CRITICAL CURRICULUM DESIGN

Rachel López[*]

Autocratic leaders often rise to power under a veil of legality, making lawyers essential to their ascent. Indeed, from Watergate to the January 6th attacks on the U.S. Capitol, lawyers have played pivotal roles in efforts to undermine democracy. *Critical Curriculum Design* reflects on this phenomenon, exploring why law schools produce lawyers so willing to thwart democracy, at times using their law licenses to do so.

Accordingly, this essay explores how by teaching students "to think like a lawyer" (implicitly, a better lawyer), law professors simultaneously incentivize them to be worse citizens of democracy. By emphasizing textual analysis, issue-spotting, and adversarial argumentation as the central features of practice, legal pedagogy promotes an individualistic and decontextualized understanding of law that undervalues the qualities needed to safeguard against democratic decay.

Drawing insights from two theories of democracy—deliberative democracy and contestatory democracy, it instead proposes "critical curriculum design" as a method for training future lawyers not just to be skilled technicians, but also active participants in sustaining and improving our democracy. Specifically, it contends that law schools should cultivate the qualities of "engaged citizenship," including the ability to bridge divides among people with diverse perspectives, the readiness to challenge overreach by people in positions of authority, and the capacity to imagine alternative legal frameworks. The essay then concludes by proposing concrete strategies for regularizing these democratic competencies across the law school experience.

* Rachel López is a James E. Beasley Professor of Law at Temple University Beasley School of Law. This piece was enriched by feedback and engagement from María Adelaida Ceballos Bedoya, Jennifer Allison, Sameer Ashar, Swethaa Ballakrishnen, Carliss Chatman, Jenna Collins, Renato Constantino, Russell Dalton, Fabio de Sa e Silva, Bryant Garth, Wendy D. Greene, Kathleen Hamill, David Hoffman, Lonny Hoffman, Joan Howarth, Felipe Jimenez, Oren Kerr, Sarah Lawsky, Itamar Mann, Eric Miller, Daniel Morales, Chad Oldfather, Jenny Orlando, Kim Lane Scheppele Eric Segall, Matthew Stiegler, Etienne Toussaint, and Nathan Yaffe. I am thankful for the opportunity to present this research at the faculty workshop at University of Houston Law Center and at the Ellmann Clinical Theory Workshop at Fordham Law School.

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INTRODUCTION

Legal education in the United States stands at a critical juncture. As democracy faces mounting threats both at home and abroad, law schools must grapple with their role in shaping not just competent lawyers but engaged citizens capable of safeguarding democratic institutions. Yet the traditional model of teaching students to "think like a lawyer" may be inadvertently undermining the very values and norms essential to stabilizing our democracy. Indeed, from Watergate to the January 6th attacks on the U.S. Capitol, lawyers have played key roles in efforts to undermine democracy.[1] As legal educators, we must ask ourselves, why are our law schools producing lawyers willing to thwart democracy in fundamental ways, sometimes employing their law licenses to do so?

This essay argues that by emphasizing textual analysis, issue-spotting, and adversarial argumentation as the central features of legal practice, legal pedagogy promotes an individualistic and decontextualized understanding of the law that undervalues the qualities needed to be good citizens of democracy. Drawing on theories of deliberative and contestatory democracy, I contend that law schools should instead cultivate the qualities of "engaged citizenship," including the ability to bridge divides among people with diverse perspectives, the readiness to challenge overreach by people in positions of authority, and the capacity to imagine alternative legal frameworks.[2] Through "critical curriculum design," I

[1] Tom Dreisbach, *Trump lawyer's Jan. 6 actions 'threatened our democracy,' State Bar attorney says*, NPR, March 29, 2024, https://www.npr.org/2024/03/29/1241726803/trump-lawyers-jan-6-actions-threatened-our-democracy-state-bar-attorney-says (detailing Trump lawyer John Eastman's role in pressuring Vice President Mike Pence not to certify the election as well as investigations into other efforts of Trump's legal team to thwart the 2020 election); John W. Dean III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609 (2000)(questioning why at least twelve lawyers were involved in the Watergate scandal); *See* also *infra* note 77.

[2] Relatedly, Etienne Toussaint proposes a set of "pedagogical principles of public citizenship lawyering" meant to guide law students in how to fulfill their ethical duties to promote justice and improve access to justice, as called for by the ABA Model Rules of Professional Conduct. Etienne

propose concrete strategies for regularizing these democratic competencies across the law school experience. By incorporating critical perspectives, emphasizing real-world context, and encouraging reflective practice, we can produce lawyers who are not just skilled technicians, but active participants in sustaining and improving our democracy. At this precarious political moment, reimagining legal education is not just an academic exercise, but an urgent democratic imperative.

I. MODELS OF DEMOCRATIC ENGAGEMENT

Law schools are often said to teach students how to "think like a lawyer."[3] This section explores how in some ways, by teaching students "to think like a lawyer" (implicitly, a better lawyer), we are simultaneously incentivizing them to be worse citizens of democracy. We do this by undermining some of the values and norms that are critical to a stable democracy. This section substantiates that argument, relying on two theories of democracy—deliberative democracy and contestatory democracy—to identify a set of norms and values that characterize "good citizenship" to inform legal pedagogy.

Far too often, legal scholars use the moniker of democracy loosely to mean participation in electoral politics, usually in the form of voting at the ballot box. Under this "aggregative model," a term evoked by Iris Young, the goal of democracy is "to decide what leaders, rules, and policies will best correspond to the most widely and strongly held preferences."[4] The democratic process then becomes a competitive one, in which rival political parties and candidates craft a set of policy preferences in a singular platform, which is meant to appeal to the largest number of people.[5] To influence the law, citizens who share similar preferences group together into coalitions to put pressure on their political parties or elected officials to enact their preferred policies.[6] Under this model, citizens become winners or losers in the struggle to exert the most influence on policy-makers.[7] Especially when voter turnout is low, those who succeed are the ones most capable of galvanizing the greatest number of like-minded voters to the polls.[8]

Especially in the U.S. current political climate, this thin approach to

C. Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. ON POVERTY L. & POL'Y. 287, 295-97 (2022). In contrast, this essay focuses instead on what the core experiential skills are needed to stabilize democracy in times of democratic backsliding.

[3] William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007) [hereinafter *Carnegie Report*].

[4] IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 19.

[5] *Id*.

[6] *Id*.

[7] Susan L. Brooks and Rachel E. Lopez, *Designing a Clinic Model for a Restorative Community Justice Partnership*, 48 WASH. U. J. L. & POL'Y 139, 152-53 (2015).

