

# Can You Be a Legal Ethics Scholar and Have Guts?

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## ABSTRACT

*Recent efforts to hold lawyers accountable for their actions—including lawyers who sought to overturn the 2020 Presidential election based on false evidence, and New York City prosecutors who have committed serious misconduct—failed to draw a significant number of legal ethics scholars. The authors of this Essay are troubled by this. We understand why practicing lawyers might be reluctant to join such an effort; calling out other lawyers in positions of power can be bad for clients. But it is less understandable when it comes to law professors who, except for those who teach in law clinics or otherwise engage in law practice, have no clients. Legal ethics scholars write and teach—often from a secure academic position—about the importance of legal ethics.*

*The authors have been involved in both efforts. In this Essay, we examine why so many of our academic colleagues begged off, and why they are reluctant to use their privileged perch to speak out generally. We then argue for greater engagement in real world legal ethics, no matter how controversial. This Essay proceeds as follows: Part I explains what we mean by having “guts.” Part II acknowledges our debt to Monroe Freedman and Deborah Rhode, two scholars who were fully engaged in legal ethics in the real world. Part III discusses why filing disciplinary complaints under the Model Rules of Professional Conduct is a sound approach to holding lawyers accountable, even lawyers engaged in politics. Part IV recounts the prosecutorial misconduct project to which it was difficult to recruit legal ethics scholars. Part V identifies some factors we believe underlie our colleagues’ reluctance to become engaged in these sorts of efforts. Part VI suggests a path forward.*

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## INTRODUCTION

The Trump Presidency was a turbulent time, to put it mildly.<sup>1</sup> From Trump’s angry, incendiary inaugural address in 2017<sup>2</sup> until he grudgingly left the White

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1. See *Trump Presidency: A Flashback Through Four Turbulent Years*, BBC NEWS (Jan. 18, 2021), <https://www.bbc.com/news/av/world-us-canada-55683896> [<https://perma.cc/5MLZ-P65Q>] (providing a collection of news clips from the Trump Presidency); Stephen Collinson, *Trump’s Turbulent and Lawless Presidency Will End With Historic Second Impeachment*, CNN POLITICS (Jan. 13, 2021), <https://www.cnn.com/2021/01/13/politics/donald-trump-impeachment-history-joe-biden/index.html> [<https://perma.cc/C63M-9EWK>] (reporting on Trump’s second impeachment, sparked by the January 6, 2021 insurrection at the Capitol, and noting that “it is an extraordinary mark of turbulent times and a lawless term that Trump will become the first president to be impeached twice—only 13 months after the House first resolved that his abuses of power merited removal from office”).

2. See generally Sam Stein & Daniel Lippman, *How the First Day of the Trump Presidency Foreshadowed the Four Years to Come: Behind the Scenes at the Last Inauguration—As Remembered by the Obama and Trump Aides Who Were There*, POLITICO (Jan. 19, 2021), <https://www.politico.com/news/magazine/2021/01/19/trump-2017-inauguration-presidency-460248> [<https://perma.cc/BY6Q-ESPE>] (recounting the events of

House in 2021—in the aftermath of a mob attack on the Capitol, which he incited<sup>3</sup>—each day of his presidency somehow managed to be worse than the day before.

Interestingly, Trump had fewer lawyers in his administration than any other president in recent years.<sup>4</sup> To those of us who believe in legal ethics—rules of conduct that members of the legal profession are required to observe—this was not a good sign. The presence of principled professionals might provide some assurance that the Trump administration would not entirely reject the rule of law.<sup>5</sup>

That the few lawyers in high places in the Trump administration turned out to disappoint on every level—they were some of the least ethical, least principled, least truthful professionals imaginable—was bad for both the profession and the polity. Something had to be done. And yet organized efforts by individual

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Trump's Inauguration, including his divisive, inflammatory Inaugural address, "with designs for shock, not sweeping oratory," including his reference to "American carnage").

3. See generally Peter Nicholas, *What I Saw at the White House on Trump's Last Day*, THE ATLANTIC (Jan. 20, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-leaves-white-house/617758/> [<https://perma.cc/6JL7-DV26>] (describing Trump's last day in office and noting that Trump is not "merely a sore loser," but "was even a sore winner, weaving conspiracy theories about how he was robbed of the popular vote in 2016"). As presidential historian Michael Beschloss said:

This is the only president in American history who incited an insurrection against Congress that could have resulted in assassinations and hostage-taking and, conceivably, the cancellation of a free presidential election and the fracturing of a democracy. . . . That's a fact, and it won't change in 50 years. It's very hard to think of a scenario under which someone might imagine some wonderful thing that Donald Trump did that will outshine that. He did, literally, the worst thing that an American president could ever do.

*Id.*

4. Debra Cassens Weiss, *Trump's Cabinet Has Fewer Lawyers Than in Past Administrations*, ABA J. (Mar. 3, 2017), [https://www.abajournal.com/news/article/trumps\\_cabinet\\_has\\_fewer\\_lawyers\\_than\\_in\\_past\\_administrations](https://www.abajournal.com/news/article/trumps_cabinet_has_fewer_lawyers_than_in_past_administrations) [<https://perma.cc/YW75-83H8>] (reporting that the number of lawyers in President Donald Trump's cabinet trails that of the past four presidents); Joe Palazzolo, *In Short Supply in Donald Trump's Cabinet: Lawyers*, WALL ST. J. (Mar. 2, 2017), <https://www.wsj.com/articles/in-short-supply-in-donald-trumps-cabinet-lawyers-1488463200> [<https://perma.cc/ND8L-KSSF>] (reporting that only three of Trump's sixteen cabinet picks have law degrees, including Vice President Pence, a sharp drop from the four previous administrations). Oddly, the Trump Administration did have an abundance of Ivy League graduates. See Stephen Marche, *How Ivy League Elites Turned Against Democracy*, THE ATLANTIC (Jan. 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/ivy-league-apologists-january-6-gop-elitism-populism/621153/> [<https://perma.cc/T3AS-YLJ9>] (noting that Donald Trump's inner circle included Steve Bannon, Harvard '85, Ben Carson, Yale '73, Jared Kushner, Harvard '03, Steven Mnuchin, Yale '85, Mike Pompeo, Harvard Law '94, Wilbur Ross, Yale '59, and Stephen Schwarzman, Yale '69; his inaugural Cabinet had more Harvard alumni than his predecessor Barack Obama; and many of the strongest supporters of the stolen-election theory have also been Ivy League graduates).

5. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L. J. 275, 284–85 (2017) (discussing Trump's threats to the rule of law). See also Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Representation Role*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 151, 153 (2019) (discussing whether government lawyers should have special obligations beyond private lawyers and whether state disciplinary committees should sanction Giuliani and other lawyers who "intentionally present false facts because lawyers are sworn to uphold the Constitution and laws of the United States and pursue the fair administration of justice").

members of the legal profession to hold the Trump lawyers accountable were few and far between and failed to galvanize the broader membership.

This was understandable for practicing lawyers. These lawyers must put their clients first and calling out other lawyers in positions of power can jeopardize their clients and law practice. But it was less understandable when it came to law professors—in particular, legal ethics scholars—few of whom became involved in these efforts. Except for those who teach in law clinics or otherwise engage in law practice, legal ethics scholars write and teach. They write and teach about the importance of legal ethics. Moreover, they often hold secure, if not tenured, academic positions. Why wouldn't these lawyers step up and "speak truth to power"?

Recent examples of the failure of legal ethics scholars to lead—or participate at all—include the effort to hold accountable the Trump lawyers who filed demonstrably false lawsuits challenging the election or who argued that the election was stolen,<sup>6</sup> and a project organized by a national public interest organization to hold accountable New York City prosecutors who engaged in serious misconduct.<sup>7</sup> Finding legal ethics scholars to join either of these projects was harder than finding a good bagel in Idaho.<sup>8</sup> Although these are but two examples of the failure of legal ethics scholars to speak out about significant lapses in lawyers' ethics, they are recent, emblematic, and prominent.<sup>9</sup>

The writers of this essay have been involved in both efforts. Overall, our experience is that legal ethics scholars do not speak out when issues seem at all "political"<sup>10</sup> or involve controversy. This failure to speak out undermines the

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6. See Liz Dye, *Trumpland Lawyers Face Bar Complaints After Engaging In Some Light Coup-ing*, ABOVE THE LAW (Oct. 5, 2021), <https://abovethelaw.com/2021/10/trumpland-lawyers-face-bar-complaints-after-engaging-in-some-light-coup-ing/> [https://perma.cc/U67C-5MQD] (describing efforts by individual lawyers and bi-partisan groups to hold Trumpian lawyers accountable). See also Alison Durkee, *Sidney Powell to Face Texas State Bar Investigation—Potentially Leading To Her Disbarment*, FORBES (Aug. 26, 2021), <https://www.forbes.com/sites/alisondurkee/2021/08/26/sidney-powell-to-face-texas-state-bar-investigation-potentially-leading-to-her-disbarment/?sh=dc50aa31f994> [https://perma.cc/RN2Y-AHJR] (describing ethics complaints against Sidney Powell); Jason Lemon, *1,300 Attorneys Demand Calif. Bar Investigate Trump Lawyer Over Effort to Overturn Election*, NEWSWEEK (Dec. 17, 2021), <https://www.newsweek.com/1300-attorneys-demand-calif-bar-investigate-trump-lawyer-over-effort-overtum-election-1660724> [https://perma.cc/7HR9-2PSW] (describing complaints against John Eastman).

7. The prosecutorial misconduct complained of was identified and decried by appellate courts. See Jonah E. Bromwich, *They Publicized Prosecutors' Misconduct. The Blowback Was Swift*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/nyregion/queens-prosecutors-misconduct.html> [https://perma.cc/9UJV-GEER] (reporting about the effort by Civil Rights Corps and a handful of law professors to hold prosecutors in Queens, New York accountable).

8. We mean no offense to Idaho. Frankly, a truly good, authentic bagel is hard to come by anywhere! Moreover, Yaroshefsky, who has spent time in Idaho (unlike her more parochial colleagues), believes that it may be possible to find a good bagel in that state.

9. See generally Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 261 (2019) (describing those who file ethics complaints).

10. This has become such a contested term that we feel compelled to put it in quotes. Although we are referring to politics more broadly, we like Ernest Benn's definition (often wrongly attributed to Groucho Marx): "Politics is the art of looking for trouble, finding it whether it exists or not, diagnosing it incorrectly, and

legitimacy of lawyers and the rule of law and leaves egregious lawyer misconduct unchecked.

We, together with a handful of other legal ethics professors, have tried hard to inspire, persuade, and cajole our colleagues to join us. We have some thoughts about what was at play when these colleagues begged off but wanted to do more than voice frustration. In this essay, we will examine why so many of our peers have been reluctant to speak out. We will then argue for greater engagement in real world legal ethics, no matter how controversial, offering a different model going forward. In short, we believe you can be a legal ethics scholar and have guts.<sup>11</sup>

This essay proceeds as follows: Part I explains what we mean by having “guts.” Part II acknowledges our debt to Monroe Freedman and Deborah Rhode, two legal ethics scholars who were fully engaged in real world legal ethics, no matter how controversial or “political.” Part III discusses why filing disciplinary complaints under the *Model Rules of Professional Conduct* (“*Model Rules*”) is a sound approach to holding lawyers accountable, even lawyers engaged in politics. Part IV recounts a current, ongoing example of an important effort in which it was difficult to recruit legal ethics scholars. Part V identifies some factors that we believe underlie our colleagues’ reluctance to become engaged in efforts to hold lawyers accountable. Part VI suggests a path forward.

## I. WHAT DO WE MEAN BY “GUTS”?

Many scholars, especially since the 1960s and the civil rights movement, have acted with “guts.” What we mean by guts is taking a position on matters of broad public interest and advocating views based on principle with little regard for the effect on one’s status or reputation. These scholars speak out in opinion pieces on the editorial pages of newspapers, on social media outlets, or in public appearances. They file amicus briefs, or, as discussed in this article, disciplinary complaints. They also participate in organized groups and assist such groups in preparing materials and lobbying on legislation. Their goal is to advance a principle, idea, social cause, or social movement. Upholding respect for the rule of law, pursuing social justice, and promoting democracy are overarching goals.<sup>12</sup>

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applying the wrong remedy.” 2 *Politics: A Contested Concept*, OPEN UNIVERSITY, <https://www.open.edu/openlearn/society-politics-law/what-politics/content-section-2> [https://perma.cc/Q7VM-UMLU] (last visited Feb. 26, 2022).

