9-23-2004

Redefining the 'Public' Profession

Debra Lyn Bassett
Southwestern Law School, dbassett@swlaw.edu

REDEFINING THE "PUBLIC" PROFESSION

Debra Lyn Bassett

36 Rutgers L.J. 721 (2004-2005)

RUTGERS LAW JOURNAL

VOLUME 36 SPRING 2005 NUMBER 3

REDEFINING THE "PUBLIC" PROFESSION

*Debra Lyn Bassett**

ABSTRACT

The Preamble to the best-known source of lawyers' ethical rules—the American Bar Association's Model Rules of Professional Conduct—uses the word "public" ten times. In particular, the Preamble repeatedly refers to lawyers as "public" citizens and to the ideals of "public" service. However, the practice of law rarely has a "public" focus. Rather, both the practice of law and the ethical rules focus on the client's—and the lawyer's—interests rather than the interests of the public. Indeed, the current Model Rules are intentionally skewed toward a focus on the client's interests, as is evident from examining the ethical rules in such areas as confidentiality and perjury: a "public" focus often would require revealing client information, whereas the current rules typically require concealment. This Article asserts that the current focus on client interests is harming both the general public and the legal profession, and urges changes to the Model Rules that would, through a change in focus, serve to "redefine" the profession to create a truly "public" profession.

I. INTRODUCTION

The view of law as a "public profession" is nothing new. From Roscoe Pound[1] to the American Bar Association,[2] and from long ago[3] to recent

* Loula Fuller and Dan Myers Professor of Law, Florida State University College of Law. dbassett@law.fsu.edu. J.D., University of California, Davis, 1987; M.S., San Diego State University, 1982; B.A., University of Vermont, 1977. Many thanks to Rex Perschbacher for his helpful comments on a previous draft.

1. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 9–11 (1953).

times,[4] law has been described as a "public" profession. This notion of public service and a public focus remains in references within the American Bar Association's Model Rules of Professional Conduct.[5] For example, the Preamble to the Model Rules uses the word "public" ten times, repeatedly referring to lawyers as "public" citizens and to the ideals of "public" service.[6] Indeed, public service is the overarching topic of the Model Rules found within Article 6.[7] A look behind these references, however, reveals a far different reality, with the possibility that the public profession of law is more window-dressing than actuality.[8]

---

2. *Report of the Professionalism Committee: Teaching and Learning Professionalism*, 1996 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR 6 [hereinafter *Teaching and Learning Professionalism*] (defining a "professional lawyer" as "an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good").

3. *See generally* PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION (1999) (tracing the history of the legal profession); ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

4. *See, e.g.*, Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 255 (1990) [hereinafter Gordon, *Public Calling*] ("Law is a service profession; but it is also a public profession.").

5. MODEL RULES OF PROF'L CONDUCT (2003).

6. *Id.* pmbl. ¶¶ 1, 5, 6, 7, 8, 12.

7. *Id.* R. 6.1–6.5.

8. *See* Gordon, *Public Calling*, *supra* note 4, at 255–57:

> At the bar association dinner, those lawyers who have not fallen asleep during the speech can be seen nodding their heads and applauding afterwards. You can find the message summarized on the "President's Page" of any current bar journal, and at length in the American Bar Association's (ABA) 1986 Stanley Commission Report on rekindling lawyer professionalism.
>
> Yet if after the rhetoric you ask what the ideal demands in practice, the standard answers may seem a bit anticlimactic. Lawyers, we are told, should avoid vulgar advertising, volunteer some pro bono time, and support the bar's efforts to strengthen lawyer discipline, curb litigation abuse, promote legal-services programs for the poor, and improve public relations with its outside critics. Nothing wrong with this, to be sure, but as a program it seems rather a comedown from the much richer and more ambitious conceptions of their public obligations that lawyers have historically entertained and occasionally, though infrequently, acted upon.
>
> . . . .
>
> . . . [U]nder pressure, the ideal sometimes has a way of vanishing like the smile on the Cheshire cat.

Id.

Despite the historical and Model Rule references, neither the Model Rules nor the general practice of law are geared toward law as a public profession. Indeed, much of the practice of law looks nothing like a profession, much less a "public" profession. Law practice today is simply another profit-making business, in which regard for the common good is no more than an afterthought.[9] The seeming transition of law from a profession to a business, and concerns about decreasing professionalism and civility, have been the subject of extensive commentary in legal literature,[10] while stories of lawyer greed and scandal abound in the media.[11]

---

9. *See* RUDOLPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 19 (1989) ("Money has become the number one goal for many firms and individuals. Quality has become secondary, professional commitment has become a third priority, and public service and fun have been nearly eliminated."). Although the problem has become more obvious during the past twenty years, the problem was recognized earlier:

> Instead of a profession, an organized body of men pursuing a learned art in the spirit of a public service, the era of emergent democracy, in its leveling zeal, and the succeeding era of hegemony of the frontier, in its faith in the ability of any man to do anything and its zeal for unrestrained individual freedom, sought to substitute for the profession pursuing a learned art, an uneducated, untrained trade pursuing a money-making calling in the spirit of a business.

POUND, *supra* note 1, at xxvii.

10. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 23 (2000) ("Competition and commercialization are accelerating, while collegiality and civility are heading in the opposite direction."); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996); Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1 (1993); Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971); Catherine T. Clark, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Brent E. Dickson & Julia B. Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) [hereinafter Pearce, *Paradigm Shift*]; Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861 (1997); Jeffrey W. Stempel, *Therapeutic Jurisprudence/Preventive Law and the Lawyering Process: Theralaw and the Law-Business Paradigm Debate*, 5 PSYCHOL. PUB. POL'Y & L. 849 (1999) [hereinafter Stempel, *Law-Business Paradigm*].

11. *See, e.g.*, Douglas Feiden, *Predators at Law*, DAILY NEWS (N.Y.), Nov. 16, 2003, at 4 (reporting lawyer greed and dishonesty); James V. Grimaldi, *Jamail Goes on the Offensive*

With scandals come calls for additional rules and regulations, typically accompanied by criticism of the self-regulating nature of the legal profession as protectionism.[12] Indeed, the scandals involving such corporate entities as Enron, WorldCom, and Tyco generated a sufficient outcry to motivate passage of the Sarbanes-Oxley Act,[13] which forced changes to the Model Rules and to the practices of many lawyers.

---

in Defense of Vinson & Elkins, WASH. POST, Feb. 25, 2002, at E1 (discussing the role of lawyers in the Enron scandal); Dennis Wagner, *Romley, 3 Lawyers Sued Over Scandal*, ARIZ. REPUBLIC, Oct. 31, 2003, at 1B (reporting alleged conspiracy among three lawyers to destroy reputation of local attorney); Steve Weinberg, *Two Takes on the Enron Affair*, LEGAL TIMES, Nov. 3, 2003, at 36 (characterizing the Enron scandal as a "chronicle of greed run wild"); *see also* S.E.C. v. Nat'l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978) (lawyers found to have aided violations of securities laws); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1009 (2003) (noting that many lawyers were implicated in the Watergate scandal); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (discussing the role of lawyers in the savings and loan scandals).

12. *See* Dennis Archer, *Why is Accountability Important?*, 54 S.C. L. REV. 881, 882–83 (2003). Archer states that:

> While investors, politicians, and prosecutors search for the people to blame for the bankruptcies and scandals, a new target, as expected, has emerged—lawyers. . . .
>
> . . . .
>
> The current climate nationally, before Congress and the SEC is not an easy one for us. . . . They now look at the role of lawyers and ask whether we should be regulated.

Id.

13. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); *see* Peter A. Atkins & Marc S. Gerber, *Securities and Exchange Commission Standards of Professional Conduct for Attorneys*, 1388 PLI/CORP. 621, 633 (2003) (describing concerns "about the role of attorneys in the Enron and other corporate scandals" as leading to new professional conduct standards required by the Sarbanes-Oxley Act); Ralph C. Ferrara, *Charting a New Course: The New Age of Federal Chartering*, 1388 PLI/CORP. 21, 51–52 (2003) (noting that "[c]orporate scandals (Enron, Tyco, WorldCom) [have] cause[d] Congress and the press to focus on the role of lawyers" and led to the Sarbanes-Oxley legislation); *see also* Darlene M. Robertson & Anthony A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 GEO. J. LEGAL ETHICS 785, 785 (2003):

> Hoping to restore investor confidence eroded by the recent trend of corporate scandals and accounting frauds that have permeated Wall Street, President George W. Bush recently signed into law the Sarbanes-Oxley Act of 2002. . . . This bill . . . authorizes the Securities and Exchange Commission . . . to promulgate rules setting forth minimum standards of professional conduct for corporate attorneys representing publicly held corporations.

Interestingly, the sustained hue and cry regarding the changing nature of law practice, lack of civility, decline in professionalism, and lawyer greed has had little impact.[14] Although a few civility codes now exist, one of the most common proposals involves an additional focus on ethics and professionalism in the law schools.[15] However, additional coursework will not resolve the underlying problem.

This Article asserts that many of the identified "problems" with lawyers and the practice of law—and with the ethical rules specifically—result from a regulatory focus narrowly linked to client interests.[16] This narrow focus is particularly apparent within the provisions of the Model Rules.[17] The Model Rules' references to the public nature of the legal profession are within provisions that are purely voluntary, whereas the mandatory provisions—and the more difficult issues—focus on the client's (or the lawyer's) interests. Part II discusses professions generally;[18] Part III analyzes whether law is truly a "profession" in a sociological sense;[19] and Part IV examines law as a "public" profession more specifically.[20] Part V then analyzes various provisions from the Model Rules, with a particular emphasis on the thorny

---

Id.

14. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 276–80 (1995) (describing extensive, but largely failed, efforts of ABA commissions, state and local bar associations, the judiciary, and law schools to promote professionalism); *see also* RHODE, *supra* note 10, at 17 ("Over the last decade, the professionalism problem has launched a cottage industry of efforts: commissions, conferences, courses, centers, creeds, and codes. Despite these efforts, chronic ethical dilemmas remain unresolved.").

15. *See Teaching and Learning Professionalism*, *supra* note 2, at 13–25 (expressing consensus that law schools should expend more effort in teaching professionalism); *see also* Atkinson, *supra* note 14, at 335 ("A recurrent theme in the professionalism crusade is the need for law schools to inculcate the virtues of professionalism.").

16. *See* Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1067 (2003) (referring to "client-centered approach to representation" in law practice and the ethical rules).

17. *See* Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 87 (1999) [hereinafter Stempel, *Embracing Descent*] ("[T]he legal ethics launched under the professionalism paradigm make client loyalty perhaps the highest duty of the attorney."); *see also* RHODE, *supra* note 10, at 15 ("Under prevailing views of professional responsibility, lawyers need not choose to exercise moral independence within their professional role. Rather, their preeminent obligation is loyalty to client interests.").

18. *See infra* Part II (discussing the meaning of "profession").

19. *See infra* Part III (analyzing law as a profession).

20. *See infra* Part IV (examining law as a "public profession").

issues of confidentiality and client perjury.[21] Finally, Part VI examines the impact of a shift in focus within the ethical rules from the client to the public.[22]

II. THE MEANING OF "PROFESSION"

Elevating an occupation to the status of a "profession" accords that occupation a distinct mantle of honor, respectability,[23] and intelligentsia.[24] Law is regularly described as a "profession,"[25] often without definition and seemingly without reflection. What does it mean to be a "profession"? The next section addresses this question, drawing upon an extensive body of sociological literature.[26]

---

21. *See infra* Part V (analyzing the orientation of the Model Rules as a factor in evaluating a "profession").

22. *See infra* Part VI (proposing a shift in the Model Rules from a client-centered focus to a more public focus).

23. *See* Anthony T. Kronman, *Professionalism*, 2 J. INST. STUD. LEGAL ETHICS 89, 90 (1999) ("The word 'profession' suggests a certain stature and prestige. It implies that the activity to which it is attached possesses a special dignity that other jobs do not."); *see also* ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 4 (1986) [hereinaftter FREIDSON, PROFESSIONAL POWERS] ("There is a tendency for prestige and respect to be given to formal knowledge by those who lack it."); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS, at x (1977) ("[P]rofessions are occupations with special power and prestige."); RONALD M. PAVALKO, SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS 17 (2d ed. 1988) ("In popular usage, the term 'profession' is frequently used to convey prestige, respect, and a positive evaluation."); William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194, 195 (1957) ("[P]rofessionals stand at the apex of prestige in the occupational system.").

24. *See* Morris L. Cooke, *Professional Ethics and Social Change*, 15 AM. SCHOLAR 487, 488 (1946) (noting that "the status of intelligentsia" tends to be accorded to members of professions).

25. *See id.* ("For centuries the practice of law has been considered a profession both by lawyers and lay people, and legal education has always been thought of as a form of professional and not merely vocational training.").

26. *See* Bernard Barber, *Some Problems in the Sociology of the Professions*, 92 DAEDALUS 669, 669 (1963) ("Although it is still only a partly developed field of specialized knowledge, the sociology of the professions is already too large a body of theoretical analysis and empirical research to be more than sketched in this paper."); Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 1 (1998) [hereinafter Posner, *Professionalisms*] (describing sociology as "the discipline that has done most to study the professions"). *See generally* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); A.M. CARR-SAUNDERS & P.A. WILSON, THE PROFESSIONS (1933);

A. The Study of Professions

The word "profession" has two general meanings: "'profession' as a special kind of occupation, and 'profession' as an avowal or promise."[27] Although one's initial reaction might be to assume that only the former meaning is relevant to this Article, I will suggest that both meanings contribute to our understanding of the term.[28]

There are many places where one could begin a discussion of the study of professions, but certainly the work of Max Weber ranks high on the list.[29] Weber has been described as a "historian, turned cultural scientist and

---

KEITH M. MACDONALD, THE SOCIOLOGY OF THE PROFESSIONS (1995). This is not to say that legal commentators have ignored the subject. *See infra* notes 69–80 and accompanying text (discussing legal commentary defining a "profession"). However, sociologists have analyzed the professions both more generally and more extensively. *See, e.g.*, Goode, *supra* note 23, at 195 ("[As a] profession comes into being, or as an occupation begins to approach the pole of professionalism, it begins to take on the traits of a community . . . . Many of the traits that make the professions sociologically interesting grow from the dimension of community."); Robert A. Rothman, *Deprofessionalization: The Case of Law in America*, 11 WORK & OCCUPATIONS 183, 183 (1984) ("Sociological analysis of the professions has had a long and complex history.").

