

# DEMOCRATIC LAWYERING: UPENDING THE “HIDDEN CURRICULUM” TO PREPARE NEW LAWYERS FOR A NEW WORLD

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*Multiple heightening crises reveal the deficiencies and contradictions of legal education, in particular the values it imparts. Perpetuating myths about U.S. democracy and rule of law, the enduring formalist, liberal legalist cast of law school is increasingly at odds with students’ lived experiences. As liberal democracy and the rule of law falter, no longer is relying on the “hidden curriculum” or the historically nebulous and mythical narratives of the law and our legal system sufficient to prepare tomorrow’s lawyers for the challenges faced by our profession. Instead, with a boost from ABA Standard 303, this article draws on the tradition of democratic lawyering as a well from which to continue to propagate an approach to professional-identity development. This approach—democratic lawyering—makes explicit its orientation: training legal professionals rooted in and committed to multiracial democracy. Only by clearly and intentionally recentering the project of legal education to embrace and spring from this tradition can the legal profession meet the challenges ahead.*

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- II. The “Hidden Curriculum”
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- IV. Meeting the Moment with Democratic Lawyering
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## **I. Introduction**

Despite innumerable attempts at reform, legal education remains mired in stasis. The general structure and approach to educating lawyers is essentially unchanged since Christopher Columbus

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Langdell introduced the casebook method in the late nineteenth century. While various reform movements, including legal realism, the crits, clinical education, and more recent efforts to introduce holistic approaches<sup>1</sup> have changed some aspects of legal education, the core of the legal academy remains rooted in the Langdellian model and, with it, a casebook-based inculcation of professional identity.

This method of acculturation remains durable because the law school is, of course, a key pillar of the American establishment. “Thinking like a lawyer” in the Langdellian cast has served the status quo exceptionally well: It abstracts, objectifies, normalizes, and obscures the exercise of power in a set of purportedly neutral rules. Normalized, it has become largely hidden from view, obscured by the ongoing market cycle of recruitment, retention, and reproduction of law students, lawyers, and law professors perpetuating a system seemingly immune from its implications. This method relies on our long-standing obsession with liberal legalism, which silently acculturates generations of legal professionals to formalistic acquiescence—and, enforced by institutional structure and discipline, to the values of procedural justice, precedent, the rule of law, objectivity, color blindness, and reason. While laudable, these values emanate from a specific tradition that leaves little room, if any, for elevating perspectives that complement and give substantive meaning to—let alone compete with—those from which the “rational” approach to legal thought originates. As a result, beginning even before a first-year law student steps on campus—consonant with civic education defining what is normal and acceptable democratic legal discourse—along with the entirety of the law school experience, this process of indoctrination communicates how lawyers should think, act, dress, talk, and engage with peers, professors, and others. We have written elsewhere about the damage this process can do to individual students, their personal identities, and their values—especially students for whom this ideological universe may be foreign.<sup>2</sup> Despite the challenges it has posed for law students,<sup>3</sup> this “hidden

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<sup>1</sup> For recent approaches to legal education, see, e.g., NICOLE P. DYSLEWSKI ET AL., *INTEGRATING DOCTRINE AND DIVERSITY* (2021); K-SUE PARK, *RACE & PROPERTY LAW* (2021); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* (1995).

<sup>2</sup> Eduardo R.C. Capulong et al., *Antiracism, Reflection, and Professional Identity*, 18 *HASTINGS RACE & POVERTY L.J.* 3 (2021).

<sup>3</sup> See, e.g., David M. Moss, *The Hidden Curriculum of Legal Education*, 2013 *J. DISP. RESOL.* 18, 20–21 (2013) (describing the hidden curriculum and noting that it “convey[s] seriously distorted messages about law and lawyers and therefore fail[s] to convey additional needed information and skills,” resulting in students “mak[ing] judgments about what really matters in law

curriculum”<sup>4</sup> remains the foundation and frame on which modern legal education is constructed.<sup>5</sup>

This method has been under assault from its inception.<sup>6</sup> In times of crisis, its shortcomings and contradictions become even more obvious. Heightened social ferment forces us to bring all our educational faculties to bear, and law schools are no exception. Today, the poverty of this approach is set in even sharper relief; the times they are a-changin’.<sup>7</sup> Existential threats to liberal democracy and values abound. From the disintegration of faith in, and commitment to, the rule of law and rise of authoritarianism<sup>8</sup> to the return of imperial warfare, the domestic and international legal and political climate can no longer mask the defining role of impunitive power—economic, racial, state, military, or otherwise—in our world order. Recent social movements, like those opposing the genocide in Gaza, protecting Black Lives, and promoting climate justice, elucidate the shortcomings and contradictions of the American legal and political experiment while demanding both a reckoning with the nation’s

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school from their incomplete perspective and perceive meaning through participation in classes and experiences whether those meanings are intended or not”); Sheila I.V. Martinez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585, 593 (2015) (“[T]he legal education model as it stands today continues to create ‘dehumanized individuals’ in order to ‘perpetuate and protect the economic stakes held by barons of global capitalism.’ It has remained the dominant pedagogy because it serves its purpose of producing law students ready for employment in the ruling class’s service.”) (citations omitted); see also Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. ADDICTION MEDICINE 49 (2016), [https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the\\_prevalence\\_of\\_substance\\_use\\_and\\_other\\_mental.8.aspx](https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_other_mental.8.aspx).

<sup>4</sup> Moss, *supra* note 3, at 21; see also Melissa H. Weresh, *Hidden Lessons, Unforeseen Consequences: Interrogating the Hidden Curriculum in Legal Education & Its Impact on Students from Historically Underrepresented Groups*, 75 ALA. L. REV. 656 (2024).

<sup>5</sup> Cf. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 628 (2006).

<sup>6</sup> See Jerome Frank, *Why Not a Clinical-Lawyer School*, 81 U. PENN. L. REV. 907 (1933).

<sup>7</sup> Bob Dylan, *The Times They Are A-Changin'* (Columbia Records 1964).

<sup>8</sup> See, e.g., Kim L. Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

history and a future rooted in racial, economic, and environmental equity, among other calls for justice.

