The Independence of Lawyers

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THE INDEPENDENCE OF LAWYERS*

ROBERT W. GORDON**

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** Professor of Law, Stanford University. I presented a (mercifully much shorter) version of this article as a lecture in the Boston University School of Law's Distinguished Lecturer Series in April, 1987. I am grateful to the Dean and Faculty of the School of Law, and especially to Ronald Cass, for their generous invitation and hospitality. John Coffee's willingness to share his insights about current conditions of corporate practice was of great help to me in formulating a thesis. David Sugarman helped with bibliography. Avi Soifer, David Trubek, David Kennedy, and Joe Singer gave me useful comments on the lecture, as did Bryant Garth, Steve Diamond, John Leubsdorf, Deborah Rhode, and Bill Simon on the draft article. Leubsdorf and Simon, moreover, contributed many suggestions that considerably improved the argument. My conversations over the years with lawyers about their practices have helped to lead me to guarded optimism about, as well as sharp recognition of the real constraints upon, opportunities for socially responsible law practice. This work was supported by a bequest from the Claire and Michael Brown estates, for which I am most grateful.

1
Let me begin by quoting some eminent lawyers on the theme of the lawyer's professional independence. The classic location for the theme is Louis Brandeis's famous speech of 1914, on "The Opportunity in the Law."

It is true that at the present time the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago; but the reason is not lack of opportunity. It is this: Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. . . .

The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of corporations.

For nearly a generation the leaders of the Bar have, with few exceptions, not only failed to take part in constructive legislation designed to solve in the public interest our great social, economic and industrial problems; but they have failed likewise to oppose legislation prompted by selfish interests. . . . They have often advocated, as lawyers, legislative measures which as citizens they could not approve, and have endeavored to justify themselves by a false analogy. They have errone-
ously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public, as it is in litigation between private individuals.¹

A few years later, Woodrow Wilson addressed the ABA, expanding on Brandeis's themes but exhibiting more reluctance than Brandeis to assign blame for the reduced role of lawyers in matters of great social concern:

You cannot but have marked the recent changes in the relation of lawyers to affairs in this country; and, if you feel as I do about the great profession to which we belong, you cannot but have been made uneasy by the change. Lawyers constructed the fabric of our state governments and of the government of the United States, and throughout the earlier periods of our national development presided over all the larger processes of politics. Our political conscience as a nation was embedded in our written fundamental law. Every question of public policy seemed sooner or later to become a question of law, upon which trained lawyers must be consulted. . . . Public life was a lawyer's forum. . . .

. . . A new type of lawyer has been created; and that new type has come to be the prevailing type. Lawyers have been sucked into the maelstrom of the new business system of the country. That system is highly technical and highly specialized. . . . [Lawyers] do not handle the general, miscellaneous interests of society. They are not general counsellors of right and obligation. They do not bear the relation to the business of their neighborhoods that the family doctor bears to the health of the community in which he lives. They do not concern themselves with the universal aspects of society. . . .

. . . In gaining new functions, in being drawn into modern business instead of standing outside of it, in becoming identified with particular interests instead of holding aloof and impartially advising all interests, the lawyer has lost his old function, is looked askance at in politics, must disavow special engagements if he would have his counsel heeded in matters of common concern.²

In 1932, Chief Justice Stone focused on the consequences of the trend toward legal specialization that Wilson had noticed:

The rise of big business has produced an inevitable specialization of the Bar. The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods. More and more the amount of his income is the measure of professional success. More and more he must look for his rewards to the material


satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest. Steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance. At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations. In any case we must concede that it has given us a Bar whose leaders, like its rank and file, are on the whole less likely to be well rounded professional men than their predecessors, whose energy and talent for public service and for bringing the law into harmony with changed conditions have been largely absorbed in the advancement of the interests of clients.  

Closer to our own time, former Chairman of the Securities and Exchange Commission, Harold Williams, scolded the securities bar for ignoring the social implications of its work:

In my view, corporate lawyers must adjust their concept of their professional obligations to match society’s evolving conception of the responsibilities of the institutions which the corporate bar serves, the rights of those impacted by such institutions, and the needs of the larger society.

