to have difficulty accessing lawyers.¹ Consequently, innovative legal programs and policy initiatives that herald the use of nonlawyer advocates to fill the gap in access to lawyers will disproportionately impact marginalized people—for better or worse.² Growing work has sought to assess the impact of nonlawyers, especially in comparison to lawyers. Whereas some research has suggested that nonlawyer advocates can effectively work to resolve legal problems,³ other research has identified limitations of their work (as compared to lawyers' work) with respect to ethical issues, the resolution of individual legal problems, and the transformation of the broader structure of the law.⁴

¹ Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2019); Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339 (2008); Michelle Statz et al., *'They Had Access, but They Didn't Get Justice': Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL'Y 321 (2021).

² Daniel C. Lang, Note, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289 (2011).

³ Anna E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 LAW & SOC. INQUIRY 1023 (2017); Anna E. Carpenter et al., *America's Lawyerless Courts: Legal Scholars Work to Recommend Large-Scale Changes in Lawyerless Civil Courts*, 48 LAW PRAC. 48 (2022); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998).

⁴ Carpenter et al., *supra* note 3; Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOCIO. REV. 909 (2015); John F. Wirenius, *The Ethics of Nonlawyer Advocacy: Expectations, Rules, and Complications*, 2 INT'L COMPAR., POL'Y & ETHICS L. REV. 777 (2018).

As nonlawyer advocates likely continue to grow more common to meet the demands of various legal institutions, future research could systematically assess the effectiveness of representation by nonlawyers (compared to lawyers and/or pro se representation) with respect to various outcomes (e.g., length of time a case is open, case outcomes, and client satisfaction with the legal process). Such research could be conducted through the analysis of administrative court data linked to novel survey data capturing clients' attitudes as well as more detailed information about their experiences with racism, sexism, and class bias. In-depth interviews with nonlawyers, lawyers, and clients, as well as ethnographic observations, could help to detail the social processes and mechanisms that may explain broader patterns.

In addition, future research could give greater attention to the role of nonlawyer advocates in criminal legal settings, where the right to counsel has long fallen short of the ideal.⁵ A trend among public defender's offices, for example, has been to experiment with novel models of representation that rely on nonlawyers to assist clients with both their legal and non-legal needs.⁶ Client-centered, holistic, and participatory defense models all rely, to some extent, on nonlawyer advocates, such as paralegals, social workers, service navigators, and family members. Unlike in civil settings, where there is no constitutional guarantee to a lawyer, serious criminal settings with the possibility of incarceration ensure access to a lawyer for indigent clients. Consequently, researchers will need to use more sophisticated and nuanced approaches to assess the impact of nonlawyers in the criminal legal context, where nonlawyers typically work to complement—rather than supplant—the work of lawyers. However, some criminal legal settings, such as community justice centers, peacemaking courts, and neighborhood courts, remove lawyers from the equation altogether.⁷ Here, careful comparisons of similarly situated people processed in each setting (e.g., misdemeanor court vs. peacemaking court) could allow researchers to assess the impact of lawyers vs. nonlawyers. Quasi-experimental designs that ethically randomize participants (e.g., if a peacemaking court takes a limited number of referred clients per month) could also prove insightful.

What will sustain legal service providers throughout their careers?

Since the mid-twentieth century, a number of landmark studies have examined the socialization of lawyers during law school and into their professional careers.⁸ This research tradition has provided important insight into the impact of structural forces, such as law school debt, corporate career fairs, elite credentials, social ties, and law firm discrimination, in shaping the aspirations and trajectories of

⁵ SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* (2020); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019).

⁶ MATTHEW CLAIR, *PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT* (2020).

⁷ See *id.*; Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 122 DICKINSON L. REV. 349 (2017).

⁸ E.g., CARRIE YANG COSTELLO, *PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS* (2005); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11 (1978); ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992); ROBERT L. NELSON ET AL., *THE MAKING OF LAWYERS' CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION* (2023); YUNG-YI DIANA PAN, *INCIDENTAL RACIALIZATION: PERFORMATIVE ASSIMILATION IN LAW SCHOOL* (2017); ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (Howard S. Erlanger ed., 1989);

lawyers. Alongside resources and social connections, a personal sense of meaning in one's work has been shown to matter for many lawyers as they choose to stay in their jobs or pursue new opportunities.⁹

Understanding what sustains lawyers (and nonlawyer advocates alike) throughout their careers is important for the maintenance of a healthy bar that can vigorously represent people with legal and other correlated social problems.¹⁰ The question of sustaining a legal career is especially pressing when it comes to lawyers who represent poor and disadvantaged clients. Much ink has been spilled about the drift to corporate law during law school, which underscores the importance of money and status in sustaining lawyers' careers. What sustains the work of underpaid and overworked public interest lawyers who not only assist those at the margins of society but also often work to shift the structure of the law in a progressive direction? Existing research has suggested that in the absence of money and status, passion and meaning for public interest work and for broader political goals sustains many cause lawyers.¹¹ Still, much more could be learned.

Future research on what sustains legal service providers throughout their careers could be enriched by moving in two new directions. First, researchers could begin to study not just what sustains lawyers but also what sustains *nonlawyer* advocates as they work to provide legal services and, potentially, take on a growing share of society's legal problems. Doing so would require examining other, legal-adjacent occupations, such as social work, to see why, for example, some social workers decide to join legal aid and public defender's offices rather than work for other institutions such as schools or healthcare providers. In addition, researchers could conduct rich ethnographic analyses of formal socialization processes and spaces within these adjacent occupations, such as paralegal certificate programs. Longitudinal surveys or interview-based studies that follow nonlawyer advocates over time as they change jobs would also provide important insights.

Second, researchers could begin to study college-educated young adults who express early interest in legal careers but ultimately do not persist into the legal profession. We know a lot about people who enter law school, but we know far less about those who express an interest in law school in high school or college but then ultimately choose another career path altogether. Who are they, and what career paths do they choose instead? Do they disproportionately come from certain groups, and how could we assess the loss to the legal profession with respect to its demographic and ideological diversity? Longitudinal

⁹ John Bliss, *Divided Selves: Professional Role Distancing among Law Students and New Lawyers in a Period of Market Crisis*, 42 LAW & SOC. INQUIRY 855 (2017); NELSON ET AL., *supra* note 8.

¹⁰ Kathryn M. Young, *Understanding the Social and Cognitive Process in Law School that Creates Unhealthy Lawyers*, 89 FORDHAM L. REV. 2575 (2021).

¹¹ E.g., THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005).

research designs that capture pre-law students would be necessary to carry out this line of work. My own longitudinal research suggests that prospective law school students of color today—many of whom were coming of age during Black Lives Matter, Me Too, and the COVID-19 pandemic—may be less likely to ultimately attend law school because they perceive the legal profession’s dominant orientation to be contrary to their progressive moral commitments.¹² The prospective law school students in my study who initially expressed interest in law school but then decided not to go often chose to go into politics or community organizing instead. Deeper understanding of the concerns, politics, and moral dilemmas among prospective law school students today could provide greater insight into what is needed to sustain healthy legal careers in the future.

¹² Matthew Clair & Sophia Hunt, *Moral reconciling at career launch: The case of liberal prospective law school students*, SOCARXIV (2023).

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Many of the research questions about the future of legal services that are worth pursuing center on the role of AI in a fast-digitizing civil justice system. One way I have tried to gain traction in this otherwise wide-open field of inquiry is to carve the civil justice system into two parts which, for better or worse, I call the “upper” and “lower” precincts.

The upper precincts feature complex litigation of various sorts, with multi-district litigations (“MDLs”) and class actions at the top and, beneath them, a long parade of business-on-business contract disputes, labor and employment disputes, and torts. What unites the upper precincts, however, is that everyone is represented, and so justice is hashed out in an adversarial clash of lawyer against lawyer. The lower precincts are a very different parade: of debt collection actions, evictions, mortgage foreclosure cases, and family law matters. What most distinguishes cases in the lower precincts, in stark contrast to the upper precincts, is that they overwhelmingly pit an institutional plaintiff (a bank, a debt buyer, a corporate landlord, the government) against a self-represented individual. Here, then, is the access to justice crisis that has roared onto legal and political radars in recent years and remains one of the most urgent challenges facing the American legal system.

If I convince you of anything in this discussion, it’s that the American civil justice system is on the cusp of some of its most important change in a century or more because of the rapid proliferation of a growing array of potent new AI-based legal tech tools. However, the questions researchers should be asking about the future of law and legal services are quite different depending on which precinct we’re talking about. In the upper precincts, a key question is whether AI-fueled legal tech will level or slant the litigation playing field, and the answer to that question will turn in significant part on how well policy-makers, rulemakers, and the courts themselves shape the upstream flow of inputs, particularly data, that will determine both legal tech’s potency and its distribution across the legal services industry. In the lower precincts, the key questions revolve around whether and how AI can narrow the justice gap, but one question in particular stands out: Can standalone, unmediated, direct-to-consumer technology tools ever serve a substantial proportion of the millions of people with unmet civil legal needs, or instead (and given their limited legal and potentially limited technical capacities) will some degree of human mediation and navigation always be necessary to serve them well? That seemingly narrow question, it turns out, has enormous implications for the types of technology and data infrastructures that courts will build, and it also goes to the heart of whether we should be building tech that serves self-represented litigants (“SRLs”) directly or tech that extends the reach of legal services providers, from legal aid lawyers to community justice workers. Only by understanding AI’s promise and peril in both precincts can we fully see, and ready ourselves for, the civil justice system’s next chapter.

The Upper Precincts: Will AI Level or Slant the Litigation Playing Field?

Start in the upper precincts, where everyone has a lawyer. Until recently, technology assisted review, or “TAR,” was the only pervasive use of AI in civil litigation. Here’s how TAR works: Lawyers read a thousand-document subset of a pool of millions of documents that might need to be produced and attach labels to them—for instance, whether each document is relevant or not relevant, privileged or not privileged. That’s called a “seed set,” and its labels are used to train a machine learning model that can label the remainder. The resulting efficiencies can be enormous.

TAR provided many courts, lawyers, and the litigation system with their first encounters with sophisticated AI. One question that quickly arose is whether one side in a discovery dispute can demand the other side’s seed set to check their work. That’s a problem, for the seed set contains both relevant documents and irrelevant ones. What procedural rule allows a party to demand the latter? Another question is limits on discovery of work product. Doesn’t the seed set contain attorney mental impressions about what documents are and aren’t important, akin to the documents counsel uses to prepare a witness for depositions? TAR also presses hard on proportionality rules, brought front and center by cost-obsessed rulemakers two decades ago, requiring that discovery’s value exceed its cost, or even plausibility pleading, which the U.S. Supreme Court grounded in concern about litigation cost asymmetries, particularly plaintiffs’ ability to impose high discovery costs on defendants.

These are tough issues, but the bigger question that hung over TAR from the start was its potential distributive effects and, in particular, whether TAR would level or tilt the litigation playing field. Commentators, including me, worried that if one side had more resources and better data scientists, or better vendors, it could get away with all sorts of things that the other side couldn’t even begin to detect.

But TAR, it turned out, was just the canary in the coalmine, because advances in AI, especially generative AI, have introduced tools that can perform far more advanced legal cognitions than document review. An increasingly powerful suite of legal tech tools can perform advanced legal research, write and analyze contracts, and draft litigation documents. E-discovery is likewise blasting off. The primary use cases are no longer a mechanical process of labeling documents for relevance. Instead, new generative AI tools—think Casetext’s CoCounsel or Harvey—allow lawyers to tell a machine: “Write me a timeline of key events,” or “Give me every document that talks about product X or meeting Y.” It’s no longer about preparing a document production. It’s about parsing the evidence and building a case.

Finally, there’s the holy grail of legal tech: tools that predict case outcomes. After all, that’s the essence of what lawyers do. In fact, Justice Holmes once said that law, once shorn of its many pretensions, is just a prediction about what a court will do. Even before GPT-4, we were starting to see the holy grail in action. At legal tech conferences five years ago, Walmart began touting its work with a legal tech company and a law firm on a suite of tools that can perform two tasks in the thousands of slip-and-falls and employment disputes the company faces each year: (1) predict the case’s outcome and also how much it will cost and how long it will take to get there; and (2) generate first drafts of an answer and

initial discovery requests. That's a big deal: Outcome-prediction is power at the bargaining table, and document generation is power in the battle of costs that is civil litigation.

So just how worried should we be that legal tech, particularly its turbo-charged generative AI version, will slant the litigation playing field? Some observers say legal tech will ultimately level the playing field and democratize legal services, perhaps even allowing small shops to do battle with BigLaw firms. Others say not so fast; rather than democratizing legal services, the “haves” of the litigation world are going to come out ever further ahead.

When I think about this, I like to get back to fundamentals and ask prior questions. Just how good can these tools get—and what will it take to make them truly effective? In order to understand leveling or slanting, we have to stay focused on those questions.

On the one hand, one should wonder just how good case outcome prediction can become, particularly in all but the simplest cases. Legal analytics are dizzyingly complex. As any lawyer knows, case outcomes turn on a wide array of arguments, including textual arguments (about the meaning of words in a statute or rule), systemic arguments (about how one part of a statute or rule relates to another), analogical arguments (about how past cases are similar or different), evidentiary arguments (about how probative this or that piece of evidence is), and teleological arguments (about a statute's or doctrine's purpose). In other words, law is a uniquely difficult prediction task. Even generative AI and machine learning together may have trouble corralling all of this analytic complexity in upper-precinct cases.

On the other hand—and here's where I get worried—it takes more than analytics, and it takes more than fancy AI, to build powerful legal tech tools that can predict case outcomes. It also takes data, and data aren't evenly distributed within the system. Indeed, most cases settle and then exit dockets as curt voluntary dismissals. Many or even most settlements are cloaked by NDAs or confidentiality provisions. The system, in other words, is opaque. To be sure, some of this has started to change: The #MeToo movement and opioid crisis have fueled legislative activity around the country to increase the transparency of litigation by prohibiting secret settlements or tightening standards for protective orders. Even so, we're still a long way from full transparency, and that means that only the “haves” of the litigation world—and in particular, large repeat-players like Walmart—have both the analytics and the privileged access to the data necessary to build powerful tools that maximally leverage AI. Data access will be a huge challenge for the courts in the age of AI, and the terms on which courts make their data available beyond their walls will fundamentally shape the trajectory of the legal tech industry.

A final set of considerations in all of this is what AI does to the current structure of the legal services industry. Here there are all sorts of predictions about what CoCounsel or Harvey or other legal tech tools will do to the traditional law firm structure. Some say we'll see a massive reduction in partner-as-associate leverage: from 5:1 or 7:1 to something more like 1:1 or 2:1. Declining leverage will have training implications. It's easy to teach new lawyers prompt engineering. Harder will be teaching them litigation judgment in a world in which machines perform many of the basic and not-so-basic tasks through which

young lawyers previously learned to litigate.

