

Essay

Critical Curriculum Design: Teaching Law in an Age of Rising Authoritarianism

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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 also 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

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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> [<https://perma.cc/FH5B-TY4B>]; John W. Dean III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609 (2000); See also *infra* note 80.

producing lawyers so 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 to the exclusion of other essential skills needed for legal practice, existing legal pedagogy promotes an individualistic and decontextualized understanding of the law that undervalues the qualities needed to be good citizens of democracy.² Drawing on theories of deliberative and contestatory democracy, I contend that law schools should also strive to 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.³ Through “critical curriculum design,” I 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 equipped with the critical thinking and relational skills needed to sustain and improve 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.”⁴ 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

2. When I reference citizen or citizenship, I am referring to any member of the polity without regard to immigration status.

3. 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 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.

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

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 political theorist 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.”⁵ 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.⁶ 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.⁷ Under this model, citizens become winners or losers in the struggle to exert the most influence on policy-makers.⁸ 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.⁹

Especially in the current political climate in the U.S., this thin approach to 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 comprised 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.¹⁰ The process of identifying policy preferences becomes increasingly individualistic or

5. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 19 (Oxford University Press ed., 2002).

6. *Id.*

7. *Id.*

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

9. YOUNG, *supra* note 5, at 19.

10. *Id.*

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.”¹¹ Over time, mutual tolerance—a societal norm that political scientists Steven Levitsky and Daniel Ziblatt identify as essential to democracy’s endurance—erodes.¹²

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 vote.¹³ 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.”¹⁴

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.”¹⁵ Thus, citizens whose opinions 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

11. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 102 (2018).

12. *Id.*

13. YOUNG, *supra* note 5, at 20.

14. *Id.* at 21.

15. *Id.*

electoral politics because they consistently lose.¹⁶ Relatedly, authoritarian leaders are able to exploit the aggregative model of democracy to consolidate power by claiming that any constraints on their power are undemocratic, “because they [and they alone] speak for the people.”¹⁷

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.”¹⁸ 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.¹⁹

Proponents of this theory of democracy believe that policymaking could be improved if we focus more on the quality of the decision-making process, rather than narrowly on the outcome.²⁰ Under this deliberative model, decision-making about collective problems through dialogue among stakeholders is essential to the democratic process for a couple of

16. RUSSELL DALTON, THE PARTICIPATION GAP: SOCIAL STATUS AND POLITICAL INEQUALITY 111–12, 116 (2017); Jeffrey Karp & Susan Banducci, *Political Efficacy and Participation in Twenty-seven Democracies*, 38 BRITISH J. POL. SCI., 311 (2008).

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

18. 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).

19. Katharine Travaline et al, *Deliberative Policy Analysis and Policy-Making in Urban Stormwater Management*, 17 J. Env't Pol'y & Plan., 691, 692 (2015).

20. Jennifer L. Eagan, *Deliberative Democracy*, ENCYC. BRITANNICA, May 17, 2016, <https://www.britannica.com/topic/deliberative-democracy> [https://perma.cc/RA9L-7AHF].

reasons.²¹ 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.²² In this way, ideally, how one forms their policy preferences is less individualistic and not cultivated by “group think” of people similar to them.²³ 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 produce consensus amongst those directly affected by the policy, others focus on the legitimizing features of deliberative dialogue even if disagreement and debate continue.²⁴ 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.²⁵ In the words of Levitsky and Ziblatt, it engenders mutual tolerance, an essential guardrail of democracy.²⁶

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.²⁷ 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.²⁸ In addition to ensuring citizen scrutiny of law on

21. TINA NABATCHI ET AL., DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 3 (2012).

22. James Bohman & William Rehg, *Introduction* in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix (James Bohman & William Rehg, eds., 1997).

23. Eagan, *supra* note 20.

24. *Id.*

25. DEREK W.M. BARKER ET AL., DEMOCRATIZING DELIBERATION: A POLITICAL THEORY ANTHOLOGY 2 (2012).

26. LEVITSKY & ZIBLATT, *supra* note 11, at 102.

27. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 852 (2021).

28. Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 746 (2015).

