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THE PROFESSIONALISM PROBLEM

DEBORAH L. RHODE*

"[The bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor. . . . For the past thirty years it has become increasingly contaminated with the spirit of commerce, which looks primarily to the financial value . . . of every undertaking."¹

Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar. *The American Lawyer* issued its complaint in 1895, but

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1. Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in *THE LAW FIRM AND THE PUBLIC GOOD* 19, 38-39 (Robert A. Katzman ed., 1995) (quoting *The Commercializing of the Profession*, *AM. LAW.*, Mar. 1895, at 84, 84).

such sentiments are in ready supply a century earlier or later. If ever there was a true fall from grace, then it must have occurred quite early in the profession's history. Over two thousand years ago, Seneca observed attorneys acting as accessories to injustice, "smothered by their prosperity," and Plato condemned lawyers' "small and unrighteous" souls.²

Given this historical context, it is tempting to discount the recent chorus of complaints about the profession as variations on familiar themes. Lawyers' ethics never have lacked for critics, and the bar's own rhetoric repeatedly has featured wistful references to some hypothesized happier era in which law was less a business than a calling. Although the novelty of recent critiques should not be overstated, their significance should not be undervalued. Recent commentary consistently presents the profession as "lost," "betrayed," in "crisis," and in "decline."³ Discontent with legal practice is increasingly pervasive and is driven by structural factors that are widening the distance between professional ideals and professional work.

Some of those factors are specific to the market for legal services, such as the bar's increasing size and competitiveness. Other causes reflect more general cultural trends that are reinforcing commercial priorities and eroding individuals' sense of social obligation. Yet what is most disheartening about the profession's current plight is the gap between the bar's and the public's perception of the problem and the failure of both groups to confront its underlying causes.

Although lawyers and nonlawyers share some concerns, their central preoccupations and preferred solutions are vastly different. In one respect, however, they are quite similar. Neither the profession nor the public has addressed its own ambivalence

2. 2 PLATO, THE DIALOGUES OF PLATO 175 (B. Jowett trans., Random House 1937); *Online Exchange*, LEGAL TIMES, Apr. 1, 1996, at S39.

3. ANTHONY T. KRONMAN, THE LOST LAWYER (1993); SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION (1994); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1257 (1995); Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y. L.J., Nov. 19, 1993, at 2, 2; *Identity Crisis*, A.B.A. J., Dec. 1994, at 74, 74; see also Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1 (reporting that over 80% of surveyed partners at large firms believe the profession has changed for the worse).

over competing values. Nor has either group been willing to make the tradeoffs and invest the resources that effective reform strategies require. The result has been symbolic crusades and political paralysis on problems far too important to be left unremedied.

I. THE PROBLEM FROM THE PUBLIC'S PERSPECTIVE

What the public doesn't like about lawyers could fill volumes. Although the order of grievances changes somewhat over time, certain consistent themes emerge. Recent survey data, together with the critiques and caricatures that most often surface in popular culture, raise two primary concerns. The first involves character defects associated with lawyers. The second involves problems in the advocate's role and the adversary system for which lawyers are held partly responsible.

Of all the traits that the public dislikes in attorneys, greed is at the top of the pecking order. "A lawyer is a learned gentleman who rescues your estate from your enemies and keeps it himself."⁴ It is an old quip, but the perception remains widely shared. According to national surveys, including one by the American Bar Association (ABA), about three-fifths of Americans described attorneys as greedy, and over one-half thought they charged excessive fees.⁵ Other polls find even broader agreement that lawyers handle many matters that could be resolved as effectively and less expensively by nonlawyers.⁶

The public's other principal complaint about attorneys' character involves integrity. Only one-fifth of the ABA survey participants felt that the phrase "honest and ethical" described law-

4. Henry Broughman (1778-1868), quoted in *THE WIT OF WESTMINSTER* 33 (Adam Sykes & Iain Sproat eds., 1967).

5. See Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 63; see also Robin Pogrebin, *The Observer Poll: Lawyers Overpaid, Not So Honest*, N.Y. OBSERVER, Mar. 18, 1991, at 1 (finding that 59% of surveyed New Yorkers believe lawyers are overpaid); Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1, 22 (finding that 31% of a national sample believe lawyers are too interested in money).

6. See, e.g., BARBARA A. CURRAN, AMERICAN BAR ASS'N & AMERICAN BAR FOUND., *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 244 (1977).

yers.⁷ In other recent studies, close to one-third of Americans believed that lawyers were less honest than most people, and only about a quarter believed lawyers were very honest or mostly honest.⁸ These ratings put lawyers substantially below members of other occupations, such as doctors, police officers, and educators.⁹ Most groups that consistently rank worse than attorneys are not attractive bedfellows: politicians and sellers of real estate, insurance, and used cars.¹⁰ Concerns about integrity are equally apparent in antilawyer humor, which features countless variations on the same theme: "How do you know when a lawyer is lying? When his lips are moving."¹¹

Underlying such quips are more serious subtexts. Humor serves as a socially acceptable way of expressing hostility; the increasing frequency and virulence of antilawyer jokes is some testament to public disaffection. Contemporary American attorneys are especially frequent targets of popular abuse, partly because they seem so impervious to other forms of criticism. Common complaints include arrogance, incivility, and insensitivity or inattention to client concerns. Less than one-fifth of Americans in the ABA study felt that the terms "caring and compassionate" described lawyers.¹² Unsurprisingly, reports of callous or condescending treatment are especially common among disempowered groups, such as women in divorce cases or indigent defendants.¹³ Perceptions of arrogance, however, are also frequent

7. See Hengstler, *supra* note 5, at 62.

8. See Samborn, *supra* note 5, at 20; Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 52.

9. See Leslie McAneny & David W. Moore, *Annual Honesty and Ethics Poll: Congress and Media Sink in Public Esteem*, GALLUP POLL MONTHLY, Oct. 1994, at 2, 2; see also David S. Casey Jr., *What Has Become of Lawyers?*, S.F. DAILY J., Oct. 23, 1997, at 4 (reporting Mervin Field poll in which the public ranked lawyers second to last among professions that inspired confidence).

10. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 325 n.2 (1996) (collecting surveys); Samborn, *supra* note 5, at 20; Budiansky et al., *supra* note 8, at 52.

11. See, e.g., STAN ROSS, *THE JOKE'S ON . . . LAWYERS* (1996); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 725 n.7 (1994).

12. Hengstler, *supra* note 5, at 62.

13. See, e.g., KAREN WINNER, *DIVORCED FROM JUSTICE* 3-14, 26-54 (1996); W.L.F. Felstiner, *Professional Inattention: Origins and Consequences*, in *THE HUMAN FACE*

even among the most influential consumers of legal services, including in-house counsel who hire outside law firms.¹⁴ Insensitivity and neglect are among the main sources of complaints to bar disciplinary authorities.¹⁵ Given these perceptions, it should come as no surprise that ninety to ninety-five percent of surveyed parents would not want their children to become lawyers.¹⁶

Part of what the public dislikes about the legal profession is hard to disentangle from what it dislikes about the law, the legal system, and the lawyer's role within that system. Because the bar exercises so much power over all of these matters, it is also held accountable for systemic failures.

One cluster of complaints focuses on attorneys' amoral advocacy—the willingness to defend causes and clients without regard to their ethical merits. Many individuals share Lord Macaulay's complaint that a lawyer will “do for [money] what . . . he would think it wicked and infamous to do for an empire.”¹⁷ Two-thirds of surveyed Americans believe that attorneys are no longer “seeker[s] of justice,” and one-fourth believe that they inappropriately “manipulate the legal system without regard for right or wrong.”¹⁸ Some individuals are particularly critical of defense counsels' role in freeing the guilty.¹⁹ Others fault lawyers for representing wealthy corporations at the expense of the public.²⁰

OF LAW 128 (Keith Hawkins ed., 1997); Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979); see also Roy B. Fleming, *Client Games: Defense Attorney Perspectives on Their Relations With Criminal Clients*, 1986 AM. B. FOUND. RES. J. 253, 254 (discussing indigent criminal defendants' misgivings about court-appointed attorneys).

14. See, e.g., Paul M. Barret, *New York Firms Called Pricey, Arrogant*, WALL ST. J., Nov. 11, 1996, at B8.

15. Over 80% of the complaints filed with bar disciplinary agencies involve “client relations” rather than a breach of the Rules of Professional Conduct. See Janet Stidman Eveleth, *Perception is Reality*, MD. B.J., July-Aug. 1994, at 7, 8; see also *When You Need a Lawyer*, CONSUMER REP., Feb. 1996, at 34 (reporting that one-fifth of surveyed clients claimed their lawyer did not return phone calls promptly or paid too little attention to the case).

16. See Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 87 (1994); Samborn, *supra* note 5, at 20.

17. 6 THE WORKS OF LORD MACAULAY 163 (Lady Trevelyan ed., 1900).

18. Hengstler, *supra* note 5, at 62; Samborn, *supra* note 5, at 22.

19. See Samborn, *supra* note 5, at 20.

20. See *id.* at 22.

Attorneys also are blamed for perpetuating and profiting from an unnecessarily cumbersome system. Most Americans believe that the nation has too much law and too little justice.²¹ Over the last half century, legal regulation has become an increasing presence throughout personal and public life, and it is not always a welcome guest. Everyone hears tales of disputes that are too big for courts, disputes that are too small, and disputes that should never have been disputes at all. At one end of the spectrum are the legal stegosauri that can amble on for decades, leaving in their paths endless paper trails and exorbitant legal bills.²² At the other extreme are the trivial pursuits: football fans suing referees, suitors suing dates, or beauty contestants suing each other.²³ About one-half of surveyed individuals blame lawyers for filing too many lawsuits,²⁴ and almost three-quarters believe that the United States has too many lawyers.²⁵ The most meanspirited antilawyer humor endlessly replays these themes: "Why does New Jersey have so many toxic waste dumps and California have so many lawyers? New Jersey got first choice."²⁶

From the public's vantage, problems in the legal system frequently are of the profession's own making. Members of the bar, working as lobbyists, legislators, and judges, have created a structure that seems far too complex, expensive, and open to abuse. As newspaper columnist Art Buchwald once observed, "it isn't the bad lawyers who are screwing up the justice system in

21. See, e.g., Laurence H. Tribe, *Too Much Law, Too Little Justice: An Argument for Delegating America*, ATLANTIC MONTHLY, July 1979, at 25.

22. See, e.g., JETHRO K. LIEBERMANN, CRISIS AT THE BAR 164-65 (1978) (reporting Bruce Bromley's discussion of a fourteen-year antitrust case involving a 50,000 page record but no real dispute about the facts); Jack W. Snyder, *Silicone Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts Be Reconciled?*, 18 J. LEGAL MED. 133, 212 (1997) (discussing toxic tort cases).