Until recently, the view among scholars doing the best work on the incorporation of AI into law firms was that the legal services industry was way behind the rest of the economy in tech, not because AI wasn't strong enough, but because firms couldn't figure out how to tap real tech talent given Rule 5.4's bar on giving equity to nonlawyers. Nor could they figure out how to fund big, firm-wide, client-spanning projects in a business model built on per-partner-profits and billable hours.

But things may be starting to change. Some firms—especially the more tech-forward Silicon Valley ones—have begun to consciously reframe and shift what they do along a spectrum from service to product. Wilson Sonsini is a great example. It built its name on high-end, bespoke services, but is now building out a lower tier of automated services, harnessing the firm's reputation and the bespoke expertise they've built up over time to serve smaller businesses and entities. The firm has even gone so far as to create a subsidiary called SixFifty that does a mix of for-profit and non-profit automation. Here, BigLaw is using AI to reach down into what is sometimes called the PeopleLaw sector of the legal services industry and serve clients that were previously served by one-, two-, or three-person law firms – or not served at all. That's a potential revolution in the industrial organization of law.

More and better research can try to understand these complicated dynamics. John Armour and Mari Sako come to mind—a law professor and business professor duo who deploy a neat mix of organizational theory, labor economics, and a rich understanding of where AI-based legal tech is and where it can go. Overall, however, I've been surprised how little fundamental research there is. Instead, much scholarly attention gets sucked up by the robo-lawyer and end-of-lawyers talk of a Richard Susskind, or a very near-term (and, in my experience, entirely empty) debate over hallucinations and other micro-practice concerns that will be well-handled by modest improvements to LLMs and adaptations to legal ethics rules.

The Lower Precincts: Can Standalone Legal Tech Narrow the Justice Gap?

The access to justice crisis that is gripping the lower precincts is increasingly familiar to lawyer audiences, and yet the basic facts never seem to lose their punch. In something like three quarters of the roughly 20 million civil cases filed each year in American courts, at least one side lacks a lawyer. And these tend to be small but consequential cases. They're evictions, debt collections, and certain types of family law, particularly child support enforcement actions and domestic violence protective order petitions. As already noted, many and even most, depending on case type, pit an institutional plaintiff with a lawyer against an individual defendant without one.

Given these stark representational asymmetries, generative AI has massive potential to widen access to justice. Generative AI's promise is at least twofold. First, is translation: The new generative AI systems are getting better and better at converting plain language into legalese and vice versa. That's essential if you want to build tools that serve unsophisticated SRLs. Second is mapping: The new generative AI

systems can take an individual's plain language explanation of a problem, map it to a legal ontology, and then return with plain language, actionable advice on options and outcomes—the core of what lawyers do. To be sure, it's easy to get ahead of ourselves here: The hallucination problem is real, and there's some evidence that hallucinations are especially bad for SRLs. But it also seems clear that AI will become more and more reliable.

A key question going forward, then, will be: How can courts best realize AI's access to justice potential? By my lights, I see the challenge facing courts over the next 10 years as a version of the “make” or “buy” choice that many organizations face at one point or another. In a nutshell, courts can “make” assistance for SRLs by developing and offering their own court-linked AI tools or courts can “buy” assistance for SRLs by structuring themselves to make it easier for third-party technology companies out in the world—think LegalZoom or the increasingly rich array of startups—to assist self-represented litigants.

Start with “make.” Courts can “make” new legal services by creating virtual self-help centers—e.g., court portals, or chatbots—that provide information, document assembly services, and even advice to SRLs. They can also offer court-linked online dispute resolution platforms, or ODR. The first ODR platforms at eBay and PayPal were simple places where disputants could gather, usually asynchronously, and bargain their way to a settlement. But with generative AI, we can glimpse more advanced versions—call it ODR 2.0—that primes the disputants with legal information or advice, including, perhaps, a prediction as to how their case would come out if litigated to a judgment in court. Here again, ODR platforms double for a big part of what lawyers do—and, indeed, they strive to render lawyers irrelevant.

“Buy” looks different. If courts choose “buy,” they must structure themselves in a way that facilitates a robust marketplace of legal tech providers who can assist SRLs using newly powerful AI tools. But if that's the choice courts make, there's a lot of work to do. One problem is restrictive rules that say only lawyers can practice law (unauthorized practice of law or “UPL”) and only lawyers can own law firms (Model Rule of Professional Conduct 5.4). UPL limits what AI tech companies can do. Rule 5.4 cuts off law from sources of capital that might fund innovation. States around the country have begun to experiment with relaxing these rules, first in Utah and Arizona, but now spreading to other states, to welcome new legal services providers into the system, including human nonlawyers (e.g., paraprofessionals along the lines of nurse practitioners or physician assistants) and nonhuman nonlawyers (i.e., software). But similar efforts to liberalize the rules have stalled in other places, particularly in California. Brewing litigation under the First Amendment, already underway in New York and the Carolinas, might provide a potent reform lever against such recalcitrance.

Another barrier is a checkerboard of technology systems and data infrastructures across the roughly 14,000 separate court jurisdictions in the U.S. This technological Babel makes it impossible for legal tech providers to achieve the scale they need to serve consumers who, by definition, have limited to no ability to pay.

A final problem, and one that takes us back to the question I started with at the top, is that it's not at

all obvious that standalone digital self-help services can ever serve more than a small portion of the millions of people who currently go without any meaningful legal help. Indeed, there's quite a bit of evidence that even seemingly sophisticated SRLs cannot navigate even the most robust and user-friendly document assembly tools. Also worrying is the possibility that filing an answer is only an initial litigation step in debt or eviction actions, and institutional plaintiffs have plenty of workarounds, including showing any defendant with the temerity to answer with immediate requests for admission. Discouraging evidence suggests that SRLs who dare to file an answer in these case types often end up worse off than those who do not.

The implications of all of this are bracing. If lawyerless legal tech can't be viable, then the best way forward may be for courts to remake their approach to adjudication via a massive exercise in "make." That would mean reimagining the courthouse, the role of judges, and the role of courts as active guarantors of due process values through a mix of "active" (or "investigatory," or "inquisitorial") judging and data-based managerial efforts. Such is the central thrust of the American Law Institute project I'm leading. But it might also mean we would be better off building tech that extends the reach of legal aid providers, not continuing to pursue a fiction of "autocomplete for law," and it might also mean that the sweet spot for "reg reform" efforts that are gaining momentum all around the country is not full-scale relaxation of UPL and Rule 5.4, with all its attendant concerns and political challenges around "corporate practice of law." (On the latter, the recent drumbeat of studies on the private equity takeover of medicine is worrying and, in any event, has provided awfully good ammunition to the reactionary wing of bench and bar.) Instead, we might gain far more leverage, and do far more to narrow the justice gap, with less ambitious but potentially more effective reforms, including the possibility of empowering "community justice workers," overseen by already-existing legal services providers, and then cabining their work and extending their reach with well-designed technology.

I don't think anyone can predict with certainty where exactly all of this is going in the lower precincts any more than we can in the upper precincts. But I increasingly think that the make-or-buy choice is a real one. The two paths require very different technology and data infrastructures and very different commitments of political capital; and courts may not be able to do one, let alone both.

How does research on the future of legal services get to ground on these issues? My own view is that there are few substitutes for testing these ideas in the wild. My Stanford research team's recently announced collaboration with the L.A. Superior Court, the nation's largest trial court, is a prime opportunity. We're getting data the court doesn't share with anyone, and we have a commitment from the court to design, implement, and, most important of all, rigorously evaluate new digital pathways in eviction, debt, and family law. What's worrying here is the uniqueness of the opportunity. Lower-precinct, access to justice research is woefully under-funded relative to its importance. It only takes one hand to count the largescale, grounded, in situ projects of the sort we have embarked on. That's worrying with so many open questions about how to responsibly relax the rules of lawyering, make-or-buy, and the like.

A Slice of the Political Economy of Public Interest Lawyering: Pressing Issues for Consideration

Public interest organizations have been imperiled by crises since at least the 1960s. These groups catapulted into the national spotlight through the emergence of the Legal Services Program (the predecessor of the Legal Services Corporation), the slow constitutionalization of an affirmative right to counsel in specific criminal and civil contexts, and the expansion of a civil rights bar focused on a range of subject matter specific and ideological issues.¹ In that same time frame, there have been a host of scholarly treatments—qualitative, quantitative, and anecdotal—that have captured some of the pressures faced by these organizations and the people that staff them, chief among them being financial precarity, political hostility, and judicial retrenchment.²

In considering future directions for research, the issue that stands out most to me is education financing for public interest students and their post-graduate experiences with debt. I chose this topic in part because it involves a chronically underfunded segment of the bar that serves some of the country's most vulnerable populations. I also selected it because sophisticated information about public interest data is difficult to come by. (Indeed, the National Association for Law Placement does not collect consistent annual data on this field like the private sector; in this way, and many others, the *After the JD* study and *The Making of Lawyers' Careers* has been an empirical treat). This topic is capacious enough to host a range of qualitative and quantitative inquiries and implicate a range of legal areas such as tax law, non-profit law, local government law, consumer protection, education law, (in addition to the traditional areas they cover such as criminal law, public benefits law, family law, housing law, etc.).

Public interest lawyering is a unique species of white-collar work in that it is situated in a relatively well-paying profession (law) but is far from remunerative when compared to private sector legal colleagues and counterparts in other professions that require graduate training (e.g., medicine, dentistry, optometry). Public interest attorneys often take out six-figure debt and obtain salaries similar to some college graduates. With the steady growth of law school tuition, scholars have captured how educational

¹ Shaun Ossei-Owusu, *Civil vs. Criminal Legal Aid*, 94 S.C. L. REV. 1561 (2021); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2009); Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62 (2014); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993).

² ALAN HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES (2018); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

debt shapes law student and post-graduate choices, although the results are somewhat mixed.³ A threshold issue worthy of research inquiry focuses on *the preferability of ex-ante interventions (tuition remission for public interest law students) vs. ex-post interventions (loan of forgiveness). Which approaches are more welfare-enhancing and produce more PI lawyers in the long run?* Field’s study suggests that students prefer the former, but there is some evidence that such approaches can lead to perverse cross-subsidies and exacerbate race and class inequalities.⁴ Still, some have speculated that back-ended LRAPs are more efficient ways to allocate resources.⁵ Assuming that is right,⁶ it is worth double-clicking more intently on such programs.

The federal government has many loan forgiveness programs, but they have been inelegant, to put it nicely. In 2015, The ABA Task Force on Financing Legal Education found that there were many repayment plans but that “deciphering and successfully navigating those plans is a daunting process that can undermine a student’s ability to take advantage of the benefits available.” This conclusion was underlined by the Young Lawyers Division’s plea for “comprehensive debt counseling and debt management education” from law schools and bar associations as well as multiple Law School Survey of Student Engagement surveys that found that many law students did not use available financial counseling and/or were unsatisfied with those services.⁷ A year later, the ABA sued the Department of Education for its APA-violating waffling around what kind of work was eligible under the Public Service Loan Forgiveness (PSLF) program, ultimately prevailing in 2019.⁸

Meanwhile, the Consumer Finance Protection Bureau highlighted how student loan servicers (intermediaries between the lender and the borrower) were frustrating the goals Public Service Loan Forgiveness Program. Common issues included problems recertifying income and the inability to get accurate information on avoiding default.⁹ One could imagine a survey or qualitative interview study modeled off anthropologist Caitlin Zaloom’s examination of college debt that asks the following questions: *What barriers do attorneys face navigating PSLF? How does the program influence financial decisions, stress levels, and*

3 ROBERT L. NELSON ET AL., THE MAKING OF LAWYERS’ CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION (2023) (finding no relationship between debt and decision to pursue public service); Steven A. Boucher et al., *A Faustian Bargain? Rethinking the Role of Debt in Law Students’ Career Choices*, 20 J. EMPIRICAL LEGAL STUD. 166 (2023) (finding no relationship between debt and decision to pursue PI); Christopher J. Ryan, Jr., *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, 2021 U. ILL. L. REV. 97, 135 (2021) (finding a causal relationship between debt and intention to participate in Public Service Loan Forgiveness program); Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early-Career Occupational Choices*, 95 J. PUB. ECON. 150 (2011) (finding a relationship, though focused on college); Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1 (2009) (finding a relationship between debt alleviation programs and public interest law work).

4 Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J. L. & EDUC. 41, 75 (2018).

5 William C. Whitford, *Law School-Administered Financial Aid: The Good News and the Bad News*, 67 J. LEGAL EDUC. 4 (2017).

6 If it is not right, there is a separate empirical question about how law schools are distributing financial aid. Law schools are required to provide financial data to the ABA Section on Legal Education and Admissions to the Bar, but the Section treats it as propriety and confidential. (“Because law schools compete for students and rankings, the schools do not want their detailed data shared with rivals”). *Id.* at 6. The ABA’s Task Force on Financing Legal Education was only able to analyze this data in 2015 on the promise that it would be used in a limited fashion. Unless one secured access from several schools or the ABA, there would be imaginable access concerns to studying tuition, although the same might apply to LRAPs as discussed below. This might require another ABA Task Force investigation absent such consent to independent researchers.

7 AM BAR. ASS’N TASK FORCE ON FIN. LEGAL EDUC., REPORT 2, 34 (2015).

8 Am. Bar Ass’n v. United States Dep’t of Educ., 370 F. Supp. 3d 1 (D. D.C. 2019).

9 CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK (2017).

overall well-being?¹⁰ This would be alongside more basic questions about demographics, basic comprehension of how the program works, different types of loans, and the kind of employer they work for (more on this below).

The federal government isn't the only player in town when it comes to LRAP, as schools have their own programs. One might consider differences between law school-administered LRAPs that could be the basis of qualitative research across institutions (e.g., interviews, surveys) and/or longitudinal studies focusing on one school and the program's efficacy. For example, some programs are endowed by still-living donors (e.g., Temple's Barrack Public Interest Fellowship Program, the Caruso Family Loan Forgiveness Fund at Pepperdine). For these entities, one might ask: *What factors influenced donors' decisions to fund such programs? More generally who at the law school/university is responsible for fund management, and how do they communicate the impact of such programs (especially in a world where victories and impact are not flashy)? What are best practices that allow for long-term sustainability, continued funding, and replicability by other philanthropists? What are replication challenges? And perhaps most basically, how effective are these different programs in buoying public interest law careers?*

Considering the longstanding literature on lawyer dissatisfaction, *what implications does debt have on the quality-of-life PILs (an issue partially surfaced in After the JD)?* Social scientists have observed how millennials and people in Gen Z are less likely to get married, more likely to delay childbirth and find homeownership increasingly elusive. *How do these unique debt burdens and the decision to forgo "the traditional path of marriage-homeownership-children" play a role in the calculations students make about pursuing careers in this space?*

A host of other comparative distinctions abound that are worthy of inquiry. Some programs, like Chicago, only cover law school debt, while some, like Yale, cover law school and undergraduate debt. *What are the justifications for and implications of these differences?* Some schools vary in their definition of what kind of work is eligible, with Michigan allowing for any law-related work under an income threshold. In contrast, many others focus on traditional definitions of public interest. *How might this strict line drawing influence other access to justice issues (e.g., the unavailability of legal services for the middle class)?* Some schools allow graduates to apply for up to ten years, whereas some places, like Virginia and Berkeley, only enable lawyers to apply after 2 and 3.5 years, respectively. *What implications do stricter temporal rules have for people's willingness to circulate from the private to the public sector?*

Other state and federal programs operate on smaller levels but have been less discernible to researchers though worthy of empirical attention. On a federal level, there is the Herbert S. Garten Loan Repayment Assistance Program (provided to attorneys who work for Legal Services

Corporation grantee organizations), the John R. Justice Student Loan Repayment Program (provided to local, state, and federal prosecutors and public defenders) and the Attorney Student Loan Repayment

¹⁰ CAITLIN ZALOOM, *INDEBTED: HOW FAMILIES MAKE COLLEGE WORK AT ANY COST* (2019).

