

The Citizen-Lawyer - A Brief Informal History of a Myth with Some Basis in Reality

Robert W. Gordon

Repository Citation

Robert W. Gordon, *The Citizen-Lawyer - A Brief Informal History of a Myth with Some Basis in Reality*, 50 Wm. & Mary L. Rev. 1169 (2009), <http://scholarship.law.wm.edu/wmlr/vol50/iss4/4>

THE CITIZEN LAWYER—A BRIEF INFORMAL HISTORY OF A MYTH WITH SOME BASIS IN REALITY

ROBERT W. GORDON*

The term “citizen lawyer” seems to be shorthand for a complex assortment of social types, but the core meaning is plain enough. The citizen lawyer is a lawyer who acts in a significant part of his or her professional life with some plausible vision of the public good and the general welfare in mind. Of course, citizen lawyers, like most lawyers, may seek wealth, power, fame, and reputation for themselves. They may also represent and further the ends of clients with distinctly selfish or antisocial interests. What makes them citizen lawyers, then, is that they also devote time and effort to public ends and values: the service of the Republic, their communities, the ideal of the rule of law, and reforms to enhance the law’s efficiency, fairness, and accessibility.¹

So general and bland a definition would, I expect, command agreement from most lawyers. But it covers up deep divisions among the views that lawyers have traditionally held on the proper scope of their public or civic obligations.

American lawyers’ starting point for conventional reasoning about these roles, more or less a constant throughout its history, is like that of professions of advocates elsewhere: that lawyers effectively produce the public goods of justice and the rule of law by just doing their regular day jobs, zealously serving their clients.²

* Chancellor Kent Professor of Law and Legal History, Yale University.

1. See W. Taylor Reveley III, *The Citizen Lawyer*, 50 WM. & MARY L. REV. 1309 (2009) (discussing of a variety of ways lawyers can participate in their communities).

2. See MONROE FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 10-12, 43-49 (1973) (using examples to defend a theory of zealous advocacy).

The paradigmatic public benefit of private practice is illustrated by criminal defense, the defense of individual clients' rights of liberty and property against the dangers of an overbearing state.³ In civil litigation as well, by vigorously asserting some clients' claims and defending others against such claims, the lawyer plays a vital, differentiated part in a process, the adversary system, whose overall end is the vindication of rights and the defeat of unjust claims.⁴ In the words of the official comments to the ABA's current ethics code, "[C]lients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."⁵ Like the invisible hand of the market, which aggregates selfish interests into a virtuous equilibrium, the procedures of the legal system bring clients' private interests into harmony with public goals and values.⁶

But only the most starry-eyed idealist could take seriously this account of a perfect convergence between private practice and public benefits. Legal systems are subject to systemic failure even more than markets. Legal resources—access to and ability to pay legal talent (lawyers)—are distributed very unequally, so that instead of delivering equal justice, they are put largely to the service of wealth

The American legal system is adversarial, with each party to a lawsuit, either personally or through an attorney, investigating his case and presenting facts to an impartial tribunal while simultaneously seeking to rebut the evidence offered by the opposition. The entire American historical experience is punctuated by instances of struggles for individual rights, and against this background it is not surprising that the American legal system has developed as an adversarial one.

Id.

3. See, e.g., U.S. CONST. amend. VI; see also FREEDMAN, *supra* note 2, at 8; Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution*, 50 WM. & MARY L. REV. 1239, 1240 (2009) (highlighting that the tension between common good and individual representation is muted in representation of criminal clients).

4. See FREEDMAN, *supra* note 2, at 8; Levinson, *supra* note 3, at 1240 (discussing the effects of zealous representation in civil cases); cf. Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1343 (2009) (noting instances in which the differences between criminal prosecutions and civil suits were blurred).

5. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 1 & 3 (2007).

6. See Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379, 1384-85 (2009) (arguing that the law is created as a result of the aggregation of individual interests and values that ultimately reflect the public good).

and tend to magnify inequalities of power.⁷ Law can be an instrument of extortion and oppression.⁸ Lawyers can and do help plaintiffs to pursue frivolous and unjust claims to extort settlements,⁹ and they help defendants resist valid and just claims through delay and discovery abuse.¹⁰ Lawyers can and do lobby for bad laws and rulings that promote special interests over any plausible view of the general welfare, and by means of procedural tactics or strained interpretations effectively resist and even nullify good laws.¹¹

Yet lawyers are also the principal instrumentalities for producing the public goods sought from the effective operation of the legal system—the protection of individual rights, equal justice between persons, security and public order, and the implementation of policies designed to promote the common welfare.¹² The law is the originating cause, the *raison d'être*, of the lawyer's calling, the reason for licensing this special corps of social agents. If the activities of lawyers undermine the public benefits of law, should not lawyers themselves have special obligations—deriving from their situation and opportunities, their expert knowledge, and their

7. DEBORAH RHODE, IN THE INTERESTS OF JUSTICE 2 (2000). In this symposium, Rhode discusses a lack of access to justice as a result of the disjuncture between the bar's exalted pro bono principles and lawyers' actual pro bono practice. See generally Deborah Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009).

8. RHODE, *supra* note 7, at 2.

9. See Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 145, 157 (Deborah L. Rhode ed., 2003) (describing a "blame the other guy" approach to litigation, through which a lawyer claims that the opposing counsel is bringing a frivolous case, uses the discovery process to figure out whether he has a case, and even seeks to extort payments for ceasing to be a "nuisance").

10. See, e.g., SOL M. LINOWITZ, THE BETRAYED PROFESSION 14 (1994) (describing the tactics R.J. Reynolds Company's lawyers used in the 1980s to try to force plaintiffs to drop their tobacco-related cases).

11. For a concise review and critique of the adversary-advocacy system, see generally RHODE, *supra* note 7, at 49-80. The classic critique of the ideology of adversary-advocacy remains William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; see also Michael Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211 (1990) (recognizing the belief that all the dispositions of legal issues are ultimately political and subjective).

12. In the United States, lawyers have created a government structure "that is a model for much of the world. And they have been leaders in virtually all movements for social justice in the nation's history." RHODE, *supra* note 7, at 3.

monopoly of the privilege to practice—to help improve the law and its day-to-day administration? These are the obligations of the lawyer as citizen.

In our legal culture, the big arguments within the profession have been over whether performance of the citizen lawyer's role is distinct from, or an integral part of, the regular lawyer's job. To summarize the major arguments:

(1) One view is that public lawyering is strictly the task of separate and distinct corps of public lawyers—judges, government lawyers, and public interest lawyers—and that ordinary private lawyers can safely leave to such officials and NGOs the job of repairing and improving the framework of laws.¹³

(2) A second view is that all members of the profession, including private practitioners, have obligations to perform public functions.¹⁴ Some lawyers think that (a) these public tasks or duties are to be performed in venues separate from regular practice, on leave from practice, or in after-hours pro bono practice or bar activity or reform politics.¹⁵ Others maintain, however, that (b) at least some of the profession's public obligations should be incorporated into the regular functions of private practice.¹⁶

So basically, the first view says, "If the law as implemented through our advice and efforts happens to result in major injustices, that's someone else's problem to fix." The second view says, either (a) "It's a special responsibility of our profession, but one we should work to discharge in settings outside our day jobs"; or (b) "Some public obligations come along with the day job."

13. See *id.* at 2 ("Many lawyers are, in Auden's apt phrase, 'trudging in tune to a tidy fortune,' but they have lost their connection to the values of social justice that sent them to law in the first place.").

14. LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 47 (Susan D. Carle, ed. 2005) (portraying the civic republican lawyer as one who sees his primary duties as serving community leaders and safeguarding the public interest, rather than solely advocating for his client).

15. See Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 460 (2001).

16. The classic expression of the idea that lawyers must reform the law in the regular course of practicing it is LOUIS D. BRANDEIS, *BUSINESS: A PROFESSION* 313-27 (1914).

This second view in both its variants expresses the ideal of the citizen lawyer—sometimes also called the “civic-republican” or “public interest” conception of law practice.¹⁷ For reasons I will try to explain, this ideal has lately fallen out of favor with the modern profession, or at least with its elite practitioners. Most support for the citizen lawyer ideal comes, if anywhere, from government lawyers, public interest lawyers, academic lawyers, judges, bar leaders, and retired lawyers, often accompanied by laments at its disappearance or marginality in the rhetoric and practice of the bar. Let me take a moment to spell out some of the implications of the citizen lawyer ideal for the day-to-day conduct of legal practice.

In advising clients contemplating litigation, the citizen lawyer takes into account the merits or justice of the claim. She seeks to dissuade plaintiffs from pursuing plainly meritless claims, and encourages defendants towards fair settlements and away from invalid defenses of just claims. The purely private-minded lawyer, by contrast, asks only whether—justly or not—a client is likely to obtain, or forestall, a settlement or outcome worth the costs of suit; his aim is simply to maximize his client’s damages or minimize his client’s liability.

When involved in litigation, the citizen lawyer regards herself as an “officer of the court,” that is, a trustee for the integrity and fair operation of the basic procedures of the adversary system, the rules of the game, and their underlying purposes.¹⁸ She fights aggressively for her client, but in ways respectful of the fair and effective operation of this framework.¹⁹ In discovery, she frames requests intended to elicit useful information rather than to harass and inflict costs, and responds to reasonable requests rather than obstructing or delaying. She claims privilege or work product protection only when she thinks a fair-minded judge would be likely to independently support the claim. In deciding how ferociously to attack the credibility of a witness on cross-examination, she tries to assess and take into account the likely truthfulness of the witness and the underlying merits of the case. The intensely private-minded

17. See Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

18. See LINOWITZ, *supra* note 10, at 9 (describing an “Officer of the Court” as one who owes loyalty to one’s client, but first owes “deference to the court and obedience to the law”).