The accreditation standard requiring law schools to more intentionally develop students' professional identities presents an opportunity to fundamentally reexamine and reform legal education. With repeated challenges to the assumptions on which our legal system has been built, we must reassess and reshape how legal professionals are prepared to exist in a new world. In other words, we must reconstruct the very concept of legal professional identity. At the very least, we should expect (and are already experiencing) that our students will no longer abide a disconnected law school experience that cannot meet these challenges, much less one that denies their own lived experiences. If we are to meet the moment, we can no longer expect that preparing our students to "think like (the same old) lawyer," is enough. Nor can we continue to rely on the implicit or explicit, often unexamined, inculcation of professional values that incentivize, reflect, or perpetuate that thinking. Instead, we need to develop legal professionals steeped in a set of values rooted in social and economic equity, anti-racism, (true) participatory democracy, solidarity, and the rule of (just) law. We believe this approach will ultimately require redesigning the entire project of American legal education.<sup>9</sup>

Our main argument here is that our approach to legal education must explicitly articulate a transformative vision of democratic values and defend and live up to those values. Only by doing so can we enable and empower a new era of professional-identity development more clearly and consistently committed to the true meaning of our profession rather than the unexamined, superficial, and exclusionary approach safely ensconced in and often concealed by the hidden curriculum. Drawing on a long tradition of efforts to reform legal education, this approach—we prefer the term "democratic lawyering"<sup>10</sup>—aims for a deeper and more fundamental reassessment of law and lawyering themselves, particularly the values, biases, and assumptions that created our present ideas of what constitutes "the law" and how law students and lawyers engage it. As discussed in greater detail below, these notions of the law and lawyering inform

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<sup>9</sup> See, e.g., Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1 (2023); Claudia Angelos, et al., *The Deborah Jones Merritt Center for the Advancement of Justice*, 82 OHIO ST. L. J. 911 (2021); Gerald P. Lopez, *Transform—Don't Just Tinker with—Legal Education*, 24 N.Y.U. L. REV. 247 (2018).

<sup>10</sup> See Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009).

nearly every aspect of today's law schools, from language to course offerings to pedagogy, and make up the scaffolding on which both the hidden and actual curricula rely. Thus, if we are to succeed in the transformational reform required by the moment, we cannot accept the ABA's charge to engage our students in professional-identity development as (yet another) curricular or pedagogical reform emanating from the same antiquated assumptions on which the legal system has been built. Instead, our work is to excavate, reengage, and articulate a set of values from which we can reconsider the possibilities of law and lawyering.

Given our normative biases, this argument is likely to be criticized as violating the value of objectivity and, instead, as calling for the indoctrination of students in a particular political, social, or moral agenda.<sup>11</sup> But that's what the hidden curriculum has been doing all along: training generations of law students and lawyers by espousing and elevating certain values, such as civility,<sup>12</sup> that are no less politically, socially, or morally biased than those described above. Further, by virtue of its deeply embedded nature, the inherent and assumed righteousness of the hidden curriculum largely avoids any critical or explicit examination.

This is a central premise underlying our argument: Beneath the course offerings, class schedules, diversity, equity, and inclusion and professional-identity development initiatives of present-day legal education lies a foundation rooted in particular values and assumptions that must be explored and addressed. The liberal tradition of legal education and its espoused values of objectivity, rational thought, and human reason, among others, have cloaked this foundation with an air of neutrality while largely shielding it from fundamental reform. Far from "neutral", however, this foundational but hidden infrastructure privileges market imperatives—extraction, exploitation, competition, and individualism, among them—and racial, sexual, and gender hegemony and sustains mythologies of American exceptionalism. More importantly than as a basis for objecting to our thesis, this blind acceptance and propagation of the hidden curriculum has disabled our legal system—and many of the professionals within it—from responding to the threats it currently

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<sup>11</sup> See Harmony DeCosimo, *A Taxonomy of Professional Identity Formation*, 67 ST. LOUIS U. L.J. 1, 13, 15 (2022) (describing values approach to professional identity formation as "the most ideologically freighted" and "righteous").

<sup>12</sup> See generally Rory Bahadur, *Civility as Morally Justified Oppression*, 30 TEX. J. ON C.L. & C.R. 89 (2024).

faces. Thus, while the hidden curriculum may spawn academic critiques of our call for reform as a “value-inculcation approach,”<sup>13</sup> the current moment shows that the alternative cannot rest on the status quo. Rather, failing to reorient our approach to legal education will result in a continuing slide toward hyperfactualized dysfunction, violence, and tyranny. Our values, our teaching, our students, and our future must respond to that challenge.

The remainder of this essay discusses the hidden curriculum and the current historical moment. We then discuss the professional-identity formation movement and ABA Standard 303 as a front for reform. The article concludes by situating our argument in the tradition of democratic lawyering and plotting some coordinates to map a course for reform. Far from presuming we know how best to navigate that journey, our aim is to catalyze further discussion and collaborative efforts toward that goal. Ultimately, we believe curricular reform, as in times past, will happen only in coalition with larger social movements that have spurred them in the first place.

## II. The “Hidden Curriculum”

Law school obviously imparts values. Nothing is value-free—or, as the historian Howard Zinn put it, “[Y]ou can’t be neutral on a moving train.”<sup>14</sup> While individual schools differ, and plural, even contradictory, values exist within each, the standardized curriculum<sup>15</sup> means a core, reigning structure and ideology, which the legal system requires.<sup>16</sup> Based on “legal reasoning,” that core may be described as one that is fundamentally formalist and liberal-legalist—and crucially one that reinforces and deepens our lifelong education in American civics and the virtues of liberal democracy.<sup>17</sup>

Law schools communicate specific values and forge legal professional identity in ways hidden and not so hidden. The law

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<sup>13</sup> DeCosimo, *supra* note 11, at 14.

<sup>14</sup> HOWARD ZINN, YOU CAN’T BE NEUTRAL ON A MOVING TRAIN (1994); *see also* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1067–68 (2022) (describing American property law as a train whose tracks are slavery and conquest).

<sup>15</sup> *See* 2023–24 ABA Standards and Rules of Procedure for the Approval of Law Schools, [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/).

<sup>16</sup> A systemic requirement, in turn, necessitated by capitalism. *See* Isaac D. Balbus, *Relative Autonomy of Law*, 11 L. & SOC’Y REV. 571 (1977); Ian Gough, *POLITICAL ECONOMY OF THE WELFARE STATE* (1979).

<sup>17</sup> As we discuss *infra*, this arrangement is under authoritarian/fascist threat.

school curriculum is, of course, open and explicit: We teach doctrine in large classes via the casebook method, learn IRAC (or some variation of it) in legal writing courses, take ethics and clinical courses, and so on, and, in so doing, we intentionally construct a legal professional. Our focus here is less on doctrine, skills, and ethics as such but on *how* we teach. This underlying process, the values it imparts, and the overall experience and culture of law school, taken together, reinforce, amplify, and supplement many of our preexisting values—in particular those mythologizing American democracy and rule of law—and indoctrinate students in a specific liberal legalist ideology that forms the basis of legal professional identity, an identity persistently and increasingly challenged and contradicted by students’ lived experiences<sup>18</sup>—particularly in times of acute social and economic (and today, planetary) crises.

