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The Futures of Law, Lawyers, and Law Schools: A Dialogue

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THE FUTURES OF LAW, LAWYERS, AND LAW SCHOOLS: A DIALOGUE

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Abstract

On April 19 and 20, 2023, Professors Bernard Hibbitts and Richard Weisberg convened a conference at the University of Pittsburgh School of Law titled "Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers." Four speakers concluded the event with a spirited conversation about themes expressed during the proceedings. Distilling a lively two days, they asked: what are the most critical challenges now facing US legal education and, by extension, lawyers and the communities they serve? Their agreements and disagreements were striking, so much so that Professors Hibbitts and Weisberg invited those four to extend their conversation in writing. The University of Pittsburgh Law Review graciously agreed to publish the result.

RACHEL F. MORAN:

Thanks to Bernard Hibbitts and Richard Weisberg, we have just finished a wonderful conference on the challenges confronting American legal education. As I listened to the range of presentations, it occurred to me that two key themes featured in each of the sessions we had over the course of the last two days. The first theme related to market shortcomings and the sustainability of the traditional law school model. For instance, Paul Campos described the relentless increase in law school tuition, the growing stratification among law schools, and the questionable value proposition of pursuing a law degree at less elite institutions. He predicted that these patterns could not last, and for legal academics, "the party is coming to an end."[1] Meanwhile, Paula Monopoli argued that law school programs should be streamlined to two years, although she framed this as a way to broaden

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[1] Paul Campos, Professor of Law, University of Colorado Law School, Remarks at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 20, 2023)

access to the profession, particularly for women.[2] Ben Barton explored how law schools have responded to a declining pool of applicants for their J.D. programs by offering new degrees. These credentials include not only LL.M.s for international students but also Masters of Law in specialized fields like health care, dispute resolution, technology, and regulatory compliance. These programs have helped law schools to survive the shrinking of their J.D. programs, though Barton worries that institutions may be trading on their reputations to offer degrees of questionable value in the marketplace.[3]

The second theme was markedly different, dealing instead with the moral shortcomings of legal education. Sameer Ashar may have offered the most forceful indictment, arguing that legal educators have been unduly timid in challenging existing structures of power. With a focus on clinical programs, he urged law schools to prepare students for progressive prefigurative thinking, which should enable them to imagine how best to challenge the status quo and partner with social movements for fundamental reform.[4] In his keynote address, Pete Davis recounted the ways in which his alma mater, Harvard Law School, failed to inspire public spiritedness in its graduates. In his view, elite law schools generally have not been leading by example to support aspirations to serve the greater good. Few alumni pursue careers in public interest or government, and those at large law firms devote relatively little time to pro bono representation. In contrast to Ashar, Davis looked to tools to advance social justice that are already available but concluded that top law schools simply prefer to train students to serve power elites.[5] Meanwhile, Dara Purvis argued that law schools have failed to reckon with their own legacies of unfairness and exclusion. In particular, she contended that legal education continues

[2] Paula Monopoli, Sol & Carlyn Hubert Professor of Law, University of Maryland Francis King Carey School of Law, Remarks at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 20, 2023).

[3] Benjamin Barton, Helen and Charles Lockett Distinguished Professor of Law, University of Tennessee College of Law, Remarks at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 20, 2023).

[4] Sameer Ashar, Clinical Professor of Law, University of California, Irvine School of Law, Remarks at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 20, 2023).

[5] Pete Davis, Writer/Civic Advocate, Keynote Address at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 20, 2023)

to engender inequality by entrenching masculine norms of professionalism, even as women have come to dominate student bodies throughout the country.[6]

Throughout these two days, the themes of market failure and moral failure have existed side-by-side with the distinctions largely unremarked. Yet, these are two very different diagnoses of the trouble with legal education, and they are bound to result in divergent prescriptions for reform. Market-based critiques lead to demands for law schools to streamline, to make graduates practice-ready, and to forgo frills that undermine the law degree's value proposition. These analyses largely accept the profession as it is and demand that legal educators better conform themselves to market demands.[7] Morality-based critiques reject the inequality and stratification that are built into law and the legal profession. Instead of urging legal educators to conform themselves to market imperatives, these analyses turn on disrupting the existing dynamics of law school instruction and law practice.[8]

What, if anything, can be said about the relationship between these two kinds of critique? Are they fundamentally incompatible or can they be reconciled? If they are not easily reconciled, should one type of critique take precedence over? Does morality always trump the market? Or should market imperatives come first because there will otherwise be an existential threat to law schools' very survival?

MICHAEL MADISON:

I'm grateful for Rachel Moran's characteristically thoughtful and concise summary of the themes of the conference. Rather than respond directly to her question, I want to bring forward a third perspective.

I don't doubt that in many respects "market failure" and "moral failure" as she's described them are causes and products of the challenges that US law schools face today. If we imagine legal education in the hands of Hollywood scriptwriters, then

[6] Dara Purvis, Professor of Law, Penn State Law School, Remarks at the University of Pittsburgh Conference on Disarmed, Distracted, Disconnected, and Distressed: Modern Legal Education and the Unmaking of American Lawyers (Apr. 21, 2023).

[7] *See, e.g.*, Mark A. Cohen, *Law Schools Must Restructure. It Won't Be Easy*, FORBES, May 15, 2017, https://www.forbes.com/sites/markcohen1/2017/05/15/law-schools-must-restructure-it-wont-be-easy/?sh=7b06be233d3f.