19. See *id.*

lawyer, by contrast, only seeks to win for his client, regardless of collateral damage to adversaries, third parties, and the effective operation of the judicial framework; he exploits every possible weakness of negligent, incompetent, or underfunded adversaries and inattentive judges or magistrates; he stretches the rules to the utmost allowable extent.²⁰

In advising clients outside litigation, the citizen lawyer is the "wise counselor," who sees her job as guiding the client to comply with the underlying spirit or purpose as well as the letter of laws and regulations to desist from unlawful conduct,²¹ and if needed, to do so with strong advice backed by the threat of withdrawal, and in extreme cases, of disclosure.²² If the client needs her help to resist or change unfavorable law, she makes the challenge public and transparent, to facilitate its authoritative resolution. Her private-minded counterpart is of course the hired gun, whose sole concern is with minimizing adverse effects of law on his client's plans and profits.²³ The neutral version of the lawyer-agent simply identifies legal constraints and advises clients on risks of detection and

20. For a discussion of the distinction between vigorous representation and being an "officer of the court," see Simon, *supra* note 11, at 37, noting that some ethics scholars take partisanship for granted and

would probably agree that the lawyer should not reveal adverse evidence learned from the client even though it may be relevant and probative. They would probably agree that he should exclude accurate, probative adverse evidence at trial whenever the rules of evidence permit. They would agree that he should not hesitate to plead his client not guilty even when he knows the client has committed the crime with which he is charged, and they would probably agree that he should invoke the statutes of frauds and limitations to defeat otherwise valid civil claims.... Others have thought that partisanship warrants the use of dilatory procedural tactics, lying under almost any circumstances in which discovery is unlikely, and the citation of false precedents to the judge.

Id. (internal citations omitted).

21. See LINOWITZ, *supra* note 10, at 12 ("As the clergyman advises on the moral nexus of his parishioners' problems, the lawyer tells clients what the law permits them to do.").

22. See *id.* at 4 ("Elihu Root put the matter more simply: 'About half the practice of a decent lawyer,' he once said, 'consists of telling would-be clients that they are damned fools and should stop.'").

23. See Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1161 (2009) (remarking that, while "troublemaker[]" lawyers do exist, far more lawyers simply wish to help their clients in "minimizing transaction costs, circumventing regulatory constraints, escaping encumbering liabilities, and pursuing various strategic objectives").

costs of noncompliance.²⁴ The aggressive or hardball lawyer-agent enthusiastically undertakes to bend; stretch; punch loopholes in; and nullify by obstruction, concealment, and delay the legal and regulatory constraints in the path of a client's desires and interests.²⁵

Citizen lawyers acknowledge that the system of adversary representation that creates and justifies their roles as zealous advocates cannot pretend to function fairly unless everyone who needs a lawyer (or an equivalent means of access to the legal system) can get one.²⁶ In this view, legal services are themselves public goods and the legal profession is a public utility charged with supplying these services to poor and unpopular clients—through mandatory pro bono services or support of legal services programs.²⁷ Private-minded lawyers reject this conception of the profession's obligations.²⁸ In their view, any client who can find a lawyer willing to represent him and can pay for that lawyer's services is entitled to one.²⁹ If some people cannot afford lawyers, that is not peculiarly the legal profession's responsibility to fix: legislatures may (or may not) choose to subsidize them out of general tax revenues through public defender or legal services programs, vouchers for judicare, or fee-award systems.³⁰

24. See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1191 (2003) (describing the lawyer's role as a risk manager).

25. RHODE, *supra* note 7, at 7 (discussing "lawyer's willingness to manipulate the systems on behalf of clients without regard to right or wrong").

26. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 233-34 (1999) (discussing the structure of the American legal system and its implications for those who might lack access in other systems).

27. See Rhode, *supra* note 7, at 1332 (advocating for mandatory pro bono reporting requirements enforced by courts, bar associations, or legal employers). *But see* James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261, 1273 (2009) ("[T]he organized bar has never embraced an ethic of more-than-optional public service for lawyers.").

28. Even though many private-minded lawyers do provide free legal services, "both individuals and professional organizations typically recoil at the idea of mandated service." Loder, *supra* note 15, at 460.

29. For a glimpse on how the public at large feels about this view as it manifests itself in reality, see RHODE, *supra* note 7, at 7 ("Americans dislike the fact that the best legal representation typically goes to the highest bidder and that law is accessible only to those who can afford it. But Americans also dislike efforts to remedy those inequalities.... Our nation spends far less than other Western industrial societies on subsidized legal representation.").

30. See Steven Wechsler, *Attorney's Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE

To generalize more broadly about these types, the citizen lawyer identifies broadly with the institutions, goals, and procedures of the legal system, even though she may (and if she is conscientious, probably does) also think that aspects of the existing system are inefficient, oppressive, or fundamentally unjust.³¹ She feels a sense of proprietorship, or ownership in common, of the legal framework—that the law, considered aspirationally as well as conservatively, as a set of norms and principles rather than a collection of particular rules, is in her profession's special stewardship, to preserve and cultivate and reform so it can serve its best purposes.³² In some instances, it may be that unjust laws or bad interpretations of them are so entrenched in conventional legal practice that a lawyer could not deprive a client of the unjust advantages they confer without committing malpractice. In that case, the citizen lawyer works with law reform commissions, bar committees and task forces, legislative committees, and administrative agencies to reform laws to make them more just and efficient, regardless of whether the reforms would help or hurt their clienteles.³³ The private-minded lawyer (or at least his pure type), on the other hand, views the law and its procedures from the outside, as an alienated observer and instrumental manipulator: he is Holmes's "bad man;" to him, the law is only an instrument—a bundle of opportunities for, or obstacles in the way of, realizing his clients' ends.³⁴ If the law-as-it-is serves his client of the moment, he will support it; if not, he will undermine it.

L. REV. 909, 914-30 (discussing taxpayer-subsidized and other mandatory pro bono initiatives from a historical perspective).

31. For a description of how such a lawyer might respond to laws she perceives as unjust, see ANTHONY KRONMAN, *THE LOST LAWYER* 18-19 (1993) ("[A good lawyer] must also be a public-spirited reformer who monitors this framework itself and leads others in campaigning for those repairs that are required to keep it responsive and fair.... [T]he appropriate object of the law reformer's concerns is the structural arrangement of the legal order as a whole and not the resolution of particular disputes of the sort that lawsuits and other concrete controversies typically involve.").

32. See *id.*

33. See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 286 (1990) (describing the ways law reform groups, bar associations, and task forces allow lawyers to articulate disinterested views of policy).

34. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (describing the "bad man" as one "who cares only for the material consequences" that knowledge and manipulation of the law may bring about, and does not defer to morality or other decisions greater than these consequences).

Keep in mind that these are models or ideal types, and that any real-life lawyer is likely to blend these models. Few people who seek the social respect attached to professional status enjoy being typecast as cynical villains, eager to do dirty work for anyone willing to pay for it. It is hard for a lawyer to sustain the feeling that he is pursuing an honorable vocation purely as a zealous agent for clients and causes that he despises: he has to rationalize his practice as serving some larger social end.³⁵ Lawyers in this situation often invoke the standard view of adversary advocacy as ultimately resulting in a virtuous equilibrium. For example, criminal defense lawyers, besides feeling sorry for many of their clients, and believing that their clients are in more trouble than they deserve, reasonably suppose that aggressive defense performs an indispensable public function in checking police and prosecutorial abuse and bargaining down savage sentences to something approaching proportional punishment.³⁶ Even some of the most ferocious hardball players may have a passion for legal ideals as well as devotion to client interests—for example, business lawyers inflamed by strong libertarian convictions that the high-tax regulatory welfare state violates basic rights of liberty and property and cripples wealth-producing enterprise;³⁷ or for that matter, lawyers resisting federal racial integration orders in the belief that these infringe on states' sovereign rights, increase racial tensions and violence, or are futile and counterproductive because they will only cause white flight without achieving any actual integration.³⁸ But a lawyer who

35. See, e.g., RHODE, *supra* note 7, at 49 (reflecting on working at the Washington, D.C. public defender's office:

My supervisor was able to get the case [a brutal murder committed by two juvenile offenders] dismissed on what the public would consider a "technicality." He also was proud of his accomplishment.... [W]ith the benefit of a quarter century's hindsight, I think both my supervisor and I were right. He was providing an essential and ethically defensible safeguard for constitutional values. And I was right to feel morally troubled by the consequences.

36. See *id.* at 55.

37. See Sung Hui Kim, *The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 1013 (2005).

38. See Edward J. Kelly III, Note, *White Flight as a Factor in Desegregation Remedies: A Judicial Recognition of Reality*, 66 *VA. L. REV.* 961, 961-62 (1980); James Dao, *The New Administration: The Justice Department; Ashcroft Leaned Right, Then Center*, *N.Y. TIMES*, Jan. 23, 2001, at A15 (discussing John Ashcroft's efforts as state Attorney General and later Governor to overturn federal rulings finding Missouri schools liable for segregation).

improvises a novel high-minded rationale for representing every new profitable client cannot qualify as a citizen lawyer in my conception of the role. That conception requires that the lawyer commit some part of himself or herself to a view of the legal framework and its norms that may sometimes cut against the short-term interests of the client at hand, who may simply want an ad hoc exemption from laws that generally benefit everyone, including (and often, especially) himself.