[8] YOUNG, *supra* note 4, at 19.

democratic participation presents a host of problems that risk undermining democracy over time. First, the aggregative model discourages interaction between people with divergent viewpoints. Since policy deliberation mostly occurs internally within parties made of individuals who generally share a similar worldview, there are few opportunities for people to change their political opinions as a result of interacting with others.[9] The process of identifying policy preferences becomes increasingly individualistic or tribal, based on what each citizen believes is in their self-interest or the interest of their group, rather than the greater well-being of society. Consequently, this model of governance makes it exceedingly difficult to develop a collective consciousness that binds a nation together, compounding an already polarized society. And, as inter-group divisions deepen, each side begins to see their political rivals as "treasonous, subversive, or otherwise beyond the pale."[10] Over time, mutual tolerance—a societal norm that Steven Levitsky and Daniel Ziblatt identify as essential to democracy's endurance—erodes.[11]

Second, the practice of exercising democratic preferences in the aggregative model may gradually make decision-making about policy worse. According to Young, the problem with this system is that there are few opportunities to examine the reasons that motivate any one person's vote. It could be motivated by fear, self-interest, altruism, or mere whimsy, yet it is accorded the same deference as any other.[12] There are no collective criteria for evaluating the merits of any policy preference. Even if each individual citizen arrived at their preference through their own evaluative process about the best means of realizing their goals, "the aggregate outcome has no necessary rationality and itself has not been arrived at by a process of reasoning."[13]

Third, and relatedly, in this majoritarian model of democracy, minority groups must accept a system of policies and rules that rarely accords with their understanding of what is best for society. Absent any broader deliberation and consensus building, their sole reason for accepting this rule is that it was the largest aggregation of votes, which "offers only a weak motivational basis for accepting the outcomes of a democratic process as legitimate."[14] Thus, citizens whose opinions that consistently rest in the minority become disillusioned with democracy, believing that it will never serve their interests. With time, that sentiment translates into apathy about electoral politics because they consistently lose.[15] Relatedly, authoritarian leaders are able to exploit the aggregative model

[9] *Id*.
[10] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 102 (2018).
[11] Id.
[12] YOUNG, *supra* note 4, at 20.
[13] *Id*. at 21.
[14] *Id*.
[15] RUSSELL DALTON, THE PARTICIPATION GAP: SOCIAL STATUS AND POLITICAL INEQUALITY 111-12, 116 (2017)("People are also more likely to participate if they feel political efficacious, meaning they believe their participation can influence government actions (and those without

of democracy to consolidate power by claiming that any constraints on their power are undemocratic, "because they [and they alone] speak for the people."[16]

Here, I am adopting two alternative theoretical frameworks for analyzing what it means to be a good citizen of democracy: 1) deliberative democracy and 2) contestatory democracy. While sometimes portrayed as contradictory theories of democracy, I argue here that they can be co-constitutive.

First, in contrast to the aggregative model of democracy, where public opinion is expressed by tallying votes with the majority opinion prevailing over the minority, deliberative democracy (sometimes called deliberative civic engagement, citizen participation, or public engagement) seeks to "put communication and reflection at the center of democracy."[17] In this sense, the aim of deliberative democracy is to arrive at solutions or policies that are informed by a variety of perspectives in society, rather than to aggregate perspectives that reflect a certain "group think" common among people in that group.[18]

Proponents of this theory of democracy believe that policymaking could be improved if we focus more on the quality of decision-making process, rather than narrowly on the outcome.[19] Under this deliberative model, decision-making about collective problems through dialogue among stakeholders is essential to the democratic process for a couple of reasons.[20] First, through dialogue, citizens have the opportunity to form and transform their policy preferences taking into account a host of viewpoints and interests that are different from their own.[21] In this way, ideally, how one forms their policy preferences is less individualistic and not cultivated by "group think" of people similar to them.[22] Thus, decisions are better vetted and informed by reasoning in lieu of bias or assumptions. Second, a more deliberative model of decision-making also helps to legitimize democratic governance. This does not necessarily require that forming a consensus be the result of the process. Indeed, while some believe that the process of discussion between those with divergent perspectives will be more likely to

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such feelings have much less motivation to vote."); Jeffrey Karp and Susan Banducci, *Political Efficacy and Participation in Twenty-seven Democracies*, 38 BRITISH J. POL. SCI., 311 (2008).

[16] Kim Lane Scheppele, *Autocratic Legalism*, 85 U CHI L REV. 545, 581 (2018).

[17] JOHN DRYZEK, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE 3 (2012). TINA NABATCHI ET AL., DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 19-21 (2012).

[18] Katharine Travaline et al, *Deliberative Policy Analysis and Policy-Making in Urban Stormwater Managemen*t, 17 J. Environmental Policy & Planning, 691, 692 (2015).

[19] Jennifer L. Eagan, Deliberative Democracy, ENCYCLOPEDIA BRITANNICA, May 17, 2016, https://www.britannica.com/topic/deliberative-democracy (last visited July 17, 2024).

[20] TINA NABATCHI ET AL., DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 3.

[21] James Bohman and William Rehg, *Introduction* in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix (ed. James Bohman and William Rehg 1997).

[22] Eagan, *supra* note 19.

produce consensus amongst those directly affected by the policy, others focus on the legitimizing features of deliberative dialogue even if disagreement and debate continues. [23] Critical to this second vision of deliberative democracy is cultivating a culture of "civic action, confidence, and collective self-rule," which arguably keeps people of all stripes more invested in democratic governance.[24] In the words of Levitsky and Ziblatt, it engenders mutual tolerance, an essential guardrail of democracy.[25]

Another related theory of democracy that motivates this intervention is contestatory democracy. This theory of democracy emphasizes that sometimes resistance and dissent is critical to upholding democracy.[26] Similar to deliberative democracy, proponents of contestatory democracy emphasize the importance of ensuring that the public has a greater role in decision-making processes, at times by challenging official actions. [27] In addition to ensuring citizen scrutiny of law on the front-end (i.e. policy-making), this model of democracy also emphasizes the role of citizens in contesting law on the back-end (i.e. law enforcement). [28] As legal scholar Eric Miller underscores, "contestation helps guarantee laws that are just, not only in their inception, but in their execution too."[29] Another premise of this form of democracy is that citizens are not just permitted to contest the law through "formal institutions, such as a congress or a court, but also in the street (and the jury), as government officials execute those laws."[30] As Jocelyn Simonson argues, such disruption, as long as it is "within the bounds of current political structures," should not be seen as destabilizing democracy, but rather as an important exercise of rights in a healthy democracy.[31] Thus, contestation should be understood as one method of checking repressive exercises of state power.[32]

II. GOOD CITIZENSHIP FOR OUR TIME

What then are the qualities that a good citizen should have under these models of democracy? More to the point, how might legal education be inadvertently creating a culture that undermines norms and values associated with these qualities? Surveys of U.S. citizens reveal that they tend to identify with two broad dimensions of citizenship, which Russell Dalton calls: 1) duty citizenship and 2) engaged citizenship. These dimensions roughly correspond to the models of

[23] *Id*.
[24] DEREK W.M. BARKER ET AL., DEMOCRATIZING DELIBERATION: A POLITICAL THEORY ANTHOLOGY 2.
[25] LEVITSKY AND ZIBLATT, *supra* note 10, at 102.
[26] Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 852 (2021)
[27] Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 746 (2015).
[28] *Id*. at 745
[29] *Id*.
[30] *Id*.
[31] Simonson, *supra* note 26, at 843-45.
[32] *Id*. at 843-44 (Simonson defines contestation as "any form of political action that involves direct opposition to reigning laws, policies, or state practices.")

democracy described in the prior section.[33] First, as the name suggests, those who adopt a duty-based understanding of citizenship would define a "good citizen" as one who engages in traditional forms of political engagement often associated with the aggregative model of democracy, such as going to the polls to vote and engaging in party activity.[34] A "good citizen" would also be someone who pays taxes, obeys the law, and enlists in the military.[35] At the same time, research shows that "higher levels of citizen duty are negatively related to non-electoral forms of action."[36] Consequently, since these citizens are motivated by a sense of duty that encourages them to be law-abiding citizens and respect authority, they would be unlikely to engage in contentious forms of action associated with contestatory democracy like participating in protests.[37]

On the other hand, instead of seeing civic participation primarily as a duty to vote or be engaged in electoral politics, those who ascribe to a notion of "engaged citizenship" typically associated it with activities that involve the exercise of rights that challenges authority and the fulfillment of duties that promote collective wellbeing.[38] Their commitments and activities reflect an understanding of democracy more closely associated with deliberative democracy and contestatory democracy.