23. See *Cherna v. Cherna*, 427 So. 2d 395, 396 n.2 (Fla. Dist. Ct. App. 1983) (discussing Redskins and suitor cases); *Bridges v. Georgiana*, 511 A.2d 1255 (N.J. Super. Ct. Ch. Div. 1985) (adjudicating beauty contestant's claim); MARY ANN GLENDON, A NATION UNDER LAWYERS 257-58 (1994) (discussing suitor case).

24. See Hengstler, *supra* note 5, at 63.

25. See Tony Mauro, *Lawyers' Top Topic: Public's Perception*, USA TODAY, Aug. 10, 1993, at 3a, available in 1993 WL 6716078.

26. See ROSS, *supra* note 11, at 64-94; Lasson, *supra* note 11, at 723-25; Budiansky et al., *supra* note 8, at 50.

this country—it's the good lawyers. . . . If you have two competent lawyers on opposite sides, a trial that should take three days could easily last six months."²⁷ Because legal services are allocated almost entirely through market mechanisms, many Americans seem to end up with all—and only—the justice that money can buy. The result is much as a *New Yorker* cartoon portrays it, in which a well-heeled lawyer informs his client, "You have a pretty good case, Mr. Pitkin. How much justice can you afford?"²⁸

II. PROBLEMS WITH THE PROBLEM AS THE PUBLIC SEES IT

For many lawyers, these public perceptions have been a source of longstanding frustration. When asked to identify the most important problems facing the profession, lawyers consistently have put public image and credibility at the top of the list.²⁹ Yet when confronted with specific complaints, bar leaders typically respond with irritation or resignation. From their vantage, popular perceptions seem unfair and uninformed.³⁰ Although the bar's conventional reaction is not without some basis, neither is the public's list of grievances. Lawyers have good insights about what is wrong with everyone else's view of lawyering, but they appear far less sensitive to what is often right. On the infrequent occasions that the organized bar seriously has considered popular complaints, the results rarely have been impressive. Attention has focused more on refurbishing lawyers' tarnished image than on addressing the problems that create it.³¹

The profession's most common response to popular criticism is to deny its validity. Over half of some 2800 surveyed lawyers, judges, and law students believe that the public's negative perception of the profession is "due to its ignorance . . . and is fundamentally unjustified."³² As one recent ABA president put it,

27. FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, AMERICAN BAR FOUND., *THE MAKING OF A PUBLIC PROFESSION* 3 (1981) (quoting humorist Art Buchwald).

28. *THE NEW YORKER BOOK OF LAWYER CARTOONS* 73 (1994).

29. See *Law Poll: Lawyers Concerned About Their Image and Credibility*, 69 A.B.A. J. 440, 440 (1983); see also *infra* text accompanying notes 45-47 (discussing the ABA's and California Trial Lawyers Association's public relations campaigns).

30. See *infra* notes 32-33 and accompanying text.

31. See *infra* notes 45-47 and accompanying text.

32. Wes Hanson, *Reflections on Lawyers: New Polls Hold a Mirror to the Profes-*

"[t]he average American doesn't understand what all the issues are."³³

Blame for this sorry state is distributed widely, but the media receives a generous share. According to bar leaders, portraits of vicious and venal lawyering are a Hollywood staple, and journalistic coverage is similarly skewed. The press reportedly enjoy featuring lawyers' sensational and egregious conduct. The fraud and felonies of a few "bad apples" get front page coverage, while lawyers' "countless other acts of quiet heroism . . . go unnoticed and unpublicized."³⁴

The problem, as bar leaders see it, is compounded by lawyers who are "their own worst salesmen . . . [who] do not do a good job blowing their own trumpet about their selfless activities."³⁵ Many practitioners provide a "tremendous" amount of pro bono assistance or work "incredible hours" for reduced fees: at times, a lawyer's hourly rate "works out to less than the minimum wage."³⁶ A constant refrain among the bar is that "no other profession . . . is as charitable with its time and money."³⁷ No evidence is cited.

Nor are such responses likely to convince the audiences most in need of convincing. Many portrayals by bar leaders are no less exaggerated than the media coverage they denounce. If, for example, long hours, low pay, and charitable contributions are the standards for comparison, then the legal profession is unlikely to win a selflessness sweepstakes. Ministers, social workers, and

sion, *ETHICS: EASIER SAID THAN DONE*, 1993 (23/24), at 34, 35.

33. Hank Grezlak, *New ABA President Seeks Overhaul of Justice System*, *LEGAL INTELLIGENCER*, Aug. 13, 1993, at 1, 8 (quoting ABA President R. William Ide III); see also David M. Balabanian, *Our Unpopular Profession*, *CAL. LAW.*, Apr., 1997, at 96, 96 (noting that "[t]here will always be people—at times even a majority—who do not want justice, safety, or freedom for others").

34. Haig, *supra* note 3, at 2.

35. Bill Rankin, *Nation's Lawyers Seeking to Polish Tarnished Image*, *ATLANTA J. & CONST.*, Aug. 9, 1993, at 4, available in 1993 WL 3378489 (quoting criminal defense attorney Ed Garland); see Chris Klein, *Poll: Lawyers Not Liked*, *NAT'L L.J.*, Aug. 25, 1997, at A6 (quoting Chicago partner Lawrence Gerber's assertion that "Lawyers and law firms do a tremendous amount of good," such as providing pro bono assistance, and "we're just not public about it").

36. Haig, *supra* note 3, at 2; Klein, *supra* note 35, at A6 (quoting Lawrence Gerber).

37. Haig, *supra* note 3, at 2.

other professions have a better shot. Although most attorneys' incomes may not measure up to popular culture's glamorized perception, few practitioners frequently toil for minimum wages. Law has become America's highest paid profession.³⁸

It is also unclear that the public's perceptions would shift if information about the bar's charitable works were trumpeted from more rooftops. As a percentage of income, lawyers' pro bono contributions are quite modest. In New York, where bar leaders perceive "countless" acts of "quiet heroism,"³⁹ about half of practicing lawyers provide no pro bono assistance to the poor.⁴⁰ The average for the other half is about forty-four hours per year.⁴¹ Although national data are limited, New York lawyers do not appear exceptional. In Florida, which is the only state that requires members of the bar to report pro bono assistance, the average contribution is under fourteen hours per year.⁴² According to the best estimates available, the profession as a whole provides less than half an hour per week of assistance to the poor.⁴³

It is also doubtful that lawyers' excessive modesty is at the root of their public image problems. The legal profession is not known for its reticence in self-promotion. Lawyers spend well over \$500 million annually in advertising their own services, and various bar organizations devote healthy budgets to public relations campaigns.⁴⁴ In the mid-1990s, the ABA developed a

38. See Margaret Cronin Fisk, *Overall, Lawyers' Pay Tops Other Professions*, NAT'L L.J., July 10, 1995, at C2.

39. Haig, *supra* note 3, at 2.

40. See Gary Spencer, *Lawyers' Pro Bono Participation Still Lags*, N.Y. L.J., Apr. 19, 1994, at 1, 1.

41. See *id.* at 4.

42. See *Annual Pro Bono Reporting: A Look at Texas and Florida*, 59 TEX. B.J. 1230, 1230 (1994); Mark Hansen, *Reporting Pro Bono*, A.B.A. J., Oct. 1993, at 16, 16.

43. Calculations are based on the surveys cited *supra* in notes 40-42. In the 100 firms with the largest gross profits, the average contribution per lawyer was 40 hours per year. See Tom Schoenberg, *The Ups and Downs of Pro Bono*, LEGAL TIMES, June 24, 1996, at S37; see also Richard L. Abel, *Revisioning Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW* 1, 14 (Richard L. Abel & Philip S.C. Lewis eds., 1995) (noting that lawyers' charitable activities are "quantitatively insignificant, whether measured in long hours or cash contributions to legal aid").

44. See Jun Shen, *Second Thoughts on Advertising*, RECORDER (San Francisco), Oct. 6, 1997, at 4, 9 (noting that in 1996 lawyers spent over \$750 million on television commercials and advertising in the Yellow Pages).

three million dollar "communications" campaign to increase Americans' understanding of the role of lawyers and the justice system.⁴⁵ So too, the California Trial Lawyers Association (the "Association"), in an effort to restore "public confidence" and counter "unfavorable media attention," worked out a rebate arrangement with a bank credit card.⁴⁶ Under this arrangement, a percentage of every participating California bar member's charges and fees would support the Association's public relations program.⁴⁷

The premise of such efforts—that popular ignorance and a bad press are the central problems—is highly dubious. Indeed, the bar's own commissioned research suggests the contrary. Most Americans have had direct contact with attorneys.⁴⁸ Three-quarters of the public have retained lawyers, and half deal with them on a "semi-regular basis."⁴⁹ Moreover, the individuals most likely to have negative impressions of attorneys are those with the most knowledge and direct personal contact with lawyers.⁵⁰ Corporate clients are among lawyers' harshest critics.⁵¹ By contrast, those who know relatively little about the legal profession and the legal system, and who get their information primarily from television, have the most favorable impressions.⁵² Such perceptions stand to reason in light of other research indicating that most television portrayals of lawyers are positive.⁵³ Contrary to bar leaders' assumptions, the ratio of fa-

45. See Sandra Torrey, *A Million-Dollar Campaign to Love the Lawyers*, WASH. POST, May 24, 1993, at F7.

46. Letter from Ray Bourkis, Vice President, and J. Gay Gwilliam, President, California Trial Lawyers Ass'n, to Members of the California Bar (undated) (on file with author).

47. See *id.*

48. See Hengstler, *supra* note 5, at 61.

49. *Id.*

50. See *id.* at 62.

51. See COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASS'N, "... IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), reprinted in 112 F.R.D. 243, 254 (1987) ("[O]nly 67% of corporate users of legal services rated 'all or most' lawyers as deserving to be called 'professionals.'").

52. See Hengstler, *supra* note 5, at 61-62.

53. See Thom Weidlich, *A Cynical Age Sees Few Heroes in Its Lawyers*, NAT'L L.J., Nov. 19, 1993, at S26.

avorable to unfavorable televised portraits of attorneys ranges between six-to-one and ten-to-one during the periods surveyed.⁵⁴ Although lawyers probably are right that newspaper coverage is skewed in the opposite direction, much of the adverse press coverage is consistent with people's personal experience. The problem, in short, is more with the reality of lawyering than with its image.

Yet finding solutions is more difficult than the public typically acknowledges. A large part of popular dislike of lawyers stems from aspects of the legal system that are not primarily the fault of lawyers or that are not readily changed. Courts are overburdened and underfunded,⁵⁵ and some discontent is inherent in even the best system of dispute resolution. The contexts in which people encounter the profession are often unpleasant: divorce, bankruptcies, personal injuries, or contractual disputes. This unpleasantness inevitably affects perceptions of lawyers who are profiting from others' miseries.⁵⁶ Attorneys also deliver unwelcome messages about the law, so they readily become scapegoats when the justice system fails to deliver justice as participants perceive it.