This Article will evaluate the history and current status of this conception. Is the ideal of the "citizen lawyer," as I've broadly defined it, in decline? Prominent spokespersons for the American legal profession have said that it is, and have done so almost from the very beginning of the Republic.³⁹ The laments that law has decayed from a profession to a business, that lawyer-statesmen have given way to profit maximizers, and that lawyers have sold out the honor of their profession and its devotion to the public good for self-seeking, are perennial themes in our professional culture, sounded anew in every generation.⁴⁰ It is tempting to think that laments so common and so constant must be mere nostalgic diatribes, the sentiments of yearning for better and simpler times that overcome every generation on its way out.⁴¹

These laments are certainly overgeneralized. Lawyers complaining about decline often compare the ordinary lawyers of today with the extraordinary ones of the past.⁴² They compare lawyers in normal times to lawyers called upon to respond to exceptional challenges demanding extraordinary public efforts—for example, the Revolution and Constitutional Convention, the slavery crisis

39. See RHODE, *supra* note 7, at 1 (reporting that between the beginning of the nineteenth century and the present the legal profession has continuously lamented its loss of honor).

40. For some of the most prominent and eloquent of such laments, see generally MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); KRONMAN, *supra* note 31; LINOWITZ, *supra* note 10; ZITRIN & LANGFORD, *supra* note 26, at 45.

41. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549-62 (1996).

42. See, e.g., KRONMAN, *supra* note 31, at 11 (describing a speech that Chief Justice William Rehnquist gave to students at the University of Chicago Law School that proceeds by extolling the careers of eight notable legal figures, all from the eighteenth and nineteenth centuries, and concluding by commenting briefly on the demise of the lawyer-statesman as an important professional type); LINOWITZ, *supra* note 10, at 9 (calling prominent lawyers of the past, such as John Adams and John Marshall, "icons" and "leaders of their communities and of the country").

and Civil War, and the Great Depression and World War II—which mobilized platoons of lawyers to rally to the cause.⁴³ It is not surprising that no group of lawyers has approached the distinction of the Founders: none have had the opportunity, arguably, to play such heroic roles. Nor is it surprising that lawyers on leave from practice no longer dominate the major posts of government as they did when governments were small and law was the only training for public affairs.⁴⁴ Lawyers still dominate the staffing of senior political posts, but many of them have been replaced by professional politicians in the legislatures, and, in the wake of the expansion of bureaucratic government, by full-time civil servants in appointive positions who may possess expertise in rival professions such as economics, journalism, public policy, or foreign affairs.

Contrary to the rhetoric of decline, the general ethical standards of practice, one practical measure of civic virtue, are probably higher today than they have been for most of our history simply because bar associations, courts, regulators, and law firms have put in place some disciplinary machinery to enforce them.⁴⁵ More importantly, there are more lawyers who work full-time in the “public interest”—as government lawyers, legal services lawyers, lawyers for nongovernmental organizations serving causes (civil rights and civil liberties, human rights, the environment, etc.)—and part-time as “pro bono” counsel, as well as academic lawyers, than there have ever been.⁴⁶ Their numbers are very small as a proportion of the

43. See LINOWITZ, *supra* note 10, at 9.

44. See Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 73, 96 (Michael Grossberg & Christopher Tomlins eds., 2008) (describing the Eastern corporate lawyers who “dominated high foreign policy posts in the first half of the twentieth century”); see also Reveley, *supra* note 1, at 1313 (arguing that when the number of lawyers in the legislature declines, “the caliber of the laws made often declines too”).

45. See Jeanne F. Backof & Charles L. Martin, Jr., *Historical Perspectives: Development of the Codes of Ethics in the Legal, Medical and Accounting Professions*, 10 J. BUS. ETHICS 99, 104 (1991) (asserting that such changes were the product of “changes in public attitudes and values, governmental influence, and changes within the bar itself”).

46. The total number of lawyers in the United States increased from 109,000 in 1900 to nearly 1,000,000 in 1999. Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW’S CENTURY 287, 292 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002). More specifically, the number of lawyers employed in government, legal aid, and public defender positions rose from 77,889 in 1980 to 101,790 in 2000. But note that the percentage of lawyers employed in these positions as compared to the total lawyer population actually declined from

bar—the total quantities of legal aid and pro bono practice are derisory in relation to the demand⁴⁷—but most of the jobs they do scarcely existed a hundred years ago, when even felony defendants routinely went unrepresented or depended on the random luck of appointed counsel. Since the 1970s, bar associations, which used to be hostile or indifferent to legal aid and public interest law, have become enthusiastic backers of increased access to the legal system as well as of general legalist causes, such as improving the quality of the judiciary and promoting the rule of law abroad.⁴⁸

By many indications, therefore, at least some versions of the citizen lawyer ideal are very much alive, and even if not exactly flourishing everywhere, they are at least more vigorous than they ever used to be. Nonetheless, I think the rhetoric of decline captures something real. To some extent, the performance of public roles has devolved onto specialists in the public good, like government and “cause” lawyers.⁴⁹ It is the ideal of the citizen lawyer as part of the calling of ordinary private lawyer that is in recession. That has happened because the economic, political, and cultural conditions that helped to sustain the ideal no longer remain. The history of this development is very long and complex.⁵⁰ I provide here only a summary sketch with a sprinkling of examples. I begin by noting a striking contradiction. In comparison to other societies, the American legal profession is overwhelmingly oriented to service of private clients. In many other societies the top graduates of elite schools go into the state civil service; in the United States they mostly go to large private law firms.⁵¹ American legal ethics tend to

16 percent to 11 percent in the same time period. CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000*, at 6 (2004).

47. See Gordon, *supra* note 46, at 292-93; see also Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, N.Y. TIMES, Nov. 16, 2007, at B3 (“Legal Services for New York City, which represents and advises about 10,000 households, said the agency assisted only 21 percent of eligible tenants who seek their help.”).

48. See EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 254-59 (1978).

49. See *generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter CAUSE LAWYERING] (containing articles that discuss the context, organization, strategies, and potential of “cause” lawyering).

50. For this Article, I draw on a larger work-in-progress on the history of law as a public profession.

51. See NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., *AFTER THE JD: FIRST RESULTS*

stress the ideal of adversary advocacy—loyalty and zeal in service of client interests—over service of public ends. Our ethics codes firmly cement lawyers' loyalty to clients, and we expect lawyers to creatively stretch the law, facts, and procedural maneuvers to benefit clients, even at some cost to the effective functioning of the legal framework as a whole.⁵²

But at the same time, American lawyers have an exceptionally robust tradition of public service and public involvement. The American public leadership class has been overwhelmingly drawn from the legal profession: lawyers generally constitute over half of the state and federal legislatures, the majority of senior appointive posts in the executive branch agencies, and of course virtually all judges.⁵³ And the public contributions of American lawyers go well beyond service in public office. Lawyers from private practice have served as key figures in policy entrepreneurship and movements to provide legal, civic, and social reform.⁵⁴ They have invented the occupations of "cause" lawyer and "public interest" lawyer and have exported them to the rest of the world.⁵⁵

Lawyers do not play these central public roles in every society. We owe their prominence in our public life to a distinctive political history. Before the American Revolution, the bar was divided between those lawyers who held office in the British imperial administration and those who represented planters, landowners, merchants, and other citizens who often came into conflict with the Crown.⁵⁶ The lawyers who represented colonial interests became the main spokesmen for colonial grievances in the struggles with England.⁵⁷ After the Revolution, the lawyers and officials loyal to Britain emigrated.⁵⁸ Those left behind were inclined to distrust executive

OF A NATIONAL STUDY OF LEGAL CAREERS 25-26 (2004); Gordon, *supra* note 46, at 331 n.1.

52. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 20 (1988).

53. MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 31-43, 50-52, 61-64 (1995).

54. See Gordon, *supra* note 46, at 318-27.

55. See *id.* at 326.

56. See Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 68, 71-73 (Michael Grossberg & Christopher Tomlins eds., 2007).

57. See Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in *POLITICAL SEPARATION & LEGAL CONTINUITY* 3, 23-27 (Harry W. Jones ed., 1976).

58. See 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 5-

authority, bureaucratic centralization, and aristocratic dominance.⁵⁹ The Revolution permanently put the major models of European governance off the table.⁶⁰ One was rule by hereditary classes of monarchs and landed nobles.⁶¹ The other was what would gradually develop in England and the European continent over the nineteenth century: governance through an elite group of powerful and highly educated civil servants.⁶²

The Revolutionary generation thought America's destiny was governance by a light hand—popular government by elected amateurs serving brief terms, and by other popular institutions such as juries.⁶³ In America, the ambitious would seek business success rather than a place at court. Most Americans, they assumed, would not have to think about government at all—only about making a living, getting ahead, and taming a continent.⁶⁴ The main job of law would be protecting the People's rights from the danger of an overbearing State.⁶⁵

As it turned out, the main problems facing the new states and nation were not caused by overbearing government, but too little and ineffective government, not an excess of law but a shortage of law.⁶⁶ Alexis de Tocqueville observed that a commercial-democratic society could suffer badly for want of political leadership, because although in theory the people ruled, most were uninterested in the public's business and did not elect superior men to public office.⁶⁷

10 (1965); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 226 (3d ed. 2005).

