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LEGAL EDUCATION AND THE RULE OF LAW

JAMES HUFFMAN*

TABLE OF CONTENTS

INTRODUCTION ................................................................................... 571
I. CURRICULUM ........................................................................... 586
II. SKILLS TRAINING ..................................................................... 589
III. ABSENCE OF PHILOSOPHICAL DIVERSITY ......................... 593
IV. LAW SCHOOL MISSIONS ........................................................... 596
CONCLUSION ...................................................................................... 604

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INTRODUCTION

For generations, American legal education provided the foundation for a legal profession dedicated to the rule of law. Law students learned that if both public and private affairs are conducted in conformance with the law, rather than at the whims and wishes of those who administer the law, every individual will share the benefits of a just and prosperous society. Over the last few decades, however, many legal educators and most law schools have altered course. Students now learn that through creative interpretation, the law can be made to serve as a powerful tool for the advancement of favored causes and clients’ interests. No longer is the lawyer an officer of the court and the court a guardian of the law. The lawyer’s role, many students learn in law school, is to persuade judges and others who administer the law that their responsibility is to promote the public good and improve—rather than enforce—the law.

The rule of law—governance by transparent and settled rules, rather than arbitrary human discretion—is at the core of American social, economic, and political life. Although the principle has been variously defined at least since Aristotle, the core attributes have been constant: all persons, entities and institutions (including government and governors) are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated. That the law must be publicly promulgated assures predictability and fairness for those subject to legal mandates. That the law must be equally enforced assures that all persons, without regard for individual differences, interests, and associations, will have the benefit of that predictability and the

1. Illustrative is an article by Professor Joseph Sax, in which he called for creative interpretations of the public trust doctrine to encourage judicial interventions in environmental and natural resources controversies. Joseph L. Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 509–46 (1970). More recently, Katrina Kuh argues for an expansive public nuisance theory as a judicial alternative to “the anemic policy response to climate change[.]” Katrina Fischer Kuh, The Legitimacy of Judicial Climate Engagement, 46 ECOLOGY L.Q. 731, 747 (2019). The creative theories of these scholars and many others are widely taught in environmental law school courses. See generally id.

2. See generally Overview: Rule of Law, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law#:~:text=Rule%20of%20law%20is%20a,Independently%20adjudicated%20(last
visited Mar. 27, 2024).
resultant social stability.\(^3\) That the law must be independently adjudicated assures, to the extent true independence can be achieved, that laws will be equally enforced as publicly promulgated.\(^4\)

From the early beginnings of American legal education, the principle of the rule of law was one of the first and most fundamental lessons learned by law students.\(^5\) Students also learned that upon entering the legal profession, they are obliged to comply with Rules of Professional Conduct, one of which is interpreted to require zealous representation of clients’ interests.\(^6\) Because the law does not always conform to a client’s interests, the lawyer’s obligation of zealous representation may appear to conflict with his or her commitment to the rule of law. But the Rules make clear that there can be no conflict. Rule 3.1 provides that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”\(^7\)

Yet Americans today might conclude that zealous representation has become the overriding obligation of the lawyer. Indeed, there are reasons to believe that today’s lawyers have learned different lessons in law school than did their twentieth century predecessors.\(^8\) The indications that twenty-first century American lawyers are less imbued than earlier generations in the rule of law are everywhere in our public life.\(^9\) Lawyers contend, and judges sometimes agree, that doctrines derived from ancient customs and laws written to address historic problems can

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3.  See id.

4.  For a recent discussion of the rule of law see BRIAN Z. TAMANAH, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

5.  As recently as 1974, John E. Cribbet, then dean of the University of Illinois College of Law, described two missions of legal education. John E. Cribbet, Legal Education and the Rule of Law, 60 Am. Bar Ass’n J. 1363 (1974). One is instruction in the various doctrinal subjects. Id. Less obvious but “the silent raison d’être of legal education and the lasting claim for public and private support of the law schools,” he wrote, is “[faculty guidance of] the student toward an understanding of and respect for the rule of law . . . .” Id. at 1365–66.

6.  MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 1983) [hereinafter Rule 3.1]. “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Id.

7.  Id.

8.  Id.

9.  See discussion infra, notes 145–152 and accompanying text.
be relied on to advance totally unrelated present-day objectives. A proliferation of lawsuits relying on creative but seemingly implausible theories, along with the occasional judicial embrace in the name of improving the law, is the result. But if rules designed for historic purposes are applied in pursuit of present-day objectives, it is not possible to know what the rule requires until after the revised interpretation: making that interpretation the rule of the interpreter, not the rule of law. Presidents, governors, and other executive officials issue orders with little regard for their legal authority to do so, even after having acknowledged the absence of such authority. Administrative agencies, all staffed with an abundance of lawyers, frequently issue regulations purporting to implement statutes that are vague in scope and sometimes unrelated as to purpose. Public prosecutors proclaim their intention not to enforce criminal laws with which they disagree.

10. For example, taking up Professor Sax’s call for an expansion of the common law public trust doctrine, lawyers representing Our Children’s Trust (an organization seeking judicial intervention to remedy the perceived shortcomings in the political branches response to climate change) advocates for an “atmospheric trust” theory. See generally, Anna Christiansen, Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children’s Trust, 20 ULR 867 (2020). Such a theory, however, has no foundation in the common law public trust doctrine, which applies only to navigable waters. Id.


13. For example, in March of 2022 the Securities and Exchange Commission proposed a 534-page rule entitled “The Enhancement and Standardization of Climate-Related Disclosures for Investors.” The Enhancement and Standardization
It is all done in the name of the public good and of improving the law, but at the expense of the rule of law. When laws are effectively amended in a judicial proceeding, there is neither notice nor equal application to the affected parties. Unauthorized executive orders of Climate-Related Disclosures for Investors, 87 Fed. Reg. 29059 (May 12, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249), https://www.govinfo.gov/content/pkg/FR-2022-05-12/pdf/2022-10194.pdf. In the view of SEC commissioner Hester M. Peirce, the “proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech.” Commissioner Hester M. Peirce, We are Not the Securities and Environment Commission–At Least Not Yet, U.S. SEC. AND EXCH. COMM’N (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321. In the face of significant resistance, final action on the rule is pending. Id. Innovative regulation also is common at the state level. For example, pursuant to its statutory authority to control air pollution, in 2022 the California Air Resources Board issued a 46-page order requiring that one hundred percent of cars sold in California be electric by 2035. CAL. CODE REGS. tit. 13, § 1962.4 (2022), https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/2acciifro1962.4.pdf.