America's adversarial system compounds popular frustration. Litigation is rarely a win-win enterprise, and losers are apt to put some of the blame on lawyers. The targets of resentment are not, however, only—or even primarily—the parties' own attorneys. Nearly two-thirds of surveyed individuals are satisfied with *their* lawyers.⁵⁷ The public's major grievances involve perceived abuses by other peoples' lawyers and a system that fails to prevent them. As one columnist notes, "[e]veryone would hate doctors too, if everytime you went in the hospital your doctor was trying to take your appendix out, and the other guy's doctor was standing right there trying to put it back in."⁵⁸

It is, however, by no means clear that the public would prefer

54. See *id.*

55. See Don J. DeBenedictis, *Struggling Toward Recovery*, A.B.A. J., Aug. 1994, at 50, 50.

56. See *When You Need a Lawyer*, *supra* note 15, at 34.

57. See Hengstler, *supra* note 5, at 61.

58. Jon Carroll, *He's Not Heavy; He's My Attorney*, S.F. CHRON., May 29, 1995, at E10, available in 1995 WL 5283554 (quoting law student John Hou).

a substantially different structure in which lawyers played a substantially different role. In fact, Americans are ambivalent. Many dislike attorneys for zealously protecting criminal defendants.⁵⁹ But when individuals imagine themselves facing criminal charges, a zealous champion is precisely what they have in mind.⁶⁰ So too, in other legal contexts, much of what people dislike about opposing counsel is what they value in their own. One of the most positive traits that the public associates with lawyers is that their first priority is loyalty to their clients.⁶¹ Yet one of the most negative traits is lawyers' willingness to manipulate the system on behalf of clients without regard to right or wrong.⁶² People hate a hired gun until they need one of their own.

As legal scholar Robert Post notes, this ambivalence reflects deeper cultural contradictions.⁶³ We use law to preserve both individual liberty and social responsibility, and "we use lawyers both to express our longing for a common good, and to express our distaste for collective discipline."⁶⁴ Legal disputes and the profession that choreographs them serve as irritating reminders of the tension between those values.

The public is similarly ambivalent about the tension between money and justice. Americans dislike the fact that lawyers are for sale and that law is accessible only to those who can afford it.⁶⁵ But Americans also dislike efforts to remedy that imbalance. Justice is what we proclaim on courthouse entrances, not in redistributive policies.⁶⁶ Our nation spends far less than other Western industrial societies on government-subsidized legal representation.⁶⁷ Even before massive recent cutbacks in federal legal services programs,⁶⁸ about three-quarters of the legal needs

59. See Samborn, *supra* note 5, at 20.

60. See *id.*

61. See *id.* at 22.

62. See Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 380 (1987).

63. See *id.* at 380-89.

64. *Id.* at 386.

65. See Budiansky et al., *supra* note 8, at 52.

66. See James Podgers, *Chasing the Ideal*, A.B.A. J., Aug. 1994, at 56, 56.

67. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 737 (2d ed. 1995).

68. See Claudia MacLachlan, *Legal Services Fights Back*, NAT'L L.J., July 8, 1996, at A1.

of low income households remained unmet.⁶⁹ As one Denver legal aid attorney has observed, "the only thing less popular than a poor person these days is a poor person with a lawyer."⁷⁰ We lament the inequalities in our justice system but refuse to support policies that would address them. Most Americans find it easier to fault the bar's greed than to acknowledge their own.

Although part of the public's discontent with lawyers reflects misplaced or displaced frustrations, not all its complaints should be so readily dismissed. Many criticisms of professional conduct and regulatory processes have a strong basis in fact. On matters such as excessive fees, unresponsive disciplinary structures, and overbroad protections of the professional monopoly, the public does not appear ambivalent, and its concerns do not seem unwarranted.⁷¹ Even on issues like zealous advocacy, where popular opinion is more divided, the individuals who have the most contact with lawyers and knowledge about their practices are the least satisfied.⁷²

In short, the problem on some important issues of professional regulation is not so much that the public is uninformed or undecided, but rather that it is unorganized and uninvolved. For the vast majority of Americans, such issues are not a priority. Most people's direct contact with lawyers is limited. Routine users are usually organizational clients, who do not bear personally the costs of conduct that they find objectionable.⁷³ Although egregious abuses occasionally galvanize the public into action, nonlawyers seldom have sufficient incentives to organize around questions involving regulation of lawyers.

69. See ROY W. RESSE & CAROLYN A. ELDRED, INSTITUTE FOR SURVEY RESEARCH AT TEMPLE UNIVERSITY, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 21 (1994), reprinted in AMERICAN BAR ASS'N, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 21 (1994).

70. Brian Sullivan et al., *Obiter Dicta: So They Say*, A.B.A. J., Nov. 1995, at 36, 37 (quoting Jonathon Asher, executive director of the Legal Aid Society of Metropolitan Denver).

71. See RHODE & LUBAN, *supra* note 67, at 693-96; Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 694-96 (1994); Darlene Ricker, *Greed, Ignorance and Overbilling*, A.B.A. J., Aug. 1994, at 62, 62-66.

72. See Hengstler, *supra* note 5, at 62; *supra* notes 59-63 and accompanying text.

73. See Hengstler, *supra* note 5, at 61; *supra* note 50 and accompanying text.

By contrast, the legal profession has every incentive to pursue regulatory concerns and to block initiatives that advance public interests at the expense of its own. Such problems are by no means unique to this regulatory context, but they are compounded by the bar's pivotal role in American policymaking. Unless some substantial constituencies within the profession—practitioners, judges, or legislators—share a reform agenda, its prospects are likely to be limited.

Yet the conditions for building such constituencies have seldom been better. Discontent within the profession is pervasive and increasing. And at least part of lawyers' disaffection arises from the same conditions that fuel popular criticism. The challenge lies in redirecting that frustration to serve a constructive agenda and in identifying ways to bridge the gap between professional and public interests.

III. THE PROBLEM FROM THE PROFESSION'S PERSPECTIVE

For the American legal profession, these are the best of times and the worst of times.⁷⁴ Not only is law the nation's highest paying profession, it is still a preferred route to public office and political power. In no other country do lawyers exercise such significant influence over social and economic policy.⁷⁵ And in no other historical era has the legal profession been more diverse and more open to talent irrespective of race, gender, religion, and ethnicity.⁷⁶

Disaffection with legal practice, however, has never been more apparent. A majority of lawyers report that they would choose another career if they had the decision to make over, and three-

74. For a similar diagnosis, see Robert L. Nelson & David M. Trubeck, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES* 1, 9 (Robert L. Nelson et al. eds., 1992).

75. See GLENDON, *supra* note 23, at 283-84.

76. Since the early 1960s, the representation of women in the profession has grown from under 3% to over 20%, and the representation of lawyers of color has increased from about 1% to almost 8%. See COMMISSION ON WOMEN IN THE PROFESSION, AMERICAN BAR ASS'N, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 5 (1995); Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Education Debt*, 70 N.Y.U. L. REV. 829, 860-65 (1995).

quarters would not want their children to become lawyers.⁷⁷ About one-quarter of young attorneys are dissatisfied with their current position, and a slightly greater number are dissatisfied with the practice of law in general.⁷⁸

The symptoms of professional malaise are also reflected in health-related difficulties. An estimated one-third of American attorneys suffer from depression or from alcohol or drug addiction.⁷⁹ Lawyers have about three times the rate of depression and almost twice the rate of substance abuse as other Americans.⁸⁰

Although the primary sources of discontent vary somewhat across different areas of practice and demographic groups, common themes emerge. Lawyers are unhappy with the culture of the profession, the structure of their workplaces, and the performance of the justice system.

At the most general level, many lawyers express concern about the "decline of professionalism." That phrase captures a range of more specific complaints, such as increasing commercialism and competition and decreasing civility and collegiality. The perception of law as a craft and calling is under siege, and the consequence is an eroding sense of public service and cultural authority. About three-quarters of surveyed members of the profession believe that attorneys are more money-conscious, half think they are less civil, and a third report that they are more likely to lie than in earlier eras.⁸¹ Declining public respect also fuels lawyers' rising sense of status anxiety. Less than a fifth of Americans view the legal profession as very prestigious, and that perception is itself a major source of attorneys' discon-

77. See GLENDON, *supra* note 23, at 85; Nancy McCarthy, *Pessimism for the Future*, CAL. B.J., Nov. 1994, at 1, 1.

78. AMERICAN BAR ASS'N, YOUNG LAWYERS DIVISION SURVEY: CAREER SATISFACTION 13 (1995) [hereinafter CAREER SATISFACTION].

79. See *Just One for the Road*, CAL. LAW., July 1993, at 17, 17.

80. See GLENDON, *supra* note 23, at 87; Blane Workie, Note, *Chemical Dependency and the Legal Profession: Should Addiction to Drugs and Alcohol Ward Off Heavy Discipline*, 9 GEO. J. LEGAL ETHICS 1357 (1996); Michael J. Sweeney, *It's About Time: Lawyer Assistance Programs*, COMPLEAT LAW., Spring 1996, at 17; see also Andrew Herrman, *Depressing News for Lawyers*, CHI. SUN-TIMES, Sept. 13, 1991, at 1, available in 1991 WL 8720774 (noting that lawyers top the list of professionals most likely to suffer from major depression).

81. See Hanson, *supra* note 32, at 35.

tent.⁸² This sense of decline colors prominent accounts of professional culture, such as *The Lost Lawyer*, by Yale Law School Dean Anthony Kronman, and *The Betrayed Profession*, by Washington practitioner Sol Linowitz.⁸³ As subsequent discussion suggests, some widespread assumptions about decline are historically questionable, but they nonetheless reflect an important fact about modern professional life.⁸⁴ Practitioners feel adrift. To borrow one bar association's description, it is as if lawyers are "looking for their lost wigs."⁸⁵

That search is bumping up against several recent developments in the market for legal services.⁸⁶ Increases in the number of lawyers have increased the level of professional competition and diminished the force of informal community sanctions. Price consciousness among corporate clients, together with the relaxation of bar restrictions on competitive practices within and across professions, also have intensified economic pressures in private practice. One result has been a strong emphasis on the bottom line, which squeezes the time available for pursuit of other professional values, such as mentoring and public service.

A further consequence of increased competition has been increased instability in lawyer-client relationships and increased constraints on professional independence. Corporate clients today appear more likely to shop for representation on particular matters, rather than to build long-term relationships with firms that supply representation for most needs.⁸⁷ As private practice becomes more competitive, specialized, and transactional, lawyers face intense pressures to satisfy clients' short term desires at the expense of other values. Without a stable relationship of

82. See Klein, *supra* note 35, at A6; *supra* note 29 and accompanying text.

83. KRONMAN, *supra* note 3; LINOWITZ WITH MAYER, *supra* note 3.

84. See *infra* notes 114-21 and accompanying text.

85. Committee on the Profession, Ass'n of the Bar of the City of New York, *Is Professionalism Declining?*, 47 RECORD 129, 131 (1992) (referring to statement of Dean Norman Redlich).

