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ARTICLE

LEGAL EDUCATION IN THE AGE OF AMERICAN TRIBALISM

ROBERT K. VISCHER*

I. INTRODUCTION

Recent months have brought forward unexpected attorney-client conversations. Let's assume you are an attorney representing a business owner in a small town many miles from the nearest metro area. Your client has a deep-seated opposition to wearing masks as a response to the COVID-19 pandemic, as do virtually all of her customers, business associates, family members, and friends. She believes a recent state mandate is a stark form of government overreach and asks for your advice regarding compliance. You can offer your opinion on the chances of an enforcement action, the potential penalties, or the legality of encouraging customers to invoke disability exemptions from mask-wearing. Does your own view of masks' efficacy as a virus safeguard matter to your advice? Does your belief that your client is misunderstanding the purpose and intent of the mask mandate matter to your advice? What if you believe that the misunderstanding is shared widely by all of the groups whose views matter to your client? And how can you ensure that you are navigating these tensions with client-centered humility without abandoning the need for meaningful engagement?

The facts could change, but the nature of these broader questions would persist in disputes over vaccines, the 2020 presidential election results, climate change, responses to systemic racism, immigration, and various issues at the intersection of religious belief and anti-discrimination law. These and other areas form an increasingly impermeable boundary between broad factions in our society. Attorneys can no longer presume that disagreement about a particular issue is what it seems on its face. More and more frequently, that issue is but one component of a much broader set of beliefs that together comprise the social identities that drive the great American red-blue cleavage.

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How does this phenomenon matter to an attorney's work, and how should it matter to legal education? Our country continues to undergo an ideological sorting that entrenches our divide by realigning our political identities in ways that reinforce and magnify geographic and demographic differences. Do lawyers have an opportunity—or perhaps a responsibility—to begin to bridge the chasm? I believe that they are relatively well-positioned to do so, for reasons I will explain. Put more bleakly, if lawyers cannot play a helpful role on this front, no profession can.

II. WHAT'S CHANGED?

I have written in the past about how the traditional understanding of a lawyer's work—in particular, viewing lawyers as agents who maximize a client's individual autonomy—is a harmful fiction to the extent it can ignore the relational accountability that comprises most clients' well-being and interests.[1] Human beings are not just bundles of self-contained rights waiting to be maximized.

Adopting a default presumption that the client is a self-defining, atomistic individual when we chart the attorney's professional duties is problematic, especially when external influences and sources of meaning are not even acknowledged. Without ever being unpacked by the attorney or affirmed by the client, those influences can sway the representation significantly or be ignored completely. Recognizing the messiness of the landscape against which the client's commitments and priorities come into view has always been a challenge for attorneys—we have long been "bundles of hyphens"—but the great "red versus blue" sorting has complicated these dynamics.

Put simply, we have gone from having overlapping and intersecting identities to a point where there is now a set of what Ezra Klein calls "political mega-identities."[2] Klein writes that these identities are now stacked on top of one another so that challenging one of them challenges all of them. Each time one of the identities is activated, they're all activated, strengthening in the process.

It is not a novel insight to recognize that disagreements about issues can reflect a deeper divergence in moral worldviews. Twenty-five years ago, for example, George Lakoff observed that conservatives conceive of America, implicitly and unconsciously, as "a Strict Father family," and liberals conceive of it as "a Nurturant Parent family."[3] Conservatives and liberals both consider themselves intentionally and coherently moral, but they struggle to discern moral consistency in the other side's worldview. Liber-

1. *See, e.g.*, Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225 (2006).

