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A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials

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A GOLDEN AGE OF CIVIC INVOLVEMENT: THE CLIENT CENTERED DISADVANTAGE FOR LAWYERS ACTING AS PUBLIC OFFICIALS

JAMES E. MOLITERNO*

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INTRODUCTION

We have been told for centuries that lawyers are better than others at being public officials, lawmakers in particular. And without doubt, lawyers possess some attributes that suit them to this work. But I will suggest in this Article that lawyers have one significant flaw for doing public official work: they are accustomed to representing clients' interests against the interests of all others, including the public interest. This Article addresses only one aspect of the lawyer's tradition of doing public service and proposes a recalibration of the value of lawyers serving as public officials.

This Article is exclusively about one popular form of the citizen lawyer: the lawyer in public life, government office, or leadership in a profession's organizations.¹ I am not discussing here other forms of the citizen lawyer: the lawyer who does pro bono work;² the lawyer who works for organizations that challenge injustice;³ the lawyer generally, simply working in the dispute resolution or economic system who is doing a public good by that ordinary lawyer work is not my subject. Nor is my subject the lawyer who represents the government as a lawyer—such as a prosecutor, a Department of Justice lawyer, or a White House counsel. These lawyers are meant to be lawyers, representing a particular kind of client, the government.⁴ My subject is the lawyer who is a lawmaker, administrator

1. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (describing the decline of the lawyer-statesman and a morale crisis for the legal profession in America).

2. See Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323, 1324 (2009) (discussing "the bar's responsibilities not only to engage in pro bono work, but also to support a system that makes legal services widely available to those who need them most").

3. See Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1169 (2009) (defining the citizen lawyer as one "who acts in a significant part of his or her professional life with some plausible vision of the public good, the general welfare in mind").

4. Although the government lawyer's role is adjusted from the private lawyer's role, giving more consideration to the public interest. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); James E. Moliterno, *The Federal Government Lawyer's Duty To Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633 (2005). Compare *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (holding that a federal Whitewater investigation subpoena was effective to acquire materials from White House counsel because

or improver: a legislator; an administrative agency official enforcing law;⁵ a lawyer working on changes in the law through work with the ALI, the ABA, or a state bar committee.

Part I of this Article recounts, and does not substantially disagree with, the rationales traditionally given for lawyers having a comparative advantage in the skills and temperaments that make a good public official or lawmaker.

Part II compares the role of the lawyer with the role of public official, and points out one crucial comparative disadvantage for lawyers as public officials: lawyers are accustomed to representing client interests to the virtual exclusion of the interests of others or the public interest.

Part III uses the example of the turn of the twentieth century organized bar's pursuit of advertising sanctions against plaintiff's lawyers, its effort to raise educational standards for admission to keep immigrants out of the profession, and other acts of civic involvement, all of which were aimed in part at increasing the wealth and protecting the interests of the clients and former clients of the citizen lawyers. Much of this activity was undertaken by members of the bar who were also public officials in one sense or another. At a minimum, the makers of these rules were making the law governing lawyers and the attendant public policy choices. Some aspects of this civic involvement by lawyers may be nothing more than one might expect: lawyers doing lawyers' work in the interests of their clients, but unfortunately doing that work in part while engaged as a public servant or lawmaker. I will suggest that lawyers serving as public officials, especially making laws, may too often continue to act as lawyers act; they serve the interests of their clients while they are acting as public servants.⁶

of the limited attorney-client privilege), *with Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998) (holding that a federal Whitewater investigation subpoena was ineffective at obtaining private counsel's notes even though the client, a Deputy White House Counsel, was deceased).

5. Cf. Edward Rubin, *The Citizen Lawyer and the Administrative State*, 50 WM. & MARY L. REV. 1335, 1378 (2009) ("We do ourselves and our students a disservice if we fail to take [the administrative state] seriously and fail to redefine our notions of ethical behavior in response to it.").

6. While acting as a public official, of course, the citizen lawyer has no ordinary clients. But they do have former clients, often the current clients of the citizen lawyer's former law partners, and often the same law partners and clients to whom the citizen lawyer will return

I am not suggesting any evil motive or flaw of the heart. I simply mean that by training and experience, lawyers tend to favor client interests, with less than normal regard for the interests of others and the public. In this respect, the person we usually regard as a good and able lawyer is not a particularly good citizen. A citizen would put the interest of the public first, and personal interests second.⁷ As a lawyer, client interests properly come first and are only overcome by the gravest of threats to the public interests or the interests of others.⁸ This is as it is and should be. A client-favoring posture is in large measure the definition of the lawyer's role. Certainly we do not expect lawyers to do a simple balance between the interests of their clients and the interests of others, and serve whichever interest is the weightier or more meritorious or more worthy. But it is not the role of the public official to serve an interest over that of the general public. Public officials are meant to be specifically empowered, good citizens. When lawyer-public officials act like lawyers, they are not properly performing the public official role. This "lawyer behavior" by public officials may make them less valuable than others when filling the roles of public life. Lawyers lead a client-centered life.

Why should I worry about this? Do lawyers who are in public service tend to favor the interests of their clients, former clients, and so on? Surely not always. But if there is some tendency toward that defect, then it is an aspect of the lawyer that is ill-suited to public service. And being aware of that tendency and its pernicious effects may aid in identifying and eliminating the phenomenon when it occurs. On balance we may in the end conclude that the advantages of lawyers in public life outweigh this disadvantage and that lawyers are well-suited to be public officials. But knowing of

upon completion of the public official duties.

7. For a most exaggerated example of what a good citizen would do, see JEAN-JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* 40 (Allan Bloom trans., Basic Books 1979) (1762). Rousseau relates the story of a Spartan mother who asked an arriving Helot for news. When he told her that her five sons were killed in the battle, she retorted, "Base slave, did I ask you that?" He replied, "We won the victory." The woman then dashed to the temple to give thanks to the gods. *Id.*

8. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2008) (describing the limited circumstances when a lawyer can breach her duty of confidentiality).

this disadvantage is worth something in any event. It should be guarded against with regulation of lawyers who are public officials.

In the end, I am simply saying that it may be harder for lawyers than nonlawyers to be good citizens. And a public official is first a citizen, one with special power. To be a good citizen, and a good public official, lawyers have a special burden: they must shed their training, experience, and inclination to represent the interests of a client despite the contrary interests of the public.

I. WHY WE SAY THAT LAWYERS ARE AT A COMPARATIVE ADVANTAGE FOR BEING PUBLIC OFFICIALS

Some attributes of lawyers make them especially well-suited to serve as public officials. The lawyer is trained to see and analyze a problem from every angle and to consider every aspect, argument, and view. Lawyers know how the law works and how government works, and as such may be especially able in government office and lawmaking roles.⁹ Many lawyers possess special forensic skills and can present positions clearly and effectively. Lawyers tend to appreciate the need and value of process. For all these reasons, one quite reasonably might suggest that lawyers have a special capacity for public life and leadership.

The government and democracy is favourable to the political power of lawyers; for when the wealthy, the noble and the prince are excluded from the government, the lawyers take possession of it in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people who can be the object of popular choice.¹⁰

Lawyers often and with good reason have been thought to be particularly suited for public life, and, in fact, lawyers make up a substantial portion of those in government offices and other public

9. See Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1164 (2009) (discussing how lawyers are well-versed in the "structural variable"—the way social, legal, and nonlegal institutions interact).

10. David Podmore, *Lawyers and Politics*, 4 BRIT. J.L. & SOC'Y 155, 163 (1977) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, PART I, at 1285 (Oxford Univ. Press 1947) (1835)).

positions. Commentators and scholars have long and richly celebrated the citizen or statesman lawyer ideal and noted how legal training and practice can prepare individuals for public life.¹¹

An important argument for why lawyers are considered better at public life than the ordinary individual is that there exist many transferable skills between law and politics.¹² Whereas some scholars have noted that in certain circumstances, legal education fails political and public life, nonetheless, "many of the qualities and skills which lawyers acquire during their professional training and polish in their daily practice are the same qualities and skills which are essential for success in community and political activities."¹³ Lawyers, unlike most other individuals, are trained to understand the government and how the law works. As a North Carolina judge explained in a speech given to a North Carolina bar association in 1925, "The lawyer who has studied government and the laws and constitutional principles ... to the practical operations of government has gained an equipment which fits him, beyond most of his fellow citizens, for public service."¹⁴ Or as Elihu Root more famously explained, "The study and exposition of existing laws, of course, tends to qualify men to be makers of law, and to a less degree to administer the law."¹⁵ Lawyers' specialized training in understanding how laws are applied gives them a knowledge base that can be put to great use in public life.

Root, in his turn of the twentieth-century generation, was the quintessential citizen lawyer. He had created a successful law

11. See KRONMAN, *supra* note 1, at 109; Robert E. Scott, *The Lawyer as Public Citizen*, 31 U. TOL. L. REV. 733, 733-34 (2000) (calling for a return of the Jeffersonian lawyer as a public citizen ideal); Timothy J. Sullivan, *The Legal Profession and Its Future: Recapturing the Ideal of the Statesman-Lawyer*, 32 U. RICH. L. REV. 477, 479-81 (1998) (arguing that there is a need to move back toward the education of statesman-lawyers, noting that "[i]n singular ways, lawyers are guarantors of the success of the American experiment").

12. See Podmore, *supra* note 10, at 168-71 (summarizing the transferable skills between law and politics). *But see generally* Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239 (2009) (arguing that nonlawyers sometimes operate as "citizen lawyers" on certain legal issues, like constitutional interpretation); Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379 (2009) (same).

13. Podmore, *supra* note 10, at 171.

14. Frank A. Daniels, *The Lawyer as a Citizen—His Duty to the Public*, 3 N.C. L. REV. 156, 158 (1925).

15. Elihu Root, *Some Duties of American Lawyers to American Law*, Commencement Address Before the Yale Law School (June 27, 1904), in 14 YALE L.J. 63, 64 (1904).

practice representing banks, railroads, and financiers.¹⁶ He undertook government appointments to be Secretary of War, Secretary of State, and became a U.S. Senator.¹⁷ He won the Nobel Prize in 1912, and moved back and forth between returning to his practice, government, and leadership roles in the ABA.¹⁸ He spoke with great eloquence about the lawyer's duty and talent for engaging in public life.¹⁹

Another set of skills that legal education and practice provides is the ability to speak, write, and debate well. In order to be a successful lawyer, students must learn to speak and write persuasively. In the nineteenth century for example, scholars noted that one of the most valuable attainments for a lawyer was eloquence,²⁰ a skill that easily benefits public life.²¹ These skills "are of vital importance to the politician—in speaking, in writing and arguing, in organising. By virtue of his training and daily activities the lawyer becomes master of both the spoken and written word ..."²² Further, "self-confidence, debating skills, persuasive abilities and articulateness which lawyers typically develop through the practice of their profession, is also a formidable asset to a political career."²³ While Arthur Wood and Walter Wardwell argued in the 1950s that the reasons lawyers often find themselves participating in public affairs has more to do with self-interested factors outside of their law school training, such as self-selection and the need for lawyers to meet people to develop their practice, they still noted that lawyers "receive rigorous training in the logic of reasoning and develop a facility with language. And, of course, they acquire a specific knowledge of the law which fits them for certain public

16. NOBEL FOUNDATION, NOBEL LECTURES IN PEACE: 1901-1925, at 263 (Frederick W. Haberman ed., 1972).

17. *Id.* at 263-64.