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).²⁹ As legal scholar Eric Miller underscores, “contestation helps guarantee laws that are just, not only in their inception, but in their execution too.”³⁰ 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.”³¹ As legal scholar 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 instead as an important exercise of rights in a healthy democracy.³² Thus, contestation should be understood as one method of checking repressive exercises of state power.³³

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 inadvertently be 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 political scientist Russell Dalton calls: 1) duty citizenship and 2) engaged citizenship. These dimensions roughly correspond to the models of democracy described in the prior section.³⁴ 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.³⁵ A “good citizen” would also be someone who pays taxes, obeys the law, and enlists in the military.³⁶ At the same time, research shows that “higher levels of citizen duty are

29. *Id.* at 745.

30. *Id.*

31. *Id.*

32. Simonson, *supra* note 27, at 843–45.

33. *Id.* at 843–44.

34. DALTON, *supra* note 16, at 113.

35. *Id.* at 117.

36. *Id.* at 114.

negatively related to non-electoral forms of action.”³⁷ 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.³⁸

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 associate it with activities that involve the exercise of rights that challenge authority and the fulfillment of duties that promote collective wellbeing.³⁹ Their commitments and activities reflect an understanding of democracy more closely associated with deliberative democracy and contestatory democracy.⁴⁰

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.⁴¹ Thus, a “good citizen” is motivated by awareness of and concern for others.⁴² These commitments manifest in their civic behaviors, such as “being active in civil-society groups and buying products for political or ethical reasons.”⁴³

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.⁴⁴ 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.”⁴⁵ For example, engaged citizens are more likely to be involved in direct action, such as boycotts, demonstrations, petitioning politicians, and being a

37. *Id.* at 117.

38. *Id.* at 114, 118.

39. *Id.* at 114.

40. Russell Dalton agrees with my assessment that his survey findings tend to correspond to these two models of democratic engagement.

41. DALTON, *supra* note 16, at 113.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 114.

conscientious objector to military service.⁴⁶ They are also “skeptical of parties as political gatekeepers” and more willing to challenge the actions of political elites.⁴⁷ 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.⁴⁸

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.⁴⁹ When democracy is relatively stable, citizens who regularly vote and are involved in political parties serve a critical function. However, in the current moment of global democratic backsliding, including in the United States,⁵⁰ with autocracy on the rise worldwide,⁵¹ and a third of citizens in the United States supporting governance by the military or a “strong leader,”⁵² 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

46. *Id.* at 114, 117, & 118.

47. *Id.* at 113, 117.

48. Miller, *supra* note 28, at 747.

49. DALTON, *supra* note 16, at 114.

50. Thomas Carothers & Andrew O’Donohue, *Understanding and Responding to Global Democratic Backsliding*, Carnegie Endowment for Int’l Peace (Oct. 20, 2022), <https://carnegieendowment.org/research/2022/10/understanding-and-responding-to-global-democratic-backsliding?lang=en> [<https://perma.cc/N4YG-M99R>] (analyzing recent patterns of democratic erosion across the world and attributing democratic decline to “grievance-fueled illiberalism, opportunistic authoritarianism, and entrenched-interest revanchism”).

51. 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 [<https://perma.cc/2TZP-KX9W>] (“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*, U.S. NEWS, Feb. 16, 2024, <https://www.usnews.com/news/best-countries/articles/2024-02-16/indonesia-election-result-comes-amid-global-rise-of-autocracies> [<https://perma.cc/4HFJ-TJLV>] (reporting on the recent “democratic recession” worldwide).

52. Alex Woodward, *Nearly one-third of Americans support autocracy, poll finds*, THE INDEPENDENT, (Feb. 28, 2024), <https://www.the-independent.com/news/world/americas/us-politics/pew-democracy-poll-authoritarianism-b2504148.html> [<https://perma.cc/R7YE-T5PC>].

force, but through “anticipatory obedience.”⁵³ In other words, citizens give up their rights willingly, without contest, as they adapt to their new political environment.⁵⁴ 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.⁵⁵ In sum, in the time of democratic backsliding, contestation by everyday people may be necessary to forestall democratic decay.

