

Lawyers as "The Great Social Evil"

Gowri Ramachandran

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Gowri Ramachandran, *Lawyers as "The Great Social Evil"*, 62 DePaul L. Rev. 479 (2013)
Available at: <https://via.library.depaul.edu/law-review/vol62/iss2/11>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

LAWYERS AS “THE GREAT SOCIAL EVIL”

*Gowri Ramachandran**

INTRODUCTION

This Article explores what we can learn from drawing analogies and contrasts between some of the responses to the current “crisis in legal education” and some of the responses to the so-called “great social evil” of prostitution during the Victorian era. By drawing these analogies and contrasts, I hope to elucidate how we may be witnessing a reinstated form of the “litigation panic” that Marc Galanter identified. Like the discourse of the litigation panic, the crisis in legal education discourse continues to often devalue lawyering and access to law’s benefits, especially for the less well off, even as it appears to revolve around sympathy for the plight of individual lawyers and law students “seduced” into taking on unmanageable education debt. The discourse may not appear anti-lawyer on its face, yet it is anti-law. Similarly, some feminist responses to prostitution during the Victorian era were highly sympathetic to individual prostitutes, who were depicted as having been “seduced” into the profession by men of means, but even as these responses may have seemed “pro-prostitute,” they were ultimately anti-prostitution. Moreover, just as the seduction narrative distracted feminist reform efforts from the kind of broader social changes that would have helped individual prostitutes and other working-class people, the seduction narrative today may distract us from making changes that would actually help individual lawyers and increase access to law’s benefits.

What do the litigation panic and the costs of legal education have to do with access to justice? And how could the Victorian response to prostitution, identified at the time as “the great social evil,” inform our discourse? In his previous work, Galanter identified what he

* Professor of Law, Southwestern Law School; J.D., Yale Law School; M.A., Harvard University; B.A., Yale College. Thank you to Rick Abel, Tom Baker, Anne Bloom, Michael Boucai, Michael Dorff, Bryant Garth, Danni Hart, Marc Galanter, Angela Riley, Kelly Strader, Brian Tamanaha, and other participants at the 18th Annual Clifford Symposium for their extremely helpful suggestions. Thanks especially are due to the dedicated editors of the *DePaul Law Review*.

called a "litigation panic,"¹ by which he seems to have meant a descriptively inaccurate belief that a "hypertrophy" of litigation was leading to moral and economic decline.² He also identified, in conjunction with the panic, a vilification of lawyers as, among other things, the agents of this moral and economic decline.³ Some might call the term "panic" overly derogatory or exaggerated; others might call it too kind in that it implies irrationality rather than a calculated political strategy. By creating a panic over litigation, the rhetorical groundwork was laid for a reduction in lawyering itself, as well as actions by parties that involve lawyers. Vilifying both lawyers and claimants was a step towards minimizing lawyering and, ultimately, law in the form of public accountability. If law's enforcement through litigation were minimized, then its crucial role in the United States—creating public accountability for one's actions—would be diminished.

Galanter once described access to justice as the "access of individuals to the benefits of legality."⁴ He further described the major drivers of that access: (1) the legal services; (2) the rules; (3) the tribunals in which disputes are resolved and the advocates who represent the parties in those tribunals; and (4) the capacity of the parties.⁵ The litigation panic operated to make changes on the first and fourth drivers of access to justice—the legal services themselves, and the capacity of the parties—that would likely *reduce* access to justice. Would the services exist? How much of them? What kinds of legal services would be performed? Would there be services for business or injured individuals? Would the parties feel proud of their legal claims for compensation (for injuries like discrimination or product injuries), or would they feel unworthy and dependent? Would they recognize law as something that is available to them as one means of getting their agendas for life accomplished? The litigation panic served as an argument for reducing both services and the parties' capacities.