18. *Id.*

19. See Root, *supra* note 15, at 63-64.

20. See Philip Gaines, *The "True Lawyer" in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 AM. J. LEGAL HIST. 132, 150-51 (2001) (reviewing nineteenth-century writing on the legal profession and the importance of eloquence for advocacy lawyers).

21. Eloquence was an even more valuable tool in the nineteenth century, before the dawn of the office lawyer as the elite lawyer model.

22. See Podmore, *supra* note 10, at 168 (footnote omitted).

23. *Id.*

offices and other positions of authority."²⁴ This facility for language that lawyers learn through their education and practice is an important skill that benefits any public career.

Another important skill that lawyers learn is the ability to think quickly on their feet—a skill that is necessary for any public leader who must often make important decisions or answer questions at a moment's notice. As Elihu Root noted, "The capacity to get the sense of a document in the shortest possible time, and the faculty of rapid decision—both of which are so necessary in court—are useful in an administrative office."²⁵

Also, lawyers, through their interaction with clients and life, are trained to have strong interpersonal skills. The best lawyers are able to understand how other people think in order to effectively interact with them and be persuasive. The typical nineteenth-century lawyer "is brought in contact, in his daily work, with all classes and conditions of society, he knows the existing laws, their excellencies and defects, hence, other things being equal, he is certainly best qualified to act wisely as the legislator."²⁶ At its best, modern legal education explicitly teaches lawyers to be versatile, understand, and interact with different types of people. The ability "to understand and get along with [people]" that lawyers are encouraged to have is indispensable in public life.²⁷

Many positions in public life also demand the ability to move between different subjects and concerns all the time, a skill that many lawyers acquire.²⁸ Perhaps the best argument made in this strain was by Elihu Root in 1904:

The lawyer thus naturally tends to avoid the running into a rut of narrow experience and activity, which makes so many men who are able in their own particular business worthless for anything else.

24. Arthur L. Wood & Walter I. Wardwell, *The Lawyer and Community Leadership*, 9 J. LEGAL EDUC. 162, 173 (1956).

25. Root, *supra* note 15, at 64.

26. S.D. Wright, *The Citizen as Lawyer*, 5 W. JURIST 337, 338 (1871); *see also* Gaines, *supra* note 20, at 150 (noting how good lawyers understand people, what makes them "tick," and use this knowledge to be persuasive).

27. Podmore, *supra* note 10, at 168.

28. An argument could be made that the increasing specialization of the legal profession makes this less true now than it was before.

....
More important is the adaptation for public office which results from the variety of a lawyer's experience and training of But I think the chief reason why so many lawyers tend naturally to public office is that every public office is quite different from any private business, and it is much easier and more natural for the lawyer, with his varied experience and his habit of transplanting himself frequently from one set of interests and ideas to another, to meet the different requirements of public office, than it is for any other member of the community.²⁹

Lawyers' ability to adapt suits them well for public life, which often requires the ability to grasp and solve different types of problems.

Another argument that has been made historically for why lawyers are particularly suited for public life is that they are trained to be impartial and act unselfishly. The Framers of the Constitution viewed lawyers as the "virtuous political elite," who were somehow less selfish and "therefore better equipped for political leadership and disinterested decision-making than merchants and businessmen."³⁰ The same argument was made at the turn of the twentieth century, with Root noting that "[n]o one is so well fitted as the lawyer to ascertain the true limits of official authority, and no one can do so much as he, to form public opinion regarding this class of questions, upon the lines not of partisan political advantage, but of independent and impartial judgment."³¹ All but the last point is clearly true: lawyers' fare is the prediction of the limits of official authority. But lawyers are trained to use this knowledge as a partisan in the interests of a client, even though advising the client in objective terms is part of that service. Legal educators tend to preach to students about serving the public's interest over those of clients and personal interests but then send them into a legal environment at odds with their preaching. Even Patrick Henry and Thomas Jefferson joined many other prominent citizen lawyers in placing advertisements advising prospective clients that they

29. Root, *supra* note 15, at 64-65.

30. 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, 386 (2001) (quoting GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 253 (1991)).

31. Root, *supra* note 15, at 75.

would not undertake to represent them unless their fee was paid up front.³²

Many lawyers and legal scholars have also pointed out that lawyers, for various reasons, have a duty to become involved in public life.³³ Throughout its history, the American legal profession has been celebrated for its exalted position that is believed to instill upon its practitioners certain public duties.³⁴ Many scholars have criticized the legal profession for failing to live up to this ideal.³⁵ And some have noted that the failure to live up to this ideal has created a serious void in our society.³⁶

The unique training that lawyers receive through their legal education and their legal practice instill within them certain skills that specifically benefit public life. They learn to understand and apply the law, sharpen their facility for language, learn how to understand and interact with diverse groups of people, and sharpen their ability to adapt and act in different types of circumstances.

32. 1 ANTON-HERMONN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 41 n.109 (1965); see also Erwin C. Surrency, *The Lawyer and the Revolution* (1964), reprinted in *READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION* 74 (Dennis R. Nolan ed., 1980).

33. See Mary Ann Dantuono, *A Citizen Lawyer's Moral, Religious, and Professional Responsibility for the Administration of Justice for the Poor*, 66 *FORDHAM L. REV.* 1383, 1390 (1998) (arguing that the practice of law requires further involvement in the development of law itself and law students should be taught ways to fulfill their public responsibilities); Root, *supra* note 15, at 65 ("And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come.").

34. See, e.g., Gaines, *supra* note 20, at 135-42; Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 *WM. & MARY L. REV.* 1105 (2009) (discussing how citizen lawyers are obligated to protect the integrity of the judiciary).

35. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 38 (2000) (noting that the failure of the legal profession to promote more public service activity is a loss to both the profession and the public); see also KRONMAN, *supra* note 1, at 166-67 (blaming the law and economics movement for undermining the ideal of the statesman-lawyer).

36. See KRONMAN, *supra* note 1, at 363 (arguing that social science programs cannot fill the void left by the demise of the lawyer-statesman ideal because they are too "narrowly intellectual" while the "lawyer-statesman ideal is an ideal of character"); see also Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 *WM. & MARY L. REV.* 1207 (2009) (discussing the conception of citizen lawyer *qua* "civics teacher").

All of these skills profit public life and likely explain why so many lawyers find themselves in public positions.

II. THE LAWYER'S ROLE AND THE PUBLIC OFFICIAL'S ROLE

Skills and talents aside, the lawyer's role is a poor fit with that of the public official. Lawyers' work and training are client-centered. Client goals are paramount with only modest constraints imposed by the countervailing interests of others or the public generally. Not so for the public official, who as a specially empowered good citizen, places the public interest first.

A. The Lawyer's Role

Within only very loose constraints, lawyers seek the private good of their clients and disregard the interests of the public. That is our role. If our client wants something lawful that harms another, even that does injustice to another, we seek our client's goal. If our client wants something lawful that harms the public good, we seek our client's goal. The lawyer is not generally a broad, public-good seeker. Only in gross instances of harm to the public good is the lawyer permitted under ethical norms to betray her client's interests (revealing information to prevent very serious future harm, for example).³⁷ Our ethical norms and the lawyer's accepted role exalt advancing client goals to the detriment of others.

This is no criticism of lawyers. This is what lawyers do. It is what lawyers have done for centuries. It is what makes lawyers lawyers, and what makes lawyers useful. We advance our clients' good over that of others, even when the result might be unjust, and we advance our client's good over the public good except in rare and extreme instances.

What is the role of a lawyer then?

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only

37. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2008).

duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.³⁸

Lord Brougham's classic rendition of the lawyer's role is surely overstated and subject to exception and criticism. It has more often been criticized than praised by academic writers.³⁹ But nonetheless, even discounted for its exaggeration, it makes clear that lawyers are primarily interested in advancing their clients' lawful aims and all other interests are a distant second. More modernly, we have rules that permit a lawyer to withdraw when the client's course is highly repugnant.⁴⁰

A more tailored than Brougham's, but nonetheless strong statement of the lawyer's client-centered duty, was given by former ABA President, Justice Lewis Powell.⁴¹ Writing in the case that at long last struck down citizenship requirements as a lawyer qualification, he said:

Lawyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country. In such representation, the duty of the lawyer, subject to his role as an "officer of the court," is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious

38. 2 THE TRIAL OF QUEEN CAROLINE 18 (J. Nightingale ed., 1821) (quoting Lord Brougham); Fred C. Zacharias & Bruce A. Green, "Anything Rather Than a Deliberate and Well-Considered Opinion"—Henry Lord Brougham, Written by Himself, 19 GEO. J. LEGAL ETHICS 1221 (2006).

39. See, e.g., Joseph A. Colquitt, *Evidence and Ethics: Litigating in the Shadows of the Rules*, 76 FORDHAM L. REV. 1641, 1667 (2007); Scott A. Fredricks, *The Irresponsible Lawyers: Why We Have an Amoral Profession*, 11 TEX. REV. L. & POL. 133, 151 (2006); Duncan Webb, *Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel*, 5 N.Z. J. PUB. & INT'L L. 243, 249 (2007).

40. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008). This rule does not require withdrawal, and the rationale for this rule is as much to ensure the client will get a lawyer who can advance his interests with zeal rather than one who is conflicted about the representation.

41. *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973).

sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.⁴²

Despite talk of public service obligations, the organized bar has never embraced an ethic of more-than-optional public service for lawyers.⁴³ Neither has it embraced justice as a lawyer's primary goal, despite William Simon's persuasive argument to the contrary.⁴⁴ The legal profession was embarrassed by Monroe Freedman's candor when he asserted that the criminal defense lawyer's duty was to argue even false inferences for his client.⁴⁵ But Freedman and Simon both described what they saw: a profession whose members were animated by the adversary excuse and their role as partisans.

Perhaps no more lasting description of the lawyer's role exists than Oliver Wendell Holmes's "The Path of the Law."⁴⁶ In this speech, Holmes explains that a lawyer sells her ability to predict the consequences of proposed and past conduct by the client, Holmes's "bad man."⁴⁷ The bad man, every lawyer's client for Holmes, cares nothing of the consequences of his actions to the public good, but only of the consequences he will likely reap at the hands of public officials.⁴⁸ The lawyer's role for Holmes is to provide expert predictions of those consequences, not to decline to serve the client if the client's actions will harm others or the public, but rather to guide the client in his evaluation of the personal consequences of his actions, consequences imposed by public officials either in the form of prosecution or by courts as a result of private litigation.⁴⁹

42. *Id.*

43. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008); George Ballman, Jr., *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?*, 7 GEO. J. LEGAL ETHICS 1139, 1141-46 (1994).

44. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 9 (1998).

45. Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966); see also William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1, 8 (1998); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36.

46. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

47. *Id.* at 459.

48. *Id.*

49. *Id.* at 461. David Luban's "morally activist lawyer" stands in perhaps the starkest

Holmes taught us that lawyers represent "the bad man"⁵⁰—one who cares only for his own good and the consequences that may be taken by public agencies (criminal prosecution, administrative consequences, or orders of court at the instance of private plaintiffs) as a result of his actions.⁵¹ Lawyers, Holmes said, do not calculate the niceties of justice or the public interest against those of the client.⁵² Rather, Holmes said essentially that lawyers sell their expertise and judgment about official consequences to their clients.⁵³

Lawyers are partisans. There is nothing shameful in that. It is what makes lawyers lawyers in some sense. A lawyer's role is to advance the lawful interest of her client, without regard for whether those interests harm the interests of others (they most often do), or whether those interests are at odds with more general notions of the public's interest.