Program (focused on the Department of Justice). Additionally, approximately 25 states have loan repayment assistance programs ranging in age, award, number of recipients, and the kind of work they cover. Civil legal aid, for example, is eligible in most programs, but work in government, prosecutor, and public defender offices, and even non-profit organizations is only eligible in less than half, which comes back to the perennial question of what constitutes public interest.¹¹ Again, relevant research questions that deploy interviews, surveys, or quantitative methods could focus on attorney satisfaction with these programs, the way these programs influence career choices (if at all), experiences and challenges with the program, political support, and funding sources for these programs.

¹¹ See *State Loan Repayment Assistance Programs*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defense/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs/ (last visited Feb. 28, 2025).

From Legal Education to Legal Careers: Building and Funding Research that Matters

QUESTION PRESENTED: In light of the changes in the legal profession, how might past or future (empirical/data-based) research inform beneficial reforms in legal education?

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Mandating Wellness

Legal education is in the midst of several crises. Prospective students are applying to law school at declining rates, with a resulting drop in enrollment.¹ At the same time, the cost of attending law school has skyrocketed over the past decade, with students accruing more debt than ever before.² The very campus composition of the student body is also changing; while law schools had been more diverse in recent years, the Supreme Court decision in *SFFA v. Harvard* and its companion case *SFFA v. UNC* herald the end of affirmative action as we know it and an inevitable upcoming decrease in the number of law students of color.³ Furthermore, we are barreling away from the COVID-19 pandemic with little thought to its ongoing effects, although it was a period of unprecedented upheaval where students and faculty alike struggled through physical challenges, mental health burdens, and decreased academic and professional success.⁴ Through it all, law students as well as practicing attorneys have been anxious, lonely, stressed, and depressed.⁵

Taken together, these crises require immediate attention and intervention. Empirical scholars have a particularly noteworthy role to play in this moment. When we consider how data-based research might inform beneficial reforms in legal education, we must begin with the understanding that without data we have no idea where we are, which leaves us little direction on how to get to where we aspire to be. Building impactful research requires a commitment to documenting current realities—as well as measuring success as we work toward fundamental change. Ideally, researchers will communicate effectively

¹ *Enrollment and Admission Standards*, LAW SCH. TRANSPARENCY, <https://www.lawschooltransparency.com/trends/enrollment/all> (last visited Dec. 5, 2023) (showing a decline from 52,404 enrolled first-year law students in 2010 to just 38,019 in 2022—the lowest number since 1974); Christine Charnosky, *LSAT Sees Lowest Number of Test-Takers in a Decade, But the Dip is Likely Temporary*, ALM LAW (Apr. 2022), <https://www.law.com/2022/04/08/lSAT-sees-lowest-number-of-test-takers-in-a-decade-but-the-dip-is-likely-temporary/> (highlighting the low numbers of LSAT test-takers); Karen Sloan, *Law schools see double-digit decline in new students after surge*, REUTERS, Dec. 19, 2022, <https://www.reuters.com/legal/legalindustry/law-schools-see-double-digit-decline-new-students-after-surge-2022-12-19/> (noting additional decline in law school enrollment in 2023).

² LSSSE data reveal the dramatic increases in law student educational debt, with only 18% of LSSSE respondents expecting to owe more than \$100,000 in 2004 compared to 39% in 2019. The racial disparities are even more troubling, with 21% of students of color owing over \$100,000 in 2004 compared to 49% in 2019. MEERA E. DEO, CHAD CHRISTENSEN & JAKKI PETZOLD, A 15-YEAR LSSSE RETROSPECTIVE: THE CHANGING LANDSCAPE OF LEGAL EDUCATION, LSSSE SPECIAL REPORT (2020)).

³ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

⁴ Meera E. Deo, *Equity in Legal Education*, 63 SANTA CLARA L. REV. 95 (2023); Meera E. Deo, *Pandemic Pressures on Faculty*, 170 PA. L. REV. ONLINE 127 (2022), https://download.ssrn.com/22/04/11/ssrn_id4081301_code1342480.pdf; Meera E. Deo, *A CRT Assessment of Law Student Needs*, 125 TCHR. COLL. REC. 1 (2023); Catherine Albiston & Tonya Brito, *The Hamster Wheel is on Fire* (in progress).

⁵ Paula Davis, *Stress, Loneliness, and Overcommitment Predict Lawyer Suicide Risk*, FORBES (Feb. 15, 2023), <https://www.forbes.com/sites/pauladavis/2023/02/15/stress-loneliness--overcommitment-predict-lawyer-suicide-risk/?sh=5f826818621e>; Jakki Petzold, *Law Student Stress and Anxiety*, LSSSE INSIGHTS BLOG (May 11, 2022), <https://lsse.indiana.edu/blog/law-student-stress-and-anxiety/>.

about whatever piece of the legal education puzzle they choose to study; together we can then construct a true picture of the current landscape and work together to improve it for the future.

Wellbeing, or the lack thereof, is one important piece of this puzzle when considering the landscape of legal education and the legal profession. In fact, empirical research reveals that attorneys are among the loneliest and most stressed of all American professionals.⁶ For many lawyers, depression and anxiety begin in law school and only increase upon graduation. The herculean tasks many lawyers engage in on a daily basis can compound existing stress to create various mental health concerns. Furthermore, law students and lawyers are more likely than others to engage in unhealthy coping mechanisms to manage their stress, including substance abuse and self-harm.⁷ It is imperative that regulators of legal education and the legal profession confront this ongoing mental health crisis, introducing law students and lawyers to healthy ways to balance school and work as part of life. Fortunately, we have data-based knowledge to both bring current challenges to light and inform potential interventions.

This article and presentation review existing empirical research on stress, loneliness, anxiety, and depression for law students and legal professionals. Data from the Law School Survey of Student Engagement (LSSSE), a national longitudinal study of law students, is particularly instructive. Since 2004, LSSSE has collected empirical data from a national sample of law students attending participating law schools, with a focus on engagement indicators, student experiences, and diversity, equity, and inclusion.⁸ The resulting institution-specific data are shared with each participating law school so they can craft empirically-informed responses to better meet the needs of their own student body.⁹ LSSSE staff also aggregate the data to document and influence trends in legal education through annual reports,¹⁰ online publications,¹¹ and data sharing collaborations with external advocates and scholars.¹²

LSSSE data reveal significant obstacles on the path to wellbeing. The data show that roughly half of all law students report “very high levels of stress.”¹³ While particularly high percentages of students suffered from depression (87%) and anxiety (85%) that interfered with daily functioning in 2021 (likely as

⁶ Davis, *supra* note 5.

⁷ Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys*, 10 J. ADDICTION MED. 46 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4736291/>.

⁸ For more information on what LSSSE does see *About LSSSE*, LSSSE, <https://lsse.indiana.edu/who-we-are/#about>. (last visited Mar. 5, 2025).

⁹ For LSSSE data uses see *Using LSSSE Data*, LSSSE, <https://lsse.indiana.edu/using-lsse-data/> (last visited Mar. 5, 2025).

¹⁰ For a list of annual reports see *Annual Results*, LSSSE, <https://lsse.indiana.edu/annual-results/> (last visited Mar. 5, 2025).

¹¹ The LSSSE Insights Blog includes monthly posts from LSSSE staff as well as external researchers. *LSSSE Insights Blog*, LSSSE, <https://lsse.indiana.edu/insights/> (last visited Mar. 5, 2025).

¹² The LSSSE Scholarship page lists recent articles published using LSSSE data. *Scholarship*, LSSSE, <https://lsse.indiana.edu/scholarship> (last visited Mar. 5, 2025).

¹³ Petzold, *supra* note 5.

a result of the COVID-19 pandemic),¹⁴ only 4% of respondents reported “low” stress levels even years before, suggesting an ongoing problem.¹⁵ The ABA and other sources report similarly disturbing results for practicing attorneys with regard to mental health challenges and coping mechanisms.¹⁶ Findings for both law students and lawyers are particularly troubling when we consider racial, gender, and raceXgender disparities, as people of color, women, and especially women of color experience higher levels of mental health challenges and adverse behaviors than others.¹⁷ These figures will likely increase further as legal education and the legal profession become even more homogenous, given the Supreme Court’s recent affirmative action decisions. This article and presentation also share literature on ways that attorneys engage in unhealthy coping mechanisms to address or alleviate mental health challenges, ranging from alcohol abuse to active physical self-harm.

To address these challenges, my article and presentation suggest an empirically informed approach to ameliorate the crisis. I propose a method to alert law students and lawyers to the likely mental health challenges of legal education and legal practice as well as share alternative healthy ways to manage their stress. Specifically, my article and presentation have two specific recommendations:

- 1) That the ABA (the regulating body for legal education) require all law schools to provide training to law students on wellbeing; and
- 2) That state bar associations (the regulating bodies for legal practice) require every practicing attorney in their state to complete training on wellness in the legal profession.

To implement these mandates, I propose that both the ABA and state bar associations make changes to their requirements, adding trainings on wellness for law students and practitioners. Specifically, I propose the ABA update Chapter 3 of their Standards with a new Standard 303(d), which would read as follows:

A law school shall provide education to law students on wellness, stress management, and healthy coping mechanisms for mental health challenges:

- (1) at the start of the program of legal education, and*
- (2) at least once again before graduation.*

Proposed ABA Standard 303(d) tracks the language of recently added Standard 303(c), which went into effect in February 2022.¹⁸ While Standard 303(c) requires law schools to provide training to law students on “bias, cross-cultural competency, and racism,” just as with proposed Standard 303(d), it places a

¹⁴ MEERA E. DEO, JACQUELYN PETZOLD, AND CHAD CHRISTENSEN, LSSSE 2021 ANNUAL REPORT: THE COVID CRISIS IN LEGAL EDUCATION (2021), <https://lsse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf>.

¹⁵ *Law Student Stress*, LSSSE INSIGHTS BLOG (Aug. 8, 2016), <https://lsse.indiana.edu/blog/law-student-stress>.

¹⁶ AM. BAR ASS’N, LAWYER WELLBEING, CHAPTER OUTLINE, ABA PROFILE OF THE LEGAL PROFESSION 2022, <https://www.abalegalprofile.com/well-being.php>.

¹⁷ *Id.* The term “raceXgender” highlights the compound effects of these two identity characteristics on lived experiences. MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA (2019).

¹⁸ Neil W. Hamilton & Louis D. Bilonis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer’s Professional Identity, Part 1: Understanding the New Requirements*, NALP BULLETIN+ (May 2022), <https://www.nalp.org/revised-aba-standards-part-1>.

new requirement on law schools to better prepare aspiring attorneys for the practice of law.¹⁹ Clearly, given the empirical data we already have on the lack of wellbeing in law school and the legal profession, the need for mental health training is imperative for law students and would be useful not only during the course of their legal education but well into their practicing years as lawyers face similar hurdles throughout their careers.

Similarly, I propose state licensing bodies add a one-hour wellness training requirement as part of the mandatory Minimum Continuing Legal Education (MCLE) requirements that already exist in each state. For instance, the California state bar states that “all attorneys who are actively practicing law in California must complete ongoing legal training referred to as Minimum Continuing Legal Education (MCLE).”²⁰ Most of the 25 hours required to be certified and reported as completed every three years may cover any areas of interest or practice, leaving up to the attorney how they choose to continue learning about the law. However, as part of their 25 reported hours, active licensed California lawyers must specifically complete four hours of trainings dedicated to legal ethics, two hours on elimination of bias (including one hour on “implicit bias and the promotion of bias reducing strategies”), and one hour focused on competency issues.²¹ My article and presentation suggest states maintain the current level and number of hours required, but mandate that at least one of those hours be dedicated to wellness in the legal profession. Thus, a California lawyer would continue to complete and report 25 MCLE hours every three years, and while seven of these would continue to be dedicated to legal ethics, elimination of bias, and competency issues, one hour would now be focused on wellness.

This two-part proposal is a creative, simple, and effective way to ameliorate an ongoing crisis in the legal profession. It is creative because it places responsibility for improving wellness among law students and lawyers on the shoulders of the regulating bodies which should be committed to this ideal already. It is simple because it adds an additional requirement into an existing structure that already mandates similar priorities; for law schools, students will have at least two exposures to wellness ideas whereas for lawyers, wellness is added as a required topic without increasing the total number of training hours. Finally, this solution is effective because the goal is to introduce law students and lawyers to the challenges of balancing a stressful career with the rest of their busy lives; a training is an effective way to teach or remind aspiring and practicing lawyers how stressful the profession can be (especially as some normalize the stress or feel they are immune to it), the effects of that stress on their physical and mental health, and healthy ways they can manage that stress rather than relying on harmful methods. Ideally, law students and lawyers will take heed during these trainings, recognize how stress manifests in their own lives, and consider the suggested healthy coping mechanisms to improve their lives.

¹⁹ AM. BAR ASS'N, ABA STANDARDS, CHAPTER 3: PROGRAM OF LEGAL EDUCATION, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-standards-ch3.pdf.

²⁰ *Minimum Continuing Legal Education*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Attorneys/MCLE-CLE> (last visited Mar. 5, 2025).

²¹ *Id.*

Pivots, the Pipeline, and Participation: Data for Change

One of the most exciting things about the legal profession right now—despite its reputation for being woefully hidebound and wedded to past processes simply for their own sake—is the level of innovation and change taking place. As law schools grapple with this dynamic environment, three specific areas are ripe for new research that could reveal opportunities for potential reforms or evolution in legal education. These are (1) identifying the causes for law students’ professional goals shifting between entry and graduation, particularly away from public interest roles; (2) the impact of artificial intelligence on practice; and (3) expansion of law schools’ participation in research beyond current levels to ensure broad representation.

“To Thine Own Self Be True” vs. “Evolve or Die”.

While many law students apply to and enter law school intending to pursue public service careers, a small minority actually go into public interest/public service or government roles after graduation (8.4% and 10.4%, respectively, for the Class of 2022, according to the most recent ABA employment statistics).¹ The majority, instead, elect to go into private practice.² What are the drivers of this shift? Are law students making decisions based on internal factors, such as intellectually gravitating to new areas of focus, or as a result of externalities (debt, perceived prestige, etc.)? And when do these shifts occur?