11. Not just can be, but should be. See generally Erwin Chemerinsky, *How Law Schools Can Make a Difference*, American Association of Law Schools, Annual Meeting, January 2022, at <https://am.aals.org/theme/> (incoming president of the AALS arguing for an enhanced role by legal academics—“leaders on matters of law”—in a time of “unprecedented dangers” in a “country that has lost faith in the institutions of government”).

12. See, e.g., Laurence H. Tribe, *Politicians in Robes: Why does Stephen Breyer continue to insist that the Supreme Court is apolitical?*, N.Y. REV. BOOKS (Mar. 10, 2022), <https://www.nybooks.com/articles/2022/03/10/politicians-in-ropes-justice-breyer-tribe/> [https://perma.cc/66KK-XFA2] (decrying Justice Stephen Breyer’s “platitudinous” defense of the United States Supreme Court as “apolitical” and pointing out its “profoundly undemocratic legacy”).

We acknowledge that we don't have to call this "guts."<sup>13</sup> We could have used the term "scholar-activist," although "activist" has an increasingly negative connotation within the legal academy and among many lawyers.<sup>14</sup> Professor David Yamada refers to the kind of scholarly engagement we are talking about as "intellectual activism."<sup>15</sup> He defines this as "public education directed toward advancing one's legal and policy objectives, ranging from partnering and affiliating with other individuals and organizations, to engaging in various outreach initiatives."<sup>16</sup>

Yamada's brand of intellectual activism includes:

- (1) Affiliating with organizations to work collaboratively toward desired legal and policy outcomes;
- (2) Breaking down, adapting, simplifying, and excerpting the foundational writing for blog posts, website material, op-eds, newsletters, non-academic publications, and position papers;
- (3) Providing written and oral testimony in support of proposed legislation or regulations;
- (4) Presenting talks and remarks at non-academic and community events;
- (5) Participating in social media exchanges; and,
- (6) Engaging in interviews with the media.<sup>17</sup>

Yamada's model entails going well beyond the "ivory tower."

Likewise, Professors Amna Akbar, Samer Ashar, and Jocelyn Simonson's exhortation for more "movement law scholars" urges scholars to write and work from a perspective that "embod[ies] an ethos of solidarity, collectivity, and accountability with left social movements."<sup>18</sup> This includes, but is not limited to,

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13. The resistance of some to the term guts reflects the very problem in academia we seek to address in this Essay. We mean to be provocative, not self-important or condescending. To us, having guts is the dictionary definition that includes "courage, conviction and resolve." *Have the guts*, THE FREE DICTIONARY, <https://idioms.thefreedictionary.com/have+the+guts> [<https://perma.cc/YLZ4-R3GC>] (last visited Feb. 26, 2022); see also *Guts*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/guts> [<https://perma.cc/YU8F-BKWH>] (last visited Feb. 26, 2022) (defining guts as acting with bravery and determination). Nonetheless, the authors debated changing the title of this essay to something blander and more palatable.

14. See generally Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 74 N.Y.U. ANN. SURV. AM. L. 77 (2018); Jonathan Matthew Smucker, *Why We Should Stop Using the Word "Activist,"* IN THESE TIMES, (May 30, 2017), <https://inthesetimes.com/article/the-trouble-with-activist> [<https://perma.cc/SV53-WFLP>].

15. David C. Yamada, *Intellectual Activism and the Practice of Public Interest Law*, 25 S. CAL. REV. L. & SOC. JUST. 127, 133 (2016).

16. *Id.*

17. *Id.*

18. Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 822 (2020). We share this commitment to progressive social movements that work for fundamental change in

scholarly work.<sup>19</sup>

Having guts means going beyond scholarship to engage with the broader community and movements to address pressing legal and ethical issues. We elaborate this further in describing the prosecutorial misconduct project in Part IV.

Whatever the terminology, our call for scholars with guts builds upon the work of scholars like Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Lani Guinier, Angela Harris, Cheryl Harris, Duncan Kennedy, Gerald Lopez, Mari Matsuda, Gary Peller, Kendall Thomas, Patricia Williams, and others who have challenged the underlying constructs of law and the role and functioning of the legal academy.<sup>20</sup> To take just one example, Lopez's theory of "rebellious lawyering" calls for a different paradigm to address the dominant neoliberal culture within law school.<sup>21</sup> In addition to offering trenchant criticism of the legal academy, he and other scholars in the critical legal studies, lat-crit, fem-crit, critical race theory, and related movements call for a "rebellious idea of lawyering against subordination" that involves "collaborat[ing] with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation."<sup>22</sup>

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society, including providing greater access to justice. However, we acknowledge that such forms of engagement could also pertain to scholars identified with conservative and right-wing causes. *See, e.g., Paul G. Cassell, HATCH LAW GROUP*, <https://www.hatchpc.com/paul-cassell> [<https://perma.cc/NBL9-Y84V>] (last visited Apr. 11, 2022) (prominent victims' rights and criminal justice reform advocate).

19. Each of these formulations derive from a longstanding call for scholars to be public intellectuals who address a general and educated audience. Thirty-five years ago, Russell Jacoby lamented that such public intellectuals have been on the decline in the past decades, replaced by academics whose scholarship is tailored to a narrow, specialized audience. RUSSELL JACOBY, *THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME* (1987); *see also* *THE PUBLIC INTELLECTUAL* (Helen Small ed., 2002) (offering various perspectives on the role of public intellectuals in society).

20. *See, e.g.,* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); Lani Guinier, *Legal Profession: Responsibilities of Public Lawyers*, HARV. L. SCH., [hls.harvard.edu/academics/curriculum/catalog/index.html?faculty=Guinier,+Lani&year=2014-2015](https://perma.cc/Z6JZ-BR72) [<https://perma.cc/Z6JZ-BR72>] (last visited Feb. 11, 2015); Harold McDougall, *The Rebellious Law Professor: Combining Cause and Reflective Lawyering*, 65 J. LEGAL EDUC. 326–51 (2015); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 145 (describing the expansion of a "normative vision" through intersectional analysis of anti-discrimination statutes).

21. McDougall, *supra* note 20, at 348 (quoting GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992)):

Neoliberalism disempowers people in favor of corporations, and tries to convince people that consumption, not collective action, is the answer to their problems. When facing entrenched profit-making interests as they try to protect their health, seek an education, or look for social support, it tells them they stand alone. Further, if they are minorities, they must succeed, if at all, in a "color-blind" world. This affects all of us, university people and community people, often differently, but still profoundly alike.

*See also* Duncan Kennedy, *Legal Education as Training for Hierarchy*, reprinted in *THE POLITICS OF LAW* 54, 57 (D. Kairys ed., 3d ed. 1998).

22. McDougall, *supra* note 20, at 326 n.1 (quoting Lopez, *supra* note 21, at 440–41).

Younger legal scholars such as Shaun Ossei-Owusu and some Law and Political Economy (LPE) scholars have continued this critique of legal education and lawyering more broadly.<sup>23</sup> We applaud the work of these gutsy scholar-activists.

## II. OUR DEBT TO MONROE FREEDMAN AND DEBORAH RHODE

This essay takes inspiration from two mentors and friends, Monroe H. Freedman and Deborah Rhode. They are no longer with us, but their legacies live on. Freedman and Rhode exemplified the kind of principled, intrepid behavior we applaud. Both within and outside the academy, they believed in the importance of speaking out, no matter how controversial the issue.

Freedman died at age 86, after a full life during which he was often regarded as what the *New York Times* called “a gleeful jurisprudential provocateur.”<sup>24</sup> Although he loved being provocative—how better to get people to think?—he was much more than this. He was an immensely influential scholar and an activist.<sup>25</sup>

One of the founders of the field of legal ethics,<sup>26</sup> Freedman never hesitated to express his views frankly and publicly. Whether through his classic law review article on the ethics of criminal defense, *The Three Hardest Questions*<sup>27</sup> (which landed him in trouble with then-federal appeals court judge and later Chief Justice of the Supreme Court Warren E. Burger),<sup>28</sup> his criticism of prosecutors’ ethics,<sup>29</sup>

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23. See, e.g., Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413 (2022).

24. Margalit Fox, *Monroe Freedman, Influential Voice on Legal Ethics, Dies at 86*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/nyregion/monroe-freedman-expert-on-legal-ethics-dies-at-86.html> [<https://perma.cc/YVH4-3K8W>]. Along these same lines, one commentator referred to Freedman’s “ardent, insistent, probing, sometimes fierce or sardonic—almost never solemn—methods of inquiry.” Michael Tigar, *The Essential Monroe Freedman*, in *Four Works*, 44 HOFSTRA L. REV. 659, 660 (2016).

25. See Fox, *supra* note 24.

26. See *id.* (describing Freedman as “a dominant figure in legal ethics whose work helped chart the course of lawyers’ behavior in the late 20th century and beyond”). Alan Dershowitz considers Freedman the intellectual architect of legal ethics. *Id.* (“He invented legal ethics as a serious academic subject . . . Prior to Freedman, legal ethics was usually a lecture given by the dean of the law school, which resembled chapel: “Thou shalt not steal. Thou shalt not be lazy.” But Monroe brought to the academy the realistic complexity of what lawyers actually face.”).

27. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (discussing whether a criminal defense attorney may discredit a truthful witness, knowingly allow a client to testify falsely, and provide a client with legal advice that the client may use to commit crime).

28. See Fox, *supra* note 24 (noting that Burger attempted without success to get Freedman disbarred); see also Matt Schudel, *Monroe H. Freedman, Scholar of Legal Ethics and Civil Liberties Dies at 86*, WASH. POST (Feb. 28, 2015), [https://www.washingtonpost.com/national/monroe-h-freedman-scholar-of-legal-ethics-and-civil-liberties-dies-at-86/2015/02/28/9e9c562a-beb3-11e4-8668-4e7ba8439ca6\\_story.html](https://www.washingtonpost.com/national/monroe-h-freedman-scholar-of-legal-ethics-and-civil-liberties-dies-at-86/2015/02/28/9e9c562a-beb3-11e4-8668-4e7ba8439ca6_story.html) [<https://perma.cc/P6KN-AB2P>].

29. See, e.g., Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors’ Offices*, 52 WASHBURN L.J. 1, 1 (2012) (identifying two sources of prosecutorial misconduct: office policies that encourage violation of rules and the problem of the rogue prosecutor and lamenting the lack of professional discipline of prosecutors generally).



his prescient critique of Atticus Finch,<sup>30</sup> or his many op-eds on a variety of timely subjects,<sup>31</sup> Freedman fought for access to justice and regularly spoke out against injustice, inequality, and unfairness.<sup>32</sup>

From the start of his legal career in the 1950s until his death on February 26, 2015, Freedman was a champion of women's rights, gay rights, and civil rights and civil liberties.<sup>33</sup> Though he served in the Navy before going to law school, he was an active participant in the Anti-Vietnam War Movement.<sup>34</sup>

Prominent lawyer and law professor Michael Tigar eloquently applauded Monroe's "fierce determination" in pursuit of fairness and justice.<sup>35</sup> Tigar writes that, "when we think of courage, we should be guided by Monroe's advocacy and personal example."<sup>36</sup> He declares:

To stand, as Monroe did for six decades, and confront social injustice against all manner of attack, requires a firm sense of who you are and what you are doing. That in turn requires that you live by the standards you have set for others and that you claim to have set for yourself. *Monroe did not simply talk about a subject called "ethics." He was ethical.*<sup>37</sup>

Similarly, Deborah Rhode, a pioneer in gender and the law and legal ethics, wrote many books, articles, op-eds, and amicus briefs to promote gender equality, access to justice, and the importance of character and leadership among lawyers.<sup>38</sup> The second woman to be tenured at Stanford Law School, she wrote one

30. See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994) (arguing that Atticus Finch, the hero of Harper Lee's beloved novel, *To Kill a Mockingbird*, was less than honorable in several key respects).