Today, we have something quite different from the litigation panic going on, namely the crisis over the cost of legal education. But the current crisis over the cost of legal education and our response to it has everything to do with access to justice, just as Galanter's work on the litigation panic and lawyer jokes has much to do with access to

1. Marc Galanter, *Beyond the Litigation Panic*, in 37 *ACAD. OF POLITICAL SCI., NEW DIRECTIONS IN LIABILITY LAW* 18 (Walter Olson ed., 1988).

2. *See id.*

3. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 *GA. L. REV.* 633, 634 (1994).

4. Marc Galanter, *The Duty Not to Deliver Legal Services*, 30 *U. MIAMI L. REV.* 929, 932 (1976).

5. *See id.* at 932-36.

justice. By comparing the current crisis over law school tuition to the responses to prostitution of the Victorian era, I seek to highlight a particular danger—the danger that even rhetoric about this issue that is sympathetic to lawyers will become a reinstated form of the attempt to eradicate, or at least severely minimize, lawyers themselves, especially those who perform legal services for the “have-nots.” Not all participants in the current discourse surrounding the cost of legal education are anti-access to justice. But by comparing and contrasting the current crisis in legal education to the perception of and responses to “the great social evil” of prostitution, we may gain insights that help us avoid a discourse that reinstates the rhetoric of litigation panic, which Galanter so usefully pointed out was tied to a concerted effort to limit access to justice for the “have-nots.”

In Part II of this Article, I will define the so-called “moral panics” and “sex panics” identified by critical and queer theorists, to which I compare Galanter’s use of the term “litigation panic.” Whether or not “panic” is the best term, it will become clear that the phenomenon highlighted by Galanter shares many of the common attributes of so-called moral panics. Indeed, we will see analogies between lawyers, who were the prime scapegoats of this litigation panic (or, one might even say, “law panic”), and prostitutes.

A comparison between the litigation panic and the panic over prostitution during the Victorian era will highlight some of the very unique features of the litigation panic. While the litigation panic was ultimately a libertarian panic, the typical moral panic has been a driver to regulation and control, including not only conservative and religious, but also progressive and egalitarian forms of regulation. Indeed, the Victorian sex panic was driven not only by conservative evangelicals, but also by progressive feminists and social egalitarians who sought to save working-class prostitutes from what they imagined were middle-class and wealthy seducers who corrupted and abandoned them. In contrast, the litigation panic seemed to be a driver toward deregulation and decreased public accountability.

Part III of this Article highlights a surprising parallel between Victorian responses to, and deeply inaccurate beliefs about, “the great social evil,” which were often sympathetic to the prostitutes themselves, and certain strands of the current discourse around rising law school tuition and the inability of graduates to pay back their loans. Most who have commented on this as a crisis are sympathetic to lawyers, who, in their narrative, are seduced into taking on disastrous levels of debt. But just as the Victorian reformers who pitied individual prostitutes still sought to eradicate or at least minimize the occur-

rence of prostitution, some of the strands of the current response to rising law school tuition still promote the reduction of lawyers and lawyering, and thereby a reduction in access to justice. Many of these reformers are more like those who sought to place prostitutes (at least the saveable ones) into the penitentiary, than the pro-sex feminists and queer activists who came decades later and sought to make life better for prostitutes without attempting to eradicate or even shrink the profession. Those who see rising tuition as a crisis of access to justice are quite different from those who see a crisis of too many lawyers.

Part IV of this Article proposes that we avoid the trap of reform rhetoric that, however well-intentioned, may fail to provide viable alternatives for upward mobility and, moreover, may contribute to a reduction in access to justice for working-class and poor people. We should avoid responding to rising law school costs with proposals to reduce lawyering, especially lawyering focused on the “have-nots.” Much of the pity for recent and future law students is correctly placed, just as it was correct to view the life of most prostitutes in the Victorian era as dangerous and full of suffering. Moreover, that pity is often motivated by a sincere concern for the well-being of those who seek to enter the profession, as it surely was for many of the Victorian reformers, especially feminists of the time. But the impulse to eradicate or at least contain lawyers by “saving” them from seduction into the profession reinstantiates the goals of those who spread the original litigation panic, which were to limit access to justice and, ultimately, public accountability through law. Instead, we need far more quality empiricism on what motivates students to take the gamble of high debt with mediocre chances of paying it off comfortably. We also need innovative responses that simultaneously provide those students with good alternatives, which might bring the “benefits of legality”⁶ to more than just a wealthy few.