This broad-based pivot also takes place despite the significant resources law schools deploy in support of public service, such as public interest scholarship programs, loan forgiveness, and robust clinical offerings. And, indeed, many law students demonstrate strong interest in public service during law school through participation not only in clinical programs, but in pro bono challenges, pro bono activities, and other service opportunities, yet post-graduate public service work does not remain as their primary professional focus.

There are numerous theories as to the culprit(s), including the traditional law school curriculum, perception of law firm jobs in particular as higher status than other roles, variable law school advising on non-firm opportunities, the impact of the law students’ high educational debt, and the relative ease of the law firm hiring cycle compared to other avenues.

With little empiric data illuminating the actual reasons and the timing when so many law students make this pivot, law schools and the profession more broadly cannot effectively support students with public

¹ AM. BAR ASS’N SECTION OF LEGAL EDU. & ADMISSIONS TO THE BAR, EMPLOYMENT OUTCOMES AS OF MARCH 15, 2023 (CLASS OF 2022 GRADUATES) (Apr. 25, 2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/class-2022-online-table.pdf.

² *Id.*

service aspirations and ensure that these are actually tenable post-graduate options for them. In fact, there appears to be a serious misalignment between many graduates' first positions and their professional goals: The NALP Foundation's annual *Study of Law School Alumni Employment and Satisfaction* data shows persistently high levels of mobility within graduates' first three years of practice, with two thirds reporting two or more jobs in that relatively short timeframe.³

Data illuminating why and when students are making these shifts during law school, and also assessing the efficacy of efforts to support public interest-oriented law students in particular, will provide critical information for law schools to enable them to effectively support all students' professional goals. Furthermore, we need to understand whether there are differences between cohorts—by race/ethnicity, gender, socio-economic background, first generation status, or other important aspects—in the choices these students are making and the drivers for these professional decisions.

Finally, such data might not only assist the legal academy, but the profession more broadly, by providing insights to address the ongoing national access to justice gap (despite adding approximately 35,000 lawyers to the market each year), and fostering more robust and fulfilling long-term careers for attorneys.⁴

Are Robots Coming for Legal Jobs?

Amidst the legal profession's generalized anxiety about the potential impact of Artificial Intelligence, particularly generative AI, a more specific concern has arisen—whether the broad deployment of this technology will replace the work traditionally performed by junior attorneys (whether associates at firms or in other organizations), reducing employers' need for this segment of the legal workforce, and eliminating critical training and development opportunities.

For law schools, the queries therefore include whether current law school class sizes are sustainable if law firm opportunities, which as noted above, currently provide the bulk of post-graduate positions, diminish significantly and rapidly. From a curricular perspective, law schools must grapple with how to integrate AI preparation into the legal education, whether in Legal Writing and Research classes, as stand-alone classes, or as supplemental programs. Additionally, law schools will need to determine the requisite levels of AI fluency for faculty and students in clinical or other experiential offerings to accurately replicate that necessary in practice. Graduates of law schools that most effectively and accurately identify the AI skills of the future, and train their students in these skills, may have a distinct market advantage, particularly in a tight talent environment. This may also prove an alumni engagement opportunity for law schools by providing AI training or development opportunities.

Employers must weigh whether to reduce their entry level hiring if many of the tasks historically

³ NAT'L ASS'N FOR L. PLACEMENT & THE NALP FOUND. FOR L. CAREER RSCH. & EDUC., *STUDY OF LAW SCHOOL ALUMNI EMPLOYMENT AND SATISFACTION: EMPLOYMENT OUTCOMES THREE YEARS AFTER GRADUATION (CLASS OF 2019)* 44 (2023).

⁴ AM. BAR ASS'N SECTION OF LEGAL EDU., *supra* note 1.

performed by junior attorneys could now be completed by AI as well, in less time, and at lower cost. The countervailing concern will be how to ensure the development and training opportunities previously gleaned from experience are now provided in alternative formats, so attorneys already within organizations or hired into them develop the judgment and experience clients demand of more senior attorneys.

The NALP Foundation is addressing this by adding new queries on AI to the annual *Study of Law School Alumni Employment and Satisfaction*, probing the preparation graduates receive as law students in various artificial intelligence tools as well as their use of these in practice, to assess both the levels of preparation and utilization, as well as the alignment between the two.

More Data Is Better...For Everyone.

Finally, how do we increase law schools' and law students' participation in research?

Despite the best efforts of many organizations, including those represented on the panel, law school participation remains lower than optimal for key studies. Recognizing the multiplicity of data gathering requests law schools receive, including from LSSSE, NALPF, the ABA (generally but also particularly if a school is in a site visit year), NALP, as well as rankings (USNWR and other), and independent researchers, nonetheless, with approximately 200 ABA accredited law schools, greater participation would enhance representation.

It would therefore be helpful to identify the specific barriers to participation that currently exist (including human and financial resources, student and alumni engagement, time constraints, and data management challenges) both for individual schools and more broadly.

It would also be fruitful for both schools and researchers to assess whether there are opportunities for collaboration/cross-fertilization between the various data requesting organizations, or alternatively, for the development of centralized data sets that would contain the data numerous researchers seek (while safeguarding institutions' and individuals' data), and simultaneously simplifying data collection and submission for schools.

ELIZABETH MERTZ

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**Law Professors' Values:
Hierarchy, Democracy, and Diversity in U.S. Law Teaching**
Co-authored with Katherine Barnes and Frances Tung

Lawyers have long occupied a prominent place in governing the United States, for good or ill. The power to train those lawyers has, in modern times, resided in the hands of the law professors who work in that country's law schools. Those professors have much in common, which they impart to their students when teaching shared languages, worldviews, and understandings of law. But law professors have also experienced significant divisions and struggles—not least over who should be allowed to pass through this key credentialing for the practice of law, as well as over what priorities should prevail in training and thinking about law. In many cases, the struggles have reflected a fundamental tension between democratic aspirations for U.S. law and legal education, on the one hand, and the imposition of hierarchies that would favor the interests of the powerful and wealthy, on the other. This is a tension that has been in place since the colonization of the U.S. gave birth to a new form of law and legal training that replaced Indigenous systems. And from the time of the foundation of formal law schools, those schools have put up barriers to socially marginalized people who wish to become lawyers—or who wish to become law teachers. Despite eloquent expressions of adherence to democratic and egalitarian values, today's law schools continue to reproduce social hierarchy and inequality. The legal profession is one of the least diverse in the United States. Even the medical profession has managed to do better, despite known disparities in STEM training across the country.

Yet the law professors we interviewed were, by and large, earnestly committed to the idea that law and lawyers should serve democratic goals. How do these law professors teach the fundamentals of a democratic legal system while participating in a system that generates noticeably unequal results? How do they make sense of the conceptions of “merit” that continue to generate those results in screening, training, and producing this country's lawyers? And how does U.S. legal education continue to resist change despite perennial criticisms? Despite perennial “crises” and reform efforts, law schools generally lean on old methods—and they still have not widely incorporated the kind of training in skills, ethics, and professional identity formation, based in empirical research, recommended since the time of Karl Llewellyn and Jerome Frank, through today.

Our study provides an empirically based analysis of U.S. law professors' professional values at the beginning of the 21st century, combining (to our knowledge) the only national random sample survey of U.S. law professors performed to date, and follow-up interviews with 100 of the survey respondents. We focused on the relatively understudied career phase after tenure—the period when professors have the most power to shape the law schools in which they teach. Using quantitative and qualitative approaches,

we discovered a striking difference in how tenured law professors viewed the core values of their profession. Some professors focused on making legal education open and accessible to people from a wide range of backgrounds, and on training lawyers who would further democratic goals such providing legal services to underserved communities. These values were over-represented among professors from traditionally excluded social groups. Others emphasized hierarchy as a key part of their vision of “merit,” with “top” test scores and grades from highly ranked schools as the gold standard. These values were over-represented among professors from advantaged gendered and raced backgrounds. This hierarchical approach has been shown to favor students from more privileged backgrounds. Some findings are further explained in appendices A & B to this piece.

If hierarchical approaches have a narrowing effect on admission to law schools, they have even more pronounced effects in the hiring and assessment of law professors. The tension between hierarchical and democratic goals was often implicit or obscured in professors’ discourse as they described their work, whether in our interviews or in patterned answers to our survey questions. For many, there was no tension. To them, the current system seems fundamentally fair. In this view, any skewing in outcomes happens because of inequalities in applicants’ abilities, not because of the system itself. For others, however, the question is more complicated. For those professors, questions of merit are intertwined with the overall goals of the legal system in a democracy. People holding these complex views are differentially law professors from formerly excluded groups. The sheer presence of traditionally marginalized people has not, according to some of our respondents (and available social science research), made legal training truly inclusive, democratic, or egalitarian. This is the case not only in terms of including diverse *students and professors* in law schools – but also in terms of openness to *knowledge and ideas* that challenge the status quo. To analyze the wide range of law professors’ views and values, it is crucial to grasp the culture of legal knowledge inside law schools, as part of a deeper picture of how U.S. law schools function in relation to hierarchy and democracy. One crucial part of this is what we call the hidden story of “unmarked” and “marked” identities and assumptions.

Patrece, an African-American woman who had trained at one of the top two law schools in the country, was teaching in a top-20 law school when we interviewed her. She told us that she worried not only about race and gender bias in the hires at her law school, but also about related cultural and class “elitism.” That elitism, she felt, favored scholars who had clerked on the Supreme Court regardless of whether their work was excellent or “pedestrian.” Nonetheless, she described her job as “the greatest job in the world in some ways.” Fred, a white man who had similarly been teaching for more than twenty years at his top-20 law school, was also happy with his job, encouraged that his dean had started placing “such a high value on citation counts and scholarly production.” Like Patrece, he graduated from a law school viewed as in the top two in the country. But unlike Patrece, he was very comfortable with a singular focus on stature and rankings, complaining only that his dean had not done more to succeed in that regard. He perceived no inequities along lines of race, gender, or sexual orientation at his law school, though he felt that “we need to make maybe some more efforts on racial minority hiring.” Fred viewed his profession through the eyes of an “unmarked” perspective, which accepts the traditional

values and hierarchy within U.S. law school cultures as natural, fair, and ahistorical.

For many “insider” professors like Fred, entrenched in a hierarchy that favored them, the structure of the U.S. legal educational system seemed natural, correct, and meritocratic. In one sense, Patrece is also an “insider” in that she graduated from one of the very top law schools in the country and was then successful in her research and teaching career. But, like a striking majority of women of color in our study, she maintained a more removed or skeptical attitude toward hierarchical values—keeping one foot outside of the mainstream. “Insider/outsider” professors like Patrece, working from marginalized or “marked” identities, perspectives and/or institutions, have thus created bridges between internal and external views of professors’ professional values. In answers to survey questions and in open-structure interviews, a high percentage of “insider/outsider” professors (and a small percentage of “insider” professors) moved beyond hierarchy, focusing instead on opening the doors of legal education to previously excluded populations, on serving communities without access to law, and on working toward equality in substantive justice.

As our study shows, from inside the cultures of legal institutions—whether law schools, law offices, courtrooms, or other sites—it is easy to think that the structures and cultures are natural, that this is the only way our institutions could be constructed. From inside U.S. law schools, it is easy to accept traditional ways of admitting students, teaching students, and ranking them. Assessment and hiring of law professors themselves also depend on hidden assumptions that often go unquestioned. But our results open a wider frame, demonstrating how taken-for-granted precepts are themselves constructed within institutional cultures. And for those who have thought of minority professors—and the knowledge they bring—as “add-ons” to a central story about the profession, we offer an alternative vision in which the traditional periphery is included as a crucial part of the center, of the future, of the hope that ideals can one day become closer to reality. From the marginalized or “marked” edges of the culturally accepted professional hierarchy, then, we find resilient sources of wisdom that could, if heard, help the center of U.S. legal education live up to its democratic aspirations. In recognizing the power of unmarked and marked assumptions in the culture of the legal academy, we can move beyond mere numerical assessments of diversity on law faculties to deeper examinations of inclusion.

In linguistic anthropology, this kind of division in perception has been addressed as part of “marking theory.” To take a relatively non-controversial example, consider the opposition in many varieties of English between “short” and “tall.” If we ask “How tall is he?” English speakers do not generally presuppose that the person in question is tall or short. By contrast, when we ask “How short is he?” the question generally presupposes that the person in question is short. Thus “short” would be considered the “marked” part of the opposition tall/short, while “tall” is “unmarked” in relation to short—it can cover the entire ground of relative height (from short to tall), or it can specifically refer to a tall height. A similar, more controversial relationship used to stand between “he” and “she,” though that is changing under the pressure of social change. The fact that “he” could stand for “he and she,” and that “man-kind” could unproblematically be taken to subsume women as well as men, was strongly related to the

social, hierarchical, and power relations between the traditionally recognized halves of a gender binary (Silverstein 1985).

Similarly, the unmarked racial category within professions such as law teaching has traditionally been “white.” That category is widely recognized within the social sciences as a socially constructed category into which immigrant populations have sometimes been assimilated (Irish and Italian immigrants in the U.S., for example). However, the implications of marking in raced professional relations have gained only very slow recognition in the dominant center of scholarship on the professions—and we include ourselves in the group of scholars who are still struggling to grasp the full extent of the changes needed to create a less skewed understanding. Our study results pushed us to see just how important it is to integrate marked and unmarked perspectives in analyzing our study results. We often write about “the” law school or “the legal profession” as unmarked centers to which “race,” “gender,” and other aspects of experience are then added. But the centers of professions and professional institutions are all constructed and occupied by people who can be characterized by race, gender, and other identities — all at once, as we’ve learned from scholars working on intersectionality. When people come from traditionally dominant groups, those aspects of their identity are often naturalized and taken for granted—as are the effects of their identities on the institutions in which they work. This is apparent in our data, and it has long been discussed in scholarship that, too, has been relegated to the margins.

Yet clear explications of racialized markedness in educational and professional settings have been available for a very long time. Our study draws on work by marginalized scholars who began spelling out the institutional landscapes and individual effects of racial markedness some time ago—and whose work continues to blaze trails that challenge the limits of current dominant paradigms. From this vantage, we can integrate race into the core analysis by recognizing that “white” is also a racial perspective; that we cannot ignore the way the way race is naturalized at the center of mainstream professions and scholarship on the professions; and that once we correct our own empirical/theoretical tools, it is not only people but also ideas that have been invisible.¹ In those ideas lie many exciting and fruitful ways to push old social scientific paradigms forward into greater accuracy and deeper understandings of the phenomena they’ve sought to study. Thus, when we look beyond assumptions baked into marked and unmarked categories, we can start to desegregate intellectual traditions and discourses. In particular, the responses of the law professors in our study reveal a pattern in which features of dominant racial and gender structures remain invisible or unanalyzed at the center of the profession. These taken-for-granted aspects of race and gender permeate assumptions about merit and professional values. In the process, the skewing cultural elements that respond to power structures and hierarchy, rather than to democratic values, are naturalized (made to seem natural or rational). However, the irrational aspects of these cultural assumptions are clearly visible from outside of the “unmarked” core—just as the clearest democratic vision for reform in our study emerged from the more marginalized law professors.