27. ELIOT FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE, at xv (1988) [hereinafter FREIDSON, PROFESSION OF MEDICINE]. Others have noted additional meanings:

> [T]he term "profession" (and, by extension, the term "professional") has a number of different meanings and uses. In common speech, the term "professional" is used to differentiate between amateurs and professionals. In this sense, a professional is someone who engages in an occupation "for pay and who intends to make a living from it." This is the sense in which the term is used when we refer to professional athletes, professional hairdressers, and professional firefighters. "Professional" is also used in common speech to indicate that "work measures up to a high standard of proficiency." This is the sense in which the term is used when we refer to the work that someone has done as a "professional" job. These lay definitions of the term are rather broad and can potentially include within their ambit many different occupations.

Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589, 598–99 (2003).

28. *See infra* notes 62–68 and accompanying text (examining the promise of an altruistic component in the professions).

29. *See* Posner, *Professionalisms*, *supra* note 26, at 8 (noting that "the study of what might be called universal professionalization must acknowledge a major debt to [Max] Weber").

advocate of a particular sort of sociology,"[30] and his work encompasses a number of areas, including philosophy, history, and the social sciences.

Weber's insights into the underlying structure and concepts of economic order and the vocations have been used by many subsequent theorists in constructing a sociology of the professions.[31] For example, with respect to the structure underlying the professions, prominent sociologist Magali Larson has expressly incorporated Weber's ideas[32] on social stratification and economic and social order:

> In our century, growing bureaucratization and the "organizational revolution" increasingly model the pattern of individual advancement in the professions along the lines of bureaucratic career. However, the affinity between professions and bureaucracy—or, in other words, their common pertinence to the process of capitalist rationalization—was already apparent at the inception of the modern professional project. The new pattern of mobility opened by the professions depends, initially, on the uses of education. As Max Weber has shown, modern bureaucracy similarly works to make education into the intervening structure between social and occupational stratification. As all forms of status, the "specific status developments" of both bureaucracy and profession tend to be monopolized. Given the structural connections with allegedly "open" educational systems, this monopoly can claim universalistic ideological legitimations.[33]

---

30. Sam Whimster, *The Profession of History in the Work of Max Weber: Its Origins and Limitations*, 31 BRITISH J. SOCIOL. 352, 352 (1980).

31. *See, e.g.*, FREIDSON, PROFESSIONAL POWERS, *supra* note 23, at 3 ("If there is a single concept by which the nature of formal knowledge can be characterized, the most appropriate is likely to be *rationalization*, a concept that is central to Max Weber's analysis of the development of Western civilization."); ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 8–9 (2001) [hereinafter FREIDSON, THIRD LOGIC] (noting that "the organized point of comparison for delineating what is different about . . . new forms of organization remains Weber's ideal type or its reflection in traditional management conceptions of formal organization"); LARSON, *supra* note 23, at xvi (noting that "Weber, in particular, defined the ability to command rewards in the marketplace as a function of both property and skills, and the possession of skills may be seen as a typically 'modern' form of property").

32. *See, e.g.*, MAX WEBER ET AL., ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Claus Wittich & Guenther Roth eds., 1979); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (reprint ed. 1997); FROM MAX WEBER: ESSAYS IN SOCIOLOGY 180–92 (C. Wright Mills ed., 1958).

33. LARSON, *supra* note 23, at 79.

In addition to Weber's notions of order and stratification, his work originated two important concepts in the area of professions: "one is the calling of the aristocracy of the intellect, the other is a notion of duty over and beyond the everyday sense of doing a job."[34] Accordingly, Weber laid important conceptual groundwork for the sociological study of professions.

Many sociologists also acknowledge Karl Marx's contributions to the study of professions.[35] Of particular interest, perhaps, is Marx's work exploring the transition from a guild economy[36] to a capitalist economy.[37] The guilds lay an apt framework for the study of professions.

> Associations of craftsmen took upon themselves the right to create all their own rules—on who might enter the association, on how an initiate would be trained and progress . . . , on how the workplace would be controlled and the product and skill monopolized, and so on. . . .
>
> . . . .
>
> Control over the market, through the guild's monopoly over the product made or the skill provided, . . . was intimately interrelated with the . . . power over the relation between the guild and the state. . . . Someone had to grant the guild a monopoly, and guilds threatened by nonguild production constantly had to lobby, beg, or bribe the local powers to protect and preserve their monopoly. . . .
>
> . . . .
>
> The skill and the group possessing the skill were thus equated. . . . Then as now, power of association plus power over the workplace could lead to market control—if local or national government would agree to grant it, or protect it, instead of challenging it.[38]

---

34. Whimster, *supra* note 30, at 370; *see* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 32, at 77–128; Max Weber, *Science as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 32, at 129–57 [hereinafter Weber, *Science as a Vocation*].

35. *See, e.g.*, FREIDSON, THIRD LOGIC, *supra* note 31, at 39–40, 46, 49, 52 (discussing Marx's contributions); ELLIOTT A. KRAUSE, DEATH OF THE GUILDS 2 (1996) (noting that "Marx, Weber, and Durkheim each had an interest in this problem"); LARSON, *supra* note 23, at 209–18 (discussing Marx).

36. *See* KRAUSE, *supra* note 35, at 2 ("Guilds are social groups, institutions created by groups of workers around their work, their skill or craft.").

37. *See* 1 KARL MARX, CAPITAL 284–85, 423, 439, 479–80 (B. Fowkes trans., 1976).

38. KRAUSE, *supra* note 35, at 3–6.

These concepts of association, power, monopoly, and self-governance common to guilds appear in most sociological approaches to the professions.[39] The sociological study of professions includes decades of sociological research and commentary, providing a rich source of guidance.[40]

Among the prominent approaches[41] to the study of professions are the functionalist approach, the power approach, and the professional project approach, which have common and overlapping elements. In brief, and at the risk of oversimplification, the functionalist approach to the study of professions, heavily influenced by the work of Emile Durkheim,[42] included a focus on defining and classifying occupations. The classification of an occupation as a "profession" often entailed a "traits" approach—"listing the characteristics of an ideal-typical profession against which actual examples of occupational groups could then be assessed as more or less professional."[43] The power approach, stemming from a more Marxist perspective,[44] and influenced by the work of Eliot Freidson, among others,[45]

---

39. *See, e.g.*, TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370 (rev. ed. 1954) (positing a social contract view of professions, in which society grants a monopoly and the power of self-governance to professions).

40. *See* DANIEL W. ROSSIDES, PROFESSIONS AND DISCIPLINES: FUNCTIONAL AND CONFLICT PERSPECTIVES 45–46 (1998) ("The study of the professions is fairly recent, but interest in them goes back to the very origins of modern social science. . . . The study of the professions by mainstream academics has resulted in a considerable body of knowledge.").

41. Other approaches—and categories of approaches—also exist. *See, e.g.*, ABBOTT, *supra* note 26, at 15 (grouping views on the study of professions into the functionalist, structuralist, monopoly, and cultural approaches).

42. *See* MACDONALD, *supra* note 26, at 2 (noting that functionalism "dominated mid-twentieth-century social theory" and "traced its origins back to Durkheim"); Posner, *Professionalisms*, *supra* note 26, at 8 (opining that "the sociological study of the professions owes most to Durkheim"). *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., 1st ed. 1997); EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (Sarah A. Solovay & John H. Mueller trans., George E.G. Catlin ed., 8th ed. 1958).

43. MACDONALD, *supra* note 26, at 3; *see also* Rothman, *supra* note 26, at 183 ("Early work in the structural-functionalist tradition was devoted to isolating and listing those attributes that served to distinguish professions from nonprofessional occupations."). Not surprisingly, some have called the functionalist approach the "attribute model." PAVALKO, *supra* note 23, at 19.

44. *See, e.g.*, FREIDSON, THIRD LOGIC, *supra* note 31, at 39–40, 46, 49, 52, 107–08, 112 (citing to perspectives of Karl Marx).

45. *See* MACDONALD, *supra* note 26, at 4–6 (discussing Freidson's prominence in the power approach literature, and noting that the power approach could be seen as "derived from interactionist or Marxian traditions"); *see also* Eliot Freidson, *The Theory of Professions:*

focused on the self-regulated nature of the professions, which reflected professional autonomy and power.[46] The professional project approach, as developed by Larson and others, again employed Marxian concepts,[47] but re-introduced Weber's notion of social stratification and added market considerations.[48]

State of the Art, *in* THE SOCIOLOGY OF THE PROFESSIONS 19 (R. Dingwall & P. Lewis eds., 1983) [hereinafter Freidson, *State of the Art*].

46. *See, e.g.*, FREIDSON, PROFESSIONAL POWERS, *supra* note 23, at 110–230 (discussing autonomy as the crucial characteristic of professionalism); FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 72 ("Unlike other occupations, professions are *deliberately* granted autonomy, including the exclusive right to determine who can legitimately do its work and how the work should be done."); *see also* LARSON, *supra* note 23, at xiii:

> The profession is, in fact, allowed to define the very standards by which its superior competence is judged. Professional autonomy allows the experts to select almost at will the inputs they will receive from the laity. Their autonomy thus tends to insulate them: in part, professionals live within ideologies of their own creation, which they present to the outside as the most valid definitions of specific spheres of social reality.

Id.; *see also* ROSSIDES, *supra* note 40, at 46 ("The professions openly seek to exclude others, work politically to get the state to give them monopolies, and engage in incessant turf battles."). This approach is sometimes called the "process model." PAVALKO, *supra* note 23, at 29-30; *see id.* at 33 ("The key to understanding the professions is to understand the process by which power is acquired and used vis-à-vis other occupational groups, organizations with which professionals must interact, clients, and the state."); ANSELM L. STRAUSS, PROFESSIONS, WORK, AND CAREERS 9 (1975) (noting that "[t]he 'process' or 'emergent' approach to the study of professions . . . differs from the prevailing 'functionalism' because it focuses more pointedly upon conflicting interests and upon change").

47. *See* ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY 3 (1994) [hereinafter FREIDSON, PROFESSIONALISM REBORN] (stating that Larson's work "brought both Marxist and Weberian theory to the fore"); KRAUSE, *supra* note 35, at 18 (noting that Larson's work "is broadly informed by Marxian perspectives"); LARSON, *supra* note 23, at 209–18 (discussing Marxian concepts).

48. *See* LARSON, *supra* note 23, at xvi ("My intention is to examine here how the occupations that we call professions organized themselves to attain market power. I see professionalization as the process by which producers of special services sought to constitute and control a market for their expertise.") (emphasis omitted). Larson further observes:

> Professionalization is thus an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards. To maintain scarcity implies a tendency to monopoly: monopoly of expertise in the market, monopoly of status in a system of stratification. The focus on the constitution of professional markets leads to comparing different professions in terms of the "marketability" of their specific cognitive resources. It determines the exclusion of professions like the military and the clergy, which do not transact their services on the market. The focus on collective social mobility accentuates the relations that

The potential interrelatedness of these approaches is perhaps obvious. The shift from the functionalist to the power approach arguably substituted a single trait analysis for the previous multiple trait analysis.[49] And if self-regulation is a method for gaining power, then perhaps, as Rothman

---

professions form with different systems of social stratification; in particular, it accentuates the role that educational systems play in different structures of social inequality.

Id. at xvii; *see id.* ("[T]he two dimensions [of] market control and social mobility . . . are inseparable; they converge in the institutional areas of the market and the educational system, spelling out similiar results but also generating tensions and contradictions which we find, unresolved or only partially reconciled, in the contemporary model of profession."); *see also id.* at 66 ("[A]ll the devices mobilized for the construction of a professional market and the organization of the corresponding area of the social division of labor also served the professions' drive towards respectability and social standing."). One commentator has summarized Larson's "market control" approach as follows:

> The market control aspect . . . requires that there should be a body of relatively abstract knowledge, susceptible of practical application, and a market, or market potential, given the social, economic and ideological climate of the time. If the possessors of this knowledge can form themselves into a group, which can then begin to standardize and control the dissemination of the knowledge base and dominate the market in knowledge-based services, they will then be in a position to enter into a "regulative bargain" with the state. This will allow them to standardize and restrict access to their knowledge, to control their market and supervise the "production of producers."

MACDONALD, *supra* note 26, at 10–11 (citations omitted).

49. *See* Freidson, *State of the Art*, *supra* note 45, at 32–33 (drawing this very conclusion). Freidson's later work identified five interdependent elements of professionalism:

> 1. specialized work in the officially recognized economy that is believed to be grounded in a body of theoretically based, discretionary knowledge and skill and that is accordingly given special status in the labor force;
> 2. exclusive jurisdiction in a particular division of labor created and controlled by occupational negotation;
> 3. a sheltered position in both external and internal labor markets that is based on qualifying credentials created by the occupation;
> 4. a formal training program lying outside the labor market that produces the qualifying credentials, which is controlled by the occupation and associated with higher education; and
> 5. an ideology that asserts greater commitment to doing good work than to economic gain and to the quality rather than the economic efficiency of work.

FREIDSON, THIRD LOGIC, *supra* note 31, at 127. These "elements," although an intellectual construct, *id.*, bear resemblance to functionalism's "trait" approach, with the caveat that "[t]he prime contingency of professionalism is the state and its policies," *id.* at 128.

suggested, "phenomena that once were used to define professions have come to be recognized as resources employed in the struggle to extend prerogatives and rewards in the labor market."[50]

Regardless of the sociological approach employed, the intelligent study of a subject begins with its definition,[51] and sociological commentators have

---

50. Rothman, *supra* note 26, at 184. "Professional claims to monopoly and autonomy are substantiated on the basis of expert knowledge, self-regulation, and dedication to ethical standards. . . . These factors appear to have played a central role in the struggle to establish and legitimize a position of dominance in the labor market." *Id.* at 187–88. Similarly, according to Pavalko:

> To the extent that a profession is successful in achieving a high degree of autonomy, it also establishes a monopoly over training, the right to perform particular work activities, and the conditions under which work will be performed. The ability to manipulate supply and demand also leads to the ability to determine the fees that will be received for various services.

