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Law and Illiberalism: A Sociolegal Review and Research Road Map

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Abstract

In democratic backsliding, threats to democracy no longer come from abrupt, radical ruptures promoted by those who are close to, but outside of, state power. They come from those who win elections and, while in office, systematically undermine accountability institutions and minority rights. Zakaria used the term illiberal democracies to describe these regimes where popularly elected governments are divorced from political freedoms and accountability. Law is not absent from these stories. Rising autocrats seek to make their moves legal and use law—as a weapon or as a shield—in attempts to amass power and suppress opposition. Authors coined the term autocratic legalism to describe these power-grabbing tactics that operate through law. Others use different concepts, such as constitutional retrogression or abusive constitutionalism. I review this growing body of literature and outline a research agenda on the encounters between law and illiberalism.

INTRODUCTION

January 6, 2021, will be remembered as the day when the mythical—and, to many, exceptional—character of US democracy was put under unprecedented distress. As Congress convened to certify the results from the 2020 presidential elections, the Capitol was invaded by a far-right mob that claimed that the electoral process had been defrauded and that the true winner was the Republican president, Donald J. Trump. Congresspeople and their staff were forced to evacuate the building and seek shelter. Some invaders were carrying weapons; a few people died as the event unfolded.

The Capitol events were neither random nor sudden. They reflected a process of democratic backsliding (Levitsky & Zibblat 2018, Mounk 2018, Snyder 2018, Waldner & Lust 2018), well-documented in countries from Venezuela and Hungary to Turkey and Poland, which scholars had warned could also happen in the United States under Trump (Corrales 2020, Ginsburg & Huq 2019, Levitsky & Zibblat 2018, Scheppele 2020). In democratic backsliding, threats to democracy no longer come from abrupt, radical ruptures promoted by those who are close to, but outside of, state power. They come from those who win elections and, while in office, systematically undermine accountability institutions and minority rights. The Capitol mob made Trump's efforts to cling to power more visible, but these had been underway, taking place and root within the government apparatus. Months before the election, Trump had cast doubt on the US electoral system, weaponized the postal service to suppress voting, curtailed the investigative autonomy of the Justice Department, and pursued the appointment of Supreme Court Justice Amy Coney Barrett at all costs to ensure a conservative majority in the court.[1]

Democratic backsliding highlights the contingency in the link between democracy (a governance scheme in which those who rule are selected by popular vote) and political liberalism (a more complex system of political freedoms, usually translated into codified individual rights and institutionalized means of accountability). Political liberalism and democracy can surely work in synergy and mutual reinforcement, but they also can, and did come to, advance in relative separation from one another. In his well-read and -cited essay in *Foreign Affairs*, Zakaria (1997) demonstrated that the global dissemination of popularly elected governments (i.e., democracies) had not been necessarily followed by the expansion of political freedoms and systems of accountability. Multiparty electoral systems flourished ubiquitously precisely because of what happened after the elections: Power was easily centralized and abused. Zakaria used the term illiberal democracies to describe these regimes and warned that they might be hard to improve, because they could always claim legitimacy from the fact that they were "democratic."

Law is not absent from these stories. Rising autocrats seek to make their moves legal and use law—as a weapon or as a shield—in attempts to amass power and suppress opposition.[2] Authors coined the term autocratic legalism to describe these power-grabbing tactics that operate through

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[1] Barrett's appointment occurred in the middle of a presidential election—a prerogative that Republicans had denied to Trump's predecessor, Barack Obama, at an even earlier stage of the 2016 electoral process. The resulting conservative majority in the court, *ceteris paribus*, may block reforms intended by Democrats and advance the conservative legal agenda, including areas of high relevance for liberal democracy, like voting rights and civil rights.

[2] This is different from liberal legality coexisting with illiberal practices, which is documented in both consolidated democracies (for example, police brutality in the United States) and transitional democracies [for example, Latin American countries analyzed by O'Donnell (1999)]. In these cases, liberal legality can be deemed imperfect or incomplete so that a "dual state" exists (McCann & Kahraman 2021); in the conscious, systematic use of law for illiberal purposes addressed in this review, liberal legality no longer exists as such. This being said, a productive link can be traced between these two approaches—one that "looks at law and illiberalism in unitary, holistic, state-focused ways" and another that "recognizes the complexity and multiplicity of legal forms and practices" (M. McCann, personal communication, 2021). Current illiberal turns may well "build

law. Corrales (2015) used this term to refer to the use, abuse, and nonuse of law by Venezuela's Hugo Chávez. Chávez used the law by pushing the congress to pass legislation that gave him more power, abused the law by interpreting existing norms in new ways to better fit his plans, and nonused the law by not enforcing norms that would prevent him from achieving his goals. Scheppele (2018) highlighted the aggregated effects of these tactics on governance structures. By examining a larger number of countries—for example, Hungary, Russia, Poland, Turkey, and Ecuador—she demonstrates how autocratic leaders have carried out legal reforms to remove the liberal content of constitutions and to rule unconstrained. Others use different concepts, such as "constitutional retrogression" (Ginsburg & Huq 2019) or "abusive constitutionalism" (Landau 2013), but refer to the same phenomenon and mechanisms. Pirro & Stanley (2022) recently proposed a tripartite typology with gradations of illiberal policy change with respect to the rule of law: (*a*) forging, where change occurs in accordance with both the letter and the spirit of law; (*b*) breaking, where change directly breaches the constitutional order and liberal-democratic principles; and (*c*) bending, where change is consistent with the letter of the law but contradicts its liberal spirit.