¹ Rahim’s (2021) research calls striking attention to the way this happens in graduate and law school classrooms, for example.

APPENDIX A

1. Values with minimal differences of opinions across demographic groups

“Maintaining tough teaching standards and setting high goals for student excellence”

“Protecting academic freedom by promoting diversity of opinions and of political attitudes”

“Producing students who are well-prepared for the practice of law”

Teaching their students well, and protecting academic freedom, were widely shared values. Across the board, professors also reported that they placed less value on the rankings of law schools than did their law schools. In qualitative responses, there were many complaints about the effects of law schools’ attention to rankings on the attention given to teaching and serving students.

2. Values with more significant differences of opinions across demographic groups

“Producing students who will represent indigents or under-represented communities”

“Providing legal services to the community (e.g. through clinics)”

“Promoting demographic (e.g., gender, race) diversity in the faculty”

“Promoting demographic (e.g., gender, race) diversity in the student body”

“Creating open and accepting classroom environments where students can feel comfortable”

“Teaching students tolerance; opening their minds to other cultures and new ideas”

White men professors were significantly less likely to place high importance on these values than were women of color. Men of color and white women fell in between white men and women of color, but they were also significantly more likely to place high importance on these values than were white men.

“Admitting students with the strongest possible credentials in terms of undergraduate GPA, quality of undergraduate institution, and LSAT scores”

Here the differences were the opposite, with white men being significantly more likely to place high importance on this value. Men and women of color were significantly less likely to place high importance on these values, as were white women albeit to a somewhat smaller degree than their colleagues of color.

APPENDIX B

In earlier work using these “After Tenure” data, our team discovered a very similar pattern in law professors’ assessments of how *fair their tenure process* was, (Barnes and Mertz 2012- *JLE*). The same was true of professors’ reports of *overall job satisfaction* (Barnes and Mertz 2018- *LSI*). In each case, women of color had the lowest opinions regarding job satisfaction and tenure fairness, while white men had the highest. This accords with Merritt and Reskin’s (1992) early finding that women of color are subject to a double penalty in law school hiring, based on facing bias based on both race and gender. It also supports Deo’s later finding of continued hurdles faced by women of color faculty in U.S. law schools (Deo 2019). Crenshaw (1989), Collins (1990), and many others have provided insight into the wider social structures, and narrower institutional patterning, that underlie this ongoing marginalization. Beyond documenting the penalties and structural biases that still lurk within the legal academy, scholarship on intersectionality opens new theoretical avenues for re-thinking values in the legal academy and beyond. If we do not assume that the dominant demographic group’s position is the normative or central place from which all other viewpoints are assessed, new vistas appear, both methodologically and substantively. (See Mathis, Rahim, and others on problems with the deficit model in law schools; Au, Emdin on deficit model in education generally. See Taylor and Guinier, Guinier/Torres on how responding better to this “miner’s canary” problem can improve legal education for all students.)

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When I think about change in the legal profession (and society), I most immediately go back to the year 2020. The COVID-19 pandemic; the unjust killings of George Floyd, Breonna Taylor, and Ahmaud Arbery; and the chaotic and fraught election cycle each sparked intensified calls for the legal profession to promote racial justice and protect democracy. Renewed were demands for a profession that reflects the racial and ethnic demographics of the country. The profession responded volubly. A deluge of solidarity and commitment statements was released. In unprecedented fashion, more than 300 law firms formed the Law Firm Antiracism Alliance, with a purpose of “promoting racial justice and eliminating systemic racism.”¹

The demands for racial representativeness invoke core imperatives of broadening access to justice and ensuring the protection of democratic rights for all people. Data tell us that lawyers from underrepresented backgrounds are more likely to represent underserved people and interests. For example, according to the National Association of Law Placement (NALP), about 11 percent of new Black and Latino/a lawyers worked in public interest jobs in 2016.² This was almost double the 6 percent proportion among Asian American and White lawyers.³

The trend is apparent in the private sector as well. A study of the legal profession in Texas found that Black and Latino/a lawyers there were more likely to practice as solo practitioners,⁴ likely the norm elsewhere as well. Solo practitioners serve critical access to justice roles by “blend[ing] legal practice and community service in a way that most other private practitioners cannot.”⁵ The study found that Black and Latino/a solos were typically representing “members of their own racial communities.”⁶ These are clients who often have limited options for legal representation, due to factors such as geographic location, limited financial resources, or the relatively low stakes of their matters.

In an article describing the distinctive role that Black lawyers play in our democracy, Carla Pratt, professor at the University of Oklahoma’s law school, asserts that Black lawyers stand at the gap

¹ Brief of Law Firm Antiracism Alliance as Amicus Curiae Supporting Respondents, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707), at 1.

² INST. FOR INCLUSION IN THE LEGAL PRO., IILP REVIEW 2019-2020: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 28 (2020), https://theiilp.wildapricot.org/resources/Documents/IILP_2019_FINAL_web.pdf.

³ *Id.*

⁴ Milan Markovic & Gabriele Plickert, *The Paradox of Minority Attorney Satisfaction*, 60 INT’L REV. L. & ECON. 1, 32 (2019), <https://scholarship.law.tamu.edu/facscholar/1443/>.

⁵ *Id.* at 10.

⁶ *Id.*

between democratic institutions and the democratic needs of the Black community.⁷ Pratt argues that Black lawyers help legitimize our democracy through race-conscious lawyering and by “their mere physical presence” in government and in the courts.⁸

A qualitative analysis of the After the JD data illustrates the assertions from both the Texas study and the Pratt article. The After the JD report highlights a Mexican American solo practitioner with a thriving criminal law and immigration practice.⁹ In addition to his paid work, the lawyer provided free legal advice and engaged in other volunteer activities, including service on his city’s school board and on the board of the Hispanic Bar Association. He serves his community through compensated and pro bono legal work, and his mere physical and visible presence confers legitimizing benefits to our democracy.

Unfortunately, the legal profession is woefully lacking in racial and ethnic representativeness. In 2023, the American Bar Association estimated that less than 12 percent of lawyers identify as Black, Latino/a, or Native American; members of these groups comprise more than 36 percent of the U.S. population.¹⁰ Fortunately, law schools are growing increasingly representative, with the 2023 national cohort being “the most diverse ever.”¹¹ Twenty-seven (27) percent of the cohort identified as Black, Latino/a, or Native American.¹² This represents tangible (albeit still insufficient) progress. But despite the growing diversity of law schools, the pathway to the profession remains filled with hazards that disproportionately harm underrepresented and marginalized aspiring lawyers. And this is an issue that data yielded from rigorous empirical research is helping expose and address.

The proverbial “pipeline” to the profession is typified by the disproportionate leakage of underrepresented people. To start, law school admission rates varied widely by racial and ethnic group. In 2022, fifty-two (52) percent of Black law school applicants did not receive a single offer of admission.¹³ This was the highest shutout rate among all groups. Native American and Latino/a applicants had shutout rates of 48 percent and 42 percent respectively.¹⁴ All were far higher than the 22 percent rate among White applicants that year.¹⁵

⁷ Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 *FORDHAM L. REV.* 1409, 1412 (2009).

⁸ *Id.* at 1411.

⁹ See Bryant G. Garth & Joyce S. Sterling, *Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews*, 31 *GEO. J. LEGAL ETHICS* 123, 166-67 (2018).

¹⁰ AM. BAR ASS’N, *PROFILE OF THE LEGAL PROFESSION* 18-31 (2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf>.

¹¹ James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, LSAC (Dec. 15, 2023), <https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains>.

¹² *Id.*

¹³ See ACCESSLEX INST., *LEGAL EDUCATION DATA DECK 7* (2024), <https://www.accesslex.org/research-and-data-tools-and-resources/legal-education-data-deck>.

¹⁴ *Id.*

¹⁵ *Id.*

The most apparent cause of these disparities is the misuse of LSAT scores by law schools. In short, law schools commonly place undue emphasis on the test when selecting students. Racial and ethnic score disparities mean that Black students, who have the lowest average score,¹⁶ face the toughest admission odds. But a 2021 analysis of almost 5,000 law students from 20 law schools highlighted the limits of the LSAT.¹⁷ It found that a 6-point increase in LSAT score (one standard deviation among the pool) predicted a 0.17 increase in first-year law school GPA.¹⁸ The analysis also found that the LSAT predicted bar exam passage—to a “small” extent.¹⁹ These impacts, while tangible and noteworthy, do not justify what one historian call the “overwhelming importance” placed on scores.²⁰ This analysis, conducted by me and colleagues from AccessLex, demonstrates the power of empirical research to buttress calls for reform.

A commonly expressed cause of the misuse is the supposed lack of information about other factors that help predict law school grades and bar exam performance. LSAT scores are used to essentially fill an information vacuum. But the consideration of the relevancy of various applicant characteristics and factors is ripe for empirical inquiry. Since 2018, AccessLex has partnered with law schools to conduct comprehensive studies of the academic and student engagement factors that impact a student’s academic and bar exam performance. Each partnering school shares outcomes data for multiple classes of their graduates. AccessLex researchers then conduct multipronged analyses and draft reports summarizing useful findings and offering actionable recommendations.

Findings vary across schools, but common themes have emerged, most pertaining directly to notions of inclusive student success. One of the most interesting findings has come from a novel analysis of undergraduate GPA that we added to our models in 2022. The analysis estimates the extent that *change* in an applicant’s UGPA predicts law school and bar exam outcomes. Does the extent to which the applicant’s UGPA improved (or declined) from the end of freshman year to graduation tell us anything about their prospects for law school success?

For each of the 14 schools we have exposed to this analysis, UGPA *change* was only slightly less predictive than LSAT scores and comparably predictive as the cumulative UGPA. In short, our analyses demonstrate that UGPA *change* can be a useful admission factor. We further found that this interpretation of UGPA yielded much lower racial and ethnic disparities than LSAT score or even cumulative UGPA.

The true value of the UGPA *change* factor was captured when we constructed two mock admission index

¹⁶ LAURA A. LAUTH & ANDREA THORNTON SWEENEY, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL AND ETHNIC BREAKDOWNS: 2011-2012 THROUGH 2017-2018 TESTING YEARS, 22 (2023), https://www.lsac.org/sites/default/files/research/tr-22-01_june-2023-edition_accessible.pdf.

¹⁷ Aaron N. Taylor, Jason M. Scott & Josh Jackson, *It’s Not Where You Start, It’s How You Finish: Predicting Law School and Bar Success* (AccessLex Inst. Rsch. Paper Series, No. 21-03, 2021), <https://dx.doi.org/10.2139/ssrn.3827402>.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 24.

²⁰ William P. Lapiana, *Merit and Diversity: The Origins of the Law School Admissions Test*, 48 ST. LOUIS U. L.J. 955, 986 (2004).

formulas using the dataset. One formula included LSAT score, UGPA, and UGPA *change* as selection factors. The other included LSAT score and UGPA only. The index that included UGPA *change* yielded 20 percent more Black students and 29 percent more Latino/a students than the LSAT/UGPA only index. Both formulas predicted about one-third of the variance in first-year grades among the pool of about 5,600 students.

With these findings, we are working to build school-specific formulas that integrate various impactful factors, including LSAT score, cumulative UGPA, and UGPA *change*, in ways that reflect their relative impact. The output of each formula will be a score that would aid the holistic and evidence-based review of applicants. The expected outcome will be an admission process that ensures that all applicants get a fair review, irrespective of their race or ethnicity.

The law school experience represents another source of leakage. Each year, thousands of law students are dismissed from law school due to deficient academic performance. Students from underrepresented groups are more likely than other students to face this indignity. An AccessLex analysis of 2016 ABA data found vast racial and ethnic disparities in non-transfer (likely academic) attrition.²¹ Native American law students were almost three times as likely as White students to leave law school for reasons other than immediate enrollment at another school.²² Black law students were more than twice as likely.²³

For over a century, legal education has been structured based on a model attributed most prominently to Christopher Columbus Langdell. The so-called “Langdell System” has three components: the case method of organizing course material; the Socratic method of teaching the material; and written exams based on hypothetical scenarios to test knowledge of the material. The system’s philosophical basis is an academic “meritocracy” centered on individualism and the pitting of students against each other for coveted places in the curved grading distribution. This structure has given legal education its justified reputation as a stressful, sometimes cutthroat, experience.

Langdellian instructional methods have been broadly presumed to be effective at training students to “think like lawyers.” But for many decades, this presumption was not rigorously tested. Recently, however, findings from various studies have shed light on the limits of this traditional pedagogy. For example, a 2017 study conducted at the University of Minnesota’s law school sought to assess the impacts of exposing students to multiple formative assessments throughout the semester as an alternative to the traditional model of little to no formal feedback other than a grade on a final exam.²⁴ The study findings were fascinating, though unsurprising to anyone with some understanding of instructional science.

²¹ Kylie Thomas, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX INST. (Sep. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

²² *Id.*

²³ *Id.*

²⁴ Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139 (2017).

Students receiving the enhanced feedback outperformed their peers who were exposed only to the traditional pedagogy. The effect was “both statistically significant and hardly trivial . . . approaching about one-third of a grade increment,” after controlling for various student background characteristics.²⁵ The researchers further concluded that the favorable effects were most intense for students who entered law school with below-median LSAT/UGPA profiles.²⁶ These students are more likely to be members of underrepresented and marginalized groups.

The study was an example of applied empirical research that yielded actionable data. It was conducted at a single school, taking advantage of conditions creating what the researchers deemed a “natural experiment.”²⁷ The study was rigorously designed and made appropriate use of regression modeling that allowed for causal inferences. The findings were directly actionable, exposing the shortcomings of traditional pedagogy while providing insights about superior methods. Moreover, the findings highlighted how good pedagogy fosters broad, inclusive student success. This study could be replicated at virtually any law school.

Bar admission processes, centered on bar exams, are a third point of leakage. According to 2022 ABA data, Black bar exam takers had only a 57 percent first-time passage rate.²⁸ This was the lowest rate among all racial and ethnic groups. Native Americans had a rate of 60 percent; Latino/a test-takers had a rate of 69 percent.²⁹ The rate among White test-takers was 83 percent.³⁰ The most dreadful thing about the disparities is that there is little evidence that bar exams do what they are purported to do.