In line with deliberative democracy, engaged citizens have a relationship-centered approach to citizenship that is often reflected in actions that demonstrate solidarity with others, both at home and abroad, and a desire to understand others' perspectives.[39] Thus, a "good citizen" is motivated by awareness of and concern for others.[40] These commitments manifest in their civic behaviors, such as "being active in civil-society groups and buying products for political or ethical reasons."[41]

In line with contestatory democracy, engaged citizens are also more likely to associate good citizenship with acts that uphold the autonomy norms of keeping watch on government.[42] For that reason, they are often involved in "a wider repertoire of activities that give them a direct voice in the decisions affecting their lives."[43] For example, engaged citizens are more likely to be involved in direct action, such as boycotts, demonstrations, petitioning politicians, and being a

[33] RUSSELL DALTON, THE PARTICIPATION GAP: SOCIAL STATUS AND POLITICAL INEQUALITY 113 (2017).
[34] *Id*. 117
[35] *Id*. at 114.
[36] *Id*. at 117
[37] *Id*. at 114, 118.
[38] *Id*. at 114.
[39] *Id*. at 113.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 114.

conscientious objector to military service.[44] They are also "skeptical of parties as political gatekeepers" and more willing to challenge the actions of political elites.[45] In contrast to duty-based understandings of citizenship, being an engaged citizen means that you typically will not blindly follow the law, but rather require a sufficient justification for the law before obeying it.[46]

While engaged citizenship and duty citizenship are not necessarily at odds with one another, these approaches do prioritize different characteristics of "good citizenship" that might be required at different times to protect democracy.[47] When democracy is relatively stable, citizens that regularly vote and are involved in political parties serve a critical function in a democracy. However, in the current moment of democratic backsliding, with autocracy on the rise worldwide,[48] and a third of citizens in the United States supporting governance by the military or a "strong leader,"[49] there may be good reason to encourage approaches to citizenship that are grounded in a model of contestatory democracy. First, as experts in autocracy remind, authoritarian leaders are often able to consolidate power not through force, but through "anticipatory obedience."[50] In other words, citizens give up their rights willingly, without contest, as they adapt to their new political environment.[51] Second, as tactics of voter suppression and gerrymandering run rampant in the United States, political activities associated with a traditional duty-based notion of citizenship, like voting, have less impact on electoral politics and may do little to stave off authoritarian rule.[52] In sum, in the time of democratic backsliding, contestation

[44] *Id*. at 114, 117, & 118.
[45] *Id*. at 113, 117.
[46] Miller, *supra* note 27, at 747.
[47] DALTON, *supra* note 15, 114.
[48] V-DEM INSTITUTE, DEMOCRACY REPORT 2024: DEMOCRACY WINNING AND LOSING AT THE BALLOT 6 (2024), https://v-dem.net/documents/43/v-dem_dr2024_lowres.pdf ("But 71% of the world's population – 5.7 billion people – live in autocracies – an increase from 48% ten years ago.") *See also*, Elliot Davis, Jr., *The Global Rise of Autocracies* , US NEWS, Feb. 16, 2024, https://www.usnews.com/news/best-countries/articles/2024-02-16/indonesia-election-result-comes-amid-global-rise-of-autocracies (reporting on the recent "democratic recession" worldwide).
[49] Alex Woodward, Nearly one-third of Americans support autocracy, poll finds, https://www.the-independent.com/news/world/americas/us-politics/pew-democracy-poll-authoritarianism-b2504148.html
[50] Sara Wallace Goodman, *"Good Citizens" in Democratic Hard Times,* 699 THE ANNALS OF THE AMERICAN ACADEMY 68, 70 (2022). ("Oftentimes authoritarian leaders gain power not because individuals voted for them but because they did nothing to obstruct a power grab."); TIMOTHY SYNDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 15-17 (2017). ("Most of the power of authoritarianism is freely given. In times like these, individuals think ahead about what the more repressive government will want, and then offer themselves without being asked. A citizen who adapts in this way is teaching power what it can do.")
[51] *Id*. at 19-20.
[52] *See generally*, THE CENTER FOR AMERICAN PROGRESS, HOW PARTISAN GERRYMANDERING LIMITS VOTING RIGHTS (examining how gerrymandering affects voting rights in four states: North Carolina, Michigan, Pennsylvania, and Wisconsin)

by everyday people may be necessary to forestall democratic decay.

In addition, as the United States becomes increasingly polarized along party lines,[53] many of the characteristics of engaged citizenship associated with deliberative democracy might help us push past our divisions. First, as political scientist Sara Wallace Goodman also suggests, at a moment "[w]hen the source of democratic erosion is frequently found within parties themselves, then we might favor a model of citizenship that is not so tied to party politics," as duty citizenship is.[54] Indeed, during times of democratic backsliding, citizenship norms can be a stabilizing force, if they promote principles and norms that protect democracy over party.[55] Part of what is needed to stabilize democracy and ensure the resolution of political difference without violence, however, is the ability to establish a shared understanding of what values and principles are at the heart of democracy.[56] Characteristics associated with engaged citizenship, like a concern for others and desire to understand different perspectives, would make citizens more adept at identifying shared values and norms that allow for democratic governance.[57] Those who embrace an approach to citizenship that is grounded in deliberative democracy would create more opportunities for interactions across political divides and establish cross-cutting connections to people different from themselves.[58]

III. LEARNING TO "THINKING LIKE A LAWYER"

The traditional approaches of teaching students "how to think like a lawyer," especially in the first-year curriculum, share some of the same flaws of the aggregative model of democracy, while also undermining some of the values and qualities associated with being a good citizen under the deliberative and contestatory models of democracy.

Specifically, this section advances three principal ways that the traditional method of teaching law erodes the norms needed to protect democracy particularly in precarious political moments like the one we find ourselves in today. First, the methods of assessment and class participation promote a very adversarial and individualistic approach to legal practice that leaves students lacking the skills needed to facilitate deliberative dialogue about the law or build coalitions among diverse constituencies. Second, the case method strips the law of its broader context, portraying the law as apolitical and merit-based, and

[53] PEW RESEARCH CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014), https://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf (last visited August 13, 2024)(Republicans and Democrats are more divided along ideological lines – and partisan antipathy is deeper and more extensive – than at any point in the last two decades.").
[54] Goodman, *supra* note 50, at 68.
[55] *Id*. at 70-71.
[56] *Id*.
[57] *Id*. at 70.
[58] *Id*. at 70.

encourages an acceptance of the status quo as natural and predictable.[59] Third, consequently, the current curricular design promotes a blind stewardship of the law, characterized by a belief in the law, and its enforcement through litigation, as the primary means of social change.