15. Illustrative is a 1969 Oregon Supreme Court case, involving a single property owner, in which the state court ruled that every property on the Oregon coast is subject to a public right of access. State v. ex rel. Thornton v. Hay, 254 Ore. 584, 587–88 (1969). This ruling relied on English common law doctrines of ancient use and custom, the latter doctrine having been relied upon in a single American case decided more than a century earlier, Perley et ux’r v. Langley, and never before cited in an Oregon case. Perley et ux’r v. Langley, 7 N.H. 233 (1834). As Justice Scalia observed in dissenting from denial of cert in another Oregon case involving beach access, because only a single property owner was party in Thornton, every other coastal property owner lacked notice and the opportunity to plead their case as required by the due process clause of the United States Constitution. Stevens v. City of Cannon Beach, 854 P.2d 449, 452–54 (1993), cert. denied 510 U.S. 1207 (1994). In issuing its dubiously reasoned Thornton decision, the Supreme Court of Oregon essentially rubber-stamped what Justice Scalia believed amounted to a “landgrab” that “ran the entire length of the Oregon coast.” Id. In so doing, the Supreme Court of Oregon “creat[ed] [the doctrine of custom]” upon which it relied to reach its decision, “rather than describing it.” Id. at n.4.

16. Whether or not an executive order receives full authorization is ultimately a question for the judiciary. In the case of the Obama Administration’s executive order for Deferred Action for Childhood Arrivals (DACA), the Supreme Court
may apply to everyone but similarly fail to provide prior notice; furthermore, these unauthorized actions violate the separation of powers as required by the Constitution. Regulations purporting to implement vague legislation raise similar separation of powers issues while creating uncertainty rather than predictability, particularly given that subsequent administrations often feel empowered to issue contradictory regulations. Prosecutorial refusal to enforce duly enacted laws is, on its face, the rule of man or woman, not the rule of law.

The same is true in the private sector. Lawyers press weak and frivolous claims against companies with the expectation that defendants will settle rather than bear the costs of proving their case in court. Where interest groups are unhappy with legislative and


17. See U.S. CONST. amend. II, § 3.
18. Illustrative is the Trump Administration reversal of the Obama Administration DACA rule. See cases cited and accompanying text supra note 16.
19. Unless the law in question allows for prosecutorial discretion on the merits (as opposed to discretion with respect to public priorities and available resources), a refusal to prosecute is by definition a rule imposed by the prosecutor. See Murray, supra note 14 (contending that the democratic process is a corrective, but in the interim, the preferences of the prosecutor, rather than the democratically proclaimed law).
20. There is little data on the actual costs of nuisance litigation, but the general consensus is that it occurs frequently. William H. J. Hubbard, Nuisance Suits 1 (Coase-Sandor Institute for Law and Economics Working Papers No. 691, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2458685. According to Professor William H. J. Hubbard, “[a] persistent source of vexation for lawyers, both in practice and in the Ivory Tower, is ‘frivolous’ or ‘nuisance’ litigation.” Nuisance lawsuits are particularly commonplace in the area of patent law. Id. In 2008, Greg Gilchrist, then a partner at a Palo Alto, California, law firm, stated that “[a] technical patent case might get budgeted at $2 or $3 million dollars or more even if it’s completely lacking in merit, so there’s a lot of room to extract a settlement that has no relationship to the merits of the case or to the damages exposure.” Jesse Greenspan, Counting The True Cost Of A Nuisance Settlement, LAW360
executive action, as in the cases of climate policy, lawyers sometimes acknowledge that their legal theories are novel but seek to influence public opinion and thereby affect public policy. Lawyers represent self-proclaimed stakeholders whether or not they have legal rights enforceable by a court. Judges (who, after all, are lawyers) allow frivolous cases to proceed and parties with doubtful legal standing to participate.


21. Alice Kaswan writes: “Even if common law actions are not ideal, the ability of litigants to bring them might prompt an otherwise paralyzed legislature or administrative agency into action.” Alice Kaswan, The Domestic Response to Global Climate Change: What Role for Federal, State, and Litigation Initiatives?, 42 U. S.F. L. REV. 39, 100 (2007). Timothy Lytton identifies six ways in which litigation can influence policy making by legislatures and regulatory agencies: “(1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions.” Timothy D. Lytton, Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits, 86 TEX. L. REV. 1837, 1838 (2008).

22. In the federal courts and most state courts claims by interested individuals who lack legal standing are precluded as generalized grievances, although many courts have been generous in their assessment of what constitutes individualized harm. See United States v. SCRAP, 412 U.S. 669 (1973).

23. After describing the case before her as “no ordinary lawsuit,” Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016), rev’d and remanded, 947 F.3d 1159 (9th Cir. 2020), Federal District Court Judge Ann Aiken went on to rule that the plaintiffs had a constitutional due process “right to a climate system capable of sustaining human life.” Id. at 1250. Judge Aiken sought to justify her creative interpretation of the due process clause by noting that “[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.” Id. at 1262. In support, she quoted Federal Circuit Court Judge Alfred Goodwin: “The third branch can, and should, take another long and careful look at the barriers to litigation by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.” Id. (quoting Alfred T. Goodwin, A Wake-Up Call for Judges, 2015 WIS. L. REV. 785, 788 (2015)). Judge Goodwin, notably, authored the Thornton decision. See supra note 11.
partisans have long sought to counter their political failures in the legislature by appealing to administrative agencies and courts. The founders of the United States Constitution understood well the inevitability of such threats to the rule of law. Had the founders devised flawless safeguards, appeals to side-step the legislature would be ineffective. But the reality is different, and increasingly so. Over the last several decades, the human propensity to seek advantage through the immense powers of government—an inclination the American founders sought to constrain—has been fostered by the education of a generation of lawyers, including many who come to occupy positions...

24. For example, during his eight years as president, Theodore Roosevelt removed by executive order 130 million acres from the public domain (making it unavailable to private acquisition). Lorraine Boissoneault, The Debate Over Executive Orders Began With Teddy Roosevelt’s Mad Passion for Conservation, SMITHSONIAN MAG. (Apr. 17, 2017) https://www.smithsonianmag.com/history/how-theodore-roosevelts-executive-orders-reshaped-countryand-presidency-180962908/. Many, if not most, of those reservations would likely not have overcome political opposition from special interests in Congress but were favored and promoted by various conservation groups. See An Alternative Founding Father – Theodore Roosevelt and the American Conservation Movement, HISTORY IS NOW MAG. (Jul. 16, 2014), https://www.historyisnowmagazine.com/blog/2014/7/13/an-alternative-founding-father-theodore-roosevelt-and-the-american-conservation-movement. Environmentalists have long looked to the courts to achieve policy objectives when they have failed to enact legislation. See supra note 16.

25. A dominant theme of the framing of the Constitution was the influence of political factions (‘special interests’ in today’s parlance) on all three branches of government. The Federalist No. 10 (James Madison). Concluding that political factions are not to be avoided, James Madison, in Federalist 10, explained how the proposed separation of powers and other structural arrangements of the proposed Constitution would control faction and limit the resulting abuses of power. Id.

26. In addressing the hazards of special interests (factions in his terms) James Madison wrote in Federalist 10:

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

Id.
of authority, who see themselves more as political activists than as advocates for the rule of law.\textsuperscript{27}

Today’s law students learn that the law can be a tool for the advancement of causes and interests. Even before they enter law school, applicants are advised that they can improve their prospects for admission by explaining how becoming a lawyer will empower them to advance a favored cause (or a cause they think will be favored by an admissions committee).\textsuperscript{28} It is the rare applicant who proclaims his or her passion for the rule of law or for a stable and prosperous society.\textsuperscript{29} Once in law school, aspiring lawyers come to understand the importance of learning how the law can be employed to advance the interests they favor and obstruct the advancement of interests they oppose.\textsuperscript{30}

\textsuperscript{27} Given that few law schools make any reference to the rule of law in their mission statements, and many proclaim varying activist missions, it is not surprising that many of today’s law school graduates also see themselves as political activists. \textit{See infra} discussion Part IV.