31. See, e.g., Monroe H. Freedman & Abbe Smith, *Machen Tramples on the Mayor's Due Process*, WASH. POST (Mar. 21, 2014), [https://www.washingtonpost.com/opinions/machen-tramples-on-the-mayors-due-process/2014/03/21/f780eca6-afaa-11e3-9627-c65021d6d572\\_story.html](https://www.washingtonpost.com/opinions/machen-tramples-on-the-mayors-due-process/2014/03/21/f780eca6-afaa-11e3-9627-c65021d6d572_story.html) [<https://perma.cc/FE98-5BDF>] (denouncing U.S. Attorney for the District of Columbia Ronald C. Machen for publicly excoriating for "corruption" but not charging then-DC mayor Vincent C. Gray); Monroe H. Freedman & Paul Butler, *Ferguson Prosecutor Should Have Bowed Out*, NAT'L L.J. (Dec. 8, 2014), <https://www.law.com/nationalallawjournal/almID/1202678248369/oped-ferguson-prosecutor-should-have-bowed-out/?sreturn=20220010205415> [<https://perma.cc/9ZCU-9HFM>] (arguing that the prosecutor presiding over the grand jury investigation of the killing of Michael Brown by Ferguson, Missouri police officer Darren Wilson had a conflict of interest that should have prohibited him from prosecuting a police officer who worked in his jurisdiction).

32. See Fox, *supra* note 24 (noting Freedman's support for lawyer advertising and even "ambulance chasing" in order to help members of the public know about their rights and his championing of the kind of criminal defense lawyering that breathed life into *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

33. See *id.*; Schudel, *supra* note 28. For instance, Freedman was volunteer counsel to the Mattachine Society, one of the country's first gay-rights organizations.

34. Schudel, *supra* note 28.

35. Tigar, *supra* note 24, at 668.

36. *Id.*

37. *Id.* at 666 (emphasis added).

38. It is an understatement to say that Rhode was a prolific writer. She authored thirty books and some 200 law review articles. See Clay Risen, *Deborah Rhode, Who Transformed the Field of Legal Ethics, Dies at 68*, N.Y. TIMES (Jan. 18, 2021), <https://www.nytimes.com/2021/01/18/us/deborah-rhode-dead.html> [<https://perma.cc/6RHG-M6G9>]. Her books included JUSTICE AND GENDER (1989), SPEAKING OF SEX (1997), IN THE

of the first books to provide a comprehensive investigation of gender and the law in the United States, against a backdrop of historical and sociological change.<sup>39</sup> Her first scholarly work challenged the legal profession's monopoly on providing legal services, as the bar's exclusive hold on most services related to law impedes equal access to justice.<sup>40</sup>

Rhode has been called a “moral force” and the “conscience of the legal profession” for the decades she spent “articulating hard truths about women, power, leadership, and the search for justice.”<sup>41</sup> A Stanford colleague remarked that, in Rhode's view, “it wasn't enough to memorize rules or espouse airy principles . . . . Legal ethics—and legal ethics scholars—would have to refocus on what matters: access to justice, integrity, accountability, and equality.”<sup>42</sup>

Rhode was willing to stick her neck out on a range of controversial issues others shied away from. One memorable instance was the *New York Times* op-ed she wrote about the 2002 prosecution of criminal defense lawyer Lynne Stewart for materially assisting terrorism in her representation of a blind Egyptian Sheik, Omar Abdel Rahman, accused of plotting to blow up various New York City landmarks.<sup>43</sup> Notwithstanding the terrorism allegation against Rahman—or the fact that the country was still reeling from the September 11, 2001 World Trade Center bombing—Rhode was troubled by Stewart's prosecution:

America's civil liberties depend on counsel willing to assert them. John Adams, who reported losing half his practice after defending British officers charged in the Boston Massacre, considered that case “one of the best pieces of service that I ever rendered for my country.” If the indictment against Ms. Stewart signals a broader trend to crack down not just on terrorists but on those courageous enough to represent them, we are all at risk.<sup>44</sup>

Shortly before her untimely death in 2021, at age 68, Rhode called for sanctions for Donald Trump's legal team, including Rudy Giuliani, for filing dozens of frivolous lawsuits alleging voter fraud in the 2020 presidential election. In a widely read essay in *Slate Magazine*, Rhode and her co-authors argued that

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INTERESTS OF JUSTICE (2000), *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010), *LAWYERS AS LEADERS* (2013), and *THE TROUBLE WITH LAWYERS* (2015). She also wrote numerous op-eds in newspapers.

39. See Rhode, *JUSTICE AND GENDER*, *supra* note 38.

40. See Deborah Rhode & Ralph C. Cavanagh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *YALE L.J.* 104 (1976) (comparing the outcome in divorce cases when parties represent themselves and when parties have legal counsel and finding little or no difference).

41. John Roemer, *The Moral Force of Deborah Rhode*, *STANFORD MAG.* (Sept. 2017), <https://stanfordmag.org/contents/the-moral-force-of-deborah-rhode> [<https://perma.cc/7PLA-7MTA>].

42. Risen, *supra* note 38 (quoting Stanford Law professor Nora Freeman Engstrom).

43. Deborah L. Rhode, *Terrorists and Their Lawyers*, *N.Y. TIMES* (Apr. 16, 2002), <https://www.nytimes.com/2002/04/16/opinion/terrorists-and-their-lawyers.html> [<https://perma.cc/3RL5-M3A5>]. For a discussion of the Stewart case, see Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 *S. TEX. L. REV.* 31 (2002).

44. Rhode, *supra* note 43.

Trump's lawyers violated their most basic professional obligations by filing cases "that make unsubstantiated allegations of election fraud and heedlessly assist their client's calculated effort to erode trust in our democratic system."<sup>45</sup> Calling this "an astonishing breach,"<sup>46</sup> Rhode urged swift discipline of the lawyers. The urgency of the matter was the broader political context:

Trump's lawyers' conduct should not be viewed in a vacuum. The conduct must be judged in the context of the Trump campaign's broader effort to perpetrate an unprecedented fraud upon the American public by claiming election theft, without a shred of credible evidence . . . . These frivolous lawsuits are expressly engineered to undermine the public's faith in core democratic processes.<sup>47</sup>

But Rhode and her co-authors also circled back to the ethical rules for attorneys in this country, pointing to the Preamble to the *Model Rules*, which states that lawyers have a "special responsibility for the quality of justice" and a responsibility to further the public's "confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."<sup>48</sup>

A realist, Rhode was not sanguine about the prospect of discipline for any of Trump's lawyers. As she told a *Mother Jones* reporter in late 2020, "[i]f history is any guide, it's extremely unlikely that any of these lawyers are going to face disciplinary sanctions."<sup>49</sup> Rhode was again blunt about the political context and the role politics plays in the unwillingness of disciplinary agencies to sanction the most dangerous lawyer misconduct: "[t]he bar is just, historically, extremely reluctant to take on anything that isn't a clear, easily provable violation of disciplinary rules, and that has any kind of political overtones."

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45. See Scott Cummings, Nora Freeman Engstrom, David Luban & Deborah L. Rhode, *It's Time to Consider Sanctions for Trump's Legal Team*, SLATE (Nov. 23, 2020), <https://slate.com/news-and-politics/2020/11/trump-legal-team-rudy-giuliani-state-bar-sanctions.html> [<https://perma.cc/26DR-HCMF>].

46. *Id.*

47. *Id.* For a thoughtful discussion of the fragile state of democracy around the world and the need to fortify core democratic processes, see David Brooks, *The Dark Century*, N.Y. TIMES (Feb. 17, 2022), <https://www.nytimes.com/2022/02/17/opinion/liberalism-democracy-russia-ukraine.html> [<https://perma.cc/7JWG-LJZP>]. Brooks calls the 21st century "dark, regressive, and dangerous" and notes that "democracy . . . takes enormous work." *Id.* Channeling Deborah Rhode, Brooks writes:

[W]e need to fortify the institutions that are supposed to teach the democratic skills: how to weigh evidence and commit to truth; how to correct for your own partisan blinders and learn to doubt your own opinions; how to respect people you disagree with; how to avoid catastrophism, conspiracy and apocalyptic thinking; how to avoid supporting demagogues; how to craft complex compromises.

*Id.*

48. Cummings, Engstrom, Luban & Rhode, *supra* note 45 (citing MODEL RULES OF PROF'L CONDUCT pmbl. (2018) [*hereinafter* MODEL RULES]).

49. Pema Levy, *The Legal Assault on Democracy Is Clearly Unethical. But the Lawyers Will Probably Get Away With It*, MOTHER JONES (Dec. 14, 2020), <https://www.motherjones.com/2020-elections/2020/12/trump-lawyers-ethics-sanctions/> [<https://perma.cc/RG73-K2PL>].

Like Freedman, Rhode was deeply principled. In one of her final, as yet unpublished books, she writes: “[u]ltimate fulfillment comes from a sense of remaining true to core ideals and principles, and of using life for something of value that outlasts it.”<sup>50</sup> Both Freedman and Rhode were public intellectuals and social justice activists. Both had guts. Alas, they are relatively unique in the world of legal ethics.

### III. USE OF THE *MODEL RULES OF PROFESSIONAL CONDUCT* AND DISCIPLINARY AGENCIES TO CURB UNETHICAL BEHAVIOR

The American legal profession is self-policing. This organizational scheme has always been essential to lawyers’ independence and autonomy (and, more cynically, its monopoly on providing legal services).<sup>51</sup> The Preamble to the *Model Rules* makes clear that lawyers play an essential role in self-policing the profession. Lawyers are supposed to “aid in securing . . . observance [of the *Rules*] by other lawyers” because “[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”<sup>52</sup> The Preamble goes further. Lawyers are responsible for the maintenance and preservation of our free society as well as working towards equality and equal access to justice: “[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.”<sup>53</sup>

But the self-policing must actually happen—especially in high profile cases—and be meaningful. In this Part, we argue that the *Model Rules*—the *code*<sup>54</sup> under

50. *Id.* (quoting from Rhode’s unpublished book *AMBITION*).

51. *See* MODEL RULES pmb. ¶ 10–12:

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct.

52. MODEL RULES pmb. ¶ 12.

53. MODEL RULES pmb. ¶ 1.

54. We owe a debt here to the character of Omar on the HBO series *The Wire*, played by brilliant actor Michael K. Williams, who famously declared, “a man gotta have a code.” Keith Reid-Cleveland, ‘It’s All In The Game’: Remembering Omar’s Code On ‘The Wire,’ UPROXX (July 31, 2015), <https://uproxx.com/tv/omar-the-wire-quotes/> [<https://perma.cc/96YV-FWBY>]. Tragically, Williams died in 2021 at age fifty-four.

which lawyers practice—provides a sufficient framework for disciplining lawyer behavior, even in a political context.

As Deborah Rhode aptly pointed out, the bench and bar rarely discipline lawyers for conduct regarded as political or, indeed, discipline powerful attorneys such as prosecutors and law firm partners. Instead, they tend to discipline solo practitioners—who are disproportionately people of color—for misconduct such as commingling client funds or even accounting errors.<sup>55</sup> Although, of course, misconduct that hurts clients ought to be regulated, misconduct that threatens the rule of law and undermines fundamental due process rights in the criminal system should be regulated as well.

The responsibility of lawyers to call out other lawyers when they engage in serious misconduct is not about “snitching,” back-biting, or one-upmanship. It is about “Maintaining the Integrity of the Profession,”<sup>56</sup> which, in turn, is essential to maintaining the rule of law. As the Preamble states: “[L]awyers play a vital role in the preservation of society.”<sup>57</sup> The way lawyers fulfill this role is by “understanding . . . their relationship to our legal system” and how the “Rules of Professional Conduct, when properly applied, serve to define that relationship.”<sup>58</sup>

Accordingly, it is not only required, but also makes sense for lawyers to turn to the *Model Rules* to seek discipline for lawyers who engage in misconduct in high places—especially in a political context. This is when lawyers are most visible. This is also when members of the general public form a view of the role of lawyers in a free society, and of lawyerly ethos and ethics.<sup>59</sup> The same is true of

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Julia Jacobs et al., *Michael K. Williams, Omar From 'The Wire,' Is Dead at 54*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/2021/09/06/arts/michael-k-williams-dead.html> [<https://perma.cc/72VZ-L3A7>].