In this article, I review this growing body of literature and outline a research agenda on the encounters between law and illiberalism. My effort is guided by two questions: How are illiberal turns impacting the law-and-society interplay? And how can this process be more comprehensively studied across time and space? The next section takes stock of sources addressing the use of law for illiberal purposes from a broad historical and sociolegal perspective and suggests themes and domains of inquiry on law and illiberalism going forward. The third and fourth sections consider the themes of resistance and power. The fifth section advances concluding considerations.

LAW AND ILLIBERALISM: WHAT DO WE KNOW ABOUT IT, AND HOW CAN WE KNOW BETTER?

The rich emerging lines of study on law and illiberalism advance two important contributions. First, authors notice that the use of liberal law to fit illiberal goals has become systematic, which is due to both symbolic constraints at the international level and practical reasons at the local level. Contemporary illiberal leaders came to power under a global "liberal consensus," when democracy and the rule of law were deemed "the end of history" (Fukuyama 1992) or "the only game in town" (Linz & Stepan 1996); hence, they had few incentives to pursue the traditional authoritarian script. But even as the global liberal consensus wanes, the hybrid regimes that these leaders have come to institute have proven preferable to turns to full-blown authoritarianism. Traditional authoritarian regimes require elite cohesion and a state apparatus capable of suppressing opposition that are rare—although not entirely impossible to find (Levitsky & Way 2020). They are too costly and complicated.

Second, authors developed a comprehensive inventory of techniques by which modern illiberal leaders use law for illiberal purposes. These leaders pass new statutes that increase presidential power and/or weaken the press, universities, and civil society; pack courts to avoid legal accountability for their acts; and even push for changes in constitutions that reshape government branches to benefit the president's office. These techniques (*a*) typically conform to authoritative legal forms, taking hold as statutory law and constitutional reforms, and (*b*) provide means for the

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on well-established illiberal legal traditions, making national and centralized what had mostly existed in more fragmented ways earlier" (M. McCann, personal communication, 2021), as documented in many cases like Brazil (R.M. Pimenta & M.R.A. Machado, manuscript in preparation), India (M. Suresh, D. Das Acevedo & M.A. Bhat, manuscript in preparation), and the United States (McCann & Kahraman 2021).

chief executive or the ruling party to sideline opponents and avoid accountability. These maneuvers keep law in place—chief executives continue to follow norms enacted by the congress and have their actions checked by the judiciary—but those norms and rituals are "hollowed out" and "repurposed" (Scheppele 2018, pp. 561, 573) to become a mere facade for the "rule of men."[3]

These contributions can be expanded and refined in their own terms. For example, scholars have so far emphasized the construction of illiberal legal orders but paid very scarce attention to how this is resisted, if at all. Likewise, scholars stress the similarities in the strategies of legalist autocrats, but these could well vary based on factors specific to national contexts. In this article, I identify these and other questions that are deserving of scholarly attention going forward. But, more important, I try to put these questions into larger historical and sociolegal context, as follows.

Law and Illiberalism in Historical Perspective I: Studying the Phenomenon over Time and across Regimes

Much of the literature on law and illiberalism has a smell of novelty. Yet research on rule by law shows that, under appropriate conditions, even old-day authoritarian regimes maintained and relied on courts to, for example, repress dissidents and manage high-level conflicts (Ginsburg & Moustafa 2008, Pereira 2005). More recently, under the rule of law consensus, authoritarian countries like China and Singapore came to introduce courts and rights that make their legal systems look more liberal on paper but that, in practice, are repurposed to fit their authoritarian rule (Gallagher 2017, Rajah 2012). These moves create some space for contestation, though they also add effectiveness and legitimacy to regimes (Ding & Javed 2020). Pereira's (2005) study on the judicialization of repression in Argentina, Chile, and Brazil in the 1960s offers a compelling demonstration: Brazil used courts to try dissidents; the Argentinean military resorted to a dirty war, fought with their own hands. Brazilian dissidents and their lawyers could engage in legal disputes about the reach of national security laws; their Argentinean counterparts were disappeared with. But the Brazilian gains—the thousands of lives that were saved in that country, compared with Argentina—came at a price. Judicialization of political repression caused Brazil to be looked at with more complacency by the international community, and once Brazilian democracy was restored, repressive judicial doctrines and practices had been normalized, with dire, enduring consequences (R.M. Pimenta & M.R.A. Machado, manuscript in preparation).

Illiberal uses of law are also observed in what political scientists call consolidated democracies, where studies show that law can be (ab)used to create and sustain states of exception against "enemies of the people." The most common examples come from crises, from World War II's *Korematsu* to the post-9/11 War on Terror, beautifully chronicled by Abel. Abel's (2018a,b) account is less than hopeful. He concludes that, to the extent that the rule of law was upheld in the War on Terror, this was due mostly to politics. Pushback against rights violations usually came from Democrat-appointed judges and in cases of higher visibility (for example, cases litigated in civil courts and covered extensively by the media, rather than those handled secretly in military commissions). Ordinary criminal cases did follow due process rituals and basic rules but targeted the poor, racial minorities, and the uneducated, whose role in terrorism was minor, if any. Tort judgments followed a similar pattern, with a US lawyer who had converted to Islam who was wrongly detained for two weeks receiving $10 million, whereas foreign victims had their claims dismissed (Abel 2018a,b).