59. See CHROUST, *supra* note 58, at 5-7.

60. See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT* 46 (2003).

61. See *id.* at 52.

62. See Konefsky, *supra* note 56, at 73-74 (noting that by virtue of their education and training, lawyers were particularly well suited to replace the ministry as society's preferred leaders).

63. See J.R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 145 (1993).

64. See Mark R. Wilson, *Law and the American State, From the Revolution to the Civil War: Institutional Growth and Structural Change*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 1, 3 (Michael Grossberg & Christopher Tomlins eds., 2007).

65. See CHROUST, *supra* note 58, at 32.

66. See EDLING, *supra* note 60, at 45-46.

67. See, e.g., ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA (Henry Reeve trans., Arlington House Press 1966) (1835) ("The pursuit of wealth generally diverts men of great talents and of great passions from the pursuit of power: and it very frequently happens that a man does not undertake to direct the fortune of the State until he has discovered his incompetence to conduct his own affairs.").

Yet the new states, the new nation, and the new economy required more regular and sustained attention to governance than part-time legislators could provide. Foreign policy, economic development, and well-functioning markets require a good deal of public infrastructure, enforcement, and regulation. To manage foreign relations, the federal government needed to develop a body of international and mercantile law, build a national common market, and develop a statutory and common law of interstate commerce and trade barriers.⁶⁸ To build a transportation system of roads, canals, and railroads, the new states needed legal mechanisms like corporate personality, bonds, public credit, and mortgages to facilitate and protect public and private investment; the government needed to take and regulate property for public purposes, clothe coerced or fraudulent expropriations from Indian tribes in the forms of law, and deal with external effects such as damage to property, persons, and livestock.⁶⁹ The government needed to regulate safety, labor, slavery, capital markets, and finance; it needed to develop a law of commercial instruments and insurance; and it needed to cope with frequent bankruptcy.⁷⁰

Lawyers stepped forward to fill the vacuum of public leadership authority. They had the credentials and the legitimacy, because they had taken the leading role in state-building in the new republic. The desire to participate in public life—indeed, to achieve fame in public life, not just gentlemanly status—became one of the main reasons for seeking a legal career.⁷¹ Hamilton aspired to be like Caesar, the founder of an empire; and he and Madison identified with the great lawgivers of antiquity, Lycurgus and Solon, Numa and Publius.⁷² Lawyers had articulated the grievances of Revolution in legal terms; they had drafted the new federal and state constitutions and gradually persuaded society to accept them

68. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 13-15 (2d ed. 1964).

69. See FRIEDMAN, *supra* note 58, at 120-39.

70. For the functions and uses of law and lawyers in the early republic, see *id.* at 125-39; HURST, *supra* note 68, at 29.

71. See DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS: ESSAYS 7-9* (Trevor Colbourn ed., 1998) (discussing iconic historical figures that certain Founding Fathers desired to emulate).

72. See *id.* at 20-22, 29.

as legal texts subject to lawyers' arguments and judges' interpretations.⁷³ They took the leading roles in the many conventions to amend state constitutions.⁷⁴ They made legal discourse and legal procedures into primary modes of governance and dispute settlement in the new nation.⁷⁵ Lawyers dominated high offices, state and federal, elective and appointive, and (after early experiments with lay judges) monopolized the upper judiciary.⁷⁶ By the 1830s, Tocqueville was calling lawyers the American "aristocracy"—a ruling class more legitimate than nobles or gentry because they were an aristocracy of merit.⁷⁷

Nearly all successful lawyers moved regularly in and out of politics and public service. In Massachusetts between 1760 and 1840, over half of the entire practicing bar probably sought election to public office.⁷⁸ In cities and local communities, lawyers played an active part in civic life as promoters of civic improvement and trustees of hospitals, colleges, and charities.⁷⁹ The trajectory of a successful lawyer's career led inexorably to public involvement: the leaders of the bar were also the leading lawyer-statesmen, propelled from success in private practice to elective and appointive office—men like Daniel Webster, William Maxwell Evarts, and Elihu Root, who served both as U.S. Senators and Secretaries of State.⁸⁰

Lawyers have always tended to vastly exaggerate their civic-mindedness, which is why historians like Lawrence Friedman have good reason to be skeptical about their claims.⁸¹ In the early republic, lawyers professed to admire Cicero, the classical republican ideal of the citizen lawyer, who stood for patrician independence

73. See FRIEDMAN, *supra* note 58, at 71-79.

74. See *id.*

75. See *id.*

76. See *id.* at 79-91.

77. See TOCQUEVILLE, *supra* note 67, at 276 ("[M]embers of the legal profession ... constitute the only aristocratic body which can check the irregularities of the people.").

78. See GERARD GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840*, at 68 (1979).

79. See MILLER, *supra* note 53, at 28-29; see also ROBERT F. BODEN, *THE COLONIAL BAR AND THE AMERICAN REVOLUTION* 5 (1976) (noting that lawyers "took time off from practice to perform a public service"—that of creating the United States of America).

80. See generally CHESTER L. BARROWS, *WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN* (1941); MAURICE BAXTER, *ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION* (1984); 1 PHILIP C. JESSUP, *ELIHU ROOT* (1938).

81. Friedman, *supra* note 23, at 1155.

from tyrannical power; Thomas Erskine, the fighter for political dissidents like Tom Paine; and John Adams, defender of such unpopular clients as the Boston Massacre soldiers who fired on a patriot crowd.⁸² Lawyers habitually claimed to act in their public roles for the general interest as agents of the Constitution and as a bulwark of the best conservative values, protecting rights of property from reckless redistribution, but also as champions of equal rights.⁸³ The emergence of constitutional judicial review, in particular, gave plausibility to lawyers' claims to be masters of statecraft and policy, not merely a crabbed and technical legal science, in their ordinary practices.⁸⁴ Lawyers also claimed to be, as professionals, a genuinely *disinterested* element in society, upholders of principle against party, class, and faction; upholders of the rule of law and regular procedure; and selfless public servants.⁸⁵ Bar leaders and law writers on professional ethics such as George Sharswood and David Hoffmann routinely denounced the ethic of "my client first, last and always," insisting that lawyers in their private practices must remain statesmen, guiding their clients to seek the public good and doing their part to maintain and improve the legal framework.⁸⁶ Thus, for example, Simon Greenleaf of the new Harvard Law School argued:

While our aid should never be withheld from the injured or the accused, let it be remembered, that all our duties are not concentrated in conducting an appeal to the law;—that we are not only lawyers, but citizens and men;—that our clients are not always the best judges of their own interests,—and that having confided those interests to our hands, it is for us to advise to that course, which will best conduce to their permanent benefit, not

82. See ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 74-78 (1984); PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 112 (1998).

83. See FERGUSON, *supra* note 82, at 24-28.

84. See *id.* at 20-24.

85. See Gordon, *supra* note 52, at 14.

86. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241, 247 (1992) (citing George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 1 (1907)); see also David Hoffman, *Resolutions in Regard to Professional Department*, in 2 A COURSE OF LEGAL STUDY 752, 758 (1836).

merely as solitary individuals, but as men connected with society by enduring ties.⁸⁷

Lord Brougham's famous admonition that the "advocate, by the sacred duty which he owes his client ... [to] save that client by all expedient means, ... at all hazards and costs to all others ... must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other,"⁸⁸ was frequently cited, but almost invariably to condemn it as exaggerated, even monstrous.⁸⁹

The quantum of hype in these claims is obvious. Lawyers found it no easier than anyone else to rise above party, class, and faction; especially if their livings depended on being such factions' faithful servants.⁹⁰ Lawyers hardly floated above the politics of party and faction: they were the cadres of party activists—leaders, wheel-horses, and ideological spokesmen.⁹¹ They were as prone as most political actors to identify their own good, or their clients' good, with the public good. Unpopular clients without money⁹² have never had much luck attracting lawyers in any age. It is also hard to know how far lawyers who solemnly abjured their colleagues to refrain from hardball tactics and to counsel clients in the paths of public virtue actually carried out that advice in their own practices.

As for lawyers' public service, it was often simply a means of advancing a private career: political office brought opportunities to show off oratory and persuasive talents, and to contact and do

87. SIMON GREENLEAF, A DISCOURSE PRONOUNCED AT THE INAUGURATION OF THE AUTHOR AS ROYAL PROFESSOR OF LAW IN HARVARD UNIVERSITY 17 (1834).

88. Henry Lord Brougham, *Speech in the Case of Queen Caroline*, in 1 SPEECHES OF HENRY LORD BROUGHAM 105 (1838). Brougham himself was an exemplary citizen lawyer outside the bounds of his advocacy practice, one of the most energetic and successful law reformers of his time, and eventually became Lord Chancellor.

89. The reader can verify this for herself by running a "Brougham w10 advocate" search through the Making of Modern Law database of legal writings published between 1800 and 1926. Norman Spaulding correctly points out, however, that the rhetoric of public-serving professionalism was by no means universal. There were plenty of lawyers who spoke up for a "hired gun" zealous advocate's view of the lawyer's role. Norman Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397, 1409 n.45 (2003).