55. See, e.g., Jill Switzer, *Inequalities in Lawyer Discipline Demand Action*, ABOVE THE LAW (Feb. 11, 2021), <https://abovethelaw.com/2021/02/inequalities-in-lawyer-discipline-demand-action/> [<https://perma.cc/P8BS-ZNF5>] (small-firm practitioners are disciplined more than larger-firm lawyers); Joe Patrice, *Study Finds That Bar Discipline Is Totally Racist Shocking Absolutely No One: Black Male Attorneys Are More Likely to Be Disciplined Than White Attorneys*, ABOVE THE LAW (Nov. 19, 2019), <https://abovethelaw.com/2019/11/study-finds-that-bar-discipline-is-totally-racist-shocking-absolutely-no-one/> [<https://perma.cc/9STT-XD2V>]; Debra Cassens Weiss, *New California Bar Study Finds Racial Disparity in Lawyer Discipline*, ABA J. (Nov. 18, 2019), <https://www.abajournal.com/news/article/california-bar-study-finds-racial-disparities-in-lawyer-discipline> [<https://perma.cc/67JA-UPCS>] (reporting on a California study that charted attorney discipline over a twenty-eight-year span and discovered that, by and large, Black and Latinx attorneys are disciplined more often and their punishments are more severe than the comparable population of white lawyers).

56. MODEL RULES R. 8.3 (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

57. *Id.* at pmb1. ¶ 13.

58. *Id.*

59. Some commentators disagree. See, e.g., Bruce A. Green & Rebecca Roiphe, *Opinion: As the Giuliani Case Goes Forward, Courts Should Think Deeply About the First Amendment*, WASH. POST (June 25, 2021), <https://www.washingtonpost.com/opinions/2021/06/25/suspend-giulianis-law-license-dont-chill-free-speech/> [<https://perma.cc/L32E-HNGT>] (“It is unlikely that the public credits media personalities who are attorneys more than others, or that, when these attorneys are caught in lies, the public sees it as a reflection on the entire legal profession.”).

powerful attorneys who sometimes abuse their power, such as prosecutors. If we fail to regulate ourselves in the midst of political turmoil—when the rule of law and the role of lawyers are most important—or when prosecutors violate fundamental ethics rules, we should not call ourselves a self-policing profession.

The chief argument against filing disciplinary complaints about lawyers' conduct in a political context is that doing so chills the unbridled free speech we especially value and protect in politics.<sup>60</sup> Some legal ethics scholars have taken this view in response to disciplinary complaints filed against Trump lawyer Rudy Giuliani and others.<sup>61</sup> For instance, in a 2021 op-ed in the *Washington Post*, Professors Bruce Green and Rebecca Roiphe argue that lawyers ought to be able to lie in the political arena as a matter of free speech. Otherwise, “[r]obust political debate would be chilled” when lawyers became fearful about “misspeaking.”<sup>62</sup>

Green and Roiphe have followed up on the op-ed with a forthcoming law review article, entitled *Lawyers and the Lies They Tell*, which makes the same basic point.<sup>63</sup> They “disagree with the premise that lawyers do not deserve the same robust protection for disfavored speech that the First Amendment affords speakers in general.”<sup>64</sup> In the longer piece, they also argue that lawyers who lie in a public, political sphere do not reflect badly on the rest of the profession, because most people can distinguish between lawyers who lie to the public and other, more honorable, lawyers.<sup>65</sup>

Critics of using disciplinary rules to curb lawyers engaged in untruthful and anti-democratic efforts also often focus on Model Rule 8.4(c), which forbids “conduct involving dishonesty, fraud, deceit or misrepresentation.” They contend that 8.4(c) is a vague and overbroad catchall, not necessarily related to fitness to practice law.<sup>66</sup>

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60. See *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position.”).

61. See, e.g., Green & Roiphe, *supra* note 59 (arguing that lawyers should be able to lie in a political arena as a matter of free speech); Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114 (2021) (taking a more nuanced approach).

62. Green & Roiphe, *supra* note 59.

63. Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL’Y (forthcoming 2022).

64. *Id.* at 4.

65. See *id.* at 22, 32.

66. See W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001) (addressing unanswered question as to how first amendment should apply to lawyer speech); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998). See generally Randall P. Bezanson & William G. Buss, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004) (arguing that government lawyers should not be first amendment holders for their speech); MODEL RULES R. 8.4 cmt. 2 (“[A] lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”). But see Tim Wu, *Is the First Amendment Obsolete?*, *Emerging Threats*, 117 MICH. L. REV. 547 (2018).

This argument ignores the fact, however, that the Rule was deliberately drafted broadly; it was intended to “maintain[] the integrity of the profession.”<sup>67</sup> Moreover, Comment 7 to Rule 8.4 states that “[l]awyers holding public office assume legal responsibilities going beyond those of other citizens.”<sup>68</sup> Although Rudy Giuliani was not holding public office when he made baseless claims about a stolen 2020 Presidential election, he was suspended from law practice in two jurisdictions because of the brazenness of his lies to courts, lawmakers, and the public.<sup>69</sup> On the other hand, public officials like then-Attorney General William Barr and then-Acting Assistant Attorney General for the Civil Division of the Department of Justice Jeffrey Clark should also be held to a higher standard for their misconduct in relation to “The Big Lie”<sup>70</sup> under Rule 8.4. These two high-ranking Justice Department lawyers—who were literally in charge of *justice* in the United States—helped perpetuate the dangerous anti-democratic lie that the 2020 presidential election was “stolen” by Joe Biden, no matter how many courts found otherwise.<sup>71</sup>

As we discuss below in Part IV, we believe there are even fewer rationales for prosecutors who were called out by courts for acts of misconduct not to be disciplined—in fact, no one to our knowledge has suggested any—and yet so few legal ethicists support this effort, at least thus far.

#### IV. ONE EXAMPLE OF A MAJOR ETHICAL PROBLEM THAT LEGAL SCHOLARS WERE NOT EAGER TO ENGAGE WITH

In this Part, we describe “Accountability New York,”<sup>72</sup> a recent project that demonstrates the problem this Essay addresses. Accountability New York—an

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67. MODEL RULES R. 8.4.

68. *Id.* at R. 8.4 cmt. 7.

69. Guardian Staff & Agencies, *Rudy Giuliani Suspended From Practicing Law in DC*, THE GUARDIAN (Jul. 7, 2021), <https://www.theguardian.com/us-news/2021/jul/07/rudy-giuliani-suspended-from-practicing-law-in-washington-dc> [<https://perma.cc/Z439-GH2Q>] (reporting the suspension of Giuliani’s law license in Washington, DC, following the suspension of his license by a New York court for “demonstrably false and misleading statements to courts, lawmakers and the public” in trying to overturn the results of the 2020 elections in favor of Trump).

70. See Melissa Block, *The Clear and Present Danger of Trump’s Enduring ‘Big Lie,’* NPR (Dec. 23, 2021), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election> [<https://perma.cc/B4F6-43ME>] (reporting about the continuing dangers of the “big lie” of a stolen 2020 election).

71. See *id.* Interestingly, the California State Bar recently announced it was conducting an investigation into law professor John Eastman of Chapman University for ethics violations stemming from his involvement in the January 6, 2021 insurrection. See News Release, State Bar of Cal., State Bar Announces John Eastman Ethics Investigation (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation> [<https://perma.cc/3YT4-3QLS>] (announcing an ongoing investigation of Professor Eastman as to whether he engaged in conduct in violation of California law and ethics in relation to his conduct in the November 2020 presidential election).

72. ACCOUNTABILITY NY, <https://accountabilityny.org> [<https://perma.cc/X9XN-C4FZ>] (last visited Feb. 27, 2022) (“Accountability NY Is A Coalition of Law Professors, Civil Rights Corps, Community Activists, Attorneys And Other Concerned Community Members Seeking Professional Consequences For Prosecutorial Misconduct.”).

example of ethics in practice—seeks to hold prosecutors who have committed misconduct accountable through state bar disciplinary processes.<sup>73</sup> Perhaps naively, some of us thought this would be an easy sell: It is apolitical, meaning prosecutors of any party or political bent are included; it addresses a significant problem in the criminal legal system that many legal scholars write about; and it is “following the rules” by using the state bar disciplinary system, the established scheme of self-regulation. Radical it certainly is not. But, alas, we underestimated resistance to stepping at all outside the conventional role.<sup>74</sup>

Over the last decade, awareness has grown that the criminal legal system is deeply flawed and that largely unchecked prosecutorial power, especially in a world of plea bargains,<sup>75</sup> has been a significant factor in overcriminalization and mass incarceration.<sup>76</sup> There has also been increased recognition that the legal profession’s self-regulation has not worked well to curb prosecutorial misconduct.<sup>77</sup> The combination of these two problems has created a perfect storm—a “black box”<sup>78</sup> of prosecutorial action in which misconduct can thrive, producing serious concerns about fairness and sometimes leading to the conviction of innocent people.<sup>79</sup>

For instance, a 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only

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73. The misconduct cited in the disciplinary complaints is based on appellate court findings of prosecutorial wrongdoing. *Id.* Perhaps reflecting the particularly high stakes in assessing prosecutorial conduct, the term “misconduct” itself is controversial in this context. See Ellen Yaroshfsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1945 (2010).

74. We are heartened, however, by a letter in support of these efforts organized by a criminal law professor at UNC and signed by at least ninety other law professors. See Open Letter in Support of Efforts to Make Ethics Complaints Against Prosecutors More Transparent (draft) (on file with authors) [hereinafter Open Letter] (“[I]f those tasked with enforcing the rules of professional responsibility do not appear to be fulfilling their obligations, then members of the legal profession have a duty to speak up.”).

75. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (declaring that criminal justice today “is for the most part a system of pleas, not a system of trials”).

76. See generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

77. Bruce Green & Ellen Yaroshfsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 65 (2016) (noting that prosecutors “were rarely disciplined for misconduct, and if so, not very seriously”). See also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (same).

78. This is particularly so in a system where over ninety percent of cases end in pleas, so that there is very little to no judicial or public oversight. See Brandon Garrett, William Crozier, Elizabeth Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. (forthcoming 2022) (describing plea bargaining “as a ‘black box,’ within which prosecutors have free reign, absent strong evidence of discrimination or vindictiveness”).

79. Suppression of favorable evidence has played a role in over thirty percent of known wrongful convictions and forty-four percent of known wrongful convictions for murder. SAMUEL R. GROSS, MAURICE POSSLEY, KAITLIN ROLL & KLARA STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 12 (2020).



sixty three prosecutors—less than 2 percent—were ever publicly sanctioned.<sup>80</sup> There is significant evidence that prosecutorial misconduct is unchecked; if anything, it is often rewarded when it results in convictions in high-profile cases.<sup>81</sup> For example, the prosecutors in a case about which Accountability New York filed complaints had engaged in discovery violations, made false statements to the court, and committed other misconduct resulting in the wrongful conviction and incarceration of three men, but had been promoted to very high supervisory positions in the Queens and Suffolk County District Attorney’s offices.<sup>82</sup> Political actors of both parties are loathe to address this problem, because of the power of prosecutorial lobby groups (and perhaps the fact that a fair number of politicians are former prosecutors).<sup>83</sup> As the *New York Times* Editorial Board summarized in 2018, “there’s no reliable system for holding prosecutors accountable for their misconduct, and they certainly can’t be entrusted with policing themselves.”<sup>84</sup>

Many criminal law and legal ethics scholars have written about the lack of accountability for prosecutors and discussed the issue on panels at academic conferences and ABA meetings. Many also incorporate these concerns into their classes on Professional Responsibility—prosecutors notably being the only group of attorneys with a unique (and uniquely vague) Model Rule (Rule 3.8).<sup>85</sup> In addition to their expertise and interest in this issue, legal academics have a particular role to play in curbing misconduct. Because defense attorneys cannot readily report misconduct out of fear of retaliation against their clients, judges almost

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80. CTR. FOR PROSECUTOR INTEGRITY, WHITE PAPER: AN EPIDEMIC OF PROSECUTOR MISCONDUCT 8 (2013); see also PROJECT ON GOV’T OVERSIGHT, HUNDREDS OF JUSTICE DEPARTMENT ATTORNEYS VIOLATED PROFESSIONAL RULES, LAWS, OR ETHICAL STANDARDS 2 (2014); Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 81 (2012) (citing “the small number of sanctions against prosecutors, relative to lawyers as a whole”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) (describing the “rarity of discipline” of prosecutors).