\textsuperscript{30} Raymond Brescia describes what he calls “social-change lawyers” in an article seeking to understand what makes such lawyers effective: “Although all lawyers solve problems on behalf of their clients, the role of the social-change lawyer is more complex because the problems she seeks to address are more complex, mostly because she is not trying to operate within the existing legal system on behalf of her client but, rather, trying to change it.” \textit{Creative Lawyering for Social Change}, 35 Ga. St. U. L. Rev. 529, 529 (2019). Although Brescia considers the examples of
It has not always been thus. Through much of the twentieth century, legal education was generally a conservative enterprise in the sense that law students learned that the law is an indispensable institution of social stability and predictability in human relations. Students learned that the rule of law—adherence to judicial precedent and respect for the legitimate, constitutional enactments of democratically-elected legislatures—is important to their future clients, and these same students would be seeking to advance their clients’ interests ethically within the strictures of the law. They learned how to think and speak like a lawyer in service to those future clients who would be otherwise lost in a sea of statutes, cases, and an emerging tidal wave of regulation. Although students may have been exposed to their professors’ policy critiques, they were tested on their knowledge of the law as it is, not on how the law might be changed to meet their or their future clients’ preferences.

This did not mean that law faculties were of a single mind on matters of public policy, nor did it follow that legal scholars did not question the law-as-science methods inspired by Harvard Dean Christopher Columbus Langdell. The legal realists of the 1920s and

31. Although the case method (introduced by Dean Christopher Columbus Langdell at Harvard and adopted at every law school through the 20th century) did not dwell on the rule of law, its scientific method implied that law was to be discovered and therefore not subject to molding to favored policies or in service to favored causes. Professors might be critical of existing law or believe it to be the product of political forces, but students nonetheless learned the law if only because exams tested knowledge of the law. See Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339 (2007), for a history of 20th century legal education.


33. *Id.* at 57.

34. Although the legal realist movement of the early 20th century invited the introduction of social science methods into the law school curriculum, few law schools offered “law and” courses, like “law and economics” or “law and psychology” until the 1970s and later. *See id.* at 34; *see also* Gordon *supra* note 24, at 344–49. Absent the methods of social science, law students had little basis beyond personal opinion to analyze and promote public policies.

35. Langdell sought to elevate legal education to an academic stature on a par with the sciences. In 1875, he wrote: “The work done in the [Law] Library is what
1930s exerted an influence that has endured. The impact of that legacy did not mean that students and their professors gave no thought to how the law might be improved, or that there were no disagreements about what the law is (or should be). But most understood that improvements were to be made through legislation and statute-like restatements of the common law, and that disagreements about the substance of the law were to be resolved through established rules and procedures of interpretation. Nor did it mean that lawyers on the losing side in the courts would never object that the judge got it wrong on the law, nor that courts would never overrule earlier decisions determined to be in error. But disagreements over questions of public policy and perceived denials of what today is often referred to as ‘social justice’ were to be resolved in the legislature, not the courts. The

the scientific men call original investigation. The Library is to us what a laboratory is to the chemist or the physicist, and what the museum is to the naturalist.” Richard A. Danner, Law Libraries and Laboratories: The Legacies of Langdell and His Metaphor, 107 L. LIBRARY J. 7, 8 (2015) (quoting C.C. Langdell, The Law Library, 49 ANN. REP. PRESIDENT & TREASURER HARV. COLL. 1873–74, at 63, 67 (1875)). For legal education, this meant that a thorough study of the cases would yield an understanding of fundamental legal principles analogous to the laws of nature. Id.

36. The legal realists challenged Langdell’s scientific approach, arguing that law is the product of all manner of social forces, including the background and training of lawyers and judges, the social circumstances of the moment, and the existing distribution of power and influence in society. See Karl Llewellyn, Some Realism about Realism: Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931), for an early proponent of legal realism. Their approach was not unscientific, but rather sought to draw on the social sciences to better understand the forces influencing the evolution of law. Id. The critical legal studies movement of more recent decades draws on similar insights, particularly with respect to political power. See Karl E. Klare & Duncan Kennedy, A Bibliography of Critical Legal Studies, 94 YALE L.J. 461 (1984) (discussing critical legal studies).

37. See generally, Llewellyn, supra note 36.

38. Since 2000, the Supreme Court has overruled twenty-nine prior decisions. Table of Supreme Court Decisions Overruled by Subsequent Decisions, CONSTITUTION ANNOTATED, https://constitution.congress.gov/resources/decisions-overruled/ (last visited Mar. 27, 2024). Although one can attribute some of these overrulings to ideological differences, the Court’s explanation invariably asserts legal error or factual mistake, not preference for a different social policy. Id.

39. Dissenting in Griswold v. Connecticut, Justice Stewart described the law in question as “uncommonly silly” but insisted that the Court is “not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to
courts delivered justice by at least claiming to be enforcing the rule of law—by upholding and enforcing reasonable expectations based on existing rules derived from legitimate rule makers.  

Some law professors will acknowledge and applaud the activist bent of legal education, dismissing the rule of law as a guarantor of elite power and a source of injustice. This view is at the core of critical legal studies, a long languishing set of ideas that have lately erupted in the broader society in the form of critical race theory. Adherents of this theory contend that rather than being a foundation for justice and social prosperity, the rule of law lies at the heart of institutionalized advantage for some and disadvantage for others.


40. One might conclude from Stewart’s being in dissent in Griswold that the majority invalidated the law because it was silly, but every justice in the majority claimed to be enforcing the law, not their preferred public policy. There is no escaping that judges can and will sometimes preempt the legislature’s role, but when they acknowledge they are doing so for policy reasons, the rule of law suffers.

41. For example, Etienne C. Toussaint, professor at University of South Carolina Law School, contends:

[T]he anti-racist, democratic, and movement lawyering principles advocated by progressive legal scholars should not be viewed merely as aspirational ideals for social justice law courses. Rather, querying whether legal systems and political institutions further racism, economic oppression, or social injustice must be viewed as endemic to the fundamental purpose of legal education.

Etienne C. Toussaint, The Purpose of Legal Education, 111 CALIF. L. REV. 1, 9 (2023). He goes on to plead, “the urgency of moving beyond liberal legalism in legal education by integrating critical legal theories and movement law principles throughout the entire law school curriculum.” Id. at 2.