[8] *See, e.g.*, Etienne Toussaint, *The Purpose of Legal Education*, 111 CAL. L. REV. 1 (Feb. 2023), https://static1.squarespace.com/static/640d6616cc8bbb354ff6ba65/t/64434be99eead871eee06270/1682131946230/Toussaint+36+post-EIC.pdf.

one may be the "A" plot and the other the "B" plot. It may not matter which is which.

My third perspective is this.

Sometimes plots are less than they seem. To continue with the scriptwriting analogy, are money and values Hitchcockian "McGuffins," objects that trigger our narrative interest and hold our attention while critical themes are developed less theatrically? The trouble with contemporary legal education may be buried within the salient specifics of economy and virtue.

What if law simply isn't as important as we have assumed it to be? What if law schools – and lawyers, and law professors, and judges, and others who run law schools, train new lawyers, and often look to law schools as the embodiments of law's present and the progenitors of law's futures – aren't as important as we've believed for the last one hundred-plus years or so?

(The questions aren't entirely novel. More than 30 years ago, in an essay commemorating the 100th anniversary of the founding of the *Harvard Law Review,* Judge Richard Posner challenged the "prevailing faith in the autonomy of law."[9] I confess also to being provoked by recent work by David Graeber and David Wengrow, in *The Dawn of Everything: A New History of Humanity*. [10] Their book offers a wide-ranging synthesis of research on communities, governance, and values across time and space. Although it resists a quick summary, it is fair to note their conclusion: our contemporary focus on the modern state as the apotheosis of Enlightenment values -- including the rule of law -- is mostly a product of a too-narrow intellectual tradition. As reformers, we are "stuck," in their phrase, in a box of our own design.[11])

I hasten to add that I frame my question as a hypothesis. As a hypothesis, it lacks a lot of specifics and leaves a lot of further questions unanswered. It has empirical dimensions (is it true?), normative dimensions (should it be true?), philosophical dimensions (how might it be true?), and pragmatic dimensions (if it's true, then so what?). What do I mean by "law," and by "important" (or "not as

[9] Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 765 (1987).
[10] DAVID GRAEBER AND DAVID WENGROW, THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY (2021).
[11] *See id.* at 480-502.

important")? I'll explain briefly what motivates the hypothesis and what I and others might do to explore its foundations and its implications.

The motivation comes from a blend of two activities that I've devoted a lot of time to over the last decade.

The first comes from my research, which increasingly prioritizes alternatives to law-based systems for generating, distributing, and preserving knowledge and information. I started my faculty career as an intellectual property scholar and teacher, but for the last 15 years I've committed almost all of my research time to exploring what I and my colleagues call "knowledge commons."

"Knowledge commons" is broad category that refers to communal or collective governance of shared knowledge, information, data, and culture. The core insight of the research builds on work for which Elinor Ostrom received the Nobel Prize in Economics in 2009: there exists a large, robust sector of governance institutions for resource management that rely primarily not on the state nor on markets. "Commons" or community governance of shared natural resources, she demonstrated, offers a critical but often overlooked third way.

With colleagues, I've adapted Ostrom's field for the 21st century, looking – as she mostly didn't – at 21st century knowledge systems.[12] Ostrom was largely hostile to the idea that formal legal systems should be elements of resource governance. Our knowledge commons work is more inclusive and pluralistic. Some law professors acknowledge governance roles played by "social norms"; we try to dig into the empirical details. The longer I pursue the work, the more significance I attach to the importance of communities, systems, institutions, and technologies in solving both large and small social problems. These are tools and strategies that have complex links to traditional law and legal systems. My attachment to this perspective becomes my students' burden; my copyright and trademark students have a learning experience that is quite unlike what they've encountered elsewhere in law schools.

The second comes from an entirely distinct field of activity. For several years I've been trying to galvanize colleagues around the world with a call to action directed to large scale institutional reform in law. That begins with law schools and other modes of legal education and extends to universities. It includes court

[12] For a full accounting, see the Workshop on Governing Knowledge Commons, https://knowledge-commons.net, where we inventory knowledge commons books and papers that I and my colleagues have produced since 2009.

systems, other dispute resolution systems, institutions for licensing lawyers, regulating the delivering of legal services and access to information, and organizing people and technologies to deliver so-called "legal" services. It's the work that prompted my being invited to contribute to this conference, and it's inspiring and ongoing. I've found hundreds of "fellow travelers" around the world, academics, practitioners, judges, technologists, and others, who see the urgent need to act not in conventional reformist modes but in frames that describe large-scale institutional invention.[13]

One of the lessons of that work, for me, and so far, is that the institutional legacies of law as such – positive law in both substance and procedure; the conventional institutional architectures of liberal democracy, the rule of law, and equal justice; and the gatekeeping of degree-granting law schools and their partners in 20th century legal licensure – are yielding, slowly but surely, to the multiple imperatives of the market and communities of many sorts. Social problems exist at large and small scales, and law is only one device among many options when groups of people try to figure out how to solve them.

What does that look like on the ground? We can look to dispute resolution via technology platforms, and to data analytics that support large-scale planning administrative and business systems, and to innovation and improvement from solo law offices to global enterprises. When I observe that law is one choice among many in the field, what I mean is that the language of problem-solving, the language of operation, the language of practice, and the language of change today comes from many fields: management, engineering, information science, sociology, and even knowledge commons (!). In conversations with friends and colleagues in this space, I rarely hear the language of law, that is, the semantics, syntax, and institutional framings that drive how modern lawyers are still trained to communicate and to think.