### A. Legal Reasoning: ‘Thinking Like a Lawyer’

Law school’s signature pedagogy—the Langdellian casebook method—hides formalist indoctrination in two ways: via linguistic abstraction *qua* legal reasoning and via ontological erasure. Duncan Kennedy made this observation some time ago in his description of legal education as “training for hierarchy.”<sup>19</sup> In her study of the language of law school, the linguist Elizabeth Mertz substantiated Professor Kennedy’s critique of legal reasoning by detailing how law students forge their professional identities by changing how they talk—and therefore how they think and who they become—from day one. Students realize quickly that what differentiates them from others—a “crucial focal point of professional identity”—is language:

In converting virtually every possible event or conflict into shared rhetoric, legal language generates an appearance of

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<sup>18</sup> Particularly given the changing demographics of law school. The legal profession is overwhelmingly white and male. *See generally* American Bar Association, *Profile of the Legal Profession 2023: Demographics*, ABA (2023), <https://www.abalegalprofile.com/demographics.html>. Today, more than half of law students are women, 40.2% are students of color, 14.7% identify as LGBTQ+, and 24.2% are first-generation college students. James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, LSAC L. Blog (Dec. 15, 2023), <https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains>.

<sup>19</sup> Duncan Kennedy, *Legal Education & The Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 608 (1982).

neutrality that belies its often deeply skewed institutional workings. The classroom experience initiates law students into this new language using an approach that encourages them to push aside the emotional and socially embedded particulars of the conflict. Instead, law professors direct their students' attention to the oddly abstract conceptions of people and contexts provided by layered readings of legal texts . . . . When students speak this language, they operate in a world in which important aspects of social context and identity have become invisible . . . . At the same time, other aspects of dominant culture and assumptions become highly visible: the logic of capitalist exchange, for example, in Contracts classes, and the focus on an abstract, strategizing individual as the central figure in legal narratives.<sup>20</sup>

This is the “appearance of perspectivelessness”—of neutrality—that Kimberlé Crenshaw also has criticized.<sup>21</sup> In her book, Professor Mertz observes how, even in the course of a single semester, students change: “[T]hey come to talk differently about such things as facts, persons, authority, and the appropriate structure of arguments. But so also do they come to see the world in a new and different way.”<sup>22</sup> Students enter into “a new relationship with language” but “embedded [within that] relationship is a hidden epistemology, one with significant moral dimensions.”<sup>23</sup> Reviewing Professor Mertz's book, another linguist, John Conley, observed:

These dimensions include “a shift from a ‘justice-oriented consciousness’ to a ‘game-oriented consciousness,’” “entirely new views on reality and authority,” and “altered conceptions of themselves and others (and their relationships to the world around them).” In this alternative universe, “increasingly instrumental and technical appeals to legal authority blunt moral and context-sensitive judgment.” Injecting a normative judgment into the analysis, Mertz concludes that form triumphs over substance; “justice is done if the proper linguistic protocols are observed, if the opposition of voices is

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<sup>20</sup> ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL* 132 (2007) [hereinafter MERTZ]; see also Robert Granfield, *Cynicism and the Law: The Emergence of Legal Consciousness in Law School* 25 *J. SOC. PH.* 188 (1994)

<sup>21</sup> Kimberlé W. Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 *NAT'L BLACK L.J.* 1, 6 (1988).

<sup>22</sup> MERTZ, *supra* note 20.

<sup>23</sup> *Id.* at 98.

literally represented in apparently dialogic form.” Ultimately, “law students . . . are undergoing a quiet process in which their very selves are decentered through and in speech, as they take on the voices and perspectives pushed on them by the demands of legal discourse.”<sup>24</sup>

Ontologically, this process of teaching students legal reasoning is accompanied by the erasure of context—in particular, the histories of legal doctrine and, indeed, the outright adulteration and fabrication of U.S. history. Examples are legion, leading to one recent effort by historians to fact-check the U.S. Supreme Court.<sup>25</sup> Despite the welcome increase of “materials” in legal casebooks, we still teach law by and large self-referentially. As Foluke Adebisi put it:

[D]octrinal law is unable, of itself with only reference to itself, to provide a true self-portrait for educators to transmit to learners. Thus, unable to create a true picture of humanity, traditional legal education suffers functional decay, serving no other purpose than certification into a discipline which disciplines the world to conform to a seemingly perfectly pre-ordained but wholly unequal legal order.<sup>26</sup>

Our pedagogical and ontological approach to teaching law produces the “illusion of innocence, universality, and neutrality.”<sup>27</sup> This approach, silent about law’s involvement and complicity in the sins of American capitalism and empire,<sup>28</sup> results in a technocratic, instrumental professionalism.

## B. Liberal Legalism and Ideology

This process is part and parcel of our profession’s reigning ideology: liberal legalism. Karl Klare defines liberal legalism as

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<sup>24</sup> John Conley, *Can You Talk Like a Lawyer & Still Think Like a Human Being?*, 34 L. & SOC. INQ. 983, 1002 (2009) (internal citations omitted).

<sup>25</sup> See *A Supreme Fact-Check* (Oct. 12, 2023), <https://www.brennancenter.org/events/supreme-fact-check>.

<sup>26</sup> Foluke Adebisi, *Should We Rethink the Purposes of the Law School?*, 2 AMICUS CURIAE 428, 429 (2021).

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

[t]he particular historical incarnation of legalism (“the ethical attitude that holds moral conduct to be a matter of rule-following”), which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general “democratically” promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate on its underlying jurisprudence. With respect to its modern Anglo-American form these include adherence to precedent, separation of the legislative (prospective) and judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis (“legal reasoning”). The rise and elaboration of the ideology, practices and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating “legal reasoning” and the legal process.

Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.<sup>29</sup>

Quoting Robin West, Etienne Toussaint observes that liberal legalism, which Professor West terms “American legalism,” is

not as a jurisprudential articulation of the nature of law, but rather as “a particular set of values both reflected in and grounding a complex set of practices, articulated in a large,

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<sup>29</sup> Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123, 132 n.28 (1979) (internal citation omitted).

even vast, collection of texts, and yielded by a swath of shared history . . . that *defines a way of being in the world.*"<sup>30</sup>

This "way of being" is characterized by a preference for individual rather than group identity, analysis, and remedies; an aversion to focusing on issues of power rather than formal rights; a discomfort with radical democracy and its fear of popular passions or excesses; an assumption that the legal system alone is sufficient to make the very small, incremental adjustments necessary to move from status quo to social justice; a presumption of rational expert professionals' greater ability to diagnose, design, and implement necessary social remedies—and a concomitant skepticism or hostility toward the ability of low-income and working-class people to do the same; and a valorization of judicial review and the importance of checking popular opinion and democratic agitation.<sup>31</sup>

These values comport with our lifelong education in American civics—or the virtues of American democracy, rule of law, and capitalism, which "leads to certain ideas about oneself, money, products, social relations, and the nature of society[,], [and which, in turn] have to do with individualism, freedom to choose, the power of money, greed, competition, and mutual indifference."<sup>32</sup> They would not be so influential were it not for how primed we are—from the beginning of our formal education—to hew to them. This education and these virtues advance a version of American history—and mythologize an identity—built on, among other things, erasing the dispossession of Native American lands and genocide and colonization of Indigenous peoples; the badges and incidents of slavery; and discrimination against nonwhite immigrants. Critical to this education and these virtues, especially for legal education, is the obscuring of the central role of the legal system in these violent realities and in the preservation and perpetuation of the racial and economic inequality and hierarchy. Law school hypertrophies these values while marginalizing, if not erasing, the struggles that reveal their contradictions and hypocrisy.<sup>33</sup>

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<sup>30</sup> Toussaint, *supra* note 9 (emphasis added).