2. EZRA KLEIN, WHY WE'RE POLARIZED 70 (2020).

3. GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 155 (1996).

als dismiss conservatives as embracing "an ethos of selfishness,"[4] and conservatives understand liberals to be moral degenerates corrupted by special interests and supportive of wasteful bureaucracy:

> Each side sees the other as immoral, corrupt, and lunkheaded. Neither side wants to see the other as moral in any way. Neither side wants to recognize that there are two opposed, highly structured, well-grounded, widely accepted, and utterly contradictory moral systems at the center of American politics.[5]

Today, the sorting that has occurred between conservatives and liberals maintains an ideological core, but it has been fed and facilitated by demographics. Klein points out that the two major American political parties today "are sharply split across racial, religious, geographic, cultural, and psychological lines," and that these identities "are fusing together, stacking atop one another."[6] Further, since "these mega-identities stretch across so many aspects of our society, they are constantly being activated, and that means they are constantly being reinforced."[7]

This sorting is especially pertinent to the lawyer's role to the extent that one dimension of our work is two-way translation: helping opposing parties and decision-makers understand our clients' perspectives, and helping clients understand the perspectives of decision-makers and opposing parties. When those relationships cross the red-blue chasm, we may need more than translation—we may need a restoration of trust as a precursor to mutual understanding. Over the past fifty years, Americans have become more consistent in voting for a single party: even though we've come to like our own party less, we have come to dislike the opposing party even more.[8] The divide is motivated more by antipathy than by allegiance, and disagreement about issues "are just one expression" of a deeper division "over fundamental identities."[9]

It hasn't always been this way. Even the notion of "red states" and "blue states" would have made no sense until relatively recently. For example, according to Alan Abramowitz, "[f]rom 1972 to 1984, the average difference between how a state voted in one presidential election and how it voted in the next was 7.7 percentage points," while "[f]rom 2000 to 2012, it was only 1.9 percentage points."[10] Or take landslide counties, defined as counties where winning presidential candidates won at least 60 percent of the vote. In 1992, 39 percent of voters lived in landslide counties; by 2016,

4. *Id.* at 144.
5. *Id.* at 196.
6. KLEIN, *supra* note 2, at 136.
7. LAKOFF, *supra* note 3, at 196.
8. KLEIN, *supra* note 2, at 10.
9. *Id.* at 38.
10. *Id.* (citing ALAN ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP (2018)).

61 percent did.[11] The percentage of voters who lived in extreme landslide counties—where winning candidates won by more than 50 percentage points—increased from 4 percent in 1992 to 21 percent in 2016.[12]

The sorting is even reflected in our commercial landscape. As Klein puts it, "the more sorted we are in our differences, the more different we grow in our preferences."[13] In 2018, for example, Democrats in the U.S. House represented 78 percent of Whole Foods locations and only 27 percent of Cracker Barrel locations. Those companies know that the prevalent psychologies of local communities differ greatly, with Whole Foods catering to those "high in openness to experience," prominently featuring "ethnic foods, unusual produce, and magazines touting Eastern spirituality."[14] By contrast, Cracker Barrel caters to those who value tradition, offering "comforting, Southern favorites that are delicious without being surprising."[15] The experts who choose these locations are not "trying to serve one side of the political divide," but the choices nevertheless "map onto our politics" because "our politics map onto our deeper preferences."[16]

As our party affiliations increasingly correspond to racial, religious, ideological, and geographic differences, "the signals that tell us if a place is our kind of place" serve to "heighten our political differences."[17] In a 2017 Pew survey, most Republicans said they would rather live in a community with houses that are larger and farther apart and where schools and shopping are not nearby; most Democrats said they prefer smaller houses within walking distance of schools and shopping.[18] As a result, "a preference that seems nonpolitical on its face – 'I want a big house with a yard' or 'I want to live in a diverse city with lots of new restaurants' – becomes yet another force pulling partisans away from each other."[19]

These divides are stacking on top of one another because, according to Klein, "[t]hey don't merely track differences in our politics," they also "track differences in our psychologies."[20] Lilliana Mason explains that:

> The competition is no longer between only Democrats and Republicans. A single vote can now indicate a person's partisan preference as well as his or her religion, race, ethnicity, gender, neighborhood, and favorite grocery store. This is no longer a single social identity. Partisanship can now be thought of as a mega-

11. *Id.* at 39.
12. *Id.*
13. *Id.* at 42.
14. KLEIN, *supra* note 2, at 45.
15. *Id.*
16. *Id.*
17. *Id.* at 42.
18. *Id.*
19. *Id.*
20. KLEIN, *supra* note 2, at 42.