To reiterate: my suggestion -- that law and law schools aren't as important as we imagine -- is a hypothesis. It's a hypothesis grounded in a kind of anxiety, akin to Harold Bloom's theory of an anxiety of influence.[14] Bloom argued that literary influence is inescapable, yet authors are caught in a kind of psychological trap that demands that they produce "original" work. I hope that I don't stretch the metaphor too far by suggesting law schools (that is, law professors, law students, lawyers,

[13] For a full accounting, see Future Law Works, https://futurelawworks.org. The same theme is expressed via an interview-based podcast that I have co-hosted since 2018, The Future Law Podcast. http://futurelawpodcast.com.

[14] HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF ENGLISH (1973).

and judges) are acutely aware of the power and influence of social, cultural, and economic contexts in which they are operating yet are caught in a kind of institutional trap that demands that they learn, respect, and practice the intellectual and practical autonomy of "law."

In short, the 20th century ideology of legal education holds that law is largely autonomous and largely singular, in its role in constructing and enabling the institutional glue that holds diverse societies together. The big components of that glue are the rule of law, liberal democracy, and equal justice. In the 20th century, that ideology was expressed in teaching, learning, and professional practice to an acceptable degree, out in the world. Problems were solved; lawyers built careers; states, governments, businesses, universities, and other organizations (law firms, for example) were constructed and often prospered.

The 21st century practice of well, everything, but including law, increasingly reveals the empirical weakness of the ideology to people – in governments, businesses, universities, and elsewhere – who are told that they are supposed to live with it but who often work around it instead. Deans and law professors and their stakeholder partners on the bench, in the bar, and in the university's central administration are now directly confronted with the practical implications of the gap. Who should go to law school, and why? Who should teach in a law school, and what, and how? What does one do with a law degree? Those are questions that go to the futures of the roles of law in society, not only to whether law schools and law students can build economically viable institutions or claw back the role of lawyers as citizen leaders.

I'll close by confirming one thing and pointing to another.

I'll confirm that I'm using "law" here in a mostly conceptual sense and mostly to refer to positive law and to late 19th century and 20th century legal institutions. Most of all, I'm referring to legislatures and courts and their formal products. I'm skipping over a lot of nuance and detail and distinctions between common law and civil law traditions, and I'm not focusing on what "law" or beliefs about law do in the daily lives of actual human beings, licensed lawyers included. My sense of "important" or "not important" does not refer to the disappearance of law in any sense but instead to the hypothesis that law is no longer *primus inter pares*, or first among equals, as a source of social order. Robert Ellickson wrote about *Order Without Law* and was referring to the efficiency produced by community-based

social norms among Shasta County cattle ranchers.[15] Edward Rubin wrote about the fact that the modern administrative state today is unhelpfully described, metaphorically at least, in the same language that once was used to describe the power of the crown in medieval England.[16] I combine Ellickson's thick "bottom-up" description and Rubin's resistance to the "top-down" account of modern power and conclude by hypothesizing that order *with* law isn't what it's been cracked up to be.

I'll point to this. What should any of us do with my hypothesis?

One strategy, of course, is to examine it and test it, empirically (with the tools of the social scientist) or analytically (with the tools of the moral philosopher) or both. Is the hypothesis framed in a useful way? Is it pitched at the right or best level(s) of generality or specificity? What would the evidence look like, one way or another? Does the hypothesis hold up as a matter of shared belief or social psychology, or as a matter of other qualitative (or even quantitative) data, or not?

Maybe the terms of the debate are set in economic terms. Maybe the terms are set in ethical terms. Maybe these are questions of collective experience; maybe they are matters of individual status, preference, opportunity, or capacity.

Perhaps my hypothesis holds up in some respects as a descriptive matter but should be resisted as a normative matter. Maybe law *should be* more important than it has become. Perhaps I'm suggesting that we should not assume the normative significance of the rule of law, liberal democracy, and equal justice in the 21st century; those are values that must be articulated and defended again, foundationally, as they began to be 150 years ago.

It's easy to cast the foregoing in terms of the grand "we." How does this come down to the personal? A second strategy is to do largely what I've done so far myself: develop an admittedly intuition- and experience-based reading of the legal education environment, and proceed, as I have done, to change behaviors accordingly. I do different research than I used to do; I teach some of the same courses differently and teach some different and far from traditional courses;[17] I have built and participate in personal and professional communities of practice that have little to do with conventional law teaching or legal analysis or the challenges

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[15] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).
[16] EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005).
[17] See the syllabus for "Technology, Law, and Leadership," https://michaelmadison.net/technology-law-and-leadership/fall-2023/.

and opportunities of "law reform." I am trying to advance a vision of personal and institutional change that builds on an assumption that my hypothesis is largely correct. I have only one measure that tells me whether I am headed in the right direction: the observed effects of my teaching, my writing, and my volunteerism on various people communities around the world. I am satisfied with that, to a point.

But US law schools, on the whole, mostly have yet to notice what I and my fellow travelers are doing.

To me, that's trouble.

BENJAMIN BARTON:

What an honor to be included in this conversation! So far we have two different intriguing questions, seemingly quite distinct. Rachel identifies two classes of critiques of legal education, one based in market failure and the other in moral failures and asks whether they are irreconcilable. Michael asks whether 21st century American law is ebbing "in its role in constructing and enabling the institutional glue that holds diverse societies together." I am going to attempt to address both of these concerns, first by disagreeing with Michael on his framing, but enthusiastically agreeing with him on his larger premise and many of his solutions. Then I'll argue that my recasting of Michael's point actually unites the clans and also suggests a preliminary to answer Rachel's provocative question.