[3] With Scheppele (2018), I notice that all illiberal leaders referred to in the literature are males, which makes the use of gender-coded language a matter of accuracy.

Table 1 Use of law for illiberal purposes in different political regimes (author's elaboration)

Regime type	Use of law for illiberal purposes is...	It happens...	Law is used to...
Authoritarianism	residual	in areas where it is/was appropriate and convenient	suppress dissidents, manage conflicts
Consolidated democracies	residual	in critical times	create and sustain states of exception
Backsliding democracies, hybrid regimes, competitive authoritarianism	central	regularly	enable power consolidation and unconstrained rule

The use of law for illiberal purposes is thus not new in history, although this does not erase the singularity and significance of the phenomenon nowadays (see **Table 1**). That it has become a regular, perhaps definitional, trait of the new hybrid forms of government that have surfaced in contexts of democratic backsliding (Corrales 2015; Levitsky & Way 2002, 2010, 2020) is, to quote from Scheppele (2018, p. 559), "a big deal." But emphasis on these differences in regimes may eclipse continuities in the role that law plays in each and all of them to facilitate political domination. For researchers with an interest in the latter, it is beneficial, if not required, to look at the phenomenon over time and across regime types.

Law and Illiberalism in Historical Perspective II: The Ties That Bind, Until They Do Not

That law is used regularly for illiberal purposes in backsliding democracies becomes even more dramatic when we consider that, historically, modern law is structurally tied to political liberalism.[4] Three ties bind one to the other. First—though this may be more of historical contingency—modern legal systems were built upon the rights to life, liberty, and property that are central to liberal politics. The rise of welfare states and administrative agencies in the twentieth century did not fundamentally alter this. The need for governments to intervene in the economy to compensate for market failures and externalities was recognized, but the rights to life, liberty, and much of property were left intact. Second, in modern legal systems, the production of legal norms is regulated by legal norms themselves. Hart (2015) conceived of this in terms of primary and secondary rules. In Kelsen's (1967) description of a hierarchically structured legal order, those who enact legal norms may be holders of political power, but their norm-making capabilities are not unlimited. They must follow predefined procedures and keep the scope of the norms they enact within the boundaries of the authority that they have been given by preexisting norms. Without either, the norms they enact will lack legitimacy and enforceability. Third, modern law, once enacted, is shielded from subversion by powerful interests and political forces. Following from separation of

[4]This premise is drawn from some grand narratives on law and modernization, such as Unger's (1976) and de Sousa Santos's (2009), but it finds support in classic works in political philosophy and sociology (Durkheim, Marx, Weber, Foucault, Habermas, Luhmann). In these accounts, modern law and political liberalism appear as means of emancipation from a social order that was seen as hierarchical and structured by tradition and religion. Authors also notice that the marriage between modern law and political liberalism was instrumental to, or maybe even constitutive of, the birth and maturation of a capitalist economic order. This later caused the promises of freedom and equality by both modern law and political liberalism to be denied, opening space for scholarly critiques and imagination of postliberal and/or postmodern societies and legalities. Although this article is more concerned with the emergence and dangers of illiberal legal orders, I do not ignore these critiques and the limits of liberal legality for emancipation they help reveal.

powers doctrines, independent courts become the settings in which modern law is argued and decided over. This process is, in turn, based on a distinct epistemology and ethos. The full meaning of the law is developed and rigorously guarded by legal scholars and taught at law schools, where lawyers are trained and socialized into an autonomous profession.

Tied to one another and into liberal legality, modern law and political liberalism should become mutually reinforcing. Basic rights inscribed in constitutions would infuse modern legal systems with fundamental liberal principles. Law's "self-referentiality" [Luhmann 1995 (1982), 2004 (1993); Teubner 1993] would keep arbitrariness and sheer will out of legal systems, while making ordinary norms in the systems reflect—or at least not contradict—their foundational liberal principles. Independent courts supported by a robust and autonomous legal profession would determine and enforce those norms through quasi-scientific methods—and, if needed, do so against ruling majorities.

In this context, the puzzle central to studies on law and illiberalism becomes, How do illiberal leaders loosen or break these ties, making modern legal orders susceptible to being hollowed out and repurposed to enable power consolidation? Or, put more broadly, how does illiberal politics get itself into liberal legality to transform it into illiberal legality? Answers to these questions require long-term investigation, synchronically and diachronically. In this article, I devise a tentative framework to guide these efforts drawing from the law and society canon. I illustrate the application of the framework with examples from existing studies on law and illiberalism, including the emerging findings from the Project on Autocratic Legalism (PAL)—an International Research Collaborative and Global Collaborative Project initiative at the Law and Society Association currently undertaking comparative research on law and democratic backsliding in Brazil, India, and South Africa.

Law and Illiberalism in Sociolegal Perspective: Four Gateways for Illiberal Politics to Enter and Transform Liberal Legality

At the center of my framework are four factors that constitute the lived reality of law and render modern legal orders vulnerable to being maintained in form but hollowed out or repurposed to serve illiberal purposes. These factors—or gateways for illiberal politics to operate within and transform liberal legality—are explained briefly as follows (**Figure 1**).