86. For discussion of these forces, see MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991); GLENDON, *supra* note 23, at 76; KRONMAN, *supra* note 3; MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW* 11, 15, 85-105, 151 (1997); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996).

87. See GLENDON, *supra* note 23, at 25; KRONMAN, *supra* note 3, at 276; TROTTER, *supra* note 86, at 85.

trust and confidence, it is risky for counsel to protest unreasonable demands or to deliver an unwelcome message about what legal rules or legal ethics require.⁸⁸

Part of the dishonesty, incivility, and acrimony that lawyers find troubling in current practice seems driven by these profit dynamics. As Judge Richard Posner has pointed out, "[c]ompetitive markets are no fun at all for most sellers."⁸⁹ Law is not an exception, and fun is not the only casualty.

Legal practice has become more competitive within as well as among law firms.⁹⁰ A steady rise in costs, coupled with periodic declines in demand, have led to greater insecurity in private practice. More public information about law firm salaries has intensified financial rivalries and lateral defections.⁹¹ The desire to attract and retain the most productive attorneys has kept compensation levels relatively high, but the profession pays the price in other ways. Partnership means less and is harder to obtain. Fewer associates receive promotions. Unproductive partners are squeezed out. Productive ones are lured away. As working relations become more transient and more strained, fewer lawyers have a stake in investing in their professional culture. These trends are reflected and reinforced by the "eat what you kill" approach to law firm compensation. Especially in large and mid-sized firms, the greatest rewards go to the organizations' "finders," not its "minders" or "grinders."⁹² The partners who attract clients are at the top of the food chain. Lawyers with different priorities—craft, mentoring, public service—lack comparable leverage.

Other forces are further straining the professional culture.

88. See COMMISSION ON THE FUTURE OF THE LEGAL PROFESSION AND THE STATE BAR OF CAL., *THE FUTURE OF THE CALIFORNIA BAR: FINAL REPORT* 50-52 (1995); James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1065 (1994) (reviewing KRONMAN, *supra* note 3).

89. RICHARD A. POSNER, *OVERCOMING LAW* 92 (1995).

90. For discussion of the increased competitiveness described below, see WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 100-11 (1995); GALANTER & PALAY, *supra* note 86; GLENDON, *supra* note 23, at 24-26; KRONMAN, *supra* note 3 at 271-314; TROTTER, *supra* note 86.

91. See GLENDON, *supra* note 23, at 31-32; KRONMAN, *supra* note 3, at 280-81.

92. See Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 118.

New entrants to the profession reflect increasing diversity across race, gender, class, and national origin, but many members of traditionally underrepresented groups do not find a supportive workplace.⁹³ Moreover, lawyers from all backgrounds are encountering greater pressures. As the likelihood of partnership diminishes, the competition among young lawyers intensifies. Incoming associates in large firms are wined and dined, and then worked to death. In smaller firms and solo practice, the rising number of lawyers compounds the difficulties of attracting clients, which heightens economic insecurity. In legal services, public defender, and public interest practice, the overwhelming inadequacy of resources encourages high stress and frequent burnout.⁹⁴

For too many practitioners, "quality of life is a non-issue. What life?"⁹⁵ Billable hour requirements have increased dramatically over the last two decades, and what has not changed are the number of hours in the day. Most lawyers now bill over 200 hours a month, and to charge honestly at that level, they need to work about a sixty-hour week.⁹⁶ In large firms, where hourly demands can be even higher, all work and no play is fast becoming the norm rather than the exception.

What loses out is not just leisure. Lawyers also have fewer opportunities for pro bono service, civic involvement, and experiences that build professional judgment and sustain a professional culture.⁹⁷ The scope for crucial personal relationships is also narrowing. Almost half of American attorneys feel that they do not have enough time for their families.⁹⁸

93. See COMMISSION ON WOMEN IN THE PROFESSION, *supra* note 76, at 5; COMMISSION ON WOMEN IN THE PROFESSION & COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, AMERICAN BAR ASS'N, *THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER: A REPORT OF THE MULTICULTURAL WOMEN'S ATTORNEYS NETWORK* 9, 14-27 (1994).

94. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240-41 (1993).

95. LORRAINE DUSKY, *STILL UNEQUAL* 172 (1996).

96. See *id.* at 171-72; Bogus, *supra* note 86, at 925-26; Nancy D. Holt, *Are Longer Hours Here to Stay?*, A.B.A. J., Feb. 1993, at 62, 64; Benjamin Sells, *Stressed-Out Attorneys*, S.F. DAILY J., May 25, 1994, at 3A.

97. See Bogus, *supra* note 86, at 926.

98. See Sells, *supra* note 96, at 3A. Over half of surveyed partners believe they work too hard. See Klein, *supra* note 3, at A1.

For employed women, who still spend about twice as much time on family responsibilities as employed men, the puritan ethic run amok poses special difficulties.⁹⁹ Excessive hours are the leading cause of professional dissatisfaction among surveyed female practitioners.¹⁰⁰ Recent reports on women's status in law firms describe, in deadening detail, the sweatshop schedules for many full-time attorneys and the glass ceilings for part-time practitioners.¹⁰¹ Female lawyers speak of not seeing their children awake for a week and of leaving their social life on perpetual hold.¹⁰² For some disenchanted associates, the only thing worse than not finding a job is finding one. Those with the greatest family commitments often drift off the partnership track, leaving behind a decision making structure insulated from their concerns.¹⁰³ Such patterns help account for the persistent underrepresentation of women in positions with greatest professional status and reward.¹⁰⁴

The problem in some of these settings is not only the quantity of work but also the quality. Intellectual challenge is the main reason most attorneys choose law as a career, and, for a substantial minority, it falls well short of expectations.¹⁰⁵ "Doing

99. See DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 6, 149-53 (1997).

100. See AMERICAN BAR ASS'N, *THE REPORT OF AT THE BREAKING POINT: THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES* 3, 9-11 (1991) [hereinafter *BREAKING POINT*]; Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 387-88, 391-99, 411 (1995); *Women in the Law Survey: Analyzing Job Dissatisfaction*, *CAL. LAW.*, Jan. 1990, at 84, 84-85 [hereinafter *Women in the Law Survey*]. See generally HARVARD WOMEN'S LAW ASS'N, *PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS* (Suzanne Nossel & Lisa Westfall eds., 1995) (reporting survey findings).

101. See Epstein et al., *supra* note 100, at 386, 406-07; *Women in the Law Survey*, *supra* note 100, at 84-85.

102. See HARVARD WOMEN'S LAW ASS'N, *supra* note 100, *passim*; Epstein et al., *supra* note 100, at 390-95.

103. See DUSKY, *supra* note 95, at 193-207; Epstein et al., *supra* note 100, at 393-95.

104. Women constitute over 40% of law students, law firm associates, and in-house counsel lawyers, but only 13% of law firm partners and 17% of heads of legal departments. See COMMISSION ON WOMEN IN THE PROFESSION, *supra* note 76, at 5-13; Susan Saltonstall Duncan, *What Women Need to Make it to the Top*, *AM. LAW.*, Jan.-Feb. 1996, at 9.

105. See YOUNG LAWYERS DIV., AMERICAN BAR ASS'N, *THE STATE OF THE LEGAL PROFESSION 1990* 55-61 (1991).

litigation" in the style to which many practitioners have become accustomed means endless cycles of scutwork. As Professor Stephen Gillers has noted, too many lawyers find too much of their practice "nasty, narrow[,] . . . relentlessly repetitive, and strangely unconnected to a . . . dimly recollected purpose in choosing law."¹⁰⁶

This lack of larger purpose accounts for the greatest gap between expectations and experience among American lawyers. In the ABA's mid-1990s survey of career satisfaction, less than a fifth of surveyed attorneys felt that legal practice had "very well" lived up to their expectations in contributing to the social good.¹⁰⁷ A quarter felt that law had "not at all" satisfied this aspiration.¹⁰⁸

Lawyers' explanations for that failure partly overlap the public's explanations. According to both groups, much of the problem involves dishonest and uncivil opposing counsel and an unduly expensive and unwieldy justice system. Lawyers also blame biased and incompetent judges, greedy and ungrateful clients, and norms of professional responsibility that are undemanding and underenforced.¹⁰⁹ A substantial number of practitioners are unhappy with bar disciplinary structures and with the misconduct and hucksterism that they appear powerless to prevent.¹¹⁰

All of these trends have left many lawyers disaffected or disengaged. As Professor Bruce Ackerman has noted, although today's practitioners will spend most of their waking hours at work,

they will save their ultimate concerns for something else: family, friends, the bassoon, some little cottage in the Maine woods.

106. Stephen Gillers, *Great Expectations: Conceptions of Lawyers at the Angle of Entry*, 33 J. LEGAL EDUC. 662, 669 (1983).

107. See CAREER SATISFACTION, *supra* note 78, at 11.

108. See *id.*

109. See DEBORAH L. ARRON, RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION 25 (1989); BACHMAN, *supra* note 90, at 112-24; Bogus, *supra* note 86, at 913; Hengstler, *supra* note 5, at 62-64; Marcia M. McBrien, FAX Poll: *Unhappy Lawyers Cite Hard Work, Few Rewards*, MICH. LAW. WKLY., Dec. 26, 1994, at 1, 32.

110. See McCarthy, *supra* note 77, at 6. Fifty-four percent of surveyed California lawyers believe lawyer advertising is contributing to a decline in professionalism, and only 20% believe the bar's disciplinary system does a good job of regulating unethical behavior. See *id.*

Even if successful, this kind of life will have no unity to it. There will be great moments, hopefully; but the whole will be less than the sum of its parts. At the center . . . there will be a vast professional hole—what *was* it that I spent most of my waking hours worrying about?¹¹¹

Many lawyers are now asking that question. And many are looking for new answers.

IV. PROBLEMS WITH THE PROBLEM AS THE PROFESSION SEES IT

"No social role encourages such ambitious moral aspirations as the lawyers'," observes legal ethics expert William Simon.¹¹² "And no social role so consistently disappoints the aspirations it encourages."¹¹³ Yet the persistence of this disappointment is alternatively overlooked and overstated in professionalism debates.

Many discussions proceed with no historical memory, or one that is highly selective. In these accounts, the past functions as a mythic ideal: Commentators invoke what Marc Galanter has termed the "golden age of legal nostalgia."¹¹⁴ Here, lawyer-statesmen ruled, if not the earth, at least the profession. Then came the Fall, and our own Dark Age of crass commercialism, uncivil tactics, and amoral advocacy.¹¹⁵

When exactly this transformation took place remains unclear, because few commentators are interested in historical precision. Those who are interested cast doubt on conventional assumptions. For example, although commentators generally paint legal practice at the turn of the century in rosy hues, Professor Mary Ann Glendon identifies much to dislike about what then passed for professionalism.¹¹⁶ Some of the bar's best and brightest made their reputations "using every tactic in the book (and

111. Bruce A. Ackerman, *Commencement Remarks*, YALE L. REP., Spring/Summer 1982, at 6, 6.

112. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (forthcoming Apr. 1998) (manuscript at 1, on file with author).