In addition, as the United States becomes increasingly polarized along party lines,⁵⁶ many of the characteristics of engaged citizenship associated with deliberative democracy might help us push past our divisions. 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.⁵⁷ Indeed, during times of democratic backsliding, citizenship norms can be a stabilizing force, if they promote principles and norms that protect democracy over party.⁵⁸ Accordingly, part of what is needed to stabilize democracy and ensure the resolution of political differences without violence is the ability to establish a shared understanding of what values and principles are at the heart of democracy.⁵⁹ And characteristics associated with engaged citizenship, like a concern for others and a desire to understand different perspectives, may make citizens more adept at identifying shared values

53. Sara Wallace Goodman, “*Good Citizens*” in *Democratic Hard Times*, 699 THE ANNALS OF THE AMERICAN ACADEMY 68, 70 (2022); TIMOTHY SYNDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 15–17 (2017).

54. *Id.* at 19–20.

55. See generally, Alex Tausanovitch & Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, THE CENTER FOR AMERICAN PROGRESS, (July 8, 2020), <https://www.americanprogress.org/article/partisan-gerrymandering-limits-voting-rights> [<https://perma.cc/JQ7H-T6UR>].

56. 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> [<https://perma.cc/HA5R-957E>].

57. Goodman, *supra* note 53, at 68.

58. *Id.* at 70–71.

59. *Id.*

and norms that allow for democratic governance.⁶⁰ In sum, embracing an approach to citizenship that is grounded in deliberative democracy could help to facilitate more opportunities for interactions across political divides and to establish cross-cutting connections among people with divergent views.⁶¹

III. LEARNING TO “THINK 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, adopting the case method as the sole technique of legal education strips the law of its broader context, portraying the law as apolitical and merit-based, and encourages an acceptance of the status quo as natural and predictable.⁶² 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

60. *Id.* at 70.

61. *Id.* at 70.

62. Toussaint, *supra* note 3, 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.”).

job of law schools—that is, preparing students for practice.⁶³ 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.⁶⁴ In short, not only does it make students 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—which often inscribe norms and values from the nineteenth century.⁶⁵ From day one in the classroom, through the Socratic method of call and recall, the law professor puts individual students on the spot, asking them to showcase their memory of the facts and ability to extract rules from cases.⁶⁶ Both in class and on the exam, students are rewarded for 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

63. Samuel Moyn, *Law schools are bad for democracy: They whitewash the grubby scramble for power*, CHRON. HIGHER EDUC. (2018); Chad M. Oldfather, JUDGES, JUDGING, AND JUDGMENT 133–34 (2024).

64. Kristen Holmquist, *Challenging Carnegie*, 61 J. LEG. EDUC. 353, 354 (2012); 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).

65. ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER” 44–49 (2007); Claudia Angelos, Mary Lu Bilek, Joan W. Howarth & Deborah Jones Merritt, *Langdell’s Subjects*, 102 U. DET. MERCY L. REV. 1, 1–3, 4–9 (2024) (describing how Christopher Columbus Langdell developed the law school curriculum still taught at law schools today during the era of Jim Crow laws).

66. *Id.* at 44.

possible.⁶⁷ 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”⁶⁸) that might guide them later in their careers when confronted with ethical dilemmas in practice.⁶⁹ Moreover, most evaluation of the efficacy of the law relies on a very narrow context—namely, the one presented in the case by the judge.⁷⁰ 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.⁷¹

First, like the aggregative model of democracy, this method of teaching and assessment through cases reinforces 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.

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

67. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUCATION 591, 595–96 (1982).

68. Toussaint, *supra* note 3, at 303.

69. Dean III, *supra* note 1, at 614. See also MERTZ, *supra* note 65, at 90. Much gratitude to Kim Lane Scheppele for helping me to appreciate this connection.

70. *Id.* at 95.

