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A working-class profession: opportunism and diversity in U.S. law

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Abstract Experts of capitalist labor and economy have called white-collar professionals a "re-embedded market" inasmuch as they defy expectations that free-market economic life should be liberated from social and moral constraints. In the USA, lawyers, a historically middle-class community, have re-embedded their profession through robust ethics rules that prohibit opportunistic behavior. But, in recent years, they have seen increased opportunism by legal academics toward aspiring students eager for a chance at professional upward mobility. This shift has manifested in the increased recruitment of working-class students into low-value law schools struggling to fill their seats after the global economic downturn. As legal education grew more accessible to the working class, it grew increasingly detached from the morally grounded economic judgment that once characterized professionalism. From this example, I argue that the embeddedness of professional labor may be tied to socioeconomic class relations more than advanced knowledge and the informational asymmetries that entails.

Keywords Law · Profession · Market · Labor · Economy · Class

The learned professions have long posed a series of important problems for students of labor and market economy. On one hand, professions like law, medicine, and architecture participate in and support the broader market societies in which they are rooted. On the other hand, they defy many of the ambient norms of their surrounding economic environments. Modern market behavior has been described as "dis-embedded" from society because social and moral values are nowadays expected to support economic activity rather than vice versa, the way social life used to be. But whereas lay actors in market society are free to transact aggressively in their own best interests, professionals are expected to restrain their economic ambitions to serve higher moral and social ends.[1] Experts describe professionals in this way as socially "re-

[1]Medical doctors, for instance, are discouraged from denying life-saving care for failure to pay; architects are not to design unsafe structures even where clients are willing to pay for them.

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embedded" because they submit to social norms in this modern context of widely dis-embedded markets. A key purpose of this restraint, theorists have said, is to prevent experts from taking advantage of the vast information asymmetries they possess over a trusting public (Block 1990, 63).

But are these added moral constraints the result of professional knowledge alone or are they tied to the class aspirations of the learned professions? Recent evidence from professional law suggests the latter: once considered a uniformly "white-collar" guild, law has deliberately tried to broaden its ranks to more and more working-class aspirants. The stated reasons have been to promote "diversity" and improve "access to justice," but the unstated reality lately is that many law schools needed working-class applicants and matriculants to stay viable amid a massive applicant and enrollment slump. Among for-profit law schools in particular, this need evokes Rosa Luxembourg's thesis that capital must continually find new markets to satiate an aggressive appetite for growth (Luxembourg 1913).

For the past few years, my ethnographic research into low-ranked American law schools suggests a new development, one I will inelegantly call the "re-dis-embedding" of professional expertise from the broader market economy. This refers to a renewed rollback of the moral and social constrains to which legal professionalism has long submitted itself. Ethnographic evidence suggests key lawyers—specifically legal academics and law school administrators—may be again comfortable taking advantage of the information asymmetries just mentioned, and that there is an increasing pride among the professional community for embracing unfettered economic exchange over and above social attachments. Elsewhere (Tejani 2017a, b), I have suggested this "neoliberal capture" of professional law is indicative of a global trend toward reimagining legal institutions and norms as mere guardrails for economic activity. This paper argues that this shift in legal professional conduct, from an economic position subordinate to social and moral constraints to a position once-again liberated from them, has been fostered by an underlying shift in the class character of the legal profession from a patrician white-collar community toward, increasingly, a "working-class profession." Indexing the sequential nature of embedded, dis-embedded, and re-embedded relations between economy and society, it calls this new legal professional stance "re-dis-embedded."

The first section of this piece describes theories of market society that pertain to the exceptional nature of learned professions. In particular, it explains why professions occupy an unusual place in the moral economy of contemporary market societies. The next section describes the traditional class hierarchy of the legal profession. It suggests generally and not surprisingly that law has historically been a bastion for the middle and upper socioeconomic classes in U.S. society. Section 3 then describes recent changes in this predicament; it describes new overtures in professional law toward marginalized groups—in particular working-class aspirants—under a new ideological impetus to remedy the so-called access to justice problem. And finally, the fourth section analyzes the moral implications of this shift toward recruiting socioeconomic outsiders through programs that makes use of information asymmetries, and it reasserts the underlying point that class "diversity" seems to correlate with a rollback of the added moral constraints that made the legal profession resist unfettered marketization for so long previously. This is not to suggest working-class aspirants themselves exert force on legal professional ethics—by most accounts they are not yet broadly in institutional positions to do so. Rather, it is to suggest that those long in leadership roles may excuse themselves from ethical questions by pointing to more and more socioeconomically diverse students and attorneys in their midst.

In using variations of the term embedded, this research taps a deep tradition in the study of markets, morals, and society. The political scientist John Ruggie first used "embedded" to describe the kind of liberalism international relations experts sought to cultivate among non-aligned states sympathetic toward socialism near the end of the Cold War (1982). David Harvey has since used it to describe the tempered social welfare politics of the 1930s New Deal and the 1960s Great Society eras (2005, 11–12). Recent theorists have viewed contemporary moral weaknesses in the justice system, corporate governance, and bioethics as a result of a dramatic swing in the opposite direction, toward the "marketization of everything" (Sandel 2012). Karl Polanyi wrote about this already in 1944 as the "dis-embeddedness" of markets from society. The "great transformation" of premodern societies into modern market economies, he said, entailed a removal of market transactions (and transactionalism in general) from social and thus moral constraints. This upended an existing slow but stable capitalist order and would trigger the global economic crisis of the early 1930s (Fraser 2013). Detached from the social bedrock on which it sat, market economy began to erode critical institutions like family and community that had furnished the labor market on which it was based (Fraser 2014, 12). Others (Machado 2011; Vancura 2011) today point out that Polanyi's "embeddedness" was more nuanced than many have recognized, and must be separated into anthropological and political-economic, or micro- and macro-level meanings. Zelizer (2011) has meanwhile argued that the Polanyian belief in a discontinuity between market and society was itself questionable.[2] Her "multiple markets" paradigm, in which the market lies within the "interaction of cultural, structural, and economic factors" shares much with those who propose re-embedded markets as a solution—particularly after the 2009 financial crisis.[3] Prior to the 2016 elections, theorists on the left emboldened by the strength of Democratic politics in the USA and the recent rise of Occupy Wall Street and Black Lives Matter uprisings argued for a new global "protective counter movement" (Block 2008) to finally reign in the economic behavior that led to the Great Recession.