> identity, with all the psychological and behavioral magnifications that implies.[21]

The ensuing group conflict is not primarily motivated "by zero-sum collisions over resources or power," as psychological studies reveal that such conflict is often motivated by a desire to increase difference between the in-group and the out-group.[22] This desire is well known not only by political strategists, but also by brand strategists. Witness Nike's decision to hire former NFL quarterback Colin Kaepernick as its spokesman despite his intensely polarizing effect on football fans given his commitment to protest racial injustice by kneeling during the national anthem. Because "[i]ntense supporters are catnip for brands," the company purposely polarized its own brand.[23] Football becomes another battleground on which to further demarcate our in-group from the out-group.

This is the American identity crisis, according to Mason: "when partisan identities fall into alignment with other social identities, stoking our intolerance of each other to levels that are unsupported by our degrees of political disagreement."[24] Partisan affiliation is not new, of course. The attachment of partisan affiliation to a much more robust and comprehensive social identity is new, and it is evidenced by how we view those in the opposing party. For example, in 1960, 5 percent of Republicans and 4 percent of Democrats said they would be upset if their children married someone from the other party. In 2010, 49 percent of Republicans and 33 percent of Democrats said they would be upset.[25] Another study showed that people asked to select a college scholarship recipient cared more about the political party of the student than the student's GPA in making their decision.[26]

Our polarization is fundamentally about social identity, not simply disagreement about particular issues. Bridging the divide will not happen by providing more information about the opposing party's position. Dan Kahan has written extensively about what he calls "identity-protective cognition," which refers to our "way of avoiding dissonance and estrangement from valued groups" by "subconsciously resist[ing] factual information that threatens [our] defining values."[27] Kahan explains that "[w]hat we believe about the facts tells us who we are," and we have a powerful "psychological imperative" to protect "our idea of who we are and our relationships with the people we trust and love."[28]

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21. *Id.* at 69 (quoting LILLIANA MASON, UNCIVIL AGREEMENT (2018)).
22. *Id.* at 54–55.
23. *Id.* at 71.
24. *Id.* at 74 (quoting MASON, *supra* note 21).
25. *Id.* at 75.
26. KLEIN, *supra* note 2, at 76.
27. *Id.* at 96 (quoting Dan M. Kahan, *Making Climate-Science Communication Evidence-Based—All the Way Down*, *in* CULTURE, POLITICS AND CLIMATE CHANGE (M. Boykoff & D. Crow eds. 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216469).
28. *Id.* (quoting Kahan, *supra* note 27).

This imperative is seen empirically in a wide range of experiments. When exposed to the information and reasons that underlie the other side's position on a matter, neither Republicans nor Democrats respond by moderating their own views. In fact, hearing opposing opinions "not just to a deeper certainty in the rightness of their cause, but more polarized policy positions – that is to say, Republicans became more conservative rather than more liberal, and Democrats, if anything happened at all, became more liberal rather than more conservative."[29]

As our commitment to our group deepens, "the more determined we become to make sure our group wins."[30] Even more ominously, our commitment to winning is positional: "we often prefer outcomes that are worse for everyone so long as they maximize our group's advantage over other groups."[31] In other words, when clients face issues that implicate an element of their in-group identity, they may feel compelled to make decisions that are not rationally related to their own best interests, much less the best interests of the broader community. If clients are motivated by fear of the out-group, might that fear warp the clients' evaluation of their own interests? If so, might lawyers serve as a sort of corrective lens to bring the big picture into clearer focus?

III. Current Understandings of the Lawyer's Role

The current legal scholarship on the lawyer's role is of limited relevance to the phenomenon outlined above. These limitations are exhibited by my own work as well. For example, I have argued that legal advice often reflects a moral perspective—it could be the lawyer's own perspective, the lawyer's perception of the client's moral perspective, or the lawyer's adoption of the profession's moral perspective. In any case, the lawyer needs to help the client understand the operative moral perspective in order to safeguard the client's decision-making autonomy.[32] I still believe this to be the case, but unpacking and conveying the operative perspective may be more complicated given the rise of mega-identities. The lawyer may need not only to explain a particular moral perspective animating the advice—as though it is a stand-alone moral claim related to a specific aspect of the representation—but also help the client understand the in-group or out-group values from which the perspective emerges. If we believe that client autonomy requires the lawyer to help the client contextualize decisions, we may need to help clients understand the opposing social identities.