81. Joaquin Sapien, ProPublica & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody> [<https://perma.cc/4SQA-3M4T>].

82. George Joseph, *Prosecutors Wrongfully Convicted Three Men Who Spent 24 Years Behind Bars. Will They Be Disbarred?*, GOTHAMIST (May 6, 2021), <https://gothamist.com/news/prosecutors-wrongfully-convicted-three-men-who-spent-24-years-behind-bars-will-they-be-disbarred> [<https://perma.cc/6S9S-49WS>].

83. See Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, WASH. & LEE L. REV. (forthcoming 2022); see also David Leonhardt, *Why KBJ Is Different*, N.Y. TIMES (Mar. 22, 2022), <https://www.nytimes.com/2022/03/22/briefing/ketanji-brown-jackson-hearings-supreme-court.html> [<https://perma.cc/DJ8D-HNTT>] (“There have been three main career paths to becoming a federal judge in recent decades: defending corporate clients, serving as a prosecutor or working in politics. Many judges have followed more than one of the paths.”).

84. Editorial Board, *Prosecutors Need a Watchdog*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html> [<https://perma.cc/8RS8-TMTW>].

85. Connick v. Thompson, 563 U.S. 51, 65–66 (2011); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT, 80–81 (2012); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); see also Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 316 (2001) (“The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.”).

never report prosecutors, and, to our knowledge, no prosecutor has ever reported a fellow prosecutor, there is a serious gap in reporting and addressing prosecutorial misconduct.<sup>86</sup> “It’s an insidious system,” said Marvin Schechter, then-chairman of the criminal justice section of the New York State Bar Association, to *ProPublica*. “Prosecutors engage in misconduct because they know they can get away with it.”<sup>87</sup>

The only group of people who are insulated from retaliation and have expertise in this subject are law professors. In many cases, the misconduct raises constitutional as well as ethical concerns, a combination with which most legal ethics scholars are familiar.<sup>88</sup>

Importantly, Accountability New York is carefully and narrowly tailored to eliminate concerns of bias, hearsay, or pettiness—it includes only cases of serious or repeated misconduct, and only cases where courts explicitly found prosecutorial misconduct after reviewing the full record, often resulting in reversible error—a very high bar. This is directly in the wheelhouse of scholars teaching and writing about criminal legal ethics. But many didn’t see it that way. More than twenty experts were approached to join the project, but the vast majority declined to participate or even sign their name to complaints. Because of the risk-averse and highly hierarchical culture of the academy,<sup>89</sup> we only asked scholars who had tenure. However, we also put the word out—asking colleagues to let others know about the project. The small handful of professors who first joined Accountability New York were disproportionately clinical professors. Two members did not yet have tenure. Now that’s guts!

In addition to their reluctance to draft or sign ethical complaints against prosecutors with documented misconduct, some academics criticized those taking part in the project as “crossing a line”—apparently between academia and practice or between intellectual cogitation and real-world impact. What was really behind the criticism is unclear. Thankfully, we received a lot of support from both the “usual suspects”—public defenders, people caught up in the criminal system and their families and communities, other concerned members of the public—and

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86. Miriam Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015); Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715, 730–33 (2011) (criticizing *Brady* and lack of enforcement mechanism against offices that encourage prosecutors to withhold exculpatory evidence); Jennifer Blasser, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531–34 (2007) (arguing inconsistent judicial enforcement of *Brady* rule encourages prosecutors to engage in gamesmanship).

87. Sapient, *ProPublica & Hernandez*, *supra* note 81.

88. Some legal ethics scholars argue that they have no expertise in the criminal legal system, despite the transsubstantive nature of the *Model Rules* and of the topic of professional responsibility itself. This seems related to the larger problem of a reluctance to question, and/or report attorney misconduct, despite the profession’s self-regulation.

89. *See infra* notes 99–114.

some unexpected backers—big law partners, the mainstream media,<sup>90</sup> and some retired prosecutors.

An important goal of Accountability New York is to address prosecutorial misconduct as a systemic problem: the persistence and prevalence of the misconduct demonstrates that it goes beyond a few bad apples. Most scholars seem to agree there is no easy fix. Accordingly, Accountability New York not only seeks discipline against individual prosecutors, but also asks the disciplinary agency to investigate other cases these prosecutors handled or supervised; such investigations are routine in police misconduct cases.

The group also publicizes the complaints that are filed, putting them on a website and speaking to the media about the project.<sup>91</sup> The purpose of making the complaints public is both to promote conversation about prosecutorial misconduct—a subject often limited to lawyers, judges, and other insiders—and to render the attorney discipline process more transparent. Attorney discipline proceedings have been criticized as being secretive and inadequate, exposing clients and the public to risks,<sup>92</sup> none more so than in New York State.<sup>93</sup> One would think that making the attorney disciplinary process more transparent, fair, and effective would be an important cause for legal ethicists.

The group has filed more than a dozen grievances against prosecutors from the Queens County District Attorneys' Office (DAO) who have been found to have committed serious misconduct. Immediately upon filing, there was significant pushback from government officials—the Queens DAO and the statewide Office of Court Administration (OCA) criticized the law professors who signed the grievances

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90. See Brief for N.Y. Times, Associated Press, ProPublica & Newsday as Amici Curiae Supporting Accountability New York (Mar. 9, 2022) (on file with authors).

91. See ACCOUNTABILITY N.Y., <https://accountabilityny.org/> [<https://perma.cc/KS9B-A9GR>] (last visited Feb. 22, 2022).

92. Leslie Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007); Benjamin Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 451 (2005). Some states have responded by publishing more information and trying to reform. See, e.g., Donna S. Hershkowitz, *State Bar of California Response to Audit Report 2020-030*, CAL. STATE AUDITOR (Apr. 9, 2021), <https://www.auditor.ca.gov/reports/2020-030/response.html> [<https://perma.cc/6Y59-YPVT>]; Bigad Shaban & Mark Villarreal, *Lawmakers Fight to Reform California Bar After Audits Skewer Agency for Mismanagement, Lack of Transparency, and Pricey Salaries*, NBC (Nov. 30, 2019), <https://www.nbcbayarea.com/news/local/lawmakers-fight-to-reform-california-bar-after-audits-skewer-agency-mismanagement-pricey-salaries/82618/> [<https://perma.cc/UY7L-CGXT>].

93. See, e.g., Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 496 (2014); see also NYS COMM'N ON STATEWIDE ATT'Y DISCIPLINE, FINAL REPORT TO CHIEF JUDGE JONATHAN LIPPMAN, THE COURT OF APPEALS, AND THE ADMINISTRATIVE BOARD OF THE COURTS 62 (Sept. 2015) ("New York is one of only 9 jurisdictions which do not permit public dissemination of information concerning disciplinary proceedings until, at the earliest, a recommendation that discipline be imposed, and usually upon a final adjudication."). N.Y. JUD. LAW § 90.10 (2014) prohibits the grievance committees from revealing information about disciplinary complaints, but the ambiguous wording in that statute leads the City to argue that the professors' actions violated that law. The Accountability New York lawsuit asks the court to declare that § 90.10 is unconstitutional, a violation of their First Amendment rights. Bromwich, *supra* note 7.

publicly, and the New York City Corporation Counsel wrote the professors a letter accusing them of misconduct and prohibiting them from publicizing the case. This response, plus the lack of support from academic colleagues, left the professors anxious and isolated.<sup>94</sup> Fortunately, the project secured pro bono representation from prominent New York law firm Patterson Belknap, which filed a complaint against the city and various state actors claiming a violation of the First Amendment, among other things.<sup>95</sup>

There has since been media coverage of the project and more push-back, bringing needed attention to the issue of prosecutorial misconduct.<sup>96</sup> The *New York Times* wrote a letter supporting the unsealing of key records in the case, calling prosecutorial misconduct a “matter of serious public concern” and arguing that the secrecy “would do damage to the public’s faith in the justice system.”<sup>97</sup> The case is still pending, but the court recently ordered the unsealing of the government defendants’ threatening letters and found that the defendants violated the plaintiffs’ First Amendment rights by demanding the complaints not be publicized.<sup>98</sup> This result alone has value for improving the disciplinary process.

## V. WHY DO SO FEW LEGAL ETHICS SCHOLARS ACT WITH GUTS?

Why isn’t there a groundswell among legal ethics scholars to organize or sign ethics complaints or engage in other actions to uphold the rule of law generally and fundamental fairness in the criminal legal system? There are many inter-related factors that contribute to an overly cautious approach by our law professor colleagues. Here we flag three overlapping ones: A. the hierarchical, risk-averse, and status-conscious culture of legal academia; B. an overly narrow perception of the appropriate role of law professors; and C. the false divide between law and politics or, put another way, law’s “neutrality.”

### A. CULTURE OF THE LEGAL ACADEMY

The legal academy has long been a hierarchical system of status, prestige, and power. It is a fundamentally conservative institution that inculcates viewing the social order through a formalist legal lens. At best, it embraces incremental change. Law schools, ranked by U.S. News & World Report along an extensive list of factors,<sup>99</sup> strive to improve their rankings, because rank determines how

94. The letter in support signed by dozens of colleagues helped ameliorate this. See Open Letter, *supra* note 74.

95. Complaint, *Civil Rights Corps v. Pestana*, No. 21-cv-09128-VM, 2022 WL 220020 (S.D.N.Y. Jan. 25, 2022).

96. See Joseph, *supra* note 82; Bromwich, *supra* note 7; Dye, *supra* note 6; Editorial Board, *How Can You Destroy a Person’s Life and Only Get a Slap on the Wrist?*, N.Y. TIMES (Dec. 4, 2021) <https://www.nytimes.com/2021/12/04/opinion/prosecutor-misconduct-new-york-doj.html> [<https://perma.cc/9MU8-LZJP>] (describing the status quo system as a “prosecutor protection racket”).

97. David McCraw, Letter on Behalf of the N.Y. Times (Jan. 19, 2022) (on file with authors).

98. *Civil Rights Corp. v. Pestana*, No. 1:21-cv-09128-VM (S.D.N.Y. June 13, 2022) (decision and order granting in part plaintiffs’ motion for partial summary judgment and denying defendants’ motions to dismiss).

99. Robert Morse, Kenneth Hines, Eric Brooks, Juan Vega-Rodriguez & Ari Castonguay, *Methodology 2022: Best Law School Rankings*, U.S. NEWS & WORLD REP. (March 29, 2021), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/FR2T-VWAA>].

selective the school can be about future applicants, the credentials of future faculty, the ability to raise money, and overall status. Newly hired assistant professors quickly learn how to move up the ladder to become an associate professor and, eventually, a full professor with tenure. Publications in top journals, good teaching reviews, service on the more important committees, and perceived collegiality are essential in moving along this path. Obtaining tenure, or a lateral appointment to a more highly-ranked school, depends upon the assessment of colleagues whose predilections can be quirky. Many tenure guidelines, either explicitly or implicitly, do not reward pro bono or other work in the community. Tenured faculty govern the institution, creating the curriculum, voting on new faculty, and choosing the Dean, among other responsibilities. Consequently, young faculty seek to curry favor with full professors who can act as mentors and references, and who provide advice on how not to rock the boat.

In short, if a young academic wants to succeed in the legal academy—and the parallel fields in which a professor might engage, such as legal consulting—she must garner favor with her colleagues, and focus on conventional academic scholarship and university service as opposed to social commentary and advocacy, especially commentary critical of other lawyers and the profession.