42. “Critical legal studies (CLS) is a theory which states that the law is necessarily intertwined with social issues, particularly stating that the law has inherent social biases. Proponents of CLS believe that the law supports the interests of those who create the law.” LEGAL INFO. INST., Critical Legal Theory, CORNELL L. SCH., https://www.law.cornell.edu/wex/critical_legal_theory#:~:text=Critical%20legal%20studies%20(CLS)%20is,those%20who%20create%20the%20law (last visited Feb. 25, 2024). “Critical race theory . . . [posits] that race is a social construct, and that racism is not merely the product of individual bias or prejudice, but also something embedded in legal systems and policies.” Stephen Sawchuk, What is Critical Race Theory, and Why Is It Under Attack?, EDUC. WK. (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05.

43. See HELEN PLUCKROSE & JAMES LINDSAY, CYNICAL THEORIES: HOW ACTIVIST SCHOLARSHIP MADE EVERYTHING ABOUT RACE, GENDER AND IDENTIFY (2020).
Many other law professors will dispute the foregoing assertions while denying that they, themselves, use the classroom to advance favored agendas. They contend that the dramatic expansion of the curriculum over the last several decades better serves students of varying interests and allows them to understand legal doctrine in all its myriad social and cultural contexts. Professors will further contend, correctly, that today’s law schools are far better at training aspiring lawyers in the actual practice of law than were their early to mid-twentieth century predecessors. Lawyering skills now share prominence with legal theory and rote memorization. But the teaching of lawyering skills through client representation, and the neglect of theory and tradition have, even if inadvertently, encouraged students to see themselves as activists and agents for change rather than advocates for the rule of law in service to their clients’ legitimate expectations. At the same time, the substantive law courses, taught

44. I base this assertion on my thirteen years of experience as dean of Lewis & Clark Law School. Students have frequently reported that professors used their classrooms to advocate for particular policies and perspectives. When confronted, faculty members invariably denied they were doing so. It was not that the professors were being dishonest, but more seriously that they simply failed to recognize their classroom advocacy.

45. More than a half century ago, Arthur Kinoy celebrated the addition of courses in the law of poverty and urban problems and argued “that the law schools must capture . . . the excitement of the new challenge of making law serve the needs of people in struggle as well as continuing to fulfill the needs of corporations and the business community.” Arthur Kinoy, The Present Crisis in American Legal Education, 24 RUTGERS L. REV. 1, 6 (1969).

46. Heather Gerken, Dean of Yale Law School, contends that the current balance of theory and practical skills training is about right: The key is that the broad-gauged training that enables Yale’s own graduates to thrive in so many fields is the same training that makes for great lawyering in the most conventional settings. Whether our graduates follow unconventional paths or work at the core of practice, they will all need to be lawyers-writ-large.

by faculties of little philosophical diversity,\textsuperscript{47} have come to focus less on doctrine and more on favored policies and results. Several developments have contributed to this transformation of legal education:

(1) Law school curricula have exploded with a grab-bag of courses that oversimplify or distort the historical and cultural foundations of law and have little to do with professional education.\textsuperscript{48} Law schools have introduced a wide array of specialized programs and courses as a response to developments in the law,\textsuperscript{49} to faculty members’ idiosyncratic interests,\textsuperscript{50} and to recruit students in a highly

\hspace{1cm} 47. The only comprehensive studies of philosophical diversity among law faculties have been conducted by Professor James Lindgren at Northwestern University between 1997 and 2013. James Lindgren, Measuring Diversity: Law Faculties in 1997 and 2013, 39 HARV. J.L. & PUB. POL’Y 89, 149 (2015). According to Lindgren: “In the 2010s, the dominant group in legal education remains Democrats, both male and female. Democrats make up nearly 82% of law professors, but only 41% of the English-fluent full-time working population of a similar age. Id. He found that in the 2010s, 82% of law faculty identified as Democrat. Id. See also Jonathan Turley, Study: Only Nine Percent of Law Professors Identify As Conservatives, JONATHAN TURLEY (Sept. 1, 2022), https://jonathanturley.org/2022/09/01/study-only-nine-percent-of-law-professors-identify-as-conservatives/.

\hspace{1cm} 48. For example, the Harvard Law School curriculum lists the following courses, among 668 (including multiple sections of the same courses), offered during the 2023–2024 academic year: (Dis)illusionment for Young Lawyers; Algorithms and the Law; American Empire: Puerto Rico and the United States Territories; Art of Social Change; Bonobo Sisterhood; Character and Self in the Modernist Novel; Creating Electricity in the U.S.: Exploring the Tradeoffs; Crimmigration: The Intersection of Criminal Law and Immigration Law; Debt, Discrimination and Inequality; Decolonization and the Law; Engaging China; Facts and Lies; Feminist Utopias; Gender and Political Economy; Knowledge as Power in Law and Science; Leading from the Middle; Lying and the Law of Questioning; Money and Empire; Nietzsche for Lawyers; Organizing for Economic Justice in the New Economy; Polarities: Harnessing the Power of Opposites to Lead Effectively; Progressive Alternatives: Institutional Reconstruction Now; Psychedelic Law; Thinking Like Yourself: Poetry, Law, and Social Justice. Course Catalog, HARV. L. SCH., https://hls.harvard.edu/courses/? (last visited Feb. 25, 2024).

\hspace{1cm} 49. See supra notes 50–68, and accompanying text.

\hspace{1cm} 50. A review of the Harvard Law Schools courses listed in note 48, could only lead to the conclusion that faculty interests, not student demand, is driving some of the curriculum.
competitive market. Few law students today study legal history or the great traditions in legal philosophy.51

(2) With the meritorious objective of better training students for the actual practice of law, law schools have introduced a wide array of lawyering skills courses including clinics in many of which students represent not private clients but rather a particular view of the “public interest.”52

(3) Most law faculties have abandoned even a pretense of intellectual and philosophical diversity, leaving students with a distorted view of both legal history and the role of law in present-day society.53

(4) Law schools have embraced social missions only tangentially related to the education of lawyers.54

My critique of present-day legal education draws upon my personal experiences, over a half century, as a law student, law professor, law school dean, and board member of the American Law Deans Association.55 I use evidence from only the two academic institutions

51. Jurisprudence and legal history were once required courses at some law schools and as of the middle of the 20th century “most major and several smaller law schools at least offer[ed] courses in jurisprudence and related fields.” Albert A. Ehrenzweig, 4 J. LEGAL EDUC. 117, 124 (1951). When I taught legal history and jurisprudence enrollment was seldom more than a dozen students. Perhaps a better teacher would have drawn more students, but in any case, a small percentage of the law student body is exposed to these subjects.

52. For example, the Earthrise Law Center at Lewis & Clark Law School has the goal of “advanc[ing] efforts to prot...

53. See Lindgren study, supra note 47. See also infra notes 91–100 and accompanying text.

54. See discussion, infra notes 100–119, and accompanying text.

55. The American Law Deans Association (ALDA) was formed to provide law deans a voice independent from the Association of American Law Schools and the American Bar Association Section on Legal Education and Admissions to the Bar. I served on the board from 1998 to 2006. ALDA appears to be inactive, if not defunct. For a discussion of certain causes ALDA supported or rejected, see
with which I have personal experience—the one I attended and the one at which I was employed for over four decades—as a case study from which I build my argument. Nonetheless, having visited dozens of law schools, regularly attended the annual meeting of the Association of American Law Schools, and been deeply involved in ALDA and the ABA accreditation process, I am confident that what I describe is similar to what a comprehensive survey would reveal.