Brad Wendel has taken the position that "the ethical value of lawyering is located in the domain of politics, not ordinary morality."[33] The politi-

29. *Id.* at 160.
30. *Id.*
31. *Id.*
32. Vischer, *supra* note 1, at 254.
33. Brad Wendel, Lawyers and Fidelity to Law 2 (2010).

cal justification of lawyering comes from our disagreement about the demands of morality, which is why we need law in the first place.[34] Because we cannot conclusively figure out what "the good" is or reach perfect consensus about its content, the law represents our best efforts to come to a workable understanding about what the good requires in particular contexts.

Wendel defines the standard conception of the lawyer's work as consisting of three principles: the principle of partisanship (the "lawyer should seek to advance the interests of her client within the bounds of law"), the principle of neutrality (the "lawyer should not consider the morality of the client's cause, nor the morality of particular actions taken to advance the client's cause, as long as both are lawful"), and the principle of nonaccountability ("If a lawyer adheres to the first two principles, neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer, in moral terms.").[35] He tweaks the definition by substituting "legal entitlements" for "interests" under the principle of partisanship. As such, lawyers are "better analogized to political officials than to ordinary moral agents,"[36] and when a lawyer facilitates injustice by manipulating the law, "the proper basis for ethical criticism is the failure to exhibit fidelity to law, not the resulting injustice."[37]

With this framing, Wendel might conclude that our polarization, tribalism, and rise of mega-identities is largely irrelevant to our understanding of the lawyer's role. Regardless of how a client views the law, the law still sets the boundaries of the lawyer's work and prescribes the trust of the lawyer's advice. My concern, though, is that while Wendel's approach places understandable importance on the lawyer's fidelity to the law, its narrowness may inhibit the client's fidelity to the law. We may be entering an era in which many of our laws are viewed through a tribal lens, resulting in widespread noncompliance and a failure to afford legal norms appropriate weight in decision-making.[38] Is it enough for lawyers to impress upon clients the importance of the rule of law, or will more fundamental translation and reha-

34. *Id.* at 210.

35. *Id.* at 6.

36. *Id.* at 8.

37. *Id.* at 9.

38. *See*, *e.g.*, James Walsh, *Defiance of COVID Restrictions is a Political Act for Some Minnesota Restaurants and Bars*, STAR TRIB. (Dec. 20, 2020), https://www.startribune.com/defiance-of-covid-restrictions-is-a-political-act-for-some-minnesota-restaurants-and-bars/573462631/; Brian Lambert, *Minnesota AG's Office Sues Defiant Restaurants, Bars*, MINNPOST (Dec. 18, 2020), https://www.minnpost.com/glean/2020/12/minnesota-ags-office-sues-defiant-restaurants-bars-over-defiance-of-covid-restrictions/; Natalie Colarossi, *California Restaurant, Fed Up with Restrictions, Encourages 'Unvaccinated' Customers Only*, NEWSWEEK (July 26, 2021), https://www.newsweek.com/california-restaurant-fed-restrictions-encourages-unvaccinated-customers-only-1613145; Paulina Villegas, *Staten Island Crowd Defies Vaccine Mandate by Storming Mall Food Court, Video Shows*, YAHOO (Sep. 26, 2021), https://ne1.www.yahoo.com/news/staten-island-crowd-defies-vaccine-032017433.html.

bilitation work prove necessary when laws are perceived to emerge from out-group values?