PAVALKO, *supra* note 23, at 26 (emphasis omitted). Further,

> [o]nce work groups are conceptualized as engaged in a quest for power and control, we are led to a reinterpretation of the meaning of the traits proposed by the attribute model as features of the professions. Thus, the creation of bodies of esoteric knowledge, the claim to be service motivated and selflessly committed to one's work, the announcement that a code of ethics is operative, etc., can be viewed as strategic myths used by work groups in a competitive process of manipulating the environment in advantageous ways. Rather than viewing the attributes as defining what a profession is, they are seen in the process model as resources that are used in the competition for rewards and privileges.

Id. at 33 (emphasis omitted).

51. *See* FREIDSON, PROFESSIONAL POWERS, *supra* note 23, at 30–32:

> [A]n emphasis on process rather than on structure, on professionalization rather than on the attributes of professions, does not really solve the problem of definition. To speak about the process of professionalization requires one to define the direction of the process, and the end state of professionalism toward which an occupation may be moving. Without *some* definition of profession the concept of professionalization is virtually meaningless, as is the intention to study process rather than structure. One cannot study process without a definition guiding one's focus any more fruitfully than one can study structure without a definition.
>
> In all, the issue of definition for a theory of professions cannot be dealt with profitably either by denial or by avoidance.

Id. Freidson concludes:

> [S]ome analysts have given the impression of condemning the very practice of seeking a definition. But surely such condemnation is inappropriate. In order to think clearly and systematically about anything, one must delimit the subject-matter to be addressed by empirical and intellectual analysis. We cannot develop theory if we are not certain what we are talking about.

noted the difficulties inherent in defining "profession."[52] In his seminal work, Professor Morris Cogan, after quoting Erasmus as saying that "[e]very definition is dangerous,"[53] continues:

> Some observers of profession, having made a demonstrably adequate search of the relevant literature, flatly deny the possibility of formulating a satisfactory definition of profession. It appears to them that the idea is too amorphous to be circumscribed. Still others admit that they perceive a structure or a form, but shy away from the complexities they encounter when faced with the necessity of discriminating among the hosts of vocations claiming the title.[54]

Despite the difficulties of definition, prominent sociological works necessarily have attempted to define what it means to be a "profession." Indeed, the heart of the functionalist approach, as noted above, was the attempt to define "profession" through the use of "traits," attributes, or

---

FREIDSON, PROFESSIONALISM REBORN, *supra* note 47, at 15.

52. *See, e.g.*, FRANCES P. DE LANCY, THE LICENSING OF PROFESSIONS IN WEST VIRGINIA 14 (1938) ("It would seem, therefore, that there is no absolute definition for a profession. The traditional characteristics often associated with the term are frequently ignored in the twentieth century civilization."); FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 3–4:

> [I]t is difficult to find very much agreement on a definition of the word "profession." This is so for a number of reasons. First, the word is evaluative as well as descriptive. Virtually all self-conscious occupational groups apply it to themselves at one time or another either to flatter themselves or to try to persuade others of their importance. . . . A second reason for the disagreement surrounding the meaning of the word lies in the strategies commonly underlying the process of definition. People frequently draw up definitions first by deciding that certain occupations "are" professions and then by attempting to determine the characteristics these occupations have in common.
>
> . . . .
>
> For these reasons, it should be clear that it would be folly to be dogmatic about any definition of "profession" or to assume that its definition is so well known that it warrants no discussion.

Id. Freidson's observations that "virtually all" occupations aspire to professional status has been noted by others. *See, e.g.*, EVERETT C. HUGHES, MEN AND THEIR WORK (1958); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOCIOL. 137–58 (1964).

53. Morris L. Cogan, *Toward a Definition of Profession*, 23 HARV. EDUC. REV. 33, 34 (1953).

54. *Id.*

characteristics.[55] The definitional hurdles become apparent when comparing the attempts at definition. For example, one commentator identified four attributes common to professions:

> Professional behavior may be defined in terms of four essential attributes: a high degree of generalized and systematic knowledge; primary orientation to the community interest rather than to individual self-interest; a high degree of self-control of behavior through codes of ethics internalized in the process of work socialization and through voluntary associations organized and operated by the work specialists themselves; and a system of rewards (monetary and honorary) that is primarily a set of symbols of work achievement and thus ends in themselves, not means to some end of individual self-interest.[56]

Another commentator identified five attributes common to professions, which do not entirely overlap with the previous four attributes:

> After a careful canvass of the sociological literature on occupations, this writer has been able to distill five elements, upon which there appears to be consensus among the students of the subject, as constituting the distinguishing attributes of a profession. Succinctly put, all professions seem to possess: (1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture.[57]

Still another commentator proposed six professional attributes, which again exhibit some, but not complete, similarity to the previous definitional attempts.

> First, the occupation had to possess and draw upon a store of knowledge that was more than ordinarily complex. . . .
>
> Second, the occupation had to secure a theoretical grasp of the phenomena with which it dealt. . . .

---

55. *See supra* notes 42–43 and accompanying text (discussing the functionalist approach to professions).

56. Barber, *supra* note 26, at 672.

57. Ernest Greenwood, *Attributes of a Profession*, 2 SOC. WORK 45, 45 (July 1957).

> Third, a qualifying occupation was one that applied its theoretical and complex knowledge to the practical solution of human and social problems. . . .
>
> Fourth, an occupation, to qualify as a profession, had to strive to add to and improve its stock of knowledge. . . .
>
> Fifth, to qualify as a profession, an occupation had to pass on what it knew to novice generations, not in a haphazard fashion, but deliberately and formally. . . .
>
> Sixth, . . . all professions tend to organize into peer formations that establish criteria of admission, legitimate practice and proper conduct. . . .[58]

Thus, although "[t]here was little consensus on the attributes that formed the professional model, . . . the items mentioned most frequently were as follows: a body of expert knowledge, autonomy, group solidarity within a professional community, self-regulation, licensing, authority over clients, and a code of ethics."[59] Sociologist William J. Goode has identified two "core characteristics" of professions from which other characteristics are derived; these core characteristics are "a prolonged specialized training in a body of abstract knowledge, and a collectivity or service orientation."[60]

In addition to the common threads of intelligence, advanced study, ethical norms, and associational notions in defining a profession, the sociological literature has also identified some theoretical dimensions of professionalism, which commonly encompass Goode's "service orientation" characteristic. For example, one commentator has opined that there exist five major characteristics of professionalism: (1) the use of a professional organization as a major point of reference; (2) a belief in public service; (3) a belief in self-regulation; (4) a sense of being "called" to the work; and (5) a desire for autonomy.[61] Of particular interest from among the characteristics discussed within the rubric of professionalism are the interrelated notions of devotion and altruism.[62]

---

58. Walter P. Metzger, *What is a Profession?*, 3 PROGRAM GEN. & CONTINUING EDUC. HUMAN. SEMINAR REP. 2–3 (1975).

59. Rothman, *supra* note 26, at 183–84.

60. William J. Goode, *Encroachment, Charlatanism, and the Emerging Profession: Psychology, Medicine, and Sociology*, 25 AM. SOC. REV. 902, 903 (1960).

61. William E. Snizek, *Hall's Professionalism Scale: An Empirical Reassessment*, 37 AM. SOC. REV. 109, 109–10 (1972).

62. *See* FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 70 ("[Professionalism] may be defined as a set of attitudes said to be characteristic of professionals. It is said to

The theme of "devotion" to one's profession appears repeatedly in the sociological literature,[63] and can be traced back to the work of Max Weber.[64] "A professional is totally devoted to his work. Work is defined as an end in itself and not merely a means to an end. So total is personal commitment . . . that the professional . . . [']performs his services primarily for the psychic satisfactions and secondarily for the monetary compensation.'"[65]

The interrelation between "devotion" and "altruism" is seen in the writings of numerous sociologists: "[W]hile the profession is of necessity a means of livelihood or of financial reward, the devoted service which it inspires is motivated by other conditions. . . . [The] acquisitive interests within the business world [make] it impossible for the intrinsic 'professional' interest to prevail."[66] In particular, Professor Cogan makes the same observation while summarizing the works of others:

> [Abraham] Flexner states categorically that the most important and most indispensable criterion of a profession is devotion to the interests of others and a denial of the mercenary spirit. [Oliver] Garceau considers that a sense of deep obligation to society is the primary motivation of profession, and [Harold] Laski attributes this preoccupation with public service to "a subtle

---

include such attributes as commitment to one's work as a career so that one's work becomes part of one's identity and an emphasis on public service rather than private profit.").

63. *See, e.g.*, LARSON, *supra* note 23, at 220 (noting that the professions incorporate "a work ethic derived from ideals of craftsmanship, which finds intrinsic value in work and is expressed in the notion of vocation or calling") (emphasis omitted).

64. *See supra* text accompanying note 34 (discussing Weber's notion of "duty over and beyond the everyday sense of doing a job").

65. Snizek, *supra* note 61, at 110 (quoting Greenwood, *supra* note 57, at 53); *see also* Max Weber, *Science as a Vocation*, *supra* note 34, at 135. Discussing the importance of the "calling" to the field of science, Weber noted:

> [W]hoever lacks the capacity to put on blinders so to speak, and to come up to the idea that the fate of his soul depends upon whether or not he makes the correct conjecture at this passage of his manuscript may as well stay away from science. He will never have what one may call the "personal experience" of science. Without this strange intoxication, ridiculed by every outsider; without this passion, this "thousands of years must pass before you enter into life and thousands more wait in silence"—according to whether or not you succeed in making this conjecture; without this, you have no calling for science and you should do something else. For nothing is worthy of man as man unless he can pursue it with passionate devotion.

Id.

66. R.M. McIver, *The Social Significance of Professional Ethics*, ANNALS 5, 7 (1922).

> alchemy in historic tradition." The extreme of this view is that the professions play a dedicated and redemptive role in society.[67]

It is in this sense that the two meanings of "profession" converge. Although a profession is indeed "a special kind of occupation," it also implicates a form of "avowal or promise" by its members—the promise of an altruistic component to their work.[68] The question then becomes whether law satisfies these professional requisites.

III. IS LAW A "PROFESSION"?

Ask any lawyer if she is a member of a profession and you will get an immediate answer of "yes," perhaps accompanied by an odd stare, as if your question was foolish and the answer obvious. Indeed, both inside and outside the practice of law, there is a generalized acceptance that law is a profession; it is accepted reflexively, without thought and without proof. Themes similar to those in the sociological literature addressing the professions are also

---

67. Cogan, *supra* note 53, at 41 (citations omitted).

68. *See supra* note 27 and accompanying text (defining "profession"); *see also* Infanti, *supra* note 27, at 601 (describing the work of sociologist Talcott Parsons as involving a social contract in which "society grants the profession a legal monopoly on the practice of the profession in exchange for a promise that it will be practiced for the public good and in accordance with the high standards set forth in the profession's ethical code"); *id.* ("The profession's commitment to altruism renders this bargain acceptable to society, which is assured that the profession will neither use its knowledge to exploit clients nor to 'advance . . . clients' interests at the expense of society.'"). This is consistent with the linguistic history of the word "profession":

> The English noun "profession" in the thirteenth century means the declaration, promise, or vow made by one entering a religious order. Then, starting in the fourteenth century, it comes to mean any solemn declaration, promise or vow. It is only in the sixteenth century that it comes to mean an occupation in which learned knowledge is applied to the affairs of others, as especially in medicine, law, divinity, and university teaching.
>
> [Professor Stephen] Barker emphasizes the importance of public oaths in medieval times as a means to regulate the morality of a profession. A student seeking a degree in university teaching, law, medicine, or theology had to swear oaths, publicly and in the name of God, professing dedication to the distinctive ideal of service associated with the students' profession. . . .

Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 100–01 (1998) (footnote omitted).

found in the legal literature. For example, prominent legal commentators have proffered definitions of what it means to be a "profession."[69] One such commentator, citing a sociological source, has asserted that a profession must:

> (1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge; (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; and (7) be imbued with an altruistic spirit.[70]

This same commentator noted that the four longstanding "traditional professions" were the ministry, teaching, medicine, and law,[71] and further

---

69. *See, e.g.*, Posner, *Professionalisms*, *supra* note 26, at 1 (noting that the term "profession" has "an incredibly large and vaguely bounded range of meanings, to the despair of sociology, the discipline that has done most to study the professions"). Posner continued:

> The hallmark of a profession is the belief that it is an occupation of considerable public importance, the practice of which requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship, hence an occupation that cannot responsibly be entered at will but only in compliance with a specified, and usually, exacting protocol and upon proof of competence.

Id. at 2. Similarly, in another article, Posner stated:

> I dare not take for granted what a "profession" is. It is an occupation in which competent performance requires or is thought to require not merely know-how, experience, and general "smarts," but also mastery of a body of specialized but relatively (sometimes highly) abstract knowledge, such as some branch of science, or some other body of thought believed to have structure and system, such as theology, or "the law," or "military science," which is the study of the general laws (in the scientific sense of the word) of tactics and strategy.

Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 5 (1993) [hereinafter Posner, *Jurisprudence*].

70. Bowie, *supra* note 10, at 743 (citing Abraham Flexner, *Is Social Work a Profession?*, *quoted in* Walter Metzger, *What is a Profession?*, 52 C. & U. 42–45 (1976)).