Good lawyers are partisans in this sense. This is not an attribute from which professional (as opposed to popular) approbation comes. It is what distinguishes lawyers, especially American lawyers. In our adversarial justice system, despite contrary-sounding happy talk, the lawyer's proper role is to advocate for her client while the other party's lawyer advocates for hers, all before an impartial judge. Whether we are correct or not, our justice system operates on the premise that this pitting of sides against one another produces justice. This believed-in result is what we rely on in describing a lawyer's role morality. The lawyer who properly plays her role within a moral system is moral, even if particular acts might offend notions of general morality.

Of course the lawyer's pursuit of client aims has limits. The goals sought and the means undertaken must themselves be lawful.⁵⁴ At least they must be supported by nonfrivolous arguments.⁵⁵ We do not require the lawyer to objectively or subjectively believe that the client's positions will prevail. We ask only that the lawyer have nonfrivolous support.⁵⁶

contrast to the Holmes description. See DAVID LUBAN, *LAWYERS AND JUSTICE* (1988).

50. Holmes, *supra* note 46, at 459.

51. *Id.*

52. *Id.* at 461.

53. *Id.*

54. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2008).

55. *Id.* R. 3.1.

56. *Id.*

The lawyer's role does permit a lawyer to withdraw from representing a client when the client's goals are repulsive to the lawyer,⁵⁷ and generally insulates the lawyer from a requirement of agreeing with a client's political, social, or moral views or activities.⁵⁸ But we counsel lawyers not to take such a position lightly, and we base our support for that "limit" on the worry that a client will not receive adequate representation from a repulsed lawyer.⁵⁹ Instead, we take professional pride in the lawyer who represents the unpopular client without regard to the lawyer's own views.⁶⁰ The profession prides itself on the ethic of separation from a client's moral position. So this "limit" is hardly one at all.

Even in the "kinder, gentler" world of the transactional lawyer, lawyers are meant to take sides. In this setting, they may often represent clients whose interests may be served by compromise and accommodations, but even the extensive literature on cooperative negotiation emphasizes that it is the client's interests that must be faithfully pursued.⁶¹ The creative, cooperative lawyer may find that her client's interests can be advanced while another party's interests are advanced as well, but the lawyer is not motivated by a desire to advance another's interests.⁶² It is only when this alignment advances the lawyer's client's interests that pursuing it is desirable. And when the interests of the client part from another's

57. *Id.* R. 1.16(b)(4).

58. *Id.* R. 1.2(b).

59. See Charles W. Wolfram, *The Duty of a Lawyer To Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 215, 216-18 (David Luban ed., 1984).

60. Witness the legion of books telling Clarence Darrow's storied career. See, e.g., *ATTORNEY FOR THE DAMNED* (Arthur Weinberg ed., 1957); *CLARENCE DARROW, THE STORY OF MY LIFE* (Da Capo Press 1996) (1932); RICHARD J. JENSEN, *CLARENCE DARROW: THE CREATION OF AN AMERICAN MYTH* (1992); MIKE PAPANTONIO, *CLARENCE DARROW THE JOURNEYMAN: LESSONS FOR THE MODERN LAWYER* (1997); KEVIN TIERNEY, *DARROW: A BIOGRAPHY* (1979); PHYLLIS VINE, *ONE MAN'S CASTLE: CLARENCE DARROW IN DEFENSE OF THE AMERICAN DREAM* (2004); ARTHUR WEINBERG & LILA WEINBERG, *CLARENCE DARROW: A SENTIMENTAL REBEL* (1980); see also Charles Friend, *Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1060 (1976).

61. See, e.g., Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 *OHIO ST. J. DISP. RESOL.* 497, 501 (2003); Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 *ARIZ. L. REV.* 289, 298 (2008).

62. ROGER FISHER, BRUCE PATTON & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 54 (1991).

interests, the lawyer invariably and properly becomes a distributive bargainer, extracting a dollar for her client from her bargaining opponent's client. As they should, lawyers advance the only loosely limited interest of their clients, not the interests of justice or the public interests.

There is, however, one aspect of lawyers' training that lends itself well to ascertaining the public's interest. In law school classes, some time is spent in discussion of what the law should be, as opposed to what the law is. In these moments, we are discussing the broader interests of the public: what law would best serve the public's interest at large? These are valuable discussions, but even these become lost and have grave weaknesses.

The discussions are weak because few law professors actually know how to evaluate the data and interests that would inform such a conversation. We are, most of us, kindergarten social scientists. We make not-so-educated guesses about what the effect on truth-telling will be when the speaker is near death, or what reaction product makers will have to different versions of the subsequent remedial measures rule. Few of us can handle the empiricism needed for such a conversation and fewer still bother to try.

Even the constructive conversations about what the law should be inevitably become lost in the deluge of attention that is paid to studying what the law is. They get lost in the deluge of attention that is paid to figuring out what the law is for the bar exam. And they get lost in the vast majority of the lawyer's daily work with what the law is and how it can be used to a client's, and not the public's, advantage.

Even the greatest citizen lawyers still have behaved as lawyers, and properly so. As mentioned, Patrick Henry and Thomas Jefferson, for example, published notices that they would not accept clients who would not pay their fee up front.⁶³ They were doing a perfectly ordinary and respectable thing: they were ensuring that their services would be paid for.

63. See *supra* note 32 and accompanying text.

B. The Public Official's Role

As a public official, the public interest is supreme. "[L]egislators must be genuinely oriented toward enacting laws that are in the common good or public interest."⁶⁴ The public official's role is that of an exalted citizen with special public authority, one who puts the public's interest first and who possesses the power to execute on that priority. To the extent that as a lawyer, a public official might favor the interests of the lawyer-officials or former clients, or expected future clients, or the clients of the lawyer's former law firm, that lawyer would be acting as a lawyer at the expense of the proper service as a public official.

Perhaps I am naïve about how public officials do their work generally. Perhaps all public officials, lawyers or not, are in reality captured by a "client" of one sort or another, a special interest, a constituency. Perhaps. But if I am naïve and this is how public officials work, then it should be no praise of lawyers who enter public life to have entered such work. They will simply have traded working for a client in one context, an open, honest, forthright one, to working for a client in a more surreptitious way, the way of a poor public official, with the lawyer-public official's goals and interests the ultimate and paramount ones. If I am naïve about public officials generally, then the praise we heap on lawyers who engage in such work⁶⁵ is misplaced and undeserved.

Generally, modern political theory has revolved around two theories of democratic representation.⁶⁶ On one side stands the trustee framework, in which the voters elect a representative⁶⁷ and

64. Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2127 (2007) (quoting and reviewing BRIAN Z. TAMANAHA, *LAW AS MEANS TO AN END: THREAT TO THE RULE OF LAW* 250 (2006)).

65. See KRONMAN, *supra* note 1, at 11-12.

66. This Article deals largely with theories of democratic representation. The same principles should apply equally strongly to those who serve in various government positions for a limited period of time. Such individuals largely serve to advise those who have been elected, or to carry out their policies. In either case, the same considerations and frameworks should be applicable to their decision-making process. In the case of those who serve as advisors to the elected, this is most plain. In the case of those who carry out their policies, a similar decision-making process will naturally occur in those areas where there is ambiguity in the laws/policies the elected representatives have enacted, and in those areas in which the unelected individual or organization has discretion in carrying out the policy.

67. Legislators and elected representatives are not the only public officials that act as

entrust that representative with the authority to make policy decisions based on his own judgment of the prudent course.⁶⁸ On the other side stands the delegate or mandate framework, in which the voters elect a representative and entrust him only with the power to follow the voters' mandate.⁶⁹ That is to say, under the delegate framework the representative acts to effectuate the voters' policy judgment, regardless of whether that judgment comports with his own judgment of what is prudent.⁷⁰

Edmund Burke's is the classic exposition of the trustee concept of democratic representation:

But *authoritative* instructions, *mandate* issued, which a member [of Parliament] is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience; these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of *Parliament*. If the local constituent should have an interest or should form a hasty opinion evidently opposite to the real good of the rest of the community, the member for that place ought to be as far as any other from any endeavor to give it effect.⁷¹

representatives. Bureaucrats, although not elected, have certain discretionary authority that places them in a representative role for the public. Administrative agencies perform several discretionary functions such as rule making, licensing, and contracting. Public administrators also often propose legislation and then decide how it is implemented after it is passed. Bureaucrats, therefore, have the same ethical responsibilities as elected officials because of the high level of discretion they are given in the policy-making process.

68. See James Conniff, *Burke, Bristol, and the Concept of Representation*, 30 W. POL. Q. 329, 330 (1977).

69. See James H. Kuklinski & Donald J. McCrone, *The Delegate Theory of Representation*, 23 AM. J. POL. SCI. 278, 280 (1979).

70. *Id.*

71. Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), in EDMUND BURKE,

Edmund Burke gave this speech in the late eighteenth century in Ireland.⁷² In it he is emphatic that, in his view, the duty of a member of Parliament is not simply to advocate the interests of the locality that elected him, but to balance the various interests pulling the British Empire in various directions.⁷³ The more complex and varied the state, the stronger Burke's claim becomes. Among the most important points made by Burke is his rejection of the delegate view: "Parliament is not a *congress* of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates"⁷⁴ Burke emphatically tells the reader that members of Parliament are not agents and advocates set up in an adversarial proceeding against other agents and advocates.⁷⁵ That, of course, is exactly how the American legal system is designed to function and the role for which American lawyers train.

Contemporaneous to and in contrast to Burke stands Rousseau, who provides a clear exposition of delegate democracy:

With each word the deputy speaks in the diet, and with every move he makes, he must already see himself under the eyes of his constituents, and feel the future influence of their judgment both on his hopes of advancement, and on that good opinion of his compatriots which is indispensable to the realisation of those hopes; for, after all, it is not to express their own private sentiments, but to declare the will of the nation, that the nation sends deputies to the diet I will add, in conclusion, that if there were actually some disadvantage in holding the deputies thus bound by their instructions, it could not outweigh the immense advantage of preventing the law from ever being anything but the real expression of the will of the nation.

[If the local assembly is unhappy with the vote of the deputy they sent to the national diet], [l]et them punish their deputies; let them even, if necessary, cut off their heads, if they have prevaricated⁷⁶

POLITICS 116 (Ross J.S. Hoffman & Paul Levack eds., 1949).

72. *Id.* at 113.

73. *Id.* at 116.

74. *Id.*

75. *Id.*

76. Jean-Jacques Rousseau, *Considerations on the Government of Poland* (1772), in ROUSSEAU, POLITICAL WRITINGS 194-95 (Frederick Watkins trans., 1953).

Rousseau presents one of the more extreme versions of the delegate view.⁷⁷ Rousseau's fairly extreme view makes clear that both delegate and trustee approaches to democracy exist on a continuum.⁷⁸ More importantly, in a diverse polity such widespread agreement may be difficult to come by.⁷⁹ This difficulty may result from the lack of clear policy demands on the part of most individual voters,⁸⁰ or the incredible difficulty in synthesizing the views of many individuals into a clear policy mandate.⁸¹ If a mandate only results from agreement by some sufficient proportion of the citizenry, mandates by the electorate may, therefore, be few and far between.