II. THE LITIGATION PANIC IN COMPARISON TO MORAL PANICS

Stanley Cohen coined the term “moral panics” in 1972 to describe a situation in which a “condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests.”⁷ After a fair amount of critique, however, other writers have

6. Galanter, *supra* note 4, at 932.

7. Gilbert Herdt, *Introduction: Moral Panics, Sexual Rights, and Cultural Anger*, in *MORAL PANICS, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS* 1, 3 (Gilbert Herdt ed., 2009) [hereinafter *MORAL PANICS, SEX PANICS*] (quoting STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2002)).

refined the idea to make it more specific and useful, distinguishing it from phenomena such as "moral shock," "great fear," "moral campaigns," and "cultural anger."⁸ A subcategory of moral panics has also been identified: sexual panics.⁹ A number of historical accounts of these sex panics have been produced, such as Gayle Rubin's famous study of American moral panics against deviant sexual practices and groups.¹⁰

While "panic" may not be the most accurate term for every instance of this phenomenon, this Article identifies common attributes in these panics, especially sex panics, many of which are also shared by Galanter's "litigation panic." In fact, Galanter identified an entire strand of lawyer jokes and anti-lawyer rhetoric in *Lowering the Bar* that compares lawyers to prostitutes.¹¹

The so-called moral or sex panics typically include "processes of representing and demonizing scapegoats in popular culture and media . . . undermining cherished sociality and morality," via a "'slippery slope' of moral decay."¹² For instance, a moral panic over masturbation in Britain in the nineteenth century involved a public narrative in which "masturbation [led] to homosexuality or degeneracy for boys, or . . . loss of virginity, lesbianism, prostitution, or nymphomania for girls."¹³ "[T]he slippery slope is not only a private fate, but also a social disaster . . ."¹⁴ Panics also often include "displacing responsibility for security and well-being from the self and community to real or imagined others on the margins of society."¹⁵

The vilification of lawyers identified by Galanter, as well as the claim that litigation is leading to or caused by a degradation in norms of "sturdy self-reliance" in favor of "contentious self-centeredness,"¹⁶ fit this trend well. For example, in his Harvard commencement speech, Alexander Solzhenitsyn stated that "[w]henver the tissue of

8. *Id.* at 4–5.

9. *Id.* at 5.

10. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 267–75 (Carole S. Vance ed., 1984).

11. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES & LEGAL CULTURE* 181 (2005); cf. Florynce Kennedy, *The Whorehouse Theory of Law*, in LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW ORDER AND THE COURTS 81, 81–82 (Robert Lefcourt ed., 1971).

12. Herdt, *supra* note 7, at 7–9.

13. *Id.* at 8.

14. *Id.* (quoting Alan Hunt, *The Great Masturbation Panic and the Discourses of Moral Regulation in Nineteenth- and Early Twentieth-Century Britain*, 8 J. HIST. SEX. 575, 598 (1998)) (internal quotation marks omitted).

15. *Id.* at 9.

16. See Marc Galanter, Presidential Address, *The Legal Malaise; Or, Justice Observed*, 19 LAW & SOC'Y REV. 537, 540–42 (1985).

life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses."¹⁷ Galanter also identified a pattern of narratives in which litigation "dampens enterprise, distracts managers, makes doctors practice defensive medicine, increases costs of products, keeps useful products off the market, and so on."¹⁸ Additionally, he articulated the most common anti-lawyer themes, namely, "that lawyers are (1) corrupters of discourse; (2) fomenters of strife; (3) betrayers of trust; or (4) economic predators."¹⁹