First, I outline my disagreement (and areas of agreement) with Michael. I am a strong believer in Gillian Hadfield's insight that in America we live in an increasingly "law-thick society."[18] Likewise, I am a fan of our symposium compatriot Paul Campos' first book, *Jurismania*, which argues that in America "[l]egal modes of vocabulary and behavior pervade even the most quotidian social interactions; the workplace, the school, and even the home mimic the language of the law."[19] Law and legalistic processes govern more and more areas of our lives: employment, financial transactions, family matters, medical care, and more settings all have legal dimensions to them. Have you agreed to a long set of terms and conditions today? If so, you've been engaged with the law. Every form of American

[18] Gillian Hadfield & Jaime Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans, in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21 (Samuel Estreicher & Joy Radice, eds., 2016).
[19] PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 5 (1998).

law, from statutes to regulations to decisional law to municipal codes have grown in recent years as has the sinking feeling that American law is everywhere.[20]

If you ask an ordinary American whether law and legalism are more or less prevalent in the U.S.A. I feel confident they will disagree with Michael. Consider the 2022 Legal Services Corporation study of unmet legal needs among low-income Americans.[21] 74% of low-income households experienced at least one civil legal problem in 2021 and 39% experienced 5 or more problems.[22] These problems spanned very serious issues, including debt, health care, housing, employment, and government benefits.[23] Rebecca Sandefur has demonstrated that middle class Americans similarly face a bevy of legal issues.[24]

Less formally, consider the prevalence of the "America has too many lawsuits or lawyers" trope.[25] The popularity of the website "overlawyered.com" from 1999-2020 is further evidence.[26] Or just pick up any of Philip K. Howard's books like "The Death of Common Sense" or "Life Without Lawyers."[27] One of my favorite, smaller examples is the battle over America's new, safer (and arguably less fun) playgrounds.[28] Opponents of the trend lay the fault completely at the feet of tort law and lawyers.[29]

As such, I disagree that American law is ebbing in influence or coverage. I think the effect is quite the opposite actually. Nevertheless, and possibly paradoxically, I think Michael and I are actually in relative agreement here. How so? Even as American law grows ever more overweening, the role of lawyers and lawyer-driven court processes are shrinking and at an alarming rate. So I'd amend Michael's

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[20] For a visual representation of the growth in regulations, *see* https://www.mercatus.org/economic-insights/mercatus-original-videos/visualizing-growth-federal-regulation-1950.
[21] https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid.
[22] https://justicegap.lsc.gov/resource/executive-summary/.
[23] *Id.*
[24] Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S. CAR. L. REV. 443 (2016).
[25] In a 2012 survey 89% of Americans agreed that "lawsuit abuse" is a problem. https://docplayer.net/2257741-Americans-speak-on-lawsuit-abuse.html. In 2014 a survey found that 56% of Americans thought there were too many lawyers. https://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/april_2014/56_think_there_are_too_many_lawyers_in_u_s
[26] https://www.overlawyered.com/accolades/.
[27] PHILIP K. HOWARD, LIFE WITHOUT LAWYERS (2009); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994).
[28] Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 57 FLA. L. REV. 265 (2006).
[29] *Id.*

hypothesis as follows: "that ~~law~~ *lawyers* and law schools aren't as important as we imagine." Evidence for the increasing irrelevance of American lawyers and courts abounds.

Above I listed the disturbing prevalence of legal issues for America's poor. Worse yet, Legal Aid can only help in roughly *half* of the cases where help is sought.[30] This means that America's poor are going it alone as often as not with very serious legal issues and often to disastrous results.

But indigent Americans at least have access to Legal Aid! America's access to justice crisis starts with the very poor but spans all the way into the middle class. The average hourly rate for a small firm lawyer in America was $313 in 2022 and the costs add up quickly for even a mildly complicated matter like a divorce or a DUI defense or a contested child custody matter.[31] As the hourly rate has risen, Americans can afford less help. Gillian Hadfield demonstrated that the average American household could afford 30% less legal help in 2012 than in 1998, and that number is likely to have grown worse since. Why? Because lawyer rates have outstripped inflation.[32] Also because the share of legal work going to businesses and corporations rather than individuals just keeps rising, as demonstrated by Bill Henderson.[33]

You can see the results of this shift in the explosion in *pro se* litigants in American courts, often in very important cases dealing with issues like eviction, foreclosure, child custody, or child support enforcement.[34] The rate of self-representation has been growing and spreading into more serious legal disputes since at least 1998, and it has accelerated since 2008.[35] Another sign that litigation by lawyers has grown prohibitively expensive is the collapse in all kinds of trials. There is also the growth in less formal (and more frequently lawyer-less) forms of dispute resolution like arbitration, mediation, and most tellingly, online dispute resolution systems.

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[30] *Id*.

[31] HTTPS://WWW.CLIO.COM/WP-CONTENT/UPLOADS/2022/09/2022-LEGAL-TRENDS-REPORT-16-02-23.PDF

[32] Clio report at 19.

[33] https://lawprofessors.typepad.com/legalwhiteboard/2016/09/-lawyers-for-people-versus-lawyers-for-business.html.

[34] Emily A. Spieler *The Paradox Of Access To Civil Justice*: *The "Glut" Of New Lawyers And The Persistence Of Unmet Need*, 44 U. TOL. L. REV. 365 (2013).

[35] American Judicature Society, *Meeting the Challenge of* Pro Se *Litigation*, http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/185.