There is, however, a disturbing trend among some corporate lawyers to move in the opposite direction—to see themselves as value-neutral technicians. True, ethical dilemmas can be avoided if one’s job is

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3 Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1, 6-7 (1932). A year later, Stone’s Columbia colleague, Adolf A. Berle, Jr., echoed Stone’s views: With the rise of the industrial system and the tremendous drive for economic development occasioned by the opening up of the west leadership was shifted to the captains of industry and finance; and the influential leaders of the bar became adjunct to this group rather than an independent influence. Traditions of public service, such as are found in the medical profession, insensibly disappeared; the specialized learning of the lawyer was his private stock in trade to be exploited for his private benefit. This is roughly the position of the profession today. Intellectually the profession commanded and still commands respect, but it is the respect for an intellectual jobber and contractor rather than for a moral force. The leading lawyers, especially those who are the heads of the great law factories, must be able to please or serve the large economic groups and they become therefore extremely skilled technicians. They rarely dare and usually do not wish to attempt to influence either the development of the law or the activity of their clients, except along the line which the commercial interests of their clients may dictate. Berle, Modern Legal Reform, in 9 Encyclopedia of the Social Sciences 340, 344 (1933).
viewed as profit-maximizing or as uncritically representing—and not questioning or influencing—the corporate client's interests so long as they are not illegal. In many ways, eliminating these tensions and professional responsibilities would be a comfortable and less contentious alternative. But, indifference to broader considerations would not be professional. Similarly, it would not serve the client well. A counsel does a disservice when, in effect, he limits his advice to whether the law forbids particular acts or to an assessment of the legal exposure, and does not share with the client his view of the possible ramifications of the various alternatives to the short- and long-term interests of the corporation and the private enterprise system. He preempts the opportunity for his client to make the fullest possible judgment by not providing the full range of information and advice of which he is capable and on which the client can make the most informed choice. To correct this tendency, the bar must place greater emphases on the lawyer's role as an independent professional—particularly, on his responsibility to uphold the integrity of his profession.4

In 1984, the Torts and Insurance Practice Section of the ABA commissioned essays on The Lawyer's Professional Independence: Present Threats/Future Challenges. One of the participants in the project attempted to identify the reasons for the contraction of the lawyer's social functions:

The causes of the decline of professional independence are many and complex but essentially reflect the attitudes and lack of vision of a significant group of American lawyers who view the practice of law principally as a source of revenue. The other contributing causes can be summarized as follows: economic pressures on lawyers and law firms... which have contributed to a “business” orientation, a remarkable increase in the sheer number of lawyers; the competition “for business,” bringing aggressiveness and incivility; the growth of lawyer advertising, soliciting, and plain hucksterism; the pyramiding trends toward multistate and multinational law firm partnerships; the clients’ revolt against excessive fees; the narrowing of the lawyers’ education and forced specialization; the perceived failure to discipline lawyers for myriad abuses—to each other, to the courts, to the client, and to the public interest; the general decline of trust and confidence in American society, impacting on members of the law profession; and the influence of heavy-handed administrative bureaucracies upon lawyers employed in government agencies, within corporation counsel staffs, and in more and more law firms themselves. These factors combine to induce the dreary metamorphosis of the American legal profession to a business.5

In these speeches—and hundreds more like them—we hear one of the

4 Williams, Professionalism and the Corporate Bar, 36 BUS. LAW. 165-66 (1980).
great epic themes of professional rhetoric: the praise of independence, the fear of its decline. Though lawyers may disagree about what such independence entails and what threatens it, there is a remarkable consistency in the substance and tone of their words. In this article, I want to sort out, in a preliminary and tentative way, what lawyers historically have meant by professional independence and how they have pursued their vision of independence in their practices. I will try to figure out how we may assess the very frequently made claim that lawyers' professional independence has declined. If the independence of lawyers is something desirable—though in fact it may not always and everywhere be so—we need to discover the conditions under which it flourishes, and ask how we might create or recreate those conditions. This is an awesomely large subject, but all I want to develop here is a survey—a sort of schematic catalogue raisonné—of some of the main issues, and some preliminary ideas about them.