Ethnographers have approached this tension between markets and morals from a variety of key angles. Karen Ho's now seminal (2009) study of Wall-Street culture in early 2000s captured the minute moral negotiations made by actors comprising the financial markets. That work supports observations by Jarrett Zigon (2015) that market actors often work to "charitably negotiate" moral breakdowns in the world they themselves have created. Applied to the legal profession and its inaugural moment—the law school experience—moral anthropology in Elizabeth Mertz' groundbreaking (2007) study on legal education classroom discourse shows the specific mechanisms by which professors teach students to cultivate a moral posture safely distanced from the lived experience of disputants.

Adjacent to that work sits an even deeper literature on professions, class, and upward mobility. Classic social theorists saw the importance of a growing professional-managerial class in Western modernity. Whereas Marx missed this development in his earlier and later phases (Vincent 1993), Weber (1978) saw the advent of modern law and its administration as a

[2] "[T]he concept of embeddedness became economic sociology's icon in its simplest versions, embeddedness described the way that price setting, asset transfers, and other standard economic activities (presumed to operate internally according the precepts of neoclassical economics) responded to their location within varied social settings. These insights launched a broad program of inquiry. But they also perpetuated the fallacies of nothing-but economic reductionism on one side and of separate spheres on the other" (Zelizer 2011, 5–6)

[3] Although, arguably markets cannot be *re*-embedded if they were not dis-embedded in the first place, the difference is one between asserting "multiple markets" and embracing them as they already exist. In both cases, the solution is in the ultimate re-attainment of embeddedness, hence "re-embedded."

key component of the wider social rationalization supportive of capitalism. C. Wright Mills (1951) later honed in on the "white-collar" professions as a key development of high-capitalist Western societies and especially indicative of the moral reordering they were experiencing.[4] Ethnographic work on class (Walley 2013) inspired by this tradition has seen increased activity since the occupy movement brought class politics back to the streets (Juris and Razsa 2012). This interest again reenergized after the failed predictions of the 2016 presidential elections cycle spurred new interest in qualitative political research and in working-class culture in particular (Edwards et al., 2017).

Research into the political economy of the legal profession has dealt with the class aspirations and positionality of attorneys since at least the 1970s. Early work interrogated the concept of "professionalism" as an object of substantial, collective effort rather than a mere status flowing from advanced knowledge (Larson 1977). Abel (1989) later situated the rise of the American legal profession in wider social theoretical frameworks showing most notably that lawyers have evolved to serve as both structural and functional bulwarks for capitalist economy.

My work on class politics in professional law weaves these strands together. But whereas the tendency might be (and has been elsewhere for me) to query how the social structure of the legal profession affects class politics, this piece is about how a class restructuring has affected the moral economy of the legal profession.

Why are professions re-embedded?

Theorists have long pointed to the specificity of professionalism that distinguishes it from both the market society in general and the labor market in particular. On one hand, professions retain vestiges of a pre-market society in which social status was more tied to moral virtue, and more detached from economic superiority.[5] On the other hand, the modern-day professions developed their distinguishing features in precisely the moment that Western societies shifted toward a market orientation. "Modern professions," writes Magali Larson, "made themselves into special and valued kinds of occupations during the "great transformation" which changed the structure and character of European societies and their overseas offshoots. The transformation was dominated by the reorganization of economy and society around the market" (xvi).

In 1939, Talcott Parsons wrote that the exceptional treatment of professions as authoritative depends upon "specificity of function," or a kind of limited specialized knowledge in a particular field. But, in the years since Parsons said this, professionals have become revered in areas of knowledge farther and farther outside their technical expertise. Medical doctors have become respected New Age philosophers,[6] and licensed attorneys have become popular commentators on society and culture.[7] Recent commentators have identified the growth of this

[4] For Mills, this was a recasting of old class structure: "What has happened since then cannot be adequately described as the destruction of the nineteenth-century world; by now, the outlines of a new society have arisen around us, a society anchored in institutions the nineteenth century did not know" (1951, xx).

[5] "The older professions, notably law and medicine, actually did retain significant vestiges of their precapitalist past. And all professions and professionalizing occupations energetically sought to present themselves as communities within the anomic mass society—altruistic where others were egoistic, self-regulating, counterweights to an increasingly monolithic state." (Abel 1989, 16)

[6] See Deepak Chopra, The Seven Spiritual Laws of Success: A Practical Guide to the Fulfillment of Your Dreams, (San Rafael, CA: New World Library/Amber-Allen Publishing, 1994).

[7] See Jeffrey Toobin, American Heiress: The Wild Saga of the Kidnapping, Crimes and Trial of Patty Hearst (New York: Doubleday, 2016).

non-specificity—the willingness of even highly trained intellectuals to weigh in on matters outside their training—as a primary culprit in the "death of expertise" (Nichols 2017).