Institutional and organizational loopholes. Coherence and rationality in modern lawmaking are, of course, no more than aspirations. Works in the social science of law have demonstrated that modern legal systems are more chaotic and contradictory than theorists expected. One reason for this is that lawmaking processes take place in institutional and organizational settings that are socially constructed and, as such, embedded in specific logics and subject to specific power arrangements. This distorts law in unintended ways and produces the gap between law in books and law in action central to law and society research. The production of this gap has two well-mapped implications: It can render the promises of liberal legality (everyone's freedom and equality before the law) unmet, and it can provide tools for some to resist law's order. Less examined is the role of institutions and organizations in transformations of liberal legality into illiberal legality—where rights, lawmaking, and adjudication are consciously and systematically used by the powers that be to curtail the freedoms of others and produce inequality before the law.

Emerging studies have shown that different designs for the presidency, executive agencies, congress, and courts can create different structures of opportunities and constraints for illiberal leaders to meddle with law. In Brazil, the combination of a multiparty system, federalism, and an ambitious constitution that can be adjudicated by the supreme court forces the president to seek consensus to rule and, so far, has limited the ability of an illiberal leader like Jair Bolsonaro

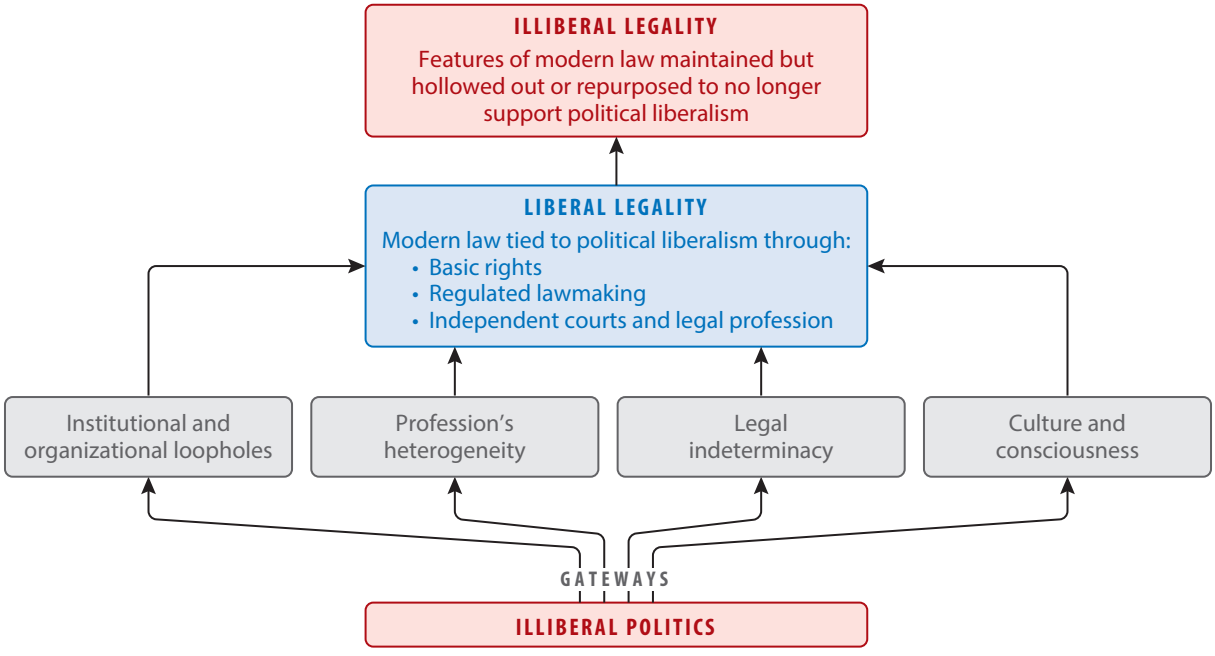

Figure 1

Gateways for illiberal politics to enter and transform liberal legality (author's elaboration).

to promote aggressive legal change—though it has also incentivized him to look for alternatives within the executive branch, via executive orders, or "on the streets" (Vieira 2021). In South Africa, a de facto single-party country, limitation to Jacob Zuma's illiberalism had to come from within the African National Congress, which also made the party—more than the government—the main arena of contestation (D. Davis, M. Le Roux & D. Smythe, manuscript in preparation).

Yet, in the lived reality of law and illiberalism, institutions and organizations are not just independent variables embedding the agency of illiberal leaders. Illiberal chief executives also seek to change institutions and organizations if they constrain those leaders' will or offer a platform for the pluralism that the leaders want to trim down. Court packing and constitutional reforms that reconfigure separation of powers are perhaps the most dramatic instances of these efforts, but they are far from the only ones. In his study of executive aggrandizement in Latin America and Eastern Europe, Freeman (2020, p. 40) identifies three tactics that operate at a subconstitutional level: colonization (creating a "critical mass of vacancies" in offices of independent institutions and using legislative supermajorities to fill these vacancies), duplication (creating parallel institutions while weakening the original ones), and evasion (creating oversight institutions but not giving them enough prerogatives or mechanisms to hold chief executives accountable). Studies from Brazil demonstrate that, although unable to pass new laws and change the constitution, Bolsonaro has debilitated existing institutions and organizations like advisory councils and environmental agencies, which reduces oversight on his administration and renders the existing body of legislation ineffective altogether (Castro et al. 2021, Prado 2021). In South Africa, Zuma and his cohorts captured tribal authorities to establish a system of governance that is instrumental to rent-seeking, creating a "state-centered pluralism [that provides] a veneer of constitutional legitimacy to the imposition of authoritarian laws" (D. Davis, M. Le Roux & D. Smythe, manuscript in preparation).