Furthermore, even among the critics of the law school curriculum, there's a belief that teaching critical approaches to law, addressing broader context, and incorporating discussions about policy outcomes distracts or detracts from the core job of law schools—that is, preparing students for practice.[60] However, as this section will also explain, the current modalities of legal pedagogy do a disservice to students by presenting an incomplete picture of what it means to be a lawyer and not cultivating the skills needed for many components of the job.[61] In short, not only does it make them worse citizens of democracy, but also worse lawyers.

As a starting point, this argument is not premised on what "thinking like a lawyer" looks like in practice, but rather how this mode of thinking is taught within the traditional curriculum at law schools in the United States. Here, I focus on the pedagogical and evaluative methods employed in the classroom and the exam room, particularly in the first year of law school, when law students are starting to form their professional identity. The vast majority of the 1L curriculum is structured around learning how to do a textual analysis of statutes or derive precedent from cases.[62] From day one in the classroom, through the Socratic method of call and recall, law professor puts individual students on the spot, asking them to showcase their memory of the facts and ability to extract rules from cases.[63] Both in class and on the exam, students are rewarded for

[59] Toussaint, *supra* note 2, at 292. ("The traditional emphasis on teaching legal rules through appellate court opinions can undermine the importance of social and political context to legal analysis.")

[60] Samuel Moyn, *Law schools are bad for democracy: They whitewash the grubby scramble for power*, CHRON. HIGHER EDUC. (2018) ("Their primary task will always be the production of lawyers for the bar —a core commitment with which other agendas will necessarily fit uncomfortably. Law schools will never be staging grounds for fundamental social change when they are organized to advise private dispute resolution and administer extant forms of public justice."); Chad M. Oldfather, JUDGES, JUDGING, AND JUDGMENT 133-34 (2024)(chronicling the scholarship arguing that law professor teach legal theory at the expense of making students practice ready")

[61] Kristen Holmquist, *Challenging Carnegie*, 61 J. LEG. EDUC.353, 354 (2012) ("The Carnegie Report drew attention to legal education's open secret: Law school only half-heartedly and rather incompletely prepares students for the practice of law."); *See* Chris Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, a Cademic Support, and Subordination*, 33 Indiana L. Rev. 737, 744-750 (2000) (documenting the multitude of critiques of legal education for not preparing law students for what they will encounter in legal practice).

[62] ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 44-49 (2007).

[63] *Id*. at 44 (identifying the "core aspects of Socratic method" as "extended questioning of a single student about a case assigned for that particular day, frequent interruption, few (if any) answers

remembering and regurgitating legal doctrine, for applying the existing law to hypothetical facts, and for so called "issue-spotting," which amounts to pinpointing events in a fact pattern that relate to the rules taught to them throughout a course, often as quickly as possible.[64] The bar exam then reifies the notion that these are the skill sets needed to be competent in the practice of law.

Additionally, to demonstrate their acuity as future lawyers, students are often asked to argue both sides of a case, even one that might be morally repugnant to them. At the same time, they are not provided with training or guidance on the basic principles of justice or ethics (beyond the professional rules of conduct, which often "numb moral accountability and constrict social justice advocacy"[65]) that might guide them later in their careers when confronted with ethical dilemmas in practice.[66] Most evaluation of the efficacy of the law relies on a very narrow context—namely, the one presented in the case.[67] Occasionally, in the classroom but rarely on the exam, a wayward professor will discuss the public policy motivations behind the law or the broader context of the case, often to students' chagrin, who perceive this deviation as tangential to what they think they really need to know—the black letter law.[68]

First, like the aggregative model of democracy, this method of teaching and assessment through cases reenforces the idea that there are winners and losers within the law. Students are left with the understanding that those who win, in the classroom and in the courtroom, are those who are best able to articulate the argument of their side and persuade an elite actor—in this case, a judge—and just like at the ballot box, the winner takes all. The only reason to attempt to understand the other side's argument is to identify ways to undermine it, not to find common ground or explore how the law might better serve both parties or society at large.

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provided, an insistence on close attention to the language of the cases, a challenging, if not hostile, tone.").

[64] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUCATION 591, 595-96 (1982).

[65] Toussaint, *supra* note 2, at 303.

[66] For example, a White House lawyer during the Watergate scandal described how "when [he] received assignments relating to those dark and foggy worlds where all Presidents regularly travel, national security, [he] was often adrift without map or compass." Dean III, *supra* note 1, at 614. See also MERTZ, *supra* note 62, at 90. ("In Socratic classrooms, this process of thinking like lawyer is taught through dialogic speech in which students are by example encouraged to ask themselves a series of questions about the case and to consider the arguments on both sides in answering those questions."). Much gratitude to Kim Lane Scheppele for helping me to appreciate this connection.

[67] *Id*. at 95. ("Emotion, morality, and social context are semiotically peripheralized in this process.")

[68] *Id*. ("At the same time, professors occasionally open up a wide panorama of social and moral and personal stories that could arguably be relevant to legal decisions at the fringes of the core legal reading. The lack of careful analysis and substantiation in these wide-ranging discussions only furthers the sense of legal power over social life.:)

Students are not taught how to facilitate difficult conversations, like the ones they might have to have in counseling their clients, or to find common terms of agreement, as they will need to do to reach a settlement agreement or plea deal (which is how most cases are resolved in practice).[69] As these examples make clear, these skills are not just needed to be good citizens of democracy under the deliberative model, but also good lawyers.

Second, to "think like a lawyer" in law school often means how to parse how the differences and similarities between seemingly alike things, and then apply pre-ordained rules to generate legal outcomes.[70] Latent in the process is a certain acceptance of the status quo that almost goes unnoticed. The "things" described in the case or the hypo (be they people, actions, or motivations) are as they appear to be in the text of the case. They are static—essentially stuck in time, and essentialized. Students are not trained to wonder what facts or context might have been struck from the record. Rather, they come away from the curriculum with the impression that the law is ordered according to logic and reasoning, inherited from past cases or statutes. And, as I am not the first to say, much of the law school curriculum, particularly that taught in the first year perpetuates an idea of the law as neutral and emotionless.[71] Over time, there is a creep where the application of the law to the facts begins to feel inevitable, and with it comes a growing sense that the legal order is natural, or at least predictable.

Critical thinking skills are reduced to being able to think quickly on your feet, to recite the law on command, and to reason your way through facts to create categories of people and things so that the law can generate the proper outcomes. Yet, being an effective attorney requires so much more than putting "things" into categories and applying the law. Practicing law requires unearthing and appreciating the context and nuance of a case (and a client's situation) as well as the capacity to see where the law can be pushed often by excavating its underlying, and often unstated, purpose. These are some of the same skills needed to be a "good citizen" of democracy under the deliberative model, which requires

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[69] ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH (2022). ("About 97% of criminal convictions in the federal system, and about 94% of state convictions, are the product of guilty pleas. These numbers have led the Supreme Court to observe, '[C]riminal justice today is for the most part a system of pleas, not a system of trials.' *Lafler v. Cooper*, 566 U.S. 156 (2012)."); Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 J. EMPIRICAL L. STUDIES 111 (2009). *But see*, Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022) (building on an idea first proposed by Susan Burton, a formerly incarcerated organizer, for a collective strike against plea bargaining)

[70] John Rappaport, *Learning to Think Like a Lawyer: What Early Childhood Development Can Teach Us About Mastering Legal Reasoning*, available at https://www.law.uchicago.edu/news/learning-think-lawyer.