I. SOME TYPES OF INDEPENDENCE

A. Corporate Self-Regulation

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


7 See, e.g., McKay, The Future of Professional Independence for Lawyers, in THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES 42 (1984). John Leubsdorf has described the nature of this social bargain:

Clients were to entrust their affairs to the professional judgment of counsel, who would serve them with selfless devotion. In turn, the legal profession would protect clients from ignorance and unreliability by preventing them from hiring anyone not enlightened by a legal education and warranted by bar membership. Furthermore, the bar would prevent abuses by its own members through the establishment and enforcement of rules, such as those protecting clients from the wiles of advertising attorneys.

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bar regulates its members to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.8

Two groups of lawyers that often oppose each other are most likely to invoke the rhetoric of corporate independence. The first group is composed of lawyers who are protesting some attempt by a government agency or corporate employer to regulate conditions of practice. Lawyers in the second group urge reform of the profession and warn that unless reform comes from within, it will be imposed from without and the privilege of self-regulation will be lost.

B. Control Over the Conditions of Work

A second meaning of independence—and again one that will concern me only incidentally here—is what many sociologists have taken to be the distinctive core of "professional" occupations, that is, a large degree of discretion, of autonomy from outside direction, in determining the conditions of one's work.9 Ideally independent lawyers10 freely decide which clients and causes they will represent,11 how to divide their time between

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8 For a concise summary of the social bargain between the professions and society, see Rueschemeyer, Professional Autonomy and the Social Control of Expertise, in The Sociology of the Professions: Lawyers, Doctors, and Others 38, 41 (R. Dingwald & P. Lewis eds. 1983). What "upholding the law" means is of course notoriously vague and controversial.

9 For a description and trenchant critique of "autonomy" as a defining characteristic of professionalism, see E. Freidson, Professional Powers 110-230 (1986).

10 Note, however, this is not necessarily true for law firms—there is a long and perilous leap here from the individual to the collective.

11 This obviously needs qualification. Professionals' freedom to structure their work is usually contrasted to employees' or bureaucrats' submission to hierarchical direction. Yet professionals may also be less free than other market actors to control the terms on which their services are sold, because they work within the constraints of corporate professional norms. The English barristers' "cab-rank" rule supposedly requires them to accept the next client in line, whomever that may be and whatever the cause. See infra note 61. American lawyers, however, have worked themselves into the curious if convenient position of feeling completely free to turn away clients for financial reasons but nevertheless selectively and occasionally doubting the propriety of refusing clients whose substantive ends they dislike, even when such clients can easily find other lawyers to effectively represent their interests. See, e.g., Morgan, Bad for Lawyers, Bad for Lawyering, N.Y. Times, Oct. 11, 1985, § A, at 35, col. 1 (condemning the law firm of Covington & Burling for dropping a South African business client following law student pressure). But see J. Auerbach, Unequal Justice 231-62 (1976) (noting that bar associations in the 1950s passed resolutions censuring or disbarring lawyers who represented suspected Communists); J. Bass, Unlikely Heroes 286-96 (1981) (noting that lawyers in the desegregating South of the 1950s and 1960s were practically foreclosed by social and collegial pressure from accepting pro-integration clients and causes).
paying clients and other commitments, what strategies and tactics to follow in pursuit of the clients' ends, and so forth. On this view, professionals are distinctive not only because they respect their profession's self-imposed restraints as well their clients' needs, but also because at the core of their jobs there is an empty stage where all outside direction ends, where the structures and constraints are theirs to supply alone. The client dictates (as moderated by the lawyer's advice) the results to be sought and has the final say on major decisions, but there are large interstices of often crucial choices reserved for the professional's judgment.

Lawyers typically invoke the rhetoric of autonomous control over their work in response to threats of strengthened regulation of their practices by government agencies, bar groups or, more importantly, their employers in state or private corporate bureaucracies. For example, the members of the Torts and Insurance Practice Section of the ABA (TIPS) who commissioned the research on independence quoted above are chiefly insurance-defense attorneys whose work their insurance company employers are seeking to bring under strict guidelines regulating settlement offer negotiations and decisions. Many sociologists argue that the TIPS attorneys' experience of "heteronomous" controls imposed by employer-bureaucracies supplanting "autonomous" control over professional terms and conditions of work is common among professionals in modern societies. Like other professionals, the TIPS attorneys find their work becoming more "routinized" and "proletarianized" and therefore less subject to individual discretion and judgment.13