90. See Gordon, *supra* note 52, at 15.

91. See Konefsky, *supra* note 56, at 69-70.

92. RHODE, *supra* note 7, at 58 (referring to such clients as "social pariahs with shallow pockets").

favors for potential clients.⁹³ Indeed for many, public life was simply an extension of private practice. As one of many examples, Cleveland's Attorney General Richard Olney continued to represent the Chicago Burlington & Quincy Railroad while in office and used his office to bring injunctions against Eugene Debs's Pullman union while it was striking his client's railroad.⁹⁴ In more recent times, Gale Norton was a lawyer and lobbyist for timber, grazing, and extractive industries before entering the George W. Bush Administration; once in office, as Secretary of the Interior, she effectively continued to be a lawyer and lobbyist for the timber, grazing, and extractive industries; and when she left office, she took a job as legal advisor to an oil company.⁹⁵ Lawyers might sometimes defend established property rights and regular procedures and the ideal of access to justice for everyone, but if their clients' interests lay in destroying such rights, ignoring such procedures, or cutting off plaintiffs' practical ability to bring tort suits, they would happily take that side as well. Contrary to the bar's mythology, most of their work for business clients was not defending them against tyrannical government, but extracting favors from government—privileges, subsidies, immunities, tax exemptions, land grants, and contracts.⁹⁶

In fact, the public roles of lawyers came under increasing strain from the pressures of their private practices. English barristers had adopted rules forbidding them to accept retainers, lest they become continuously dependent on a single set of clients or clienteles;⁹⁷ but as early as 1800, the most successful American law practices were being built on retainers from insurance companies, banks, merchants, and manufacturers.⁹⁸ Barristers could not negotiate directly with clients, but they had solicitors to do that for them and Americans did not.⁹⁹ Nineteenth-century American lawyers

93. See FRIEDMAN, *supra* note 58, at 233.

94. GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN 151-52 (1974).

95. Zachary Coile, *Interior Chief Gale Norton to Step Down*, S.F. CHRON., Mar. 11, 2006, at A1; see *Ex-Interior Secretary Norton Is Hired as Counsel for Shell*, WALL ST. J., Dec. 28, 2006, at B5.

96. See Gordon, *supra* note 44, at 94-95; Konefsky, *supra* note 56, at 76.

97. See ANDY BOON & JENNIFER LEVIN, *THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES* 178-83 (1999).

98. See Konefsky, *supra* note 56, at 89-90.

99. See DANIEL DUMAN, *THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY* 41 (1983); FRIEDMAN, *supra* note 58, at 235.

spoke frequently and fearfully about the dangers of falling into dependence on client groups but gradually did so anyway.¹⁰⁰

Yet the view of lawyers as economically self-interested actors and agents of economically self-interested clients cannot adequately explain the rich traditions of American lawyers' civic activism—their involvements in state and legal institution building, first in the founding era and early Republic, then in the construction of the Progressive administrative state from 1870 to 1940, or their role in brokering and stabilizing the social contracts of the political economy in the post-World War II social order.¹⁰¹ It cannot explain their sustained attention to construction and refinement of elaborate systems of private and public law doctrines that were relatively detached from immediate client interests.¹⁰² And it certainly cannot explain lawyers' contributions to the moral and ideological causes of underdogs and marginals, their campaigns for universal rights and civic inclusion, from antislavery to civil liberties, civil rights, and public interest "cause" lawyering.¹⁰³ These contributions to building, maintaining, and reforming the general public framework of the legal system would seem to require a richer set of explanations.

Perhaps the most favorable conditions for public-minded lawyering have arisen, not surprisingly, when the clientele themselves promoted a broad vision of the national interest. The Federalist and Whig lawyer-statesman of the early Republic were field agents of the New England mercantile, banking, and industrial elite, with economic interests in, and a sense of the visionary possibilities of, a national common market.¹⁰⁴ Daniel Webster depended on this clientele for campaign contributions as well as fees; he did much of the important legal work for them and represented them as advocate, Senator, and Secretary of State.¹⁰⁵ In those capacities he

100. See JAMES C. FOSTER, *THE IDEOLOGY OF APOLITICAL POLITICS: THE ELITE LAWYERS' RESPONSE TO THE LEGITIMATION CRISIS IN AMERICAN CAPITALISM, 1870-1920*, at 136-41 (1990); Konefsky, *supra* note 56, at 89-91.

101. See Gordon, *supra* note 46, at 312-14.

102. See *id.*

103. See *id.*

104. See R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, in *THE CONSTITUTION AND AMERICAN LIFE* 154, 169 (David Thelen ed., 1988).

105. See BAXTER, *supra* note 80, at 155-56, 504-06.

developed, along with other legal visionaries like John Marshall and Joseph Story, the Federalist-Whig conception of the national Union under supreme federal law as well as constitutional doctrines of vested rights that protected some of their clients' enterprises from legislative revision.¹⁰⁶

Moreover, until the late nineteenth century, even lawyers with extensive and regular ties to business clients felt some freedom to take on public causes at odds with those of their clients—though some of them, like the antislavery lawyers, paid a price for it in lost business.¹⁰⁷ That is because at that time they were still viewed as independent advocates, able to argue for any side that hired them.¹⁰⁸ The advocate's role, diversified clienteles, and the tolerance that law partnerships had for long leaves to conduct political activity and public service opened up space for living out the public side of a lawyer's life.¹⁰⁹ The opportunities that public involvement offered for making a public reputation, making valuable contacts in government and politics, and attracting new clients naturally supplied additional motives: a lawyer could sometimes accumulate more social capital as an effective rhetorician or the spokesman for a public-regarding set of principles than as an industry "hired gun."¹¹⁰ To give a couple of examples almost unimaginable today: Rufus Choate, the leading Boston lawyer of his time and one with many prominent business clients, represented Gilham Barnes, an injured worker, in a famous tort suit against the Boston & Worcester Railroad Co., trying to establish the principle of employer liability for industrial accidents. Choate argued broadly that the privilege of incorporation carried with it extensive legal and moral duties of care.¹¹¹ Clarence Darrow was still general counsel for the Chicago

106. See *id.* at 172-73 (remarking that Justices Story and Marshall "thought much as Webster did," and detailing the development of vested rights).

107. See JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 50-53 (2003).

108. See Konefsky, *supra* note 56, at 89-91.

109. See FRIEDMAN, *supra* note 58, at 233.

110. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 205-06 (2005) (discussing a controversial theory put forth by Robert Putnam that civic engagement is inextricably tied to social capital and that disengagement has depreciated social capital on a nationwide level).

111. CHRISTOPHER L. TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 331-47 (1993).

and Northwestern Railway while trying to get pardons for the Chicago Haymarket defendants;¹¹² he resigned from his railroad job to represent Eugene Debs in his legal battles with the Pullman Company and the nation's railroads, but continued to do legal work for his railroad client part-time.¹¹³ As late as the 1870s, even the lawyers who appeared most often for railroad clients in court appeared almost as often for individuals suing the railroads.¹¹⁴

By the last quarter of the nineteenth century, however, nearly all of the most successful lawyers were drawn into the orbit of powerful corporate clients, beginning with the railroads. Some railroad lawyers tried to retain their independence, but

were overwhelmed by the railroads' insistence on an exclusive loyalty. If they wanted any railroad work, they had to agree to represent the railroad exclusively. Often the most able lawyers in towns along the line were paid retainers, not for actual legal work, but to prevent them from appearing for anyone on the other side, not just of the client, but of any anti-railroading interest. Railroad legal departments organized lawyers as political as well as legal agents; they formed trade associations, lobbied and paid for friendly legislation and friendly commissions, and financed campaigns of friendly politicians. By 1900, a lawyer who had railroads among his clients was expected to support and be a spokesman for railroad interests generally.¹¹⁵

At the same time, a specialized personal injury bar, increasingly of foreign origins, developed to oppose the business bar; just as much later a labor bar arose to oppose the management bar.¹¹⁶ The lawyers for business interests and individuals in trouble were recruited from different social strata and rarely changed sides.¹¹⁷

As a reaction to this development, a small but ultimately very influential minority of Progressive Movement lawyers engaged in

112. CLARENCE DARROW, *THE STORY OF MY LIFE* 99-100 (1932).

113. *Id.* at 61-62; ANTHONY LUKAS, *BIG TROUBLE* 311 (1997).

114. This is based on my own research in progress, a survey of cases in New York and Illinois between 1860 and 1900.

115. Gordon, *supra* note 44, at 100. The main source for this passage is WILLIAM THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, POWER, AND LAW IN THE NEW SOUTH* (1999).