I. CURRICULUM

When I enrolled at the University of Chicago in 1969, the first-year curriculum included torts, property, civil procedure, contracts, criminal law, a tutorial linked to one of the substantive courses, and a course called “Elements.”56 The latter course, designed by the influential legal realist Karl Llewellyn and taught by his widow, Soia Mentschikoff, was a bow to the legal realist critics of Langdell’s law-as-science approach.57 But, otherwise, the first-year curriculum
was deeply embedded in the Langdellian study of cases as the raw data from which the law is to be discovered. Today, Chicago’s first year curriculum is unchanged in name, although casebooks authored by Chicago faculty indicate that course content has come to include more than appellate cases. To the extent today’s course contents reflect a recognition of the shortcomings of Langdell’s law-as-science method, these changes are for the better. Students should come to understand the many sociological and economic factors influencing law and the legal process. But it is a slippery slope from teaching the lessons of legal realism to indoctrinating for one cause or another in the belief that power rather than principle rules.

While on its face, Chicago’s first year curriculum suggests little change from the early 1970s, today’s offerings for second- and third-year students paint a very different picture. In 1969, there were a total of thirty-eight courses and thirty seminars listed, of which six of the courses and nine of the seminars were not offered that year. Only a single seminar in trial practice and a fledgling legal aid clinic would be considered “lawyering skills” courses today. Chicago’s 2022 offerings include 265 courses for second- and third-year students, of which twenty-one are explicitly described as clinics. Most of the core courses from 1969 remain, while the dramatic growth has been in highly specialized courses, ranging from “Buddhism and Comparative Constitutional Law” to “Feminist Economics and Public Policy”, and “Public Law in the Time of Trump.” Notably, Chicago’s apparent abundance is dwarfed by Harvard Law School’s offering of over 500 courses, seminars and reading groups. Most of Chicago’s new courses sound interesting, but many would seem to reflect the idiosyncratic interests or activist agendas of faculty. Whether they contribute to an appreciation for the rule of law, or the legal education

58. See discussion of Langdell’s theory of legal science, supra note 35.
60. Id.
61. 1969 Curriculum, supra note 56.
63. Id.
of future American lawyers, is a fair question. That many of these courses have an activist agenda is beyond question.

When I joined the faculty of Lewis & Clark Law School in 1973, the first-year curriculum was identical to what I had four years earlier as a student in Chicago—absent Elements, a course unique to Chicago, and with the addition of Legal Writing, a more focused and practical version of Chicago’s tutorial. The second and third-year course and seminar offerings totaled sixty-one, of which four were required (Constitutional Law, Bill of Rights, Evidence and Legal Writing) and another was a single clinic providing legal services to the poor. As with Chicago, Lewis & Clark’s core courses from five decades ago remain mostly intact today, while additions to the curriculum include a wide and similarly esoteric range of subjects. Course descriptions reveal the activist agendas of many of the offerings. A few examples with excerpts from course descriptions:

- **Access to Justice**: “[I]f we are honest, we notice that most of what we thought of as justice when we entered law school gets taken off the table in every discussion in favor of precedent or the judicial role or ‘neutrality’ or ‘thinking like a lawyer.’”

- **Animal Law Litigation**: “[S]tudents develop legal theories and litigation strategies to establish and expand legal protections and legal rights for farmed animals.”

- **Crimmigration, Crisis and Conflict**: “The course delves into how crimmigration developed in line with the War on Drugs, the significance of criminal arrest and civil detention as means of social control, the centrality of race in the implementation of crimmigration law . . .”

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66. Id.
• **Food, Agriculture and Environmental Law:** “The industrial agriculture system is also a fundamental cause of our current environmental degradation.”

• **Public Trust:** “The public trust doctrine has drawn widespread attention for its potential to authorize judicial oversight of legislative and executive disposition of natural resources.”

• **Transformative Immigration Law & Policy:** “Students acquire lawyering skills through engaging the tools of change.”

• **Understanding Racism Dialogue Group:** “The dialogue hopes to increase understanding of racism by examining our personal subconscious stereotypes, and to motivate participants to use that understanding to eliminate racism.”

Interesting courses, no doubt, but with unambiguously activist agendas.

II. SKILLS TRAINING

The emergence of clinical education in the 1960s and 1970s was a well-intended effort to better prepare law students for the day-to-day business of lawyering—to teach them how to find the courthouse door, in the waggish commentary of the day. Although professors could design mock practice exercises modeled on the long-standing moot court proceedings to which all law students were exposed, the dearth of real clients and meaningful results made the assignments artificial and less engaging. More would be learned, it was believed, from working with real clients on real controversies.


76. *Id.*
Many of the early clinics were made possible by private foundation support through the Council on Legal Education for Professional Responsibility.\textsuperscript{77} The idea was that students would be introduced to the legal process and professionalism even if they had little interest in landlord-tenant disputes, domestic relations, employment relations, and other areas of the law affecting those who could not afford legal counsel.\textsuperscript{78} Because they were largely supported by private foundations, these poverty law clinics posed little burden for the law school budget, and had the added benefit of introducing students to the provision of pro bono legal services as part of their professional responsibilities.\textsuperscript{79}

Clinical courses became popular with students bored with doctrine and anxious to get on with their lawyering careers, but available opportunities were limited by the hands-on nature of clinical instruction (requiring a much lower student/faculty ratio) and the limited funds for compensating instructors. A combination of student demand and American Bar Association pressures to expand skills instruction gradually led law schools to develop other clinical opportunities.\textsuperscript{80} In assessing what those opportunities might be, law schools were constrained by pressures not to compete with the practicing bar. Few lawyers, many of whom were alumni, were making a living representing the poor, but if law students started representing clients who could afford to pay, it was a different matter. A solution was to have law school clinics engage in what came to be described as “public interest law”—representing the amorphous, unrepresented, general public. An added benefit was that public interest representation could attract philanthropic contributions from donors sharing a clinic’s perception of the public interest.

In conjunction with the enactment of several environmental laws in the 1960s and 1970s, numerous groups emerged as representatives of what was generally described as the public interest in a clean and

\textsuperscript{77} Id. at 9–18.
\textsuperscript{78} See generally, id.
\textsuperscript{79} \textsc{Model Rules of Pro. Conduct} \textsect{ 6.1 (Am. Bar Ass’n)}.
\textsuperscript{80} ABA Standard 303(b)(1) requires law schools to provide “substantial opportunities” for “law clinics or field placement.” \textsc{Standards & Rules of P. for Approval of L. Sch.}, \textsect{ 303(b)(1) (Am. Bar Ass’n 2023–24)}, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024 /23-24-standards-ch3.pdf.
healthy environment. Lewis & Clark was one of the first law schools to offer a course in environmental law in 1970 and over the next decade the curriculum expanded to include specialized topics like air and water pollution, endangered species, hazardous substances, public lands, wildlife conservation, and many others. Because these laws were enacted in the name of protecting the public from environmental harms and of preserving the natural environment as a good in-and-of itself, there were few private interests (able and willing to pay lawyers’ fees) to ensure that the laws were complied with and enforced. Following the lead of public interest law firms like Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club Legal Defense Fund (later Earth Justice), law schools began to see that law students could gain practical experience through clinics also representing the public interest in environmental protection and conservation of natural resources. Today numerous law schools have