These moves become tricky to deal with, as they are usually conducted in accordance with the letter of the law (Pirro & Stanley 2022), drawing legitimacy from modern law's proceduralism [Luhmann 1983 (1969)].[5] But things can get even more complicated, as institutions and organizations must be considered in not just their formal but also their informal dimensions. A lot of what the literature identifies as the tactical repertoire of illiberal leaders involves the breaking of unwritten rules and the lack of forbearance (Levitsky & Zibblat 2018). It is not that leaders are legally forbidden from doing what they do, but agreements had been in place that made their courses of action unacceptable. Along with Trump's appointment of a new Supreme Court justice referred to earlier in this review, India provides another example: For the Indian government to diminish constraints to its will, it took no more than not recognizing the leader of the opposition, who has a role in appointing heads of accountability mechanisms (M. Suresh, D. Das Acevedo & M.A. Bhat, manuscript in preparation).

Going forward, scholars could provide better data and analysis on the following questions: How do different institutional and organizational settings enable or constrain the transformation of liberal legality into illiberal legality? How do illiberal leaders exploit existing institutional and organizational loopholes—or create new ones—to consolidate power? When—and by what means—do they retool existing institutions and organizations, and when do they create new ones? When do they focus on the formal versus the informal aspect of institutions and organizations—and why?

Legal indeterminacy. As we were taught by those in critical legal studies, legal principles and rules are not self-defining. They require interpretation by authoritative sources like legal scholars and courts. Law's interpretation can lead to radically different directions, which potentially expands the gap between law in books and law in action, making modern legal systems not only less coherent and predictable but also less able to deliver the promises of a political liberal order—freedom and equality for all.

No extensive training in critical legal studies is required for one to envision how this "legal indeterminacy" (Kairys 1983, 1998; Kennedy 2007; Unger 1986) can function as another gateway for the transformation of liberal legality into illiberal legality. The literature, nevertheless, offers telling examples. Corrales shows how Venezuela's Chávez introduced contempt provisions (*desacato*) in otherwise progressive statutes, later used to criminalize government opponents and critics. Because contempt is a rather vague concept, it was not difficult for prosecutors and courts to find people guilty of it. Abel (2018b) notes how, in the War on Terror, Bush administration lawyers who issued the (in)famous torture memos employed language broad enough to avoid being disciplined: They could always claim that they were working within the boundaries of law, even if they were pushing these boundaries to make torture acceptable and defensible. Scheppele (2018) notes that the Hungarian prime minister, Viktor Orbán, claimed that his attacks on minorities had support in political liberalism and free speech rights, whereas his victims were trying to suppress freedom via political correctness. As such, Orbán made a tactical use of the emptiness of free speech rights.[6]

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[5] Scholars tend to consider that law's proceduralism inherently leads to liberal outcomes, when in fact it can be easily co-opted, instrumentalized by illiberal politics and used to mask and legitimate illiberal practices. Greater awareness of this malleability makes it easier to understand why (*a*) authoritarian regimes can become more legalized but not necessarily more liberal, (*b*) consolidated democracies continue to systematically reproduce social inequalities through the law, and (*c*) rising autocrats can use law and not tanks to consolidate power.

[6] See, for example, the disparate ways in which free speech rights are construed in the constitutional jurisprudence of the United States and Germany, two consolidated democracies. The United States is much more

Law's indeterminacy has also enabled malicious legal transplants by autocrats in which the meaning of the transplanted laws gets lost in translation (Bourdieu 2002). Scheppele (2018) notes, for instance, that Orbán undertook a reform in Hungary's electoral law combining US provisions on gerrymandering and German provisions on district sizes, but ignoring the circumstances in the United States and Germany that limit the use of these provisions for electoral manipulation.

Still, many questions about the role of legal indeterminacy in law and illiberalism remain unanswered: How is legal indeterminacy tactically exploited by different illiberal leaders? How does this work in the legislature, compared with in the executive and courts? How is legal indeterminacy then dealt with by institutions and citizens? Does visibility in decision-making processes constrain their outcomes? Are things different in different areas of law and policy, such as criminal justice versus civil rights? What networks and practices sustain the circulation and distortion of models that seem to enable the diffusion of illiberal legality?

Heterogeneity in the legal profession. The role of legal professionals in supporting liberal legal orders has been at the heart of important sociolegal works. Authors in political lawyering studies found that transitions from authoritarian and illiberal regimes to liberal political societies in the eighteenth century were frequently spearheaded by lawyers, who defended the independence of the bench and basic individual rights for individuals and mobilized their expertise and resources to moderate government power (Halliday & Karpik 1997). They concluded that the *longue durée* of liberal states cannot be explained without considering this legal activism. Authors also concluded that the fight for political freedoms usually involves a collective action within a larger legal complex, composed of private lawyers, judges, prosecutors, legal academics, etc. (Halliday et al. 2007, 2012; Karpik & Halliday 2011).