Mandates and preferences of a constituency are notoriously difficult to determine accurately.⁸² Additionally, it is not clear that voters generally come to the polls with a clear policy mandate in mind to guide either elected representatives, or those who advise the representatives, or those who are directed by the representatives to carry out the policies the representatives enact.⁸³

77. Rousseau seeks to make the representative mirror his constituents' views as closely as possible by allowing those constituents to take their representative's heads if they do not vote as they had desired. *Id.* Rousseau would still hold those constituents bound by the law for which their representative voted against their wishes. *Id.* It is thus apparent that although Rousseau's stance is fairly extreme, it is not necessarily the most extreme possible.

78. See also Richard W. Krause, *Two Concepts of Democratic Representation: James and John Stuart Mill*, 44 J. POL. 509, 510-11 (1982) ("Carried to its logical extreme, each of these views threatens to violate one of the Janus-faced requirements of the concept of representation—delegate representation, by tending towards direct democracy at one remove (with the represented no longer meaningfully 'absent')"); cf. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 4 (1972) (discussing the two views and stating, "The truth may lie somewhere in between, but if so, where does it lie, and how is one to decide?").

79. See Samantha Besson, *The Paradox of Democratic Representation. On Whether and How Disagreement Should be Represented*, in *THE THEORY AND PRACTICE OF LEGISLATION* 125, 129 (Luc F. Wintgens ed., 2005); Iris Marion Young, *Deferring Group Representation*, in *ETHNICITY AND GROUP RIGHTS* 349, 362 (Ian Shapiro & Will Kymlicka eds., 1997).

80. See John C. Wahlke, *Policy Demand and Support System: The Role of the Represented*, 1 BRIT. J. POL. SCI. 271, 273-74 (1971).

81. See Heinz Eulau, *Changing Views of Representation*, in *CONTEMPORARY POLITICAL SCIENCE: TOWARD EMPIRICAL THEORY* 53, 70 (Ithiel de Sola Pool ed., 1967).

82. See Marjorie Randon Hershey, *The Meaning of a Mandate: Interpretation of "Mandate" in 1984 Presidential Election Coverage*, 27 POLITY 225, 228 (1994). It appears that this argument would weaken as the size of the electorate shrinks. At the local level it may be that there is less diversity in views, fewer discrete issues, and that clear and discrete positions are more easily identifiable.

83. Wahlke, *supra* note 80, at 274. Wahlke gives a number of reasons for why people do not vote with clear policy mandates in mind: (1) "Few citizens entertain interests that clearly

Furthermore, at least in American politics, "the fragmentation built into the U.S. political structure, and the tendency toward split party control of the presidency and Congress" weighs against the possibility of a policy mandate.⁸⁴ The issue here is that even though a president is elected by a wide margin, if the electorate at the same time chooses to leave the other party in control of the Congress, then identifying a clear mandate that elected representatives and other public servants must follow becomes difficult.⁸⁵

Of course, if a lawyer-legislator could determine her mandate, zealously following a mandate or directive from a client is exactly what lawyers are trained to do. More importantly, a lawyer is trained and indeed his professional codes demand that he follow the directives of his client even if the lawyer himself believes that the directive of the client does not serve the best interest of all concerned. Indeed, it would seem that one of the more challenging parts of the attorney's training is his striving to overcome the desire to act in the way he thinks most just, and rather act as his client directs. This is so even though that in its isolated context, the result is not the one the lawyer judges to create the greatest benefit in sum for the parties involved. The justification for the legal profession's departure from what we would normally judge the prudent and moral course is grounded in the utilitarian assumption that the

represent 'policy demands' or 'policy expectations', or wishes and desires that are readily convertible into them."; (2) "Few people even have thought-out, consistent, and firmly held positions on most matters of public policy."; (3) "It is highly doubtful that policy demands are entertained even in the form of broad orientations, outlooks, or belief systems."; (4) "Large proportions of citizens lack the instrumental knowledge about political structures, processes, and actors that they would need to communicate policy demands or expectations if they had any."; (5) "Relative few citizens communicate with their representatives."; (6) "Citizens are not especially interested or informed about the policy-making activities of their representatives as such."; (7) "Nor are citizens much interested in other day-to-day aspects of parliamentary functioning."; (8) "Relatively few citizens have any clear notion that they are making policy demands or policy choices when they vote." *Id.*

84. Hershey, *supra* note 82, at 253 (generalizing while examining the issue of whether the 1984 election gave President Reagan a policy mandate); *see also id.* at 250-54.

85. The 2006 election and the Iraq war are instructive in that this election is often cited as a clear condemnation of the way things are progressing and a mandate to "get out of Iraq." *See, e.g.,* T.J. Pignataro, *Election Results Seen as Mandate for Peace*, BUFFALO NEWS, Nov. 11, 2006, at D5. Upon further examination though, it is unclear that this is the actual mandate. It appears that it would be more accurate to say that the mandate was "do something about Iraq." If that is the case, however, that mandate offers little direction, but rather begs the question, "What do we do about Iraq?"

profession can produce sufficient benefits to society to outweigh whatever harm is caused by its departure from customary morality.⁸⁶

Whichever theory of representation one thinks more efficacious, the public official's goal must be serving the public interest first and foremost.

Ethics codes adopted by public officials and administrators support this notion.⁸⁷ The code of the American Society for Public Administration ("ASPA") is such an example.⁸⁸ Its code provides ideal ethical norms for public officials.⁸⁹ Its first provision commands that public administrators make the public interest paramount.⁹⁰ Public officials, according to the code, are required to hold service to the public above any self-interest they may have.⁹¹ The public trust is in the hands of government officials. Legislators and public administrators have the responsibility of putting the values of the public into effect as public policy.⁹²

C. *The Poor Fit*

Lawyers by role are simply ill-suited to pursue a broad publicly interested goal. They are trained and accustomed to identifying a narrow interest of a client and advancing it without regard for the public interest and within very loose constraints.⁹³ To the extent that one or the other model of the lawmaker is better suited to the lawyer's experience and mind-set, it is the delegate theory.⁹⁴ A lawyer would be reasonably well-suited to identifying what a constituency wants and treating that constituency's interest as a client's, pursuing it without regard for considerations of the broader

86. DAVID LUBIN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 92 (1988).

87. Vera Vogelsang-Coombs & Larry A. Bakken, *The Conduct of Legislators*, in *ETHICS, GOVERNMENT, AND PUBLIC POLICY: A REFERENCE GUIDE* 79, 80 (James S. Bowman & Frederick A. Elliston eds., 1988).

88. The American Society for Public Administration: ASPA's Code of Ethics, http://www.aspanet.org/scriptcontent/index_codeofethics.cfm (last visited Feb. 15, 2009).

89. *Id.*; Vogelsang-Coombs & Bakken, *supra* note 87, at 86.

90. American Society for Public Administration, *supra* note 88.

91. *Id.*; Vogelsang-Coombs & Bakken, *supra* note 87, at 86.

92. James Bowman, *Introduction*, in *ETHICS, GOVERNMENT, AND PUBLIC POLICY*, *supra* note 87, at 1.

93. See Webb, *supra* note 39, at 246-47.

94. See *supra* text accompanying notes 67-70.

public interest. There should be no celebration of lawyers acting in the delegate model.

By training and experience, lawyers tend to favor clients' interests, with less than normal regard for the interests of others and the public.⁹⁵ In this respect, what we usually regard as a good and able lawyer is not a particularly good citizen. A citizen would put the interests of the public first, and personal interests second.⁹⁶ As a lawyer, client interests come first and are only overcome by the gravest of threats to public interests of others, and this is as it should be. A client-favoring posture is in large measure the definition of the lawyer's role. Certainly we do not expect lawyers to do a simple balance between the interest of their clients and the interests of others, and serve whichever interest is the weightier or more meritorious or more worthy. But it is not the role of the public official to serve an interest over that of the general public. Public officials are meant to be specially empowered, good citizens. When lawyer-public officials act like lawyers, they are not properly performing the public official role. This "lawyer behavior" by public officials may make them less valuable than others when filling the roles of public life. Lawyers lead a client-centered life.

This one aspect of the lawyer's role, the lawyer ethos, may be a terrible disadvantage to the lawyer's capacity to do effectively public service and public life. Lawyers represent clients, advance the interests of others, typically for a fee, and within very broad ranges. Lawyers represent the interest of clients, with little regard for the public good or the legitimate competing interests of others or the public generally. It is no shame on a lawyer to represent the interests of a client effectively and to undermine the interests of others for the gain of her client. That is the perfectly legitimate role of the lawyer in representation. No one questions the propriety of a lawyer who advances her client's interests at the expense of others.

But as a public official, the public interest is supreme. To the extent that, as a lawyer, a public official might favor the interests of the lawyer-official's clients or former clients, or expected future clients, or the clients of the lawyer's former law firm, that lawyer

95. Webb, *supra* note 39, at 246-47.

96. For a most exaggerated example of what a good citizen would do, see ROUSSEAU, *supra* note 7.

would be acting as a lawyer at the expense of the proper service as a public official.

Good citizens would act otherwise. Good citizens would make broadly considered judgments of what was in the public interest and pursue those interests. Even when a constituency wanted something identifiable, if that desire was contrary to the public interest, the citizen would pursue the public interest at whatever personal costs might pertain. A good public servant or lawmaker would act as the good citizen.

Can a lawyer put aside the lawyer's role when acting as a legislator? Perhaps; and some surely do. But that is precisely the point. A lawyer must eschew what he has been trained to do to be a good legislator. It is a challenge to being a good legislator that nonlawyers do not labor under.

III. EXAMPLES OF ROLE CONFLICT IN ACTION

There are small and large instances of this phenomenon at work every day, most undoubtedly unknown. Here is one rather extreme example that is both extensive and well-documented, from among any number of this phenomenon at work.

Blatant, orchestrated examples like the one that follows happen and are noticed from time to time. They are in part the result of this client-centered disadvantage. But mostly this Article is not about the blatant examples. Mostly I am referring to something much more subtle and understated, something perhaps not even noticed by the lawyer-legislator involved. I am not impugning the character of the lawyer-legislator. I am suggesting that as lawyers our training, experience, and focus are obstacles to identifying and serving the public interest. Overcome by some, to be sure—perhaps not even noticed by others—but an obstacle nonetheless.

There are more modern examples of lawyer-public officials serving their clients' interests and their own, but for this purpose, I will use the example of the citizen lawyers of what has been

termed a golden age of lawyers⁹⁷ and their activities in public realms that served the goals of their clients.

This story has been ably and thoroughly told elsewhere,⁹⁸ so a summary will suffice here.

Around the turn of the twentieth century, the leaders of the American bar advanced the interests of their clients by creating a law governing lawyers that excluded and punished lawyers whose clients opposed the clients of the leading lawyers, the citizen lawyers, the rulemakers.⁹⁹ Some of this work was done as leaders of the ABA and some as members of legislatures.¹⁰⁰ These leading lawyers proposed and adopted provisions restricting entry to the profession and creating new ethical violations for the punishment of lawyers who as a class represented the opponents of the leading lawyers' clients.¹⁰¹ In their role as policymakers for the profession and for the public generally, these public official lawyers served the interests of their clients.