Meanwhile, Fred Block asserts that the professions are exceptional in a different sense more particular to market society. This is a context in which the moral constraints that maintain relative social harmony and cohesion apply less and less to economic activity. It is one in which markets are "dis-embedded." In a world of increasingly dis-embedded markets, Block describes the professions as "re-embedded." They are effectively specialized pools of advanced labor that agree to self-governance regimes that restrain their economic activity through added constraints formalized as "professional ethics." The need for such constraints is particularly pronounced: learned professions have access to information their clients do not, and this raises the specter of fraud. As Block (1990, 63) explains, "Professionalism can be understood as a social means to reduce opportunism in markets where information inequalities are particularly significant."

That this distinction turns on the relationship toward information is most significant. Information has been described by economic theorists as essential to the "proper functioning" of market economy. Only with an even distribution of information, for example, do the price and demand curves reach healthy equilibrium—a position macro-economists have idealized for centuries and one that market fundamentalists hail as the crowning achievement of laissez-faire approaches. In Law and Economics, jurisprudence about such sociocultural issues as the "right to privacy" (see e.g., Posner 1983, 233) and land use rights (see e.g., Coase 1960) celebrate the role of free information in a market society.

The information inequality Block refers to should be further spelled out as having two subtly different modalities. Professional experts possess elite, technical knowledge about some esoteric field somewhat independent of social life. This modality is internal to the professional expertise itself. In medicine, this information is about the human body; the level of depth to this information has changed over time (with advances in surgery, microscopy, genetics, etc.) but the object of it and the elite nature of this have remained constant. In law, the information is about legal doctrine and legal process. Arguments abound regarding which of these fields is more esoteric. On one hand, laws are pure abstractions and cannot be "found" in nature, whereas everyone has a body and can test some of its functions. On the other hand, written laws can (since the advent of literacy, publishing, and archives) be found by those who read, and bodily functions can only be understood with intimate knowledge of life sciences like chemistry, anatomy, and physiology. In both medicine and law, the ability to locate information has increased with technology. So far, the possibility of professional displacement however seems more real in law than in medicine. Experts of the legal profession of late often talk about AI or artificial intelligence lawyering as the new frontier in legal research and advising, but a future in which legal advice can come from an algorithm still feels remote to most (Lohr 2017). For now, lay persons may find and know certain basics about legal doctrine for instance the rule that open and sustained claims on portions of a neighbor's property may lead to acquisition of that property,[8] but they usually still need a lawyer to locate local authorities (e.g., cases and statutes) and navigate the appropriate courts or administrative processes.

In another sense, meanwhile, the information disparity professions enjoy relates to non-technical information about their field. This modality is external to the professional expertise itself, but it is still tightly connected to that expertise and known primarily by

[8] Known as the doctrine of "adverse possession"

its possessors. This includes things like "how many competing practitioners are there?" or "does a doctor or lawyer's educational degree affiliation really matter?" These are much like the market parameters in other commercial fields to which vendors may be privy but consumers are not. And yet, knowledge of the market in professional services is probably more esoteric than in traditional business fields such as groceries, gas stations, or toy stores to name a few. The latter advertise conspicuously and want their commercial terms widely known (e.g., discount prices, loyalty programs), whereas attorneys, for reasons described below, must downplay these commercial indicators.

It is important at this juncture to make another important distinction between lawyers and doctors on one hand and the "white-collar" workers written of presciently by C. Wright Mills. Although lawyers form an important chapter in Mills' (1951) famous study, they are for him only a subset of the larger white-collar man rising in early 1950s America. For him, white-collar refers in general to the non-industrial, service, and information worker of Wall Street, Madison Avenue, and the booming insurance sector. These fedora and gray flannel suit-wearing, turnpike commuting professionals were "white collar" in the generic sense, but they were not "learned professionals" of the kind I am concerned with in this article. Indeed, Mills (1951, xvi) saw the alienated social conditions of those white-collar workers close in status to that of industrial age manufacturing laborers. He also saw the corporate white-collar worker as morally adrift.

> [A]ny order of belief has left them morally defenseless as individuals and politically impotent as a group. Newly created in a harsh time of creation, white-collar man has no culture to lean upon except the contents of a mass society that has shaped him and seeks to manipulate him to its alien ends. For security's sake, he must strain to attach himself somewhere, but no communities or organizations seem to be thoroughly his (xvi).

This suggests that talk of embeddedness ought to make a distinction among white-collar professionals between the so-called learned professions and all others. Learned professions, as they sound, require advanced higher education and (or) apprenticeship en route to mastery.[9] They imply a sharp knowledge disparity between practitioners and clients. And they usually come with additional certification and licensing requirements such that their practitioners are held to a common standard—what lawyers call a "standard of care" or an objective standard of "reasonable" expert judgment. It is this group, the learned professionals, to which the arguments weighed in this paper apply. Block's point, that the learned professions are re-embedded as a way to minimize market opportunism made possible by information inequity, matters only where such inequity is palpable.

How does law re-embed itself?

Focusing specifically on law, the manner in which the profession re-embeds itself within social norms is palpable and self-reflexive. Indeed, the legal profession offers an especially fertile

[9] It was once common for the U.S. lawyers to obtain their training solely through apprenticeship. In some states, this is still allowed. See Morant (2016, 248).

ground to study this; law provides the formal norm structure on which most economic rights and transfers are secured, and the profession comprises agents of state sovereign authority "practicing" law among the lay public. Attorneys are characterized not only by theoretical and practical mastery of legal norms, but also by purportedly strict adherence to a deep set of ethical codes that govern claims to and deployments of legal expertise. These "rules of professional responsibility" apply to everything from attorney-client romances to lawyer comingling of client funds to active solicitation or what is often called "ambulance chasing." These ethics rules are meant to protect the social standing of the legal profession in a world in which pure economic rationality would justify a wide array of profit-seeking behaviors that could tarnish the reputation of lawyers in their communities.