In the development arena and processes of importation/exportation of the rule of law, these hopes around law, lawyers, and the construction of political liberalism set foot even more decisively. A multimillion-dollar industry was established to provide countries with technical and financial assistance in tasks such as drafting constitutions, setting up independent bar associations, or recruiting and training judges and prosecutors (Garth 2014, Gordon 2010). Building rule of law institutions was seen as a precondition for both political and economic development (Dezalay & Garth 2002, 2005, 2010). The empowerment of lawyers became both a virtue and a necessity (Garth 2014, Gordon 2010).

One needs not be naive to consider that lawyers can be freedom fighters. Their commitment to liberal legality can be understood as a matter of self-interest. The profession becomes weaker if rights and courts are rendered less meaningful. But to transform this fair hypothesis into a universal law may be a mistake. Scheppele (2019a) notes that rising autocrats like Vladimir Putin and Orbán are law graduates; hence, law degrees do not mean necessary commitments to liberal values. Rather, it may be that legal training, familiarity with law, and knowledge of law's lived reality enable the use of law for illiberal purposes. In my studies of law-centered anti-corruption campaigns in Brazil (de Sa e Silva 2020), I found that lawyers who rose to the eyes of the world as champions of transparency and the rule of law helped produce an illiberal political grammar that helped legitimate Bolsonaro. Authors in political lawyering themselves later discovered cases where lawyers failed to resist, or even supported, illiberalism. They posited that it is more appropriate to ask under what conditions the legal complex stands up for political

permissive, even considering some forms of hate speech constitutionally protected. Germany criminalizes Holocaust denial and promotion of Nazism.

liberalism (Halliday et al. 2007, Karpik & Halliday 2011). They pointed to strict business interests as a potential explanation for lawyers' passivity toward, or complicity with, attacks on political liberalism. Abel (2018a,b) also contends that documents such as the US torture memos were written by career-driven lawyers seeking federal judicial appointments. Future studies on law and illiberalism can and should explore what binds lawyers to illiberal projects.

Meanwhile, others in the sociology of the legal profession have demonstrated forcefully that lawyers are best represented as a heterogeneous group. Some have analytically divided the profession across hemispheres—large-firm corporate practitioners and solo/small practitioners—others along multiple arenas of professionalism. Recent studies have shown that the profession's heterogeneity is expanding into politics as well. Conservatives in the United States have supported legal think tanks and funded law professors and students who share their political viewpoints (Bonica & Sen 2020, Hollis-Brusky & Wilson 2020). A conservative litigation industry has also arisen. In transitional and developing countries where the bar and the bench are more recent constructs, the scope of these disputes can arguably become even more heated (Southworth 2004, 2008; Teles 2008, 2009).

Studies on law and illiberalism thus must pay greater heed to the social organization and the political impacts of the bar. Questions they could tackle involve, among others, What distinguishes lawyers who support and those who resist illiberalism? Do these groups have similar composition in terms of race, class, and gender? Did lawyers in these groups attend similar schools, follow similar professional trajectories, and practice in similar settings? How do they build their links to politics and the state? How is their agency enabled and constrained by institutions, both national and international?

Culture and consciousness. Another difference between present-day democratic backsliding and old-day authoritarian regimes is the incorporation of the masses. Contemporary autocrats may face constraints from more entrenched rule of law and accountability systems, so they must build supermajorities in congress and the public opinion to be able to change rules and tilt the playing field. To this end, these leaders use "populist or ethnonationalist appeals" (Levitsky & Way 2020, p. 60).

Studies on law and illiberalism generally echo these findings. Authors observe that illiberal leaders often claim to represent the people against the elites or national enemies—though the people, elites, or enemies at hand can vary considerably (Alviar García 2020, Bugaric 2019, Bugaric & Tushnet 2021). Not all feel comfortable characterizing these appeals as populist. Scheppele (2018, 2019b) argues that they are but a means of distraction; the primary interest of leaders is in reconfiguring governance systems to remove the liberal content of constitutions and to rule unconstrained.[7] Consideration for the cultural character of law may give another significance to this debate, nonetheless.

The cultural turn in the social sciences puts consciousness and ideology at the heart of law and society studies. Popular representations of law were recognized as constitutive of law's life. These representations guide people's interpretations of everyday life and transactions, while their

[7] Others (Bugaric 2019, Bugaric & Tushnet 2021) argue that there can be different forms of populism, not all with the same illiberal effects on law. Leaders can rise claiming to represent the people against the elites but rule within the boundaries of liberal constitutions; when this happens, they end up including in politics and policy the hitherto excluded, making both democracy and constitutionalism stronger. Examples would be Syriza in Greece, Podemos in Spain, or Bernie Sanders in the United States. This review focuses solely on right-wing populism.

cumulative (re)production supports law's hegemony (Ewick & Silbey 1998, Sarat 1990, Sarat & Kearn 1993). In this context, rhetorical appeals to the people or "tradition"[8] can hypothetically matter: They introduce cultural symbols—or build upon existing illiberal dispositions (Drinóczi & Bień-Kacała 2021)—within polities, which factor in the way law's indeterminacy is resolved, making rights violations more tolerated, if not endorsed, by the leaders' constituency. India and Brazil provide telling examples: In both cases, the populist appeals made by Narendra Modi and Bolsonaro entail a concept of citizenship that excludes minorities and opponents and that eventually gets translated into statutory law and jurisprudence (R.M. Pimenta & M.R.A. Machado, manuscript in preparation; M. Suresh, D. Das Acevedo & M.A. Bhat, manuscript in preparation).