71. *Id.* Posner has provided a more expansive list of professions. Posner, *Professionalisms*, *supra* note 26, at 1–2 (listing as professions "law, medicine (and related fields such as dentistry, pharmacology, optometry, nursing, physical therapy, and psychology), military officership, engineering, the clergy, teaching, architecture, actuarial services, librarianship, social work, journalism, and accounting").

observed, "[L]ittle doubt exists that teaching and the ministry easily meet the definition. [However,] [d]octors and lawyers have always done relatively well financially, and hence, it has been incumbent upon them to prove that their primary motivation was altruism."[72]

Other legal commentators have similarly noted the altruistic component inherent in a "profession."[73] Professor Kronman has identified four characteristics justifying law's classification as a profession: (1) "the law is a public calling which entails a duty to serve the good of the community as a whole, and not just one's own good or that of one's clients;"[74] (2) "the nonspecialized nature of law practice;"[75] (3) "the capacity for judgment;"[76] and (4) the "internal[] connect[ion] to [law's] past—connected by its own defining norms and values—and not just externally connected, as every enterprise is, through the story an observer might tell about its development over time."[77]

Changes in the practice of law have led some commentators to argue that law has come to more closely resemble a business than a profession.[78] In

---

72. Bowie, *supra* note 10, at 743.

73. *See* Infanti, *supra* note 27, at 600 (noting that a "profession" is, among other things, "marked by altruistic motivations (i.e., the individual professional's commitment to clients and public service surpasses her self-interest in making money from engaging in the activity)").

74. Anthony T. Kronman, *The Law as a Profession*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 29, 31 (Deborah L. Rhode ed., 2000).

75. *Id.* at 32.

76. *Id.* at 33.

77. *Id.* at 34.

78. *See, e.g.*, GERBER, *supra* note 9, at 19 ("[O]ver the last ten or fifteen years since the onslaught of automated accounting systems, hourly billing, and annual billable hour quotas, a disease has spread like a shadow over the profession's soul. . . . Law is now 'business as a business,' performed according to the morals of the market place . . . ."); Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947 (2002). Professor Morgan writes:

> Organized professionalism in the sense developed by the ABA in the first half of the twentieth century is—and should be seen as—dead.
>
> Ignoble as it may sound, lawyers today are not guardians of the law. They are not legislators; they are not judges. They may become either or both, but until they do, they are just citizens. They should have respect for law and legal institutions, but so should everyone else.
>
> If I am right, bar associations will and should continue to evolve into trade associations, not governors of an organized profession.

Id. at 974–75. According to Professor Pearce:

particular, Professor Russell Pearce has argued that law today is not a "profession" in the traditional sense of the term,[79] although he also argues that perhaps such a characterization was flawed historically as well.[80]

Paring down the notion of a "profession" to its essential core, a consensus would likely support characterizing a "profession" as a calling requiring specialized knowledge and specialized, lengthy academic preparation.[81] Indisputably, law satisfies this basic definition. Similarly, if

---

> Without overtly adopting it, the legal community has begun to employ a new paradigm . . . : the Business Paradigm. The Business Paradigm is evident in the way much of the legal community perceives itself. Defenders and opponents of the Professionalism Paradigm agree that lawyers are behaving like businesspersons. They structure their practices and sell their services using the same techniques as other businesspersons. Many, if not most, commentators recognize that financial self-interest plays an important role in lawyers' conduct.

Pearce, *Paradigm Shift*, *supra* note 10, at 1265 (footnotes omitted); *see also* Hamilton & Coan, *supra* note 68, at 98 (noting that "segments of the [legal] profession increasingly see the practice of law as merely a business for personal gain, unrestrained by other professional values"); Infanti, *supra* note 27, at 614 (noting "the recurring claims that the legal 'profession' is slowly becoming the legal 'business'"); Richard C. Reuben, *Change of Course Needed: Elder Statesman Says Acceptance of Law as Business Will Break the Profession*, 80 A.B.A. J. 99 (Oct. 1994) (stating that "law has become a business").

79. Pearce, *Paradigm Shift*, *supra* note 10, at 1265–76. *But see* Stempel, *Embracing Descent*, *supra* note 17, at 36–57 (challenging Professor Pearce's arguments).

80. Pearce, *Paradigm Shift*, *supra* note 10, at 1230–32, 1237–40. *But see* Stempel, *Law-Business Paradigm*, *supra* note 10, at 861 (asserting that, contrary to Professor Pearce's contentions, "the underlying rationale for crafting law as a profession may not be inherently flawed").

81. *See* Posner, *Professionalisms*, *supra* note 26, at 2 ("The hallmark of a profession is the belief that it is an occupation of considerable public importance, the practice of which requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship . . . ."). This is, in fact, the definition of "profession" commonly found in dictionaries. *See, e.g.*, BLACK'S LAW DICTIONARY 1089 (5th ed. 1979) (defining a profession as "[a] vocation or occupation requiring special, usually advanced, education and skill"); 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2368 (Lesley Brown ed., 1993) (defining profession as "[a] vocation, a calling, *esp.* one requiring advanced knowledge or training in some branch of learning or science"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1134 (2d college ed., 1982) (defining profession as "a vocation or occupation requiring advanced education and training, and involving intellectual skills").

Indeed, sociologist Terence Halliday proposed an epistemological foundation of the professions, which would divide the professions into classes based on the epistemological foundation of their knowledge. Halliday suggested that "the more normative (or syncretic) the epistemological core of professional knowledge, the more readily that profession will be able

autonomy is the hallmark of a "profession," law seemingly satisfies this prerequisite.[82] The other common characteristics of a profession—group solidarity within a professional community, self-regulation, licensing, authority over clients, and a code of ethics—are also easily satisfied in law. Much more interesting is the suggestion that a "profession" additionally requires an "altruistic spirit."[83]

---

to exercise moral authority in the name of expertise and thus the greater will be its potential breadth of influence." TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 40 (1987).

82. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6–7 (1988) [hereinafter Gordon, *Independence*].

> Independence might be thought of simply as an attribute of the legal profession as a corporate group. In this context, . . . independence means the bar's freedom to regulate its own practices, and its freedom from outside regulation. These freedoms are usually analyzed as part of a social bargain: they are public privileges awarded in exchange for public benefits. Lawyers are given a monopoly over certain kinds of work. They benefit from legally guarded relations of confidentiality with clients and from the power to regulate terms of entry, fix practice standards (though no longer prices) and discipline offenders. They enjoy the social prestige of "professional" status. In return, supposedly, the bar regulates its members to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.

Id. (footnotes omitted). However, justifications must be proffered for permitting lawyers such independence and power—justifications extending beyond "that it's a good deal for lawyers" or that it "facilitates more efficient and effective client service." *Id.* at 9. As Professor Gordon has explained, this goes to the "broader argument: that the independence of lawyers has a social and political value going well beyond the value of effective client service." *Id.* at 10.

83. *See* Bowie, *supra* note 10, at 743 (citing Abraham Flexner, *Is Social Work a Profession?*, *quoted in* Walter Metzger, *What is a Profession?*, 52 C. & U. 42–45 (1976)). Consistent with his law-and-economics approach, and perhaps also more cynically, Judge Posner has suggested that a "profession" requires an altruistic "pretense" rather than a genuinely altruistic spirit. *See* Posner, *Professionalisms*, *supra* note 26, at 4.

> [A] profession is likely to employ *altruistic pretense*; that is, it will try to conceal the extent to which its members are motivated by financial incentives, in order to make more plausible the implication that they have been drawn to the profession by the opportunity to pursue a calling that yields rich intellectual rewards. Altruistic pretense reinforces charismatic personality, which is undermined by the appearance of self-seeking.

Id.; *see id.* at 2 ("[B]ecause the arcane skills of the professional make his performance difficult for outsiders to monitor and therefore facilitate exploitation, it is usually believed that the norms and working conditions of a profession should be such as to discourage the undiluted pursuit of pecuniary self-interest.").

As sociologist Eliot Freidson has emphasized, a "profession" must reach beyond an "ideology of service":[84]

> The professional ideology of service goes beyond serving others' choices. Rather, it claims devotion to a transcendent value which infuses its specialization with a larger and putatively higher goal which may reach beyond that of those they are supposed to serve. Each body of professional knowledge and skill is attached to such a value, one sometimes shared by several disciplines. . . . [S]eparate from individual conscience, is the ideological claim of collective devotion to that transcendent value and, more importantly, the right to serve it independently when the practical demands of patrons and clients stifle it.[85]

These sociological insights into professions as a general matter are highly relevant to a particularized inquiry into whether law continues to function as a profession. Certainly the danger is obvious that law seems to be acquiring a "service" orientation, in which attorneys' loyalties "lie only with those who pay them."[86]

Freidson has noted the potential dangers when the work of a profession diverges from society's expectations in granting professional status:

> If a profession's work comes to have little relationship to the knowledge and values of its society, it may have difficulty surviving. The profession's privileged position is given by, not seized from, society, and it may be allowed to lapse or may even be taken away.[87]

In particular, Freidson has noted, "[t]he profession's service orientation is a public imputation it has successfully won in a process by which its leaders

---

84. FREIDSON, THIRD LOGIC, *supra* note 31, at 122.

85. *Id.* at 122–23.

86. *See id.* at 122; Posner, *Jurisprudence*, *supra* note 69, at 29 ("The increasingly competitive character of the legal services market makes lawyers feel like hucksters rather than the proud professionals they once were, and brings forward to positions of leadership in the profession persons whose talents, for example for marketing ('rainmaking'), are those of competitive business rather than of professionalism.").

87. FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 73 (footnote omitted); *see also* Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 13 (1989) ("[S]ociety may have delegated responsibility to professionals, but it has the power to relieve them of this responsibility if they fail to live up to their public promises.").

have persuaded society to grant and support its autonomy."[88] He explains that "without a service orientation, a profession granted control over its work could be expected to take material advantage of its monopoly to serve its own selfish interests."[89]

Thus, if law wishes to call itself a "profession," it must satisfy an altruistic component. This necessarily requires further discussion of the

---

88. FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 82 (emphasis omitted). Professor Rhode has made a similar argument in the context of lawyers' provision of pro bono services:

> [T]he legal profession has a monopoly on the provision of certain essential services. Lawyers have special privileges that should entail special obligations. In the United States attorneys have a much more extensive and exclusive right to provide legal assistance than attorneys in other countries. The American legal profession is responsible for creating and guarding that right, and its success in restricting lay competition has helped to price services beyond the reach of millions of consumers. Some pro bono contribution is not unreasonable to expect from lawyers in return for their privileged status.

Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 432 (2003) [hereinafter Rhode, *Pro Bono*]; *see also* Stephen F. Barker, *What is a Profession?*, 1 PROF. ETHICS 73, 92–93 (1992). Barker notes a "social contract," which he describes as follows:

> [T]he profession agrees to curb its self-interested behavior in certain respects so as to promote ideals of service, while society, in return, allows the profession to take charge of formulating and administering its own code of behavior, and perhaps even allows it a degree of monopoly control over entry into the profession.

Id. Professor Robert Bellah has offered a similar analogy and identified a similar threat, describing a "profession" as having a "tripartite structure": the professional, the client, and the higher societal standard or purpose. *See* Robert N. Bellah, Professions Under Seige: Can Ethical Autonomy Survive? (unpublished address), *cited in* Hamilton & Coan, *supra* note 68, at 99 n.176. "If, in a market economy, a profession does not attend to its transcendental purpose, money will sweep the field as a determiner of value. The tripartite structure of a profession will be reduced to an economic market exchange between a service provider and a customer for profit." Hamilton & Coan, *supra* note 68, at 100 (footnote omitted).

89. FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 360.

> While expertise and ethicality are relevant to both the content and terms of work, it seems to me that in the content of work, expertise is the primary element and, in the analysis of the terms of work, it is ethicality which is central. Special expertise not shared with anyone is the main prerequisite for justifying control over the content of work, while ethicality is prerequisite for being trusted to control the terms of work without taking advantage of such control.

Id.

notion of "altruism." Perhaps two of the best-known discussions of altruism are found in the writings of Aristotle[90] and Thomas Nagel.[91]

Nagel defined "altruism" as something different from "abject self-sacrifice," instead as "merely a willingness to act in consideration of the interests of other persons, without the need of ulterior motives."[92] Some schools of thought contend that altruism cannot exist because all behavior stems from self-interest.[93] Indeed, some have ascribed this very argument to Aristotle.[94] According to Julia Annas,

> Aristotle's discussion in the *Nicomachean Ethics* is often abused as reducing friendship and all apparent altruism to egoism. "Every point confirms the impression that Aristotle does not think it psychologically possible for a man

---

90. *See* ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS (Hugh Tredennick rev. trans., 1976).

91. *See* THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

92. *Id.* at 79; *see* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 728 (1992) (describing altruism as a notion of "transcend[ing] . . . self-interest"); *see also* Neera Kapur Badhwar, *Altruism Versus Self-Interest: Sometimes a False Dichotomy*, *in* ALTRUISM 90 (Ellen Frankel Paul et al. eds., 1993) (observing that mixed motivations often exist for helping others).

93. *See* Rhode, *Pro Bono*, *supra* note 88, at 415. Professor Rhode has acknowledged, and rebutted, this argument:

> Whether pure altruism is possible has been a matter of long-standing dispute. Some branches of moral philosophy, joined by the rational choice school of economics, generally deny the possibility of wholly disinterested actions. These frameworks assume that all reasoned action is motivated by some self-interest: after all, why else would someone act? On this view, when people attempt to benefit others, it is because they derive some personal satisfaction from doing so. Yet this approach verges on tautology and ignores a relevant moral distinction. As other theorists note, an action taken because it will be intrinsically rewarding stands on different ethical footing than an action taken because it will bring extrinsic rewards. Unpaid legal work designed to attract favorable publicity or to accommodate a paying client does not carry the same moral significance as less self-serving support of legal aid programs. Both contributions are charitable, but only the latter may seem genuinely altruistic.

Id. (footnote omitted); *see also* KRISTEN RENWICK MONROE, THE HEART OF ALTRUISM 6 (1996) (noting that altruism is significant "because its very existence challenges the widespread and dominant belief that it is natural for people to pursue individual self-interest") (footnotes omitted); Jon Elster, *Selfishness and Altruism*, *in* BEYOND SELF-INTEREST 44–45 (Jane J. Mansbridge ed., 1990) (defending altruism).

94. *See* Julia Annas, *Plato and Aristotle on Friendship and Altruism*, 86 MIND 532, 539 (1977).