Importantly, the process of demonization in so-called sex panics is often driven by and reflected in empirically false claims—sensational and "hyperbolic media coverage that both reflects and produces sex panics."²⁰ For instance, the risks of transmission of HIV among gay persons and through casual contact were exaggerated, "promoting the view of HIV/AIDS as just retribution . . . for the sexual depravity produced by the sexual revolution in the 1960s and 1970s."²¹ "[D]istortion, lies, or various forms of exaggeration" are used.²² The pattern often involves "the facts of the [salient] story [being] inflated, suggesting that a moral code has been broken that threatens societal progress and agreed-on norms. . . . [T]he framing and public understanding of a situation or phenomenon can change without the reality of an event or change in trend."²³

The litigation panic described by Galanter similarly follows this model. Galanter usefully demonstrated the falsity of claims about numbers of lawyers, and the lack of nuance in claims about rising amounts of litigation.²⁴ Galanter also described the use of sensational but relatively rare stories involving "bizarre claims, immense jury ver-

17. See Marc Galanter, *supra* note 1, at 27 (quoting SOLZHENITSYN AT HARVARD: THE ADDRESS, TWELVE EARLY RESPONSES AND SIX LATER REFLECTIONS 7–8 (Ronald Berman ed., 1980)).

18. Galanter, *supra* note 1, at 29.

19. Galanter, *supra* note 3.

20. Janice M. Irvine, *Transient Feelings: Sex Panics and the Politics of Emotions*, in MORAL PANICS, SEX PANICS, *supra* note 7, at 234, 240.

21. Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: Reproductive Rights and Sexuality Education During the Bush Years*, in MORAL PANICS, SEX PANICS, *supra* note 7, at 47, 71.

22. Saskia Eleonora Wieringa, *Postcolonial Amnesia: Sexual Moral Panics, Memory, and Imperial Power*, in MORAL PANICS, SEX PANICS, *supra* note 7, at 205, 209.

23. Cathy J. Cohen, *Black Sexuality, Indigenous Moral Panics, and Respectability: From Bill Cosby to the Down Low*, in MORAL PANICS, SEX PANICS, *supra* note 7, at 104, 119.

24. Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 285, 299–303 (2002).

dicts, undeserved windfalls, the engorgement of contingency fee lawyers, the financial devastation of defendants, and other horrors."²⁵

The typical panic, however, represents a drive toward regulation. "[T]he folk devils must . . . be identified, incarcerated, exiled, or destroyed."²⁶ As an alternative to destruction, they are often regulated and controlled, as Michel Foucault famously described. The panics "inflame policing and control," while also having the effect of causing sexual practices to proliferate and spread, in a "Foucaultian paradox."²⁷ In contrast, Galanter's litigation panic was driven, he argued, by a reaction to the "heightening of public accountability in the courts," which was an unwelcome "counter to deregulation in the executive branch of government."²⁸ Indeed, in 2002 he called all of this "the turn against law," and suggested the libertarian impulse behind the panic.²⁹ Thus, the litigation panic is unique in that it is a panic that seemed as though it would result in *deregulation*, rather than an increase in regulation and control.

The litigation panic is an anti-law panic. It is libertarian in thrust, in contrast to how we imagine typical panics, which are pro-regulation. For instance, one of the classic panics—the Victorian panic over prostitution—was promoted in part by deeply progressive people, not only by religious conservatives in Britain.³⁰ Some reformers even saw prostitution as a necessary practice and gave up on trying to eradicate it; instead, they sought only to contain it.³¹

III. THE CRISIS IN LEGAL EDUCATION AND REINSTITUTION OF THE LITIGATION PANIC

Despite the sharp contrast between the litigation panic as a libertarian panic, and the classic moral and sex panics as impulses towards regulation, we may be witnessing a new version of the anti-law and lawyer theme, reinstated in strands of the discourse around the cost of legal education outpacing the earning capacity of lawyers. If this rhetoric represents a reinstatement of the anti-lawyer theme, it now better fits the classic model because it appears as a complicated reformist impulse for regulation and control and sympathizes with the

25. Galanter, *supra* note 1, at 29.

26. Herdt, *supra* note 7, at 1, 12.

27. *Id.* at 13.