[71] *See, e.g.,* MERTZ, *supra* note 62, at 95; Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1988) (explaining how "what is understood as objective or neutral is often the embodiment of a white middle-class world view").

being able to understand why people might come to the same issue from a different perspective in light of their lived experience and finding common ground among people despite their differences. Likewise, a "good citizen" under the contestatory model of democracy must be able to uncover the philosophy undergirding the law to assess whether its enforcement is legitimate or needs to be contested.

Third, the curricular design present in many law school courses across the United States delivers a shallow understanding of the law that does not reflect the ways in which many people experience it on the ground. First-year courses often emphasize a set of legal constraints that are meant to ensure equity, fairness, and justice, which in practice do not function as they are portrayed on the pages of law school casebooks. By way of example, as described by Professor Alice Ristroph in her seminal article, *The Curriculum of the Carceral State*, the criminal law curriculum re-enforces a traditional canon that depicts criminal law "as a necessary and race-neutral response to grave injuries, and…as capable of self-restraint through various internal limiting principles."[72] However, this supposed "race-neutral" canon has shepherded in an era of mass incarceration that is widely agreed to be discriminatory. [73] Criminal law courses inadvertently bolster this canon by focusing on the worst of the worst crimes and assigning cases that depict the most salacious facts, rather than providing an accurate picture of the criminal legal system in the United States.[74] So, although homicides account for only a minuscule portion of criminal prosecutions, criminal law professors devote the bulk of their course to that offense and often do not cover property crimes, which are statistically much more commonplace.[75] In this way, traditional approaches to law courses, which often assign casebooks first published decades earlier, paint a picture of the law that is outdated at best, entirely misleading at worst.

The current curriculum design leaves law students believing that the law is a public good that is generative of justice and equality in society. Like those who adopt a duty-based approach to citizenship, students are more likely to accept the overarching legal architecture without critically grappling with what interests it serves and how it might be exacerbating inequality rather than correcting it. They are accordingly inclined to believe in the sanctity of the law, almost as an omnipotent force, without appreciating that law is a human practice, grounded in decision-making that is replete with all the flaws, cognitive biases, and subjectivity that come with being human.[76] This method implicitly encourages

[72] Alice Ristroph, *The Curriculum of the Carceral*, 120 COLUM. L. REV. U 1631 (2020)
[73] *Id*. at 1635-36.
[74] *Id*. at 1644-71.
[75] Id. at 1667. According to data gathered by the FBI, homicide is the least common of all reported crimes in 2022, while property crimes are the most common. John Gramlich, *What the data says about crime in the U.S.*, PEW RESEARCH CENTER, April 24, 2024, https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us/. (last visited August 15, 2024.)
[76] Ristroph, *supra* note 72, at 1671, 1694.

students to be blind stewards of the law rather than critically reflect on how the law could be restructured to achieve broader societal goals.

This gap in the law school curriculum can have dire consequences for democracy. While law is often portrayed as critical to a well-functioning democracy, what typically remains unsaid is how law is also often the vehicle through which democracies are subverted, either through legislation, executive orders, or judicial decisions.[77] Indeed, authoritarian leaders are often hard to recognize at first, because they are covered in "a veneer of legality."[78] As Kim Lane Scheppele explains, they often employ "autocratic legalism" to consolidate power.[79] In her words, "they do not enter office with a phalanx of soldiers. Instead, they come to power with a phalanx of lawyers."[80]

Further, those future lawyers inclined to contest the law and legal authority do not develop the faculties to do so. In the classroom, most critiques of the law are grounded within the four corners of existing law, and not in critical theory that exposes the sexism, racism, and classism embedded in law. As many others have argued, learning "how to think like a lawyer" is often code for learning a white middle-class heteronormative way of thinking and approaching legal problems.[81] And as Duncan Kennedy notably argued, this approach reproduces social hierarchy.[82] Law students are not schooled in methods for challenging the law outside of the courtroom.

Though increasingly common in movement spaces, inside the classroom students only get rare glimpses of pre-figurative legal thinking, which facilitates imagining how the law might be otherwise, or learn how to contest the law

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[77] Scheppele, *supra* note 16, at 547. (Autocrats "use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state."); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 77 (2018) ("Indeed, government moves to subvert democracy frequently enjoy a veneer of legality: They are approved by parliament or ruled constitutional by the supreme court."

[78] *Id*.

[79] Scheppele, *supra* note , at .

[80] *Id*. at 581.

[81] Christina Kimberlé Williams Crenshaw, Toward a Race-Conscious Pedagogy in Legal Education, 11 NAT'L BLACK L.J. 1, 2 (1988); MERTZ, *supra* note 62, at 1; Bennett Capers, *The Law School as a White Space?*, 106 MINN. L. REV. 7 (2021) (arguing that law schools are "white spaces" both demographically as well as in what and how they teach law); Swethaa Ballakrishnen, *Law School as Straight Space*, 91 FORDHAM L. REV. 1113, 1117 (2023) (describing how genderqueer people are marginalized in law schools, which are often straight spaces).

[82] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUCATION 591 (1982); Samuel Moyn, *Law schools are bad for democracy: They whitewash the grubby scramble for power*, The Chronicle of Higher Education (2018) ("If elite students are forced into a dilemma about how to preserve their sense of justice even as they embrace extraordinary privilege, it is, first and foremost, because society allows law schools to endlessly reproduce elite ascendancy.")

through direct actions outside of a courtroom or legislative hall.[83] Pre-figurative practices are particularly aligned with the contestatory model of democracy, in that their goal is to increase democratic engagement through local, collective structures rather that national party politics, which are seen as reproducing hierarchical authority relations.[84] Hence, the qualities and attributes of a "good citizen" as understood under the contestatory model of democracy are also left underdeveloped.

IV. CRITICAL CURRICULUM DESIGN

To facilitate the attributes of engaged citizenship associated with deliberative and contestatory democracy in legal education, I employ what I have been calling "critical curriculum design," by which I mean engaging in pedagogical methods and crafting courses in such a way to challenge students to rethink their priors as well as critically reflect on whether/when the law is an instrument for social justice. The remaining pages will be devoted to providing some concrete examples for how I have implemented critical curriculum design in the courses I teach.