A long research avenue thus lies on the horizon, ready for scholars to chart. What are the symbols on which illiberal leaders base their assaults on liberal legality? How are these symbols mobilized and made part of the schemas with which people represent and lend support to an illiberal legality? How does this all vary across national settings? Are some symbols and schemas more efficient than others in operating the transition from liberal to illiberal legality? Conversely, how can these symbols be deconstructed by activists and replaced with symbols of liberal legality, such as tolerance and pluralism?

BRINGING POWER BACK IN: MONEY, RACE/ETHNICITY, RELIGION, GENDER, AND THE POLITICAL ECONOMY OF LAW AND ILLIBERALISM

Illiberal leaders are the obvious beneficiaries from the hybrid regimes and illiberal legality they usher in, but they are not the only ones. In studies of law and illiberalism, a deeper investigation into *"cui bono?"* becomes of double utility. It can reveal the structural forces that help sustain illiberal legality in societies, as well as the ways in which illiberal legality helps (re)produce the social.

Authors engaged in a political economy approach have taken initial steps in this direction. Bugaric (2019) argues that the success of illiberal leaders in Europe is a response, even if imperfect, to the embracing of neoliberal economic policy by mainstream politicians, including those on the left. He draws from Polanyi's (1944) account of how market societies evolved at the turn of the twentieth century, when the exclusionary effects of a disembedded economy led to a second movement to re-embed it—in some cases via social democracies, in others via fascism. Indeed, right-wing populists in Europe push back against the EU economic orthodoxy and pursue economic agendas based on higher levels of public spending and protection to local industries. Of course, this comes at a high price—the targeting of minorities and the scapegoating of migrants—while the promise of greater welfare to "nationals" is unmet and the neoliberal orthodoxy remains prevalent (Shields 2021). Brazil represents an even more extreme case. Bolsonaro rose to power promising to deepen austerity and cut back on social policies, which he denounced as "socialist," while at the same time furthering a "law and order" agenda for crime control. He thus more explicitly represents what authors like Brown (2019) and Dardot & Laval (2019) see as this new

[8]Recourse to tradition is less emphasized in studies but no less relevant in the playbook of illiberal leaders. Putin presents himself as an incarnation of Vladimir, "a Russian whose conversion [to Christianity] linked forever the lands of today's Russia, Belarus, and Ukraine" (Snyder 2018, p. 64); Trump rose promising to "make America great *again*"; and Orbán used the Holy Crown of Saint Stephen to legitimate his rule and the constitutional changes he promoted in Hungary (Scheppele 2000). Like the people, tradition is usually subject to distortion and selective appropriations of the past: None of these uses of symbols would resist solid historical scrutiny.

stage of neoliberalism, where capitalist accumulation is freed from constraints posed by democracy and state power becomes a tool of social ordering.

Yet the economy is but one of the structural forces shaping and being shaped by illiberal leaders and illiberal legality. Race/ethnicity and religion also prove significant in existing studies, a notable example being India, where the rise and rule of Modi are inseparable from the (re)production of Hindu hegemony (M. Suresh, D. Das Acevedo & M.A. Bhat, manuscript in preparation). Gender is no less important. All contemporary autocrats are men, and their platform and legalistic agenda often reinforce gender hierarchies, such as Orbán's attacks on the LGBTQ (lesbian, gay, bisexual, transgender, and queer/questioning) population and fertility policies that solidify strict ideas of family and women's roles (*BBC News* 2019; see also Pirro & Stanley 2022).

Class, race/ethnicity, religion, and gender are, of course, often intertwined. Orbán's fertility plans bring together his ethnonationalist appeals (*BBC News* 2019; see also Pirro & Stanley 2022), homegrown approach to economic development, and traditional vision on gender roles. Trump's policies ensured white Christian supremacy (Brown 2019, Levitsky & Zibblat 2018) while keeping big corporate power intact. Bolsonaro's insurgence against socialism involves not just developmentalist and distributive economic policies (Trubek et al. 2013) but also affirmative actions, indigenous rights, women's rights, and LGBTQ rights—all of which are understood as expressions of the new left's agenda (Jamin 2014). Scholars must track different ways in which illiberalism and illiberal legality tap on, and help constitute, these different pieces of the social structure across time and space.[9]

THE PUZZLES OF RESISTANCE

The theme of resistance to and through law is common to many strands of law and society scholarship. More generally, authors notice that law—the amalgam of rights, institutions, and procedures that regulates social relations—offers an avenue for individuals and groups to "name, blame, and claim" over the injuries they feel have been inflicted by someone else (Felstiner et al. 1980). However, law also shapes these processes to a deep extent. Law can affect what is perceived as an injury (for example, a violation to one's rights), and legal disputes limit the terms by which injuries are recognized and responded to (for example, through restitution or incapacitation).