The rules of professional conduct were a relatively late development in the history of the U.S. legal profession. The American Bar Association (ABA) only began developing them in 1908, and it added social and moral responsibilities later (see e.g., Tejani 2017a, 10n34). The first draft of "model code" appeared in that year as the "Canons of Professional Ethics" and this remained policy until 1969. The canons included many of the key precepts of attorney ethics, such as the limitation on advertising, that remain visible today (Geraghty 2016). In 1969, this code was revised and renamed; however, the Watergate scandal implicating a number of high level attorneys prompted another revision in the 1970s leading to the 1983 adoption of the Model Rules of Professional Conduct, a code that remains largely in effect today. Perhaps the most significant artifact of the Watergate era revisions was an ABA Formal Opinion, a kind of official interpretation issued by the professional organization, saying that all lawyers would be governed in their conduct by the rules of professional responsibility, "whether acting in his professional capacity or otherwise" (2016). This interpretation on its face is a stark commentary on Talcott Parsons' "specificity of function" argument: so pervasive is attorney influence on society outside of formal legal practice that the re-embedding of the profession should extend far beyond technical legal work into civic participation more generally.

Several of the key model rules have already been mentioned. One is about attorney advertising. The rule as it appeared in the 1908 Canons articulated this norm clearly:

> It is unprofessional to solicit professional employment by circulars, advertisements through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements . . . . offend the traditions and lower the tone of our profession and are reprehensible (quoted in Geraghty 2016).

A variant of this rule made its way into the subsequent iterations of the code, but it has been substantially limited by legal challenges culminating in 1977's Bates v. Arizona in which the Supreme Court allowed advertising on constitutional "free speech" grounds. Another is an ongoing limitation on "solicitation" or in-person recruitment of clients. Model rule 7.3 still says it is unethical to solicit cases directly unless there is a prior relationship, especially when any duress may be involved. In concrete terms, this was designed especially to prohibit lawyers from taking advantage of client emotional, financial, and legal vulnerabilities. A third is rule 1.5 about attorney fees. This requires foremost that any fees charged not be "unreasonable" so that this standard can be fleshed out among State Bar organizations and professional custom. And finally, the fourth most conspicuous model rule is about assistance to the weak. Rule 6.1 says, "Every lawyer has a professional responsibility to provide legal services to those unable to pay," meaning, in short, there is a duty to the public to help those in need. This is

premised in part on the adversarial nature of the U.S. civil and criminal justice where the most zealous advocacy on both sides of a dispute is necessary to reaching the "truth."

While just a sampling of the key precepts laid out in the Model Rules historically and today, these give a clear sense that lawyers are meant to be embedded in the moral environment in which they practice and live. This comes with both positive and negative norms (e.g., "do this, not that"), and they come about only after Western economies had moved to an industrial market society.[10] For this reason, they represent, at least formally, a re-embedding of the legal profession in society. But does this work?

There may be good reason to think it does not. Formal expectations of morally upright conduct create the sense among many practitioners that these are mere requirements for the privilege to practice—"hoops to jump through" opening the door to economic benefits of professional life. Similar concerns are raised within the civil justice system when experts debate, for example, a potential bystander "duty to rescue" accident victims. While there may be a moral duty to help your neighbor, many say, elevating this to a legal requirement could actually undermine the moral significance of "doing the right thing." Nevertheless, lawyers do embrace their role as moral guardians and role models. Nowhere is this more visible than in the Skadden Fellowship program—a public interest fellowship award offered by one of the world's largest and most labor-extracting corporate law firms. As Abel points out, "All law is inescapably two-faced. It reproduces and justifies existing inequalities and injustices; yet it also embodies ideals and offers mechanisms through which they can be pursued. Lawyers display the same moral ambiguity."[11]

But the moral re-embedding of dense legal ethics rules may work in the symbolic sense of creating the appearances, the ceremony, and the public perception that lawyers are a "gentlemanly" learned community. From the moment of entry into law school in the U.S., students are told to watch their personal reputations, treat each other respectfully, and avoid run-ins with the law because they are cultivating a professional citizenship and will be representatives of the Bar. Law schools are far more formal than liberal arts university campuses at both undergraduate and graduate levels. And the codes governing academic integrity in law schools are more draconian and severe than in more general academic settings. All of this is designed—and expected by the ABA accrediting body—to portray the socialization of lawyers as genteel and impervious to market opportunism.

On the outside, law graduates enter a profession governed by the Model Rules. But, the enforcement of professional ethics is often criticized. The reason is that for violations of the code lawyers are subject only to professional discipline, and this is meted out by ethics review boards in each State Bar. The boards are all lawyers themselves, so this is in effect a form of self-policing. Critics have argued that the number of ethics citations issued annually would be much larger if the task were delegated to an independent body separate and apart from the profession itself. However, for historical reasons relating to the independence of the justice system from government interference, U.S. associations have long resisted the idea of state "oversight" more common in other industries. Many believe that this self-regulating function limits the efficacy of the rules of professional ethics. I suggest that this, in turn, must limit the degree to which those rules secure the "re-embeddedness" of law as a profession in society.

[10] Larson 1977, xvi
[11] Abel 1989, vii

Academic law

Academic law and lawyering practice are very different socially and institutionally. Socially, law professors are generally afforded great respect and deference as experts on law, policy, and matters further afield. Practicing lawyers—both the plaintiff's and defense bars—are meanwhile looked upon often with more suspicion. Institutionally, the academic environment is in theory designed to move slowly, reward dissent, and nurture the next generation of professionals. Law practice, meanwhile, is by design faster paced, rigidly hierarchical, and Darwinist—rewarding success more than protecting and learning from failure. Legal academics have furthermore achieved and safeguarded their "autonomy" from the practicing bar on the belief that they can better legal procedures and rules if they are liberated to propose and debate ideas unbeholden to the limitations of the established order. The relationship between legal education and legal profession has therefore been a "vexed" one.