At the turn of the century, a wave of immigrants was entering the country and some were becoming lawyers. Many of these urban, ethnic lawyers became the first real personal injury plaintiffs' bar, representing mostly injured workers and some consumers against the corporate clients of the bar elite.¹⁰² The bar elite bemoaned this development and pursued a series of strategies to deny the immigrant lawyers membership in the profession and dampen the effectiveness of those already in it who represented these injured workers.¹⁰³

In the late nineteenth century, "lawyers began to organize into what at first were rather exclusionary voluntary bar associations to insulate themselves from the rougher, unethical parts of the bar."¹⁰⁴

97. James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 783 n.17 (1997). But cf. Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 553 (1996) (suggesting that "[w]e are surely living in the literary Golden Age of nostalgia for the Golden Age of lawyering").

98. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 50 (1976); EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 40-41 (1953); Moliterno, *supra* note 97, at 783.

99. Moliterno, *supra* note 97, at 783.

100. AUERBACH, *supra* note 98, at 46.

101. Moliterno, *supra* note 97, at 783.

102. AUERBACH, *supra* note 98, at 48.

103. *Id.* at 50.

104. Walter W. Steele, Jr., *Cleaning Up the Legal Profession: The Power to Discipline—The*

The demographics of those “rougher, unethical parts” can be deduced from the location of the first bar association, New York City,¹⁰⁵ the arrival point of the great part of the immigrants who began flooding into the country at about that time¹⁰⁶ and the “dumping ground of the world,”¹⁰⁷ as one bar leader described the city. Not only were these bar associations voluntary, but they generally selected their membership “by invitation only,”¹⁰⁸ thus assuring that undesirables would be effectively excluded. Indeed, there was an early proposal to limit the number of members of the ABA absolutely,¹⁰⁹ whether members of the elite or not, thus ensuring that room would be found only for the best of society.

The immigrant lawyers “were concentrated among the urban solo practitioners,” and their professional practices were declared “unethical because established Protestant lawyers said [they were].”¹¹⁰ It is amply clear that “[t]he impetus behind the 1908 Canons was in large measure a subterfuge for class and ethnic hostility.”¹¹¹ Historians and lawyers alike have found that “[t]he

Judiciary and the Legislature, 20 ARIZ. L. REV. 413, 420 (1978).

105. *Id.* at 419; see also Marvelle C. Webber, *Origin and Uses of Bar Associations: Review of Much Interesting History Relating to Organizations of the Legal Profession, Beginning with Colonial Times and Extending to the Present*, 7 A.B.A. J. 297, 297 (1921); Philip J. Wickser, *Bar Associations*, 15 CORNELL L. REV. 390, 396 (1930).

106. See The Project for the Active Teaching of History, Immigration Facts 4-5, http://www.path.coe.uh.edu/seminar2002/week2/immigrant_facts.pdf (showing New York City as the arrival point of most immigrants) (last visited Feb. 8, 2009). This influx of immigration made New York City, and because of its predominant population in the state, New York state as well, the home of some of the most restrictive nativist legislation in the country, even in matters unrelated to the bar. See MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 171 (1946) (arguing that “[t]aking New York, we find that it leads all the states in the number of occupations in which aliens or non-declarants may not engage”).

107. F.M. Danaher, *Proceedings of the Section of Legal Education*, 36 A.B.A. REP. 632, 646 (1911) [hereinafter *Proceedings of the SLE, 1911*].

108. Steele, *supra* note 104, at 420.

109. SUNDERLAND, *supra* note 98, at 40-41.

110. AUERBACH, *supra* note 98, at 50.

111. Moliterno, *supra* note 97, at 811. They were a subterfuge because they were not openly nativist. However, the reasons cited for requiring the code of ethics do specifically target the practices of lower-class lawyers, who were in large part from poor and foreign backgrounds. *Id.* Furthermore, the Committee’s report has an overtly nativist tone despite its lack of specific derogation. See also Comm. on Code of Prof’l Ethics, Am. Bar Ass’n, *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 601 (1906) [hereinafter *Report on Professional Ethics*]. The new advertising rules applied to all lawyers, those representing corporations as well as those representing injured workers, just as laws against sleeping under bridges apply to the rich and poor alike.

ethical crusade that produced the Canons concealed class and ethnic hostility,"¹¹² and the content of "unethical" behavior therefore became the behavior of the disfavored ethnicities, regardless of its actual character. As Monroe Freedman commented, the Canons "were motivated in major part by the large numbers of Catholic immigrants from Italy and Ireland and Jews from Eastern Europe beginning in about 1880."¹¹³ In addition, "[d]eviance was less an attribute of an act than a judgment by one group of lawyers about the inferiority of another."¹¹⁴

It was no coincidence that the immigrant lawyers' clients were litigation opponents of the rulemakers' clients.

"Commercialization" was a concept of malleable meaning. It was a marker of being an elite lawyer when applied to the attachment of leading lawyers to the corporate, commercial world, and the mark of a crass, disreputable lawyer when applied to the efforts of solo and small firm lawyers to earn a living and represent the interests of workers and other injured people, often pursuing claims against the interests of the leading lawyers' clients.¹¹⁵ As public officials, many lawyers of the time engaged in public acts that advanced their private and former law firm's clients.¹¹⁶

The immigrant lawyers, who did not move in the circles of big business, were inferior precisely because they were not from the same Anglo-Saxon Protestant extraction as the elite lawyers generally were. Consequently, the elite drew up a code of ethics which, "reflecting values appropriate to a small town, were easily adaptable to an equally homogeneous upper-class metropolitan constituency, where they served as a club against lawyers whose clients were excluded from that culture: especially the urban poor, new immigrants, and blue-collar workers."¹¹⁷ Two planks of this code were most prominent in their attack on lower-class lawyers; both of them, however, can be united under the single appellation of

112. AUERBACH, *supra* note 98, at 50.

113. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 3 (1990).

114. AUERBACH, *supra* note 98, at 50.

115. *Id.* at 40.

116. *Id.* at 4.

117. *Id.* at 42.

"commercialization of the profession,"¹¹⁸ or, more commonly, "ambulance chasing."¹¹⁹

Among other measures, the bar leaders engaged the following devices and provisions to aid their clients: increased educational requirements; a reinvigorated good character requirement that was used as a subterfuge; new citizenship requirements for lawyers; new advertising prohibitions; and newly heightened supervision of contingent fees.¹²⁰ The new prohibitions on advertising by lawyers came to be enforced with an uncommon zeal. The first three of these were used to prevent lawyers who were likely to represent injured plaintiffs from entering the profession. The latter two were measures to handicap plaintiffs from retaining lawyers who would represent them.

A. The Good Character Requirement

Although the requirement of good character has been in place for admission to the bar since time immemorial,¹²¹ its potential for abuse was thoroughly exploited against recent immigrants and the poor in the late nineteenth and early twentieth centuries, used as a reinvigorated tool to keep the plaintiffs' lawyers from joining the profession. "Much of the initial impetus for more stringent character scrutiny arose in response to an influx of Eastern European immigrants, which threatened the profession's public standing. Nativist and ethnic prejudices during the 1920's, coupled with economic pressures during the Depression, fueled a renewed drive for entry barriers."¹²² The statements of the bar leaders at the time make this conclusion unavoidable.

118. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 429-30 (2005).

119. See AUERBACH, *supra* note 98, at 49.

120. See *infra* Part III.

121. See, e.g., Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 3 (2002) ("Since colonial times in America, good moral character has been singularly requisite for lawyers to gain membership in a bar association"); see also Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494 (1985) (noting that "formal character requirements for practicing attorneys span almost two millenia").

122. Rhode, *supra* note 121, at 499-500.

In a speech to the American Bar Association, Clarence Lightner announced that the real problem with the bar's image was "the foreign element."¹²³ The idea "that there are in the profession lawyers whose services cannot be bought at any price for immoral use" was unknown "in communities having a large foreign population."¹²⁴ A career in law "is regarded by them as a desirable, because lucrative, business for their talented children."¹²⁵ Because of this apparently universal quest for lucre (seemingly, according to Lightner, unique to the foreign population),

[a]n undue proportion of young men seeking admission to the Bar are of foreign birth or parentage, and they carry into the profession the point of view that they have acquired from their environment. The larger part of them have no character from a professional point of view, except, perhaps, the much-vaunted virtue of fidelity to the client.¹²⁶

The bar at the time identified the problem of character at the bar with the problem of foreigners entering the bar; because foreigners have no character, they must be the problem.¹²⁷ Or so the elite's reasoning went.

The requirement was used during this time "to keep down the underdogs."¹²⁸ In Pennsylvania, for example, the state that took its character certification process to the greatest extreme, the reasons given for rejecting good character certification were often superficial sounding, including such reasons as "[l]ittle regard for moral principles" and "[n]o proper sense of right and wrong."¹²⁹ Often, however, they were simply excuses for rejecting an applicant

123. Clarence A. Lightner, *A More Complete Inquiry into the Moral Character of Applicants for Admission to the Bar*, 38 A.B.A. REP. 775, 779 (1913).

124. *Id.*

125. *Id.*

126. *Id.*

127. This way of thinking is betrayed even in the report recommending the adoption of a code of ethics, in which the reasons for which a code is necessary are cited as "the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners," characteristics which were applied primarily to foreigners. See *Report on Professional Ethics*, *supra* note 111, at 601.

128. R.J. Gerber, *Moral Character: Inquiries Without Character*, 57 THE BAR EXAMINER 2, 15 (1988).

129. Walter C. Douglas, Jr., *The Pennsylvania System Governing Admission to the Bar*, 54 A.B.A. REP. 701, 703 (1929).

disfavored for some reason. Such labels as "dull," "colorless," and "stupid" were used as reasons for rejection.¹³⁰ Some applicants were rejected for crimes that their fathers, brothers, or even uncles committed, and the Board even acknowledged this apparent punishment of sons for the sins of their fathers without apology.¹³¹ Furthermore, two applicants were rejected because they had been employed as runners by law offices,¹³² and one was rejected for seeing "no wrong in ambulance chasing, buying cases, employing runners, and advertising."¹³³ The lower and immigrant classes engaged in these practices; the practices facilitated claims being brought against the rulemakers' clients; therefore, these practices were unethical, and support of them proved lack of good character.¹³⁴ The otherwise useful character requirement, therefore, was corrupted and used against qualified applicants for the bar, furthering the goals of nativism and the corporate legal elite's clients.

B. The Educational Requirements

The Association of American Law Schools (AALS) and the ABA's Section of Legal Education feuded for several years.¹³⁵ Only the values that the two shared could bring them together again: the need to keep foreigners out of the practice of law as much as possible. Auerbach observed that "teachers and practitioners edged [closer] to a common crusade in which higher educational standards would serve as an instrument of professionalization and, simultaneously, of professional purification."¹³⁶ They began to reunite because the ABA needed the AALS to enforce stricter educational

130. *Id.*

131. *Id.* at 703-05.

132. *Id.* at 703-04.

133. *Id.* at 704.

134. Douglas notes the rejection of four times as many applicants who had not graduated from college as those who had, and clearly implies that the lack of a college education, obviously limited almost entirely to the poorer classes, explains the lack of character. *Id.* at 705. The logical conclusion is that the poor lack character, and ought to be excluded from the legal profession.

135. ESTHER LUCILE BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 135 (1938); SUNDERLAND, *supra* note 98, at 47-49.

136. AUERBACH, *supra* note 98, at 94.

standards for entry into law schools for the specific purpose of excluding immigrants and their children from the legal profession.