71. *Id.*

(which is how most cases are resolved in practice).⁷² When I taught in a clinic, I witnessed firsthand the harm that this mentality can cause. In the worst-case scenario, a student's adversarial approach derailed an agreement that could have saved our client's home from foreclosure. Moreover, in the era of AI, these skills may become increasingly valuable as they are the ones that machines cannot master. 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 learning how to parse through the differences and similarities between seemingly alike things, and then apply pre-ordained rules to generate legal outcomes.⁷³ 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 in the courses taught in the first year, perpetuates an idea of the law as neutral and emotionless.⁷⁴ Over time, there is a

72. 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).

73. John Rappaport, *Learning to Think Like a Lawyer: What Early Childhood Development Can Teach Us About Mastering Legal Reasoning*, (Oct. 4, 2017) <https://www.law.uchicago.edu/news/learning-think-lawyer> [<https://perma.cc/6NNX-BKVQ>].

74. *See, e.g.*, MERTZ, *supra* note 65, at 95; Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1988).

gradual 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 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.”⁷⁵ However, this supposedly “race-neutral” canon has shepherded in an era of mass incarceration that is widely agreed to be discriminatory.⁷⁶ Criminal law courses inadvertently bolster this canon by focusing on the worst of the worst crimes and

75. Alice Ristroph, *The Curriculum of the Carceral*, 120 COLUM. L. REV. U 1631 (2020).

76. *Id.* at 1635–36.

assigning cases that depict the most salacious facts, rather than providing an accurate picture of the criminal legal system as it operates today in the United States.⁷⁷ So, although homicides account for only a minuscule portion of criminal prosecutions, criminal law professors often devote the bulk of their course to that offense and do not cover property crimes, which are statistically much more commonplace.⁷⁸ In this way, criminal law courses, which often use casebooks first published decades earlier, paint a picture of the law that is outdated at best, entirely misleading at worst.

Consequently, 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.⁷⁹ This method implicitly encourages 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.⁸⁰ Indeed, authoritarian leaders are often hard to recognize at first, because they are covered

77. *Id.* at 1644–71.

78. *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> [<https://perma.cc/77H4-WMR6>].

79. Ristroph, *supra* note 75, at 1671, 1694.

80. Scheppele, *supra* note 17, at 547; STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 77 (2018).

in “a veneer of legality.”⁸¹ As socio-legal scholar Kim Lane Scheppelle explains, they often employ “autocratic legalism” to consolidate power.⁸² In her words, “they do not enter office with a phalanx of soldiers. Instead, they come to power with a phalanx of lawyers.”⁸³

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.⁸⁴ And as Duncan Kennedy notably argued, this approach reproduces social hierarchy.⁸⁵ 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 prefigurative legal thinking, which facilitates imagining how the law might be otherwise, or learn how to contest the law through direct actions outside of a courtroom or legislative hall.⁸⁶ Prefigurative practices are particularly aligned with the contestatory model of democracy, in that their goal is to increase

81. *Id.*

82. Scheppelle, *supra* note 16, at 571–581.

83. *Id.* at 581.

84. Christina Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2 (1988); MERTZ, *supra* note 65, 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).

85. 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).

86. 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).

democratic engagement through local, collective structures rather than national party politics, which are seen as reproducing hierarchical authority relations.⁸⁷ Hence, the qualities and attributes of a “good citizen” as understood under the contestatory model of democracy are also left underdeveloped. To be clear, I am not arguing that we should abandon all of the old ways of teaching law—there is certainly value in teaching students how to analyze cases, interpret statutes, and advocate zealously for their clients. However, a reorientation of legal education is needed to meet the challenges of today, both in legal practice and in democratic governance.

IV. CRITICAL CURRICULUM DESIGN

To facilitate the attributes of engaged citizenship associated with deliberative and contestatory democracy in legal education, I have been taking some initial steps to 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—that is, their prior lived experience, biases, education, etc.—as well as critically reflect on whether/when the law is an instrument for social justice. Specifically, to operationalize critical curriculum design, I have restructured my courses to center diverse and critical perspectives, embed student-facilitated discussions, and encourage ongoing reflection on the relationship between law and justice.⁸⁸ This approach is designed to challenge students’ assumptions, deepen their engagement with each other, and encourage students to interrogate foundational legal concepts from multiple vantage

87. Ashar, *supra* note 86, at 877 (citing Carl Boggs, *Marxism, Prefigurative Communism, and the Problem of Workers’ Control*, 11 RADIAL CAL. A. M. 99, 103 (1977)).