Likewise, there is the prevalence of "legal deserts" in America (areas where there is less than one lawyer per 1000 residents).[36] There 54 American counties with no lawyers at all and another 182 that have only one or two lawyers.[37] Overall, 40% of all counties in the United States count as legal deserts according to the ABA.[38]

Or consider the rise of LegalZoom or Rocketlawyer. These non-lawyer platforms offer inexpensive access to almost any legal form, frequently without a lawyer.[39] Consider the non-profit Upsolve, which helps Americans to navigate bankruptcy without a lawyer.[40] Or consider the growth of court navigator and licensed paralegal programs seeking to address the massive unmet need for legal services in this country.[41] Wherever you look, lawyers are being replaced by non-lawyers in the consumer law/small business space (or what I call "main street lawyers").

So, Michael and I agree that a key historical ingredient to America's rule of law, its legal profession, is, in fact, receding in prevalence. I think we also agree that this trend is unfortunate and possibly even dangerous to the rule of law, since so much of our system's proper functioning assumes access to legal services, from obvious places like civil court, but also in less obvious settings like regulatory enforcement or criminal courts where ignorance of the law is rarely a suitable defense. If law permeates our existence, but legal services and advice are too expensive and rare for ordinary Americans, where does that leave us?[42]

Before I turn to Rachel's excellent question or any proposed solutions, bear with me as I try to explain *why* these trends have occurred, because any suitable solution starts with an understanding of the nature of the underlying problem. Lawyers are quick to decry the access to justice crisis.[43] But their proposed solution is always *more* lawyers. More pro bono. Or higher funding for legal aid. I have previously called this the "more lawyers, more justice" fallacy.[44] The ABA's recent attention to legal deserts, for example, is a prime example. There are huge swaths of the

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[36] https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf p. 2.
[37] *Id*.
[38] *Id*.
[39] Benjamin H. Barton & Deborah Rhode, *Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity*, 20 Chapman L. Rev. 267 (2017).
[40] https://upsolve.org/learn/transparency/.
[41] https://www.ncsc.org/__data/assets/pdf_file/0024/53691/Justice-Lab-Navigator-Report-6.11.19.pdf.
[42] Hahaha, nowhere good.
[43] BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE 97-109 (2017).
[44] *Id*.

country where Americans have limited or no access to lawyers. The solution? Subsidize more lawyers for those areas! And yet the access to justice problem is so severe that there will never be sufficient funding for subsidized lawyers to meet the demand.[45]

Lawyers and law professors are quite slow to accept that the profession and law schools bear much (all?) of the responsibility for the current state of affairs. These trends are not the result of bad luck or an accident. The access to justice crisis in America is a largely a result of lawyer regulation and training.

For centuries American lawyers have typically been paid by the hour to do individualized legal services. Sir Richard Susskind calls this the bespoke model of services.[46] This of course made sense in the past. It was hard to regularize or commoditize legal services when every document was literally hand drafted. Yet, even as technology has improved and other professions like medicine or engineering have embraced new approaches to drive costs down and regularize services, lawyers (and law schools) have balked. Few areas of American life have been as resistant to change as America's legal institutions. American law schools still largely operate on the 19th century Langdell model. Large American law firms still contain much of the DNA from the 19th century Cravath model. And American courts still look very similar to their counterparts from 150 years ago. In the fantastic legal biography "Lincoln Lawyer" Albert Woldman studies Abraham Lincoln's law practice in depth.[47] The book is striking in its description of Lincoln as an exceptionally able practitioner, but also because of the many elements of lawyering, court procedure, and trial practice that are identical today! Imagine reading a book about a famous mid-19th century surgeon. How many of the medical procedures described would remain identical today? The opposite is the case for the law. Much of law remains the same as it ever was.

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[45] Here I will mark my only real disagreement with my friend Sameer Ashar's excellent diagnosis of our dire situation and solutions. I disagree with his first suggestion for a universal public option for civil legal services, or what some others have called a civil-*Gideon* right. If there were unlimited funds for the poor and all of their pressing non-legal needs then yes, I would certainly support an excellent government funded lawyer for every American. But funding for legal aid has always been too low (and this has gotten worse over time). Even the funding for constitutionally required lawyers for criminal defense has been continuously inadequate. This makes any large-scale civil *Gideon* approach seem very unlikely to succeed. Further, even if there was money for lawyers, I question whether that would be the best use of those funds given the desperate straits of America's poor. A simple cash transfer would be preferable or subsidies for more desperately needed items like health care, housing, or food.

[46] RICHARD SUSSKIND, TOMORROW'S LAWYERS 23-26 (2013).

[47] ALBERT A. WOLDMAN, LINCOLN LAWYER (1994).

But if there is such a desperate need for legal services for the poor and the middle class, why has supply failed to meet demand? This question is especially pressing if you believe, as most Americans do, that there are too many lawyers in the country. The answer can be found in Derek Bok's famous quote: "There is far too much law for those who can afford it, and far too little for those who cannot."[48] The most lucrative legal work in America is the most complicated, or the work that requires a bespoke approach. So, this is what law schools train lawyers to do. Much time in law school is spent in parsing cases and statutes to find gray areas and making "both sides of an argument." These are valuable skills, but almost no time is spent on simplifying and commodifying legal practice. Nor is much time spent on the business of law. Graduates will presumably learn that in a firm or on their own. As such, law school graduates think there is one way to practice law: the bespoke/old fashioned way.

Then these same lawyers are stuck trying to find clients to pay them to practice in this very expensive manner. This is why there is so much competition for the most lucrative work, representing corporations or suing corporations and why there is a dearth of legal services for small businesses or ordinary Americans. Ordinary people cannot afford to pay thousands of dollars for a bespoke approach to a divorce or an incorporation or a will drafting. Paradoxically, lawyers also can't afford to lower their fees to meet the unmet demand, because they have not been trained how to do the work more quickly and cheaply and because of the sheer expense of American law school. Including undergraduate debt, the average law school grad owes $160,000.[49] This makes charging less unimaginable.