12 See supra note 5 and accompanying text.
13 See E. FREIDSON, supra note 9, at 119 ("[A]s professionals become employees, they lose their independence and so become proletarianized. . . . Employment in a bureaucracy then so constrains their discretion that they become mere cogs in a machine of production."); Abel, The Decline of Professionalism?, 49 MOD. L. REV. 1, 41 (English lawyers increasingly faced with "employment by a large bureaucracy, dependence on a public paymaster, or competition within an increasingly free market"). Reinhard Bendix has found two "antithetical principles" that shape professions:

As organizations increase in size and complexity, efforts are made to routinize their operations by job classifications, product standardization, budgetary regulations, and other measures designed to simplify procedures and simultaneously increase central control. The tendency of these efforts is to reduce the exercise of discretion by subordinates. There is an equally important tendency in the opposite direction, however, for the use of standardized procedures which accompanies bureaucratization also leads to a lengthening of the chain of command and, hence, to an increased subdivision and delegation of authority.

M. LARSON, THE RISE OF PROFESSIONALISM 197-98 (1956) (quoting R. BENDIX, WORK AND AUTHORITY IN INDUSTRY 336 (1956)). Relying on the work of Bendix and Charles Perrow, Larson concludes that professionalization "makes the use of discretion predictable. . . . Internally, expertise is implicitly proposed as a legitimation for the hierarchical structure of authority of the modern organization; professionalism, in turn, functions as an internalized mechanism for the control of the subordinate expert." Id. at 198-99 (emphasis in original).
C. Political Independence: Lawyers as a Separate Estate or Autonomously Social Force

It is easy enough to understand why lawyers would seek independence in the forms of corporate self-regulation and individual control over work. In theory at least, corporate self-regulation should allow lawyers to control the market for their services through their authority over training, licensing, and discipline, as well as through their power to define areas of immunity from the competition of nonlawyers. Similarly, it seems as if the power to define one's job and how to perform it would be something everyone would want.

Supposedly, the professional life is appealing because professionals can, within the confines of their need to make a living, structure their own time, choose among their commitments, and be selective about the people they work with and for and the causes to which they lend their talents. They are relatively free to follow the dictates of craft and conscience and the advice of discriminating peers, rather than pursue only profit and worldly success. And yet, miraculously, they may not actually have to sacrifice all hope of income and success, because professional (unlike, let us say, artistic) integrity will command public recognition and a market premium. The independent professional can, ideally, both "do good and do well." Above all, control over one's work is the classic precondition to the realization of the free, authentic personality—one that is self-governing, responsible, not servile, and possessing the authority that emanates from competence and integrity in the assumption of responsibility for other people's lives.

Yet lawyers naturally seek to justify professional independence on broader grounds than that it's a good deal for lawyers. Independence, one argument runs, facilitates more efficient and effective client service. Lawyers themselves, rather than outside regulators or laypersons, are the best judges of client interests and how to promote them, and outside supervi-

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14 Empirically, however, corporate self-regulation has not been entirely successful.
15 Once again, the historical experience of lawyers is ambiguous in this regard. Lawyers have often and eagerly traded potential autonomy for income and the benefits of association with the powerful.
17 See, e.g., McKay, supra note 7, at 42.
18 Indeed, many scholars think that lawyers should actively shape clients' own conception of their best interests. Archibald Cox is one such scholar:

If the father asks, "Can I cut my son off without a penny?" the lawyer doubtless must answer, "Yes, if you use the right words." If the client-father replies, "Then do it," the lawyer's responsibility—in my view—is not to begin drafting the will but, in words matching the intimacy of their personal relationship, to remind the father of all the unhappy implications of what he proposes, to speak of the son's strength of character even though misdirected in the particular instance, and to suggest that if the client were to die in surgery and could return twenty years later, he would probably regret his decision.