Another leading legal ethics theorist, Stephen Pepper, operates from a concern for the impact of moral paternalism. He explains, "For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable."[39] Pepper accordingly puts client interests—understood as roughly equivalent with client autonomy—at the center of the lawyer's work, insisting that "the primary function of lawyers as professionals is to assist their clients," and this assistance "is bounded by the limits of the law."[40] The resulting vision is the attorney as photocopier technician: just as we do not expect the technician to question the ends for which we will use the photocopier as a precondition for repairing it, a client should not have to justify the morality of her otherwise lawful ends in order to secure an attorney's assistance.[41]

If we train lawyers only to be technicians, and if lawyers conceive of themselves as only technicians, they may be poorly positioned to engage the client in ways that stretch the client beyond the views that define her in-group. These views will not just shape the objectives of the representation; they will often shape the client's understanding and prioritization of the legal norms that may be implicated by the client's objectives. To return to Pepper's photocopier analogy, if our tribes have fundamentally different views of the wisdom and even legitimacy of the photocopier as designed, effective client service may require deeper questions than simply asking what image the client would like to have copied.

Anthony Kronman, by contrast, understands the lawyer's role as beginning and ending in relationship. He emphasizes that both counseling and advocacy roles caution that "a lawyer cannot be the mere minister to [the client's] ambition that the narrow view portrays him as being," for both roles demand "practical wisdom," not just "technical knowledge."[42] In our polarized age, what might practical wisdom require from lawyers? David Luban lends important insight into this question:

> Honoring someone's human dignity means honoring their being, not merely their willing. Their being transcends the choices they make. It includes the way they experience the world – their perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about. . . . [W]hat I care about is central to who I am, and to honor my human dignity is to take my cares and commitments seriously. The real ob-

39. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RSCH. J. 613, 618 (1986).

40. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1599 (1995).

41. Pepper, *supra* note 39, at 624.

42. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 134 (1995).

> jection to lawyers' paternalism toward their clients is not that lawyers interfere with their clients' autonomous choices, but that they sometimes ride roughshod over the commitments that make the client's life meaningful and so impart dignity to it.[43]

Luban gives the example of Ted Kaczynski ("the Unabomber"), who believed that the apocalyptic warnings he offered to modernity were valid and true. He did not want to plead the insanity defense, even if it could mitigate his punishment. His lawyers successfully invoked the defense against his will. The primary harm to Kaczynski stemmed from the fact that his lawyers "made nonsense of his deepest commitments, of what mattered to him and made him who he was."[44] To claim insanity made his self-conception incoherent and his work pointless.

Katherine Kruse also brings a more relational understanding of the lawyer's role.[45] She criticizes "the obsession in legal ethics with the problems of zealous partisanship," which is often based on a view of clients as "cardboard clients – one dimensional figures interested only in maximizing their legal and financial interests."[46] She cautions against "overemphasizing the clients' legal interests and minimizing or ignoring the other cares, commitments, relationships, reputations, and values that constitute the objectives clients bring to legal representation."[47] She proposes an "ideal of professionalism for 'three-dimensional clients' based on helping clients articulate and actualize their values through the law."[48] The extreme polarization our country is experiencing is not marginal to the lawyer's role because it is central to the client's understanding of the world.

As a final example, consider the advocacy of Dr. Martin Luther King Jr. He became an active participant in a dynamic relationship—a subject—not a passive vessel or conduit for client demands.[49] He was not a technician. He stretched and challenged those whose interests he represented, pushing them to consider realities that may have been beyond the reach of their vision. For example, King worked to motivate the community to organize and persist in the Montgomery bus boycott. In leading the boycott, King asked his followers to look beyond the hardship it entailed over months of walking; he was not acting as a conduit for the community's stated preferences. He later wrote that the people, even though they were "exhausted by the humiliating experiences that they had constantly faced on

43. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 76 (2007).

44. *Id.* at 79.

45. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010). Even Luban, Kruse thinks, uses "cardboard" clients to make his points. *Id.* at 114.

46. *Id*.

47. *Id.*

48. *Id.*

49. ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE (2012).

the buses . . . came to see that it was ultimately more honorable to walk the streets in dignity than to ride the buses in humiliation."[50]

King's approach reflects Kronman's practical wisdom, which emphasizes that the lawyer must assess the client's judgment from "the perspective of the client's own interests."[51] This requires the lawyer "to place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, with the same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account."[52] King stepped into the shoes of his congregants—recognizing the hardship that the bus boycott would cause them—but he pushed them to embrace possibilities that they could not envision from where they stood. Similarly, do lawyers have a role to play in mitigating the effects of political tribalism, of an assessment of interests and priorities that may not be rational, or even conscious?