<sup>31</sup> Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355, 358 n.5 (2008).

<sup>32</sup> Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLIN. L. REV. 109, 184 n.431 (2009) (quoting Bertell Ollman).

<sup>33</sup> See JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME* (2018); RUSS KICK, *EVERYTHING YOU KNOW IS WRONG* (2002).

### C. Law School Culture

Beyond our signature pedagogy and development of liberal ideology, our culture also teaches a great deal to our students. As David Moss has observed, the “hidden curriculum”—“a socialization process where students pick up messages through the experience of being in school and interacting with faculty and peers”<sup>34</sup>—teaches students about what we value: the sequencing and weight of courses; faculty status and course assignments; the way the school is designed; the materials used; even how professors interact with staff.<sup>35</sup> We and others have written elsewhere about how legal professional identity is normed to white upper-class values.<sup>36</sup> As Bennett Capers observes, law school is white space.<sup>37</sup> Lucille Jewell makes a similar observation with respect to law school’s upper-class orientation.<sup>38</sup> Our culture—our space, manner, attire, traditions—indeed our rituals, which one commentator has analogized to magic<sup>39</sup>—promote an identity beholden to hierarchy, authority, and the status quo. Simply put, our ecosystem reinforces a particular brand of lawyer steeped in a particular type of educational acculturation.

### III. The Historical Moment

In 2022, the ABA made two significant—and simultaneous—changes to its accreditation standards for law schools. First, law schools are to provide substantial opportunities to students to develop their professional identities. In addition, law schools are now required to provide education on bias, cross-cultural competence, and racism. Both of these changes were effected by revisions to the language of accreditation Standard 303.

In relevant portions, Standard 303 now reads:

(b) A law school shall provide substantial opportunities to students for:

(1) law clinics or field placement(s);

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<sup>34</sup> Moss, *supra* note 3 at 22.

<sup>35</sup> Kennedy, *supra* note 19.

<sup>36</sup> See Capulong, *supra* note 2, at 13-15.

<sup>37</sup> Bennett Capers, *Law School as White Space*, 106 MINN. L. REV. 7 (2021).

<sup>38</sup> Lucille A. Jewel, *Bourdieu & American Legal Education*, 56 BUFF. L. REV. 1155 (2008).

<sup>39</sup> Jessie Allen, *A Theory of Adjudication: Law as Magic*, 41 SUFFOLK U. L. REV. 773, 773-75 (2008).

- (2) student participation in pro bono legal services, including law-related public service activities; and
  - (3) the development of a professional identity.
- (c) A law school shall provide education to law students on bias, cross-cultural competency, and racism;
- (1) at the start of the program of legal education, and
  - (2) at least once again before graduation.<sup>40</sup>

In Interpretation 303-5, accompanying the adoption of ABA accreditation standard 303(b)(3), the ABA offered some guidance about the meaning of “professional identity” and “development.” The ABA notes that “[p]rofessional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society.”<sup>41</sup> As to the content of “development,” the ABA—in Interpretation 303-5—offers that professional-identity development “should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.”<sup>42</sup> Further, it is possible to read Interpretation 303-6 as the ABA providing additional guidance about the foundational “values” of the legal profession that require “intentional exploration.”<sup>43</sup> In Interpretation 303-6, the ABA states that “the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”<sup>44</sup> The adoption of the two additional requirements in Standard 303 were the culmination of years of advocacy and a

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<sup>40</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 303 (2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2023-2024/23-24-standards-ch3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-standards-ch3.pdf).

<sup>41</sup> ABA STANDARD 303, Interpretation 303-5, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2023-2024/23-24-standards-ch3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-standards-ch3.pdf).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Interpretation 303-6.

<sup>44</sup> *Id.* at Interpretation 303-5.

reaction to social movements and civil unrest. While there have been efforts to require law schools to address racism in the past, the effort leading to this new standard gained force after the murder of George Floyd and the movement for Black Lives.<sup>45</sup> In response to these events, a majority of law deans penned a joint letter asking the ABA to make changes to the accreditation standards to require education on “bias, cultural competence, and anti-racism.”<sup>46</sup> As the deans noted, “We are in a unique moment in our history to confront racism that is deeply embedded in our institutions, including in the legal profession, and we hope that the Council will take this important first step.”<sup>47</sup>

In addition, the adoption of an ABA standard on professional-identity development is the latest step in a decades-long effort to prompt reform of legal education’s approach to “professionalism.” For example, in 1992 the ABA released the MacCrate Report, which articulated the skills and values essential to the legal professional.<sup>48</sup> The need for legal education to place greater emphasis on professional skills and values gained momentum after the 2007 publication of the Clinical Legal Education Association (CLEA)’s “Best Practices for Legal Education: A Vision and a Road Map” and the Carnegie Institute for the Advancement of Teaching and Learning’s report, “Educating Lawyers: Preparation for the Profession of Law” (Carnegie Report).<sup>49</sup>

Best Practices and the Carnegie Report sparked much discussion and curricular reform in law schools, initially primarily confined to an increased focus on the development of practical lawyering skills. Curricular reform dealing with professionalism or professional identity lagged, gaining momentum only in the past five to ten years.<sup>50</sup>

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<sup>45</sup> See LSAC Comments Regarding ABA Proposed Standards 206 and 303 (June 24, 2021); see also Andrew King-Ries, *Just What the Doctor Ordered: The Need for Cross-Cultural Education in Law Schools*, 5 TENN. J. L. & POL’Y. 27 (2009).

<sup>46</sup> Letter from Alicia Ouellette, President & Dean, Albany Law School, et al., to members of the Council of the ABA Section of Legal Education & Admissions to the Bar, AM. BAR ASS’N (2020) (requiring law schools to provide training on bias, cultural competency, and racism for law students, explaining that “such skills are essential to professional competence, legal practice, and being a lawyer”).

<sup>47</sup> *Id.*

<sup>48</sup> LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

<sup>49</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS (2007); ROY T. STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION (2007).

<sup>50</sup> See Benjamin Madison & Larry Gantt, *The Emperor Has No Clothes, But Does Anyone Really Care? How Law Schools Are Failing to Develop*

These reform efforts—collectively the professional-identity formation movement—are clearly reflected in the ABA’s adoption of a requirement to provide law students “substantial opportunities [for] the development of a professional identity.”<sup>51</sup>

As a result of the changes to the accreditation standards, law schools across the country are engaging in conversations about how to meet them.<sup>52</sup> Interestingly, the ABA brought bias, cross-cultural competency and racism education, and professional-identity formation together, stating that “the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”<sup>53</sup> Thus, schools are faced with both the challenge of developing and incorporating potentially new curricular offerings while also considering the scope and coverage of their content. Both of these changes are vital and present important opportunities to move legal education and the legal system toward disrupting and addressing these institutions’ complicity in racism and other societal ills.