113. *Id.*

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

115. *See id.* at 552-58.

116. *See* GLENDON, *supra* note 23, at 57.

many that were not) to help clients bust unions, consolidate monopolies, . . . and obtain favorable treatment from [corrupt] judges."¹¹⁷

In fact, virtually every era that modern commentators applaud attracted its own share of critics with concerns often paralleling those of today. In a 1905 address to the Harvard Ethical Society, Supreme Court Justice Louis Brandeis warned that lawyers were losing public respect because they were also losing their commitment to public service and their moral independence from clients.¹¹⁸ Several decades later, Supreme Court Justice Harlan Fiske Stone similarly worried that the economic pressures of practice had transformed the profession into an "obsequious servant of business, . . . tainted . . . with the morals and manners of the market place in its most anti-social manifestations."¹¹⁹ "More and more," Stone noted, "the amount of [a lawyer's] income is the measure of professional success."¹²⁰ Even sweatshop hours, which are usually taken as a distinctively corrosive feature of contemporary practice, have long provoked concern. In 1928, Arthur Train published a novel featuring a Wall Street firm that "never sleep[s]," with partners who "come early, stay late, and die young."¹²¹

Of course, some current problems are more acute. Although commercialism and long hours are scarcely novel concerns, their meanings have changed, and not for the better. However, on many issues of professionalism, such as lawyers' public service, honesty, greed, or capacity for judgment, we lack information for accurate historical comparisons.

Undaunted by the absence of evidence, recent bar commentary presents impressionistic assertions as self-evident truths. "[T]he spirit of public service is not what it once was," announces a

117. *Id.*

118. See David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717-18 (1988).

119. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

120. *Id.* at 6.

121. MAXWELL BLOOMFIELD, *LAW AND LAWYERS IN AMERICAN POPULAR CULTURE* 47-48 (1980) (quoting ARTHUR TRAIN, *AMBITION* 70-72 (1928)).

New York Committee on the Profession.¹²² But we have no adequate records of what it used to be. Nor can we be sure whether many other commonly cited problems are getting worse or just more visible in a world with more lawyers and more publicity surrounding their conduct.¹²³

Moreover, on at least some measures of professionalism, much is getting better. Increased competition also has encouraged increased efficiency and responsiveness to client concerns.¹²⁴ The result for many consumers has been higher quality services at lower prices.¹²⁵

So too, the bar's self-consciousness about issues of professional responsibility is itself a sign of progress. So is the attention these matters now receive in law schools. When I entered the profession some two decades ago, legal ethics was a recent, unwelcome, and scarcely visible intruder on the educational landscape. I took no course in professional responsibility, encountered no bar exam questions on the subject, and found only passing references in the legal literature. Much has changed over the last twenty years, and the profession is now at least grappling with problems that it long failed even to acknowledge as problems.

The same is true of other issues involving professional conduct. Race and gender bias are cases in point. Washington practitioner Sol Linowitz, in his recent account of the *Betrayed Profession*, recalls that his law school class in the 1950s had only two women.¹²⁶ Neither he, nor most of his male classmates, questioned the skewed ratio at the time, although they did feel somewhat uncomfortable when their two female colleagues were around. As Linowitz now acknowledges with rueful candor, "[i]t never occurred to us to wonder whether *they* felt uncomfortable."¹²⁷ In today's climate, much progress remains to be made, but at least

122. Committee on the Profession, *supra* note 85, at 139.

123. See Galanter, *supra* note 114, at 558-59.

124. See LINOWITZ WITH MAYER, *supra* note 3, at 190-94; Amy Stevens, *Law Firm Fat Threatened by a Lean Network*, WALL ST. J., July 8, 1994, at B1; Peter D. Zeughauser, *Using Alternative Arrangements to Improve Client Relationships*, *Law Firm Profitability and Results*, LAW PRACT. MGMT., Apr. 1997, at 22, 22.

125. See Zeughauser, *supra* note 124, at 22.

126. See LINOWITZ WITH MAYER, *supra* note 3, at 6.

127. *Id.*

such questions are on the agenda. Gender, race, and sexual orientation bias persist, but they are attracting increased initiatives from a wide spectrum of bar associations, judicial commissions, and organizations employing lawyers.¹²⁸

We have moved in similar directions on other issues, particularly access to legal services. Although, as earlier discussion indicated,¹²⁹ lawyers' average pro bono contributions to the poor leave much to be desired, they are increasing substantially.¹³⁰ Until recently, little pro bono assistance went to systematically underrepresented interests.¹³¹ The vast majority of beneficiaries were family, friends, and organizations serving primarily middle and upper-income groups—hospitals, museums, Boy Scouts, Jaycees, and so forth.¹³² No law schools required students to engage in pro bono activity, and few had voluntary placement programs encouraging such involvement.¹³³ By contrast, today's profession is far more likely to engage in poverty-related pro bono work.

It is also not self evident that the role of lawyer-statesmen is eroding. The legal profession remains our nation's primary source of governmental and public interest leaders.¹³⁴ Lawyers have been at the forefront of all the major social movements of the last half century. In short, we have little evidence for the common view, summarized by former Chief Justice Warren

128. See, e.g., Marjorie E. Gross, *Updated Rules on Judicial Conduct*, N.Y. L.J., May 14, 1996, at 1; Michael A. Riccardi, *Anti-Bias Principles Proposed to State Bar*, LEGAL INTELLIGENCER, Mar. 15, 1996, at 1; Susan Skiles, *Panel to Prod Firms on Minority Hiring*, CHI. DAILY L. BULL., July 14, 1992, at 1; sources cited *supra* notes 93 and 100.

129. See *supra* notes 39-43 and accompanying text.

130. See, e.g., William J. Dean, *Law Firm Activities*, N.Y. L.J., July 9, 1997, at 3; Esther F. Lardent, *Pro Bono Wave Hits More Cities*, NAT'L L.J., Mar. 10, 1997, at A23; Patty Reinert, *Pro Bono Work Increases, but Participation Is Still Low*, DAILY REC. (Baltimore), Apr. 2, 1994, at 1, available in 1994 WL 3166067; Gary Spencer, *Total Lawyers Volunteering Flat but Hours Devoted to Pro Bono Increase*, N.Y. L.J., Oct. 22, 1992, at 1.

131. See Joel F. Handler et al., *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388, 1390-91 (1975).

132. See sources cited in Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 699 (1981).

133. See LINOWITZ WITH MAYER, *supra* note 3, at 128-32.

134. See KRONMAN, *supra* note 3, at 1 (noting that lawyers "continue to dominate our public life, at all levels of government, exactly as before").

Burger, that professionalism is in a "steady decline,"¹³⁵ or has reached a crisis of "epidemic proportions."¹³⁶ A significant gap has always existed between professional ideals and professional practice, and in many respects, the present is not demonstrably worse than the past.

It does not, however, follow that the current sense of disquiet is inappropriate or unimportant. Many commentators' ready dismissal of the "professionalism problem" is as troubling as their exaggeration. Now that the professionalism campaign has a national office, journal, and logo, critics wonder whether a motto and mascot can be far behind.¹³⁷ Yet such debunking can often reinforce cynicism or resignation.¹³⁸ Indeed, the bar as a whole seems deeply pessimistic and uncharacteristically passive in the face of its own problems. About two-thirds of surveyed attorneys predict that collegiality and civility will continue to decline, and almost three-quarters think that the practice of law will grow more stressful.¹³⁹ Yet few seem to believe that these trends are within their power to change.

In commenting on that fact, lawyer and psychotherapist Benjamin Sells observed that:

[A] majority of lawyers apparently have found ways to displace their responsibility for their own profession. . . . Many lawyers seem never to have even entertained the idea that they could actually do something about how law is practiced. A more typical approach seems to be for lawyers to. . . . become focused primarily on their self interests . . . and live their work lives with a kind of up-and-out fatalism.¹⁴⁰

135. Warren E. Burger, *Attorney, Cross-Examine Thyself*, L.A. DAILY J., July 28, 1988, at 4.

136. Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949 (1995).

137. See Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as Moral Argument*, 26 GONZ. L. REV. 393, 395 (1990/91).

138. See GLENDON, *supra* note 23, at 82 (criticizing the "scholarly orgy of debunking" lawyers for not living up to their professed ideals).

139. See McCarthy, *supra* note 77, at 1.

140. Benjamin Sells, *Lawyers Aren't as Trapped as They Think*, S.F. DAILY J., Sept. 12, 1994, at 5.

The central problem facing the American legal profession is its own unwillingness to come to terms with what the problems are. At issue are competing values and concerns. Yet bar commentary on professionalism tends to paper over two central conflicts: the tensions between lawyers' economic and noneconomic interests and the tensions between professional and public interests.

Money is, of course, at the root of both conflicts. Although this fact is too obvious to overlook entirely, it is also a truth too uncomfortable to acknowledge fully. So various strategies of confession and avoidance have become common. For example, the ABA's Commission on Professionalism framed the question: "Has our profession abandoned principle for profit, professionalism for commercialism?"¹⁴¹ "The answer," it turns out, "cannot be a simple yes or no."¹⁴² Like other bar commentators, the Commission believes that the pursuit of profit in an increasingly competitive market has compromised professional values.¹⁴³ The solution is for lawyers to rise above their baser instincts. Such advice--"just say no to greed"--appears to have fallen somewhat short.¹⁴⁴

Although lawyers often acknowledge that greed is part of the problem, they generally manage to place responsibility anywhere and everywhere else. In no context is this more apparent than law firms. Partners blame mercenary and unrealistic associates, while associates blame mercenary and unfeeling partners. In fact, there is plenty of blame to go around.

According to a recent *American Lawyer* overview of law firm economics, "It's hard to find any partner who thinks that first-year salaries make any economic sense."¹⁴⁵ The irrationality of current compensation structures began, rationally enough, when competition for the ablest new associates pushed starting salaries well above what hourly billing rates justified.¹⁴⁶ Because firms have been under other competitive pressures not to raise

141. COMMISSION ON PROFESSIONALISM, *supra* note 51, at 251.

142. *Id.*

143. *See id.* at 259-61.

144. *See* Shaffer, *supra* note 137, at 411-14; *infra* notes 145-54 and accompanying text.

145. John E. Morris, *The New Seller's Market*, AM. LAW., Oct. 1996, at 7.

146. *See id.* at 7-9.

those rates, the choice has been either to decrease partner profits or to raise associates' work load.¹⁴⁷ Predictably, most partners have opted for the latter choice. But they have blamed the resulting Dickensian schedules on associates who seem to prefer high salaries to a decent quality of life.

Managing partners often report experiences similar to the one Walt Bachman describes in *Law v. Life*.¹⁴⁸ When his firm attempted to freeze both hours and starting salaries, applicants flocked to other firms. Many of these young associates were predictably miserable when they got there.¹⁴⁹ But that, from the partners' perspective, is the associates' own fault. Law, like life, rarely offers a free lunch. New attorneys can't have it both ways—high salaries and low hours—so they need to think more carefully about which way they want it.