The stated purpose of bar exams is to test minimum competence to practice law. But the weight of recent empirical inquiry strongly suggests that the exams are little more than “grueling and potentially unfair rite[s] of passage.”³¹ A fundamental issue is that few jurisdictions have even defined minimum competence to practice law. Minimum competence is surely a thing, but it is impossible to consciously devise a test to measure its acquisition without defining it. Yet, hundreds of thousands of aspiring lawyers have been told they were “incompetent” based on an undefined concept of competence. Acknowledging this unfairness, various researchers have recently employed empirical methods to identify tangible conceptions of minimum competence—the things all lawyers should know and know how to do.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ AM. BAR ASS'N, SUMMARY BAR PASS DATA: RACE, ETHNICITY, AND GENDER 1 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2023/2023-bpq-national-summary-data-race-ethnicity-gender.pdf.

²⁹ *Id.*

³⁰ *Id.*

³¹ Joan W. Howarth, *Teaching in the Shadow of the Bar*, 31 U. S.F. L. REV. 927 (1997).

A seminal study published in 2020, *Building a Better Bar: Capturing Minimum Competence*,³² convened 50 structured focus groups involving more than 200 lawyers. The effort identified twelve “building blocks” that comprise minimum competence.³³ The researchers concluded that some of the building blocks are difficult, if not impossible, to assess via a written exam—the principal format of bar exams.³⁴ Two other major studies, published by the National Conference of Bar Examiners³⁵ and the State Bar of California,³⁶ also in 2020, employed a different method—surveys of thousands of lawyers—to define minimum competence. The data yielded by these efforts are driving reforms, including the NCBE’s development of the NextGen Bar Exam and the possible adoption by California of a portfolio-based, non-exam licensing pathway. These reforms and others hold promise for increasing the effectiveness and legitimacy of the bar admission process.

The crises wrought during 2020 trained intensified focus on the legal profession’s role in promoting racial justice and protecting democracy. Calls for change came from many corners, including the profession itself. Change requires new frameworks and mechanisms for overcoming the presumptions and inertia that entrench the status quo. Rigorous empirical research is indispensable to informing useful reforms. The data it yields contribute to collective understanding and provide bases for undoing harms. As the legal profession also grapples with other sources of change—generational shifts in the workforce; the growing concern for mental health and wellness; and the emergence of new technologies—data will be needed even more to aid human judgement. Our traditions and habits, without more, will increasingly show the strain of their inadequacy in legal education and elsewhere.

³² DEBORAH JONES MERRITT & LOGAN CORNETT, *BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE* (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf.

³³ *Id.* at 31.

³⁴ *Id.* at 71.

³⁵ TESTING TASK FORCE, NAT’L CONF. OF BAR EXAM’RS, 2019 PRACTICE ANALYSIS (2020), https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf.

³⁶ STATE BAR OF CAL., *THE PRACTICE OF LAW IN CALIFORNIA: FINDINGS FROM THE CALIFORNIA ATTORNEY PRACTICE ANALYSIS AND IMPLICATIONS FOR THE CALIFORNIA BAR EXAM* (2020), <https://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf>.

Going Forward: Challenges, Opportunities, Responsibilities

QUESTIONS PRESENTED: What is the biggest challenge confronting the legal profession today? What can and should be done to respond? How do you view lawyers' responsibilities today and how do they differ than in the past?

- **William C. Hubbard**
Dean
University of South Carolina Joseph F. Rice School of Law
- **Daniel B. Rodriguez**
Dean Emeritus and Harold Washington Professor
Northwestern Pritzker School of Law
- **Norman W. Spaulding**
Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law
Stanford Law School
- **Honorable Diane P. Wood**
Senior Circuit Judge, U.S. Court of Appeals for the 7th Circuit;
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Senior Lecturer in Law, University of Chicago Law School

Upholding the Rule of Law: The Special Responsibility of Lawyers*

The Biggest Challenge: A Rule of Law Recession

The biggest challenge confronting the legal profession is the global recession of the rule of law. Characterized by executive overreach, declining trust in institutions, mounting corruption, failing justice institutions, shrinking space for civic participation, and independent media, the rule of law recession affects every region of the world, including rich and poor countries, established democracies, and autocracies.

This recession has been tracked closely by the *World Justice Project (WJP) Rule of Law Index*, the leading source of original rule of law data globally. The Index measures the rule of law in 142 countries, and it is published annually by the World Justice Project. The Index draws on surveys of practitioners and households in each country, through which it seeks to measure in a globally comparable way, how the rule of law is experienced in practice. The WJP aggregates more than 550 survey questions into scores and rankings for each jurisdiction on eight different factors and forty-four sub-factors of the rule of law. The eight factors are: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.¹

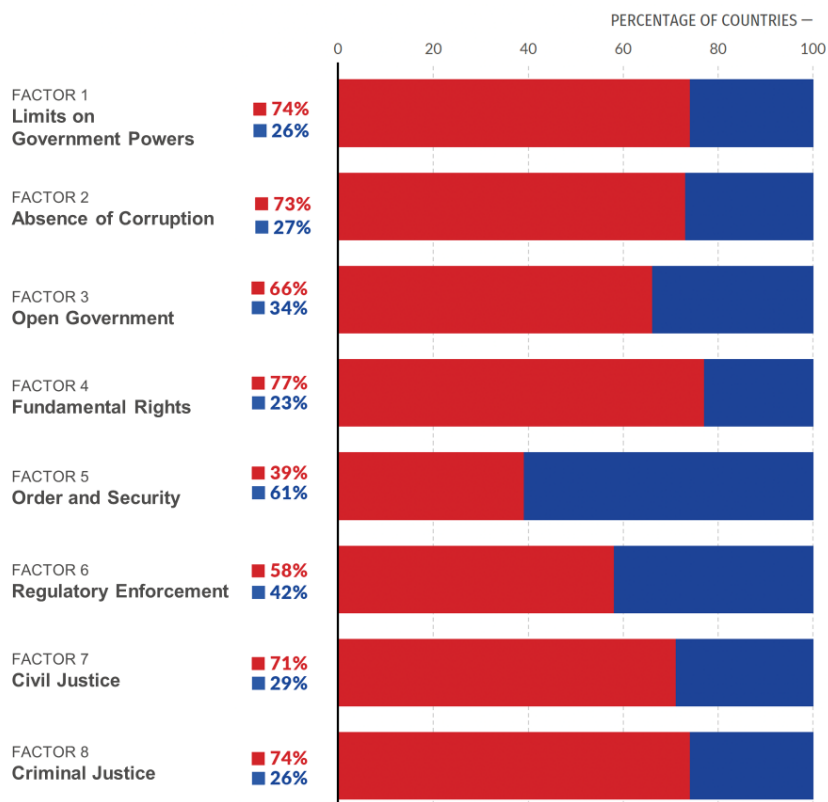
Since 2016, the WJP Index found that the rule of law declined in 78% of countries, with an average decline of 5%. Countries with weak rule of law declined more sharply. The Index marked particularly widespread and steep deterioration in the rule of law during the COVID-19 pandemic. This captured some expected outcomes, such as increased delays at shuttered courts and reduced opportunities for free assembly, but also more troubling responses like mounting discrimination and an exercise of excessive emergency powers. Unfortunately, as the pandemic has receded, the rule of law has not rebounded.

Since 2016, a majority of countries experienced a decline in all eight factors except “order and security.” The decline in the factors measuring “constraints on government powers,” “absence of corruption,” and “fundamental rights,” are most stark and correspond with a global rise in authoritarianism. A concerning trend emerged in the 2023 data (see Figure 1 below), which saw an expanding trend of deterioration in the performance of both civil and criminal justice systems as well.

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¹ A detailed description of the Index methodology is available in the Index publication and on the WJP website. See WORLD JUST. PROJECT, RULE OF LAW INDEX 2023, at 184–87 (2023), <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf>.

The Global Rule of Law Recession: 2016-2023



The rule of law in the United States mirrors global trends. In the 2023 WJP Rule of Law Index, the United States ranked 26th out of 142 countries, slipping four positions since 2016 and landing just below Uruguay and ahead of Slovenia. Since 2016, the United States has seen a 5% decline in its Index score and experienced a precipitous decline in the Index measures of “constraints on government powers” (-15%), “fundamental rights” (-9%), and the functioning of the civil (-5%) and criminal (-11%) justice systems.

These recent negative trends compound longstanding weaknesses in the United States, particularly concerning access to justice and discrimination. In the 2023 Index, the United States ranked a dismal 106th on discrimination, 115th on accessibility and affordability of the civil justice system, and 109th and 124th on discrimination in the criminal and civil justice systems, respectively.

The deterioration of the rule of law in the United States is deeply concerning and reflects an erosion of a critical foundation of our unique democracy. These trends not only affect the quality of governance in our country but also threaten global stability as the United States’ role as a rule of law standard-bearer declines. Turning the tide on these negative rule of law trends is an urgent priority.

Mounting an Effective Response

Despite division, polarization, and deteriorating rule of law in the United States, Americans remarkably agree about the rule of law principles that *should* govern our society—principles such as accountability to the law, fairness, impartiality, and non-discrimination. In a 2021 survey, WJP asked U.S. respondents

whether they thought the President should always follow the law and the courts. Eighty-six percent agreed that he should. The level of agreement was consistent among Republicans and Democrats and was significantly higher than agreement among citizens of other advanced democracies, such as France, Germany, and Japan.

Unfortunately, while we share these values in the abstract, most Americans are skeptical that they are adhered to in practice. In the same survey, only 24% of respondents believed a high-ranking official who broke the law would be held accountable. This represents a steep decline since 2014, when 60% of respondents believed law-breaking officials would be held accountable. U.S. respondents in the 2021 survey were also less likely than their counterparts in most other G7 countries to say that fundamental rights relating to free expression, the media, and voting are respected, and they were less likely to say they believe that the Congress, courts, or citizens would hypothetically stop a president's illegal action.

While Americans remain broadly committed to rule of law principles, their confidence that the institutions of government embrace those principles has eroded. This is likely a function of both institutional failings and mis- and dis-information regarding those institutions. The data suggest these challenges are growing, and the coming election cycle threatens to compound them. An effective response must strengthen both U.S. institutions and the information ecosystem that informs people's level of trust in them. The legal profession has an important role to play in mounting this response.

A. Toward Equal Justice Under Law

People's trust in institutions corresponds to their experience of those institutions delivering just outcomes—not just for those in high office, but also in people's everyday lives. Unfortunately, the U.S. justice system is notoriously laggard in meeting people's needs. A legal needs survey carried out by the WJP in the United States found that 66% of respondents experienced a legal problem in the past two years, and less than half had been able to resolve it. Only 33% turned to an advisor for help, and of those, 49% looked to a friend or family member, while just 38% turned to a lawyer, 6% to a government legal aid office, and only 15% to a court, government agency, or police. People's unmet legal needs include a wide range of problems that frequently relate to money, debt, commercial disputes, housing, and family matters. Forty-five percent reported that their legal problem caused them hardship, including consequences for their health, employment, and housing.² The justice gap is even more acute for people living in poverty. According to a 2022 study by the Legal Services Corporation, 92% of the legal needs of low-income people go unmet.³

“Equal justice under law” requires a transformation in the way the U.S. justice system conceives of

² See generally *Global Insights on Access to Justice*, WORLD JUST. PROJECT (2019), <https://worldjusticeproject.org/access-to-justice-data/#/country/USA> (last visited Feb. 27, 2024).

³ LEGAL SERVS. CORP., *THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (Apr. 2022), <https://lsc-live.app.box.com/s/xl2v2uraitotbbzrhujlgi0emp3myz1>.

and delivers services. Grounded in data about people's legal needs and a clear-eyed understanding of the barriers to justice they face, legal professionals must develop innovative solutions, including the widespread provision of legal information about people's rights and pathways to justice; the use of technology and licensed nonlawyer legal services to help people solve their problems efficiently; and collaboration with social service providers to address root causes and other preventive approaches to head off legal problems.⁴

While lawyers alone cannot solve the justice gap and build corresponding confidence in the justice system, they stand to play a critical role. As the Preamble to the Model Rules of Professional Conduct reminds us, a lawyer is a member of the profession and represents clients, but he or she also serves as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁵ Each of us must ask what we can do to strengthen that quality of justice. Bar associations, law firms, and individual lawyers must embrace innovation and change to discover new ways to deliver justice to the vast majority who cannot access it.

Finding solutions to meet the needs of our diverse country will require an equally diverse profession. The American Bar Foundation's impressive study, *The Making of Lawyers' Careers*, which is the focus of this conference, underscores the persistent challenges we face in achieving that goal.⁶ The Supreme Court's conclusion that race-conscious admissions are no longer constitutionally permissible raises the bar for all of us to redouble our efforts at building a diverse pipeline of American lawyers through outreach, recruitment, and mentoring.

Building a diverse legal profession that is responsive to the needs of people will help build a constituency that trusts and appreciates the justice system, but this is only half of the rule of law challenge we face. The justice system is also being buffeted by mis- and dis-information that undermines trust. As is elaborated below, lawyers seeking to shore up the rule of law must also counter these forces and strengthen the information ecosystem surrounding our justice institutions.

B. In Defense of the Justice System

While strengthening how our justice institutions meet people's needs will help garner greater support and trust, those institutions also need to be perceived by the public to deliver justice. Unfortunately, justice institutions, and courts in particular, are notoriously weak at public relations. Set apart from society by design in order to maintain their independence, courts and judges can appear aloof and out

⁴ See generally AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., *THE FUTURE OF LEGAL SERVICES: FINAL REPORT* (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf; see also Rebecca L. Sandefur & Matthew Burnett, *Justice Futures: Access to Justice and the Future of Justice Work*, in *RETHINKING THE LAWYER'S MONOPOLY: ACCESS TO JUSTICE AND THE FUTURE OF LEGAL SERVICES* (David Freeman Engstrom & Nora Freeman Engstrom eds., 2024).

⁵ *Model Rules of Professional Conduct*, AM. BAR ASS'N (2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/?login (last visited Feb. 28, 2024).

⁶ ROBERT L. NELSON ET AL., *THE MAKING OF LAWYERS' CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION* (2023).

of touch, rendering them vulnerable to a populist backlash.

Recent years have seen partisan interests resort to demonization of the courts. The U.S. Marshals Service has reported that serious threats against both prosecutors and federal judges more than doubled between 2021 and 2023.⁷ A recent Brennan Center report identified 129 bills undermining judicial independence introduced in 29 state legislatures over the past year.⁸ With the presumptive Republican nominee for President facing over ninety counts in four separate criminal proceedings, we can only expect the pressure on the judiciary to mount.

In the face of these challenges, lawyers must stand up for the justice institutions at the core of our rule of law. We may not agree with every decision that emerges from the courts, but we should defend the process and their authority to decide. Bar associations should resist partisan efforts that erode judicial independence, and they should mount civic education initiatives to explain and defend the role of courts to the public.

The declining state of the rule of law in the United States and around the world is a daunting challenge. But a concerted effort by the legal profession can address the systemic weaknesses in our justice system and expand access to justice. Coupled with a full-throated defense of the role of our justice institutions at this critical time, these initiatives can build much-needed trust in and adherence to the rule of law. As we did during the McCarthy era, Civil Rights movement, and the Watergate scandal, lawyers stand to play an essential role in shoring up the rule of law foundation of our democracy.