88. Indeed, there are more resources available for secondary school teachers than law professors to help equip students with these skills. *See e.g.*, Center for Civic Education, Civitas Lessons on Democracy, Civitas: An International Civic Education Exchange Program, <https://civiced.org/civitas/partner-developed-materials/civitas-lessons-on-democracy> [<https://perma.cc/XSR7-XB4B>]; Facing History & Ourselves, *Democracy and Current Events* (Jan. 26, 2023), <https://www.facinghistory.org/resource-library/democracy-current-events> [<https://perma.cc/L9A6-HP8X>]; Educating for American Democracy, *Educator Resources*, EDUCATING FOR AMERICAN DEMOCRACY, <https://www.educatingforamericandemocracy.org/educator-resources> [<https://perma.cc/7ZWT-5XE8>]. Thank you to Professor Aysha Ames for sharing these resources.

points—skills also necessary for both deliberative and contestatory democratic participation. The remaining pages will be devoted to providing some concrete examples of how I have implemented critical curriculum design across 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.⁸⁹ 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 (TWAAIL),⁹⁰ 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 TWAAIL perspective in his ground-breaking article, *Customary International Law: A Third World Perspective*.⁹¹ In another class, we discuss the vast array of arguments both in favor and against the International Criminal Court, ranging from those made by Bush administration officials to post-colonial scholars.⁹²

89. In this way, critical curriculum design builds on feminist pedagogy, which incorporates “critiques of the gender and race implications of rules and arguments” in all law courses as a method to unearth and challenge some of the foundational assumptions underlying law. See generally, Jamie R. Abrams, *Feminist Pedagogy in Legal Education*, THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams, eds. 2021) (tracing the emergence of feminist pedagogy in the legal academy and law school curriculum).

90. See generally American University Washington College of Law, *2020 Grotius Lecture: The Promise of International Law: A Third World View*, YOUTUBE (July 6, 2020), <https://www.youtube.com/watch?v=neGcxJgRogE> [<https://perma.cc/96U7-B5G8>] (presenting an incredible primer on the TWAAIL tradition in legal scholarship through James Gathii’s lecture).

91. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AMER. J. INT’L L. 1 (2018).

92. Specifically, I assign the following readings: Kamari Maxine Clarke, *Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality*, JUST SECURITY (July 24, 2020), <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality> [<https://perma.cc/MDJ2-XVTA>]; Marc Grossman, Under Secretary for Political Affairs, U.S. Dep’t of State, Remarks to the Center for Strategic and International Studies (May 6, 2002) (transcript available at <https://2001-2009.state.gov/p/us/rm/9949.htm>) [<https://perma.cc/9HMJ>].

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 of the discussion, rather than presenters of information.⁹³ 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 the given subject.

I also provide my students with a set of techniques and exercises that they can employ to encourage greater participation in the discussion and deepen their own and their classmates’ listening skills.⁹⁴ 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 conducive 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?”⁹⁵

For the first “critical discussion,” I outline the framing for the discussion as well as guiding questions. I advise the students that they can draw heavily from the proposed questions in the syllabus but need not address them all or be confined to the question set.

-FYAX]); & Rebecca J. Hamilton, *Africa, the Court, and the Council*, in ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL (2019).

93. ADRIENNE MAREE BROWN, HOLDING CHANGE 53 (2024) (describing “What Is and Isn’t Facilitation”).

94. 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, <https://www.liberatingstructures.com> [<https://perma.cc/9FXU-N7KD>].

95. SAM KANER, *Facilitative Listening Skills*, in FACILITATOR’S GUIDE TO PARTICIPATORY DECISION-MAKING, 44, 45, 51–52 (3rd ed. 2014).

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 Law⁹⁶

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

The following questions could 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 is “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?

96. 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.

- 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 into US law through *Paquete Habana*, which held that coastal fishing vessels that had been captured by U.S. 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 of 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 forty-eight 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 to identify 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 might have.