Lawyers also benefit from the protections offered by the unauthorized practice of law ("UPL").[50] UPL is banned in all 50 states, barring non-lawyers from "the practice of law." What exactly is involved in the "practice of law" is notoriously ill defined, and American UPL theoretically spans all the way to offering "legal advice."[51] The UPL protections mean that potential clients have three options when confronted with a legal problem: pay a lawyer, lump it, or go it alone (pro se). Ironically, appearing pro se in many American courts is the best advertisement possible for hiring a lawyer. Pro se clients are regularly steamrolled or

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[48] Opinion, *Too Much Law – and Too Little*, N.Y. TIMES, April 23, 1983, https://www.nytimes.com/1983/04/23/opinion/too-much-law-and-too-little.html.
[49] https://educationdata.org/average-law-school-debt.
[50] Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1994).
[51] Benjamin H. Barton & Deborah Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955-88 (2019).

misunderstood or both. The first thing you learn when you watch an American court handling pro se divorce, eviction, foreclosure, or child support actions is "I need a lawyer if I'm going to have a chance here." Just sitting in those courts persuades Americans who can afford it that they should find the money to hire a lawyer by hook or by crook. To do otherwise is to risk a catastrophic failure.

The behavior of lawyers in this regard is consistent with monopolist/oligopolist behavior. Monopolies charge higher prices for their products because they can, and as such they earn higher profits.[52] These higher profits are called "monopoly rents." OPEC would sell more oil if they lowered the price, but their profit per barrel would decline. Likewise for lawyers. By restricting the supply of needed services and making it costly and painful to proceed without such services, they can charge more for the work they do, all while leaving demand unmet.

Now at last we can turn to solutions and Rachel's excellent question – how can we reconcile the market-based critique of law schools with the moral one? By recognizing that the market-based critique is *also* a moral critique. When I say that law school must be cheaper and teach different skills to address market failures for middle class and poor Americans I do so not only because it will be better for American lawyers and law schools, I do so because it will be better for the health of the country itself. We can hardly run a country based on equal justice under law, a country that was designed by lawyers for operation by lawyers by pricing lawyers out of any interactions with ordinary citizens!

I well know that there are other moral critiques of law school and I mean no slight to those cases at all, especially law school as an oppressively white and male space. Nevertheless, in my mind the solutions that would meet the market and access to justice needs would also help address other issues of inequality, because access to legal help is a precursor to almost every other kind of legal solution to our moral failings.

So yes dear reader, I am arguing that my diagnosis and solutions actually address BOTH Michael and Rachel's excellent points, because the addressing the political and market failures of American law schools is in fact at the heart of the moral case for changing law schools. Law schools need to be cheaper and teach

[52] DAVID HARVEY, SOCIAL JUSTICE AND THE CITY 179 (2009).

different things in order to place lawyers back into the lives of ordinary Americans. As law grows the role of lawyers should grow. And law schools must lead the way.[53]

SAMEER ASHAR:

Our society, not just the legal profession, is beset by both a moral and a market crisis. We are living through an era with a drastic upward distribution of wealth, the highest rate of incarceration in our history, and a climate crisis that threatens our continued existence as a civilization. We are emerging from a global pandemic and coping with the imposition of state control over the bodies of women and transgender people. Our political system has been engineered to allocate power against the interests of the many and for those of the few. Large-firm lawyers, acting as amoral technicians, have written the code of capital[54] that has facilitated our skewed political economy.[55] Legal activists on the right—in the field and on the bench—have undermined the New Deal settlement across many areas of social and economic governance and knocked out or weakened the Warren Court precedents and Congressional enactments underpinning the civil rights reforms of the 1960's and early 1970's. Law remains the terrain on which distributions of power are concretized, from the asymmetric treatment of capital and labor in tax law, financial regulation, and immigration law, to the closing of the courthouse door to consumers and workers. I fully sign on to Ben Barton's assessment of the prevalence of law (including everyday legalism and various kinds of legal process) and its pervasive impact on family, community, and society. Visions of a post-law society are of a piece with the supposed libertarianism of the titans of Silicon Valley: less legal constraint for the privileged few, more incontestable law for the masses.

Law also necessarily remains the terrain on which distributions of power are challenged. Social movements return to law repeatedly as they imagine structural change,[56] both because they fight carceral and fossil fuel legal regimes that choke

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[53] This also explains why I heartily cosign the solutions, both systemic and individual, that Michael suggests. Anything that will make law school and legal services cheaper is A-OK with me.

[54] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2018).

[55] Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth Century Synthesis*, 129 YALE L. J. 1784 (2020); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90 (2020).

[56] Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263 (2015).

the life out of communities and because law and legalism offers a vernacular, a demosprudence,[57] for the changes that they seek. Successive left movements engage in constitutionalism from below, often after they have disrupted things as they are.[58] In part, this is the development of a distinctive nomos that enriches and enlivens a social democracy.[59] The law/politics divide has never been less salient, as left movements attempt to play on the fields of social contestation that have been blocked off to them by liberals and flooded by right-wing activists.