IV. WHY LAWYERS?

More than any other profession, lawyers are positioned to function as a sort of corrective lens that helps clients overcome a tribal, fear-driven assessment of the world and gain a clearer vision of their own interests, the values driving opposing parties or decision-makers, and the implications of the representation for the broader community. Several attributes at the heart of the lawyer's role underlie this potential:

- Suspension of judgment: Lawyers know that it is important to assess the situation dispassionately before drawing any conclusions, while much of our political culture's discourse features judgment as the lead message.
- Precision with language: Sweeping conclusions, ad hominem attacks, and guilt by association animate red-blue battles, particularly on social media, but lawyers are taught to use careful and focused arguments to make their points.
- Position of trust: The lawyer's role presumes a relationship with the client of willfully encountered vulnerability.[53] Fear of the out-group is not conducive to vulnerability, and vulnerability is a prerequisite to growth and learning. Because of the lawyer's many ethical constraints and fiduciary obligations, clients can—or at least should be able to—let their guards down, speak openly and candidly, and listen to new perspectives.
- Detached empathy: As Anthony Kronman captured, lawyers support their clients by coming alongside them and giving

50. *Id.* at 90 (quoting MARTIN LUTHER KING JR., STRENGTH TO LOVE 151 (1981)).

51. KRONMAN, *supra* note 42, at 130.

52. *Id.*

53. *See generally* Robert K. Vischer, *Big Law and the Marginalization of Trust*, 25 GEO. J. LEGAL ETHICS 165 (2012).

voice to their lived experience, but they don't fully inhabit their clients' stories. Lawyers maintain a degree of objective detachment, an ability to tell would-be clients, in the immortal words of Elihu Root, "that they are damned fools and should stop."[54]

- Critical analysis: As noted above, arguments are not going to bridge our divide, as today's polarization is more about social identity than rational propositions. But a lawyer's ability to construct (and deconstruct) arguments and point out flaws in reasoning may help clients become more self-aware. If clients can recognize when their positions are not compelled by logic but are rooted in deeper values or commitments, conflicts may be recast and clarified. Put differently, good lawyers excel at separating background noise from the substantive points on which the conflict rests.
- Championing unpopular causes and clients: The best traditions of the legal profession have rejected guilt by association. When lawyers make their best arguments on behalf of unpopular clients, they model what citizens should be doing when they evaluate claims made by the out-group: take the position seriously by evaluating it on the merits, not by focusing on characterizations of the person or group holding the position.

Even outside the traditional attorney-client relationship, attorneys occupy positions of influence in a wide range of contexts that lie at the center of our polarization. Whether holding elected offices, leading government agencies, participating in corporate boardroom discussions, or joining community debates outside any formal professional role, lawyers are deeply engaged in American civic life. As our civic bonds fray, lawyers are positioned to exacerbate or ameliorate that process.

V. Why Law Schools?

Are lawyers prepared to engage in the two-way translation that may help clients, opposing parties, decision-makers, and the broader public understand one another when they are venturing across in-group and out-group boundaries? Though there are no ethical constraints preventing such conversations, there is cause to wonder whether many lawyers have the capacity to do so.

If that capacity is going to develop, law schools will have to be more engaged in these questions than they have been traditionally. Joseph Singer, for example, notes that "the ability to make sophisticated arguments about justice and morality is a basic skill all lawyers need."[55] And yet, in his classes at Harvard Law School, he finds it sorely lacking:

54. Philip C. Jessup, Elihu Root 132–33 (1938).

55. Joseph W. Singer, *Normative Methods for Lawyers* 5 (Harv. L. Sch. Pub. L. Rsch. Paper, No. 08-05, 2008), http://ssrn.com/abstract=1093338.