28. Galanter, *supra* note 1, at 30.

29. See Galanter, *supra* note 24, at 291–99.

30. See PAULA BARTLEY, PROSTITUTION: PREVENTION AND REFORM IN ENGLAND, 1860–1914, at 110–11 (June Purvis ed., 2000); see also JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE 6–7 (1980).

31. See JAMES GREENWOOD, THE SEVEN CURSES OF LONDON 271–74 (1869).

lawyer in the same way that many reformists sympathized with prostitutes during the Victorian era, even as they deemed the practice of prostitution deeply immoral and degrading to society.

Although prostitution was deemed “the great social evil” during the Victorian era, it was not always the prostitutes who were scapegoated in the panic. Conservative evangelical reformers often “regarded prostitutes as a source of pollution and a constant temptation to middle-class sons.”³² In contrast, other reformers, including feminists, scapegoated middle- and upper-class men, who, in their narrative, seduced young women and then abandoned them to a degraded life of prostitution, sometimes after getting them pregnant. For instance, James Greenwood, in *The Seven Curses of London*, claimed that

in countless cases . . . these poor wretches did not in the original “make their bed” If we could discover the truth, we might get at the real bed-makers—the villainous conjurers of couches of roses that were so speedily to turn to thorns and briars—in the seducer and the base deserter.³³

Historian Judith Walkowitz describes how a critique of evangelical writers “was shaped in response to popular indignation at the sexual exploitation of working-class women by men of a superior class.”³⁴ Paula Bartley describes how the “seduction myth” was driven by the need of “those involved in the rescue and reform of prostitutes” to “convince themselves, and those whom they asked for financial support, that prostitutes were worth saving.” She argues that despite the existence of more “sophisticated” explanations, “there was a gradual, and somewhat imperceptible, shift from holding prostitutes responsible for prostitution to thinking of them as the victims of masculine sexual profligacy and social injustice.”

The frequency of this narrative was deeply exaggerated, as Walkowitz and Bartley have demonstrated.³⁵ Even at the time, “attitudes were not always coherent—at one and the same time women were viewed as victims, sinners and sexual contaminators,”³⁶ but the stereotype of the “fallen woman” was prevalent, despite the fact that most prostitutes had their sexual initiation with working-class men

32. WALKOWITZ, *supra* note 30, at 32–34.

33. GREENWOOD, *supra* note 31, at 324–27.

34. *See id.* at 34–35; *see also* BARTLEY, *supra* note 30, at 4–5.

35. WALKOWITZ, *supra* note 30, at 18 (“The stereotyped sequence of girls seduced, pregnant, and abandoned to the streets fitted only a small minority of women who ultimately moved into prostitution.”); BARTLEY, *supra* note 30, at 5 (“[S]uch beliefs were not borne out by the evidence as most prostitutes were not seduced by men of the upper classes. . . . On the contrary, many had been ‘led astray’ by other girls who had persuaded them to sell their bodies for money.”).

36. BARTLEY, *supra* note 30, at 34.

and most had working-class men as their clients.³⁷ Moreover, the reasons for choosing to work as a prostitute were complex and multi-factored, including a lack of good jobs for women in particular urban locations.³⁸ Nevertheless, reformers who sympathized with the plight of the prostitute still saw prostitution as a dangerous moral problem—one to be controlled and limited.