The adherence to traditional views of a lawyer's role may also be driven by the fact that lawyers, in general, are more cautious and risk averse than the population at large.<sup>100</sup> Even though there are few known studies separating out law professors from lawyers in general,<sup>101</sup> our observations and experience suggest that those who choose the academy may be even more risk averse than practicing lawyers.<sup>102</sup> Among law professors, legal ethicists may not be the least prone to action, but they are surprisingly reluctant.

## B. PERCEPTION OF APPROPRIATE ROLE

The predominant perception of a law professor's role—although it is one increasingly subject to challenge, and we challenge it here—is that the legal academy, and legal system more broadly, are “neutral.” Those who believe that the law and those who teach it ought to be neutral want law professors to remain cloistered, writing books and articles mainly for other scholars, rather than engaging in activism or pretty much anything outside of the academy. This embrace of

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100. Larry Richard, a lawyer and psychologist who studies the psychology of attorneys, found that lawyers typically have six characteristics in common: skepticism, high cognitive thinking, urgency or impatience, autonomy, sensitivity or defensiveness, and a lack of sociability. There are no such studies of law professors specifically. See Larry Richard, *Voices from the Field in Symposium: Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 2078 (2009).

101. See generally Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232 (1985) (commenting on differences between law professors and lawyers).

102. Some argue this risk aversion is due to their perceived role. See, e.g., Richard H. Fallon Jr., *Scholars' Briefs and The Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS, 223, 236–37 (2012) (arguing that scholars' amicus briefs on “political issues” potentially compromise the integrity of law professors by attempting to leverage their respected role as teachers and educators to give them weight in fields outside of academia).

“neutrality” links the false notion that there is such a thing as *neutrality* with the trappings of prestige in academia. Below we elaborate on the long and entrenched vision of this role, especially among traditional, more elite “podium” faculty, note that it is intertwined with the prestigious background most favored for legal academia, and conclude by pointing out some of the harms that come from this limited, outdated notion of academic role.<sup>103</sup>

Judge Learned Hand famously promoted this traditional law professor role in 1939, when receiving Harvard University’s honorary Doctor of Laws degree.<sup>104</sup> Praising scholarly independence as a goal, he advocated that scholars maintain “an aloofness from burning issues . . . without which . . . [we would] almost inevitably become advocates, agitators, crusaders, and propagandists”—groups he did not hold in terribly high regard as compared to “true scholars.”<sup>105</sup> He explained:

You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar’s gown, or lead flaming causes from a cloister. . . . You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. [A] scholar who tries to combine these parts sells his birthright for a mess of pottage.<sup>106</sup>

Learned Hand’s much lauded view has been taken up by many contemporary academics, notably literary theorist and legal scholar Stanley Fish, who is critical of academics who go beyond their proper roles of “pure teaching and scholarship,” by engaging in social change work.<sup>107</sup> Ironically, Fish is an oft-quoted public intellectual, who travels well beyond conventional teaching and scholarship.<sup>108</sup>

Many law professors have adopted this narrow view of role, eschewing anything that smacks of social justice activism. This serves them well in achieving respect from coveted colleagues, obtaining tenure, moving to a higher ranked law school, or seeking a deanship or judgeship. Others stay in a narrow lane in order to be solicited for private work as an expert witness or consultant.

Perpetuating this cycle is the background of most legal academics: graduating from an elite law school; obtaining prestigious federal clerkships or fellowships;

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103. LawProfBlawg, *Let’s Get Clinical (Faculty)!*, ABOVE THE LAW (May 8, 2018), <https://abovethelaw.com/2018/05/lets-get-clinical-faculty/> [<https://perma.cc/9DQH-VJX5>].

104. Learned Hand, *On Receiving an Honorary Degree*, 41 HARV. ALUMNI BULL. 1129 (1939), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 134, 137–38 (Irving Dilliard ed., 3d ed. 1960).

105. *Id.*

106. *Id.*

107. STANLEY FISH, *SAVE THE WORLD ON YOUR OWN TIME* 14–17 (2008).

108. See, e.g., Stanley Fish, *Always Academicize: My Response to the Responses*, N.Y. TIMES (Nov. 5, 2006), <https://opinionator.blogs.nytimes.com/2006/11/05/always-academicize-my-response-to-the-responses/> [<https://perma.cc/Y9KR-NRDG>].

having little to no experience in law practice (many are not even members of a state bar); and, more recently, having a PhD in addition to or instead of a JD. Law faculties also remain disproportionately white and male compared to the general population, and even compared to the bar.<sup>109</sup> Any previous law practice by academics skews towards “big law” and federal prosecution. As Justice Sotomayor has noted regarding the lack of judges with criminal defense experience, these rarefied backgrounds can lead to a very limited and privileged perspective.<sup>110</sup> In short, not only are academics not neutral, but their homogeneity reflects entrenched biases and cramped world views.<sup>111</sup>

Longtime federal district court judge Nancy Gertner, now a Professor of Practice at Harvard Law School, makes a related point: that their narrow range of experiences and focus on “legal formalism” instead of the parties involved or legal systems on the ground, caused many judges to contribute to mass incarceration and be resistant to necessary reforms in the legal system.<sup>112</sup>

Thankfully, the Learned Hand professorial role is not held equally by all law faculty. Clinical law professors, who teach students to practice law by working primarily with marginalized communities, have a longstanding engagement with communities and often employ creative, activist approaches to law. These professors are also more likely to be female and/or people of color and have less prestige and power (they are usually far less likely to be on the tenure track) than traditional professors.<sup>113</sup> This is likely not a coincidence, as the power dynamics within the academy are connected to power dynamics in the larger legal-political system. Critiquing the status quo outside the academy or arguing that it is not neutral, and that it perpetuates structural racial and gender inequality, could lead

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109. Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 962 tbl.2 (2015) (detailing American Association of Law Schools data to demonstrate lack of diversity in the legal academy). See generally MEERA E. DEO, *THE UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019) [hereinafter *THE UNEQUAL PROFESSION*].

110. Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 86 (2020) (noting that “academics are driven by their political commitments, so any attempt to tease out intellectual coherence is misguided” and expressing concern about the contributions of “experts” to mass incarceration and the “ostensible neutrality of expertise”); Adam Liptak, *A Proposal to Offset Prosecutors’ Power*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/a-proposal-to-offset-prosecutors-power-the-defender-general.html> [<https://perma.cc/6N8W-9AVK>] (quoting Justice Sotomayor from a talk at Brooklyn Law School).

111. Cf. Brooks, *supra* note 47 (noting the importance of acknowledging one’s own biases and questioning one’s own opinions in fortifying key democratic processes and institutions).

112. NANCY GERTNER, *REIMAGINING JUDGING: EXECUTIVE SUMMARY* (2022), <https://squareonejustice.org/wp-content/uploads/2021/12/CJLJ9284-Reimagining-Judging-summary-211215-WEB.pdf> [<https://perma.cc/SSR8-MY8Q>].

113. *THE UNEQUAL PROFESSION*, *supra* note 109, at 113. See also Robert Kuehn, *The Disparate Treatment of Clinical Law Faculty*, BEST PRACTICES FOR LEGAL EDUCATION (Jan. 4, 2021), <https://bestpracticeslegaled.com/2021/01/04/the-disparate-treatment-of-clinical-law-faculty/> [<https://perma.cc/36TU-AUJZ>] (reporting from a recent Center for the Study of Applied Legal Education (CSALE) of ninety-five percent of law schools that reveals “widespread disparate treatment of clinical instructors (*i.e.*, law clinic and externship instructors) and a lack of progress in providing parity between those who teach in law clinics and externships and those teaching doctrinal courses.” CSALE, 2019-20 SURVEY OF APPLIED LEGAL EDUCATION).

to questions about the status quo inside the academy.<sup>114</sup> This is not to suggest that all podium faculty adhere to this role. As we outline further in the next section, some have always engaged in activism and have seen it as part of their professional obligation; this group may be growing.

### C. FALSE BINARIES AND THE MYTH OF NEUTRALITY IN SCHOLARSHIP AND TEACHING

Another reason ethics scholars might be reluctant to join social justice projects is the false binary between law and politics, related to the myth of law's neutrality. Historically, the view that law is fundamentally different from politics was nearly an article of faith.<sup>115</sup> Although this view has been persuasively critiqued over the years,<sup>116</sup> it remains entrenched. Many argue that maintaining this distinction is essential to respect for the rule of law, yet, as we argue here, the rule of law cannot be neutral because law is not neutral.<sup>117</sup>

Take, for instance the Movement for Black Lives (M4BL) coalition of lawyers, who explicitly reject the false politics-law binary construct.<sup>118</sup> The credo of M4BL includes a belief in “using the law for the people and that legal tools should be used to build the power of movements.”<sup>119</sup> It also includes the following principles:

- We are political. We understand that this work requires political lawyering and explicit partnership with movement activists/organizers.
- We strive to think creatively and collectively about how the law can be used to support movements while respecting activists' and organizers' political choices. . . .
- We believe in the importance and necessity of an agile and radical legal infrastructure that supports liberation movements.
- We believe in actively combatting the elitism, hierarchies and lawyer-centric tendencies within the legal world.<sup>120</sup>

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114. See *Gender, Race, and Faculty Workload Inequities*, GENDER & SOCIETY (May 26, 2021), <https://gendersociety.wordpress.com/2021/05/26/gender-race-and-faculty-workload-inequities/> [https://perma.cc/6HPQ-87L6]. See also Brenna Clarke Gray, *The University Cannot Love You: Gendered Labour, Burnout and the COVID-19 Pivot to Digital*, in FEMINIST CRITICAL DIGITAL PEDAGOGY: AN OPEN BOOK (S. Koseoglu & G. Veletsianos eds., 2022), [https://edtechbooks.org/feminist\\_digital\\_ped/zXHDRJAq](https://edtechbooks.org/feminist_digital_ped/zXHDRJAq) [https://perma.cc/X8NQ-PP3G].

115. See Yamada, *supra* note 15, at 135–36 (discussing history of divide between law and politics).

116. See, e.g., Robert W. Gordon, *Critical Legal Studies*, 10 LEGAL STUDS. F. 335, 338 (1986) (recognizing that the political nature of law “emphasizes the historical and cultural contingency of all social arrangements, their transient, provisional, local and accidental character”).

117. See, e.g., William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175 (2001); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 264 (1993).

118. The lawyers in M4BL include the National Conference of Black Lawyers and the Ella Baker Center for Human Rights. See MOVEMENT FOR BLACK LIVES COALITION, <https://m4bl.org/> [https://perma.cc/JKB3-YLHX] (last visited May 3, 2022).

119. *Values*, LAW FOR BLACK LIVES, <http://www.law4blacklives.org/values> [https://perma.cc/8QSN-LMKV] (last visited Apr. 23, 2022).

120. *Id.*



In arguing that law, legal scholarship, and law school pedagogy are not neutral, we build not only on the work of movement lawyers, but also on a rich history of progressive scholarship. For decades, critical legal scholars proposed a wide-ranging excavation of the normative, power-laden, choices underlying the legal system. They demonstrated how a false notion of law's naturalness or neutrality has legitimized and perpetuated systems of racial, gender, class, and other inequality by focusing on empty, formal equality rather than meaningful, substantive equality.<sup>121</sup> More recently, the Law and Political Economy (LPE) project has turned the same critical lens on legal scholarship: LPE explicitly recognizes the role of legal scholarship and policy in “help[ing] to facilitate rising inequality and precarity, political alienation, the entrenchment of racial hierarchies and intersectional exploitation, and ecological and social catastrophe.”<sup>122</sup>

Indeed, legal scholarship is not neutral because it is, by its very nature, individualized, opinionated, and normative. First, no human being is truly “objective”; we are all influenced by our backgrounds and lived experiences. Moreover, our choice of topics to research and write about, and the methods of doing so, are themselves biased. This is true of all research and scholarship, even in the social and “hard” sciences. As philosopher John Dewey aptly noted, “[t]he way in which [a] problem is conceived decides what specific suggestions are entertained and which are dismissed.”<sup>123</sup> In short, how scholars frame an issue determines how they reason about it.