Cox, supra note 6, at 60.
sion would damage the delicate ecology of trust and confidence in the lawyer-client relation. One often hears as well that to assure effective representation the lawyer must be able to "control the client"—to assert exclusive or final decision-making authority on strategic or tactical issues peculiarly within the lawyer's areas of professional competence and to ensure that the client follows instructions on how to behave in public.¹⁹

But my chief interest in this article is in the broader argument: that the independence of lawyers has a social and political value going well beyond the value of effective client service. Such arguments tend to take two forms. I will call these The Ideal of Liberal Advocacy and The Ideal of Law as a Public Profession (or, Lawyers as a Universal Class).

1. The Ideal of Liberal Advocacy: Independence from the State

Within a normative framework of liberal advocacy, the vindication of individual rights, especially as against the state, requires that lawyers be able to assert and pursue client interests free of external controls, especially controls imposed by state officials. In its usual formulations, this argument tends toward vacuity. Everyone concedes that even the most zealous advocate must remain within the framework of professional ethical rules and the "law." Thus disputes over the advocate's proper role cannot really be disputes over freedom versus regulation, but rather over what the form and content of regulation should be.

The Liberal Advocacy Ideal suggests that regulation should allow advocates, particularly criminal defense lawyers, a good deal of leeway to decide how much cooperation their clients will give the other side.²⁰ In effect, lawyers ought to act as a sort of feudal power center like a minor baron. Subordinate neither to state law enforcement officers nor even entirely to judges, lawyers are a coordinate power entitled to take liberties in some ways more extensive than those of prosecutors or police. They are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients. The guiding premise of the entire system is that maintaining the integrity of rights-guarding procedures is more important than obtaining convictions or enforcing the substantive law against its violators;²¹ "[v]igorous promotion of the client's

¹⁹ For a description and critique of lawyers' control over clients, see D. Rosenthal, Lawyer and Client: Who's in Charge? (1974) (arguing that a "participatory" model of representation in which lawyers and clients share responsibility for legal decisions warrants serious consideration).

²⁰ See, e.g., K. Mann, Defending White Collar Crime 6-8 (1985) (white collar criminal defense attorneys manipulate the flow of information that the prosecution needs in order to gain concessions for the client).

²¹ Of course, this premise is largely "symbolic," attentively observed during highly visible public trials and in negotiations on behalf of resourceful and well-
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interest is not inhibited by concern that the realization of governmental policy will thereby be obstructed."

Such a system is often contrasted with that of totalitarian polities that recruit the defense lawyer to the cause of the state. The most extreme embodiment of this and most other horrors was probably found in Nazi Germany, where judges would treat the defense’s procedural objections as a form of obstructionist sabotage and where defense attorneys were sometimes tortured to obtain clients’ confessions.

2. The Ideal of Law as a Public Profession, or Lawyers as a Universal Class: Independence from Clientele

In our legal culture there is probably substantial agreement that the Liberal Advocacy ideal is most appropriate to the representation of clients confronted with the most extreme and terrifying legal peril, the criminal prosecution. Outside that context, consensus completely disappears. Some attorneys, especially trial lawyers, think they should have just as much leeway to pursue client interests in civil suits, and even in planning, counseling, and negotiating relations outside litigation. Others vehemently dis-represented clients, but often muted in routine prosecutions. The rules in any society will be structured to produce an acceptable number of convictions, usually the overwhelming majority of offenders charged. One can safely predict that a liberal advocacy framework producing “too many” acquittals will be changed. See K. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 24 (1966) (“Generally speaking, we invoke emergency measures when the volume of deviance threatens to grow beyond some level we have learned to consider ‘normal,’ but we do not react with the same alarm when the volume of deviance stays within those limits.”); Weisberg, Deregulating Death, 1983 SUP. CT. REV. 305, 386 (“Judges may manipulate legal doctrine with an eye toward the populace, not to mystify them with images of legitimate authority, but simply to help achieve the number of executions which they think the populace wants and demands.”); cf. DURKHEIM AND THE LAW 130-31 (S. Lukes & A. Scull eds. 1983) (new systems of criminal justice inevitably replace weakened ones).

22 M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 142 (1986). Damaska notes, however, that in America “[t]he invocation of counsel as officer of the court is designed to constrain the excessive amalgamation of the lawyer’s interest with that of his client and to forestall the transformation of privately managed litigation into a melee of self-seeking.” Id. at 143.