The wealthy were the only ones that could afford to go to college, both because of tuition expenses and the loss of income that taking two to four years off of work inflicted.¹³⁷ It therefore became a demand of the ABA that law schools, in order to become accredited, must require at least two years of college prior to entry.¹³⁸ The ABA further demanded that all law schools employ full-time faculty in "sufficient number ... to insure actual personal acquaintance and influence with the whole student body"¹³⁹ and withheld approval from any commercial law school.¹⁴⁰ These measures crippled the efforts of the poor, including almost all recent immigrants, to enter the legal profession.

The requirement of some degree of college education was explicitly for the purpose of excluding all those foreigners who had not been assimilated through the functions of higher education. In his famous speech supporting the requirement, Elihu Root declared that any foreign residue in the immigrant must be "expelled by the spirit of American institutions."¹⁴¹ The new standards certainly had that effect for a time. "The financial expense of undergraduate and legal education, in addition to the substantial loss of income during the seven years required to earn two degrees, eliminated the most impoverished, among whom racial and ethnic minority group members were disproportionately concentrated."¹⁴²

The statements of the men who formed those standards prove the proposition that higher education standards were designed to keep out the poor and foreign-born and advance the interests of the rulemakers' clients. Frederic R. Coudert, founder of Coudert Brothers, for example, in his speech to the American Bar Association, subtly alluded to the foreigners who were crowding

137. *Id.* at 29.

138. Am. Bar Ass'n, Special Comm., Section of Legal Educ. & Admissions to the Bar, *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679, 687 (1921) [hereinafter *Report of the Special Committee*].

139. *Id.* at 688.

140. See BROWN, *supra* note 135, at 45-46.

141. Elihu Root, *Individual Liberty and the Responsibility of the Bar*, in ADDRESSES ON GOVERNMENT AND CITIZENSHIP 516 (Robert Bacon & James Brown Scott eds., 1916).

142. AUERBACH, *supra* note 98, at 29.

into the American bar. After blaming "incompetency" for the popular dislike of the law and legal profession, he went on to condemn most applicants to the bar, praising "the more intelligent and better-equipped young men coming from one of the great university law schools of the country."¹⁴³ By implication, then, the incompetency which was plaguing the American bar was due to the poor and immigrant attendants of night and part-time schools, as opposed to the "great university law schools." These "unlearned, unlettered and utterly untrained young lawyers ... will continue to have a deleterious effect upon the administration of justice."¹⁴⁴ If admission to the bar was limited to graduates of the university law schools, most poor and immigrants would be excluded with that step alone.

The debates of the Section on Legal Education of the American Bar Association (the first section established by the ABA,¹⁴⁵ indicating the importance that the ABA attached to it) also firmly establish that increasing educational requirements were designed to exclude foreigners. F.M. Danaher, in describing the necessity of higher standards in New York than elsewhere, specifically named the influx of immigrants as a reason for these standards.¹⁴⁶ Because New York was "the dumping ground of the world,"¹⁴⁷ there were too many applicants for admission to the bar.¹⁴⁸ This influx of applicants, doubtlessly made up of those who were "dumped" into the City, "has tended to lower the morals of the profession and to foster unprofessional conduct."¹⁴⁹ Unprofessional conduct was synonymous with advertising and solicitation, practices engaged in by the lawyers for injured workers.¹⁵⁰ Danaher then explicitly affirmed the goal of increasing educational requirements. He declared that it was necessary "to adopt some of the requirements of time and cost and special training necessary for admission to the

143. Frederic R. Coudert, *The Crisis of the Law and Professional Incompetency*, 36 A.B.A. REP. 677, 682-83 (1911).

144. *Id.* at 683.

145. SUNDERLAND, *supra* note 98, at 28.

146. *Proceedings of the SLE, 1911*, *supra* note 107, at 646.

147. *Id.*

148. *Id.* at 645-46.

149. *Id.* at 645.

150. *See infra* Part III.C.

Bar in European countries,"¹⁵¹ including a requirement that applicants be "able to speak and write the English language correctly"¹⁵² How much proficiency was meant by "correctly" was in the exclusive power to be determined by the bar admission authorities.¹⁵³ Even those licensed to practice law in their own countries were required to meet these requirements—unless, of course, they were from the Anglo-Saxon common law countries, in which case they could be admitted on motion.¹⁵⁴

Edward Lee (dean of a night law school in Chicago) explicitly identified the true result of the measures at a later meeting:

[I]t would discourage legal education throughout the country, decrease legal knowledge everywhere, and deprive masses of people in our large cities, many of them of foreign extraction, from access to our courts and legal aid for want of lawyers familiar with their language and distinctive customs. To such people a lawyer is more than a mere lawyer; he is in addition an interpreter of the spirit of our laws and of our institutions in his social and political contact with his kindred.¹⁵⁵

Lee identified precisely the results of increasing the educational standards for admission to the bar: depriving lawyers to the poor and the immigrant classes. He gave a passionate argument for the rejection of the new standards, citing the many contributions of the foreign-born and their worth to practice law in America.¹⁵⁶ His warning, however, was not heeded, because the exclusion of these foreign-born was precisely the goal of the new standards. When Lee made a motion to strike the requirement of college study and replace it with a more reasonable standard (that is, one that could

151. *Proceedings of the SLE, 1911*, *supra* note 107, at 645.

152. *Id.* at 648.

153. *Id.* at 647-49.

154. *Id.* at 647.

155. Edward T. Lee, *Proceedings of the Section of Legal Education and Admissions to the Bar*, 46 A.B.A. REP. 656, 668 (1921) [hereinafter *Proceedings of the SLE, 1921*].

156. *Id.* at 671-72. Lee even alluded to the opinion of most of the ABA by saying that he was "sorry to say" that "many Americans" considered these immigrants "undesirables." *Id.* at 671. The Section, however, was apparently unmoved, as it took a recess immediately thereafter, and no one spoke up in support of Lee's speech. *Id.* at 672.

possibly be met by the poor and immigrants) his motion could not even muster a second.¹⁵⁷

The Root Committee report submitted to the Section in 1921 made it clear that “[s]etting higher educational standards for admission to the bar was [simply] one means chosen to keep the unwanted out of the profession”¹⁵⁸ The Committee and the bar leaders sought a professional ethnic cleansing. The report spoke of the need “to prevent the admission of the unfit and to eject the unworthy,” and aimed to “purify the stream at its source by causing a proper system of training to be established and to be required.”¹⁵⁹ It recommended that, in order to “purify the stream,” educational standards for admission to the bar should be increased, requiring at least two years of a college education and a three-year, full-time course of study in a law school.¹⁶⁰

The report was entirely dismissive of the difficulties that the poor faced in attending school full-time. “No man who wants a college education need go without.”¹⁶¹ It cited scholarships and work as ways the poor can attend college and law school.¹⁶² “The man of slender means has now the advantages which once belonged only to the wealthy.”¹⁶³ The fact of the matter, however, was that “[i]mpoverished applicants were advised to avoid combining day work with night law classes because only university law schools offered access to desirable professional positions.”¹⁶⁴ Because the report effectively excluded night schools from approval,¹⁶⁵ the only way anyone could work through law school had been removed.

157. *Id.* at 677.

158. James E. Moliterno, *Why Formalism?*, 49 U. KAN. L. REV. 135, 140 (2000).

159. *Report of the Special Committee*, *supra* note 138, at 681.

160. *Id.* at 683-84.

161. *Id.* at 684.

162. *Id.*

163. *Id.* at 682.

164. AUERBACH, *supra* note 98, at 26.

165. It was almost axiomatic among the elite that night schools were anathema; John Wigmore, at the first meeting of the Section of Legal Education, declared that “the principle that when a student enters upon his professional preparation in a law school, he must give to it his whole working time, and that no other and competing occupation is compatible with an adequate training” should “be fundamental in modern legal education.” John H. Wigmore, *A Principle of Orthodox Legal Education*, 17 A.B.A. REP. 453, 453 (1894). Note that this eliminates even the possibility of going to law school full-time and working at night; by the purest form of this doctrine, the poor are denied all recourse in their pursuit of a legal education. *Id.* at 458.

Furthermore, it was a fact that “[d]espite everything that full-time schools may do through scholarships and loans for students of restricted means[,] ... such [full-time] schools draw the great majority of their students only from the more favored classes in society.”¹⁶⁶ The report’s dismissal of the difficulties of attending college and law school were so obviously contradictory to the real experience of the immigrants and the poor that one can only conclude that the exclusion of these people was deliberate.

The report was authorized “to publish from time to time the names of those law schools which comply with the above standards and of those which do not”¹⁶⁷ This list reveals how concerned the ABA was with the ability of the poor to enter the legal profession. By 1936, only one part-time school had been approved by the American Bar Association, whereas only eight full-time schools had not been approved.¹⁶⁸ Furthermore, “[o]f the 94 institutions on the approved list for 1936, 90 are connected with colleges or universities”¹⁶⁹ This limited the options of the poor; although those law schools unconnected with universities were much cheaper, they were less well-known. All this was done despite the fact that there was no empirical evidence that night or non-university law schools were any less effective in educating lawyers for contemporary practice.¹⁷⁰ It was now much more difficult for the poor to become lawyers and for the poor to find lawyers to undertake their legal needs, despite the superficial concern for them given in the report.¹⁷¹ Elihu Root, chairman of the Special Committee that submitted the report, had warned that “alien influences” must be “expelled by the spirit of American institutions.”¹⁷² Whether he succeeded in expelling alien influences from the legal profession, the ABA certainly did a great deal to exclude aliens from it.¹⁷³

166. BROWN, *supra* note 135, at 43.

167. *Report of the Special Committee*, *supra* note 138, at 688.

168. BROWN, *supra* note 135, at 48-49.

169. *Id.* at 50.

170. J. Laurence Hurley, *Proceedings of the Section of Legal Education and Admissions to the Bar*, 54 A.B.A. REP. 605, 624-25 (1929) [hereinafter *Proceedings of the SLE, 1929*].

171. *Report of the Special Committee*, *supra* note 138, at 680-81, 685.

172. AUERBACH, *supra* note 98, at 94.

173. See Henry S. Drinker, Jr., in *Proceedings of the SLE, 1929*, *supra* note 170, at 621-24.

Because so many of the unethical lawyers in the country "came right up out of the gutter into the Bar,"¹⁷⁴ they must be required to go to college so that they can "absorb the American boy's idea of fair play,"¹⁷⁵ which essentially meant to abandon "the methods their fathers had been using in selling shoe strings and other merchandise."¹⁷⁶ What was important was that those poor aspirants "become Americanized," which could happen "whatever nationality a man is."¹⁷⁷ Once they had abandoned their culture's way of doing things, they would be safe members of the bar, not before.

C. Restrictions on Advertisement

One of the most prominent objections to immigrant practices was that they tended to advertise. The corporation lawyers who had become the elite in late-nineteenth and early-twentieth century America did not advertise; they had no need to do so.¹⁷⁸ Elite lawyers already had connections enough to supply them with new clients, or they were retained by business as counsel and therefore had no need of new clients, particularly from the lower classes who had little or nothing with which to pay them. The fact that the newer lawyers, on the other hand, did advertise and aggressively sought new clients, particularly for tort cases taken on a contingent fee, made advertising ipso facto unethical.¹⁷⁹ Without advertising and without client solicitation, injured workers would have significant difficulty finding representation and insurance adjusters would have free and exclusive access to negotiate low settlements.¹⁸⁰ No practice of immigrant lawyers so disadvantaged the bar elite's clients as did advertising and solicitation.

174. *Id.* at 624.

175. *Id.*

176. *Id.* at 622.