⁷ Joseph Tanfani et al., *Threats to Federal Judges Double Since 2021, Driven by Politics*, REUTERS (Feb. 14, 2024).

⁸ Michael Milov-Cordoba et al., *Legislative Assaults on State Courts in 2023*, BRENNAN CTR. FOR JUST. (Jan. 9, 2024), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2023>.

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The problems facing the legal profession are ubiquitous. The ones that approach a crisis center on the limited access to justice, especially in the administrative and civil context; the much-discussed decline in lawyering as a service, to clients and to society; and the capacity of the legal system and the legal professionals who undergird it to deal with the relentless march of technology. Just as the sources of these wicked problems are complex, the routes to change—change which may entail a fundamental rethinking of the way we do our work—are extraordinarily complex. One especially vexing obstacle to meaningful change is the absence of any cohesive, obvious fulcrum of action, of reform. Constructing collective action across a wide range of organizations and entities will be essential to progress.

The legal profession is organized around myriad institutions—institutions that regulate the profession, maintain the conditions for lawyers' professional responsibilities, promote the welfare of lawyers, channel and facilitate lawyer activism, and support other institutions. Perhaps the first mega organization that comes to mind is the American Bar Association, a nationwide group of lawyers created to advance various interests and objectives of lawyers and also, as they advertise, the advancement of the rule of law. Law schools have the Association of American Law Schools as an organization assisting member schools with professional development and progress in realizing their objectives. Judges and courts have their organizations, sometimes segmented into subject matter, and other times created around the distinct needs and wants of federal and state courts. This is just the beginning. There are dozens of organizations that are created around advancing distinct goals, some manifestly political, as with the hoary National Lawyers Guild, and others focused on matters of subject matter, as with the American Law & Economics Association. Some important organizations are preoccupied with law reform, such as the American Law Institute and the Uniform Law Commission.

With these many institutions, the organizational ecosystem of law and the legal profession is a highly balkanized one. These many organizations are bounded in their roles and, to put a finer point on it, bounded in their capacity and their commitment to help look after the ecosystem as a whole. Despite, for example, the ABA's avowed goal to be a fulcrum for the rule of law and the legal profession writ large, it has always and will always be a trade association for lawyers—and indeed, for what has long been a declining number of lawyers (fewer than 20% of lawyers are ABA members). Other organizations have a much smaller remit than does the ABA, and so will contribute limited value to the general ecosystem.

The absence of institutions that can look across the terrain at the various problems, persistent and emerging, that affect law and the legal system means that the opportunities for constructive collective action are missed, that the interests of the society whose welfare the legal system is ultimately intended to serve go unserved, and that there aren't well configured strategies to look at the big picture problems

that persist in the profession. The void is endemic to the way we organize the profession, and yet the problem is worsening, for various reasons that deserve our attention.

Without diminishing the continuing value of the ABA as perhaps the most obvious fulcrum for organizing lawyers into a large group to tackle myriad issues and to develop constructive solutions, that group is in some ways on the ropes. As mentioned above, membership continues to decline, especially among younger lawyers, and so that organization has a hard time billing itself as broadly representative of all or even most elements of the profession. Nor has the ABA distinguished itself in recent decades as a constructive agent of innovation and courageous risk-taking. I say this with some measure of care, acknowledging that the ABA has in even its recent history been able to count among its leadership such brave and wise leaders as William Hubbard, the person who bears of the name of this important legal education conference. But, still and all, I do not believe we do well by our profession, which we prize, to ignore the fact that the ABA is not showing the kind of inclusive, effective leadership in driving systematic change, incentivizing innovation, experimenting with novel means of furnishing legal services, rethinking problematic rules that constrain imaginative reform (take the anachronistic intransigence of the way the ABA deals with Model Rule 5.4), and in being a centrifugal force for change.

Other organizations, as noted, do not aspire to such comprehensive reform. They intend to improve parts of the profession, advocate for distinct issues, and provide space for individuals with specific affinities to come together to do specific things. It is hard to see these groups as recreating themselves for more omnibus purposes, although it would at least be interested to do some blue-sky thinking about whether some common interests could be identified and, if so, a more common structure configured.

The bigger task is to explore how we might think creatively about a larger organization that can be a blueprint group, a lever of sorts, for meaningful consideration of reform and the facilitation of such reform. Such an organization need not aspire to replace the ABA. To be clear, my focus on the deficiencies of the ABA should not blot out the obvious and important ways that this organization supports many elements of the profession and therefore has a major role in our legal ecosystem. Rather, such an organization, or maybe a cluster of organizations with overlapping, common objectives, might be formed and supported with an avowed set of goals, which includes:

- 1.** Sustainable support for the great work being done by the American Bar Foundation (on whose board I am privileged to sit). Not to reinvent the wheel, but to ensure that the ABF is supported on the scale that would enable it to be dependent not merely, or even mainly, on the generous support of the American Bar Endowment (whose support is of course necessarily discretionary), but also would expand considerably the empirical efforts of that organization;
- 2.** An innovation-minded focus, permeating the entire structure and ideology of the organization. Such a focus would require the very difficult transition from the mindset that privileges the status quo interest of lawyers, and, as well, a mindset that finds comfort in the existing ways of doing and thinking, toward a mindset that accepts that we have a profession deeply broken; that

we have an access to justice crisis that necessitates a fundamental reconsideration of existing “unauthorized practice of law” rules and other rules that obstruct change; and, overall, that fundamental, not incremental, change is needed;

- 3.** A technology-minded focus, and one that looks closely and broadly at the challenges posed by, and opportunities provided by, various new modalities of technology. Such an organization cannot be expected to be pro technology or anti-technology, but catholic and evidence-based in its consideration and evaluation of technology as it impacts law;
- 4.** A cross-disciplinary membership and leadership. Law and legal institutions are embedded in larger contexts and require multidisciplinary ways of thinking. It is only appropriate, therefore, that an organization that focuses on solving the problems that plague law and the legal profession would include individuals and entities that are impacted by, and impact, law and legal institutions, even if they are formally outside of the legal profession. Current organizations, including the ABA, recognize the importance of affiliates. Yet it is only if there is a more conspicuous effort to connect folks from outside the four corners of the profession then we can expect wicked problems to be truly solved by eclectic, multidisciplinary solutions.

Disintegrated Professional Identity: Two Forms of Interest Convergence in the Twenty First Century Legal Profession¹

I am not a proponent of the view that the profession is in crisis. Abundant evidence from the ABF's pathbreaking research rebuts the point. Substantial barriers remain to establishing a truly egalitarian profession, especially at the most elite echelons, but there has also been transformative progress since the publication of *Chicago Lawyers* in 1975 – greater progress than at any other period in the history of the legal profession has occurred in two generations, and greater progress than one might have expected given the degree of entrenched racial, religious, and gender bias reflected in the “two hemispheres” bifurcation of the profession in the 1970s.² Understanding how this progress has been made is essential to breaking down remaining barriers. Celebration of these transformative changes is not irreconcilable with intolerance for discrimination and acute sense of urgency about remaining barriers.

The long, arduous, and exclusionary path to equity partnership in large firms is sobering, but relative to any other period in the history of the profession, in-house counsel and entrepreneurial opportunities for lawyers are extraordinary. There has also been a remarkable shift in power and prestige to in-house counsel, not only in the profession, but in the companies in which they work. *The Making of Lawyers' Careers* correctly characterizes general counsel as “the ultimate judges determining how much professionalism they are willing to pay for.”³ There is further evidence that lawyers can be absorbed into the business culture of the corporations at which they work, to the detriment of the independent judgment (see Enron and GM), but there is also evidence that GCs have tangible influence on the leadership and culture of these corporations. The rise of risk management and compliance have “broadened the role of general counsels,” giving them a seat at the table in the very earliest phases of business planning – a phenomenon some have described as nothing short of a “seismic shift” -- and they have become “viable candidates for the job of CEO – evidence of their growing role as business partners.”⁴ The enduring question is how and on what terms GS's preserve their independent judgment as against the business imperatives of the corporations in which they work and there is need for deeper study of this.

Lawyers still fail to perform the full 50 hours of pro bono work that the ABA recommends, but compared to the 39 percent of doctors who report having provided any free medical services over a 12

¹ © Norman W. Spaulding. I am grateful to the Rhode Center and the ABF for sponsoring this event and inviting me to participate.

² JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

³ ROBERT L. NELSON ET AL., *THE MAKING OF LAWYERS' CAREERS* 44 (2023).

⁴ Boris Groysberg, L. Kevin Kelly & Bryan MacDonald, *The New Path To the C-Suite*, HARV. BUS. REV., MAR. 2011, [HTTPS://HBR.ORG/2011/03/THE-NEW-PATH-TO-THE-C-SUITE](https://hbr.org/2011/03/the-new-path-to-the-c-suite).

month period, the ABA's 2018 study showed that more than half of the American bar performed pro bono work at an average of 37 hours per year.⁵ That is more hours than ABF participants reported, but taking either measure, lawyers do more pro bono work than a service profession that enjoys far greater popular support. We do more pro bono work than accountants, architects, engineers, and software engineers as well. It is a drop in the bucket compared to the needs of low- and middle-income Americans, but its purpose is never to fully close the access to justice gap. In addition to providing legal services to those in need, it reinforces core service values, deepens professional independence and expertise, it boosts morale, and it helps solo and small firms stay afloat by developing business relations.

There are important, complex issues surrounding lawyers' mental health, but the ABF study showing relatively high job satisfaction among surveyed lawyers is consistent with other recent work by Listokin and Noonan showing that the unhappy lawyer narrative is empirically unfounded. Using "gold standard" National Health Interview Survey data from the CDC, they found that although lawyers consume more alcohol than other groups (substantially more), we are significantly less likely to have serious mental health problems than the general population, and about the same rate as people with a masters, PhD, or medical degree.⁶

All of this reinforces a point well made in *The Making of Lawyers' Careers* that the rhetoric of crisis "is frequently deployed by self-interested actors who [benefit] (directly or indirectly) from the anxiety" which the rhetoric is designed to evoke.⁷ There are very real challenges facing the profession, but those of us who study its history know that there have always been profound challenges facing the law and the profession. This is structural, not episodic, in no small part because there has always been and always will be tension in a democratic society between popular and expert determination of the administration of justice: complete popular determination would invite majority tyranny, mob justice, even fascism in our current information culture. On the other hand, complete expert determination would be fundamentally undemocratic. The people must have a say in what the law is. Those who traffic in the rhetoric of crisis play upon this contradiction, claiming that it can be resolved if only we accept their substantive theory of justice – but generally this only sharpens the contradiction, trading pluralism for legal certainty in a society that always has been and always will be pluralistic in identity and views about what justice requires. As my colleague Lawrence Friedman once wrote, however, lawyers are an "exceedingly nimble" profession and there are reasons to hope that we will respond nimbly to the challenges of this century.⁸

⁵ Kassandre Goupil & F. Stuart Kinsinger, *Pro Bono Services in 4 Health Care Professions: A Discussion of Exemplars*, 27 J. CHIROPRACTIC HUMAN. 21 (2020); AM. BAR ASS'N, STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE IV: A REPORT ON THE PRO BONO WORK OF AMERICAN LAWYERS (2018).

⁶ Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. EMPIRICAL LEGAL STUD. 4, 28 (2021).

⁷ NELSON ET AL., *supra* note 3, 28.

⁸ LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 634 (2010).

So what keeps me up at night. There are two forms of interest convergence of progressives and conservatives that will in many respects define the trajectory of the bar in this century. One concerns access to justice, another how we understand the lawyer's role. Both pose challenges to the administration of justice, especially if they develop unchecked on their current trajectories.

First, access to justice. The data are alarming and familiar to everyone in this room. Equally alarming, in my view, is the convergence on some form of legal tech as the solution. Some of the deepest incursions of AI and other digital technology into the law are occurring because deregulatory conservatives (many of whom have never previously lifted a finger to address the legal needs of low and middle income Americans), have joined forces with progressives who believe passionately in meeting these needs and have simply given up on trying to convince courts and the public to subsidize meaningful access to counsel and other alternatives. The result of this political convergence is evasion and diminution of the bar's regulatory authority in order to permit tech companies run by engineers and entrepreneurs who have no code of ethics, take no oath to uphold the law, and have no fiduciary duties to courts or clients to develop technology for online dispute resolution.

There are truly benevolent versions that could emerge from this convergence of interest. Efficient, remote methods that provide a meaningful substitute to court appearance and the costs attendant to obtaining counsel may be transformative. On the other hand, given that the vast majority of state court dockets involve some form of debt collection – either private debts owed to creditors and landlords or public debts owed to courts on the criminal docket – digital architectures based on fast, interest-based resolution that don't inform parties of their rights or attempt to determine how those rights apply to the facts of their cases is the functional equivalent of an accelerated debt collection system – all operating away from public scrutiny behind encrypted lines of code and in machine learning systems that are opaque even to their designers.

No one who really cares about the legal rights of low- and middle-income Americans could describe this as access to justice. Courts reduce their dockets and increase the payment of fines and fees; prosecutors bump their conviction rates with online uncounseled misdemeanor pleas; creditors achieve faster enforcement of remedies; and software designers reap profits. But individual, unrepresented debtors – by far the most common defendant in state courts, get virtually no help resisting debts which, on the merits, they may not owe. There is the convenience of not having to show up in court, but the travesty of conceding liability and execution of judgment when one deserves relief on the merits. This is not a dystopic future, it is the most financially sustainable model of ODR operating in several states right now.⁹

⁹ Norman W. Spaulding, *Online Dispute Resolution and the End of Adversarial Justice?*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 251 (DAVID FREEMAN ENGSTROM ED., 2023).

Proponents and apologists argue that this model is better than nothing, but no policy intervention is judged against a baseline of zero – it is judged by costs and benefits against a baseline of safety and efficacy. The assumption that poor people don’t need or deserve merits based determination of their disputes – just speed and remote access – is deeply inegalitarian. As Langdon Winner warned argued over four decades ago, technological artifacts have politics.¹⁰ What he meant was that machines are not only properly judged for “their contributions of efficiency and productivity ... but also for the ways in which they ... embody specific forms of power and authority.”¹¹ To understand innovations and assess them we have to “pay attention to the characteristics of technical objects,” especially the way technologies “settle” social practices by reshaping the space in which they occur and the aspects of some technologies that are “inherently political” because they “appear to require ... particular kinds of political relationships.”¹²

This matters because the architecture of some technologies is more centralizing and authoritarian than democratic.