116. See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY* 150-54 (1992).

117. See *id.* at 150.

building institutions that, they believed, would enable them both to practice law and render policy advice in the "public interest," relatively free of the direct influence of powerful clienteles, and to rebuild the public reputation of their profession and rescue the legal system from corruption. The major institutions of the modern bar came out of this program. The first major bar association, the Association of the Bar of the City of New York, was founded by lawyers who had represented the Erie Railroad and William "Boss" Tweed's ring before judges and legislatures bribed by their clients,¹¹⁸ and wanted to redeem their own practices from degradation.¹¹⁹ The pioneer modern law school, Harvard, was the project of C.C. Langdell, a former New York practitioner disgusted by his own practice experience, who retreated to the higher ground of New England to elevate the profession by infusing it with fresh cadres of lawyers trained in legal analysis.¹²⁰ The first ABA ethics code of 1908 was drafted by lawyers who were as alarmed by the practices of the business bar as by the practices of the mostly immigrant new plaintiffs' personal injury bar.¹²¹ The proliferation of administrative commissions and regulatory agencies, and procedures for reducing patronage in the selection of judges and civil servants, were all to some extent products of this collective effort. Elihu Root (later a Secretary of War and Secretary of State) represented the Metropolitan Street Railway system that controlled most of New York's surface transit;¹²² in 1897, he backed the reform initiative to put street railway companies under the city's control and make them conform to fair labor standards.¹²³ He was a keen and often ruthless partisan in adversary combat;¹²⁴ but, like almost half of the leading lawyers of the city, was also very active in reform causes.¹²⁵

118. See Gordon, *supra* note 44, at 76-77.

119. See MICHAEL POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 6-7 (1988).

120. See WILLIAM LAPLANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 13 (1994).

121. See Susan Carle, *Lawyer's Duty To Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 7-8 (1999).

122. JESSUP, *supra* note 80, at 183-84.

123. See *id.* at 193.

124. See, e.g., *id.* at 177-78.

125. See, e.g., *id.* at 193-94.

Like the Whig lawyers of the previous century, leading lawyers of the Progressive period, such as Louis Brandeis, Elihu Root, Charles Evans Hughes, Henry Stimson, and Harlan Fiske Stone had the backing of relatively forward-looking business clients, who perceived they had something to gain from state-building and a politics of reform and social compromise: corruption reform and a meritocratic civil service; public utilities rate regulation that would stave off public ownership; worker's compensation that would stabilize costs of industrial accidents; federal child labor regulation that would level the playing field with Southern competitors; and concords with labor unions that would advance the cause of industrial peace.¹²⁶ Likewise, the lawyers (and bankers) who directed U.S. foreign policy for most of the twentieth century represented, in both their private and public roles, an Eastern internationalist sector of investment bankers and multinational businesses with extensive foreign investments and a vested interest in international stability (peace and prosperity in Europe, friendly and pliable regimes in the developing world), and international legal and dispute settlement institutions.¹²⁷ Such clients were often party to quasi-corporatist arrangements (for example, the wartime industry boards, the interwar trade associations, the National Recovery Administration code associations, and the postwar defense industry) run through public-private agencies that they staffed with their lawyers.¹²⁸ The New Deal further expanded opportunities for lawyers to serve as mediators between business-client interests and the administrative state and to move between public and private careers.¹²⁹ It also created thousands of new functions for government and labor lawyers.¹³⁰

In the post-World War II era, a group of lawyers and legal academics—including Lon Fuller, Willard Hurst, Harvard "Legal Process" scholars Henry Hart and Albert Sacks, and corporate

126. See Gordon, *supra* note 44, at 95-96.

127. See *id.* at 96.

128. See, e.g., Daniel R. Ernst, *Law and the State, 1920-2000: Institutional Growth and Structural Change*, in 3 CAMBRIDGE HISTORY OF LAW IN AMERICA 1, 9-10 (Michael Grossberg & Christopher Tomlins eds., 2008) (describing the purpose and operative characteristics of the National Recovery Administration).

129. Gordon, *supra* note 44, at 106.

130. For a fuller account of these developments, see generally *id.* at 73-126.

lawyer Beryl Harold Levy—theorized, from hints dropped by such Progressive lawyers as Brandeis and Adolf Berle, the role of the new corporate legal counselor as a “statesman-adviser.”¹³¹ The counselor represents his client’s interest “with an eye to securing not only the client’s immediate benefit but his long range social benefit.”¹³² In negotiating and drafting contracts, collective bargaining agreements, and reorganization plans, the lawyer is a lawmaker of “private legislation” and “private constitutions,”¹³³ a “prophylactic avoider of troubles, as well as pilot through anticipated difficulties.”¹³⁴ Lawyers who helped businesses fix prices, cheat on taxes, violate safety regulations or labor laws, or produce dangerous products were not really helping their clients—which the theorists conceived of as entities that had a long-term interest in their reputations as good citizens and continuing relations with governments, customers, and local communities. The lawyer’s job was not only to represent the client to the legal system, but also to represent the legal system to the client; to not only help the client navigate through the maze of law and minimize the adverse effects of law, but also to stay on the right side of the law.¹³⁵ Thus, they thought, private and public roles of lawyering could be merged.¹³⁶

The vision rested on particular material and institutional conditions. The most important was having the right kind of client. Berle named the executives Gerard Swope and Owen D. Young of General Electric as the prototype of “manageralist” business leaders¹³⁷ who eventually came to dominate wartime government agencies and advisory boards, made their peace with the New Deal, accepted unions as the price of stability, and whose lawyers moved in and out of government and codrafted regulations in business-

131. William H. Simon was the first to identify this conception of professional obligation and its sources, which he christened “Purposivism.” See Simon, *supra* note 11, at 62; see also BERYL HAROLD LEVY, *CORPORATION LAWYER: SAINT OR SINNER?* 149 (1961) (establishing a role of the lawyer as a “statesman-advisor”).

132. LEVY, *supra* note 131, at 150.

133. *Id.* at 151.

134. *Id.* at 153.

135. See Simon, *supra* note 11, at 68.

136. See *id.* at 71.

137. A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932). For Swope and Young’s role at General Electric, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154-55 (1932).

friendly regulatory agencies.¹³⁸ The vision also assumed the model of stable corporate law firm relations that prevailed until the 1970s: a single firm composed of partners for life, who did virtually all of the legal work for corporate clients who retained them indefinitely, rarely questioned their bills, and gave their utmost trust and confidence.¹³⁹ The "wise counselor" vision of the lawyer's role found its way into the Joint Report prefacing the ABA's 1969 Model Code of Professional Responsibility;¹⁴⁰ and, according to Erwin Smigel's 1964 study of Wall Street law firms, it had been completely internalized by the partners of those firms.¹⁴¹ By employing such stratagems, business lawyers rescued a conception of a meaningful public role for their profession from descent into servility.¹⁴²

By the 1980s, however, the ideology of the lawyer as "wise counselor," which neatly spanned the public-private divide by picturing the enlightened long-run interest of the client as ultimately harmonious with the public interest as constructed by public-private corporatist partnerships, had all but disappeared. Robert Nelson's 1988 study of Chicago corporate lawyers¹⁴³ and John Heinz and colleagues' 1993 study of Washington lawyers¹⁴⁴ found almost no trace of it: both samples of lawyers saw themselves as technically

138. See, e.g., KIM MCQUAID, *UNEASY PARTNERS: BIG BUSINESS IN AMERICAN POLITICS*, 1945-1990, at 19-23 (1994) (discussing the role of the Business Council and the Council for Economic Development in establishing a fluid partnership between the public and private sectors after the New Deal).

139. See Gordon, *supra* note 44, at 106.

140. See Gordon, *supra* note 24, at 1209; see also Am. Bar Assoc. & Assoc. of Am. Law Schools, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) ("Thus partisan advocacy is a form of public service so long as it aids the process of adjudication; it ceases to be when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult."). So too with lawyer as negotiator and draftsman: "[H]e works against the public interest when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates." *Id.*

141. ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 262-72 (1969).

142. In a review of Levy's book, Adolf Berle hoped that this conception of business lawyering might "in time redeem the bulk of the corporation bar from the profitable but usually undistinguished bondage in which most of it lives." Adolf A. Berle, Book Review, 76 HARV. L. REV. 430, 433 (1962) (reviewing BERYL HAROLD LEVY, *CORPORATION LAWYER... SAINT OR SINNER? THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY* (1961)).

143. See ROBERT NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 247-59 (1988).

144. JOHN P. HEINZ ET AL., *THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICYMAKING* 186-89 (1993).

implementing goals predetermined by their clients and rarely questioned them, much less engaged in a dialogue about the long-run social and political effects of those goals.¹⁴⁵ The recent “professionalism” projects of the ABA and state bar associations mainly define professionalism as the restoration of “civility” and improving access to justice.¹⁴⁶ The citizen lawyer ideal, that lawyers might have special obligations as curators of legal norms to urge clients to comply with those norms, has largely disappeared from the practicing bar’s standard accounts of its functions and obligations.

So what happened? I have space here only to list what seem to me to be the main factors responsible for the decline of the public citizen lawyer ideal in the ideology of the elite bar and the rise and revalorization of the privatized conception of the lawyer’s role. I have split this list of factors into political-economic changes, intra-professional changes, and general cultural changes.

Political-economic:

1. The quasi-corporatist social contract underlying the assumption of ultimate harmony between big business firms’ interests and the public’s began to collapse in the late 1960s and early 1970s. Business firms embarked on newly adversary relations with governments by resisting much of the new social regulation (environmental, occupational health, and safety), getting rid of their unions and forestalling the organization of new ones when they could, and aggressively minimizing their tax liabilities.¹⁴⁷

2. As costs of litigation and regulatory compliance (and resistance) rose, companies cut back on legal costs by bringing much work in-house, upgrading general counsel to contract out and supervise legal services, breaking stable relations with

145. *See id.* at 185-86.

146. *See, e.g.,* Commission on Professionalism of the Illinois Supreme Court, Overview, <http://ilsccp.org/> (last visited Feb. 11, 2009) (“Our mission is to promote a professional culture in which lawyers embody the ideals of our profession in service not only to their clients, but to the administration of justice and to the public good.”). Information regarding the projects of other state bar professional commissions can be accessed at <http://www.abanet.org/cpr/professionalism/profcommissions.html> (last visited Feb. 11, 2009).