The assessment for the students' facilitation of their critical discussions is made according to the following grading rubric:⁹⁷

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.

97. This grading rubric was generously shared by Susan Brooks.

The pedagogical aim of these critical discussions is manifold. 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.⁹⁸ Second, and relatedly, students are encouraged to engage in prefigurative thinking, because they must grapple not just with the officially stated purpose of a particular law, but also with what might be driving its adoption and enforcement.⁹⁹ Accordingly, these discussions invite contemplation of how the law could be otherwise and create openings for students to explore ideas that inherently challenge the vertical power relations that are embedded in the law.¹⁰⁰ In addition, it exposes how even law that 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 or framed from a viewpoint different from your own. This exercise can thus help to build students’ capacity to challenge laws that are unjust either in their inception or implementation—skills associated with contestatory democracy. At the same time, it can also enhance their ability to understand how people might approach the law and its effects differently depending on their positionality vis-à-vis the law—skills needed for deliberative democracy.

Second, it enhances their facilitation skills. As described above, these skills are often underdeveloped in law school, but are 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

98. 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).

99. Ashar, *supra* note 86, at 892.

100. BROWN, *supra* note 93, at 31.

own agenda, and generating an atmosphere of trust.¹⁰¹ 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.¹⁰² Furthermore, facilitation is also a key tool for organizers.¹⁰³ When it is done well, it makes it easier for people to organize together to build movements.¹⁰⁴ 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.¹⁰⁵ These skills are thus also needed 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.¹⁰⁶ To explain that choice, in the first class of the semester, I provide the students with the following visual of the statistics about the crimes of the incarcerated population in the United States.

101. INGRID BENS, FACILITATING WITH EASE! 82 (3rd ed., 2012); *See also* BROWN, *supra* note 93, at 53.

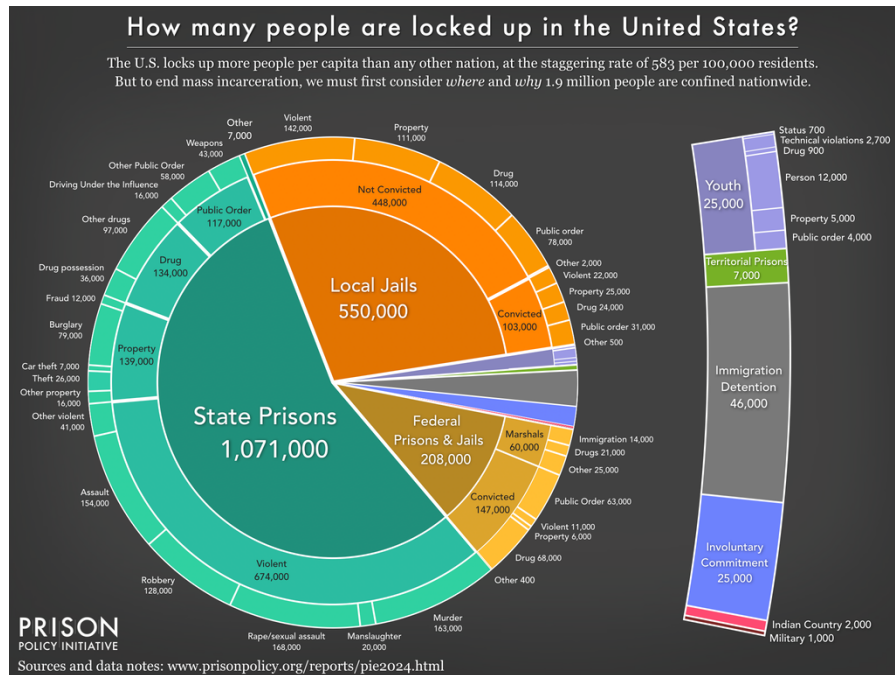
102. LEVITSKY & ZIBLATT, *supra* note 11, at 102.

103. BROWN, *supra* note 93, at 53.

104. *Id.* at 8.

105. *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> [<https://perma.cc/3MFQ-GT9B>].

106. ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH (CALI eLangdell Press 2022).