These changes come in the midst of a climate of interlapping crises.<sup>54</sup> As Angela Davis and James Varellas noted in a recent article:

In the United States and around the world, we are facing [accelerating,] intertwined crises: skyrocketing economic inequality, an increasingly destabilizing and extractive system of global finance, dramatic shifts in the character of work and economic production, a crisis of social reproduction, the ongoing disregard of Black and brown lives, the rise of new authoritarianisms, a global pandemic, and, of course, looming above all, the existential threat of global climate change.<sup>55</sup>

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*Students’ Professional Identity and Practical Judgment*, 27 REGENT U. L. REV. 339, (2014-15) (discussing history).

<sup>51</sup> ABA STANDARD 303(b)(3).

<sup>52</sup> See, e.g., *Professional Development Database*, supra note 9. The Holloran Center’s groundbreaking efforts—led by Jerome Organ and Neil Hammond—is a vital resource for law schools across the country.

<sup>53</sup> ABA Interpretation 303-6.

<sup>54</sup> See generally Davis & Varellas, *Introduction: Law & Political Economy in a Time of Accelerating Crisis*, 1 JLPE 1 (2020).

<sup>55</sup> *Id.* at 1.

War is at the forefront internationally—most recently in the Middle East, Ukraine, and India/Pakistan. Domestically, we recently experienced a pro-Palestine student movement, witnessed the murder of George Floyd and the promise of a “racial reckoning” (that has thus far been more performative than transformative),<sup>56</sup> lived through an insurrection, and are seeing daily attacks on democracy and the rule of law.<sup>57</sup> Many of us live and work in states that are restricting what we can teach and how, attacking our efforts to make our businesses, institutions, and places of learning more diverse, inclusive, and equitable, and negating the very identities of some of our students.<sup>58</sup> Davis and Varellas place the responsibility for these crises on neoliberalism and its concomitant structuring of the economy, family, finance, systems of production, and state power.<sup>59</sup>

While this list of crises is sobering, it is also incomplete. Davis and Varellas included President Donald Trump in the “rise of new authoritarianisms,” but that threat has since expanded. Their article was published before the January 6, 2021, insurrection, the four federal and state indictments charging him with nearly 100 violations of criminal law, his conviction on 34 felonies,<sup>60</sup> his return to office, and his pardon of most of those insurrectionists.<sup>61</sup> In addition, the

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<sup>56</sup> Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 63 (2021); see also Ashley Quarcio & Medina Husaković, *Racial Reckoning in the United States: Expanding and Innovating on the Global Transitional Justice Experience*, <https://carnegieendowment.org/2021/10/26/racial-reckoning-in-united-states-expanding-and-innovating-on-global-transitional-justice-experience-pub-85638>.

<sup>57</sup> See Alan Feuer, *F.B.I. Search Ignited Violent Rhetoric on the Far Right*, N.Y. TIMES (Aug. 9, 2022), <https://www.nytimes.com/2022/08/09/nyregion/fbi-search-violent-rhetoric.html?smid=em-share>; Jeffrey Toobin, *Donald Trump is Going to Get Someone Killed*, N.Y. TIMES (Oct. 19, 2023), <https://www.nytimes.com/2023/10/19/opinion/trump-gag-order-violence.html?smid=nytcore-ios-share&referringSource=articleShare>.

<sup>58</sup> See generally Karen Tokarz et al., *ABA Standard 303(c) and Divisive Concepts Legislation and Policies: Challenges and Opportunities*, 73 WASH. U. J. L. & POL'Y 247 (2024).

<sup>59</sup> Davis & Varellas, *supra* note 54, at 2–5.

<sup>60</sup> Michael R. Sisak, et al., *Guilty: Trump becomes first former US president convicted of felony crimes*, AP NEWS (May 30, 2024), <https://apnews.com/article/trump-trial-deliberations-jury-testimony-verdict-85558c6d08efb434d05b694364470aa0>.

<sup>61</sup> See Jonathan Swan et al., *How Trump Plans to Wield Power in 2025: What We Know*, N.Y. TIMES (Dec. 23, 2023), <https://www.nytimes.com/article/trump-2025-second-term.html>; Michael

U.S. Supreme Court recently set the stage for excusing at least some of these alleged criminal violations on the basis of presidential immunity, a decision decried by dissenting justices as making “a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law.”<sup>62</sup>

Significantly, a number of Trump’s co-defendants in his multiple criminal prosecutions are lawyers.<sup>63</sup> While some lawyers have always behaved badly, many of the current misdeeds of these legal professionals are targeted specifically against the rule of law and long-standing, well-established democratic standards, such as the peaceful transfer of power and due process.<sup>64</sup> In addition, these actions often demonstrate a lust for power coupled with intense disdain for professional values, conduct, and ethics. While some lawyers are

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Gold, *Trump Says He Wouldn’t Be a Dictator, ‘Except for Day 1,’* N.Y. TIMES (Dec. 5, 2023), <https://www.nytimes.com/2023/12/05/us/politics/trump-fox-news-abuse-power.html?searchResultPosition=8>; Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. TIMES (January 20, 2025), <https://www.nytimes.com/2025/01/20/us/politics/trump-pardons-jan-6.html>. Since taking office, Trump has significantly escalated direct attacks on lawyers and the rule of law, often as retaliation for work done on investigations into his conduct and the prosecution of those cases. See, e.g. Richard Zitrin, *The Clear and Present Danger to the American Rule of Law, The Intercept* (Apr. 8, 2025), <https://theintercept.com/2025/04/08/trump-big-law-firms-paul-weiss-courts/>.

<sup>62</sup> Trump v. United States, 144 S. Ct. 2312, 2355 (2024) (Sotomayor, J., dissenting).

<sup>63</sup> See Deborah Pearlstein, *Why Are So Many of Trump’s Alleged Co-Conspirators Lawyers*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/opinion/trump-indictment-lawyers.html?smid=nytcore-ios-share&referringSource=articleShare>; Scott L. Cummings, *Why do lawyers attack the rule of law? Trajectories of “Trump lawyers”*, INT’L J. LEGAL PROF. 1 (2024), <https://www.tandfonline.com/doi/full/10.1080/09695958.2024.2389195?scroll=top&needAccess=true>.