85. NATURAL RESOURCES DEFENSE FUND, https://action.nrdc.org/donation/855-support-nrde?initms=MRDAFGO_c3-FR_SE&ms=MRDAFGO_c3-FR_SE&gclid=Cj0KCQjwk6SwBhDPARIsAJ59GwdaVWAo2KFtBInwwPnE9kx2j3jMgt42EIdVmg16x3-LoZJ8nW7QMqIaUuNREALw_wcB&gclid=aw.de (last visited Mar. 31, 2024).


environmental law clinics, almost all of which provide students with the opportunity to represent only environmentalist interests through advocacy for the expansion and enforcement of government regulation. As a result, students receive little introduction to the representation of persons and entities subject to regulation or on alternative, less interventionist, methods for environmental protection.

The usual explanation for the absence of opportunities for students to represent parties subject to environmental regulations is that those parties can afford to hire legal counsel while the public interest would go unrepresented without the law school clinic. The same argument rationalizes law school clinics that represent other “public interests” such as consumer protection, affordable housing, and access to health care. There may be some truth to this claim, although there are quite literally hundreds of public interest organizations (such as those mentioned above) that litigate and are funded by private philanthropy. Pressures from students with no interest in representing ‘public interest’ clients have led some law schools to institute small business and taxpayer clinics, but the reality is that the vast majority of law school clinics purport to represent the public interest, and most faculty embrace the activist causes their clinics represent. In fact, most clinics were established to advocate for particular causes as much as for the education of future lawyers, precisely because those are the interests embraced by the great majority of faculty.


89. For examples of these type of public interest clinics, see Public Interest Clinics, AM. BAR ASS’N, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/ (last visited Mar. 31, 2024).

While clinical education remains an effective method for teaching lawyering skills and preparing graduates for the actual practice of law, the public interest focus of most clinics encourages (or, better said, does not discourage) policy-focused theories that sometimes have little foundation in the law. Where clients are paying the costs of litigation there is seldom tolerance for creative theorizing and arguments about what the law should be. But because law school clinics are funded by philanthropic contributions and/or student tuition, the legal theory and its likely policy consequences can assume larger import than the likely legal outcome. There is nothing about representing a particular set of interests that necessarily leads to reliance on creative and innovative interpretations of the law. After all, an important responsibility of the lawyer is to advise the client when the law does not support their desired outcome. But when a clinic exists to advocate for policy outcomes, students learn little about their responsibilities as officers of the court and are thereby encouraged to see lawyering as primarily an activist profession.

III. ABSENCE OF PHILOSOPHICAL DIVERSITY

Much has been written about the political imbalance in higher education in general and in legal education in particular. A 2018 paper references five studies published between 1998 and 2016, finding that conservatives constituted only ten to twenty percent of law school faculty. The authors reached similar conclusions based on a review of the political donations of every law faculty member listed in the Association of American Law Schools Directory. They concluded that fifteen percent of law faculty are conservative. While a single

91. See e.g., David Wright, Policy Labs Give Students Experience in What it Takes to Effect Legal Policy Change, U. CALGARY (Nov. 27, 2023), https://www.ucalgary.ca/news/policy-labs-give-students-experience-what-it-takes-effect-legal-policy-change (exhibiting an example of how clinics focus on implementing and changing policy).


93. Id.

94. Id. at 2.

95. Id.
political donation does not define the political ideology of an individual donor, the significant aggregate preference for Democratic candidates\(^9\) simply confirms what every law student and law professor at the vast majority of law schools knows: law faculties are overwhelmingly liberal.\(^7\)

The effects of this ideological imbalance are debatable, but if the legal realists were correct, those effects will not be nothing. It is possible to teach the traditional law school curriculum without ever revealing one’s politics or other personal values, but the principle of academic freedom is widely believed to give professors free rein in the content and method of their courses. Confident in their own biases, many law faculty let the ideological horses run wild. While dean at Lewis & Clark, I was visited by a contingent of first-year students two days after the Supreme Court’s ruling in *Bush v. Gore*.\(^8\) The students objected that in every one of their courses, none of which had anything to do with elections law or constitutional law, the professor had disparaged the majority opinion without opportunity for discussion or disagreement. Anecdotal evidence, to be sure, but a compelling argument in favor of the notion that faculty who use their classrooms to advance their political views encourage students to use the law to advance theirs. It is also common that these same professors discourage students from expressing contrary opinions.

It is not surprising that the vast majority of law school clinics promote liberal causes. The clinics exist at the will of faculties little disposed to endorsing clinics representing disfavored interests. My own experience at Lewis & Clark is informative. A proposal to establish a clinic in which students would represent natural resource users like farmers, small timber companies, water users, and other private property owners was staunchly resisted and only finally instituted independent from the law school with the faculty agreeing only to allow students to get academic credit in the same way as interns and externs working outside the law school. At the heart of the opposition was a concern that such a clinic would mar the school’s environmentalist reputation.


The activist preferences of my own colleagues are not unusual. For many years I have been on an environmental law professors listserv managed at the University of Oregon Law School. Occasionally there are exchanges about legal theory and legal pedagogy, but the vast majority of messages are critiques of what are presumed to be anti-environmentalist judicial rulings and administrative actions, praise for what are presumed to be “correct” rulings and actions, praise for environmentalist achievements of list participants, and invitations to join environmentalist communications and amicus briefs. Rarely is there a dissenting voice. Although I am confident there are list members who see it as their responsibility to instruct students on the representation of clients subject to environmental regulation, this is not obvious from communications in the listserv, which is devoid of any such discourse. It is difficult to believe that the activism that dominates the conversation among environmental law professors does not carry over into classrooms, nor that professors of other subjects are not similarly activists.

Faculty activism is also evident in the extracurricular activities of faculty. Although academic freedom assures that faculty are free to engage in controversial activities, sometimes those activities have influence on law students. Amicus briefs written by law professors, often with the assistance of students, can be helpful (as amicus briefs are meant to be) to courts wrestling with complex legal issues. But over the last decade, law professor amicus briefs have become commonplace in politically charged cases.99 Although the briefs address

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issues before the court, they are part of what has become a competition between the parties to accumulate more supporting briefs than the other side, apparently on the assumption that the court will be influenced as much by volume as content.¹⁰⁰ In that spirit, law professors have taken to signing on to briefs authored by other professors with whom they share policy preferences—often without actually contributing to the legal analysis. Law students frequently assist in the preparation of these briefs and signees are easily solicited over various law professor listservs like the one described above.¹⁰¹

IV. LAW SCHOOL MISSIONS

All the above takes place in institutions that have themselves become activists rather than institutions dedicated to the pursuit of truth. A combination of ideological mission statements, institutionalized training in the pursuit of the mission, and public pronouncements on topics of public concern encourages students to see themselves as activists in the institution’s favored causes. The views of any who disagree are effectively suppressed and sometimes punished.¹⁰²

¹⁰⁰ Allison Orr Larsen reports that amicus brief filings in the United States Supreme Court have increased 800 percent over the fifty years leading up to 2014. Allison Orr Larsen, The Trouble with Amicus Facts, 100 VA. L. REV. 1757, 1758 (2014).