> to choose otherwise than in his own interest, and is seeking, in one way or another, to say what really happens when men *appear* to subordinate their interest to that of another." This is a common view. In fact, however, something more subtle is being done.[95]

Annas argues that Aristotle preserved the possibility of altruism. "Aristotle certainly regards it as simply a fact to be taken for granted that people can in fact come to like others and regard their interests as they do their own."[96] Nagel similarly argued that altruism exists:

> [W]ithout question people may be motivated by benevolence, sympathy, love, redirected self-interest, and various other influences, on some of the occasions on which they pursue the interests of others, but . . . that is also something else, a motivation available when none of those are, and also operative when they are present, which has genuinely the status of a rational requirement on human conduct. There is in other words such a thing as pure altruism (though it may never occur in isolation from all other motives). It is the direct influence of one person's interest on the actions of another, simply because in itself the interest of the former provides the latter with a reason to act.[97]

One of the difficulties in addressing this additional altruistic element within a "profession"[98] is that, as is true of many words, "altruism" has more than one dictionary meaning. One meaning of "altruism" is the "unselfish concern for the welfare of others."[99] Without question, there are many lawyers, doctors, teachers, and other professionals who satisfy this definition.

---

95. *Id.* (quoting D. J. ALLAN, THE PHILOSOPHY OF ARISTOTLE 138) (footnote omitted).

96. *Id.* at 543; *see also id.* at 544 ("It is important that Aristotle keeps apart (as modern commentators do not always do) the arguments of IX, 4 that concern the *possibility* of altruism from those of IX, 9 that set out to show the *necessity* of at least some altruism in the good life.").

97. NAGEL, *supra* note 91, at 80.

98. *See* Bowie, *supra* note 10, at 745 ("A long tradition exists identifying the characteristics of a profession, and the most important characteristic is the altruistic spirit.").

99. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 42 (4th ed. 2002); *see also* NAGEL, *supra* note 91, at 79 (defining "altruism" as "a willingness to act in consideration of the interests of other persons, without the need of ulterior motives"); Rhode, *Pro Bono*, *supra* note 88, at 414 ("The French sociologist Auguste Comte coined the term *altruism*, derived from the Italian *altrui*, meaning 'other.' Under Comte's definition, altruism signified an unselfish regard for the welfare of others.").

In law, examples would include many legal aid lawyers, public defenders, and lawyers who work for organizations serving low-income individuals. Clearly, however, there are many more individuals in law, medicine, and other fields who do not appear to serve such a noble purpose. Both lawyers and physicians, for example, often earn very large incomes under very comfortable circumstances.

Another meaning of "altruism" is "the doctrine that the general welfare of society is the proper goal of an individual's actions."[100] It is this latter meaning of altruism that appears to be implicated in the term "profession."[101]

Absent this altruistic component, an occupation often will claim a "service" orientation, which falls short of constituting a profession:

> Ideal-typical professionalism is always dependent on the direct support of the state and some degree of tolerance of its position by both consumers and managers. Such support cannot be gained by relying solely on what many writers have emphasized about professions—their ideology of service. Many other kinds of occupations also claim to serve—merchants their customers, politicians their constituencies, and, most appositely, technicians their patrons. But those who merely serve are subordinates. Specialists who are mere technicians (as I define them here) serve their patrons as freelances or hired guns (to employ both ancient and modern terms for mercenaries): their loyalties lie only with those who pay them. They accept the choices of their patrons and serve them loyally as best they can. In light of their specialized knowledge such servants may advise their patrons to qualify or modify their choices, but they do not claim the right to make choices for their patrons, to be independent of them, even to violate their wishes. That, however, is the kind of independence claimed by professionalism.[102]

---

100. WEBSTER'S NEW WORLD DICTIONARY 41 (2d college ed. 1982); *see also* LARSON, *supra* note 23, at x ("Society grants the[] rewards [of special power and prestige to professions] because professions have special competence in esoteric bodies of knowledge linked to central needs and values of the social system, and because professions are devoted to the service of the public, above and beyond material incentives.").

101. *See* KRONMAN, *supra* note 10, at 1 ("This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul."); *see also* Atkinson, *supra* note 14, at 271 (noting that a profession, at the most general level, is "a distinct kind of occupation characterized by such features as special educational and licensing requirements; elements of nonmarket regulation, often in the hands of an occupational body rather than the state itself; and an announced ethos of public service").

102. FREIDSON, THIRD LOGIC, *supra* note 31, at 122 (emphasis omitted).

The legal profession's "altruistic" element, benefiting the general welfare of society, has typically been considered the pursuit of justice.[103] Accordingly, to come within the definition of a "profession," lawyers must be viewed as furthering justice.[104] But what is "justice"?[105] Here in the United States, our definition of what it means to further justice is peculiarly self-serving: we define our furtherance of justice as our participation in the adversary system. Thus, by zealously promoting our clients' selfish interests to the fullest extent permitted by law—which coincidentally also promotes our own selfish business and financial interests—we claim to have simultaneously satisfied our obligation to the general welfare of society. While immensely convenient, this claim is unconvincing; indeed the widespread perception of the legal profession is one of obstructing, rather than furthering, justice.[106]

If the adversary system as the means of lawyers furthering justice and benefiting the general welfare of society rings hollow, can we rationalize the altruistic component by virtue of attorneys' roles as officers of the court? Unfortunately, this alternative also falls short.[107] Although acting as an

---

103. *See* Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1546 (2002) [hereinafter Rhode, *Pursuit of Justice*] ("[L]awyers, as officers of the justice system, have a special obligation to pursue justice. That obligation runs first and foremost not to particular clients, but to the rule of law and to the core values of honesty, fairness, and social responsibility that sustain it.").

104. *See* ARISTOTLE, *supra* note 90, at 173–74 (noting that "[j]ustice . . . is complete virtue; virtue, however, not unqualified but in relation to somebody else. . . . [J]ustice is the only virtue that is regarded as someone else's good, because it secures advantage for another person").

105. *See* Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 407–08 (1992):

> Even basic values like "freedom" and "fairness" and "rights" are comparative and relative rather than absolute—one person's liberty may be viewed as another's victimization; people may disagree vehemently over the adequacy, or even the necessity, of procedures to protect a person's property. All these concepts are very abstract and circumstantial . . . . While a new drug that eliminates pain needs no defense, the public must be reminded why a court decision that frees a convicted prisoner might be good news.

Id.

106. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, at xvii (1988) ("The commonest and bitterest complaint against the legal profession is that lawyers do not give a damn about justice, or, when they do, it is despite their profession rather than because of it.").

107. *See* RHODE, *supra* note 10, at 15 ("The idealized vision of lawyers as morally independent 'guardians of justice' is out of phase with prevailing practices."); *see also id.* at

officer of the court sounds laudatory, the net reality yields little: lawyers may not lie to the court, may not knowingly further a client's criminal or fraudulent acts, and may not knowingly file meritless papers with, or knowingly make meritless arguments to, the court. In sum, the "officer of the court" appellation is little more than an admonition against lying in court—scarcely a societal benefit so compelling as to grant lawyers an elevated status.[108]

IV. THE LAW AS A "PUBLIC" PROFESSION

If the practice of law lacks an altruistic component, law does not qualify as a profession under prominent sociological models. Moreover, even if we dismiss the necessity of an altruistic component as a prerequisite to a "profession" by employing an alternative sociological model, we face an additional analysis in light of the common reference to law as not just a profession, but a "public" profession.

Despite numerous and repeated references to law as a "public profession," sources using this denomination often have not defined it.[109] For example, one of the oft-quoted descriptions of a "profession" in the legal literature is that of Roscoe Pound: "Historically there are three ideas involved in a profession: organization, learning, i.e., pursuit of a learned art, and a spirit of public service. . . . A further idea, that of gaining a livelihood[,] . . . is incidental."[110]

Dean Pound considered the concept of "a spirit of public service" as "the essence of a profession."[111]

---

17 ("If lawyers see themselves as officers of justice, they must accept greater obligations to *pursue* justice.").

108. I do not mean to suggest that our adversarial legal system is undesirable. Indeed, I agree with Professor Freedman that our adversarial system—while imperfect and undeniably susceptible to potential abuses—is both the best system known and is "an expression of some of our most precious rights." MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 2.16, at 43 (3d ed. 2004). But the overall desirability of our adversarial legal system does not render lawyers "altruistic." The current climate in the practice of law is largely profit-oriented, using business principles to promote financial gain without regard to social goals.

109. *See* Gordon, *Public Calling*, *supra* note 4, at 255 (noting that the notion of a "public" profession "is an inspiring ideal for a profession and, so long as its expression stays on this plane of comfortable vagueness, not a controversial one").

110. POUND, *supra* note 1, at 6.

111. *Id.* at 9. Dean Pound noted:

> [T]he member of a profession does not regard himself as in competition with his professional brethen. He is not bartering his services as is the artisan nor exchanging the products of his skill and learning as the farmer sells wheat or corn. . . . The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law.[112]

Clearly a "public profession" is something more than a mere "profession," but what does the reference to "public" add? For some, the use of "public profession" seems to suggest a type of aristocracy within the legal profession;[113] for others, the term is used as a synonym for a stewardship of the public interest;[114] and for still others, the term encompasses both

---

> Both in idea and as a matter of history a profession is a learned profession; a body of learned men pursuing a learned art. . . . In the third idea, however, we have the point of chief importance. It is of the essence of a profession that it is practiced in a spirit of public service.

Id. at 8–9.

112. *Id.* at 10.

113. *See* CARRINGTON, *supra* note 3, at 1 ("My vision of the role of the profession was expressed metaphorically by Alexis de Tocqueville when he proclaimed a resemblance between the American legal profession and a feudal aristocracy."); *see also* FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 1 n.1 (1981) ("The public role of lawyers is clear from their substantial overrepresentation among both the elected and the appointed officials who govern us."); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 383 (2001) [hereinafter Pearce, *Governing Class*] ("The legal elite's original and uniquely American understanding of the lawyer's role was that lawyers were America's governing class. . . . With their dedication to the common good and their placement in the center of commerce and governance, lawyers were ideally suited for political leadership.").

114. *See* Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1121–22 (1991) [hereinafter Cramton, *Mandatory Pro Bono*] ("At the core of professional ideology is the idea that the special privileges of the [legal] profession are justified because its members are dedicated to the interests of clients and the public. Although lawyers earn their living by representing clients, they do so 'in the spirit of public service.'") (quoting Am. B. Ass'n Comm'n on Professionalism, *"In the Spirit of Public Serivce:" A Blueprint for the Rekindling of Lawyer Professionalism* (1986), *reprinted in* 112 F.R.D. 243, 261 (1987)).

meanings.[115] Perhaps Professor Gordon has come closest to providing a definition:

> Law is a service profession; but it is also a public profession. Lawyers are supposed to serve their clients faithfully and zealously; but they also are supposed to work, both on and off the job of representing clients, as counselors, citizens, reformers, community activists, and public servants, to maintain the integrity of the framework of laws, institutions, and procedures that constrain their clients' practices and their own—and not just to maintain that framework, but to help transform it so that it more nearly will approach the conditions of justice and civic community.[116]

Denoting law as a "public profession" goes beyond the altruism component used in defining a "profession" more generally. Thus, the notion of a public profession contemplates more than merely serving clients, more than merely acting as officers of the court serving justice in the most general of senses, and more than merely doing what is proper under the law. A public profession requires acting affirmatively in a manner beyond what is necessary to earn a living. In particular, to claim law as a public profession requires a broader expectation of, and performance of, public service.[117] Yet lawyers have repeatedly rejected any public service requirement.[118]

---

115. *See* Pearce, *supra* note 113, at 389 (noting that David Hoffman's "exposition of lawyers as America's governing class combined the vision of the professional's commitment to the common good found in Federalist No. 35 with the view that lawyers were responsible for governance").

116. Gordon, *Public Calling*, *supra* note 4, at 255; *see also id.* at 258 ("The ideal of law as a public profession . . . supposes that lawyers will develop some vision of the common good or public interest, and try to realize it in their practices, if necessary against the immediate wishes of their clients.").

117. *See* GERBER, *supra* note 9, at 12:

> Professionalism . . . presupposes a substantial degree of public commitment and private autonomy. Most bar discourse suggests an Olympian detachment from parochial concerns and institutional constraints. Over the last century, attorneys have thus variously described themselves as "sentinels," "ministers," and "high priests of justice," their eyes elevated "above the golden calf." Legal practice is still idealized as a self-directed calling informed by "the spirit of public service."

Id.

118. *See* Rhode, *Pro Bono*, *supra* note 88, at 425–27 (chronicling the resistance to mandatory pro bono); *see also* Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 470 (2001) (noting the "past outcry over even modest pro bono proposals").

The practical reality is that we declare the law to be a profession without reflection, self-inspection, or proof. Law is a profession solely because we say so. Moreover, although we pay lip service to the ideals of public service, we have effectively merged the notion of public service with the practice of law—in effect contending that to practice law is necessarily to further the public interest because law serves the public good. This circular argument serves to justify the law's status as a profession and permits lawyers openly to focus their energies on maximizing their earnings without guilt or public obligation.

The argument over whether law is devolving from a "profession" into a mere "business" actually approaches the matter backwards. It has indeed been noted on numerous occasions that business is not a profession,[119] and some have proposed that a dichotomy exists between "business" on the one hand and a "profession" on the other.[120] However, what is really being disputed is whether law is becoming a profit-driven enterprise to the exclusion—or even the general eradication—of its responsibilities to the public good.[121] Thus, ultimately, the inquiry is not whether law resembles a business, but indeed, whether law is anything more than a business.