Legal scholarship, as well as scholarship in fields such as journalism and history, is not neutral.<sup>124</sup> Journalist and scholar Nikole Hannah-Jones responded to allegations that her Pulitzer Prize-winning *New York Times* “1619 Project” was biased and a move away from journalistic neutrality and, as a result, “integrity,” by pointing out the inevitability of viewpoint and the impossibility of true objectivity: “Most mainstream newspapers reflect power . . . [they’re] speaking to a

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121. See, e.g., IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

122. LAW & POLITICAL ECONOMY PROJECT, <https://lpeproject.org/> [<https://perma.cc/SJ82-3CZ7>] (last visited Apr. 2, 2022). See also Angela P. Harris, *Where Is Race in Law and Political Economy?*, LAW & POL. ECON. PROJECT (Nov. 30, 2017) <https://lpeproject.org/blog/where-is-race-in-law-and-political-economy/> [<https://perma.cc/73MP-Q53J>] (“The proposition is that race is foundational to ‘law,’ to ‘the political,’ and to ‘the economy.’”).

123. Ben Green, *Algorithmic Imaginaries: The Political Limits of Legal and Computational Reasoning*, LAW & POL. ECON. PROJECT (Apr. 21, 2021) <https://lpeproject.org/blog/algorithmic-imaginaries-the-political-limits-of-legal-and-computational-reasoning/> [<https://perma.cc/Z9UC-8FD8>].

124. See, e.g., David M. Perry, *Confronting the Myth of Objectivity*, PORTSIDE (May 30, 2021) <https://portside.org/2021-05-30/confronting-myth-objectivity> [<https://perma.cc/6JRS-F2RK>]; Dan Froomkin, *Dean Baquet Interview Demonstrates Why Bothsidesism Is Alive and Well at His New York Times*, PRESSWATCHERS (Jan. 31, 2020) <https://presswatchers.org/2020/01/dean-baquet-interview-demonstrates-why-bothsiderism-is-alive-and-well-at-his-new-york-times/> [<https://perma.cc/6JRS-F2RK>].

different audience.”<sup>125</sup> As in law, the veneer of journalistic neutrality gives the media, and larger societal structures, “the perception of fairness.”<sup>126</sup> This is harmful because it pretends that “the news we see is being led by objective arbiters of fact,” rather than people with their own biases and normative choices about coverage.<sup>127</sup>

A growing number of historians acknowledge there is no objective “truth” to history, and urge an expanded vision of their role and recognition that “[i]n the twenty-first century, a historian’s power lies in being a catalyst for social change.”<sup>128</sup> This requires historians to think about “what their commitments are, what their research is, and how it maybe connects to what’s happening [in current times].”<sup>129</sup> This transparency is key for intellectual honesty, as well as for effective teaching today.

Similarly, scholars who claim that law is divorced from politics obscure law’s “transient, provisional, local and accidental character, making it harder to challenge.”<sup>130</sup> They also do their students a disservice in failing to prepare them to question and critique the status quo.

In short, this myth of neutrality and of a scholarly/pedagogical role that is “above it all” legitimates existing systems of inequality and perpetuates hierarchies. It has also rendered legal scholars tangential to major questions of law reform. Judge Harry Edwards famously observed that “too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers.”<sup>131</sup> Chief Justice John Roberts agrees with Judge Edwards: “[P]ick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria.”<sup>132</sup>

125. David Folkenflik, *UNV Journalism School Tried to Give Nikole Hannah-Jones Tenure. A Top Donor Objected*, NPR (June 21, 2021) <https://www.npr.org/2021/06/21/1007778651/journalism-race-and-the-fight-over-nikole-hannah-jones-tenure-at-unc> [<https://perma.cc/E3LA-76DC>].

126. *Id.*

127. *Id.* (pointing out, for instance, that all newspapers have police reporters, but many don’t have reporters assigned to cover poverty, foster care, etc.).

128. Perry, *supra* note 124 (quoting Professor Karlos Hill, Chair of the African American Studies Dept. at the University of Oklahoma discussing teaching—and not teaching—about the Tulsa race massacre, and also noting that even science “faces a reckoning” over pretensions that it is value-neutral).

129. *Id.*

130. Louise G. Trubek, *Critical Lawyering: Toward a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49, 50 (2018).

131. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992). See generally Ross E. Davies, *In Search of Helpful Legal Scholarship, Part 1*, 2 J.L. 1 (2012) (discussing, among other things, how legal scholarship can be helpful to the U.S. Supreme Court).

132. Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), <https://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html> [<https://perma.cc/KJE2-3Z6Q>] (quoting Chief Justice John Roberts).

Although it is questionable whether courts alone are an effective path to change,<sup>133</sup> legal scholars seem less and less relevant even to what happens there,<sup>134</sup> let alone other vehicles for social change.

This peculiar commitment to the myth of neutrality also pervades legal pedagogy. In our discussions with colleagues, some claim that public expression of their views will undermine the ability to teach effectively because it is essential to maintain neutrality in the classroom. They claim that, otherwise, students who disagree will not benefit from the educational experience. These professors maintain that they do not share their personal opinions about cases and legal concepts and instead engage in more traditional Socratic dialogue to teach law.

These ideas ignore that neutrality is itself a political choice, one that ignores many students' interests, fears, and concerns.<sup>135</sup> Moreover, honestly held faculty perspectives can enhance discussion so long as the professor makes clear that dissenting viewpoints are encouraged. Indeed, a professor's articulation of personal views in the media or elsewhere may enhance the student's respect for the professor, no matter the student's politics.<sup>136</sup> Whatever the subject—whether it is legal ethics, constitutional law, or copyright law—course materials also offer opportunities for a teacher to share a personal view in order to engage students in important discussion.

On a pragmatic note, the truth is that students can easily obtain information about their professor's background, personal life, political party, and donation history—often just by Googling. Again, the curtain is pulled back to expose neutrality as a fiction and transparency as the better option.

As with legal scholarship, progressive commentators have increasingly criticized this so-called neutral approach to teaching as biased and as perpetuating the status quo under a veneer of objectivity. They argue that “what counts as law” is deeply subjective.<sup>137</sup> Relatedly, historians expose elite law schools' focus on a certain kind of pedagogy—legally formalist and anti-critical—and note that this “odd disconnect between the academic and the practice world” is unique to law schools, in contrast to other professional schools, such as medical and business schools.<sup>138</sup> Robert Gordon and others note that this model may disserve students

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133. For just two examples of work questioning the effectiveness of courts alone to best achieve societal change, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) and Cynthia Godsoe, *Perfect Plaintiffs*, 125 *YALE L.J.F.* 136 (2015).

134. Bruce Green, *What Use Are Legal Academics*, 26 *CRIM. JUST.* 1, 1 (2011).

135. Liliana M. Garces, *The False Notion of “Race-Neutrality”*: *How Legal Battles in Higher Education Undermine Racial Equity*, 52 *CHANGE: THE MAGAZINE OF HIGHER LEARNING* 51, 51–55 (2020).

136. Yamada, *supra* note 15 (noting the importance of expressing professorial views and exposing students to the full range of perspectives on every issue so that they open their minds and to question their preconceptions).

137. See, e.g., Scott Cummings, *Lessons for Legal Mobilization*, *LAW & POL. ECON. PROJECT* (Jan. 24, 2022), <https://lpeproject.org/blog/lessons-for-legal-mobilization/> [<https://perma.cc/A6Y8-NQ8G>].

138. Robert Gordon, *Harvard's Model of Legal Education*, *JOTWELL* (Jan. 21, 2022), <https://legalpro.jotwell.com/harvards-model-of-legal-education/> [<https://perma.cc/7CQL-RVB5>] (reviewing BRUCE A. KIMBALL & DANIEL COUILLETTE, *THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND CENTURY* (2020)).

in not teaching them lawyering skills that might help them in practice, certainly for public interest work or anything beyond clerkships and large corporate firms.<sup>139</sup>

In another important exposé, Professor Alice Ristroph argues that the traditional method of teaching criminal law is not neutral, but instead deeply pro-carceral, and that its position as “neutral” in casebooks and classrooms whitewashes and legitimates the carceral state.<sup>140</sup> Ristroph outlines how the creators of the canonical model of criminal law (in particular, Herbert Wechsler, also the primary creator of the *Model Penal Code*) championed their ideas of “neutral principles,” including colorblindness, which has had a huge and lasting impact on the conceptualization of criminal law.<sup>141</sup> This has of course greatly influenced criminal law practice, as most lawyers and judges have been taught this model.

Applying this discussion to the filing of ethics complaints against Trump’s lawyers and against prosecutors who engaged in misconduct, we have heard other ethicists decry that these efforts are too “political” and that those of us involved lack the neutrality and distance required to be serious scholars.<sup>142</sup> Some call these efforts “weaponizing legal ethics” for political gain.<sup>143</sup> Still others offer a more purportedly nuanced view—that the political process, not professional discipline, is the appropriate way to redress the kind of misconduct Giuliani and other high-profile lawyers engaged in on Trump’s behalf,<sup>144</sup> just as the leadership in prosecutor offices ought to discipline line prosecutors, rather than referring them to a disciplinary agency.<sup>145</sup> But, as we have argued in this Essay, what would be the point of having a code of conduct for lawyers if we fail to regulate truly dangerous lawyer conduct? How can the legal profession call itself self-regulating?

## VI. A PATH FORWARD

It has never been clearer that legal ethics scholars have a significant role to play in society. Perhaps every generation has a moment in which they call on academics to speak up and preserve justice, but this decade has produced unique challenges. We firmly believe that ethical, engaged lawyers are essential in a free

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139. *Id.* (also noting the largely deserved reputation of Harvard Law School as “basically an annex of Wall Street [with] an implicit message of its teaching and learning [jas support for the establishment of corporate law firms and their clients”).

140. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1631 (2021). See also K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062-1153 (2022) (describing how legal scholarship “has largely overlooked the role that laws and legal institutions played in facilitating the production of the two preeminent market commodities in the colonial and early Republic periods: expropriated lands and enslaved people.”).

141. *Id.* at 1635.

142. See generally Sheppard, *supra* note 9, at 297.

143. *Id.*

144. *Id.* See Bruce A. Green & Rebecca Roiphe, *Impeaching Legal Ethics*, FLA. STATE U. L. REV. (forthcoming 2022).

145. Green & Yaroshefsky, *supra* note 77 (noting the historical ineffectiveness of internal disciplinary systems).

society, and the need for legal scholars to engage in public discourse could not be more urgent.

In this Part, we highlight the work of a handful of scholar-activists who, in addition to Monroe Freedman and Deborah Rhode, can serve as role models, and we argue that adopting this role can improve legal ethicists' teaching and scholarship and contribute meaningfully to law and society. We conclude by arguing that it is essential, given our prestigious and privileged position, to be leaders in the fight for greater equality and justice.<sup>146</sup>

There are scores of excellent legal scholars who have been and are engaging in scholar-activism. Former Howard Law School Dean Charles Hamilton Houston's famous credo, "A lawyer's either a social engineer or he's a parasite on society," guides the law school's mission to this day.<sup>147</sup> His teaching, litigation, and scholarly activism laid the groundwork for dismantling legal discrimination in the United States and inspired scholars, law teachers, and lawyers to fight for social justice.<sup>148</sup>

Other examples include Professors Arthur Kinoy, who urged scholars to become "people's lawyers,"<sup>149</sup> Haywood Burns, longtime civil rights lawyer and racial justice activist, who was one of the first deans at City University of New York (CUNY) School of Law,<sup>150</sup> and Rhonda Copelon, a role model of scholarly activism who litigated seminal abortion rights cases and international human rights cases and helped found CUNY School of Law and its international human rights clinic.<sup>151</sup>

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146. We hearken to the motto of the National Lawyers' Guild, "Justice is a constant struggle." See ABBY GINSBURG & STUDES TERKEL, *JUSTICE IS A CONSTANT STRUGGLE* (1987) (documentary film on the history of the National Lawyers' Guild).

147. See *Brown at 50: Fulfilling the Promise*, HOWARD UNIV. SCH. L., <http://law.howard.edu/brownat50/BrownBios/BioCharlesHHouston.html> [https://perma.cc/DFK5-3UBP] (last visited Aug. 1, 2022).