¹⁰² The Foundation for Individual Rights and Expression reports 1028 cases of faculty sanction for alleged speech related offenses between 2020 and 2020. Scholars Under Fire: Attempts to Sanction Scholars from 2000–2022, FIRE,
When I enrolled at the University of Chicago, law schools did not have formal mission statements. The mission of educating practicing lawyers presumably was thought to be obvious (as reflected in the introduction to the 1968 course catalogue): “[T]he School seeks to impart the systematic knowledge of traditional and modern fields of the law and the intellectual discipline that are a necessary foundation for the practice of law with distinction.”\footnote{103} If Chicago claimed to be different from other law schools it was in the recognition that “education in the law must train [students] for diverse and unpredictable roles as lawyers, not only in the practice of law but as public servants, civic leaders, in business life, and as teachers and scholars.”\footnote{104} Today the school’s stated mission is “to train well-rounded, critical, and socially conscious thinkers and doers.”\footnote{105} Presumably socially conscious doers are different from simple lawyers who represent their clients while respecting the rule of law.

In 1973, the Lewis & Clark Bulletin stated that “[t]he course of instruction . . . prepares students to practice in any common law jurisdiction.”\footnote{106} Today the law school’s stated mission—“[t]o create a supportive and rigorous intellectual environment in which our students develop the legal knowledge, critical thinking, practical skills, and values that empower them to excel as ethical and engaged professionals in a diverse and dynamic world”—\footnote{107}—could be understood as only an elaboration on the 1973 statement. But the banner headline of the school website declares that it is “Empowering Advocates for the World.”\footnote{108} This activist theme is reflected in several specific program descriptions. The Animal Law Program states that “[a]dvancing animal protection through education and the law remain . . . [its] highest
priority.” The Environmental and Natural Resources Law Program educates lawyers to “solve pollution problems, protect natural resources, and develop clean energy sources against the backdrop of a changing climate and efforts to promote environmental justice.” The program description states that law is “a vital tool for forging more sustainable, resilient, and equitable societies.” The program in Energy, Innovation and Sustainability Law declares that “[a] transition to renewable energy is one of the leading goals of climate change action”, and thus seeks to provide students with “unique insights to apply as leaders in energy transition.”

Such activist declarations are not peculiar to the University of Chicago or Lewis and Clark. The University of California Law School proclaims that “a Berkeley Law degree is a tool for change, both locally and globally . . . ” California Western Law School “is committed to using the law to solve human and societal problems” and equipping students to “use the law effectively and creatively.” City University of New York Law School’s mission “is to graduate outstanding public interest attorneys and to enhance the diversity of the legal profession.” Harvard Law School’s mission is “[t]o educate leaders who contribute to the advancement of justice and the well-being of society.” Stanford Law School’s website proclaims that Stanford faculty “champion law as an instrument of positive change on scales local,

111. Id.
regional, national and global.”117 The vision of the University of Florida is “[a] law school dedicated to advancing human dignity, social welfare, and justice through knowledge of law.”118 Similarly, the University of Wisconsin’s mission is “[t]eaching, legal scholarship, and public service, inspired by our distinctive law-in-action approach and our commitment to justice.”119 Vermont Law School is “committed to developing a generation of leaders who use the power of the law to make a difference in our communities and the world.”120

These mission statements, of which there are many more examples, are admirable expressions of civic commitment and human compassion. But what about the rule of law? Does the rule of law give way to doing the presumptively right thing? Very few law school mission statements reference the rule of law. There are exceptions: notably, Louisiana State University Law Center’s mission to educate “highly competent and ethical lawyers . . . capable of serving the cause of justice and advancing the common good, consistent with the rule of law.”121 As of 2016, only twelve of 208 law schools have language concerning the rule of law in their mission statements.122

Activist law school missions are also revealed in statements issued by law school deans and other university officials in response to public events. Less than two weeks after the death of George Floyd, Lewis and Clark’s dean issued a lengthy statement proclaiming that “[t]he senseless death of George Floyd, yet another unarmed Black American killed at the hands of a police officer, on top of countless senseless killings of black people in our nation, has again catalyzed our anger and outrage.”123 Along with messages from the Student Bar

119. Scharf & Merton, supra note 117, at 110.
120. Id. at 112.
122. Scharf & Merton, supra note 117.
Association\textsuperscript{124} and the Office of Equity and Inclusion,\textsuperscript{125} the dean’s statement remains on the law school’s homepage four years later.\textsuperscript{126} Chicago’s law dean issued a similar statement days after Floyd’s death, declaring that “[t]hese incidents of police brutality and other forms of systemic racism are insidious and unacceptable.”\textsuperscript{127} While no fair-minded dean today would dispute the injustice of Floyd’s killing, at the time these statements were made, the legal process in this case had barely begun. A commitment to the rule of law would counsel a law school dean to withhold judgment—the accused police officer was to be presumed innocent until proven guilty—a foundational principal of our criminal justice system.

The Chicago dean’s statement is surprising, especially in light of the university’s long-standing commitment to institutional neutrality. Over fifty years ago, the university issued the Kalven Report which, according to the university provost’s webpage, “stands as one of the most important policy documents at the University of Chicago.”\textsuperscript{128} That report declares that “[t]o perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures.”\textsuperscript{129} There was an abundance of passion in reaction to George Floyd’s killing and, no doubt, abundant pressure for institutions to declare their outrage so as to avoid the appearance


\textsuperscript{125}. A Message from your Office of Equity & Inclusion, Lewis & Clark L. Sch. (June 3, 2020), https://www.lclark.edu/live/news/43681-a-message-from-your-office-of-equity-inclusion?gl=1*1pk93u9*ga*NTE3MDA1NzY3LjE3MDg2Mzg1MDA.*_ga_6MKT6LMD5S*MTc2OTAxMjA5MS41LjEuMTc2OTAxMzA1Mi4yMS4wLjA.

\textsuperscript{126}. Johnson, supra note 124.


of implicitly endorsing the police action. But succumbing to those passions and pressures is mob rule, not the rule of law.

Lewis and Clark’s and Chicago’s deans were not alone in issuing such statements. Similar statements were issued by a multitude of law schools and universities. A few days after Floyd’s killing, a joint commentary by the deans of the University of Minnesota Law School and School of Public Affairs declared that “we cannot remain silent or complacent in the face of such blatant injustice.” A week later, in a message to the Oregon law community, the University of Oregon law dean described the killing of Floyd as the “coming to a head (again)” of “centuries of systemic racial inequality and brutality.” In a message to students on the day the trial was concluding, the Pennsylvania Law School Associate Dean of Equity and Justice wrote: “With closing arguments today in the trial that seeks justice for the killing of George Floyd, we reach out to acknowledge the pain felt by so many and to remind you of the support offered both by the Law School and the University.” The only conclusion students could draw from a message like this was that justice could only be realized with a guilty verdict. After a guilty verdict was announced, the University of Washington law dean, in a message to the UW law community, expressed “relief after the anguish, pain and stress” and satisfaction “that due process and the justice-seeking virtues of our legal system

were upheld.” Again, the unmistakable message was that justice would not have been served by a verdict of not guilty.