The analysis in the preceding paragraphs may be judged to be alarmist and outside of the objective norms of legal academic discourse. However, even legal scholars are belatedly coming to understand what left movements have long-recognized: that we have been locked in a losing struggle in which the conditions of our social and economic life are put out of the reach of democratic contestation. Law and courts have been used both to create these conditions and to place our racial capitalist economic order outside of politics.[60]

I do not subscribe to the main responses offered by Ben Barton and Michael Madison, at least in their barest form. Deregulation of the legal profession does not necessarily expand access to justice or create conditions for equal justice, at least as currently contemplated and lobbied for in the U.S. Opening law firms to non-lawyer funding, commodifying, corporatizing, and outsourcing legal functions, and artificial intelligence solutions in the control of capital does not mean more access to the legal system or more justice for those that are disadvantaged. In the current system, these reforms are as likely to lead to the further trashing of legal ethical norms, corporate consolidation and control, and privatization of legal process. And "order without law" sounds especially ominous for the vast number of disadvantaged parties in social and economic relationships of inequality.

I suggest three approaches that may begin to address our situation. First, we should create a universal public option for civil legal services, both a moral and a

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[57] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2014).

[58] *E.g.*, JOSHUA BLOOM & WALDO E. MARTIN JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY (2016); JOHANNA FERNANDEZ, THE YOUNG LORDS: A RADICAL HISTORY (2020).

[59] Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

[60] Tonya L. Brito, Kathryn A. Sabbeth, Jessica Steinberg, & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243 (2022); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023); Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127 (2022).

market solution for some of what ails society, the legal profession, and legal education. Tonya Brito has made the case for a federal right to civil counsel for those who may not have the means to hire lawyers in the private market.[61] This kind of solution sounds like pie in the sky in our fiscally constrained neoliberal episteme. But unions and some employers currently offer employees access to legal assistance programs for reasonably priced legal services, both preventive and defensive. These programs efficiently allocate legal tasks to lawyers and non-lawyers under supervision (for which Ben Barton implicitly argues in his comments), but still within the bounds of legal ethical rules. Jeanne Charn has argued for some time that the U.S. ought to develop a "mixed-model delivery system" of public and private civil legal services, composed of both lawyers and non-lawyers.[62] Further, movement activists in particular fields, such as immigration and housing law, have been successfully pushing at the local level for the right to counsel in certain kinds of cases.[63] To be clear, more lawyers or more legal services will not fix the systemic skewing of our political economy.[64] After all, the constitutional right to counsel in criminal cases coincided with the rapid expansion of incarceration.[65] But to be contained from the outset by a false sense of scarcity, when billions are spent for militarization and criminalization, is to engage in a losing struggle for justice. As the carceral abolitionists have taught us, the state has the resources for social provision; what is needed is the mobilization of sufficient power to reorder social spending. A center-left mobilization for a civil right to counsel itself has the potential to alter the background distribution of power.[66]

Second, every lawyer should learn to work with groups of relatively powerless people against the social and economic forces that they confront in their everyday

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[61] Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56 (2019); *but see* Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform*, 62 FLA. L. REV. 1227 (2010).
[62] Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021 (2009).
[63] *E.g.,* John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L. J. 1081 (2019).
[64] Angélica Cházaro, *Due Process Deportations*, 98 NYU L. REV. 407 (2023).
[65] Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L. J. 2106 (2013).
[66] I acknowledge Ben Barton's point that lawyers sit low on the priority list for people without access to food, housing, and health care. Neoliberal politics often presents zero-sum choices to those who may seek to repair social conditions. Lawyers and legal educators are well-positioned to make the case for civil legal counsel (and increased funding for public defender offices), in conjunction with others advocating for greater social provision across a range of areas. A public option for lawyers could mobilize law school deans and law firm managing partners to join a cross-movement struggle in which they are currently absent. This is what I mean when I say that the mobilization of those currently shielded or withdrawn from social contestation has the capacity to alter the background distribution of power. We must all take up the fights in which we have a degree of authority and/or political potency.

lives. Legal education should be focused on collective representation in litigation, policy advocacy, and transactional practice, other than the class action structure, which falls well short as a method of struggle. [67] The ethical rules of the profession are animated by a focus on dyadic relationships between a single lawyer and a single client.[68] The rule on organizational representation presumes a particular structure of organization—hierarchical, delegated authority, powerless stakeholders—that is not true to the way in which people may or should organize themselves in a political struggle. Lawyers must acknowledge organizational diversity and hybridity and learn how to bring their skills to bear to advance the interests of popular collectives.[69] And lawyers should be paid to work with such groups in practice, perhaps as part of a national program of civil legal services. For those who remain fixated on cost, collective representation leverages scarce resources in exactly the ways most disfavored by landlords, employers, retailers, and police. It should not escape our attention that politicians gutted civil legal services in part by prohibiting collective representation.[70] They were "taking out the adversary," in David Luban's words.[71] Let's bring back the adversaries, but with new forms of accountability and more capacity and flexibility outside of the class action framework.

Third, taking leads from the global south and from mutual aid efforts in the U.S.,[72] law schools should train cadres of legal workers to work within communities to resolve and prevent conflict. These legal workers need not be lawyers (once again, consistent with Ben Barton's intention in his comments on deregulation). But they should be trained and deployed not based on market demand to generate profit for capital but instead to meet social demand for public safety and the development of intersecting communities of care at the grassroots. Our insecurity is social and requires collective responses other than militarization and criminalization. Public law schools have a responsibility to create non-degree programs that are socially

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[67] Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 355 (2008).
[68] Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999 (2007).
[69] Meena Jagannath & Sameer Ashar, *Case Study I: Movement Groups with Flat, Innovative Governance Structures*, 47 HOFSTRA L. REV. 19 (2018).
[70] Joshua D. Blank & Eric A. Sacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. ST. L. REV. 1 (2005).
[71] David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003).
[72] COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE, Vivek Maru & Varun Gauri, eds. (2018); DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (2020).

beneficial; elite private law schools have the resources to do so. And yet, legal education remains largely bereft of interesting ideas other than tired, extractive strategies.