148. See generally *About the Charles Hamilton Houston Institute for Race & Justice*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., <https://charleshamiltonhouston.org/about/> [https://perma.cc/WRZ9-LEVL].

149. Kinoy inspired the development of law school clinics. See Minna Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287 (2019) (explaining the history of clinical legal education).

150. Haywood Burns was a lawyer, scholar, and civil rights activist. He served as general counsel to Martin Luther King Jr.'s Poor People Campaign, was a legal advisor to the drafting of South Africa's interim constitution in 1993 after meeting with Nelson Mandela, founded the National Conference of Black Lawyers, and served as president of the National Lawyers Guild. He was a frequent speaker, lecturer, and advisor to social justice groups. Karen Arenson, *W. Haywood Burns, 55, Dies; Law Dean and Rights Worker*, N.Y. TIMES (Apr. 4, 1996), <https://www.nytimes.com/1996/04/04/nyregion/w-haywood-burns-55-dies-law-dean-and-rights-worker.html#:~:text=He%20was%2055%20and%20lived,the%20law%20school%2C%20were%20riding.> [https://perma.cc/CBQ4-PGEK].

151. Rhonda Copelon was a lifelong member of the Board of Center for Constitutional Rights, founding board member of the National Economic and Social Initiative, an Advisory Board member of Human Rights Watch, Women's Rights Watch, and Legal Advisor to and founder of the Women's Caucus for Gender Justice. She litigated, filed amicus briefs, spoke publicly, penned editorials, testified before international human rights commissions, participated in press conferences, and used her considerable skills to assist many grassroots organizations. *Human Rights Champion Rhonda Copelon Dies: Broke New Ground to Open U.S. Federal*

Since the 1970s, when law schools began to incorporate clinical education into the curriculum,<sup>152</sup> clinicians have been the backbone of the law school's commitment to social justice work. Clinical law professors around the country produce significant scholarly work that reflects their scholar-activism.<sup>153</sup>

Scholar-activists not only produce scholarly articles but act as lawyers for poor people, immigrants, single parents, and the criminally accused and convicted; provide legal support for protests; write toolkits for movements; participate in campaigns; and speak out through opinion pieces, blogs, Twitter, and other social media.<sup>154</sup> They do this work both in and out of the classroom, often with students.<sup>155</sup> To cite just one example, the immigration clinicians and their students who flocked to airports to help advise Muslim immigrants banned from entering the United States represent scholar-activist work at its finest.<sup>156</sup>

A small, but growing, number of institutions explicitly embrace scholarly activism. City University of New York (CUNY) School of Law, a public and public interest law school, has an unequivocal social justice mission for students and

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Courts to Victims of International Human Rights Abuses, CUNY SCH. L. (May 7, 2010), <http://www1.cuny.edu/mu/law/2010/05/07/human-rights-champion-rhonda-copelon-dies-broke-new-ground-to-open-u-s-federal-courts-to-victims-of-international-human-rights-abuses/> [<https://perma.cc/F25R-8XQL>].

152. Suzanne Valdez Carey, *An Essay on the Evolution of Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509 (2003) (discussing funding for clinical education in the 1960s and 1970s); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Profession: A View from the First Floor*, 28 AKRON L. REV. 463, 465–71 (1995) (discussing the history of clinical education).

153. Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 CLINICAL L. REV. 775, 776–80 (2017) (describing efforts to infuse critical concepts in human rights and impact litigation in clinical contexts); Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 CLINICAL L. REV. 671, 675–77 (2017) (describing collaborations with Muslim community organizers in New York against FBI and NYPD surveillance and harassment in the post 9/11 period); Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201, 203–06 (2016) (arguing for progressive reform of legal education emphasizing justice and cogeneration of solutions by lawyers and communities on the ground); Sameer M. Ashar, *Fieldwork and the Political*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 288, 289–90 (Susan Bryant, Elliott S. Milstein & Ann C. Shallick eds., 2014) (arguing for clinical practice that aims to expose law students to the limits of law and the promise of alternative visions of socio-economic organization from grassroots organizers); Nadine Strossen, *Wearing Two Hats: Life as a Scholar and Activist*, 41 TULSA L. REV. 611 (2006); James Douglas, *The Distinction between Lawyers as Advocates and as Activists; And the Role of the Law School Dean in Facilitating the Justice Mission*, 40 CLEV. STATE L. REV. 405 (1992).

154. See Yamada, *supra* note 15, at 149–51 (describing media and other engagement in work with the community).

155. *Id.* at 137–43 (discussing work with students on workplace bullying).

156. See, e.g., *Lawsuits Related to Trump's Muslim Ban*, ACLU <https://www.aclu.org/other/lawsuits-related-trumps-muslim-ban> [<https://perma.cc/Z2HW-9SFD>] (last visited Apr. 1, 2022); Brief for Immigration Scholars as Amici Curiae Supporting Respondent at 1, *Department of Homeland Security v. Thuraissigiam*, No. 19-161, 2020 WL 402610 (U.S. Jan. 22, 2020) (seventy-nine immigration scholars were amici curiae before the U.S. Supreme Court); Press Release, Yale L. Sch., *YLS Clinic Challenges Trump's Order Banning Refugees From Entering the U.S.* (Jan. 28, 2017), <https://law.yale.edu/yls-today/news/yls-clinic-challenges-trumps-order-banning-refugees-entering-us> [<https://perma.cc/JN4H-J8AL>].

scholars.<sup>157</sup> Its “dual mission to practice law in the service of human needs and transform the teaching, learning, and practice of law to include those it has excluded, marginalized, and oppressed make it a singular institution.”<sup>158</sup> Today, the law school highlights the work of its faculty as “engaged” scholars.<sup>159</sup>

With such examples of robust scholar-activism throughout the academy, one might expect legal ethics scholars to get involved more readily. After all, legal ethics scholars teach and write about the morality of lawyer conduct and the role that lawyers play in law and culture. Professional responsibility is often the only required upper-level course—all law students must take it—and it is required because of its direct relation to practice. Alas, while they are willing to debate some of the issues we raise in this Essay, few legal ethics scholars have engaged beyond scholarship. This needs to change.

Key to scholar-activism is questioning the role of legal academics and lawyers writ large in perpetuating the status quo, including structural racism and inequality. As Professor Douglas Laycock—a religious liberty expert (and hardly a critical legal scholar)—has argued about Judge Learned Hand:

Scholars may contribute their knowledge or insight to public debate on important issues. They may contribute it in a form that is understandable to a policymaker, or even to the public, consistently with their duty of rigorous intellectual honesty. Scholars should not feel constrained to publish only turgid prose in obscure journals. They should not leave the public debate to those who feel no scruples whatever to conform their claims to the evidence.<sup>160</sup>

Amna Akbar, and others, including one of the co-authors of this Essay, argue that, likewise, legal pedagogy needs to be transformed to better understand social movements, racial inequality, and other societal issues often absent in the

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157. Chrissy Holman, *#1 Public Interest Law School Delivers the Next Generation of Social Justice Advocates to the Legal Profession*, CUNY SCH. L. (May 13, 2021), [https://www.law.cuny.edu/newsroom\\_post/commencement2021/](https://www.law.cuny.edu/newsroom_post/commencement2021/) [https://perma.cc/UP9L-EKSQ] (“The City University of New York School of Law is the nation’s premier public interest law school driven by a dual mission: to increase access to legal education and diversify the legal profession and to prepare its graduates to be social justice lawyers.”); CUNY SCH. OF L., <https://www.law.cuny.edu/> [https://perma.cc/CS6Y-MNJ7] (last visited Apr. 1, 2022) (“As the number one public interest law school in the nation, our mission is two-fold: we learn, teach, and practice law in the service of human needs and we transform the law so that it includes those it would otherwise exclude, marginalize, and oppress.”).

158. *About*, CUNY SCH. OF L., <https://www.law.cuny.edu/about/> [https://perma.cc/8CZA-Z7WM] (last visited Apr. 24, 2022).

159. *Our Faculty*, CUNY SCH. L., <https://www.law.cuny.edu/faculty/> [https://perma.cc/XN69-WPGH] (last visited Apr. 2, 2022) (“Engaged Scholarship Series Faculty members discuss their work on some of the most timely and vital topics in social justice, anti-racism, organizing, and advocacy in this series that debuts during our annual Alumni Week.”). It should be noted that two law professor members of Accountability New York are CUNY law professors.

160. Douglas Laycock, “*Nonpreferential*” *Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 877 (1986). See also Strossen, *supra* note 153, at 624 (discussing Laycock’s response to Learned Hand).

classroom.<sup>161</sup> Indeed, a growing number of law teachers expressly aim to infuse their classrooms with critical questioning of the status quo and with law as “inevitable or natural.”<sup>162</sup>

Activism by legal ethics scholars will enhance both their students’ educational experiences and their own scholarship and expertise. Law students are future professionals who will shape and affect our world by making and enforcing law, determining policy, defending people and organizations, and influencing others. If, returning to the Preamble to the *Model Rules*, lawyers are tasked with working towards a more just and equal society,<sup>163</sup> it is incumbent upon legal ethics scholars to teach our students to see themselves as part of this mission. Engagement with “real world” ethical and social justice causes can also positively influence scholarship, making it more timely, relevant, and credible.<sup>164</sup>

At the same time, we must be mindful of the limits of our role; while we can support those directly impacted in making change, we should not tell them what to do, nor expect to lead them. Instead, we should use the tools of lawyering and legal scholarship to value their expertise and experience. As Mari Matsuda has pointed out, scholars “should listen” to the voices of marginalized people, and “build coalitions with others,” since we “will never be [at] the center of any successful [change] movement.”<sup>165</sup>

## CONCLUSION

Legal ethicists are uniquely positioned to have a voice on important issues of the day. It is incumbent upon us to speak out. Though it takes courage—and

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161. See, e.g., Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 366–73 (2015) (studying social movements has the power to transform our teaching); see also Cynthia Godsoe, *Integrating Race into Family Law Courses*, 56 FAM. L.Q. (forthcoming 2022); Luz E. Herrera & Louise G. Trubek, *The Emerging Legal Architecture for Social Justice*, 44 N.Y.U. REV. L. & SOC. CHANGE 355 (2021).

162. One of the authors has presented on and is writing about this in the context of family law. Godsoe, *supra* note 161. Other examples include Angela Harris, a founding LPE scholar, who describes her aims as a teacher as related to those of her scholarship: to engage “in a critical discussion of markets, culture, state power, and the role of law in shaping all three.” Angela P. Harris, *Theorising Law and Political Economy: A Seminar on Law, Markets and Culture*, 14 GRIFFITH L. REV. 174, 174 (2005). See also William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7 (2007) (influential essay urging law students who are interested in social justice to remain committed to this goal); William P. Quigley, *A Letter to Social Justice Advocates: Thirteen Lessons Learned by Katrina Social Justice Advocates Looking Back Ten Years Later*, 61 LOY. L. REV. 623 (2015).

163. MODEL RULES pmb. ¶ 1 (“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.”).

164. Akbar, Asher & Simonson, *supra* note 18.

165. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324, 349 (1987); see also Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 4, 83 (2022) (arguing that lawyers and scholars “should allow the true change-agents, those in the system and those touched by it, to exercise their autonomy from the bottom up”); Lopez, *supra* note 121 (urging lawyers to learn about the lived experiences of their clients and to recognize clients’ and communities’ value in achieving justice and social change).



guts—to do what is required to make real change, this is no longer optional. In the aftermath of the Trump Administration, core democratic values remain under threat.<sup>166</sup> Persistent prosecutorial misconduct also undermines core values and respect for law. Upholding the rule of law and insisting on justice in this climate require vigilance and accountability. Legal ethics scholars have an urgent, essential role to play in this effort.

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166. *See generally* ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY* (2020) (examining the decline of democracy and rise of right-wing populism in the U.S. and elsewhere); MASHA GESSEN, *SURVIVING AUTOCRACY* (2020) (investigating the corrosion of American democracy); JASON STANLEY, *HOW FASCISM WORKS* (2020) (examining the rhetoric, propaganda, and allure of fascism here and abroad).