One of the methods of critical curriculum design is to expose students to a wide range of diverse and critical perspectives, not just in a few dedicated classes, but across the curriculum. For example, in my introduction to human rights course, I incorporated a series of "critical discussions," which are classes focused on critiques of human rights law from feminist, Third World Approaches to International Law (TWAIL),[85] and other critical perspectives. Every unit in the course now has at least one critical discussion which is facilitated by students. For instance, in the class after we cover the sources of international law, we discuss B. S. Chimni's critique of customary international law from a TWAIL perspective in his ground-breaking article, *Customary International Law: A Third World Perspective*.[86]

For these classes, I assign students into groups and ask them to act as "discussion leaders." Students are instructed to think of themselves as facilitators

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[83] Sameer Ashar, *Pedagogy of Prefiguration*, 132 YALE L. J. FORUM 869 (2023). ("Law schools are especially hostile to progressive prefigurative thinking."). As defined by Professors Amy J. Cohen and Bronwen Morgan, "prefigurative legality," involves "efforts to use the language, form, and legitimacy of law to imagine law otherwise." Amy J. Cohen & Bronwen Morgan, Prefigurative Legality, 48 L. & Soc. Inquiry 1053, 1054 (2023).

[84] Ashar, *supra* note 83, at 877 (citing Carl Boggs, *Marxism, Prefigurative Communism, and the Problem of Workers' Control*, 11 RADIAL CAL. A. M. 99, 103 (1977).

[85] For an incredible primer on the TWAIL tradition in legal scholarship, see James Gathii's Grotius Lecture: The Promise of International Law: A Third World View at the American Society of International Law (ASIL)'s 2020 Annual Meeting, available at https://www.youtube.com/watch?v=neGcxJgRogE.

[86] BS Chimni, *Customary International Law: A Third World Perspective*, 112 AMER. J. INT'L L. 1 (2018).

of the discussion, rather than presenters of information.[87] I advise them that one of their main goals should be listening to their classmates and asking them follow up questions to draw out their perspectives. While I encourage them to bring their own analysis of the readings to the discussion, I remind them that their goal is not to convince their classmates of their own point of view, but rather to bring alternative ways of framing the question and different points for their classmates to consider as they develop their own thinking on this subject.

I also provide them with a set of techniques and exercises that they can employ to encourage greater participation in the discussion and deepen their and their classmates' listening skills.[88] For instance, drawing from Sam Kaner's "techniques for honoring all points of view," here are some of the strategies and questions we discuss that they can use to create an environment conductive to open and reflective discussion:

- *Paraphrasing*: "Let me see if I understand you"
- *Drawing People Out*: "Can you say more about x? What do you mean by x? Can you give me an example?"
- *Balancing*: "Are there other ways of looking at this? Does anyone have a different perspective?"
- *Helping People Listen to Each Other*: "Is what Rachel said resonating with others?"[89]

For the first "critical discussion," I outline the framing for the discussion as well as guiding questions. I advise them that they can draw heavily from the proposed questions in the syllabus but need not address them all or be confined to them. Below is a sample class plan for the discussion on the sources of international law, which I include in my syllabus:

Critical Discussion: Sources of International Law[90]

During this critical discussion, we will build from the core teachings of the last class to compare the diverse sources of public international law that are the foundation of international human rights law. We will also introduce critiques of critical scholars, including those from the Third World Approaches to

[87] ADRIENNE MAREE BROWN, HOLDING CHANGE 53 (2024) (describing "What Is and Isn't Facilitation").
[88] See, e.g., STEPHEN D. BROOKFIELD & STEPHEN PRESKILL, THE DISCUSSION BOOK: 50 GREAT WAYS TO GET PEOPLE TALKING (2016); LIBERATING STRUCTURES: INCLUDING AND UNLEASHING EVERYONE, (last visited Dec. 8, 2024).
[89] SAM KANER, *Facilitative Listening Skills*, *in* FACILITATOR'S GUIDE TO PARTICIPATORY DECISION-MAKING, 44, 45, 51, & 52 (3rd Ed. 2014)
[90] This design of this critical discussion benefitted significantly from and drew heavily from discussions, inputs, and/or syllabi generously shared by Ioannis Kalpouzos, Sandesh Sivakumaran, and Silvia Steininger.

International Law (TWAIL) tradition, as they relate to the sources of international law.

The following questions should be explored:

- What is the role of sources in the normative and institutional evolution of public international law?
- What are the benefits and limits in the development and establishment of human rights law through treaties? Are human rights treaties different from other treaties? How?
- Do you think that human rights law poses a challenge, or even a threat, to state sovereignty? How is this reflected in the debates over sources? Do you think that this is a positive or negative development?
- Article 38(1) of the International Court of Justice Statute provides that the Court should apply "the general principles of law recognized by civilized nations." What do you make of this reference to "civilized nations?" How might the Court determine whether a nation "civilized"?
- How are customary rules determined? Is the process of determining a rule any different when it comes to human rights law than other areas of public international law?
- In the reading, B. S. Chimni argues that the formation of customary international law (CIL) disadvantages developing countries. What is the basis of his argument? Do you agree with him?
- Professor Chimni links the adoption of CIL to the expansion of capitalism by Western states, pointing to prize law in the 1800s, which allowed imperial nations to capture vessels. CIL was domesticated in US law through *Paquete Habana*, which held that coastal fishing vessels that had been captured by US officials during the Spanish-American war in the Bay of Cuba were exempt from capture as a prize of war. Does that judgment undermine or support Professor Chimni's argument?
- Monica Hakimi argues that CIL does not and should not operate like a rulebook. How does her understanding of CIL differ from the conventional understanding of CIL? Do you agree or disagree with Professor Hakimi? If you agree, how do we assess its content?
- Is there – and should there be – a hierarchy in the sources and/or rules of international law? How might the rules on the sources of international law be reformed to make them more equitable?

Discussion Reading:

- B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 Am. J. Int'l L. 1, 1-27 (2018).
- Excerpts from *Paquete Habana*, in ALSTON, INTERNATIONAL HUMAN RIGHTS: TEXT AND MATERIALS 60-65 (2024).
- Either listen to Jus Cogens Episode 10 - Making Sense of Customary International Law with Monica Hakimi(until min 23:08) ***or*** read Opinio

Juris An Introduction to Making Sense of Customary International Law.

For the second assignment, I provide the framing for the discussion but ask the student leaders to develop their own discussion plan, outlining the topics they aim to cover and guiding questions. I also ask them to sketch out a plan for who will cover which topic and for how long. For both discussions, students are advised to send me their discussion plans 48 hours in advance of the class, so I can provide feedback and guidance as well as identify any gaps in coverage. After each discussion, I offer students the chance to debrief with me about what went well and areas where they might try to further hone their skills and knowledge. I begin these debriefs by asking the students to reflect for themselves what went well, and what areas of growth they have.

The assessment for the students' facilitation of their critical discussions is made according to the following grading rubric:[91]

Facilitation Criteria	Lesser Quality	Average Quality	High Quality
Knowledge and understanding of content	Discussions led and responses show little evidence of knowledge and understanding of course content.	Discussions led and responses show evidence of knowledge and understanding of course content.	Discussions led and responses show evidence of deep knowledge and understanding of course content and engagement with critical perspectives.
Discussion leadership	Discussions led do not attempt to elicit responses, and reflections from other learners and/or responses do not build upon the ideas of other learners to take the discussion deeper.	Discussions led attempt to elicit responses and reflections from other learners, and responses build upon the ideas of other learners to take the discussion deeper.	Discussions led elicit responses and reflections from other learners, and responses build upon and integrate multiple views from other learners to take the discussion deeper.