<sup>64</sup> See Deborah Pearlstein, *Why Are So Many of Trump’s Alleged Co-Conspirators Lawyers*, N.Y. Times (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/opinion/trump-indictment-lawyers.html?smid=nytcore-ios-share&referringSource=articleShare>; Scott L. Cummings, *Why do lawyers attack the rule of law? Trajectories of “Trump lawyers”*, INT’L J. LEGAL PROF. 1 (2024), <https://www.tandfonline.com/doi/full/10.1080/09695958.2024.2389195?scroll=top&needAccess=true>; <https://statesuniteddemocracy.org/resources/michigan-fake-electors/>.

being charged criminally, others face disciplinary actions and disbarment.<sup>65</sup>

In other words, these are challenging times to be a lawyer, to be a law student, and to be law faculty responsible for meeting the demands of the new accreditation standards in Standard 303. At the same time that law faculty are having important conversations about the hidden curriculum and how to seize the opportunities that the changes to Standard 303 provide to improve the system of legal education through professional-identity formation and anti-racist education, the foundations of our legal system and democracy are under attack.<sup>66</sup> In this context, we are called upon to do two or three challenging and conflicting things at the same time: preserve the foundations of our legal system in the face of significant threat; point out its limitations and reform those foundations; and articulate an alternative.

If we fail in any direction, the consequences are great. If we do not defend the system, the rule of law crumbles and we risk a perilous descent into autocracy. If we simply defend the rule of law without reform, we preserve the status quo. And if we do not articulate and build an alternative, we fail to address the systemic nature of racism, social and economic inequality, and the hierarchical power structures that continue to perpetuate them. The stakes are high, and inaction is not an option. In the past, inaction was synonymous with preserving the status quo.<sup>67</sup> Today, inaction portends further decay of these systems and hastens the slide into authoritarianism. Even the preservation of the status quo will require significant effort to maintain the integrity of our democratic institutions, civil discourse in our legal and political realms, and respect for the rules, conduct,

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<sup>65</sup> For example, the Montana Office of Disciplinary Counsel recently filed a complaint against the Montana Attorney General, alleging forty-one violations of the Rules of Professional Conduct. Arren Kimbel-Sannit, *Ethics Office Accuses Attorney General of Violating Professional Conduct Rules*, Montana Free Press (Sept. 5, 2023), <https://montanafreepress.org/2023/09/05/montana-ag-austin-knudsen-accused-of-violating-rules-of-professional-conduct>.

<sup>66</sup> See DAVID I.C. THOMSON, THE WAY FORWARD FOR LEGAL EDUCATION 6 (2023); see also George Conway et al., *The Trump Threat is Growing. Lawyers Must Rise to Meet This Moment.*, N.Y. TIMES (Nov. 21, 2023), <https://www.nytimes.com/2023/11/21/opinion/trump-lawyers-constitution-democracy.html?smid=nytcore-ios-share&referringSource=articleShare>; Zitrin, *supra* note 61 (noting the “likelihood that at some point there will be a reckoning: a showdown between the rule of law on one side and Trump on the other”)

<sup>67</sup> See Thomson, *supra* note 66 at 3, 6.

and norms of professionalism.<sup>68</sup> At the same time, going only so far as to preserve the rule of law without systemic change will leave unaddressed the social and economic inequality and systemic racism that also threaten the integrity of the system by denying too many people the promises in our founding documents.<sup>69</sup>

Thus, as Professor David Thomson notes in the context of legal education's role in "perpetuating systemic racism" and our response to the threats to our democracy,

there is a critical need to shore up these aspects of the foundation upon which our country is built and how it functions. Legal education is where all those principles are born and instilled in students, and so a reassessment and reconstruction of legal education stressing professional formation that has shifted toward making it more egalitarian and more focused towards service to the public will over time contribute to the strengthening of our democratic institutions.<sup>70</sup>

This is the challenge of the moment. We must reorient our entire approach to legal education, beginning with the oft-unspoken, un- or under-analyzed values that have long formed its core. Starting with those values, particularly within the context of newly adopted ABA Standard 303, centers the formation and development of professional identity within law schools as a critical component of a successful reformation. The rest of this essay discusses the tradition of democratic lawyering as a general orientation for approaching this work.

#### **IV. Meeting the Moment with Democratic Lawyering**

Variouslly labeled "cause," "public interest," "social justice," "rebellious," "community," "movement," "people's," and "progressive" lawyering, a tradition of democratic lawyering<sup>71</sup> historically has provided an alternative to mainstream legal practice. Based on several jurisprudential schools of thought—legal realism, critical legal studies, critical race theory, feminist jurisprudence, law and society, and law and political economy, among them—these

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<sup>68</sup> *See id.* at 7.

<sup>69</sup> *See id.* at 3, 6.

<sup>70</sup> *Id.* at 7.

<sup>71</sup> *See* Piomelli, *supra* note 10; *see generally* Capulong, *supra* note 32, at 118.

practices embody an ethos that, on the one hand, critically accepts liberal legalism and, on the other, strives to articulate competing legal and social visions. To the extent that professional identity is, at bottom, the theory and practice of lawyering, they are a point of departure and a rich tradition from which to draw to interrogate, challenge, and reconstruct it.

Thomas Hilbink's typology of cause lawyering provides a useful framework for unearthing the values underlying these practices. In both his dissertation and an article discussing Austin Sarat's and Stuart Scheingold's survey of cause lawyering practices nationally and internationally,<sup>72</sup> Hilbink identified three idealized types of democratic lawyering—procedural, elite-vanguard, and grassroots.<sup>73</sup> This typology is, in turn, based on such lawyers' visions of the system, the cause, and the lawyer's role.<sup>74</sup> Believing law to be neutral, objective, rational, and predictable, and the legal system to be fundamentally sound, proceduralists see their role as ensuring "procedural justice [and] fairness of institutional treatment"—for example, the right to counsel.<sup>75</sup> While sensitive to substantive justice, for proceduralists, "[r]epresentation becomes an end in itself, for once professional duties are fulfilled, the proceduralist lawyer's goals are seemingly accomplished."<sup>76</sup> Where legal rights "are regularly and systematically ignored or neglected," the proceduralist lawyer "pursu[es] the ends of the rule of law because the state does not in

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<sup>72</sup> Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 L. & SOC. INQ. 657 (2004). The lawyers Sarat and Scheingold studied were liberal or leftist lawyers. There are, of course, conservative/right wing cause lawyers. *See id.* at 660-61; *see generally* Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law,'* 52 UCLA L. REV. 1223 (2005); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2009).

<sup>73</sup> Austin Sarat & Stuart Scheingold, *CAUSE LAWYERING: POLITICAL COMMITMENTS & PROFESSIONAL RESPONSIBILITIES* (1998); Hilbink, Thomas, *Constructing Cause Lawyering: Professionalism, Politics, & Social Change in 1960s America* (Jan. 31, 2006) at 223, <https://ssrn.com/abstract=2417253> or <http://dx.doi.org/10.2139/ssrn.2417253>, *CAUSE LAWYERING & THE STATE IN A GLOBAL ERA* (2001).

<sup>74</sup> Thomas M. Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, & Social Change in 1960s America* (Jan. 31, 2006) at 223, <https://ssrn.com/abstract=2417253> or <http://dx.doi.org/10.2139/ssrn.2417253>.