---

119. *See, e.g.*, GERBER, *supra* note 9, at 11 ("Since at least the days of Cicero, law has been considered a profession. Professions and business have traditionally been contrasted. The professional is seen as oriented not to personal profit but to disinterested tasks like the advancement of knowledge. Professionalism involves limitations on the aggressive pursuit of self-interest."); Bowie, *supra* note 10, at 745 ("Traditionally, business has not been viewed as a profession."); Posner, *Jurisprudence*, *supra* note 69, at 5 (noting that "economics is a profession but business is not, because you can be a successful businessman without having mastered a body of formal knowledge, but you cannot be a successful economist on that basis"); Posner, *Professionalisms*, *supra* note 26, at 2 ("Occupations that are not commonly referred to as professions include business management and business generally . . . ."). *But see* Bowie, *supra* note 10, at 743 (arguing that "business should abandon the traditional business model and seek to become a profession").

120. *See, e.g.*, Pearce, *Paradigm Shift*, *supra* note 10, at 1238 (noting the "distinction between a business and a profession").

121. *See* GERBER, *supra* note 9, at 131 ("The same bar that claims to be a profession to a growing extent abdicates public service for the pursuit of money."); *id.* at 12 ("As the legal profession's competitive ethos and partisan loyalties grow more pronounced, the pretense that the bar remains above mercantilism becomes more incredible."); *id.* at 17 ("The bar's pursuit of wealth is poorly camouflaged. Law professors close to student attitudes now commonly assume that the desire to earn a law degree is driven mainly by economic benefits."); PAVALKO, *supra* note 23, at 24 (discussing how motivations in business differ from those of professions); Kathleen M. Sullivan, *The Good that Lawyers Do*, 4 WASH. U. J.L. & POL'Y 7, 18 (2000) (noting "the venerable view that law is a profession, not a business," and that "the

This is the very risk we currently run. "Nowhere is the gap between professional ideals and professional practice more apparent than on issues of public service."[122] Although the Model Rules expressly state that "[t]he practice of law is a profession, not merely a business,"[123] arguably changes in the practice of law are indeed transforming the profession into a mere money-making venture at the expense of both the public good generally and ethical considerations in particular.[124] However, this evolution is neither preordained nor inevitable. Rather, this transformation has been facilitated by the orientation of the Model Rules of Professional Conduct, which pay hortatory lip-service to the public good but then refuse to enforce any such duty—instead in effect encouraging selfish gain over the public good.

---

lawyer's license implies that the lawyer is meant to serve the good of the broader community, and not just the lawyer's, or the lawyer's clients', private self-interest").

> The polar opposite of the service motivation is found in business occupations. In the business world a premium is placed on seeking and maintaining customers. Client seeking on the part of the businessperson is expected. It is also clear that the motive for work in business activities is monetary gain and profit. The relationship between businessperson and customer is one in which the principle of caveat emptor (let the buyer beware) prevails. We enter such relationships assuming that the businessperson is primarily concerned with maximizing monetary gain and that our interests are secondary.

PAVALKO, *supra* note 23, at 24; *see also* Hamilton & Coan, *supra* note 68, at 92 ("Although the practice of law has always been pursued for personal gain as well as for the public good of justice, the responsible practice of the profession has required a balancing of these goals. Since the 1960s the balance has increasingly been skewed toward personal gain.").

122. RHODE, *supra* note 10, at 37.

123. MODEL RULES OF PROF'L CONDUCT R. 1.17 cmt. 1 (2003).

124. *See* GERBER, *supra* note 9, at xi:

> Membership in our profession entails an ethical responsibility to temper narrow self-interest in pursuit of the more fundamental goal of public service. . . . But because of the tremendous power lawyers wield in our political system, and the relentless pull of economic self-interest, the temptation to manipulate the system of justice for personal gain is ever present.

Id.

V. THE MODEL RULES AND THE EMPHASIS ON CLIENT INTERESTS

Sociologists have frequently listed a "code of ethics" as one of the attributes of a "profession."[125] The orientation of a profession's ethical rules reflects that profession's ethicality:

> What professionals do represents their effective knowledge or expertise; how they regulate what they do in the public interest represents their effective service orientation or ethicality. If the profession organizes itself in such a way as to assure good work in the public interest irrespective of personal or occupational self-interest, we may conclude that it has justified its claims to autonomy over the terms of its work.[126]

In particular, we would look to a profession's ethical rules as a demonstration of its pledge to altruism. Altruism, however, is largely absent from the Model Rules. The Model Rules do not truly promote even an "officer of the court" standard, much less reflect the public interest expected of a "public" profession.[127] The provision most closely approximating "altruism" is Model Rule 6.1, which encourages—but, importantly, does not require—attorneys to render pro bono legal services to the poor.

Lawyers represent clients. This unremarkable proposition has often led to a logical—but unfortunately, short-sighted and undesirable—focus on the client's selfish interests in the ethical rules.[128] "Once lawyers could be said to serve 'the law.' Now they serve the client. It is a profound difference."[129]

---

125. *See supra* text accompanying notes 57 and 59 (listing a "code of ethics" as one of the most common attributes ascribed to professions).

126. FREIDSON, PROFESSION OF MEDICINE, *supra* note 27, at 361; *see also* Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 551 (1992) ("[A] code of ethics or professional responsibility distinguishes a profession from an occupation, not only as an ethical code per se but as a means of self-regulation.").

127. *See* RHODE, *supra* note 10, at 2 ("[T]he public's interest has played too little part in determining professional responsibilities. Too much regulation of lawyers has been designed by and for lawyers."); *see also id.* at 8 ("[T]he legal profession has every incentive to pursue regulatory concerns and to block initiatives that advance public interests at the expense of its own.").

128. *See id.* at 15 (noting that lawyers' "preeminent obligation is loyalty to client interests . . . [e]xcept in limited circumstances, such as where a client seeks assistance in criminal or fraudulent conduct, lawyers are to maintain clients' confidences and to pursue their interests 'zealously . . . .'").

129. Posner, *Jurisprudence*, *supra* note 69, at 36.

Indeed, Professor Hazard has observed that lawyers are not "ethical" in the traditional sense because they have only one focus: that of the client.[130] Arguably, the ethical rules have a dual focus, encompassing both client and lawyer self-interest.[131]

Interestingly, lawyers generally seem to pride themselves on the Model Rules' focus on the client's interests, as though it were honorable to sacrifice all for one's client's interests. Lawyers like to think of the practice of law and the ethical rules as "client-centered," a term borrowed from psychology and counseling literature.[132] I decline to use the term "client-centered" in describing the practice of law and the ethical rules because it carries connotations that are largely untrue in the legal realm. In counseling, "client-centered" means the use of empathy[133] and other characteristics[134] to promote client growth. Although "client-centered" counseling is essentially nondirective,[135] the client's behaviors are not seen as static, unchanging, or even as serving the client effectively. Rather, the ability to "help[] clients challenge themselves" is within the list of core competencies of counselor skills.[136] Although some lawyers may have strong empathic skills,[137] the

130. *See generally* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978). *See also* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 18 (2003) ("In the law of lawyering, the role is firmly centered on the client . . . .").

131. *See* Hamilton & Coan, *supra* note 68, at 94 (noting that the legal profession "increasingly sees itself as profit-centered rather than client-centered" and that "[l]egal ethics have gradually reflected this understanding that the practice of law is a commercial enterprise where the business interests of lawyers deserve greater weight") (footnote omitted).

132. The term "client-centered" comes from psychology and counseling literature, especially the work of Carl Rogers. *See* CARL R. ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY (1995); CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY (1972); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) (employing a client-centered counseling approach to lawyering skills). Rogers's counseling approach initially was called "nondirective counseling." *See* HOWARD ROSENTHAL, ENCYCLOPEDIA OF COUNSELING 232 (rev. ed. 2002). The name was changed to "client-centered therapy" in 1951, and to the "person-centered approach" in 1974. *Id.*

133. *See* ROSENTHAL, *supra* note 132, at 183 (defining empathy as "the ability to understand the client's world and to communicate this to the client"); *id.* at 184 ("Many counselor educators consider empathy the most important factor in the counseling relationship.").

134. *See id.* at 223 ("[A]n effective counselor is authentic and genuine, not phony; gives positive regard through acceptance; and has accurate empathic understanding.").

135. *See* SHERI A. WALLACE & MICHAEL D. LEWIS, BECOMING A PROFESSIONAL COUNSELOR 54 (2d ed. 1998) ("[I]n practice person-centered counselors are nondirective.").

136. *See id.* at 50.

predominant view is that "lawyers, judges, and law professors need to develop the ability to empathize with others."[138] In far too many instances the lawyer furthers the client's selfish interests without inquiry or challenge, in a manner more closely resembling a salesperson asked to locate a shoe in a particular size.

If the practice of law truly involves mere "client service"—if lawyers are indeed "hired guns" who, for a price, will serve any and all clients without regard for the public good and, in fact, without regard for anything except the client's wishes—then perhaps lawyers have become technicians.[139] If lawyers are accountable only to their clients without serious regard for the general welfare of society, then law can no longer call itself a profession.[140] We cannot have it both ways: we cannot insist on the respect and independence accorded to professions when in practice we reject the general welfare of society as an impractical platitude, to which we nod and then disregard in favor of client interests, catering to client demands for the purpose of lining our own pockets.[141]

---

137. *See generally* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (contending that empathy can play an important role in legal decisionmaking).

138. Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 634 (2001); *see also* Rhode, *Pro Bono*, *supra* note 88, at 418 (noting that "a capacity for empathy" is one of the most significant personal characteristics linked to volunteer activity).

139. *See* Gordon, *Independence*, *supra* note 82, at 4–5 ("[There is] a disturbing trend among some corporate lawyers . . . to see themselves as value-neutral technicians. True, ethical dilemmas can be avoided if one's job is viewed as profit-maximizing or as uncritically representing—and not questioning or influencing—the corporate client's interests so long as they are not illegal.").

140. *See* GERBER, *supra* note 9, at 12. Gerber states that "[p]rofessionalism . . . presupposes a substantial degree of public commitment . . . . [But t]he true picture of the aspiring lawyer is not as high-minded as the bar would like. The aspiring lawyer's . . . career goals [often are] as narrow as a fat pocketbook." *Id.* Gerber concludes:

> Thus, the irony: the group claiming anxiously to be a profession becomes increasingly nonprofessional. The establishment dedicated to the rule of law becomes lawless, its skills to reveal others' deception unable to reveal its own, its pursuit of justice weakened by its own injustice. Like lax medieval monasteries, which they historically resemble, the bar and bench have fallen short of their calling to the point where one can question what they really do "profess." . . . What is most needed is a renaissance of moral soul to inspire pursuit of justice rather than victory or money.

Id. at 132.

141. *See id.* at 131 (noting that "[t]he same bar that claims to be a profession to a growing extent abdicates public service for the pursuit of money"); *see also id.* at xi (noting

The subjugation of justice and the public good for a client's selfish interests is not necessarily honorable as a general matter,[142] and certainly does not appear to promote the public interest. "The fact that clients have a legal right to pursue a certain objective does not mean that they have a moral right to do so or that justice necessarily will be served by zealously representing their interests."[143] Rather, blindly furthering a client's personal interests is highly suggestive of the "service" orientation that Freidson describes—an orientation antithetical to professionalism. Accordingly, this Part explores the emphasis within the Model Rules promoting the interests of clients and lawyers,[144] and the shortcomings of such an emphasis.

The Preamble to the Model Rules identifies three lawyer responsibilities: "[(1)] a representative of clients, [(2)] an officer of the legal system and [(3)] a public citizen having special responsibility for the quality of justice."[145] Despite the proclamation that three responsibilities exist, the Model Rules offer little to further the latter two. As explained previously, the Model Rules' mandate with respect to lawyers' responsibilities as officers of the legal system amounts to little more than an admonition not to lie to the court. With respect to the notion of a public responsibility, there is no mandate at all—the Model Rules suggest, but do not require, that lawyers provide voluntary pro bono services. Accordingly, although the Preamble sets out client representation as merely one of three overarching responsibilities, an examination of the rules themselves reveals the preeminent—indeed, nearly exclusive—nature of the focus on the client's selfish interests.

Many of the Model Rules are of an innocuous and straightforward nature. For example, rules requiring lawyers to provide "competent representation"[146] and to keep clients "reasonably informed"[147] are hard to

---

that due to "the relentless pull of economic self-interest, the temptation to manipulate the system of justice for personal gain is ever present").

142. *See* RHODE, *supra* note 10, at 15 ("[U]ndivided fidelity to client objectives is often difficult to square with commonly accepted ethical principles.").

143. *Id.* at 18.

144. *See* Gordon, *Public Calling*, *supra* note 4, at 278–79 (noting that the Model Rules "give primacy to the advocate's role and to reduce dissonance between pursuit of law-embodied norms and the client's immediate interests in favor of acquiescence to the client"); Mather, *supra* note 16, at 1067 ("When a lawyer takes a client-centered approach to representation, [one] is often castigated for acting as a 'hired gun' or 'mouthpiece.' Yet the ethical rules of conduct promulgated by the bar support this role.").

145. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2003).

146. *Id.* R. 1.1.

147. *Id.* R. 1.4(a)(3).

criticize. Problems arise, however, when the rules attempt to address areas where the client's interests are at odds with one of the other two primary lawyer responsibilities: the lawyer's duties as an officer of the court and the lawyer's public duty. In particular, despite a purported "public" responsibility, it has been noted that third parties are "entitled to very little from the lawyer."[148] As Professor Rhode has written:

> Under the bar's ethical codes and prevailing practices, the legal rights and personal autonomy of clients assume overriding importance; the rights and autonomy of third parties barely figure. As a practical matter, this difference in treatment makes perfect sense. Clients are, after all, the ones footing the bill for advocates' services. But from a moral perspective, such selective concern is impossible to justify.[149]

Moreover, many of the ethical rules actually promote the selfish interests of lawyers, such as requiring lawyers to refrain from charging an

---

148. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 26 (1987); *see also id.* at 30 ("A lawyer's relationship to his or her client carries only minimal obligations to others and is normally characterized by almost unambiguous fidelity."). One commentator has suggested that Model Rules 1.6, 3.1, 3.2, 3.3, 3.4, 3.5, 4.1, and 6.1 indicate a "commitment to the public good." Infanti, *supra* note 27, at 603–04. I expressly address Model Rules 1.6, 3.3, and 6.1 within this Article. *See infra* Part V.A–C. (discussing Model Rules 1.6, 3.3, and 6.1 respectively). Model Rule 3.2 reflects a client-centered focus by requiring "reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 3.2 (emphasis added). Model Rules 3.4 and 3.5 prohibit unlawful behavior. *Id.* R. 3.4 (prohibiting, among other things, "unlawful" behavior and falsifying evidence); *Id.* R. 3.5 (declining to authorize behavior "prohibited by law"). This leaves Model Rule 3.1, which prohibits the filing or defending of frivolous claims, and Model Rule 4.1, which prohibits lawyers from failing to disclose a material fact "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," to represent lawyers' commitment to altruism and the public good, and thereby to justify law's professional status. *Id.* R. 3.1, 4.1. As Professor Rhode has observed: "Although lawyers have certain obligations as officers of the court, these are quite limited and largely track the prohibitions on criminal and fraudulent conduct that govern all participants in the legal process." Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 668 (1994). Thus, we are left, I would posit, with no compelling altruistic provision within our Model Rules that would justify treating the law as a "profession."