Meanwhile, the limitations posed by self-regulation are even more pronounced in academic law. The history of academic law in the USA is a fascinating one relating to British colonization, the rise of the modern university, and urbanization and industrial growth. This history is treated well elsewhere,[12] but a few points are worth singling out. U.S. legal education is largely a professional, graduate degree. Though there are undergraduate pre-law degrees and programs available, none are prerequisite to graduate law study and none certify students to sit for a State Bar examination. The Bar exam comes at the end of the 3-year graduate study, and but for a few remaining states in which "diploma privilege" allows in-state law graduates to waive the exam, Bar passage is the last and most important hurdle in attaining a license to practice. Because the 3-year J.D. degree is their prerequisite, U.S. law schools exercise considerable power over the formation of the profession. Furthermore, although law professors enjoy the privileges of academic faculty—such as security of position—they also are frequently cited or called upon to submit briefs in active court cases. Many maintain part-time law practices, and many serve as public intellectuals on matters of corporate law, social justice, constitutional politics, and the like.

Law professors also maintain a near-monopoly over regulation of their industry. Most are members of a State Bar, but their institutions must also be accredited by the ABA[13] in order to receive federal student loan funds from student enrollees. The ABA's accreditation council is comprised of law faculty, administrators, and a small number of judges—all lawyers by training. The ABA presently has approved some 204 law schools for national accreditation, and all of these are eligible to receive federal loans through the Department of Education (ED) as a result.[14] The ED has, in effect, delegated all accrediting authority to the ABA council.

[12] For this history, see Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (Chapel Hill, N.C.: University of North Carolina Press, 1987); Brian Tamanaha, Failing Law Schools (Chicago: University of Chicago Press, 2012); and Riaz Tejani, Law Mart: Justice Access and For-Profit Law Schools (Stanford, CA: Stanford University Press, 2017).

[13] More specifically, they must be accredited by the ABA Council of the Section of Legal Education and Admissions to the Bar, a body that remains separate governance procedures from the main ABA body as mandated by the Department of Education for accrediting powers.

[14] One accredited school recently lost this eligibility due to misreporting of outcome data, then saw its eligibility restored with the transition to a new Education Secretary, then failed to file paperwork to operate in its State and failed to obtain an extension, and then closed permanently (Olson 2017). See Elizabeth Olson 2017 https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html.

Class hierarchy has long been a fixture in the U.S. legal profession. In the historical period before the rise of university-based law schools, aspiring lawyers effectively had three pathways to going into law. They could apprentice with a practicing attorney in their community. The aspirant could travel to England to study at the British "Inns of Court"—a kind of abbreviated law school study with examination and apprentice requirements of its own. Or they could enroll at one of a handful of pre-ABA for-profit law schools opened by successful law firms on the East Coast explicitly to train lawyers in exchange for money. All three pathways selected high socioeconomic status as a requirement for entry. The first required personal social connections to a professional lawyer, the second large financial sums to make the journey, and the third sizeable tuition money. These resulted early on in a legal profession comprised largely of upper-class practitioners.

Nevertheless, some working-class aspirants did make it into the profession. The most notable example is the U.S. President Abraham Lincoln, who prior to public service held a private law practice in Springfield, Illinois, after teaching himself to read and write, and "reading law" from books borrowed from attorney John Todd Stuart around 1835. Although his family had owned land at various times in his childhood, Lincoln entered the law with few connections, substantial debt, and almost no prior formal education. The law became, for him, an immediate pathway to higher social status and professional income allowing him to marry Stuart's cousin Mary Todd 7 years later.

By the mid-twentieth century, stories like Lincoln's had gained traction among the U.S. working-class—a group made increasingly literate by the Horace Mann-inspired "common schools" movement toward universal, free, and secular education. By 1918, every state in the U.S. required all children to attend some form of schooling (Graham 1974). The young adult novels of Horatio Alger popularizing the myth of the rags to riches, hardworking teenager circulated among this newly literate population. And the professions became increasingly viewed as a real-world proving ground where merit and hard work could overcome class standing and birthright. Writing in 1951, C. Wright Mills commented that this aspiration to upward mobility made any kind of middle position in the new corporate America a dream to working-class kids.

> [F]rom below, for two generations sons and daughters of the poor have looked forward eagerly to becoming even 'mere' clerks. Parents have sacrificed to have even one child finish high school, business school, or college so that he could be the assistant to the executive, do the filing, type the letter, teach school, work in the government office, do something requiring technical skills: hold a white-collar job. In serious literature white-collar images are often subjects for lamentation; in popular writing they are often targets of aspiration. (xiii).

The myth of upward mobility, for Mills, blinded aspirants to the perpetual alienation of even the white-collar class.

These aspirations boosted the popularity of the U.S. law schools and created growing demand for legal education. The existing schools in the first half of the twentieth century were those that had either existed since the post-Revolutionary period (when study in England had been cut off), such as Harvard and Yale, or those that had emerged in the wake of westward expansion such as Indiana, Case Western, and the University of Illinois.[15] In all cases, the established schools sought to maintain or increase the exclusivity from their early history. In this period, it was still difficult for Jewish and Catholic applicants to gain admission to the established schools, so a new crop of

[15] See American Bar Association (2017).