We face a deeper crisis of species life and social organization than we acknowledge. The core question for lawyers and legal educators is how we will mobilize and adapt ourselves and our institutions to meet the moment. I have no illusion that the three proposals I make above are sufficient, but acknowledging the stakes and stepping out of our neoliberal enclosure are essential first steps.

RACHEL F. MORAN:

In her book "You Could Make This Place Beautiful," Maggie Smith describes how a friend once told her that "every book begins with an unanswerable question."[73] It seems that this dialogue began with more than one such question, but the discussion has proven illuminating, nonetheless. It's clear that one way to deal with unanswerable questions is to redefine them. Mike Madison suggests that I am asking the wrong question because I assume that law is at the center of things when, in fact, it's not clear that it is or should be *primus inter pares*. I confess that it is hard for me to imagine a world in which law lacks special significance, instead operating on a par with other forms of problem-solving like management, engineering, information science, sociology, and knowledge commons. Law is not just ordinary problem-solving: It plays a constitutive role in setting the nation's priorities and defining its values. So long as government wields unparalleled powers, law has a unique platform, allowing lawyers to call on the State's authority and enforcement powers in ways that others cannot. This special power in turn explains the highly incremental nature of legal reform. At a time when creative chaos and disruptive change command considerable appeal, the slow pace of lawyerly deliberation can seem frustrating. At the same time, though, prudential use of law's power remains an essential hallmark of professionalism.

That brings me to the responses by Ben Barton and Sameer Ashar. Both acknowledge that law is pervasive and powerful and deserves to be at the center of the analysis. However, they question the way I have framed the inquiries. In particular, they suggest that separating market-based and moral critiques of legal education and the profession necessarily creates a false dichotomy. Market forces contribute to present-day moral dilemmas, and the two dynamics cannot be neatly

[73] MAGGIE SMITH, YOU COULD MAKE THIS PLACE BEAUTIFUL 11 (2023).

compartmentalized. I think this point is a valid one: Markets clearly have distributive consequences that trigger moral concerns.

Ben focuses on the access to justice gap. He argues that law schools and the legal profession have adopted an expensive, bespoke model for delivering legal services that leaves representation out of reach for many low-income and middle-class people. In his view, it's not enough simply to train more lawyers; instead, it's essential to develop innovative alternatives that can make legal services affordable and accessible to a broad swath of the American public. For Ben, solving these market failures will address at least some of the moral shortcomings of law schools and law practice.

Sameer agrees that the access to justice gap must be addressed, but he defines the problem somewhat differently. For him, it is not enough to offer representation to low-income and middle-class clients in everyday disputes. He proposes a universal public option for civil legal services as a first step in alleviating unequal access to representation. (Interestingly, Ben expresses reservations about this proposal as politically infeasible given the expense.) Beyond broader access to representation, Sameer concludes that structural reform is imperative and requires rethinking the way that we teach and practice law. Specifically, he wants to move away from the traditional focus on individual attorneys serving individual clients; instead, he wants to raise the visibility and impact of collective advocacy. Professor Ashar worries about how this change will come about. For him, there is a fundamental misalignment of will and capacity: Public law schools have the obligation to serve the greater good, while elite law schools have the necessary resources. As a result, Sameer finds that "legal education remains largely bereft of interesting ideas other than tired, extractive strategies."

What can be done with these responses to unanswerable questions? Perhaps the best strategy is to come up with some additional questions![74] Our dialogue suggests that the role of law and lawyers in American society is under stress. Symposia like this one can begin a conversation about the challenges but certainly cannot resolve them. One critical concern is where leadership in addressing these issues will come from. In his commentary, Mike notes that he has created "personal and professional communities of practice that have little to do with conventional law teaching or legal analysis or the challenges and opportunities of 'law reform.'" Yet, he admits

[74] Indeed, in her book, Maggie Smith "circles back" to "questions that themselves are hard to articulate" when trying to answer an unanswerable question. Sarah Lyall, *Maggie Smith Tries to Make the Divorce Memoir Beautiful*, N.Y. TIMES, Apr. 27, 2023, https://www.nytimes.com/2023/04/27/style/maggie-smith-poet.html.

that “US law schools, on the whole, mostly have yet to notice what I and my fellow travelers are doing.” Is there an appropriate forum for sustained and reflective inquiry into fundamental reforms of legal education and law practice?

In undertaking such a project, this dialogue suggests that contemplating the complex relationship between market-based and moral critiques can be a highly generative exercise. As Ben and Sameer observe, making legal services more accessible and affordable can redress some injuries that stem from a lack of access to justice. Still, there are limits to what market reforms can achieve. Deep-seated inequalities will remain, and many of them will involve profound disputes over our most basic values. Sameer suggests a more collectivist approach to lawyering, but in an increasingly polarized political environment, an antecedent question may be how law can create the conditions for civil discourse and peaceful resolution of disputes. As communities grow more divided, law’s emphasis on arguing both sides of an issue can seem anomalous and even tenuous. Perhaps, these trends help to explain why a retreat into the relative impersonality of the marketplace has grown so appealing.

Bernard Hibbitts and Richard Weisberg have done a great service to legal education and the legal profession by hosting this conference. The presentations have helped to unearth pressing and seemingly imponderable questions, while beginning the dialogue that can help us to manage them.