> [My students] quickly learn to make sophisticated arguments about interpreting precedent and statutes, making analogies and distinguishing cases, debating the judicial role (active or restrained), and discerning the advantages and disadvantages of rigid rules versus flexible standards. They also learn to use cost-benefit analysis, measuring the expected consequences of alternative rules of law in monetary values and adding up the costs and benefits to determine which rules appear to maximize social welfare. But when I ask my students to make or defend arguments based on considerations of rights, fairness, justice, morality, or the fundamental values underlying a free and democratic society, they are mute. They get out the first sentence: "I have a right to use my property as I see fit" or "I have a right to be left alone." But then they go silent; they do not have a second sentence – they do not know how to go on. Their silence is partly caused by their not knowing what to say; they cannot figure out what vocabulary to use or how to make the argument. But the underlying reason for this uncertainty is their fear that such arguments are merely matters of opinion that have no objective basis.[56]

More than forty years ago, Cornell Law dean Roger Cramton identified the roots of this phenomenon, noting the pervasive disregard of values in the law school classroom:

> The law teacher typically avoids explicit discussion of values in order to avoid "preaching" or "indoctrination." His value position or commitment is not thought to be relevant to class discussion. . . . The teacher, moreover, has strong interests in the substantive niceties of his subject and is concerned about "coverage." There is so much law to study! Exploration of value positions on particular questions has a lower priority. This would not be troublesome if the priorities of other instructors differed, but it is likely that systematic neglect of values results from similar choices being made by most instructors.[57]

By 2007, not much had changed, according to a report on legal education issued by the Carnegie Foundation for Advancement of Teaching.[58] Researchers visited law schools across the country and concluded that "in the minds of many faculty, ethical and social values are subjective and indeterminate and, for that reason, can potentially even conflict with the all-important values of the academy."[59] In fact, the view that "it is indoctrination even to ask students to articulate their own normative positions was

56. *Id.* at 4.

57. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEG. ED. 247, 256 (1978).

58. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (1st ed. 2007).

59. *Id.* at 133.

surprisingly prevalent" in law school.[60] As one law student told the researchers, "law schools create people who are smart without a purpose."[61] The law school classroom as a morality-free zone is more likely to be confusing than clarifying. The report's authors observe that:

> When law students bring to their first-year courses confusions about moral and legal obligations, as many of them do, the instructor can tell them that their concerns about fairness or other moral issues are not relevant to legal analysis and ask them to set aside those concerns. We know from our discussions with students that this happens frequently and that many students find it bewildering rather than clarifying, besides providing a distorted understanding of the nature of law itself. If, instead, the instructor, by introducing a careful discussion of the distinction and relationship between the moral and the legal, illustrates something of the breadth of law's concerns, this is likely to deepen students' understanding of the law, both the particular legal issues in the case under consideration and the law as a social institution.[62]

Long-overdue changes are gradually gaining a foothold in legal education, but more needs to be done.[63] If our approach to professional formation omits serious and sustained engagement with value questions, we send a strong message about their irrelevance to the lawyer's work. And if lawyers are not attentive to such considerations, lawyers will be of limited help bridging a divide that is not primarily about legal interpretation or technique.

Our nation's divide is not primarily a product of opposing moral claims—it's a product of cultures that shape and sustain opposing moral claims. Lawyers need to learn how to build trust across cultural boundaries. This requires law schools to prioritize becoming communities that reflect the types of diversity that correspond with our cultural divide: race, religion, socioeconomic status, sexual orientation, geography, and politics. Law schools are already paying attention to most of these forms of diversity, but equipping our students to navigate polarization may also require being attentive to ensuring a significant presence of small-town, rural, working-class, and politically conservative students.

The demographic makeup of a law school community is a necessary but insufficient condition for forward progress, of course. Legal educators

60. *Id.* at 136.

61. *Id.* at 142.

62. *Id*. at 144.