147. For a summary of these trends in business-government relations, see MCQUAID, *supra* note 138, at 135-38, 141-42.

outside lawyers, and auctioning off fragments of legal business (merger or takeover bid, a big transaction, or major litigation, to name a few) to competing outside firms.¹⁴⁸ In-house management and general counsel, rather than law firm partners, now determined the business's legal strategy: from lawyers they wanted only prompt, efficient, cost-conscious execution and total loyalty. "Wise counsel" was requested only of inside general counsel if of anyone; in any case outside firms knew too little about the business to provide it and no longer had long-term relations of trust with managers anyway.¹⁴⁹

Intraprofessional:

3. In response to this new environment, law firms' priorities changed. To compete for client business, firms competed for partners who could attract client business. Rainmakers, rather than lawyers conspicuous for their public service, became the leaders of the firms and reoriented their priorities to profit seeking.¹⁵⁰ To compete for new associates to staff the rapidly-growing partnership ranks, firms raised salaries;¹⁵¹ to pay for the new salaries, they demanded virtually all their lawyers' time.¹⁵² As firms compete with one another and with other professions, such as accounting firms, the last thing firm lawyers want to stress is that their ethical orientation to public ends may conflict with that of their clients'.

4. Lawyers' work, continuing trends from the 1880s, became much more specialized. The leaders of the bar in 1900 were still mostly generalists—men who made their mark as trial lawyers who tried a medley of civil and criminal cases, "wills, divorces, libels, murders," as constitutional lawyers who argued before the Supreme Court and as general business advisers.¹⁵³ "The growth of the regulatory state with its arcana of complex

148. See Gordon, *supra* note 44, at 115-16.

149. For a summary of these trends, see JOHN C. COFFEE, JR., GATEKEEPERS; THE PROFESSIONS AND CORPORATE GOVERNANCE 223-26 (2006).

150. See MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS 30-31 (1991) ("[I]n many cases there was some consideration of the candidate's [for partnership] ability to attract business.").

151. *Id.* at 56.

152. Gordon, *supra* note 44, at 116.

153. *Id.* at 117.

technical administrative rules doomed the generalist" in business practice; "a lawyer could spend a lifetime mastering a few sections of the corporate tax code ... and keeping up with new amendments and regulations."¹⁵⁴ Fields such as prosecution, labor, tax, patents, and securities were highly specialized by the mid-twentieth century.¹⁵⁵ "In the late 1970s, 22 percent of Chicago lawyers worked in only one field, [and] 70 percent considered themselves specialists; by the late 1980s, 32 percent said they worked in only one field."¹⁵⁶ Specialized lawyers are more likely to be technicians than lawyer-statesmen, less likely to develop and act on general conceptions of legal structure, design, and purpose.

5. The public minded lawyer and wise counselor is also partly a casualty of the course of professional ethics reforms. It was easy for lawyers to prescribe ample public and other aspirational duties for one another when there was no sanction for violating them. This was true throughout the nineteenth century, when there was no organized profession, and much of the twentieth, when the elite used the disciplinary machinery to sanction the solo practitioner and plaintiffs' bars that opposed them, rather than its own ranks.¹⁵⁷ The aspirational tradition continued through the 1969 ABA Model Code in the distinction between "Ethical Considerations" that should guide the lawyer's conduct and "Disciplinary Rules," the violation of which would be sanctioned.¹⁵⁸ In the 1970s, the profession began to be regulated by courts, professional bar discipline agencies, regulatory agencies, and malpractice suits.¹⁵⁹ Fear of liability has led lawyers to shy away from any statements of duties other than clear penal rules: this is the pattern of the

154. *Id.*

155. *Id.*

156. Gordon, *supra* note 46, at 294.

157. *Id.* at 297.

158. MODEL CODE OF PROF'L RESPONSIBILITY preliminary statement (1969) ("The Ethical Considerations are aspirational in character The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character.").

159. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1255-57 (1991) (discussing the evolution of ethics codes from standards to rules).

ABA Model Rules of 1983.¹⁶⁰ If liability is in prospect, lawyers do not want to perform complex discretionary balancing of public and private duties; they want clear rules to follow.¹⁶¹ Into the resulting vacuum of silence about lawyers' aspirational ideals has rushed the only consistent ideal left: the ethic of unswerving zeal and loyalty to clients.

6. Corporate lawyers, in contrast to past times, seem to feel very little identification with, or sense of proprietorship over, the law, except perhaps a general commitment to the processes and values of the adversary system (with the exception of jury trials). Lawyers of the nineteenth century saw the common law and the Constitution as their achievement and their inheritance, their responsibility to conserve and improve.¹⁶² Even during the New Deal, conservative lawyers identified with the general norms of liberty and property in the Constitution as bulwarks against overregulation;¹⁶³ whereas liberal lawyers identified with the statutory and administrative innovations that they had helped design.¹⁶⁴ Because most law is now the output of the regulatory state and has come to include expanded remedies against government and business,¹⁶⁵ corporate lawyers have come to see law as something of an alien excrescence (except, of course, when it favors their side). Indeed, one of the most remarkable developments of recent times has been the explosion of expressions of contempt for the legal system emanating from the highest precincts of the elite legal profession.¹⁶⁶ This hostility to law, lawyers, and legal process is mostly directed against the civil justice system, which is said to be awash in meritless claims brought by

160. See *id.* at 1251.

161. See *id.* at 1249-55.

162. See Gordon, *supra* note 46, at 123.

163. See *id.* at 105; J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 536-37 (2004).

164. See FRIEDMAN, *supra* note 58, at 546.

165. See, e.g., 42 U.S.C. § 1981a (2000) (allowing plaintiffs to recover punitive damages for employment discrimination claims).

166. See, e.g., Robert H. Bork, *Foreword* to MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* xi (1998) (describing the legal system as in "shambles").

whining plaintiffs egged on by greedy lawyers, resulting in out of control damage awards that are destroying the competitiveness of American business.¹⁶⁷ Careful studies demonstrate that the “litigation explosion” and “liability crisis” are largely myths and that most lawyers’ efforts go into representing businesses, not individuals; unfortunately, those studies have had no restraining effect on this epidemic of lawyers’ open expression of disdain for law.¹⁶⁸ It may be, however, that business lawyers’ identification with law and the courts may rise again with the recent revival of business-friendly jurisprudence in the Supreme Court.¹⁶⁹

7. As I mentioned earlier, the citizen lawyer ideal has now become the domain of new cadres of lawyers specializing in the public interest.¹⁷⁰ Writing in 1933, Adolf Berle pronounced that law professors were the heir to the American bar’s public-regarding lawyer-statesmen traditions, obviously referring to the band of Progressive and New Deal policy reformers in the law schools.¹⁷¹ He should also have mentioned the small but significant group of “cause” lawyers, including the ACLU and NAACP lawyers—and some in the rising labor bar.¹⁷² “Cause” lawyers were rarely drawn from the elite of the bar; they were mostly lawyers relegated to the margins of their profession because they were Jewish, Catholic, black, or female.¹⁷³ After the New Deal, Berle would have to have added the new legions of government lawyers; and, by the 1970s, a new generation of full-time “public-interest” lawyers—both liberal and (now more

167. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998).

168. On the rising prevalence and sources of “jaundiced” views of the civil justice system, see *id.* at 740-50.

169. See, e.g., *BMW v. Gore*, 517 U.S. 559, 574-75 (1996) (holding that the Constitution places limits on punitive damages).

170. See *supra* note 46 and accompanying text.

171. A.A. Berle, Jr., *Modern Legal Profession*, in 5 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 340-45 (Edwin R.A. Seligman & Alvin S. Johnson eds., 1933).

172. Gordon, *supra* note 44, at 102.

173. See Aaron Porter, Norris, Schmidt, Green, Harris, Higginbotham & Associates: *The Sociolegal Import of Philadelphia Cause Lawyers*, in *CAUSE LAWYERING*, *supra* note 49, at 151, 156; see also GALANTER & PALAY, *supra* note 150, at 25.

often than not) conservative, and radical.¹⁷⁴ Among the bar elite and the organized bar, commitment to public causes has taken the form of commitment to “legalist” projects—promotion of due process, civil liberties, and, since the 1970s, pro bono practice and government and bar-supported legal services.¹⁷⁵ Since the 1980s, new cadres of conservative public interest lawyers’ groups have been formed to serve ideological agendas that are sometimes distinct from those of business groups and sometimes even at odds with them.¹⁷⁶ Conservative movement lawyers move easily between associations like the Federalist Society, corporate law firms, think tanks like the Heritage and Cato Foundations, and federal executive branch agencies in Republican administrations.¹⁷⁷ Professional specialization in causes has generally taken the place of the older idea that all lawyers should represent the public purposes of the law in their advice to clients as well as in their part-time activities.¹⁷⁸

General cultural changes

8. Under criticism from both sides of the political aisle, traditional conceptions of the professions have declined amid a new valorization of market culture. The 1960s and 1970s were hard times for social and cultural authority generally and the traditional professions specifically.¹⁷⁹ “Left-wing critics attacked them as elitist conspiracies to exclude, dominate, exploit and paternalistically control social inferiors by mystifying professional knowledge. Right-wing critics and economists attacked them as cartels designed to restrict entry and fix

174. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering*, in CAUSE LAWYERING, *supra* note 49, at 31, 43.

175. See, e.g., Stuart Scheingold, *The Struggle to Politicize Legal Practice*, in CAUSE LAWYERING, *supra* note 49, at 118, 125.

176. See STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 263-64 (2008).

177. *Id.* at 146-47, 158-59.

178. See generally CAUSE LAWYERING, *supra* note 49 (discussing the rise of public-interest and “cause” lawyers); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008) (discussing conservative public interest lawyers); TELES, *supra* note 176.

179. STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 112-14 (1994).

prices.”¹⁸⁰ As applied to lawyers, both of these critiques had of course some validity.