The reformers' goal was to regulate, control, reform, and ultimately integrate prostitutes into proper social life.³⁹ There were at least two camps, the "repealers" and "extensionists." Repealers sought to repeal the gender-discriminatory Contagious Diseases Acts, which required prostitutes to register and submit to periodic internal examinations to check for disease while letting their male clients go unpunished. Extensionists sought to extend such regulations. Yet, "both sides undoubtedly shared a similar rhetoric of reform and similar perspectives on class, the social order, and respectable social behavior."⁴⁰ Indeed, one prominent extensionist "demonstrated a greater intellectual curiosity and personal concern for the women's welfare than other regulationists," while a prominent repealer, "despite his feminist pretensions . . . expressed his personal repugnance for prostitutes."⁴¹ "On both sides, enlightened social views coexisted

37. "Police returns available on the various ranks of prostitutes challenge the conventional assumptions . . . that the demand for prostitution largely emanated from middle-class men. . . . [T]he returns available indicate that a substantial majority of prostitutes catered to a working-class clientele." WALKOWITZ, *supra* note 30, at 23. This was true even in "certain centers with a substantial residential and transient middle class, like Edinburg and London." *Id.*

38. *Id.* ("For poor prostitutes, street-walking was a highly casual and seasonal occupation—much like the alternative legitimate occupations open to the class of women who moved into prostitution."). Walkowitz noted:

The relatively high concentration of prostitutes in ports and pleasure towns could have reflected the uneven sex ratios, the limited employment opportunities open to women, as well as the presence of a transient male population that formed a ready clientele for the prostitutes. Likewise, the relatively lower concentration of prostitutes in textile and hardware areas probably reflected the particular character of working-class social life there: in those areas stable employment for men and (in the case of textile centers) women may have permitted the continuation of traditional courting practices, so that premarital sexuality with steady lovers culminated in marriage.

Id. at 22. Walkowitz also noted that differential rates of prostitution, in light of the "limited geographic mobility of prostitutes," indicated that "women's move into prostitution was [largely] a response to local conditions of the urban job market." *Id.*

39. See BARTLEY, *supra* note 30, at 25 ("Prostitution, it was believed, would be eliminated if there were no prostitutes. Reformers therefore founded a variety of institutions . . . to rehabilitate prostitutes and make them respectable once more. . . . Reform was entirely about working-class women being saved by their middle-class 'superiors' . . .").

40. WALKOWITZ, *supra* note 30, at 83.

41. *Id.* at 82–84.

with class prejudice and, in some cases, a fear of and hostility toward female sexuality.”⁴²

But when reform efforts such as the encouraged use of penitentiaries failed to eradicate prostitution, the social purity movement arose, seeking to eliminate the cause of prostitution, which was deemed to be immorality in men.⁴³ Repressive moves to control homosexuality, public houses, and the like were made, and greater powers were given to the police to shut down brothels.⁴⁴ While many elements of the social purity movement placed thoroughgoing blame on men and sought to regulate them, as opposed to prostitutes, the goal was still the elimination of prostitution. In this way, the movement may not have been anti-prostitute, but it was definitely anti-prostitution.

Today, the anti-lawyer theme has transformed into one that might not appear anti-lawyer on its face, just as many feminist reformers of the Victorian era were not anti-prostitute as a facial matter. They *pitied* prostitutes, while simultaneously being anti-prostitution. Similarly, today, the popular media tells a narrative that does not vilify new law graduates, but pities them.⁴⁵ In this narrative, many of them have been seduced into the profession by those of a higher class (academics and administrators), then abandoned to live a degraded life without any opportunity to repay the debt they have incurred.⁴⁶

42. *Id.* at 85.

43. Bartley noted: “When it became evident that both the reform and other preventive movements had failed to end prostitution, social purity workers tried to restrain prostitutes and to create a moral climate in which prostitution would inevitably disappear. . . . Social purists, . . . believed that men, not women, were responsible for prostitution. . . .” BARTLEY, *supra* note 30, at 15–16.

44. *Id.* at 84 (describing how the Criminal Law Amendment Act of 1885 “gave the police greater powers to prosecute streetwalkers and brothel-keepers” and “criminalised homosexual acts between men,” even as it raised the age of consent).