Consistent with these premises, the literature on law and illiberalism suggests that legalization of political power creates, although also limits, space for contestation (Abel 2018a,b; Chua 2019; Gallagher 2017; Ginsburg & Moustafa 2008; Pereira 2005). In this context, it would be fair to assume that by keeping—although hollowing out and repurposing—modern law, current illiberal leaders are planting the seeds of their own destruction. The basic rights and courts that they rely upon can, and will inevitably, be mobilized against their authority and plans and may help prevent their power consolidation. But an opposite scenario is also conceivable: Their systematic use of law to suppress dissent and sideline opponents could make the victims of their new hybrid regimes less inclined to rely on law to resist the powers that be. This empirical question (Does illiberal legality discourage people from using law to resist?) should be central in studies of law and illiberalism going forward.

A different matter is whether recourse to law works to protect rights and uphold political liberalism. Here, even in democratic regimes and under the golden age of the "rights revolutions," law and society scholarship tends to be cautious. Scheingold (1974) identified obstacles for rights claims to result in policy change and argued that the "mythical" status of rights in US politics

[9]An example of how scholars could meet this challenge is in Alviar García's (2015) study of how economic development policies in Colombia reinforced traditional notions of family, keeping women subordinated.

Table 2 Avenues for research on law and illiberalism

Actors (alone or in relation to one another)	Gateways (one or more)	Institutional and organizational domains (within and across)	Areas of law	Outcomes (in total or in part)
■ Illiberal leaders ■ Opponents	■ Institutional and organizational loopholes ■ Legal indeterminacy ■ Legal profession ■ Legal culture and consciousness	■ Executive ■ Congress ■ Courts ■ National ■ Transnational	■ Civil rights and liberties ■ Criminal ■ Environmental ■ Etc.	■ Illiberal legality resisted; liberal legality upheld ■ Illiberal legality instituted and institutionalized
Agency	Structure			
Power (class, race/ethnicity, gender, religion)				

notwithstanding, the scope of rights can be disputed, and the enforcement of decisions remedying rights violations is contingent upon organizational factors and resource availability. Activists can build on law's symbolic legitimacy to politically activate their bases, use law and lawsuits to galvanize participation and organization, and manipulate legal symbols to seek political realignment—for example, by playing a "politics of rights" (Scheingold 1974). Yet this politics is seldom a task of lawyers alone. It requires multiple forms of expertise and grassroots activism. Several other studies reiterated that, when legal mobilization works, it is because of clever activist agency within a structure of opportunities and constraints.[10]

Going forward, scholars in law and illiberalism must keep these insights in mind and look more closely and systematically into the tactics, networks, and frames mobilized by both lawyers and citizens within and beyond political institutions to fight rising illiberalism and defend minorities and dissenters. What are these? Which of them are working—and under what conditions?

FINAL CONSIDERATIONS

This review drew from distinct bodies of work to outline a research agenda concerning the interplay between law and illiberalism. I situated this *problematique* in the breakdown of liberal legality that has followed the rise of illiberal leaders. I then proposed that scholars focus on how illiberal politics gets itself into liberal legality to transform it into illiberal legality. To better understand this process, I proposed that scholars look at four structural factors that render modern law vulnerable to being hollowed out and repurposed by illiberal leaders: institutional and organizational loopholes, legal indeterminacy, the heterogeneity of the legal profession, and the cultural character of law. I also called scholars to investigate how the construction of illiberal legality fits the larger social structure and the domains of power it entails (along class/money, race/ethnicity, religion, and gender lines). I finally encouraged the study of whether, to what extent, and under what conditions resistance has been pursued and achieved.

The avenues for research on law and illiberalism are vast and multidirectional (see **Table 2**). Scholars can focus on how illiberal leaders exploit one or more of the gateways above to institute illiberal legality—and how their civil society opponents push back against those moves to

[10]There is even a debate about what it means for legal mobilization to work. McCann's (2014) study of legal campaigns for pay equity reform finds that, although the court outcomes were not favorable to activists, law gave activists a frame to define and advance their cause.

uphold liberal legality. Moreover, scholars may focus on specific institutional and organizational domains—the executive, congress, or courts—as well as on processes that cut across domains. They can look at variation in how these tactical moves work, succeed, or fail across different areas of law and policy. Lastly, scholars can look at how these processes develop within and across jurisdictions, tracing tactical transplants and alliances involving illiberal leaders—or their civil society opponents—in different countries. These different studies shall reveal how structure and agency overlap and constitute one another and how they relate to power structures and struggles.

To conclude this article, I add two considerations. First, to pursue meaningful research on law and illiberalism, scholars must be wary of the epistemological obstacles to which we are commonly exposed—particularly the tendency to idealize modern law and liberal legality for what they promise but often fail to deliver. Second, to understand and resist illiberal legality, it does not follow that we must uncritically embrace liberal legality. Political liberalism is not the end of history, and liberal legality and its emphasis on individual rights may lead to bad policy and societal outcomes, including the polarization that has been so useful to modern-day autocrats (Greene 2021). It is thus possible and even necessary to envision law and society past the canon of liberal legality—as critical legal scholars urged in the past and some continue to attempt in the present. But this path must lead forward, never backward—and if defending liberal legality is how we get there, so be it.

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