177. George W. Wilson, in *Proceedings of the SLE, 1929*, *supra* note 170, at 628.

178. *See, e.g.,* Moliterno, *supra* note 97, at 809 (noting that the elite lawyers formed "a club that would not compete with one another for clients and who had no need of regularly attracting new clients through other than social means"); *see also* AUERBACH, *supra* note 98, at 43 (positing that poor lawyers at the time advertised because they "depended upon a constant client turnover for economic survival").

179. *See* AUERBACH, *supra* note 98, at 42-44.

180. *See* Moliterno, *supra* note 97, at 791.

Nearly all advertising was prohibited under the Canons of Ethics. All "solicitation of business by circulars or advertisements"¹⁸¹ was deemed unprofessional; it was "equally unprofessional to procure business by indirection through touters of any kind"¹⁸² Even "[i]ndirect advertisement ... by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct" was prohibited.¹⁸³ Effectively all advertising was, then, forbidden—except, of course, for business cards. Those were used by the professional elite, and therefore could not possibly be unethical.¹⁸⁴ Even the failure to see ill in advertising was sufficiently condemned that a Pennsylvania bar applicant was denied admission for seeing "no wrong in ambulance chasing, buying cases, employing runners, and advertising."¹⁸⁵

Here again the ideals of the country lawyer, as realized in the industrial revolution's big business firm, obfuscated the current situation of the profession.¹⁸⁶ The country lawyer and the big business lawyer were both well-known in the community; they could rely on potential clients coming to them. In the urban situation, however, it was entirely different. Lawyers were not well-known in the community simply by virtue of their profession; they had to advertise in order to acquire clients, both for justice's sake and for their own economic necessities.¹⁸⁷ Nevertheless, the new Canons of Ethics prohibited nearly all advertising, which took advantage of the fact that "[t]hese lawyers confronted problems of client procurement which an established corporate practitioner did not experience"¹⁸⁸ in order to injure the practices of the urban and largely immigrant underclass. Opposition to the "commercialization" of lawyers, the bugaboo that the established corporate society presented as the reason for their new prohibition on advertising, was "an indication of concern with immigrant ghettos and urban poverty, [and] it demonstrated antagonism toward lawyers from

181. CANONS OF PROF'L ETHICS Canon 27 (1908).

182. *Id.*

183. *Id.*

184. *Id.*

185. Douglas, *supra* note 129, at 704.

186. AUERBACH, *supra* note 98, at 42-43.

187. *Id.* at 43.

188. *Id.* at 42.

ethnic minority groups—the profession's new and growing under-class."¹⁸⁹

Interesting enough, this prohibition on advertising *was* new. Such a prohibition would seem perfectly suited to the country lawyer ethos, but the country lawyers themselves never saw a need to implement it, and even engaged in the limited advertising that the technology of their time allowed. Lincoln advertised.¹⁹⁰ And while not quite the usual sort of advertisement, Jefferson, Henry, and other lawyer-statesmen placed notices in the Virginia Gazette, warning prospective clients that they would not undertake representation without being paid their fee up front.¹⁹¹

One of the ethical treatises on which the new code of ethics was based, Sharswood's, put no restrictions on advertising, and many ethical systems, including those of most of the states, permitted certain amounts of newspaper advertising at least.¹⁹² The new Canons of Ethics, however, prohibited nearly all advertising; even business cards received only reluctant approval.¹⁹³ This sudden discovery of a legal norm against lawyer advertising, entirely baseless in the traditions of the profession, reinforces the conclusion that the corporate legal community imposed the rule as a client-advantaging weapon, rather than as an attempt to restore the image of the profession in the public eye.¹⁹⁴

Included in advertising was any direct seeking of clients, including simply approaching them, telling them that they probably had a legal claim, and offering to represent them.¹⁹⁵ This was considered the height of commercialism, and formed the substance of what was derisively called "ambulance chasing."¹⁹⁶ The practice was a near necessity for those engaged in personal injury plaintiffs practice. Failing to reach clients at an early stage meant that many

189. *Id.* at 40.

190. ALLEN D. SPIEGEL, A. LINCOLN, ESQUIRE: A SHREWD, SOPHISTICATED LAWYER IN HIS TIME 23 (2002).

191. See *supra* note 32 and accompanying text.

192. See Moliterno, *supra* note 97, at 791-92.

193. See *supra* notes 183-84 and accompanying text.

194. See Moliterno, *supra* note 97, at 791-92.

195. CANONS OF PROF'L ETHICS Canon 27 (1908).

196. Comm. on Code of Prof'l Ethics, Am. Bar Ass'n, *Report of the Committee on Code of Professional Ethics*, 32 A.B.A. REP. 676, 682 (1907) [hereinafter *Committee on Professional Ethics*].

or most would already have been visited by insurance claims personnel, effectively operating on behalf of the potential defendants.¹⁹⁷ The hypocrisy of the elite in this matter is ironic, as one contemporary commentator noted, saying that "my experience has been that it is the corporation agents who are the ones who rush to the hospital, or bedside of the dying, and try to get their releases from them."¹⁹⁸ The advantage of the corporate defendant was being undermined by the actions of the plaintiffs' lawyers, so those actions needed to be prohibited. Indeed, arguably, prohibiting advertising was the primary reason the ABA leaders set out to adopt the Code of Ethics.¹⁹⁹ The Canons declared that "[i]t is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so."²⁰⁰ The combination of new prohibitions clearly were directed at hurting the practices of the lower class of lawyers and their clients, and restoring the competitive advantage previously enjoyed by the elite's clients.

Some of the impetus for the new rules may have been prejudice, but client-centered monetary considerations appear to have surely played a role in the prohibition on advertising. Most of the framers of the code represented business interests; most lawyers who advertised were serving the poor, often representing them in tort cases which arose as a result of injuries received in working for business. "Such claims would be far less likely to be brought if urban, ethnic, underclass lawyers could be restrained from advertising about their services, soliciting the business of injured persons, and offering contingent fee arrangements to those unable to afford a pay-as-you-go lawyer fee,"²⁰¹ especially because most of those bringing the claims were probably ignorant of their claims' existences until their lawyers' runners informed them of it. These advertising restrictions were "[v]irtually the only substantive

197. FREEDMAN, *supra* note 113, at 239-42; Frank C. McGirr, *Sanitation of the Bar: Exposure at Bar Association Meeting of the Latest Methods for Employing Courts for Vicious Purposes by Ambulance Chasers*, 4 J. AM. JUD. SOC. 5, 6 (1920) [hereinafter *Sanitation of the Bar*].

198. *Id.* at 6.

199. *Committee on Professional Ethics*, *supra* note 196, at 681-82.

200. CANONS OF PROF'L ETHICS Canon 28 (1908).

201. Moliterno, *supra* note 97, at 791.

changes”²⁰² from traditional codes of ethics to the new ABA canons.²⁰³ The prohibition left the insurance adjuster free access and reign over ill-informed and unrepresented plaintiffs. The prohibition on advertising had no other purpose than the suppression not only of the largely immigrant lawyers who relied on it for their livelihoods, but also of the largely immigrant blue-collar workers who made use of those lawyers for the litigation of their claims against the business interests which the elite lawyers who so despised the underclass almost universally represented.

D. The Contingent Fee

The contingent fee, by which claims could be brought by those unable to otherwise afford to hire a lawyer, was the bane of the organized bar. The bar elite hoped to prohibit it, but succeeded only in regulating it. This effort at prohibition was even handed; all lawyers were subject to these restrictions when they charge contingent fees, just as rich and poor alike were prohibited from sleeping under bridges.²⁰⁴

A contingent fee is simply an agreement by which payment to the attorney is subjected to some contingency, generally either favorable settlement or favorable result at trial. Unlike advertising restrictions, the contingent fee had since ancient times been condemned as champerty, “[a]n agreement between a [stranger] to a lawsuit and a litigant by which the [stranger] helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds.”²⁰⁵ In the case of a contingent fee, the attorney was considered a stranger to the lawsuit—that is, he was neither plaintiff nor defendant—and he pursued the litigant’s claim by paying for it (with his services) in exchange for part of the settlement. The prohibition made some

202. *Id.*

203. *See id.* at 791-92.

204. The law’s “majestic equality ... forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” ANATOLE FRANCE, *THE RED LILY* 75 (Éld. de luxe 1894).

205. BLACK’S LAW DICTIONARY 246 (8th ed. 2004); *see also* Max Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587, 588-89 (1940) (arguing that “[t]he contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought” and lawyers considered it a “gross impropriety” and continued to “disapprove” of contingency fees long after the statute had legalized it).

degree of sense in the preindustrial society for which it was made; contingent fees were unnecessary, as the tort claims for which contingent fees primarily evolved were comparatively rare and litigants were more likely to be on a level playing field financially.²⁰⁶ Allowing contingent fees in such a situation would have been nothing more than giving attorneys and clients "the means and perhaps the incentive to file a lawsuit for its 'nuisance' value and obtain a quick settlement."²⁰⁷ It might even encourage perjury, because a lawyer, knowing that his fee rests upon his prevailing, may encourage his client or witnesses to stretch or invent the truth in the direction of a favorable result.²⁰⁸ The contingent fee offered little benefit and substantial cost. With the advent of industrialization, however, the balance of the benefits and costs of the prudential value of the contingent fee radically changed, and early in this period, the Supreme Court made clear that the contingent fee was a lawful fee arrangement.²⁰⁹

It was "the Industrial Revolution which brought into sharp contrast the group of lawyers who were willing to take cases on contingencies and those who were not."²¹⁰ The division was, of course, that between *hoi polloi* and the elite:

The latter [those who would not take a case on contingency] represented the defendant railroads, steamships, factories, power companies. They were the admitted leaders of the bar. The former [those who would take contingent fees] were the

206. See MARC M. SCHNEIER, *CONSTRUCTION ACCIDENT LAW* 14-15 (1999) (stating that in preindustrial society, tort law "was still virtually undeveloped" consisting mostly of "matters between individuals, largely assaults, trespasses, and the like").

207. Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 953 (1990) (citing criticisms leveled at the contingent fee arrangement); see also Radin, *supra* note 205, at 589.

208. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 40 (1989) (stating that contingent fees are prohibited in criminal cases because of the risk of the attorney impeding justice, "presumably by suborning perjury"); see, e.g., Honorable George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 160-64 (1907), quoted in Peter Karsten, *Enabling the Poor To Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 255 (1998) (stating that an attorney on a contingent fee would "be tempted to make success, at all hazards and by all means, the sole end of his exertions").

209. *Stanton v. Embrey*, 93 U.S. 548, 556-58 (1877).

210. Radin, *supra* note 205, at 588.

young lawyers struggling to make a living. They could scarcely help being an inferior class.²¹¹

The continued opposition to contingent fees made this division perfectly obvious. Contingent fees, often the only way a poor person could afford any sort of legal service, were the heart of the immigrant lawyer's practice; without them, no one could afford his services, he could not afford to live, and his practice would necessarily fall to the wayside.²¹² Both the poor and the immigrant lawyer needed the contingent fee for their survival. The injured worker's claim had almost no chance of being brought without the arrangement.²¹³

The lawyer needed the contingent fee because he was not part of the new elite which could rely upon retainerment by the great industrial corporations for his livelihood.²¹⁴ The plaintiff's lawyer required a certain degree of client turnover in order to survive, and offering a contingent fee to those otherwise unable to pay for legal services was the only way to ensure that turnover.²¹⁵ The poor worker needed contingent fees even more. Auerbach eloquently described the necessity of such fees for the poor:

An alarming proliferation of work and transportation accidents, most often borne by those least able to afford lawyers' fees, generated human tragedies which a profit economy and its legal doctrines exacerbated. Accident victims—and the surviving members of their families—were compelled to bear the full burden for the risks inherent in dangerous work. Corporate profit was the primary social value.... [L]egal services were available only to those who could afford to purchase them....