"outsider" schools emerged catering to these groups and, in doing so, they further democratized the profession by class. These schools included Loyola and DePaul in Chicago (1925), St. Johns and Brooklyn in New York (1937), St. Mary's in Texas (1948), and Gonzaga in Washington State (1951), among many others. Many of the new law schools in this group also opened their admissions to non-traditional working students who took classes by night so as to maintain manufacturing and service jobs by day; the point was that these aspirants could not afford 3 years of tuition, room, and board without maintaining income the way their counterparts at Harvard and Yale could. The rise of the latter-day law schools more open to ethnoracial diversity was thus also, to some extent, intended as a class equalizer.

But this function was limited by the hiring patterns of the profession itself. A comprehensive study of the Chicago Bar reported that the city saw graduates from the "elite" law programs in its midst most likely to work in large "white shoe" firms catering to corporate clients and large trade unions, while the new arrivals open to more Catholic, Jewish, and non-traditional students led to careers in small firms and solo practice (Heinz and Lauman 1994). The authors described this as a "hemispheric" model of the profession, and this term has since taken hold (Garth 2013; Barton 2015; Tejani 2017b) to describe a kind of de facto professional dualism in contrast to the formal dualism found in several countries carrying on the tradition of English common law's barrister/solicitor divide. It resulted in a bimodal distribution for lawyer salaries (Tamanaha 2012; Barton 2015) and the chasm between the two "modes" in reported income only widened in the years since the initial study (Heinz and Nelson, 2005).

American law schools also themselves have come to partake of this dualism. There are numerous success stories not unlike the Horatio Alger tales in early U.S. popular culture. The author J.D. Vance (2016a), famous for his bestseller Hillbilly Elegy, has written candidly of his matriculation at Yale Law School after growing up poor in the Rust Belt (2016b). But Vance's is a cautionary story about feeling out of place immediately upon arrival in New Haven. That is because the "top" law schools in the USA remain overwhelmingly filled with upper-class, or high-socioeconomic status (SES) students. This was shown in a 2011 study by Richard Sander of UCLA, who reported that only 5% of students in the best law programs were in the bottom half of the U.S. national average income (Sander 2011). It was then further supported in a 2013 qualitative study by a team of Yale Law students who found attention and sensitivity to differences of class sorely lacking at the elite institution (2013).

But while class exclusion and insensitivity grew at the nation's elite law schools, they seemed to have improved at the "bottom" ranked programs. 2009 saw the global financial collapse triggering the "Great Recession" and massive layoffs in the legal services sector. This led in turn to a great application and enrollment decline across most of the 200-some ABA accredited law schools. Admissions selection criteria had to be relaxed at most schools to keep enrollments high enough for operating budgets, but the top law schools, more jealous of rankings, remained guarded in their flexibility toward things like grade point average (GPA) and law school admissions test scores (LSAT). Therefore, the law schools in the lower half of the national rankings hierarchy were most receptive to lower indicators, and absorbed most of the students in these categories.

Re-dis-embeddedness and the new fourth tier

Meanwhile, for structural reasons students with the lowest indicators tended to be those of the lowest socioeconomic status. These reasons included unequal access to strong primary and

secondary education, unequal access to financial support to pay for preparatory classes like The Princeton Review and Kaplan, and unequal access to clear information about the costs and benefits of law as a course for graduate study and as a profession. There was after the Great Recession, therefore, a substantial nexus between law school rank and socioeconomic diversity.

This resembled the early twentieth century period just described: it was to the newest and most institutionally precarious institutions that working-class applicants suddenly had greater access. Because of their place in the national rankings, these programs have collectively been referred to as the law school "Fourth Tier."

Several features of the Fourth Tier are worth emphasizing. First, its schools tend to be the youngest institutionally. Many were born in just the 5 to 15 years before the "crisis." In many cases, they were conceived by well-meaning legal educators and public servants wishing to make law school more available to prospective students in areas where no institution already existed. In other cases, they were developed alongside extant law programs because the high ranking of those institutions precluded most local applicants from gaining legal expertise, and because the outlying communities badly needed it. In all cases, the openings were justified by market research showing high "demand" for legal education due to exclusivity or inaccessibility of existing programs. The University of North Texas (UNT) in Dallas is a good example of this. Long home to the Southern Methodist University (SMU) Dedman School of Law, Dallas had no other law program in its midst, and certainly none that would accept students most likely to be from working-class backgrounds. Ranked by the U.S. News and World Report at 46 as of 2017, and typically considered the second best law school in the state of Texas, SMU has to remain protective of its rankings criteria including GPA and LSAT scores. UNT, meanwhile, opened with the explicit purpose of increasing access to the profession and thus access to justice by being the most affordable tuition in the state. It managed to keep its tuition at $15,000 and achieved full accreditation in 2017.

On the other end of the Fourth Tier spectrum are five for-profit law schools.[16] Two of these are owned by a global private equity firm that had founded them at the height of a boom in for-profit higher education, law school enrollments, and private equity investment capital during the early 2000s. I conducted ethnographic observations of one such program between 2011 and 2014—amid the onset and height of the post-recession "crisis" in legal education. Marketing its program specifically to minority and working-class (and working) students, it charged premium law school tuitions on a model that promised 20% returns to outside capital investors. Amid the enrollment crisis beginning in 2012, school principals mandated a series of drastic curricular, calendar, and teaching changes to effectively "water down" the service it was offering its aspiring lawyers. It in effect granted professional access while offering low-value and higher risk to disproportionate numbers of working-class students just hoping to improve their careers and lives.