23 See id. at 143-44.


25 Even in this context, of course, there is dispute over whether prosecutors may properly stretch the rules and facts to the outer limit of plausibility to win their cases.

26 See, e.g., Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN. L. REV. 1, 34-35 (1984) (warning against “a casual and unconsidered debilitation of the adversary system” and noting risks of “imposing a meaningful duty on attorneys to
agree, arguing that the duties of loyalty to client interests must be balanced against and sometimes overridden by broad, more amorphous obligations, such as the lawyer's duties as "officer of the court," member of a public profession, and citizen with a responsibility to uphold the rule of law.  

Again, this description of the dispute tends toward the vacuous, because the most zealous advocates know they must follow some rules and obey official instructions given pursuant to those rules. The real dispute, again, is over the content of the legal framework, and even more, over what lawyers' attitudes toward the framework should be, including the manner and degree to which they should consider attending to the framework's integrity as one of their professional responsibilities. This is obviously an important dispute. It is implicated not only in such staple issues of ethics reform debates as that of whether lawyers must or may reveal clients' lies or frauds to adversaries or regulators, but also in the great (and greatly contested) issue of the extent to which lawyers should help or resist their clients' attempts to evade or nullify regulation.
Proponents of the Advocacy Ideal emphasize lawyers' nonsubordination to the officers and purposes of the state. Believers in the ideal of lawyers as engaged in a public profession, on the other hand, stress that lawyers should remain independent of all the particular factional interests of civil society, including those of their clients. Of course, lawyers in both groups routinely urge upon each other independence from clients of a narrow and merely prudential kind, a sort of detachment, aloofness, professional distance from the clients' ends. Don't get emotionally involved with your clients, don't start believing everything they tell you, don't take up their projects as a cause—it will impair your ability to analyze and act dispassionately on their problems.30

This prudential kind of independence is not really what I'm talking about here. What I mean is obliquely hinted at in the common (and commonly ignored) ethical rule that the lawyer should not publicly affirm a personal belief in the justness of the client's cause.31 This rule is partly an attempt to preserve the lawyer's effectiveness as an advocate. If lawyers become overidentified with one set of client interests, they won't be credible advocates for the opposing position in the next case. If lawyers generally get identified with client causes, moreover, they won't be able to take on disgusting or unpopular ones. But there is more: the rule incorporates the notion that although lawyers' services and technical skills are for sale, their personal and political convictions are not, for they each have a core identity that must be exempt from commodification. The loyalty purchased by the client is limited, because a part of the lawyer's professional persona must be set aside for dedication to public purposes.32

I know perfectly well that when lawyers start talking this way about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real. But try for a moment to suspend disbelief. The vision of lawyering as a public profession has real historical content, even if the "republican" tradition that gave it content happens for the moment to be in recession. It even has a real current content, meaning that in some forms it is (and, as I'll argue, must be) actually though differentially instantiated in the conventional practices of lawyers. Finally the vision has tremendous—though mostly as yet unrealized—potential to transform lawyers' practical conceptions of their work in constructive ways.

30 This prescription, somewhat troublesome in that it seems to repeal the vocation of committed advocacy, is widely violated in practice. See infra notes 189-93 and accompanying text. Many corporate lawyers identify with their clients' ends. See infra notes 197-204 and accompanying text.


32 See, e.g., Blueprint, supra note 27, at 15; Brennan, supra note 27, at 89-91.
The excerpt from Brandeis quoted above succinctly states the core of the traditional "republican" ideal of the lawyers' public role: they should hold "a position of independence, between the wealthy and the people, prepared to curb the excesses of either..." In America the earliest and most powerful articulations of the ideal came from leading (usually) Federalist lawyers, nourished on Montesquieu. These lawyers, in turn, influenced Tocqueville's view of American lawyers as a substitute for the Montesquieuian aristocracy, forming a separate estate in society, committed by professional instincts and habits to functioning as a balance wheel in political life. This view ascribes to lawyers both negative and positive roles. The negative role is that of resolutely obstructing, out of their instinctive conservativism, any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions. Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism. Performing their positive functions entails the assumption of a special responsibility beyond that of ordinary citizens. They are to repair defects in the framework of legality, to serve as a policy intelligentsia, recommending improvements in the law to adapt it to changing conditions, and to use the authority and influence deriving from their public prominence and professional skill to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.