Valid or not, the critiques had a corrosive effect on attempts to defend professional values, good as well as bad, in terms of civic virtue or social trusteeship. The left-wing solution was lay empowerment of consumers, entry of lay providers, and redistribution of social and economic power. The right-wing solution, which generally prevailed, was deregulation, increasing competition, and faith in market forces.¹⁸¹

9. In corporate practice, the marketeers found a point of entry to law practice in the crisis over the old models of law firm management. Law was a business and should be managed like a business.¹⁸² This could have meant, of course, simply more cost efficient management, in the service of whatever collection of diverse goals—for example, public service, civic activism, or reputation for probity, craftsmanship, and honorable dealing—that the firm chose to pursue. As carried out, however, it meant adoption of a firm’s profits, specifically its net-profits per partner, as the primary, if not exclusive indicator of its success.¹⁸³

10. In a parallel development, the growth of economism as an academic mode of thinking about law devalues any conception of law as expressing norms or public purposes. Lawyers influenced by the “efficient breach” theories of legal economics theorize Holmes’s hypothetical “bad man”¹⁸⁴ as Everyman: “[Corporate] managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm.... We put to one side laws concerning violence or other acts thought to be *malum in se*.”¹⁸⁵ Further,

180. See Gordon, *supra* note 44, at 122; BRINT, *supra* note 179, at 114.

181. See Gordon, *supra* note 44, at 122; BRINT, *supra* note 179, at 111.

182. GALANTER & PALAY, *supra* note 150, at 52 (remarking that to increase competitiveness, firms have hired professional managers and engage in marketing strategies and compensation formulas with an emphasis on the bottom line).

183. See *id.* at 52, 100.

184. See Holmes, *supra* note 34, at 459.

185. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) (citations omitted).

[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; *the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.*¹⁸⁶

These remarks come from a distinguished federal judge and former law school dean. This ideology takes a more common and vulgar shape—which fastidious law and economics scholars would presumably not accept—as simply global Babbity: whatever businesses want is good, and whatever constrains them—especially if it emanates from governments—is bad.

11. Finally, this general contempt for law is reinforced by a different but related set of trends—the revival in new forms of what has always been an important strain in American culture, a sort of libertarian antinomianism. In its original evangelical form, this was an ideal of individual internal self-governance, based on the premise that each of us has natural capacity to know, and to choose to follow, the moral law; and that at best man-made law is an artificial constraint, at worst a form of idolatry.¹⁸⁷ This is not the form that antilegalism mostly takes today. It is rather the belief that “autonomy”—however exercised, toward whatever ends, with whatever effects on others or the social fabric, and in the satisfaction of whatever tastes, desires, or preferences the fancy pleases—is a value in and of itself.¹⁸⁸ It is this refiguration of the idea of autonomous freedom—very distant from nineteenth century classical liberalism’s view of the individual’s freedom to act responsibly

186. *Id.* at 1177 n.57 (emphasis added). For an exceptionally penetrating critique of the view of law these quotes express, see Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1266-67 (1998).

187. See WILLIAM K.B. STOEVEY, ‘A FAIRE AND EASIE WAY TO HEAVEN’: COVENANT THEOLOGY AND ANTINOMIANISM IN EARLY MASSACHUSETTS 161-62 (1978).

188. See David Luban, *The Lysistraton Prerogative*, 1986 AM. B. FOUND. RES. J. 637, 638-39.

within a sphere of right constrained by the rights of others, by social restraints and obligations, and ultimately by law¹⁸⁹—that, I think, makes possible our modern conceptions of the role of the lawyer as someone who does his best to help clients get what they want in the world, regardless of the consequences, and to work around or flatten the constraints that the legal system sets on that kind of freedom.¹⁹⁰

These have been notes toward a history of a regulative ideal, that of law as a public profession, staffed by citizen lawyers who counsel their clients to serve the purposes of the law, and who work after hours and on leave from practice to reform the law and distribute justice more widely. Tensions between the ideal and the actual in the past have recruited a small but influential minority to the cause of remedying the practice to approximate the ideal. In recent times—outside the specialized precincts of public interest law—the tension has mostly been resolved by simply dumping the ideal or relocating it to settings in which economic pressures are less likely to compromise it.¹⁹¹ Like the railroads of the late nineteenth century, clients now demand an exclusive loyalty to their interests, and virtually all of their lawyers' time.¹⁹² Most importantly, major business clients are less public-minded: the search for stability has given way to competition; accommodation with regulators and labor has given way to confrontation; and service to local communities has given way to global mobility.¹⁹³ In response, business lawyers have mostly dropped the rhetoric of professional public-serving ideals, and have recharacterized their work as that of business service providers who sell specialized legal-financial services to customers.¹⁹⁴

189. See Hill, *supra* note 163, at 527-28, 538-42.

190. For a critique of "autonomy" as a freestanding value, see Luban, *supra* note 188, at 638-43.

191. See, e.g., Scheingold, *supra* note 175, at 125-26.

192. See GALANTER & PALAY, *supra* note 150, at 95.

193. I hasten to say do not regard all of these trends as negative. The older ideals tended to flourish in a protectionist world of cartels and cozy deals that often stifled competition from new entrants, innovators, foreign firms, and people of the "wrong" race, ethnicity, or sex.

194. See GALANTER & PALAY, *supra* note 150, at 5-6 (discussing, in part, a "shift from courtroom advocate to business adviser" that has occurred in the past generation).

My theme is not a lament for the good old days, or a story of the bar's descent from virtue. It is likely that the general ethical level of the American bar today, owing in part to more effective disciplinary and regulatory controls, is higher than it ever was; and that a larger proportion of lawyers is engaged in (broadly defined) public-oriented practices. In some ways, bar organizations are probably doing a better job at facilitating public service than they ever have—supporting legal services, access to justice, pro bono commitments by law firms, the rights of criminal defendants, and the protection of civil liberties and due process against the excesses of the national security state.¹⁹⁵ Where the profession's leadership is not doing so well is in supporting the *obligations* and the *practical capacities* of lawyers to take positions and work for policies that their experience leads them to believe may be in the public interest but not (at least not immediately) in the interest of their clients. Those functions require founding, funding, and participating in collective organizations that can and will push for legal changes that transcend the short-term profit interests of lawyers and of powerful client groups.

Some of these efforts already exist. The bar associations, as noted above, have become very active in promoting more and more efficiently delivered legal services to low and moderate income people, and pro bono work.¹⁹⁶ The National Association of Criminal Defense Lawyers lobbies for decriminalization of drugs despite the fact that winning on that issue would cost its members a substantial portion of clients and fees.¹⁹⁷ The American Academy of Matrimonial Lawyers publishes guidelines and conducts seminars trying to promote cooperative settlement of disputes between divorcing couples, despite the fact that they profit from contention.¹⁹⁸ Some national prosecutors' associations are trying to clamp down on overzealous abuses of prosecutorial discretion despite the fact that

195. See Robert Granfield, *Institutionalizing Public Service in Law School*, 54 BUFF. L. REV. 1355, 1355-56 (2007).

196. See *id.*

197. See Gerald Lippert, *Affiliate News*, CHAMPION, Mar. 2005, at 7 (documenting funding that NACDL has received to continue its legalization campaign through outreach and legislative tracking).

198. See, e.g., Am. Acad. of Matrimonial Lawyers, *Bounds of Advocacy* (Nov. 2000), http://www.aaml.org/files/public/Bounds_of_Advocacy.htm (last visited Feb. 11, 2009).

to stay silent would make their jobs easier.¹⁹⁹ Maybe the most interesting examples are tax lawyers' groups like the New York State Bar's, which recommend and lobby for policies that would close down ethically and economically indefensible (but often legal) tax evasion schemes despite the fact that such schemes are extremely profitable both to their clients and themselves.²⁰⁰ And there are many more such groups.

But current efforts, while commendable, are not nearly enough. In the big political fights about tort reform, for example, most lawyers' groups—for instance, the plaintiffs' trial bar, the insurance and corporate defense bar—are, so far as I can tell, so blatantly and narrowly self-interested, and so unconcerned with correcting systemic abuses and defects in the tort claims system, that they have lost any sense of credibility with serious reformers. Even in the wake of several major scandals, such as the savings-and-loan crisis and the Enron collapse, in which lawyers, along with other gatekeepers, were found to have actively enabled frauds that resulted in huge losses, the corporate bar largely resisted reforms that would have increased their responsibilities to monitor corporate managers' conduct, although that conduct had inflicted ruinous injuries on the very corporate entities that formed their clientele.²⁰¹

In the early twentieth century, Progressive lawyers deployed their stature and influence with clients to try to persuade them that reforms like worker's compensation, abolition of child labor, and food, drug, and meat regulation were in their best interests.²⁰² Which prominent lawyers and law firms today are active in advising their major clients that enactment of universal health insurance would help bring their benefits costs under control and help cure some major distortions in the labor market? Or in drafting and lobbying for regulatory reforms that would prevent another

199. Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1023 (2005).

200. See Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 94-95 (2006) (noting that although individual tax lawyers profited from the status quo, collectively the tax bar argued that the status quo threatened the integrity of the tax system).

201. See Nicole Kroetsch & Samantha Petrich, *Task Force on Corporate Responsibility, Current Developments 2002-2003*, 16 GEO. J. LEGAL ETHICS 727, 729-30 (2003).

202. See *supra* note 126 and accompanying text.

meltdown of credit, mortgage, and financial markets? If they exist at all, one certainly does not hear much about them. The citizen lawyer may one day stage a comeback, and I hope she does; but present conditions are not favorable.