... In more than half of all work-accident fatalities in Allegheny County [for example], widows and children bore the entire income loss. In fewer than one-third of these cases did an employer pay as much as five hundred dollars—the equivalent of a single year's income for the lowest-paid workers. Similarly,

211. *Id.*

212. See, e.g., AUERBACH, *supra* note 98, at 50.

213. See, e.g., Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 792 (1966) (describing the author's experience as an immigrant being incapable of pursuing a claim because of his lack of money for a retainer).

214. See Radin, *supra* note 205, at 588.

215. See AUERBACH, *supra* note 98, at 45.

more than half of all injured workers received *no* compensation; only 5 percent were fully compensated for their lost working time while disabled.²¹⁶

Workers in such situations could hardly afford the out-of-pocket expense of retaining a lawyer at an hourly rate, particularly with the substantial risk of losing, thus suffering not only the expenses of their injuries but also the equally unrequited expenses of an unsuccessful legal venture. The contingent fee, however, provided a way for such workers to pursue their claims without worsening their situation. It was and is a necessary consequence of the desire to provide everyone with the capability of pursuing meritorious legal claims.

By the late nineteenth and early twentieth centuries, when the new code of ethics was being formed and promulgated, the prudential value of the contingent fee was already outweighing the risks beyond any serious question. In a rapidly growing and industrialized society, "[t]here were far too many persons who could pay no retainers and far too many lawyers who could not afford to insist on them."²¹⁷ And not every lawyer could do what Jefferson and Henry had done 130 years removed, demanding payment up front.²¹⁸ In a time in which workers had precious little assistance, "the contingent fee arrangement did enable some workers to secure otherwise unattainable legal services."²¹⁹ The balance of the possibility of unmeritorious suits being brought and the certainty of the denial of any recourse for the wrongfully injured and others with legal claims can come down on only one side. Furthermore, one could argue whether the possibility of unmeritorious suits is really a problem unique to, or even especially associated with, the contingent fee agreement, since no one would deny "that vexatious and unfounded suits have been brought by men who could and did pay substantial attorneys' fees for that purpose."²²⁰

216. See *id.* at 44 (citing CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW 119-24 (1910)).

217. Radin, *supra* note 205, at 588.

218. See *supra* note 32 and accompanying text.

219. AUERBACH, *supra* note 98, at 45.

220. James Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation,"* 16 GEO. J. LEGAL ETHICS 223, 245 (2003); Radin, *supra* note 205, at 589.

However, elite corporate lawyers bemoaned the existence of the contingent fee as an attack upon legal professionalism. "Nothing plunged the professional elite deeper into despair than contingent fees and the proliferation of negligence lawyers whose practice depended upon them."²²¹ Corporate clients were losing money on the suits that contingent fees made possible, which gave the corporate legal elite no end of headache. Frank C. McGirr noted this in a debate concerning the contingent fee. He noticed "that every lawyer that got up here today in favor of this bill [which restricted contingent fees] was a corporation lawyer. Why they are so opposed to contingent fees I do not know."²²² McGirr undoubtedly knew exactly why the corporate lawyers were opposed to contingent fees.²²³

No objection to the contingent fee was too ridiculous or contrary to common sense to be forwarded as dispositive. One objection, for example, was that the client's interests are likely to suffer from the lawyer's urge to make as much money as possible.²²⁴ Putting aside the assumption that a lawyer on a contingent fee will be greedier than one on an hourly fee (a questionable assumption at best), the more likely conclusion is that a lawyer would be *more* zealous for his client's interests, because he is receiving part of the recovery. The alternative would be an hourly fee lawyer, representing a one-time personal injury client. An hourly lawyer, unlike the contingent fee lawyer, receives his fee whether he wins or loses, and has significantly less monetary incentive to pursue his client's goals. Nevertheless, this objection was voiced often, as though questioning its obviously specious reasoning amounted to sympathizing with greed itself.

The disapproval of the contingent fee was pervasive among the elite. Therefore, when this same elite decided to draw up a code of ethics, it drew up a special canon intended to sharply limit the contingent fee.

The Canons could not, of course, eliminate the contingent fee entirely because the laws of the United States considered the validity of such fees "beyond legitimate controversy" as early as

221. AUERBACH, *supra* note 98, at 45.

222. *Sanitation of the Bar*, *supra* note 197, at 11.

223. Note, *Legal Ethics-Ambulance Chasing*, 30 N.Y.U. L. REV. 182, 185 (1955).

224. CANONS OF PROF'L ETHICS Canon 13 (1908).

1877.²²⁵ Indeed, even many state codes of ethics, based largely upon the Alabama code,²²⁶ acknowledged that the contingent fee was valid, including a statement that contingent fees can be higher than others because of the risk involved.²²⁷ Contingent fees were therefore put under what was intended to be a severe stricture: the Canons declared that they “should be under the supervision of the Court, in order that clients may be protected from unjust charges.”²²⁸

The rationale for so restricting contingent fees, “that clients may be protected from unjust charges,”²²⁹ is transparently specious. Auerbach treated this proposition with scorn, quipping that “[c]ourt supervision was justified on behalf of the personal injury victim, who presumably needed protection from his attorney more than he needed monetary damages for his injury.”²³⁰ Presumably the writers of the canon reasoned that contingent fees were often excessive. However, all fees were subject to the preceding canon, which proposed no fewer than six factors for consideration in setting a neither exorbitant nor minimal fee.²³¹ Indeed, one of those factors was precisely whether the fee was contingent.²³² Why, then, were contingent fees subject to such additional scrutiny? Why insult the lawyer who worked for contingent fees with the presumption that he would charge extravagant fees for minimal service?²³³ The lawyers who used contingent fees represented clients who would otherwise not have the wherewithal to maintain their claims

225. *Stanton v. Embrey*, 93 U.S. 548, 556 (1877).

226. See *Committee on Professional Ethics*, *supra* note 196, at 678; see also Moliterno, *supra* note 97, at 789.

227. See *Committee on Professional Ethics*, *supra* note 196, at 709. While most of the codes did say that contingent fees “lead to many abuses,” and that “certain compensation is to be preferred,” no strictures were leveled against them that were not leveled against other forms of compensation. *Id.* at 710.

228. CANONS OF PROF'L ETHICS Canon 13 (1908).

229. *Id.*

230. AUERBACH, *supra* note 98, at 46.

231. CANONS OF PROF'L ETHICS Canon 12 (1908).

232. *Id.* Canon 11.

233. Auerbach suggests that the canon was meant at least partially as an insult, noting that one opinion at the meetings that formed the canon was that “[n]o self-respecting attorney ... would tolerate judicial scrutiny of his fee schedules,” and that the canon was more an effort “to distribute professional status according to a lawyer’s willingness to contract for contingent fees” than to eliminate the practice entirely. See AUERBACH, *supra* note 98, at 46.

against the rulemakers' clients. That may have been reason enough to impose the added supervision on the fee arrangement.

The standard condemnation of ambulance chasing, for example, including its system of runners who informed injured parties of their claims and recommended the services of a lawyer, was that it created litigation that otherwise would not have existed, fomenting disputes and otherwise disrupting society. The ABA condemned it on these grounds, declaring that it was "[s]tirring up strife and litigation" and that "to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action" was an unethical practice.²³⁴ However, the contingent fee upon which these ambulance chasers rested their practices was condemned upon the exact opposite grounds. The elite contended that, because it was more lucrative to settle a case than to litigate it, that an ambulance chaser on a contingent fee was *likely to settle* rather than litigate, which might injure the interests of his client.²³⁵ Their criticisms have come full circle; ambulance chasing was unethical because it stirred up litigation, whereas the contingent fee was unethical, or at least presumptively so, because it encouraged settlement rather than litigation. The new legal underclass and their clients simply could not win—but that was, after all, the idea. The elite tried to make it that way, and the legal profession has labored under their antipoor code and its progeny ever since.

IV. WHAT IS TO BE DONE?

What is to be done about this problem? Probably quite little. The problem identified here is inherent in the poor fit between the lawyer's customary role and the role of public law maker. Many lawyer-lawmakers will overcome the shortcoming, as they have for centuries. Some will succumb to its dramatic ways. Many will be affected by it, even if imperceptibly. No serious change in either role should be contemplated that would eliminate the problem.

Short of a dramatic change that would undoubtedly do more harm than good, I have only a modest suggestion for now. Even if in the end, the lawyer's advantages outweigh this disadvantage, we should

234. See CANONS OF PROF'L ETHICS Canon 28 (1908).

235. *Legal Ethics-Ambulance Chasing*, *supra* note 223, at 185.

be aware of the disadvantage and guard against it to the extent possible. We should create more restraints on client-favoring actions on the part of lawyer-legislators. We should expect the ALI and ABA to populate committees charged with law improvement in balanced ways, so that the impact of the powerful incentive to favor client interests in those contexts can be tempered.

Aurbach's suggestion was to strip the profession of self-governance: "Treatment of the legal profession as a public profession, with extensive lay control, would drastically alter its present identity as a collection of individuals whose fealty to the public is secondary to its service to paying clients."²³⁶

There are currently in place various restraints on activities of legislators,²³⁷ some of which fall especially on lawyer-legislators.²³⁸ But they ask little. For example, there are modest restrictions on representational activities during and after legislative service.²³⁹ They could ask more. For example, they might restrict activities of legislators' partners.²⁴⁰ Might these restrictions dissuade some lawyers from "serving" in these capacities? One would hope so. At least we should hope that these restrictions will dissuade the lawyer who enters public service to advance her own goals and those of her clients. That would be a positive effect. The lawyer least likely to be dissuaded is the one who can, in fact, put client interests aside and consider questions in a broader way. Such a lawyer would not be dissuaded by well-drafted restrictions on client-favoring activity. Nor would such restrictions dissuade the lawyer who understands and accepts the need to put the natural tendencies of client-favoring conduct aside.

236. Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1292-93 (1976).

237. See, e.g., FLA. STAT. ANN. § 112.313 (West 2008); HAW. REV. STAT. ANN. §§ 7-84-11 to -18 (West 2008); MISS. CODE ANN. § 25-4-105 (West 2003); N.J. STAT. ANN. § 52:13D-17 (West 2001).

238. Matter of Advisory Comm. on Prof'l Ethics Opinion 621, 608 A.2d 880, 886 (N.J. 1992).

239. See *supra* note 237.

240. *Id.*

CONCLUSION

Lawyers have always participated in great numbers as lawmakers. Conventional wisdom says they have a comparative advantage in this role and no doubt some lawyer attributes advantage lawyers in the role of public official. But lawyers have one inherent disadvantage in this role: they are lawyers. By training, practice, and temperament, they are oriented toward representing a client's interests despite the contrary interests of the public.

This disadvantage has manifested itself in dramatic ways, but more often is likely to be a subtle influence on the perspective of the lawyer-lawmaker. It should be guarded against to the limited extent possible. Lawyers may be better suited to other citizen lawyer roles. Understanding this limitation may allow a better allocation of public service minded lawyers' energy and effort.