Upon reports that outcomes like bar passage and graduate income numbers were reportedly low or misreported, the regulating body seemed to embrace the notion that the disciplinary forces of the market would take care of poor performers. Law school reform critics advocated for this market-based approach on the outside. But on the inside, students and faculty in these schools were eager to see the institutions sanctioned for bad behavior. The students, disproportionately working-class in origin, had been accepting of their place in these schools because

[16] Until August 2017, there were six but one abruptly closed after receiving sanctions for outcome reporting and upon failing to timely files state licensing forms. See Barber (2017).

it was in their view the best shot at upward mobility. To find out that this mobility was more limited than they had been told was, for students and many faculty alike, disheartening. But the regulatory scrutiny many hoped for never came. During my own ethnographic observations, school administration reported that it was told by insiders at the ABA Council that its approach to accreditation would be to "let the market decide."

In several cases, students in this position filed lawsuits against their programs. The period from 2012 to 2016 saw a wave of class action filings against primarily Fourth Tier law schools. These generally asserted claims of misrepresentation or fraud—arguing that the outcome data related to job attainment had been misreported or misinterpreted in school marketing materials.

One particular case against Thomas Jefferson School of Law in San Diego made headlines as being the first such claim to make it to trial (Feldman 2016). The female graduate argued that her Thomas Jefferson degree resulted in less lucrative job prospects than what she had been told, or that would justify the amount of tuition the school had been charging. She ultimately lost this case in a decision affirming the longstanding view that schools are not responsible for the job market, or student aptitude for it.

Misrepresentation and fraud cases against law schools are a good site at which to probe the relationship between law, justice, and ethics. On the one hand, no plaintiff or class of student plaintiffs has prevailed in a civil claim for damages resulting from law school fraud. On the other hand, the mere widespread assertion of such fraud is itself significant. The civil claim requires a series of elements to be proven by a "preponderance of the evidence," including the core element of scienter or knowledge of the wrongdoing. This element is intended to ensure that the defendants (e.g., law schools or their principals) are not simply publicizing faulty information, but that they are doing so with knowledge that it will deceive aspiring students. The schools would likely know of any methodological tricks that go into reporting Bar, employment, or income data—for instance self-reporting bias—but the students would not.

It was precisely this form of deception that, Block said, professions have been designed to mitigate by re-embedding themselves into thick ethical norms—often codified—that seem to reinforce public fiduciary expectations. The information asymmetry that generally accompanies expertise and its relationship to the public was bound to be the source for temptation. This temptation is of an economic nature: individual actors within market society are generally encouraged and expected to act in their own or familial self-interest. They are merely putting into practice the longstanding economic assumption that individuals are "utility maximizers," that they make decisions with intent to extract as much enjoyment out of resources as possible. It might be said that students are doing this when they choose to undertake the difficult 3 years of law study at high cost, because they know that this will benefit them in the long run; recent economic analysis have attempted to bolster this belief (Simkovic and McIntyre 2013a, 2013b). Further, institutions of higher education are increasingly accepted as commercial players.[17] Any growth in the economic opportunism of law schools should thus be viewed in the context of the wider marketization of Western academic life. The appeal of this new development

[17] "Universities are no longer corporations in the medieval sense; they are corporations in the capitalist sense, bureaucratic institutions organized around the pursuit of profit, even though the "profit" in question is, nowadays, slightly more broadly conceived. They are most certainly not institutions dedicated to the pursuit of knowledge and understanding as a value in itself. In that sense, I really think it can be said that the university, in the original conception of the term, is dead" (Graeber 2014, 78).

to low-ranked (and low performing) law schools is clear. Although a strictly Darwinist view of markets and marketization might lead to an assumption that low-performers would resist market discipline, the opposite may be true. Lightening of regulatory oversight allows weaker players to assert alternative metrics for performance in the first place. Hence, the very large and unselective Thomas Cooley Law School publishes its own alternative rankings in which it appears highly rated. Is it not then only fair that their transactional counterparts—the law school institutions themselves—behave as value maximizers as well?

According to Block, it would not be. Law schools are essentially professional organizations grouping together primarily licensed attorneys. Most faculty members, both full and part-time, are lawyers but so too are most administrators.[18] Law schools are, in effect, professional collectives acting in an educational capacity. Does this mean that they are exempt from the true "professional" re-embedding constraints placed on practicing attorneys?

According to both the ABA and the legal theorist Brian Tamanaha, it does not. The ABA's Formal Opinion 366 says clearly that the rules of professional ethics apply to lawyers whether or not they are acting in their legal practice. The norms transcend the formal practice of law to govern the behavior of attorneys moving and acting throughout society. Tamanaha (2012) has said cogently that this applies to law faculty and administrations, and that governance practices among ABA-accredited law schools in the years before and during the Great Recession were probably in violation of several of the Model Rules. In that period, faculty elected to raise their own salaries roughly 40%, raise tuition far in excess of the rate of inflation, and offer selective information regarding graduate outcomes to advance in the increasingly important national rankings (2012).

These trends signal a countermovement against the professional re-embeddedness Block highlights (1990). From within the legal academy, it became more than evident by the time Tamanaha was writing in his influential polemic Failing Law Schools (2012) that some of the key social and moral expectations placed upon lawyer integrity in legal practice were not being observed in legal education. Indeed, they were almost deliberately and conspicuously flouted. As Tamanaha himself predicted in the book, his thesis was met with substantial criticism. Some asserted that he misrepresented the historical and financial data on law school inequality by failing to contextualize the specifics that make law schools look so bad.[19] Origins aside, this countermovement amounts to what I refer to as a professional re-dis-embeddedness.

Although this practical rollback of professional ethical constraints predates the Great Recession and therefore the law school enrollment crisis that began around 2012, it too mutated at this juncture. Law schools were untroubled by the global economic collapse when it set in around 2010. This is because law schools historically benefit from economic contractions as the high unemployment they bring tends to send more adults to law school looking to better their careers, achieve greater security amid decreased "opportunity costs."[20] This time was different, and the application pool for the U.S. law school began drying up around 2012 reaching a historic low in 2015. From its peak of

[18] Occasionally, business offices are run by MBA experts rather than legal professionals, but this is by far the minority.