The pedagogical aim of these critical discussions is two-fold. First, having students lead these discussions requires them to deepen their understanding of the doctrine as well as the foundational theories that undergird the law.[92] In this way, the students engage in pre-figurative thinking, because they are encouraged to grapple not just with the officially stated purpose of a particular law, but also with

[91] This grading rubric was generously shared by Susan Brooks.

[92] Christopher Hampson made a similar point related to the teaching of commercial law. Christopher Hampson, *Critical Theory & Commercial Law in the Sunshine*, 75 FLA. L. REV. FORUM 15, 26 (2023)("[C]ritical theory can supply a meaningful framework for remembering the plethora of legal rules that professors expect law students to learn. Scholars of adult learning have shown that developing frameworks can facilitate the memorization of complex structures.").

what might be driving its adoption and enforcement.[93] Accordingly, these discussions invite contemplation of how the law could be otherwise, and creates openings for students to explore ideas that inherently challenge the vertical power relations that are embedded in the law.[94] In addition, it exposes how even law which appears neutral on its face—such as the sources of international law—might have discriminatory effects that are only apparent when you understand it in context. This exercise can thus help to build students' capacity to challenge laws that are unjust either in their inception or implementation—skills associated with engaged citizenship under the theory of contestatory democracy.

Second, it enhances their facilitation skills. As described above, these skills are often underdeveloped in law school, but necessary for legal practice today, in a legal order where most legal disputes are resolved through a negotiated agreement between opposing parties (e.g. a plea deal or settlement agreement), rather than by a judge ruling from above. This same skill set can also help our students to be engaged citizens in a deliberative democracy by equipping them to guide robust dialogue among diverse constituencies that have different values and priorities. Indeed, experts in facilitation describe those who do it well as making participants "feel safe in expressing their opinions," not trying to unduly push their own agenda, and generating an atmosphere of trust.[95] Arguably, the skills of facilitation needed to create conditions for full participation are those also needed to foster "mutual tolerance," which, as described above, is considered a guardrail against democratic erosion.[96] Furthermore, facilitation is also a key tool for organizers.[97] In that when it is done well, it makes it easier for people to organize together to build movements.[98] Thus, facilitation can also be helpful to movement lawyers, operating in spaces where lawyers are not necessarily, and sometimes shouldn't be, the central actors, but can help to build coalitions that can push against repression and towards liberatory aims.[99] These skills are thus also needed

[93] Ashar, *supra* note 83, at

[94] BROWN, *supra* note 87, at 31. ("Facilitation as a practice rooted in culture building and superposition can help us integrate a complex understanding of the world… Facilitation methods are ways we grow our emotional intelligence, collective decision making, alternative governance structures, and practice ways of connecting to the inherent dignity and humanity of each other. Through facilitation, we have the ability to elevate, amplify, and address the most deeply buried and least visible aspects of culture, aspects that feel like common sense but may not be what we need.")

[95] INGRID BENS, FACILITATING WITH EASE! 82 (3rd ed., 2012); See also BROWN, supra note 87, at 53. ("As the facilitator, you need to be a presence that the whole room can trust—trust to be present, on time, on purpose, trust to be a neutral person to whom anyone in the room can bring concerns, feedback, and ideas.")

[96] LEVITSKY AND ZIBLATT, *supra* note 10, at 102.

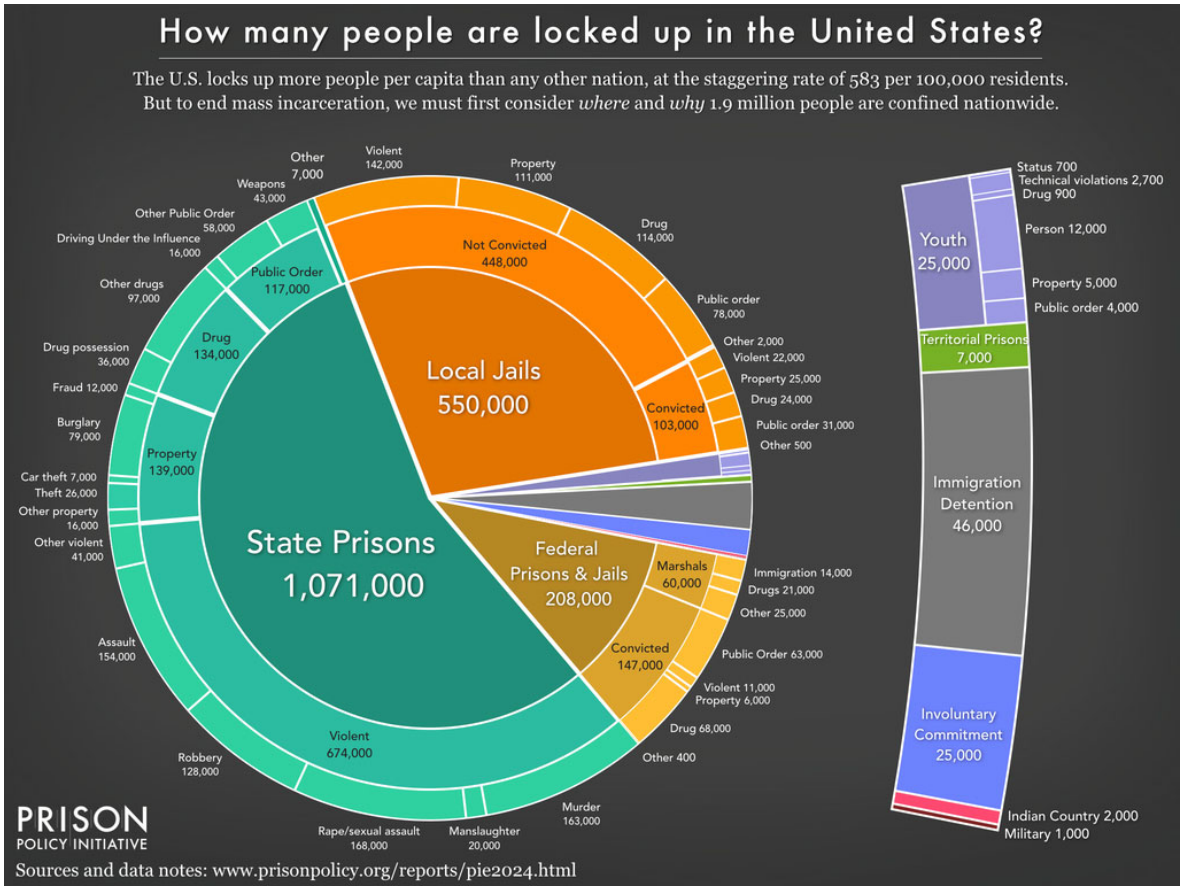
[97] BROWN, supra note 87, at 53.

[98] *Id*. at 8.

[99] *Id*. at 9; *See generally*, William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U.L. REV. 455 (1994) (describing the experience of organizers who witnessed how movements have been undermined by lawyers who sought to "help" them); For more background information on movement lawyering, see *What is Movement Lawyering?* at Movement Lab https://www.movementlawlab.org/about/movement-lawyering (last visited January 27, 2025).

for an engaged citizen under a theory of contestatory democracy.