In the republican vocabulary, independence from the dominant factions of civil society was the essential precondition to the "civic virtue" or "patriot capacity" that lawyers needed to perform these functions.

Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of society?

33 For a more comprehensive discussion of this tradition, see R. Gordon, Lawyers as the American Aristocracy (1985) (Oliver Wendell Holmes Lectures) (unpublished manuscript).
34 L. BRANDEIS, supra note 1, at 337.
35 Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. The exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgement of the crowd.
37 The Federalist No. 35, at 221 (A. Hamilton) (J. Cooke ed. 1961). This notion of the professional as the disinterested neutral among factions was far from univer-
The lawyer dependent upon the continuous patronage of a faction would no longer be able even to perceive, much less act upon, a view of the general interest. The need for people capable of maintaining such a general perspective was considered particularly important in a commercial republic like the United States. The pursuit of self-interest through commerce might well be the road to general prosperity, but it also had potential to deflect attention from social issues, to devalue public service and to corrupt politics by turning the public sphere into a trough of private favor-seeking. Some group had to be habitually oriented towards a longer-run, less particularistic, perspective on state and society.

Lawyers and others believed that in America, lawyers were peculiarly qualified to be that group. They furnished a disproportionate share of Revolutionary statesmen, dominated high offices in the new governments and the organs of elite literary culture, had more occasions even than ministers for public oratory, and were the most facile and authoritative interpreters of laws and constitutions, rapidly becoming the primary medium of America's public discourse and indeed its "civic religion." Also—this has been since so completely eclipsed that it now seems almost a joke, though it wasn't one at all in the early nineteenth century—they seemed to have exceptional opportunities to lead exemplary lives, to illustrate by their example the calling of the independent citizen, the uncorrupted just man of learning combined with practical wisdom. Lives of eminent lawyers were written up and circulated for schoolchildren and popular readers. As an inspiration to the younger bar, lawyers endlessly eulogized their dead breth-

sally accepted even in Hamilton's time. See Wood, Interests and Disinterestedness in the Making of the Constitution, in BEYOND CONFEDERATION 69, 89 (R. Beeman, S. Botein & E. Carter eds. 1987) ("Instead of seeing enlightened patriots simply making a Constitution to promote the national good, [the Antifederalists] saw groups of interested men trying to foist an aristocracy onto Republican America.").


40 See R. FERGUSON, supra note 38, at 66-72; M. LARSON, supra note 13, at 283 n.45.

41 See R. FERGUSON, supra note 38, at 17, 77-78.

42 See id. at 16-20.

43 See id. at 76 (In the lawyers of the early Republic, "virtue, politics, and literary expression merged in the classical image of man finding fulfillment in citizenship").

44 See Bloomfield, Law and Lawyers in American Popular Culture, in C. SMITH, J. McWILLIAMS & M. BLOOMFIELD, LAW AND AMERICAN LITERATURE 132-38. But see id. at 138-43 (providing examples of popular literature describing the lawyer as a "pettifogger, who stirred up needless litigation and exploited his clients and the legal system for personal gain").
ren's *disinterestedness* and devotion to professional craft and public service, often at considerable sacrifice to income.\(^4\)

(b) *The Tradition Modernized.* The ideology of professional independence originated with a legal elite anxious to play the role of the "Few," the aristocratic component of society, in classical political theory. Over the nineteenth century, the ideal shed its aristocratic origins and became the ideology of a middle class searching for a source of prestige other than landed wealth or success in business.\(^4\) The middle class discovered such a source in "professionalism."\(^4\)

As one sector of the middle class, lawyers espoused the ideology of professional independence. They hoped that through postgraduate education in legal "science," the revival of bar associations promoting ethical codes, political reform activity to purify government and the judiciary, and establishment of a professional civil service, they would be able to staff state and society with trained disinterested professionals.\(^4\) They also hoped clearly to differentiate law from business, and thus to purge the legal profession of the taint of its apparently growing subordination to the emerging great corporate interests.\(^4\) Like the lawyers of the early Federal period, they linked politics to epistemology: the fashioning of clear-sighted public policy and long-term

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\(^4\) See, *e.g.*, R. Ferguson, *supra* note 38, at 67 (Story confesses to Kent that "you carry me a voluntary captive in all your labors, whether in law, or in literature. You throw over everything which you touch a fresh and mellow coloring, which elevates while it warms, and convinces us that the picture is truth and the artist a master."); K. Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 30 (Story's eulogy of John Marshall); R. Gordon, *supra* note 33.