Those of us who are concerned with the complexity of legal jargon, its inaccessibility to lay persons, should also be interested in the inherent complexity of code; those of us who are concerned with legal decisions made behind closed doors and post hoc rationalization of judicial decisions should be concerned with encrypted code and biased, inaccessible data; those of us who are concerned by the bar’s protectionism and monopoly power should be deeply concerned with the tendency toward monopoly, and the attendant concentration of data and capital, in large tech companies; those of us concerned with the ways in which law disciplines ordinary people and produces docility should be concerned with the ways in which algorithmic governance generates accelerated compliance with legal commands that may not be valid; and those of us who believe the duty of confidentiality, the attorney client privilege, and the privilege against self-incrimination matter to privacy and civil liberty and the integrity of the administration of justice, should be concerned with the way online fact gathering exposes the data of participants to abuse by legal tech vendors, prosecutors, other government officials, and unknown third parties.

Better legal tech will emerge when the fever of group think created by interest convergence about legal tech breaks. The ABA’s guidelines for court systems considering ODR are a starting point. But courts need the work of institutions like the ABF and other independent contributors to the debate to identify proper design principles.

The second interest convergence that troubles me involves the rejection on both the left and the right

¹⁰ Langdon Winner, *Do Artifacts Have Politics?*, 109 DÆDALUS 121 (1980).

¹¹ *Id.* at 121.

¹² *Id.* at 123.

of an understanding of the practice of law as role differentiated. On the left, this began with critiques like my colleague William Simon's and philosopher Richard Wasserstrom, to the effect that serving a client's interests within the bounds of the law is (a) a form of false consciousness that masks the profession's promotion of the interests of capital, (b) evasion of moral accountability for harms caused by the role – harms that offend principles of ordinary morality cannot on this view be excused because they are required by the role, and (c) psychologically harmful to lawyers as well by alienating self from role.¹³ To this day, the most dominant voices in the field of professional responsibility begin from some combination of these dark premises about client-centered lawyering.

Notice that, just as the left was sharpening this critique in the 1970s, it was also championing ADR over the adversary system, and criticizing the civil rights movement as too moderate and underinclusive. Together these critiques represented a nearly full-scale retreat from the very tools that had produced the most significant egalitarian reforms in American society since the labor movement and the New Deal. The spirit of this retreat was iconoclastic – premised on the view that if the profession as a whole could be transformed by conscience in the form of moral activism, corporate lawyers would see the moral bankruptcy of their labor and join ranks in the project of dismantling both capitalism and the adversary system. The alternative hypothesis, that at least some corporate lawyers actually believe in wealth maximization as a means of promoting social welfare, was either ignored or dismissed. The view that the rule of law in a pluralistic society actually hinges on having some number of lawyers who do not pre-judge clients and cases according to their own morality or ideology was derided as naïve functionalism in the study of the professions.

Work by Ann Southworth and others has shown that, during the very same time period, conservatives adopted roughly the same model of morally activist and ideologically charged cause lawyering the left had used within the framework of the adversary system in the mid-century. There is no more influential form of cause lawyering right now than conservative cause lawyering. Substantively, doctrines of judicial restraint carefully elaborated to function as an alternative to Warren Court constitutional activism are now giving way to explicitly activist conservative jurisprudence such as we see in Adrian Vermeule's effort to integrate the state and religion in "common good constitutionalism."¹⁴

On both the left and the right, then, moral and political activism has prevailed. It is a defining feature of 21st century professional identity. One risk of course is that access to legal services will turn not on the client's need or ability to pay but instead upon whether a lawyer believes the client is morally and politically worthy. Another obvious risk is that lawyers will be willing to trade fidelity to law and the rule of law for fidelity to preferred causes and clients. That is one way to understand the professional misconduct underlying the sanctions, disbarments, and criminal prosecutions of lawyers involved

¹³ William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RIGHTS 1 (1975).

¹⁴ Ian Ward, *Critics Call It Theocratic and Authoritarian. Young Conservatives Call It an Exciting New Legal Theory.*, POLITICO, DEC. 12, 2022, [HTTPS://WWW.POLITICO.COM/NEWS/MAGAZINE/2022/12/09/REVOLUTIONARY-CONSERVATIVE-LEGAL-PHILOSOPHY-COURTS-00069201](https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201).

in challenging the validity of the 2020 election.¹⁵ Lawyers were feverishly engaged in an attempt to undercut the most important laws in a democratic society – laws providing for the exercise of the right to vote, to have one’s votes counted, and to ensure the peaceful transfer of power. There were lawyers in the Department of Justice and other parts of the administration who had the courage to counsel against the election fraud claims that led to the attack on Congress on January 6, 2020, but the episode is a stark reminder that it doesn’t take many lawyers who have abandoned their oath for ideological projects to threaten democracy and the rule of law.

There are other signs of what one might call role disintegration. Elite law firms have developed explicitly politically identified practice groups.¹⁶ On the left the ACLU has been roiled by debates over whether to defend the First Amendment or redefine its advocacy in light of other ostensibly higher political values.¹⁷ That debate matters because defense of the First Amendment placed the ACLU at a crucial point of intersection in civil liberties work – harmonizing progressive causes with central tenets of liberal democratic governance (not just the right of all to free speech, but to the adversary system in and through which that right and other rights are protected). There is also evidence that the phenomenon of professional role disintegration extends beyond the practice of law to medical professionals invoking religious faith to deny health services, health care institutions that have been sued for voluntarily accommodating discriminatory patient requests for physicians and nurses who share patient identity traits,¹⁸ businesses and places of public accommodation that have sought exemptions from the requirements of anti-discrimination law,¹⁹ universities that have increasingly disciplined faculty whose speech does not fit progressive agendas,²⁰ airline pilots who have made overt political statements to passengers on flights, and passengers who have had to be reminded by pilots that there are role responsibilities attendant to being a safe passenger flying in a metal tube at 35k feet.²¹

The new morally and ideologically activist lawyering on both the left and the right is accompanied by group think and the dilution of independent judgment under the demands of in-group solidarity. Research in cognitive psychology and professional judgment makes clear that excessive zeal and

¹⁵ See, e.g., Press Release, State Bar Court Hearing Judge Recommends John Eastman’s Disbarment (Mar. 27, 2024) (reporting on the disbarment proceedings brought against John Eastman).

¹⁶ David Enrich, *How a Corporate Law Firm Led a Political Revolution*, N.Y. TIMES, Aug. 25, 2022, <https://www.nytimes.com/2022/08/25/magazine/jones-day-trump.html>. The revolving door from government to private law practice has a long history. See PETER H. IRONS, *THE NEW DEAL LAWYERS* (1993). Cf. Lauren Hirsch et al., *The Banking Industry’s Go-to Crisis Adviser*, N.Y. TIMES, Mar. 27, 2023, <https://www.nytimes.com/2023/03/25/business/dealbook/rodge-cohen-banking-crisis.html>.

¹⁷ Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES, Sept. 28, 2021, <https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html>.

¹⁸ Kyle Anstey & Linda Wright, *Responding to Discriminatory Requests for a Different Healthcare Provider*, 21 NURSE ETHICS 86 (2014).

¹⁹ Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n, 584 U.S. 617 (2018).

²⁰ Colleen Flaherty, *Tracking Attacks on Scholars’ Speech*, INSIDE HIGHER ED, Aug. 30, 2021, <https://www.insidehighered.com/news/2021/08/31/fire-launches-new-database-tracking-attacks-speech>.

²¹ *Pilots Talking Politics: ALPA members speak out about presidential endorsement*, AIR LINE PILOT, at 10, Sept. 2004, <https://www2.alpa.org/alpa/DesktopModules/ViewAnnDocument.aspx?DocumentID=5525>.

surrounding ourselves with like-minded partisans results in confirmation bias, radicalization, and the disintegration of role identity.

Joseph Singer is right to say that “we are all legal realists now.”²² But the point of legal realism is not that we can dispense with law and role differentiated behavior because the law is political and no one is completely impartial. Independent judgment and professional detachment matter not because lawyers and other professionals unfailingly embody these qualities, but rather precisely because they are so easy to surrender and corrupt. In a pluralistic society where people do not share the same ideas of what justice is, lawyers cannot both uphold the rule of law and define the role by their own moral and political convictions. Lawyers, as Robert Post reminds us, “bestride the following cultural contradiction: we both want and in some respects have a universal, common culture, and we simultaneously want that culture to be malleable and responsive to the particular and often incompatible interests of individual groups and citizens. We expect lawyers to fulfill both desires, and so they are a constant irritating reminder that we are neither a peaceable kingdom of harmony, nor a land of undiluted individual autonomy, but somewhere disorientingly in between. Lawyers, in the very exercise of their profession, are the necessary bearers of that bleak winter’s tale, and we hate them for it.”²³

There may not be much common content to our culture, and one could argue that this want of common content is itself liberty enhancing – an asset of our pluralism. But the part of our common culture that lawyers uphold when they say no to a client in the face of a frivolous legal request that aligns with the lawyer’s moral or ideological priors is essential to the rule of law and functional pluralism. The part that lawyers uphold when they engage the best arguments on the other side rather than condemn, disregard, or spin them away is essential to their credibility and the credibility of the legal system. It also demonstrates, to their clients, to jurors, and to the public how to make pluralism functional. The part that lawyers uphold by reserving their own moral judgment in all but the exceptional case is essential to the perfection of judgment in those we serve.

Friedman is right. We are a nimble profession. Part of the reason is our capacity to see problems from more than what a nineteenth century lawyer statesman called “a single line of thought.”²⁴ As with meaningful access to justice, this is a professional aspiration worth defending.

²² Joseph William Singer, *Legal Realism Now*, 75 CALIF. L. REV. 465, 467 (1988) (REVIEWING LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

²³ Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 386 (1987).

²⁴ Norman W. Spaulding, *Styles of Advocacy, the Public Mind, and the National Character*, LITIGATION, AUG. 10, 2024.

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A Tale of Two (Metaphorical) Cities

We have been challenged by Dean William Hubbard to think creatively about the future of legal education in our country. This is a task that one must approach with a good deal of humility, bearing in mind the countless curricular reform committees in the more than 200 ABA-accredited law schools in the country, not to mention organizations such as the American Association of Law Schools and the ABA's Section on Legal Education. It's a crowded space. But if ever there were a group capable of "thinking outside the box," it is the people here at this conference. And in the spirit of free thinking, I'll throw some ideas into the hopper.

I called this brief paper "A Tale of Two (Metaphorical) Cities" (with apologies to Charles Dickens) because of the gulf I see between a traditional legal education and the world as it exists today. Almost all of America's law schools do a fine job educating students to serve as lawyers for major corporations, or even mid-sized businesses. The first-year curriculum exposes students to formal court procedures (usually those of the federal courts, despite the fact that more than 90% of litigation takes place in state courts, and that is where most of the students will end up); contracts; property; torts; and legal research and writing. Some schools offer an elective or two for their 1Ls; some put constitutional law in the first-year menu; and others go a different way. In the second and third years, students usually do not have required courses other than their Legal Ethics or Legal Profession class (about which I will have more to say in a moment). But they typically sign up for classes such as Corporations, Income Taxation, Federal Courts, Evidence, advanced Constitutional Law topics, Administrative Law, Labor Law, Securities Regulation, Bankruptcy, and maybe even Admiralty. The second-and third-year students also have a choice among several clinics; this gives them the opportunity both to learn about a field such as public benefits or immigration, and also to learn real lawyering skills under the supervision of experienced clinical professors. Finally, in either the second or third year or both, the students must write a substantial paper, thereby honing their written communication skills and, if they participate in moot court, also their oral skills.

What's missing from this picture? Simply this: the overwhelming majority of the training the students receive prepare them to continue in the footsteps of the lawyers already in practice, who are serving the City of the "Haves" in our society. But there is another City – that of the "Have Nots." Other than the occasional clinic, or perhaps a seminar on "Law and Poverty," the law schools are falling short in their efforts to lay the groundwork for new members of a legal profession that serves the enormous number of people who do not have ready access to legal services. If one accepts the Legal Service Corporation's

numbers, counting only people with individual civil disputes whose income falls below 125% of the federal poverty line, an appalling 90% do not have their legal needs adequately and fully addressed by a qualified legal professional. And this is not because their problems are trivial. To the contrary, they are existential: eviction from the only home the person has; lack of access to critical benefits that would assure essential medical care; inability to obtain protection from domestic violence; ruined credit because of the tactics of unscrupulous debt collectors; and so on.

The City of the Have Nots is very much on my mind today, for two reasons. First, like several participants in the Hubbard Conference, including William himself, I have just returned from a two-day meeting devoted to the topic of Access to Justice—that meeting was held at the American Academy of Arts and Sciences, in Cambridge. Second, the American Law Institute is just launching a project on High Volume Litigation, under the leadership of Reporter David Freeman Engstrom of Stanford Law. The confluence of these projects, I hope, reflects the fact that the legal profession is waking up to this massive problem we face. At the Academy, one of the messages that came through loud and clear to me is that we lawyers cannot solve the crying need for better legal services that exists all by ourselves. We need to inter our ideas of Unauthorized Practice of Law, the proper structure and financing of law firms, and perhaps even some treasured aspects of the adversarial system we inherited from the time of Henry II in England. Only then, with the detritus of the past swept away, do we have any chance of coming up with a good plan for the future.

A second message that I heard in Cambridge was that lawyers are not even the best equipped of people to solve the access problem. It may sound trite, but we need to find the affected people where they are. We need to talk to *them* about what they need most, and then see how we might meet that need. Rather than, or more accurately in addition to, lawyers, we need trained social workers, librarians, community organizers, religious leaders, city service offices, and anyone else you can think of who might help. What if, in addition to having useful materials in every public library, we were to add volunteer trained navigators who can de-mystify the process for people needing help? Suppose we put a kiosk and a person with a laptop just outside of traffic court—a place many people find themselves visiting, like it or not? What if we were to partner with major retailers, such as Walmart, Target, Walgreens, and CVS, and made plain-English materials available with a friendly (nonlawyer) volunteer ready to steer the person to the correct next step? The possibilities are endless. If we re-focused our Legal Profession classes on these concerns, and even better, if we challenged the students in these classes to come up with something even better, we would make some progress.

Perhaps the law-school curriculum could find other ways as well to focus not on the law and the lawyers, but on the *client*. This might entail the use of nonlawyer instructors; enhanced clinical work; courses focused on sociology, legal anthropology, or related fields, and system design. It also should focus on alternate business arrangements within other professions, to see what role the “apex” professional plays (the lawyer with a J.D.; the physician; the CPA; the architect), and how assistants are trained, supervised, and used. No one doubts that all of these professions have a responsibility to ensure that the

public is well served. Plainly, fraud and misrepresentation have no place in such a system. But surely there are solutions to those problems that are more flexible than a flat ban on the use of nonlawyers or other non-professionals. The legal profession needs the regulatory room to experiment with those other structures, and some states are starting to give them that room. There should also be a way to spread the word around the country when a system shows promise and seems also to be scalable.

Going forward, I would like the present Tale of Two (Metaphorical) Cities to be consigned to a dusty old bookshelf. As representatives of the business community have often pointed out, making justice truly accessible to all is a win-win proposition (just as educating all children is). Law schools have a vital role to play in bringing this about, and conferences such as this one are invaluable spaces for innovation, brainstorming, and inspiration. I appreciate the opportunity to participate.