<sup>75</sup> *Id.* at 667 (discussing practice of Malaysian and Indonesian cause lawyers).

<sup>76</sup> *Id.* at 668.

practice support such ends.”<sup>77</sup> Particularly in autocratic states, “to introduce rule-of-law practices is to take a major step, perhaps a transformative step, forward.”<sup>78</sup>

Elite-vanguard lawyers engage in more critical practices, centering substantive rather than procedural justice.<sup>79</sup> Elite-vanguard lawyers see themselves as protagonists and “treat[] law as a superior form of politics.”<sup>80</sup> Identifying constitutional values with social justice, law, as a phenomenon relatively autonomous from politics, is seen “as ‘majestic’ and ‘constitutive.’”<sup>81</sup> From this perspective,

[.]law becomes an instrument of social change, and changing law—primarily through litigation—becomes an end in itself. When practiced by lawyers on the Left, this vision of the system constitutes what Laura Kalman has described as “legal liberalism”: a belief that society’s ills can be cured through legal action.<sup>82</sup>

For elite-vanguard lawyers, the focus is on legal reform for a variety of causes—for example, racial and environmental—using litigation and the courts in particular. As with proceduralist practice, professional expertise is highly valued. But unlike proceduralists, elite-vanguard lawyers are partisan not only to law and the legal system, but in particular to law’s and the legal system’s capacity to extend rights attached to their cause(s). As such, elite-vanguard lawyers often choose their clients, and such clients tend to be collectives or representatives of collectives or classes of individuals.<sup>83</sup>

Most critical of liberal legalist values, grassroots lawyers “challenge[] dominant conceptions of law, the legal system, and professionalism while at the same time offering an alternative conception of lawyering.”<sup>84</sup> Many of these lawyers “s[ee] law as a cause of, rather than the solution to, inequality and injustice in

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<sup>77</sup> *Id.* at 669.

<sup>78</sup> *Id.* at 671 (quoting Stuart Scheingold).

<sup>79</sup> *See id.* at 673.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 674 (citation omitted).

<sup>82</sup> *Id.* (citation omitted). Note the similarity but difference between the terms “legal liberalism” and “liberal legalism.” Put simply, the former is the practice of liberal organizations to institutionalize legally their political agenda while the latter is, as we have discussed, a system.

<sup>83</sup> *See id.* at 680.

<sup>84</sup> *Id.* at 223.

America”<sup>85</sup> and believe that “there [a]re profound, if not fatal, flaws in law and the legal system that need to be exposed, accounted for, and challenged.”<sup>86</sup> Grassroots lawyering generally rejects the positions of the proceduralist and the elite-vanguard, positing instead that only participatory democracy—“direct involvement of people (clients) in the legal process”—could lead to actual social change.<sup>87</sup> Often, this involves reconceptualizing the identity and role of the lawyer by “demystifying their role for clients, adopting collective decision-making approaches with clients and movements, [and] destroying traditional office hierarchies.”<sup>88</sup> In short, grassroots lawyers identify first as activists and “reject lawyering as [a] primary identity.”<sup>89</sup>

As opposed to accepting the status quo, grassroots lawyers challenge the role of the law and lawyers in perpetuating injustice and inequity. For grassroots lawyers, “law d[oes] not merely serve a regulatory purpose, but . . . as ‘the critical ideological apparatus of the state,’ and ‘an expression of political ideology and propaganda as well as an instrument of oppression.’”<sup>90</sup> Grassroots lawyers contest the “neutrality” of the law, the “objectivity” of lawyers, the legal system’s support of an exploitative and racist capitalist economic system, and the legal system’s erasure of history and societal context through abstraction to general principles.<sup>91</sup> By this reasoning, law should serve explicitly political ends, legal action is “only one weapon in a widespread assault on injustice,”<sup>92</sup> and the point is to politicize law and legal practice.

In contrast to those in elite-vanguard practice, which privileges lawyers and courts, grassroots lawyers also believe in social transformation “from the bottom up, beginning with individuals and communities (and often the parties themselves).”<sup>93</sup> Seeing their role as radical and expansive, grassroots lawyers see lawyering as a collaborative endeavor—with client, community, and movement actors.<sup>94</sup> In so doing, therefore, they also forge alternative legal—and

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<sup>85</sup> *Id.* at 225.

<sup>86</sup> *Id.* at 238.

<sup>87</sup> *Id.* at 227.

<sup>88</sup> *Id.* at 228.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 239.

<sup>91</sup> *Id.* at 239–42, 244–45.

<sup>92</sup> *Id.* at 681.

<sup>93</sup> *Id.* at 683.

<sup>94</sup> *See also* Capulong, *supra* note 32.

social—futures.<sup>95</sup> Significantly, many grassroots lawyers expressly reject the very idea that reform of the system is possible; rather, they see their role as working with clients to bring about a radical reenvisioning of society.<sup>96</sup>

In terms of professional identity, this typology captures the lawyer's role and values as guardian, reformer, and revolutionary of the legal order. Proceduralists begin with the democratic principle and rule of law. Rejecting autocracy, they see their role as defending egalitarian values and individual rights. Elite-vanguard lawyers, on the other hand, are probably best described as reformers: They see their role as reforming a system within constitutional bounds. Finally, grassroots lawyers see their role as “co-eminent practitioners”<sup>97</sup> with other actors in bringing about fundamental social change. As such, they are not bounded by constitutional norms, but imagine futures untethered from them. Taken together, these practices—what we call democratic lawyering—capture the commitment to the rule of law, the promise of liberal legalism—in particular due process, pluralism, human rights, equality, and equity—and the sanctity of a people's right to fundamentally change an existing system if it no longer serves its purpose.<sup>98</sup>

In other words, democratic lawyering practices evince commitments, respectively, to liberal (procedural), progressive (elite-vanguard), and radical (grassroots) democracy.<sup>99</sup> As such, these practices also outline the lawyer's tasks in this particular historical moment: defend, reform, and, ultimately, fundamentally change the legal system. The clear and present danger of authoritarianism means we must defend the status quo, deficient as it is and objectionable as such defense at times may be, because autocracy is worse. At the same time, however, given such deficiencies, change, even radical transformation, is necessary.

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<sup>95</sup> See Amna Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, (2021).

<sup>96</sup> See Hilbink, *supra* note 74.

<sup>97</sup> GERALD P. LOPEZ, *REBELLIOUS LAWYERING* (1992).

<sup>98</sup> THOMAS JEFFERSON, ET AL., *DECLARATION OF INDEPENDENCE* (July 4, 1776).

<sup>99</sup> One can even say that this spectrum maps onto the preamble of the model rules of professional conduct insofar as it contemplates the lawyer's role as an officer of the court and as a public citizen with a special responsibility for the quality of justice. See MODEL RULES OF PROF'L CONDUCT PREAMBLE (Am. Bar Ass'n 2023). [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/?login](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/?login).