63. Through its Holloran Center, St. Thomas Law has led a national movement to give more emphasis to the professional formation of law students. Other schools that have joined the effort include Albany, Baylor, BYU, Drexel, Florida, Georgia State, George Washington, McGeorge, Mercer, Missouri-Kansas City, New Mexico, Northern Illinois, North Dakota, Nova, Pepperdine, Regent, Richmond, St. Mary's, Santa Clara, Tennessee, and Washburn. *See* https://www.stthomas.edu/hollorancenter.

also need to help our students grow in self-awareness, the recognition of cultural differences, and communication techniques that build trust rather than alienate. Our students also need to practice cross-cultural relationships in the classroom, in clinics, in public service opportunities, and in the casual social interactions that give rise to friendships. There is ample literature on strengthening personal and professional cross-cultural work.[64] There are nonprofit organizations dedicated to training Americans how to engage in difficult political conversations with those who disagree with them.[65] Law schools need to bring those resources into the center of the student experience.

Beyond cross-cultural work, law schools should help students understand the importance of political engagement in the local community. The best antidote to polarization is relationship, and local engagement happens primarily through real relationships. Presidential elections and Supreme Court rulings are important, to be clear, but when law students focus on the national to the exclusion of the local, there is a cost.

Catholic social teaching refers to "civil friendship," which is rooted in Aristotle's understanding of the political community as a partnership of the citizens. The partnership's aim is to allow citizens to achieve virtue and happiness, and our local communities are where those partnerships are most likely to find traction and bear fruit. The local is important not primarily as a microcosm of a larger national struggle between worldviews, but as a path to relationship—it's where civil friendship can be most easily realized. Our students should gain hands-on knowledge that opposing views on abortion, marriage, or immigration do not preclude collaboration on post-incarceration community reentry programs, reforming antiquated municipal ordinances, or helping launch a nonprofit that creates after-school programs for at-risk kids. Civil friendship does not mean law schools should withdraw their attention from national affairs, but it should encourage us to facilitate even greater attention to the local matters that will help our students understand the centrality of relationships to social progress.

VI. WHY IT MATTERS

Lawyers have an opportunity to counsel, advocate, and lead in ways that mitigate the effects of our nation's scandalously stark polarization. Legal education should respond to this opportunity. The primary beneficiary

64. *See, e.g.*, Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* RACE, CULTURE, PSYCHOLOGY, AND LAW 47 (Kimberly Holt Barrett & William H. George eds., 2004); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Neil W. Hamilton & Jeff Maleska, *Helping Law Students Develop Affirmative Evidence of Cross-Cultural Competency*, 19 ST. MARY'S L. REV. ON RACE & SOC. JUST. 187 (2017).

65. *See, e.g.*, *Our Approach*, BRAVER ANGELS, https://braverangels.org/our-story (last visited Apr. 21, 2021).

of a law school's efforts will be law students, who will become more effective in their day-to-day work:

- The lawyer will communicate more effectively with clients, unpacking the client's stated positions and preferences in order to ensure that the client is not simply bowing reflexively to in-group presumptions, but rather owning the decision as a manifestation of the client's own values.
- The lawyer's dialogues with opposing parties will be more fruitful and authentic, permitting the opposition to understand how stated positions fit with what the client values, particularly in matters that include both in-group and out-group stakeholders.
- The lawyer will be a more effective advocate with courts and other tribunals, helping decision-makers see the extent to which conduct emanates from the client's underlying value system; this won't always change the outcome, but it may clarify the stakes and degree to which the outcome implicates the client's integrity and broader worldview.
- The lawyer will grow in self-awareness and empathy. Lawyers are gatekeepers to our justice system who, in the words of the Rules of Professional Conduct, "play a vital role in the preservation of society."[66] As such, we cannot afford to have lawyers view anyone as "other"—they need to understand the coherence of the worldviews that they encounter, even if they do not affirm their substance.

Our nation's polarization threatens much greater damage to our social fabric than is evidenced in increasingly vitriolic campaign rhetoric. The rule of law presupposes respect for the law, even when those laws emerge from priorities one does not share. Mutually deep distrust toward, and alienation from, millions of our fellow Americans does not bode well for the collaboration, rational debates, and shared sacrifices on which our form of government depends. All indications suggest that our red-blue chasm is wide, deep, and growing. The short-term interests of politicians and media companies make it highly unlikely that they will take on the role of bridge-builders anytime soon. Can lawyers be among those who step into the breach, and can law schools help equip them to lead in this way? Let's work to make it so.

66. MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS'N 2020).