45. See, e.g., David Segal, *Law School Economics, Ka-Ching!*, N.Y. TIMES, July 17, 2011, at 1 (“[B]orrowing \$150,000 or more is now a vastly riskier proposition given the scarcity of Big Law jobs. Of course, that scarcity has not been priced into the cost of law school. How come? In part, it is because schools have managed to convey the impression that those jobs aren’t very scarce.”).

46. See *id.*

N.Y.L.S. is ranked in the bottom third of all law schools in the country, but with tuition and fees now set at \$47,800 a year, it charges more than Harvard. It increased the size of the class that arrived in the fall of 2009 by an astounding 30[%], even as hiring in the legal profession imploded. It reported in the most recent US News & World Report rankings that the median starting salary of its graduates was the same as for those of the best schools in the nation—even though most of its graduates, in fact, find work at less than half that amount.

Id. In an article implying that the high cost of tuition is due to professors writing scholarship (though it is not at all clear that this is the case), David Segal quoted Steven R. Smith, Dean of California Western School of Law: “It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are generally borrowing the money to do this and they

But while this narrative may not appear anti-lawyer in the way that the litigation panic and lawyer jokes identified by Galanter were anti-lawyer, some versions may indeed be a re-instantiation of an anti-*lawyering* theme. The goal may be fewer lawyers, even though individual lawyers are not blamed.⁴⁷ The narrative aims to reduce the problem of “too many lawyers, not enough jobs,” just as some of the reformers of the Victorian era sought to reduce the profession of prostitution, even as they sympathized with the plight of individual prostitutes.

This is not to say that many law graduates are not to be pitied, just as it would be incorrect to say that prostitutes during the Victorian era were leading a fulfilling life free from coercive pressures, danger, poor health, and extreme financial hardship. But the fact that the current narrative demonstrates sympathy for individual lawyers does not negate the dangerous impulse to eradicate or minimize the profession—an impulse that ultimately diminishes access to justice.

The point of this analogy is not to mock those who are concerned with the problem of the rising costs of law school by associating them with prudes of the Victorian era. The point is to be wary of responding to law school debt—a real problem—with solutions that rely on empirically unverified assumptions about why people take on that debt. During the Victorian reform era, prostitutes did not lead happy lives as a general matter, but the narrative that they were seduced into prostitution by middle class men was based on flawed empirical evidence and assumptions.

This obsession with seduction by middle-class men not only meant the application of penitentiary-based reform solutions that were doomed to fail, it also served as a distraction for middle-class reformers from class and gender inequities that they could have been trying to solve instead:

“[A]part from a few Quakers who urged reformers to concentrate on improving women’s wages, and those who recommended women join the Women’s Protective and Provident League or a trade union to campaign for better pay, few solutions were offered to end such exploitation by those involved in the reform of prostitutes.”⁴⁸

Lack of good work and opportunities for working-class women in certain areas of England was a serious problem, and the solution

are the least able of all those in the profession to pay for it.” David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at 1.

47. Cf. Katherine Mangan, *Law Schools Mull Whether They Are Churning Out Too Many Lawyers*, CHRON. HIGHER EDUC., July 9, 2009, <http://chronicle.com/article/Law-Schools-Ask-Whether-They/47364>.

48. BARTLEY, *supra* note 30, at 8 (citation omitted).

could have been a reduction in the number of women who entered the prostitution profession, or an increase in their power and options, perhaps helping prostitution become a less coercive, more fulfilling, and safer endeavor for many prostitutes. Instead, the reformers did not have much success in eradicating prostitution through penitentiaries, and the repressive elements of the social purity movement came to fruition. The primary achievement of this movement was likely the grant of police powers that harmed prostitutes.