149. RHODE, *supra* note 10, at 57.

"unreasonable fee,"[150] rather than affirmatively requiring lawyers to charge a reasonable fee.[151]

Perhaps the two most troubling areas in all of legal ethics involve the issues of confidentiality and client perjury, and perhaps not surprisingly, the current rules in these two areas reflect a focus on the client standing in direct conflict with the lawyer's duties to the court and the public. Accordingly, this Part will examine these two issues in turn.

A. Confidentiality

Confidentiality is governed by Model Rule 1.6. The current version of Rule 1.6 prevents disclosure of any information relating to the representation of the client unless the client either consents to the disclosure or the situation falls within one of six exceptions. Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;

---

150. MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

151. I have previously argued that the Model Rules' authorization of joint representation reflects lawyer self-interest. Debra Lyn Bassett, *Three's A Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 452 (2001) ("[J]oint representation reflects nothing so clearly as greed—whether economic greed, reputational greed, or mere self-centeredness. . . . Each proffered justification for joint representation is tainted by lawyers' self-interest.") (footnote omitted).

> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (6) to comply with other law or a court order.[152]

Even when a situation comes within one of the specified exceptions, the decision whether to disclose the confidential information is in the attorney's sole discretion—Rule 1.6 permits, but does not mandate, disclosure. The self-interested motivation apparent in subdivision (b)(5) authorizes an attorney to reveal confidential client information to protect the lawyer's financial interest in recovering her fee or her reputational interest in defending herself against a civil or criminal charge.[153] Yet if a third party faces "reasonably certain death," a lawyer does not violate the ethical rules if she declines to forewarn of the danger.

Rule 1.6 reserves sole discretion to the lawyer, leaving to the conscience of each lawyer the course of action to follow.[154] Extending omnipotence to the lawyer—literally including decisions of life and death—permits a lawyer to protect a client's interest at the expense of the life of another. Granted, the lawyer alternatively may elect to warn the potential victim. But the ability to

---

152. MODEL RULES OF PROF'L CONDUCT R. 1.6. Until 2003, Model Rule 1.6 contained no exception for financial interests or property damage. This omission, while championed by many as a "stronger" provision protecting client confidences, was rejected by nearly all states, which instead adopted modified versions of Model Rule 1.6, requiring disclosure under additional circumstances. Thus, the 2003 amendments to Rule 1.6 were an exercise in "catching up" to the states' rules, rather than playing a leadership role.

153. *See* Roger C. Cramton, *Proposed Legislation Concerning a Lawyer's Duty of Confidentiality*, 22 PEPP. L. REV. 1467, 1471 (1995) (noting that, at the time, "[e]very state except California [had] a confidentiality rule that permit[ted] the lawyer to disclose client information to the extent necessary to protect the lawyer's reputational, professional, and economic interests").

154. Some commentators, and many lawyers, have expressed opposition to any relaxation of the strict duty of confidentiality. *See, e.g.*, Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002) (arguing that lawyers' primary obligation is to "enhance . . . clients' autonomy as free citizens in a free society"); Nancy J. Moore, *"In the Interests of Justice": Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1783 (2002) (asserting that relaxing the duty of confidentiality would result in "thin obligation[s] of client loyalty").

sacrifice another to protect a client renders apparent the misguided nature of the rules' focus.[155]

B. Client Perjury

Client perjury comes within Model Rule 3.3, which addresses candor toward the tribunal generally, and provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material

---

155. *See* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63, 119 (1998) ("recogniz[ing] that a strong case can be made for mandating disclosure in some situations"). According to Professors Cramton and Knowles,

> [a] strong justification, such as a threat to one's own life or that of another, is necessary to overcome the moral duty to act in a way that does not severely risk the life of an innocent person. Does the adversary system constitute a sufficient justification, particularly in an extreme situation that posits a self-centered and immoral client?

Id. at 87. Professors Cramton and Knowles further note that

> [p]artisanship, often referred to as "zeal," is expressed in a lawyer's duty to advance a client's goals by committed and diligent effort. . . . At its extreme, total commitment to client extends to counseling functions as well as litigation, and involves treating those other than the client as strangers, if not enemies. The lawyer becomes a single-minded mercenary, a "hired gun."
>
> Moral non-accountability, sometimes referred to as "moral neutrality," reflects the proposition that a lawyer, acting within the role contemplated by the adversary process, is only doing what the lawyer is supposed to be doing in assisting a client to achieve a desired objective. If the client's goals, and the means chosen to advance them, are lawful, the neutrality proposition asserts that the lawyer should not be subject to moral criticism even though the goal or the means employed are viewed by others as immoral and would be so viewed by the lawyer himself in the lawyer's "off-duty" life.

Id. at 77; *see also* Rhode, *Pursuit of Justice*, *supra* note 103, at 1546 ("Clients' concerns are entitled to deference, but not to the exalted position that they now occupy in the profession's moral universe.").

> evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.[156]

At first blush, this provision may appear to promote the attorney's duty as an "officer of the court." After all, Model Rule 3.3 prohibits attorneys from "knowingly" offering evidence "that the lawyer knows to be false," thereby prohibiting attorneys from intentionally perpetrating a fraud upon the court.[157] However, some courts have construed the concept of "knowledge" very narrowly, to require a level of certainty rarely attainable absent the client's express confession.[158] This narrow construction places most situations in the discretionary category where a lawyer "*may* refuse to offer evidence . . . that the lawyer reasonably believes is false." Accordingly, similar to the previous discussion of confidentiality, Model Rule 3.3 leaves to the attorney's discretion the decision whether to offer evidence the lawyer believes is false.

Commentary concerning the ethical pitfalls of client perjury have tended to focus on the constitutional considerations inherent in the representation of a criminal defendant and related concerns relevant to the criminal defense

---

156. MODEL RULES OF PROF'L CONDUCT R. 3.3.

157. *See* Infanti, *supra* note 27, at 603–04 (asserting that Model Rule 3.3 demonstrates "[a] commitment to serving the public good" because it "imposes on lawyers a duty of candor toward the tribunal").

158. *See, e.g.*, Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989) (adopting "beyond a reasonable doubt" standard, and acknowledging that one way of satisfying the standard was through the client's confession); State v. McDowell, 669 N.W.2d 204, 223 (Wis. Ct. App. 2003) (requiring affirmative statement of intent from the client).

bar.[159] However, not only does Model Rule 3.3 specifically exempt "the testimony of a defendant in a criminal matter" from its application, but it applies without exception to civil proceedings, which do not raise the same constitutional concerns.

Model Rule 3.3 suffers the same basic deficit as Rule 1.6: it permits the lawyer to sacrifice her duty as an officer of the court in order to protect a client's self-interest, and therefore leaves to the lawyer's discretion the decision whether to respect a duty to the court or a duty to the public good. If the lawyer reasonably believes evidence to be false, she may nevertheless offer it without violating the ethical rules. "The difficulty with such an ethic, as its critics have often pointed out, is that it is a recipe for total sabotage of the legal framework. . . . The lawyer under such an ethical regime is by vocation someone who helps clients find ways around the law."[160]

So what's the problem? To a large degree, lawyers pride themselves on having a focus on the client, believing that such a focus exonerates them from any blame for their questionable behavior. It is a rare voice that disturbs this rationalization.[161] But disturb it we must. The purported focus on the client is often, in practice, a fig leaf covering lawyer self-interest.[162] With the

---

159. *See* Monroe H. Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIG. 26 (1975) (emphasizing duties of criminal defense lawyers); Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985) (discussing dilemmas in criminal cases); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case* Against *the Client Perjury Rules*, 47 VAND. L. REV. 339, 354 (1994) (focusing on client perjury in the context of criminal proceedings).

160. Gordon, *Independence*, *supra* note 82, at 20–21 (footnote omitted).

161. For one such voice, see Roger C. Cramton, *On Giving Meaning to "Professionalism,"* 1996 A.B.A. SEC OF EDUC. & ADMISSIONS TO THE BAR 20:

> [A] lawyer's primary loyalty is not to the lawyer's client. The lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the "procedures and institutions" of the law. . . . Moreover, the role of the lawyer within the legal system "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."

Id. (citation omitted); *see also id.* at 24 (urging the "regenerat[ion of] the ideal of the law as a public profession with large public responsibilities").

162. *See* FREEDMAN & SMITH, *supra* note 108, § 10.20, at 297 ("Those who support screening do so despite tradition and the obvious jeopardy to client confidences, because they want to increase lawyers' job mobility. The practice therefore mocks the claim that the law is a profession and not a business."); RHODE, *supra* note 10, at 15 ("In effect, an attorney's obligation is to defend, not judge, the client. Under this standard view, good ethics and good business are in happy coincidence."); Hamilton & Coan, *supra* note 68, at 89 (noting that

recent passage of the Sarbanes-Oxley Act, we have already experienced one incursion into our professional domain when the public decided that lawyers were not properly regulating themselves.[163] Similar incursions are likely to follow. Unless we are willing to bring a more public interest focus into the ethical rules, we risk losing any semblance of "professional" status.

C. Pro Bono Services

The one area of the Model Rules that does reflect a public interest focus is Model Rule 6.1, urging lawyers to provide pro bono publico legal services. Unfortunately, however, Model Rule 6.1 declines to set forth any obligation to provide pro bono services, and thus acts as mere window dressing.

Model Rule 6.1 currently provides that lawyers "should *aspire* to render at least (50) hours of pro bono publico legal services per year."[164] However,

---

"[t]he client choice rationale is . . . implicitly a policy of giving more weight to lawyers' financial interests and the concept of the profession as a business"); *id.* at 91 ("The policy of taking into account lawyer mobility [and thereby promoting the use of ethical walls] is in fact a policy which values a lawyer's self-interest in a market economy.").

163. *See supra* note 13 and accompanying text (discussing the passage of the Sarbanes-Oxley Act in response to corporate ethical scandals).

164. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003) (emphasis added). In its entirety, Model Rule 6.1 provides:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

most lawyers do not meet this aspirational goal. Indeed, most lawyers provide neither time nor money to legal services for the poor: the overall average "is less than half an hour a week and fifty cents a day."[165] Professor Cramton observed:

> The social arrangements by which legal services are delivered in the United States raise substantial concern about the fairness of their distribution. Publicly-funded civil legal assistance, the voluntary pro bono activities of lawyers, and the twin devices of the contingent fee and fee-shifting statutes each meet a portion of the legal needs of ordinary Americans. But for most Americans, most of the time, legal services are available only to those who are able and willing to pay relatively high professional charges. Low-income people are especially disadvantaged.[166]

As Professor Rhode has observed:

> Our profession has done disgracefully little to address the often prohibitive price of social justice. It is a shameful irony that the nation with the world's

---

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Id. As Professor Rhode has observed: "To underscore the purely aspirational nature of the rule, the ABA added the term 'voluntary' to its title and language to its commentary emphasizing that the 'responsibility set forth in this Rule is not intended to be enforced through [the] disciplinary process.'" Rhode, *Pro Bono*, *supra* note 88, at 427; *see* MODEL RULES PROF'L CONDUCT R. 6.1 cmt. 12 (stating that pro bono aspirational goals are not intended to be enforced through disciplinary action).

165. Rhode, *Pro Bono*, *supra* note 88, at 413; *see id.* ("[M]uch of what passes for 'pro bono' is not aid to the indigent or public interest causes, but either favors for friends, family, or clients, or cases where fees turn out to be uncollectible."); *id.* at 417 (noting that lawyers' "financial contributions to legal aid organizations are modest, particularly when considered in relation to their total income (under .1 percent)"); *see also* Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2415 (1999) [hereinafter Rhode, *Cultures of Commitment*] ("Recent estimates suggest that most attorneys do not perform significant pro bono work, and that only between ten and twenty percent of those who do are assisting low-income clients.").

166. Cramton, *Mandatory Pro Bono*, *supra* note 114, at 1118; *see id.* at 1116 ("Legal services are made available primarily on a fee-for-service basis in the United States. Those who want lawyers and are able to pay for them have little difficulty finding reasonably competent professional services.").

> highest concentration of lawyers meets less than one-fifth of the legal needs of the poor, and routinely leaves middle-income households without a remedy that they can afford. Law is least available to those who need it most. Equal access to justice is a ceremonial platitude over courthouse doors, not a policy priority of the organized bar.[167]

Perhaps even more offensive than the overwhelming need for pro bono legal services that remains unmet is the pretense resulting from the existence of a purported pro bono rule. The existence of Model Rule 6.1 suggests a commitment to the pro bono concept—a commitment that does not exist:

> The organized bar's inability to come to real terms with a practical pro bono requirement serves as a significant guilt catharsis. By merely urging in Model Rule 6.1 the advancement of the public good, attorneys announce their special status as public servants. Yet it is still not in any individual lawyer's interest that this public service ideal have any teeth in an obligatory code. The current code thus offers much admonition but no mandatory rule regarding pro bono. Nowhere is the disparity between rhetoric and reality more apparent than in the assertion of both the Model Rules and the Code that the basic responsibility for providing legal services for those unable to pay rests upon the individual lawyer.
>
> The rhetorical posturing about pro bono achievements is at best rank hypocrisy. Pro bono publico, if it exists at all, has become a tithe lawyers pay as a quid pro quo for special privileges (e.g., exclusion of competitors, economic reward, high social status). It exists not as a fact but as sugary fiction. It recalls Jacques Derrida's observations about the meaninglessness of professional jargon that placates the public by claiming to serve it—while, in fact, keeping them separate from each other.[168]

The rendering of pro bono services is law's most compelling and most efficient means of providing public service, and could justify the designation of law as a public profession. However, the "aspirational" nature of the provision of pro bono services, and the unfortunate reality that very few

---

167. Rhode, *Pursuit of Justice*, *supra* note 103, at 1549; *see also* Rhode, *Cultures of Commitment*, *supra* note 165, at 2415 (noting that "most practitioners make no significant pro bono contributions," and that "[t]he average for the profession as a whole is less than a half an hour per week").