Again, these categories are idealized, are not mutually exclusive, and, indeed, overlap and are even contradictory.<sup>100</sup> Despite these complexities, they form the bases by which to ask fundamental questions about professional identity. For too long the values that have shaped our individual and institutional approaches to teaching tomorrow's lawyers have flowed beneath the surface of our curriculum, courses, and communication. These values are powerful currents that drive the process of shaping law students but are rarely, if ever, unearthed, discussed, and examined. Starting our work from here could begin, from a proceduralist lawyer's standpoint, with being explicit about how we currently inculcate professional identity among our students. This is what this "Interrogating the Hidden Curriculum" symposium was about. What values does law school espouse? How would we define such identity and how does it form? At its conceptual core, U.S. democracy and rule of law was a (revolutionary) break from (British) autocracy. Is such an identity bounded by legal reasoning, law school culture, the legal profession, and liberal legalism, as we describe here? If not, what are its other constituent elements? How does personal identity—for example, in terms of race or gender—influence role conception?<sup>101</sup>

From the elite-vanguard lawyer's standpoint, the next layer of questions asks why and how the tenets of liberal legalism are not being met. What is it about our own processes of professional development and acculturation, both individually and systemically, that lead us to believe that those ideals can be fulfilled through our commitments to the status quo? Different communities are, of course, disparately impacted by legal processes. Why and how? Admittedly, the current moment offers many substantive attacks on even these values, labeling various conceptions of equality, human rights, and due process under law as "woke" attempts to disrupt or destroy a different and deeply embedded vision of America. We do not anticipate that beginning with a reexamination of the starting point for our individual and institutional commitments to educating law students will avoid, much less satisfy, those attacks; however, returning to the tenets of liberal legalism is likely to provide common

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<sup>100</sup> See, e.g., ROSA LUXEMBURG, REFORM OR REVOLUTION (1898) (discussing reformism and revolution as having different goals).

<sup>101</sup> See generally David B. Wilkins, *Fragmenting Professionalism: Racial Identity and the Ideology of Bleached Out Lawyering*, 5 INT'L J. LEGAL PROF. 141 (1998); Russell G. Pearce, *White Lawyering*, 73 FORDHAM L. REV. 2081 (2005); Capulong, *supra* note 2; see also Peggy Cooper Davis, "Hey! There's Ladies Here!," 73 N.Y.U. L. REV. 1022 (1998).

ground for that discussion. How might we make good on these aspirations? What should be changed? Why and how?

Finally, from a grassroots lawyer's standpoint, if certain issues are indeed systemic, what systemic reforms are required? Indeed, are reforms sufficient?<sup>102</sup> What is the role of the legal system and lawyers in perpetuating the injustices and inequities in our society? How does this cause us to conceptualize the role of the lawyer differently? Should lawyers strive to be (or appear) neutral, rational, and objective, or do history, personal identity, and societal context also form part of the lawyer's professional identity? If reforms are insufficient, what alternative legal systems can we envision? As collaborative professionals, how do we work with communities seeking change, and what kind of social transformation do we inevitably seek?<sup>103</sup> For example, grassroots lawyering looks to various social movements as prefiguring legal and social alternatives and leading such transformation. If we believe that law inescapably must be a component of modern social life, what alternatives beyond liberal legalism do we envision? How do we bring it about? What is the lawyer's role in rethinking law itself?

Through an examination of the three typologies, we hope to guide the "intentional exploration" of professional identity envisioned by the ABA.<sup>104</sup> However, as described above, we reject the idea that this intentional interrogation can be value neutral or simply a process without any particular substance. Rather, to meet the demands of our current moment, the following core democratic values must be a starting point for and essential components of professional identity: the advancement of participatory democracy, the commitment to democracy, the rule of law, and an equitable, fair inclusive process, and the refusal to perpetuate gender, racial, social, class or other injustices.

Admittedly, this framework is a substantive and value-focused approach to the formation of professional identity. By beginning with an honest assessment and acknowledgment of the ways in which our prior and existing approach to that task has promoted certain values, we can critically assess and challenge them while at the same time

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<sup>102</sup> See Law & Political Economy Project, *Symposia: Nonreformist Reforms*, <https://lpeproject.org/symposia/non-reformist-reforms/>.

<sup>103</sup> See Akbar, *supra* note 95 at 821 (arguing for "an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements").

<sup>104</sup> ABA STANDARD 303, Interpretation 303-5.

developing a new set of values rooted in and empowered by communities seeking progressive change.

Through this approach, we envision a path toward the development of a critical democratic lawyering professional identity for our students. While critical approaches to law have infused (at least the electives of) the law school curriculum, we have yet to rely on a similar method for unearthing and reforming the values espoused by and inherent within the framework of those curricula. Doing so intentionally and proactively through the development of professional identity presents an opportunity to fundamentally reshape legal education for the better while opening the door to a meaningful reckoning with the transformational historical effects of our past approaches on our system and society. That process should begin with an honest and open assessment of the values that we promote—not simply in our words, but also in our deeds; an assessment that would fully reveal the hidden curriculum at work. From there, reorienting those values away from those that drive the hidden curriculum and toward truly democratic values could begin the development of new legal professionals and best fulfill the call and potential of ABA Standard 303. Finally, committing ourselves to be a part of the process and not just its professors would not only serve to help us continue our own professional development but also offer the chance to model the collaborative and inclusive values that the current moment demands.

## V. Conclusion

With the additions to Standard 303's requiring "substantial opportunities to [develop] a professional identity and education on "bias, cross-cultural competence, and racism," the ABA set out its understanding of professional identity, development, and values. According to the ABA, professional-identity development "should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."<sup>105</sup> We recognize that this "intentional exploration" can, and will, take many forms, but, in light of the current moment, democratic lawyering offers a necessary way forward. Our collective journey down that path should include, at a minimum, two components: First, we should strive to make explicit the values inherent in the hidden curriculum that currently go unexamined. Second, we must intentionally and transparently infuse the formation of legal

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<sup>105</sup> *Id.*

professional identity with substantive counterhegemonic, democratic values—socioeconomic equity, inclusion, and anti-racism among them. With those values at the core, Hilbink’s typology of democratic lawyering can help guide further exploration of roles, identities, and strategies for transformational reform.<sup>106</sup> Importantly, the work is in the work, not just in these words, and our shared future depends upon our ability and commitment to live by the work, not just write or talk about it. Our hope is that, with these words, we can help start or advance that work and that, together, we can build a system of legal education, a legal structure, and a rule of law that finally live up to the true ideals of our democratic project.

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<sup>106</sup> As we have written elsewhere, the process of professional-identity development also demands a focus on the personal and systemic values that have shaped each of us, a process further supported and promoted by reflection. *See* Capulong, *supra* note 2, at 18-20. Such work remains an important part of each of the components described here.