From the associates' perspective, the tradeoff looks somewhat different. Most leave law school with high debt burdens and little, if any, experience of what life is like when billing at 2000 hours.¹⁵⁰ Many young lawyers do not yet have demanding family commitments, and the allure of creature comforts after years of genteel poverty often is irresistible. From their perspective, the way for employers to avoid unmanageable workloads is to reduce income at the top, not the bottom of the hierarchy. Why should so many senior attorneys get so much more money than juniors for essentially similar work?

The difficulty, of course, is that firms that allow incomes to fall below market rates run the same risks of defection at the upper levels that they do at the entry levels. Profitable partners who feel undercompensated have become increasingly willing to move, often taking clients and promising associates with them.¹⁵¹ Firm managers worry that if their workplaces begin to value quality of life over profitability, then they will end up with a disproportionate share of shirkers. Particularly at the associate level, a willingness to work long hours often functions as a

147. See BACHMAN, *supra* note 90, at 103-04.

148. BACHMAN, *supra* note 90.

149. See *id.* at 106.

150. See *id.*

151. See *id.* at 104-05; GALANTER & PALAY, *supra* note 86, at 54-55; TROTTER, *supra* note 86, at 85-86.

proxy for commitment and assumes major importance in promotion decisions.¹⁵²

The result is a prisoners' dilemma. Attorneys often end up working far more demanding schedules than they would like, but find themselves within institutional structures that offer no alternative. One consequence, as the California Commission on the Future of the Legal Profession candidly acknowledges, is that lawyers become habituated to "extraordinary incomes."¹⁵³ In the process, luxuries become necessities, wealth becomes critical to self-esteem, and relative salaries become ways of "keeping score."¹⁵⁴

Yet that process is often self defeating. Considerable research suggests that people overvalue income as a way of achieving satisfaction.¹⁵⁵ Above the poverty line, the cliché is correct; money doesn't buy happiness.¹⁵⁶ Part of the reason is that many crucial factors affecting satisfaction are beyond individual control, such as biological predispositions, childhood experiences, disabling disease, or the deaths of loved ones.¹⁵⁷ But the other principal circumstances affecting happiness are not directly related to income. They involve the quality of family relationships, the support of friends, a sense of effectively performing key tasks, and a feeling of control over one's fate.¹⁵⁸ Of course, income may influence some of these factors. The ability to afford good childcare, neighborhoods, and education affects family relationships and people's evaluation of their performance as

152. See Renée M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329, 329 (1996).

153. COMMISSION ON THE FUTURE OF THE LEGAL PROFESSION AND THE STATE BAR OF CAL., *supra* note 88, at 52.

154. GLENDON, *supra* note 23, at 31; see Shaffer, *supra* note 137, at 411-12.

155. See Daniel Goleman, *Forget Money: Nothing Can Buy Happiness, Some Researchers Say*, N.Y. TIMES, July 16, 1996, at C1.

156. See DAVID G. MYERS, *THE PURSUIT OF HAPPINESS* 31-38 (1992); Robert E. Lane, *The Road Not Taken: Friendship, Consumerism and Happiness*, 8 CRITICAL REV. 521, 527 (1994) [hereinafter Lane, *Road Not Taken*]; Robert E. Lane, *Does Money Buy Happiness?*, PUB. INTEREST, Fall 1993, at 56, 57 [hereinafter Lane, *Happiness?*].

157. See Goleman, *supra* note 155, at C1.

158. See Antonia Abbey & Frank M. Andrews, *Modeling the Psychological Determinants of Life Quality*, in RESEARCH ON THE QUALITY OF LIFE 85, 105 (1986); Lane, *Road Not Taken*, *supra* note 156, at 545; Lane, *Happiness?*, *supra* note 156, at 58; James Q. Wilson, *Wealth and Happiness*, 8 CRITICAL REV. 555, 560, 563 (1994).

parents. But most individuals overestimate how much money matters. They generally believe that twenty-five percent more income would significantly increase their happiness.¹⁵⁹ It usually does not. People quickly adjust to higher earnings, and their expectations and desires increase accordingly.¹⁶⁰ The priority that many lawyers and law firms attach to salaries compromises other goals that are more central to satisfaction, such as time for friends and families, and choice of work that is morally and intellectually satisfying.

Lawyers also face a related tradeoff that the professionalism debate fails to acknowledge. In the bar's idealized vision of professional life, lawyers can expect both moral independence and worldly rewards, such as power, wealth, and prominence. In actual practice, however, these interests are frequently in tension. Historical and cross-cultural research suggests that in contexts where the legal profession has maintained greater autonomy from clients and has recognized greater ethical obligations to nonclient interests than the contemporary American bar, attorneys have secured less income and influence than they now enjoy.¹⁶¹ Moral independence may bring lawyers an important measure of social esteem and self respect, but it comes at a price.

Professionalism rhetoric tends to paper over this conflict by making a virtue out of expedience. Under prevailing norms of professional responsibility, morally independent lawyers have little scope for moral independence within their professional role. Rather, their preeminent ethical obligation is fidelity to client interests. Over the last century, the bar's codes of conduct have narrowed the moral discretion that lawyers are expected to exercise once they have accepted representation.¹⁶² Except in limited circumstances, such as where a client seeks assistance in

159. See Lane, *Happiness?*, *supra* note 156, at 61.

160. See MYERS, *supra* note 156, at 51-58; Lane, *Happiness?*, *supra* note 156, at 61.

161. See Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2047-48 (1990) (book review).

162. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40 n.3 (1989). For general critiques of this trend, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

criminal or fraudulent conduct, lawyers are to maintain clients' confidences and to pursue their interests "zealously within the bounds of the law."¹⁶³ In effect, an attorney's obligation is to defend, not judge, the client. Under this standard view, good ethics and good business are in happy coincidence.

Yet such efforts to align moral commitments with prudential interests are not entirely convincing. The assumption underpinning bar ethical codes is that the most effective way to discover truth and preserve rights is through an adversarial process in which lawyers have "undivided fidelity to each client's interests as the client perceives them."¹⁶⁴ This assumption remains plausible only if all interests have adequate representation and comparable access to information and legal resources. Such conditions seldom prevail in the world that lawyers encounter. Most practitioners at least occasionally confront circumstances in which a client's legal objectives cannot readily be justified under accepted ethical principles. Familiar examples include health, safety, or financial risks that are inadequately regulated, or circumstances where important nonclient interests are inadequately represented.¹⁶⁵

These contexts receive insufficient concern both in the bar's ethical standards and in its discussions of professionalism.¹⁶⁶ The result is a dispiriting disjuncture between current norms and traditional aspirations. The idealized vision of lawyers as independent "sentinels" of justice is out of phase with prevailing models of successful practice.¹⁶⁷

163. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980). For requirements of confidentiality, see *id.* DR 4-101; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

164. AMERICAN LAWYER'S CODE OF CONDUCT ch. II cmt. (Roscoe Pound-American Trial Lawyers Found. 1982), reprinted in STEVEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 323, 335 (1989).

165. See, e.g., LUBAN, *supra* note 162, at 149-54; SIMON, *supra* note 112; Rhode, *supra* note 162, at 614-15; David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, Scholer, 66 S. CAL. L. REV., 1145, 1155-56 (1993).

166. For discussion of codified standards, see LUBAN, *supra* note 162, at app. 1; Rhode, *supra* note 162, *passim*; Simon, *supra* note 162, at 1087-90. For the professionalism debate, see Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

167. See Joseph Story, Address Delivered Before Members of the Suffolk Bar (Sept. 4, 1821), excerpted in THE LEGAL MIND IN AMERICA 63, 71 (Perry Miller ed., 1962).

A final tradeoff, similarly neglected in professionalism debates, involves the tension between professional autonomy and public respect. Many lawyers' sense of professional accomplishment is tied to their view of law as an "honorable" and honored profession. Concerns about the erosion of popular respect drive the bar's public education efforts, as well as some particularly ill-conceived responses to antilawyer sentiments. For example, in 1993, following a tragic mass murder in a San Francisco law office, California's bar president proposed that jokes deriding attorneys should be classified as hate speech.¹⁶⁸ He also suggested that crimes targeting attorneys should receive enhanced punishment, comparable to penalties for crimes against police officers.¹⁶⁹ Unsurprisingly, these proposals generated their own wave of antilawyer humor and trivialized the concerns that fueled it.

Although many practitioners resent the level of popular animosity toward the profession, they generally resist efforts to address its sources. They particularly resist seeing any connection between public respect and public accountability or any tension between public accountability and professional autonomy. Rather, the assumption frequently repeated in ethical codes and professionalism discussions is that the bar's power of self-regulation serves the public interest by helping to "maintain the legal profession's independence from government domination."¹⁷⁰

Almost never do bar leaders acknowledge the possibility that self-interest might occasionally skew lawyers' sense of the public interest or their understanding of appropriate professional obligations. To the contrary, as a New York Bar's Committee on the Profession confidently asserted: "While superficially there may appear to be a tension between professional responsibility and self-interest, in fact, broadly viewed, there is none."¹⁷¹ Such assertions speak volumes about the significance of self-interest

168. See Vicki Torres, *Chief of Bar Assn. Asks End to Lawyer-Bashing*, L.A. TIMES, July 6, 1993, at A1 (quoting Harvey Saferstein, California Bar Ass'n president).

169. See *id.* For a discussion of these proposals and the backlash that they generated, see Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1073-74 (1995).

170. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1995).

171. Committee on the Profession, *supra* note 85, at 133 (quoting the July 1987 report of the Association's Committee on the Second Century).

and the potential for self-deception. If, as Roscoe Pound once put it, the ABA is "not . . . the same sort of thing as a retail grocers' association," then self-regulation brings out more of the similarities than the differences.¹⁷² No vocational group, however well-intentioned, can make entirely unbiased assessments of the public interest on issues that place its own status and income directly at risk.

As virtually every expert on professional regulation observes, the greater an occupation's autonomy, the greater the risk of tunnel vision.¹⁷³ Eliot Freidson, one of the nation's leading sociologists of the professions, describes the problem:

[O]nce given its special status, the profession quite naturally forms a perspective of its own, a perspective all the more distorted and narrow by its source in a status answerable to no one but itself. . . . Consulting professions are not baldly self-interested unions struggling for their resources at the expense of others and of the public interest. Rather, they are well-meaning groups which are protected from the public by their organized autonomy and at the same time protected from their own honest self-scrutiny by their sanctimonious myths of the inherently superior qualities of themselves as professionals¹⁷⁴

Nowhere is the problem more apparent than in bar governance processes. Standards of professional conduct have been drafted, adopted, and enforced by bodies composed almost entirely of attorneys.¹⁷⁵ Nonlawyers have had no representation in the adoption process by courts and bar associations and have obtained only token representation on disciplinary enforcement bodies.¹⁷⁶ Few of these lay members had the backgrounds, resources, or ties to consumer organizations that could create a

172. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 7 (1953).