IV. CONCLUSION: A PRO-LAW RESPONSE TO THE CRISIS IN LEGAL EDUCATION

We should be wary of making the same mistakes or giving too much credence to those who do. Why do students actually choose to take on law school debt? Is it really because they all have unrealistic visions of working in biglaw and raking in cash, and all we need to do to save them from a miserable fate is to disclose the numbers to them more clearly? First, disclosure statutes seem to have failed miserably in the home mortgage arena, so why think they will work here?⁴⁹ And second, what if failure to understand the choice one is making is not the primary driver of the choice? What if the primary driver is that students do not have other good options, just as working-class women in sectors of England did not have other good options?⁵⁰ The choice may be coerced, not by fraud, but rather by limited options. The cost of undergraduate, graduate, and professional education has skyrocketed, not just the cost of law school. Many college graduates struggle to get a good job to help them pay off their loans. And yet, how many might we say would have been better off during the economic downturn, and in the long run, without a college degree?

Moreover, what if some prospective students knowingly and willingly play what is essentially a lottery when they go to graduate and professional school because they would rather buy the chance of a better life for their children, even if it is likely to come at the cost of

49. Cf. Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 35, 47–53 (2011) (explaining why even when disclosure statutes that pre-dated the financial crisis of 2008 were complied with, it was unlikely that rational decisions would result).

50. Another possibility is that rising tuition is simply a reflection of market competition: Competition amongst law schools for the “best” students induces them not to charge lower prices, a strategy that fails, but rather to attract students by offering more and better services, which cost money. See Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL. REV. (forthcoming 2013) (citing Caroline Hoxby’s work and concluding that this type of process drives rising undergraduate tuition, and raising the possibility that a parallel process explains rising law school tuition).

crushing debt, than to have no chance at all? What if law school is viewed as a risk worth taking on behalf of one's children? Is banning the sale of the lottery ticket or voluntarily going out of the ticket sale business all we can do in this situation? Instead, what if we tried to provide options that are *better* than a lottery ticket? The latter is much harder than the former, but it is the more socially responsible course of action.

If limited alternatives for a chance at a fulfilling life are what allow law schools to charge ever more shocking tuition amounts, then the response is not to try to convince students not to come to law school—that will not work because it does nothing to alter the limited supply of attractive alternatives. The students will continue to come. Nor is the response to force students not to attend law school by shutting down schools or reducing loan eligibility. That would simply relegate them to some other career or school choice that is no better. This is not to say that disclosure is a bad thing, but an obsession with law schools as seducers may turn out to be a massive distraction, if not an empirically inaccurate description of why people want to go to law school.

In addition, if, unlike the Victorian social purity movement and other reformers, we do not think that lawyering and law is actually "the great social evil," then why not find ways to make the profession actually work to fulfill socially valuable roles and find ways to reduce the cost of the education so that more people can fill those roles? Reactions to law school debt that propose reducing the number of law schools, either directly or indirectly, seek to contain the legal profession, and ultimately law, in contrast to proposals to reduce the cost of legal education so that more graduates can actually afford to perform the work of lawyering. The latter strand of the discourse values law and believes that lawyers are potential agents for distributing access to its benefits, while the former strand devalues law and the work of lawyers unless it is meeting a market demand driven by wealthy organizations.

The proposal that law schools that do not produce lawyers who can pay back massive levels of debt through their legal employment should shut down would mean that law will fail, even more than it already does, to serve those who cannot pay, or can only pay a little. Galanter pointed out that the litigation panic and anti-lawyering themes of the 1980s left out the problem of access to justice for those who are not elite. Similarly, panic over law school debt leaves out this problem, as long as the response is to simply match the supply of lawyers exclusively to the needs of wealthy clients.

For those who care about access to justice, real reforms to the delivery of legal services, including a wide imagination about what legal services are, is in order. This could mean innovations in providing traditional legal education but at a lower cost, innovations in legal education that prepare students for different kinds of work, American Bar Association accreditation reform that would permit more innovation, a call for licensing authorities to narrow the definition of what constitutes unauthorized practice of law, and the reformation of licensing exams to open access to the profession while better predicting the ability to perform the multitude of tasks real lawyers can do.

Legal education is facing a crisis, and there is a moral imperative to do something about it. But nobody who truly cares about opportunity for the working class or the poor should be satisfied with minimally improved disclosure and the closing down of all but a few elite law schools.