[19] Sheppard, 2013; Symkovic and McIntyre, 2013a.

[20] This refers to the cost of giving up full-time employment to attend school; it becomes neutralized when there is no such employment.

100,600 applicants in 2004, the pool fell to 54,000 by 2015 (LSAC 2017). This number slightly increased by less than 2000 applicants in 2016.[21]

By most accounts, this drop would have been worse but for affirmative steps on the part of most law schools, and especially those near the bottom of the rankings. These schools were hit hardest by the enrollment slump; whereas highly ranked programs could and did admit fewer students, ones in the Fourth Tier which tended to be newer or detached from large universities were limited in this capacity. Because students usually prefer to attend the most highly ranked program well-positioned schools could poach enrollees from the Fourth Tier programs or, under rules that did not require reporting transfer student admissions numbers, they admitted large classes of second year transfers. At the same time, the applicant downturn was not uniform: it seemed to result from a disproportionate loss of traditional, high indicator students—those most likely to come from upper and middle-class backgrounds (Wiesmann, 2012). Although school admissions and academic affair offices lamented this loss of the "best and brightest" the trend proved to be a great opportunity for working-class students to gain entry to better law schools than they historically might have. Understanding that class fill rates now depended on these students, law schools marketed themselves increasingly to the working class with new advertising strategies placing signs on buses and billboards—places they had long avoided as unseemly.

The rate of class inequality, in turn, did decline among ABA schools in this period. This change mirrored a similar one in racial diversity; the enrollment slump proved an opportunity for more minority students to gain admission. But, in both cases, this increase in diversity was not the same as a veritable decrease in inequality. Socioeconomic and ethno-racial minorities gained access primarily to the lowest ranked institutions (Taylor 2015). While this did have important sociocultural implications related to the prestige and hierarchy attached to schooling and ranking in the legal profession, it even more seriously resulted in the greatest economic risks being born by working-class students. Measured in terms of cost-benefit, risk-utility, or debt-to-income, newly enfranchised working-class students finally invited to join a legal profession that had remained out of reach did so by paying a premium in economic risk, and sometimes in tuition itself.

Moreover, many (though certainly not all) of these students would graduate in the lower ranks of their law school classes for reasons unrelated to raw intelligence or "natural" ability. Unfamiliar with the kinds of tasks needed early in law school, and in need of greater academic support throughout, these students graduated with lower GPAs leading in turn to difficulties finding the most well-paying jobs available to some of their classmates. For those able to pass the bar, practicing law would mean small or solo firm work, the kind that required the most hustling for cases and professional name recognition. Studies like the After the J.D.—a survey by members of the American Bar Foundation—have long found high satisfaction among attorneys in this lower hemisphere of professional practice; however, there can be little doubt that these forms of practice require more grunt work and come without the high prestige symbols like attire, fine dining, and lavish social events characteristic of large firm employment. This hemisphere might then properly be labeled the "working-class profession."

[21] Law School Admissions Council, "Historic ABA End-Of-Year Summary: Applicants, Admitted Applicants & Applications," Accessed August 31, 2017. https://www.lsac.org/lsacresources/data/aba-eoy/archive.

This is the class of lawyers populating the lower tier of the bimodal income distribution (e.g., $55,000 per year versus $140,000), it is one in which the poorest debt-to-income numbers are found, and it appears to be growing in size annually.

Conclusion

This class reorientation in legal education and profession, and the accompanying embrace of unfettered economic behavior among legal academics, suggests something new about the social embeddedness of professional labor. The exceptional nature of the professions Block writes of may have as much to do with socioeconomic class exclusivity as it does with the fiduciary role of professional expertise.

Whereas the legal profession was once highly exclusive regarding the class standing of its aspirants, this exclusivity has partially but significantly changed. With the growth of newly accredited law schools thanks to a regulatory deference to market discipline, there have been many more low-ranked law schools eager to recruit and embrace the working-class law student. But, most notably, as the profession has recruited more of these students from modest means into its ranks both at the educational and the professional practice levels, it has migrated further and further from the norms of professional ethics in administering its law schools.

As the white-collar legal profession has opened itself up to "working-class" aspirants, it has had fewer objections to eschewing the ethical norms that made it a "re-embedded" community within market society. As this occurred, legal academic professionals seemed to take greater advantage of the informational inequality present between themselves and their students. Indeed, the more working-class aspirants wanted to join the profession by attending law school, the greater this inequality seemed to become. Comments from Richard Abel distinguishing inequality in law and business in 1989 foreshadowed this development:

> Although inequality always requires justification, entrepreneurs seem to view success within the "free" market as self-legitimating, whereas professionals, who visibly control their markets, feel compelled to offer additional explanations. (Abel 1989, 26)

For the many new "Fourth Tier" law schools offering weaker outcomes at high student cost since the 1990s, accessibility to working-class aspirants became precisely one such explanation. It was exactly this development that allowed law schools—particularly those near the bottom—to preserve minimum enrollments at the same time that "rational choice" actors with greater indicators and greater access to information chose to stay away.

These remarks highlight two correlations. The first is between the rise of socioeconomic diversity and thus a "working-class profession" on one hand and the decline of socially re-embedded behavior among the academic branch of the legal profession on the other. The second is more generally between the embeddedness of professions and the class character of their membership. The latter opens up many more lines of questioning for further research, and perhaps comparative study across multiple professional fields including medicine, accounting, and so forth. If professions are re-embedded as genteel expert communities only insofar as their members tend to be exclusively from the upper classes, then their exceptional nature has less to do with knowledge specialization than it does with reified class mystique.

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Compliance with ethical standards

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