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 States.¹⁰⁷

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.¹⁰⁸ Exposing the

107. 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> [https://perma.cc/WW3L-NY97]; Federal Bureau of Prisons Statistics, *Offense Type, January 25, 2025*, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/98Z8-7RYP].

108. Ristroph, *supra* note 75, at 1694–99; Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462–63,

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.¹⁰⁹ Additionally, as legal scholar Shaun Ossei-Owusu explained, “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.”¹¹⁰ 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 deepen my students’ appreciation for how political, economic, social, and moral considerations shape the development and application of criminal law.

One way I accomplish this is by inviting guest speakers into the classroom to connect the course material to their lived experiences. 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.¹¹¹ 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 law and explore the role of race in the system. Over the course of the semester, he

501 (1993) (compiling a list of major works in critical race theory that contextualize the law socially and historically).

109. RISTROPH, *supra* note 72; 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).

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

111. 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 (2024).

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,”¹¹² 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 rehabilitative programming behind bars felt more like a box to check off rather than a transformative training. In another class, after we cover *In re Winship*, 397 U.S. 358 (1970), the U.S. Supreme Court case which held that every element of a crime must be proven beyond a reasonable doubt because of the presumption of innocence, Terrell describes his experience of going to trial, turning the presumption of innocence on its head. He explains how, from the moment the cuffs were placed on his wrists, everyone he encountered in the criminal legal system presumed his guilt. This presumption of guilt extended even to his court-appointed attorney, who, shortly after informing Terrell that his trial was scheduled for the following Monday, abruptly ended one of their few meetings to explain that he needed to go Christmas shopping, and then at trial hardly put up a defense. When I taught at Drexel Kline School of Law, Dan Filler, the dean of the law school who was a public defender in Philadelphia when Terrell’s case was adjudicated, also explained how Terrell’s experience may not have been unusual given the practice of assigning court-appointed lawyers, who were paid a flat fee for each case and were therefore not incentivized to invest large numbers of hours in preparation of cases—potentially with dire consequences to their clients. Dean Filler explained to the students that the private bar lobbied to continue the practice of assigning homicide cases to court-appointed attorneys, instead of public defenders, because, among other things, homicide cases were more likely to be covered in the news so were coveted by private attorneys hoping to make a name for themselves. Students thus begin to understand how some of the legal protections that are

112. For this class, I assign excerpts from Chapter 1 of Andrew Manuel Crespo and John Rappaport’s new textbook *CRIMINAL LAW AND THE AMERICAN PENAL SYSTEM: CASES AND CONTEXT* (2025).

exalted in case law do not always translate into a fair process for the accused in practice.

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 very different from their own. To that end, I assign students multiple reflective writing assignments. Take, for example, my first writing assignment of the semester. For that 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. Reflecting on that reading, 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.¹¹³ By cultivating 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

113. Indeed, several studies show that students are inclined to conform their opinion about legal matters to their political outlooks, only to a slighter lesser extent than the general public. Dan Kahan, et al., “*Ideology*” or “*Situation Sense*”: An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PENN. L. REV. 349, 354, 413–14 (2016).

actors are acting on their own stereotypes and assumptions as well.

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 some of the very norms and practices of engaged citizenship crucial for safeguarding our increasingly fragile democracy. It does so by reinforcing individualism, adversarialism, and uncritical acceptance of legal authority—traits that undermine both legal and democratic integrity. Here, I charted another way forward, providing a blueprint for how law schools can better prepare students to safeguard democracy informed by richer theories of democratic engagement—deliberative and contestatory democracy. Building on these frameworks, it identified the traits of “engaged citizenship,” such as empathy for others, critical thinking, and courage to challenge unjust laws, as essential for lawyers in a time of democratic backsliding. In response, it proposed “critical curriculum design” as a concrete alternative, demonstrating how intentional pedagogical choices—rooted in critical theory, collaborative learning, and real-world context—can cultivate lawyers who are not only technically proficient but also democratic actors capable of deliberation and contestation.

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.¹¹⁴ 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

114. American Bar Association Model Rules of Professional Conduct pmb. ¶ 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.”).

legal education could help ensure a more democratic future for generations to come.