In my criminal law course, much like my human rights course, I aim to provide the students with diverse perspectives that will deconstruct their understanding of how criminal law functions as well as challenge the traditional canon described in Part III. First, in contrast to other criminal law courses that primarily focus on homicide and assault, to provide a more accurate picture of the current U.S. criminal legal system, my course covers a full range of offenses, from property crimes to drug and gun related offenses, using an open-source casebook authored by Alice Ristroph.[100] To explain that choice, in the first class of the semester, I provide the students with the following visual of the statistics about crimes of the incarcerated population in the United States.



I also explain that property crimes in the U.S. are much more common than violent crime and 43.9% of incarcerated in federal prison are serving time for drug offenses (over twice as much as any other type of crime), making our coverage of those crimes essential to understanding criminal law in the United

[100] ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH (2022).

States.[101]

Second, in line with the teachings of critical race theory, and also informed by the insights of Alice Ristroph, I seek to teach criminal law in context and expose criminal law as a practice deeply shaped by human decision-making and all the assumptions, moral and political commitments, and cognitive biases that come with it, exploring how those commitments and biases impact legal decision-making.[102] Exposing the human element of the criminal legal process helps to denaturalize the law, thereby opening a window for contestation in the classroom. While this framing is important in all law courses, it is particularly so in criminal law, where police and prosecutors have extraordinary discretion, and most convictions occur through plea-bargaining rather than after a lengthy trial.[103] Additionally, as Shaun Ossei-Owusu has argued, "[p]ut simply, a wide range of scholarship suggests that legal education contributes to our penal status quo through its poor handling of race, poverty, and gender issues in the criminal justice curriculum."[104] The case method, which is nearly intrinsic to legal education, reserves these issues for the case notes, signaling to students that they are afterthoughts. To foreground them, I use a variety of techniques to put criminal law in context, in an effort to deep my students' appreciation for how political, economic, social, and moral considerations shape the development and application of the criminal law.

One way I accomplish this is by inviting guest speakers into the classroom to connect the course material to their lived experience. For instance, I co-teach several classes with Terrell Carter, whose life without parole sentence was commuted by the Governor of Pennsylvania after he served over three decades behind bars, and who has also co-authored several law review articles with me.[105] Drawing from his lived experience of serving thirty years at a maximum-security prison in Pennsylvania, he helps the students understand the criminal legal process in context, analyze the frameworks that restrain or fail to restrain criminal

[101] John Gramlich, *What the data says about crime in the U.S.*, PEW RESEARCH CENTER, April 24, 2024, at https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us/. (last visited on Jan. 29. 2025); Federal Bureau of Prisons Statistics, Offense Type, January 25, 2025, at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp. (last visited on Jan. 29, 2025).

[102] Ristroph, *supra* note 72, at 1694-99; Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462–63, 501 (1993) (compiling a list of major works in critical race theory that contextualize the law socially and historically).

[103] RISTROPH, *supra* note 69; Lee Curley, James Munro, &Itiel Dror, *Cognitive and human factors in legal layperson decision making: Sources of bias in juror decision making*, 62 MED. SCI. L. 206 (2022)(describing the sources of biases in juror decision-making and outlining ways to mitigate bias); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

[104] Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 418 (2021).

[105] Terrell Carter et al., *Redeeming Justice*, 116 NW. U. L. REV. 315 (2021); Kempis Songster et al., *Regarding the Other Death Penalty*, 123 COLUM. L. REV. FORUM 114 (2024); Terrell Carter & Rachel López, *If Lived Experience Could Speak: A Legal Method for Repairing Epistemic Violence in Law and the Legal Academy*, 109 MINN. L. REV. 1 (forthcoming 2024).

law, and explore the role of race in the system. Over the course of the semester, he has made a number of interventions to shed light on how racial bias, unfettered discretion, and arbitrariness are rife in the criminal legal system. By way of example, when we examined the history of the U.S. penal system, including the purported move away from cruel and unusual punishment under a Quaker reformist ideology and how prisons through the practice of convict leasing became "slavery by another name,"[106] Terrell is able to link the material to his lived experience, explaining how he worked for $0.19 an hour to produce goods and how shallow rehabilitative programming was behind bars.

In addition, my course is also structured to encourage students to be reflective learners and practitioners. Specifically, I want my students to be able to grapple with disorienting and uncomfortable moments in practice, develop their own professional identity, cultivate an awareness of how their own values and experiences might shape their understanding of and engagement with the law, and hone their ability to analyze a situation from multiple perspectives, including perspectives different from their own. To that end, I assign students multiple reflective writing assignments. For example, as their first assignment, students are asked to write a short reflection addressing the following two questions:

1. Ristroph describes criminal law as a "human practice," meaning that it is a product of human decision-making that is to some extent guided and constrained by written texts, but also influenced by other intangible factors like emotion, cognitive biases, and past experiences. What experience do you have with the criminal legal system? How does that experience inform your perspectives on criminal law and approach to this course?

2. Given your prior experience with and knowledge about the criminal legal system, what surprised you about the reading for the first class on the history of the U.S. penal system?

In this way, I encourage students to examine how they, as soon-to-be lawyers, also bring their own experiences and values to law and thereby are also engaging in the human practice of criminal law.[107] By cultivating in them an awareness of how their own biases and assumptions shape their approach to and understanding of the law, I hope that they can be both better lawyers and citizens of democracy who are capable of engaging with others who have had different life experiences than them and more equipped to identify when other legal actors are acting on their own stereotypes and assumptions as well.

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[106] For this class, I assign excerpts from Chapter 1 of Andrew Manuel Crespo and John Rappaport's forthcoming textbook CRIMINAL LAW AND THE AMERICAN PENAL SYSTEM: CASES AND CONTEXT.

[107] Indeed, several studies show that students are inclined to conform their opinion about legal matters to their political outlooks, only to a slighter lessor extent than the general public. Dan Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci, and Katherine Cheng, *"Ideology" or "Situation Sense": An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PENN. L. REV. 349, 354, 413-14 (2016).

CONCLUSION

The imperative to reimagine legal education extends far beyond the walls of law schools. As this essay has demonstrated, the traditional pedagogical model of teaching students to "think like a lawyer" inadvertently undermines the very norms and practices of engaged citizenship crucial for safeguarding our increasingly fragile democracy. By employing critical curriculum design, we can cultivate law graduates who are not only skilled legal technicians but also engaged citizens capable of deliberation, contestation, and critical engagement with the law. This approach, which incorporates critical perspectives, socio-political context, and reflective practice, equips future lawyers with the tools to challenge authority, imagine alternative legal frameworks, and actively participate in democratic processes.

The stakes of this pedagogical shift are high. In an era of rising authoritarianism and deep polarization, the legal profession bears a unique responsibility to uphold and strengthen democratic institutions.[108] By fostering the attributes of engaged citizenship in legal education, we can produce a generation of lawyers prepared to navigate the complex realities of democratic governance in these times. As legal scholars and educators, we must recognize that our classrooms are not just training grounds for future legal practitioners, but crucibles for democratic citizenship. Our willingness to critically examine and transform our approaches to legal education could help ensure a more democratic future for generations to come.

[108] American Bar Association Model Rules of Professional Conduct pmbl. ¶ 1 (2020) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.")