173. See MICHAEL D. BAYLES, *PROFESSIONAL ETHICS* 138 (1981); ELIOT FREIDSON, *PROFESSIONAL DOMINANCE* 105-06 (1970); S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA*, (1987); Jonathan Ris, *Professional Regulation: The Current Controversy*, 7 *LAW & HUM. BEHAV.* 103, 109 (1983).

174. ELIOT FREIDSON, *PROFESSION OF MEDICINE* 370 (1970).

175. See Rhode, *supra* note 71, at 687.

176. See *id.*

significant counterweight to professional dominance.¹⁷⁷

Given this structure, it is scarcely surprising that studies of bar regulatory processes uniformly find them seriously inadequate in responding to ordinary consumer grievances.¹⁷⁸ Yet, although the vast majority of surveyed attorneys concede that the current disciplinary process is flawed, comparable numbers reject changes in its structure.¹⁷⁹ The bar's unwillingness to confront tradeoffs in its regulatory objectives undermines its professionalism agenda. As long as lawyers resist public accountability, they are unlikely to win public confidence.

If lawyers are seriously committed to fostering professionalism, then they first must develop a clearer sense of what it means and the tradeoffs it requires. The bar needs a vision beyond the wistful nostalgia and wishful exhortation that dominates current debates.

V. RECASTING THE PROBLEM; RETHINKING THE RESPONSES

At a recent ABA Conference on Teaching and Learning Professionalism, the assembled academics, practitioners, and bar leaders reached partial consensus.¹⁸⁰ There was universal agreement that law schools should invest far more effort in teaching professionalism.¹⁸¹ There was universal disagreement about what professionalism is.¹⁸² Only at the most abstract level could participants rally around the same vision. Everyone wanted to encourage "ethical conduct" and "dedication to justice and the public good."¹⁸³ But they shared no view about what that would involve in circumstances of any moral complexity. Nor was there consensus on what tradeoffs the bar should make

177. *See id.*

178. *See* COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY xv-xviii (1992); Rhode, *supra* note 71, at 694-96.

179. *See* McCarthy, *supra* note 77, at 6 (finding only 20% of surveyed attorneys agreed that the current discipline system "does a good job of disciplining unethical attorneys").

180. *See* PROFESSIONALISM COMM., AMERICAN BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM (1996).

181. *See id.* at 13-25.

182. *See id.* at 5-10.

183. *Id.* at 7.

among sometimes competing interests, such as financial rewards, moral independence, regulatory autonomy, and public accountability.

Although these disagreements shape most professional debates, the organized bar generally avoids acknowledging as much. According to the ABA's Commission on Professionalism, "[w]hile one must always be conscious of the variety within the profession, more unites than separates us."¹⁸⁴ The organized bar has its own reasons for insisting on such unity, but it is not clear that this insistence makes sense. In a study of professionalism sponsored by the American Bar Foundation Research Institute, Robert Nelson and David Trubek notes that an image of consensus and cohesion is critical to protect the bar's monopoly and regulatory independence.¹⁸⁵ Yet as they also emphasize, that image is more an aspiration than a description. Today's profession has become too diverse and specialized, and its bar associations too weak and divided, to enforce any unifying vision of professional ideals.¹⁸⁶

As a result, the professionalism campaign has remained at a level of comforting generality, with "vague . . . invocation[s] of 'shared' values that really aren't shared and a symbolic and nostalgic crusade . . . which has little to do with everyday working visions of American lawyers."¹⁸⁷ Bar leaders have lurched from project to project: professionalism essay contests and awards, voluntary civility codes, and countless public relations efforts.¹⁸⁸ None seem likely to matter much. None focus on structural reforms that *could* matter in bar ethical standards and regulatory processes.

In their current form, these standards remain as much part of the problem as the solution to the bar's professionalism prob-

184. COMMISSION ON PROFESSIONALISM, *supra* note 51, at 262.

185. See Robert L. Nelson & David M. Trubek, *Areas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES*, *supra* note 74, at 177, 195.

186. See *id.*

187. Nelson & Trubek, *supra* note 74, at 14.

188. See Jack L. Sammons, *The Professionalism Movement: The Problems Defined*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 269, 269-71 (1993). Nothing in the history of such bar public relations efforts suggests that they are an effective strategy for changing popular perceptions. See Overton, *supra* note 169, at 1103.

lems. Their guiding principles, as Freidson has noted, draw too heavily "from selected fragments of idealized history . . . [and] pious exhortations."¹⁸⁹ Above all, lawyers' codes reflect lawyers' concerns. On issues of public significance, the public interest too seldom prevails.

Any serious response to the dilemmas confronting the American legal profession must begin from different premises. Although this is not the occasion for a full-scale blueprint of that alternative vision, certain guiding principles bear emphasis. These involve diversity within the profession, moral responsibilities of lawyers, access to legal services, and public accountability for professional regulation.

The first of these principles calls for adequate recognition of the variations among contemporary lawyers. For the American bar, this is in an era of postmodern professionalism, with identities fractured along lines of personal background, substantive specialty, and practice setting. As applied to law, the term "profession" has become a kind of folk concept.¹⁹⁰ In common usage, it conveys a unity that is out of step with social realities. The concerns of a small town Oklahoma divorce lawyer in a solo practice bear little resemblance to those of an urban federal prosecutor or an associate specializing in corporate mergers in a large Wall Street firm. Differences in age, race, gender, ideology, and family status further complicate the picture.

It is time to reconsider whether an occupation as large and varied as the American bar is well served by a unified regulatory structure. The profession needs to recognize in form what is true in fact. Lawyers with diverse backgrounds and practice contexts need different preparation and sources of guidance. Our current one-size-fits-all model of legal education and professional regulation badly needs revision.

Changes in accreditation standards for law schools could permit more varied curricula and degrees. Some institutions could provide advanced interdisciplinary instruction for students and practitioners in particular substantive areas, while others could

189. Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES*, *supra* note 74, at 214, 227.

190. *See id.* at 215.

offer shorter, less expensive degree programs that would prepare graduates to practice in limited fields. Such abbreviated programs could reduce students' debt burdens, increase the pool of graduates willing to provide low-cost routine services, and relieve some of the pressure to maximize income at the expense of other values. If these graduates had more options to obtain additional courses or degrees later in their careers, then the risks of early specialization would be less substantial.

Greater recognition of diversity within the profession also argues for more diverse regulatory structures. Prevailing ABA-approved ethical codes are not an adequate source of moral guidance. In a profession that is sharply divided and scarcely disinterested, such codes end up reflecting too high a level of abstraction and too low a common denominator of conduct. In order to achieve consensus, bar standards must satisfy a group that is varied in social background, practice settings, and ideological views, but largely united in its desire to minimize members' risks of disciplinary sanctions or civil liability.¹⁹¹ The result is an unsatisfying mix of vague directives, moral exhortation, and minimal prohibitions.¹⁹²

A true commitment to professionalism will require supplementing codes with more specific and more demanding standards. That process is already underway, but much could be done to expand its reach. Some specialized bar associations have drafted practice-specific rules, such as the *Standards of Conduct* by the American Academy of Matrimonial Lawyers and the *Guidelines to Tax Practice* by an ABA Section of Taxation.¹⁹³ If specialized associations certified lawyers who comply with such standards, then the consequence might be a more efficient market in reputation and a more effective reward structure for ethical performance.¹⁹⁴ So

191. See Rhode, *supra* note 162, at 616 & n.97; Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES*, *supra* note 74, at 95, 132-35.

192. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995) (requiring "reasonable" fees); *id.* Rule 6.1 ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."); *id.* Rule 1.2(d) (prohibiting assistance in criminal or fraudulent conduct).

193. BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT (American Academy of Matrimonial Lawyers 1992), reprinted in 9 J. AM. ACAD. MATRIM. LAW. 1 (1992); GUIDELINES TO TAX PRACTICE (1978), reprinted in 31 TAX. LAW. 551 (1978).

194. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooper-*

too, if courts, bar disciplinary committees, and workplace policies reinforced heightened ethical requirements, then the result could be improved practice norms.

More public and private sector employers could assist this process by adopting policies, oversight structures, and internal training programs designed to encourage ethical conduct. Courts or legislatures could also require such initiatives for all employers over a certain size or for those whose lawyers have engaged in sanctionable misconduct. For example, trial judges, bar committees, or administrative agencies like the Securities and Exchange Commission could require that attorneys who violate practice standards submit a regulatory plan to prevent subsequent misconduct by themselves or their colleagues.

Adequate recognition of diversity within the profession will also require more adequate equal opportunity initiatives. Again, the bar does not lack for models. Many employers and professional associations have developed effective policies concerning part-time schedules, mentoring, diversity training, and extended family leave.¹⁹⁵ But many employers have not, and some tolerate a wide gap between formal policies and workplace practices.¹⁹⁶ According to ABA survey data, less than ten percent of lawyers in private practice work reduced hours, and sixty percent believe that taking part-time status would limit their opportunities for advancement.¹⁹⁷

Workplace cultures that only grudgingly accommodate women's family obligations are usually even less tolerant of men's. "I have a family. I didn't get time off. . . . Why should you?" is a common attitude.¹⁹⁸ Part of the answer, of course, is that penalizing men who demand such time penalizes women and families as well. It encourages unequal division of responsi-

ation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509, 561-62 (1994); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS / LAWYERS' PRACTICES*, *supra* note 74, at 230, 243-48.

195. See Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 70 (1994).

196. See, e.g., NINTH CIRCUIT TASK FORCE ON GENDER BIAS, EXECUTIVE SUMMARY OF THE PRELIMINARY REPORT OF THE NINTH CIRCUIT TASK FORCE ON GENDER BIAS (1992), reprinted in 45 STAN. L. REV. 2153, 2166 (1993).

197. See YOUNG LAWYERS DIV., *supra* note 105, at 25-27.

198. Epstein et al., *supra* note 100, at 409.

bilities in the home, which yields unequal opportunities outside it. As long as work/family conflicts appear to be primarily "women's issues," they are unlikely to attract sufficient concern in decision-making structures controlled largely by men.

Inattention to diversity and quality-of-life issues not only undermines the profession's commitment to equal opportunity, but also compromises other values. The inadequacy of family policies and the persistence of gender, racial, and sexual orientation bias are leading causes of job dissatisfaction, stress, depression, and attrition.¹⁹⁹ These take a toll on client representation as well as on employers' bottom lines. Lawyers have long been leaders in the national struggle for equal opportunity. The challenge remaining is for them to confront the barriers in their own profession.

A second guiding principle calls for lawyers to accept personal moral responsibility for the consequences of their professional acts. To satisfy this principle, lawyers' conduct needs consistent, disinterested, and generalizable foundations. The rationale for professional actions cannot depend on retreats into roles that deny the need for reflection at precisely the moment when reflection is most needed.