168. GERBER, *supra* note 9, at 22–23.

attorneys fulfill this goal, precludes a "public profession" designation under the current circumstances.

VI. CHANGING THE MODEL RULES TO REFLECT A PUBLIC PROFESSION CONSTRUCT

At present, there is little motivation for practicing lawyers to increase their focus on the public interest and the public good. Rather, there is every motivation to act in a self-interested manner that will increase one's earnings.[169] With heavy billable hour requirements[170] and no incentive to provide pro bono services—because pro bono work is not required and typically does not "count" toward annual billable hour requirements[171]—we cannot claim surprise at low levels of pro bono activity. With a focus on "winning" cases and concomitant requests for lawyers' "win-loss" records, we cannot claim surprise that "justice" has ceased to be our focus. Moreover, the current popularity of economics-based models, suggesting that wealth maximization is the primary motivator behind human behavior,[172] lends an air of legitimacy to this selfish behavior. In such a climate, lawyers' selfish monetary interests will necessarily prevail over the public interest.[173]

---

169. *See* RHODE, *supra* note 10, at 14 ("[L]awyers have become habituated to extraordinary incomes. In the process, luxuries have become necessities, wealth has become critical to self-esteem, and relative salaries have become a way of keeping score.") (internal quotation marks omitted).

170. *See id.* at 10 ("Billable hour requirements have increased dramatically over the last two decades . . . . Almost half of private practitioners now bill at least nineteen hundred hours per year . . . .").

171. *See id.* at 37 (noting that attorneys in private practice "often would like to pursue [pro bono] work but are deterred by policies that fail to count pro bono activity toward billable hour requirements or to value it in promotion and compensation decisions").

172. *See* Sean J. Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U. PITT. L. REV. 347, 349 (2002) (noting "the fundamental insight of economic analysis: that individuals act in their self-interest to maximize their individual welfare").

173. *See id.* at 350 (arguing that "the structure of the ethical rules reflects the collective self-interest of the bar"); *see also* Pearce, *Governing Class*, *supra* note 113, at 420:

> Lawyers, like others in society, have come to doubt that they or anyone else can rise above self-interest. They understand their responsibilities in terms of individual and not communal obligation. The hired gun conception of the lawyer's role is far more compatible with these perspectives than the governing class ideal of disinterested commitment to the common good.

Id.

No number of well-intentioned bar columns and law review articles will alter the current course of self-interested behavior. Motivation to benefit the public good must be created. The approach most likely to succeed in increasing lawyers' devotion to the public interest involves revisions to the Model Rules.

Revising the Model Rules of Professional Conduct to conform with a "public profession" approach to the practice of law would serve a number of important purposes. Perhaps most importantly, under the current Model Rules, any contribution to the public good is left to the discretion of each lawyer's conscience. When conscience clashes with the client's wishes or the lawyer's self-interest, the public good is abandoned.[174] A "public profession" approach, however, would shift some emphasis to the public good.[175]

This Article does not call for the abolition of the adversary system, nor for lawyers to sit as arbiters of right and wrong. Rather, this proposal asks only that we look up from counting our gold coins. Changes to the Model Rules' focus would enhance our standing with the public, further the public interest, and reestablish our status as professionals. Toward that end, this Article specifically examines, as a first step, changes to three of the most troublesome areas: Model Rules 1.6, 3.3, and 6.1.

A. Model Rule 1.6

To Model Rule 1.6, this Article proposes modifications to subsection (b) and the creation of a new subsection (c) such that the revelation of confidential information would become mandatory to prevent, mitigate, or

---

174. Professor Pearce has observed that the precursor to the Model Rules and the Model Code—the 1908 canons—were heavily influenced by George Sharswood's treatise. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992) (citing George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 1 (5th ed. 1907)). In light of these origins, Professor Pearce persuasively has argued that Sharswood's ethical standards intended that "when republican duties conflicted with adversary duties to the client, the adversary duties must yield." Pearce, *supra*, at 282. Whatever the intentions of Sharswood or the 1908 canons, the practical application of today's ethical rules emphasizes client interests rather than the public good. *See* Rhode, *Pursuit of Justice*, *supra* note 103, at 1546 ("Clients' concerns are entitled to deference, but not to the exalted position that they now occupy in the profession's moral universe.").

175. As sociologist Talcott Parsons has noted, the lawyer is to function "as a kind of buffer between the illegitimate desires of his client and the social interest." PARSONS, *supra* note 39, at 384.

rectify harm to third parties. As amended, Model Rule 1.6(b) and (c) would provide:

> (b) A lawyer must reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; or
>
> (4) to comply with other law or a court order.
>
> (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to secure legal advice about the lawyer's compliance with these Rules; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Mandatory disclosure to prevent, mitigate, or rectify harm to third parties eliminates one of the most troubling aspects of the confidentiality rule.[176] Anyone who has taught Professional Responsibility is familiar with students' horrified expressions during class discussions of *Spaulding v. Zimmerman*[177] or hypotheticals in which an attorney believes her client intends to harm a third party but nevertheless declines to act.

---

176. *See* Cramton & Knowles, *supra* note 155, at 111 (noting the "moral dilemma of conflicting obligations to client and third person").

177. 116 N.W.2d 704 (Minn. 1962). *Spaulding* involved defense counsel's discovery of, but failure to disclose, plaintiff's life-threatening aortic aneurysm, likely caused by the accident which was the basis of the plaintiff's lawsuit. *Id.*

B. Model Rule 3.3

To Model Rule 3.3, this Article proposes substituting "when a firm factual basis supports the lawyer's belief that such evidence is false" for "knows" in subsection (a)(3), thereby eliminating the current linguistic game-playing with respect to "knowledge."[178] As amended, proposed Model Rule 3.3(a) would provide:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence, other than the testimony of a defendant in a criminal matter, when a firm factual basis supports the lawyer's belief that such evidence is false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

This modification expressly provides criminal defendants with their constitutionally protected rights. Prosecutors are still required to prove each element of the alleged offense beyond a reasonable doubt; criminal defendants are still entitled to counsel; and criminal defendants are still permitted to testify in their own defense. However, these constitutional rights do not exist in civil lawsuits, and there is no reason to authorize lawyers' participation in questionable tactics in civil litigation. A mere "suspicion" remains insufficient to invoke Model Rule 3.3, but under this proposal lawyers would no longer be able to hide behind a "knowledge" requirement.[179]

---

178. *See* Robert Pack, *Dilemmas in Attorney-Client Confidentiality*, WASH. LAW., Jan. 2004, at 28 (quoting an attorney as saying, "I don't know that something is fraud until a judge at the end of the case tells me it's fraud").

179. *See* Commonwealth v. Mitchell, 781 N.E.2d 1237, 1247 (Mass. 2003) (observing that "[a firm factual basis] requires more than mere suspicion or conjecture on the part of counsel, more than a belief and more information than inconsistencies in statements by the defendant or in the evidence").

C. Model Rule 6.1

As to Model Rule 6.1, this Article proposes revisions changing the provision of pro bono services from an aspirational goal to a mandatory requirement. The proposal would substitute "shall" for "should aspire," and "shall" for "should" in the first paragraph; substitute "20" for the two references to "50," and rewrite the last sentence. As amended, Model Rule 6.1 would provide:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer shall render at least (20) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer shall:
>
> (a) provide a substantial majority of the (20) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:
>
> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
>
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
>
> (3) participation in activities for improving the law, the legal system or the legal profession.
>
> Alternatively, a lawyer may elect to contribute financial support to organizations that provide legal services to persons of limited means, in an amount equivalent to the value of 20 hours of the lawyer's time.

The lack of affordable legal services for the poor is well documented. The unmet need has not prompted the vast majority of attorneys to act, nor has the existence of a discretionary rule. Accordingly, it appears that most

lawyers will volunteer their services only if compelled to do so. One of the common arguments proffered against mandatory pro bono is the notion that compulsory service may lead to resentment and substandard performance, and suggests involuntary servitude.[180] Reducing the required time commitment to twenty hours, and expressly authorizing monetary contributions in lieu of personally providing services, lessens the persuasiveness of these objections. Twenty hours is a mere one-third of a single week's working hours for many attorneys—one percent of an attorney's time if she has a 1900-hour annual billable requirement. Twenty hours also represents one uncomplicated client matter. To the extent that an attorney elects to make a charitable monetary contribution instead, the contribution may be viewed as a form of professional dues, and, of course, such contributions remain tax-deductible.[181] Mandatory pro bono serves the public interest, addresses an unmet need, and potentially enhances both job

---

180. *See* Loder, *supra* note 118, at 464–65. Professor Loder notes that

> [o]pponents [of mandatory pro bono] have elevated [their arguments] to constitutional dimensions. They argue that the Fifth Amendment prohibits enforced and uncompensated service as a taking. Other constitutional arguments rely upon First Amendment prohibitions against forced political speech and association that mandated representation demands, Fourteenth Amendment equal protections against singling out lawyers for burdensome treatment, and Thirteenth Amendment proscriptions against involuntary servitude.

Id.; *see also id.* at 465 ("[O]bjectors lament that a mandate will cheapen the experience of serving and stifle lawyers' altruistic inclinations to serve."). Professor Rhode states that

> [a]s to the large numbers of lawyers who do not voluntarily contribute pro bono assistance but claim that required service would lack moral significance, law professor David Luban has it right. "One hesitates to state the obvious, but here it is: You can't appeal to the moral significance of a gift you have no intention of giving."

Rhode, *Pro Bono*, *supra* note 88, at 433. Courts have regularly rejected takings and involuntary servitude challenges to states' mandatory pro bono provisions. *See infra* note 181 (referring to source citing cases).

181. *See* Rhode, *Pro Bono*, *supra* note 88, at 428:

> A well-settled line of precedent holds that Thirteenth Amendment prohibitions extend only to physical restraint or confinement. Because the sanctions for refusal of pro bono work have not included incarceration, courts generally have rejected involuntary servitude challenges. Most judges also have dismissed objections based on takings grounds on the theory that governments need not "pay for the performance of a public duty if it is already owed," and that pro bono service is such a duty.

Id.; *see also id.* at 428 n.30 (citing cases rejecting takings and involuntary servitude arguments against mandatory pro bono legal services).

satisfaction and attorney empathy.[182] "Pro bono service reflects all that is best in the legal profession."[183] Thus, the benefit of mandatory pro bono is not just to the poor, but to lawyers as well, both individually and collectively.

The contrast between the large number of poor individuals in need of legal counsel and the tiny number of lawyers willing to offer pro bono legal services is an embarrassment. In our current state, practicing lawyers have no claim to calling themselves a "public" profession. To reclaim our status as a public profession requires redefinition. In particular, redefining ourselves as a public profession requires the institution of a mandatory pro bono requirement.[184]

VII. CONCLUSION

A "public profession" resembles stewardship in the sense that the legal profession has a responsibility to serve the greater public good, rather than merely a lawyer's personal or business interests.[185] Stewardship connotes the careful and responsible handling of something entrusted to one's care.[186] As currently written, however, the Model Rules of Professional Conduct adopt, at best, an approach to lawyering focused on the client's selfish interests, even when those client interests conflict with the responsibilities of a lawyer to the court and to the public. This focus is particularly evident in the Model Rules' approach to confidentiality and client perjury. At worst, the Model Rules actively promote lawyer self-interest. Largely abandoned is the notion of the public good. This misguided focus is contributing, in a direct manner, to the devolvement of law from a profession to a mere business. As

182. *See* Loder, *supra* note 118, at 495 (noting that "altruism can be taught" and suggesting the possibility of "guiding lawyers toward a more altruistic character through [pro bono] service experiences").

183. Rhode, *Pro Bono*, *supra* note 88, at 464.

184. *See* GERBER, *supra* note 9, at 23 ("The most workable solution for pro bono is the rewriting of Model Rule 6.1 to make pro bono work obligatory, coupled with implementation by rule of mandatory stages of pro bono work. The obligation needs to become a prerequisite to licensing.").

185. *See supra* note 92 and accompanying text (defining altruism).

186. *See* Paul A. LeBel, *The Stewardship of Lawyering: Lessons from a Visit to Wendell Berry's Port William*, 34 LOY. U. CHI. L.J. 815, 815 (2003) (describing stewardship as "a notion of responsibility for the exercise of one's talents for the benefit of something in addition to self-interest"); *see also* Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2159 (1993) (calling for "a new emphasis on the lawyer's duty of service to and stewardship for the law").

sociologists have long recognized, an occupation maintains the status of a "profession" at the pleasure of society, and that status requires an altruistic component. However, the altruistic component for law—the pursuit of justice—is clearly outweighed by our commitment to an adversarial system. The widespread public perception that lawyers obstruct, rather than further, justice undermines law's ability to consider itself a profession, much less a "public" profession. Unless law honors its original status as a "public" profession it is likely to suffer additional intrusions into, and erosions of, its status as a profession, such as the recent Sarbanes-Oxley Act, which legislatively rewrote some of law's ethical obligations due to the public's perception that lawyers were not appropriately regulating themselves. Accordingly, this Article calls for a recommitment to, and a redefinition of, ourselves as a public profession. In particular, redefining ourselves as a public profession requires revisions to the Model Rules to shift the Rules' focus from the client to the public, including rendering the provision of pro bono services mandatory.