In retrospect, it is easy to agree that justice was done in the Floyd case, but only because we may have followed the trial closely or, more likely, because we accept that the jurors were in the best position to make that judgment. That is the rule of law. For legal educators to prejudge guilt or innocence so publicly and vocally is to encourage their students to advocate favored results with little regard for the rule of law. One might posit that outrage in the Floyd case, with the video evidence of seemingly obvious abuse, is not persuasive evidence of result-oriented activism in the legal academy. But it is in cases in which there is immediate and widespread agreement about the just result that the rule of law is most important. Even Jack Ruby, whose killing of Lee Harvey Oswald was recorded on live television, was innocent until proven guilty.

The Supreme Court’s overruling of Roe v. Wade also elicited institutional statements of disapproval. After the draft opinion was leaked, the incoming president (then Dean of Students) at Lewis and Clark sent an email message to students, staff and faculty stating: “[t]he recently leaked draft Supreme Court decision overturning Roe v. Wade, concerns us deeply as a potential erosion of our nation’s commitments to [Lewis & Clark’s] shared values . . . .” After the opinion was issued, the President of the University of California


137. Meerah Powell, Oregon’s public universities and private colleges react to the overturning of Roe v. Wade, OPB (Jul. 1, 2022, 6:41 AM), https://www.opb.org/article/2022/07/01/oregon-public-private-universities-react-roe-v-wade/; Email from Robin H. Holmes-Sullivan, Vice President for Student Life and Dean of Students, to Lewis & Clark Law School students, faculty, and staff (May 5, 2022, 9:44am PST) [on file with author].
declared the decision “antithetical to the University of California’s mission and values.” The president of Emory University found it “hard to see [the Dobbs ruling] as anything but a painful regression,” while also asserting that he and the university “unequivocally support your right to hold and express [different] views.” In an email to alumni, Cornell University’s Provost for Medical Affairs and Dean of the Cornell Medical School described the Dobbs decision as “deeply disappointing, as I believe it potentially undercuts the ability of doctors to provide that high quality of care needed by women.”

There were exceptions. Exemplary in their neutrality were statements from the University of Wisconsin System president and from Duquesne University. The former stated that the university system would “monitor the legal process surrounding this issue and will adhere to the law as it continues to evolve.” Duquesne declared that the university “will respect the Supreme Court’s ruling and the independent judicial system that has rendered this decision.” Of course, faculty are free to agree or disagree with judicial rulings. Indeed, agreement and disagreement are (and should be) at the core of the academic enterprise. But when those who speak on behalf of the institution violate the Kalven Report principle of institutional neutrality, institutional leaders chill free and open debate and inquiry. In the

143. See KALVEN COMM, supra note 130.
context of law schools, such institutional advocacy also encourages students to see pursuit of favored causes, rather than analysis and understanding of the law, as their role as future lawyers.144

CONCLUSION

Some of the foregoing evidence of a shift in legal education, from an emphasis on the rule of law, to an emphasis on activism, is notably anecdotal and circumstantial. It is based on a half century of personal observation, and not any methods of social science. Perhaps a survey of today’s graduating law students would reveal a deeper understanding and devotion to the rule of law. But the angry, partisan, and litigious nature of our society suggests that the unifying principle of the rule of law has been abandoned for a competition among often lawyer-represented interests seeking to bend the law to their desired outcomes. Whatever the political or personal objective, there are lawyers available and willing to represent the cause, and to find judges who seem more and more inclined to do the legal bending.

A few illustrations of disregard for the rule of law: there were lawyers prepared to argue that governments could recover damages from tobacco companies for the cost of healthcare voluntarily provided to individuals who assumed the widely understood risks of smoking.145 A few judges agreed, and the tobacco companies settled for billions of dollars.146 Young people distressed over climate change found (or were found by) lawyers willing to argue that the United States Constitution requires the government to take mitigating

144. The recent controversy over the testimony of three university presidents before a committee of Congress underscored one of the hazards of issuing statements on matters of public controversy. See Bret Stephens, Campus Antisemitism, Free Speech and Double Standards, N.Y. TIMES (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/opinion/antisemitism-college-free-speech.html. In refusing to condemn the Hamas assault on innocent Israelis, after having taken public positions on other matters, the three presidents applied a double-standard, making it clear what was deemed acceptable and unacceptable on their campuses. Id.


146. See, e.g., Estate of Michelle Schwarz v. Philip Morris, Inc, 235 P.3d 668 (Or. 2010).
At least one judge has agreed. There are lawyers representing several towns in Puerto Rico claiming that large oil companies violated the Racketeer Influenced and Corrupt Organizations Act by concealing the risks of climate change and resultant hurricanes. Their success in court would be just one more judicial extension of a statute originally intended by Congress to counter organized crime. There were lawyers available to assert that the Vice President of the United States could reject the electoral votes submitted by individual states in the last presidential election. And both political parties have a stable of lawyers waiting to challenge the results of future elections with the best theories ingenuity can devise.

There will be varying opinions about the results these and other creative legal theories achieved or will achieve if successful. Many will applaud the liability of the tobacco companies because those companies have deep pockets and many of the injured are of limited means. Those who believe something must be done about climate change will praise the judge willing to do what the other branches of government have chosen not to do. Success in the RICO claim against Big Oil will be celebrated by many as another case of the wealthy paying for the suffering of the poor. While the arguments for vice presidential authority to reject electoral votes have been widely renounced as lacking foundation, there were lawyers willing to make them and a not insignificant number of people who would have celebrated the vice president’s intervention. But none of these theories, whether or not successful in the courts, is easily defended as the rule of law.

152. Dazio, Blood & Richer, supra note 151.
The lawyers who advance—and the judges who embrace—what I have labeled creative legal theories will seldom admit to believing that judges and administrators have authority to amend the law. They will contend that their theories are legitimate interpretations of existing law. But if the rule of law is to have meaning, there must be limits on lawyerly and judicial creativity. The law must have discoverable and fixed meaning, or it is nothing more than the rule of the interpreter of the moment. I do not claim to have a formula for defining the boundaries of interpretation, but I do claim that there has developed an activist culture among American lawyers reflecting a diminished appreciation for the rule of law.

There are many explanations for the current state of affairs in the American legal system. But surely, what goes on in our law schools is an important factor. For decades American youth have learned little about government, the Constitution, or the legal system—what was once called civics.153 Now, most lawyers learn about these important topics for the first time in law school. With the proliferation of esoteric courses, skills training in the context of activist agendas, faculties of little philosophical diversity, and schools with activist missions, it is not surprising that students graduate with little appreciation for the rule of law. American society as a whole would benefit significantly from a renewed commitment to, and understanding of, the rule of law in American law schools.