In effect, this principle demands more practical content for traditional ideals. If lawyers see themselves as officers of justice, then they must accept greater obligations to pursue it. No longer should ethical analysis be shortcircuited through appeals to some idealized vision of the adversary process. Rather, attorneys need to consider the consequences of their advocacy in a realistic social context where not all interests are adequately represented.

199. See AD HOC COMMITTEE ON SEXUAL ORIENTATION BIAS, LOS ANGELES COUNTY BAR ASS'N, LOS ANGELES COUNTY BAR ASS'N REPORT ON SEXUAL ORIENTATION BIAS (1994), reprinted in 4 S. CAL. REV. L. & WOMEN'S STUD. 295, 297-302 (1995); BREAKING POINT, *supra* note 100, at 1-12; CAREER SATISFACTION, *supra* note 78, at 10; HARVARD WOMEN'S LAW ASS'N, *supra* note 100, *passim*; Committee on Lesbians & Gay Men in the Legal Profession, Ass'n of the Bar of the City of New York, *Report on the Experience of Lesbians and Gay Men in the Legal Profession*, 48 RECORD 843, 855 (1993); Epstein et al., *supra* note 100, at 387-88, 390-403; Special Comm. on Lesbians & Gay Men in the Legal Profession, Ass'n of the Bar of the City of New York, *Report of Findings from the Survey on Barriers and Opportunities Related to Sexual Orientation*, 51 RECORD 130, 133-38 (1996); Sells, *supra* note 96, at 3A; Women in the Law Survey, *supra* note 100, at 84-85.

Similar problems plague the legislative process, and they should be equally relevant to ethical decision making. Some conduct that is inconsistent with social interests remains legal either because prohibitions are too difficult or costly to enforce, or because policymakers lack sufficient information or independence from special interests. That clients have a legal right to pursue a certain objective does not mean that they have a moral right to do so, or that justice necessarily will be served by their zealous representation. Rather, one of a lawyer's most socially valued functions is to counsel clients about the full range of ethical considerations that bear on particular decisions and to withhold assistance in matters that run counter to the lawyer's own sense of social responsibility.²⁰⁰

This reformulation of role does not contemplate that attorneys must endorse all aspects of their clients' conduct. Under conventional ethical theories, moral responsibility depends on a range of factors, including an individual's degree of information, involvement, and capacity to affect action, as well as the action's likely consequences and connections to broader moral principles.²⁰¹ So, for example, the importance of protecting free speech for unpopular causes or fair trials for criminal defendants may justify zealous representation despite other possible costs. But the rationale for advocacy in such cases should not serve as some all-purpose paradigm. Nor should the general importance of encouraging client trust and protecting confidentiality trump all competing values.

Lawyers will, of course, differ over how to weigh the values at issue. And in some contexts, the need for a categorical rule should restrict individual attorneys' discretion. But any such rules must satisfy commonly accepted ethical principles, not just the restricted client-centered concerns that dominate bar ethical codes.

A third guiding principle calls for equitable access to legal services. One of the public's central concerns about lawyers and

200. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 258 (1990); Anthony T. Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489, 498 (1996).

201. See Rhode, *supra* note 162, at 644.

legal processes involves their expense and inaccessibility.²⁰² To address those concerns, more efforts should focus on reducing the need for legal assistance, lowering the costs of services available, and expanding the reach of subsidized alternatives.

The first cluster of strategies should emphasize law reforms that would enable individuals to handle more of their own problems. Procedural simplification, plain English statutes, and no-fault compensation systems are obvious examples.²⁰³

A second set of initiatives should focus on decreasing the costs of legal assistance. A primary target of reform should be rules forbidding nonlawyers from performing routine legal services. Alternative frameworks are readily available. In many nations, nonlawyers with legal training provide routine services that only attorneys may offer in this country.²⁰⁴ No evidence suggests that these lower-priced services have been inadequate.²⁰⁵ Reform along these lines would produce a more differentiated credentialing process, and routine assistance could become more readily available through certified paralegals working in form-processing services, citizens' advice bureaus, government agencies, and court clerks' offices.²⁰⁶ Further reductions in costs may be possible through carefully tailored mediation and alternative dispute resolution programs.²⁰⁷

202. See Samborn, *supra* note 5, at 22.

203. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 562-63 (1994).

204. See Richard L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, 1985 AM. B. FOUND. RES. J. 1, 29.

205. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 709-10 (1996).

206. See Cramton, *supra* note 203, at 573-74; Rhode, *supra* note 205, at 713-14; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 229-33 (1990).

207. See Cramton, *supra* note 203, at 563-64. Not all ADR and mediation programs provide cost savings but they may have other virtues. See Deborah R. Hensler, *Puzzling Over ADR: Drawing Meaning from the RAND Report*, DISP. RESOL., Summer 1997, at 8, 9 (noting that ADR systems surveyed were not representative of good mediation programs because the providers were untrained and the sessions too short and too narrowly focused); James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act: A Summary*, DISP. RESOL., Summer 1997, at 4, 6 (finding no reduction in cost or delay from surveyed federal ADR programs).

More efforts also should center on increasing the availability of subsidized services. Expanded pro bono programs are a modest step in the right direction. Organizations employing lawyers need to place higher value on public service contributions in practice, not just in principle, and to reward such work in promotion and compensation decisions.

More fundamental changes are also necessary in government support for legal aid. After recent cutbacks in federal funding, the vast majority of poor individuals lack any realistic access to lawyers.²⁰⁸ Low and moderate income consumers also remain priced out of the market for many legal matters.²⁰⁹ Other countries provide far more adequate government-subsidized assistance. These nations typically rely on some combination of insurance coverage and progressive subsidies for basic legal needs.²¹⁰ A comparable system in this country might enjoy broader public support and prove less vulnerable to restrictions than current programs serving only the poor.

To make these changes plausible, a final guiding principle demands public accountability for professional regulation. Acting under their inherent power to regulate the practice of law, courts have overvalued professional autonomy and have delegated too much of their own oversight responsibility to the organized bar.²¹¹ The result has been a governance structure that inadequately responds to public concerns, particularly those concerning the cost and accessibility of legal services, the protection of nonclient interests, and the sanctions for unethical conduct.²¹² All too often, bar ethical codes and enforcement committees have resolved conflicts between professional and societal objectives in favor of those doing the resolving.

208. See David Barringer, *Downsized Justice*, A.B.A. J., July 1996, at 60; MacLachlan, *supra* note 68, at A1; sources cited *infra* note 209.

209. See ACCESS TO JUSTICE WORKING GROUP, STATE BAR OF CAL., AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA 17-19 (1996); ALBERT H. CANTRIL, AMERICAN BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 4, 26-27 (1996); Pearce, *supra* note 3, at 1249.

210. See Cramton, *supra* note 203, at 589-92; Jim Towry, *Addressing the Needs of the Poor*, CAL. B.J., Aug. 1996, at 4 (comparing European and American funding patterns for poverty-related legal services).

211. See Rhode, *supra* note 71, at 694-96.

212. See *id.*; *supra* notes 173-79, 189, 191-92, 217-21 and accompanying text.

To be sure, lawyers need some measure of independence from governmental control if they are to check governmental abuses. But America now strikes the wrong balance between autonomy and accountability. Other countries with independent legal professions have regulatory structures that permit more responsiveness to consumer concerns.²¹³ Some state legislators also have considered disciplinary structures that would remain independent of both the government and the organized bar.²¹⁴ One proposed California statute would have established a board under state supreme court auspices with members appointed by multiple legislative, executive, and bar leaders representing diverse constituencies.²¹⁵

How authority should be divided among various regulatory bodies is, of course, a complicated question and one that receives far too little serious attention from the organized bar.²¹⁶ The structure of professional oversight has grown increasingly chaotic, partly because inadequacies in bar ethical standards and enforcement have encouraged intervention by other decision makers.²¹⁷ The resulting patchwork of disciplinary, malpractice, and agency regulations, however, leaves significant gaps and inconsistencies. A profession truly committed to professionalism cannot afford these inadequacies. Nor can lawyers assume, in the face of mounting evidence to the contrary, that self governance always serves societal interests. Under current disciplinary systems, about ninety percent of complaints are never investigated.²¹⁸ Less than two percent result in any public sanctions.²¹⁹ At least part of the reason for these patterns is that

213. For a discussion of British initiatives designed to promote greater competition and access to services, see *Lord Mackay's Legacy*, *ECONOMIST*, July 18, 1992, at 15, 15-17.

214. See RHODE & LUBAN, *supra* note 67, at 860-61.

215. See *id.* (referring to an early version of S.B. 1543, 1985-86 Reg. Sess., 1986 Cal. Stat. 3909).

216. For the first comprehensive treatment, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). For subsequent views, see Symposium, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 1 (1996).

217. See Wilkins, *supra* note 216, at 807-08.

218. See RHODE & LUBAN, *supra* note 67, at 859.

219. See *id.*

most disciplinary authorities do not have the resources or jurisdiction to pursue common client grievances, such as "mere" negligence and fee disputes.²²⁰ Nor have judicial or bar decision makers proved willing to impose serious sanctions except in the most egregious cases.²²¹

The failures of bar-controlled oversight structures have prompted an expanded range of overlapping, at times conflicting, bodies of regulation. Civil liability suits, as well as legislative and administrative agency regulations, supplement or supplant bar standards in a widening array of contexts.²²² The task now is to build a coherent structure from these increasingly disjointed patterns and to ensure that it accommodates interests in public accountability as well as professional autonomy.

The term "profession" has its origins in the Latin root "to profess" and in the European tradition of requiring members to declare their commitment to shared ideals. The American bar has maintained the form but lost the substance of that tradition. Entering lawyers may still profess to serve justice as officers of the court, but that declaration has little moral content in contemporary practice. Efforts to revive a richer sense of professionalism have foundered on the lack of consensus about what those ideals should require and how to reconcile them with more worldly interests.

In this context, it makes sense to view professionalism not as a fixed ideal, but rather as an ongoing struggle. The problems facing lawyers involve not just public image, but also personal identity. The challenge is to work toward understandings of professional responsibility that are both more and less demanding. They must ask more than current codes and enforcement structures, but they must offer a vision that also seems plausible in practice. Recent debates on professionalism have suffered from overly ambitious aspirations and overly limited initiatives.

220. See HALT (AMERICANS FOR LEGAL REFORM), ATTORNEY DISCIPLINE: NATIONAL SURVEY AND REPORT 17-22 (1990); Don J. DeBenedictus, *ABA Adopts Most Discipline Proposals*, A.B.A. J., Apr. 1992, at 28, 28.

221. See HALT, *supra* note 220, at 17-22; RHODE & LUBAN, *supra* note 67, at 863-75.

222. See Wilkins, *supra* note 216, at 805-09.

That mismatch is by no means inevitable. On matters of public interest not involving their own regulation, lawyers have been crucial in bridging the distance between ideals and institutions. By turning similar energies inward, the bar may give more substantial content to its highest traditions.