\(^4\) See B. Bledstein, *The Culture of Professionalism* 20-22, 26-45 (describing ambitions and beliefs of the newly emerging American middle class in the nineteenth century).

\(^4\) See id. at 80-128 (detailed discussion of the culture of professionalism).


\(^4\) See B. Bledstein, *supra* note 46, at 36, 88-92; see generally Haskell, *Professionalism versus Capitalism*: R. H. Tawney, Emile Durkheim, and C. S. Peirce on the Disinterestedness of Professional Communities, in *The Authority of Experts* 180 (T. Haskell ed. 1984) (critique of the view, shared by Tawney, Durkheim, and Peirce, that capitalism and professionalism are antithetical); id. at 183 (noting theory that the "invidious distinction [Tawney, Durkheim, and Peirce] drew between the morality of businessmen and that of their own, largely professional, class . . . [was] an ideological weapon, an instrument of class rivalry"); cf. R. Wiebe, *supra* note 48, at 117 ("[B]y the [1890s] a sense of professionalism had undoubtedly captured a number of relatively young lawyers, eager to see their work as a science, alert to ways of using their specialized knowledge, and far more aware than their predecessors of the social implications of law.").
interest-regarding advice to clients requires independent judgment, which is made possible only through independence of position in the political economy. The observations of Brandeis, Wilson, Berle, and Stone quoted above\textsuperscript{50} fully incorporate this Progressive-professional ideal, as well as distress at its apparent failures.

(c) Current Views of the Ideal. The "republican" vocabulary of civic "virtue," once employed to explain why lawyers should be at least somewhat independent of the major powers and factions of civil society, is now rather out of fashion.\textsuperscript{51} But in fact we cannot do without some such concept. Even someone committed to the most thoroughly reductionist versions of modern liberal theory—that there is no public interest, save that in fair rules for the free competition of private interests in the market, the provision of public goods, and the correction of market failures—must still imagine some mechanism for maintaining the basic framework of legal rules that constitute and support the market. To provide such a mechanism, it turns out that it is very difficult to manage without some notion that lawyers must be committed to helping to maintain the legal framework.\textsuperscript{52} The system of adversary representation can only work, can only be justified, if it’s carried on within a framework of law and regulation that assures approximately just outcomes, at least in the aggregate. At a minimum, lawyers must be independent enough from their clients to support the rules and institutions of the framework, even when doing so hurts their clients.

Adopting a less purely economistic and more sociological approach to social purposes makes the case for lawyers’ independence stronger still. As the functionalist sociologist Talcott Parsons argues, in a complex, differentiated, pluralist society, whose interest groups pursue diverse projects, there have to be some general norms (shared values), orienting all of these tasks to a set of common purposes. Law, in secular modern societies, is one of the most important sources of universal norms. One function of lawyers, therefore, in addition to pursuing their clients’ particular interests, is to give

\textsuperscript{50} See supra notes 1-3 and accompanying text.

\textsuperscript{51} Recently, however, scholars have been reviving the "republican" discourse. See, e.g., Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 87 (1985) ("[A]s the bicentennial of the Constitution approaches, it is especially important to appreciate the grounds on which Madison and his peers stopped short of pluralist approaches, and sought a system in which private preferences are subjected to critical evaluation."); Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 24 (1986) (arguing that although the idea of republicanism based solely on civic virtue is overly simplistic, the ideal of civic virtue remains vital as a precondition of the principle of individual freedom).

\textsuperscript{52} Even the most reductionist versions of public-choice theory, which view all politics as selfish factional rent-seeking, assume the necessity of some collectively maintained framework (often some considerably mythified and simplified version of nineteenth-century "common law" and Constitutional rules) for private ordering.
advice that will help align those interests with the set of general social norms. 53

There is also a narrower functionalist argument in favor of the lawyer's independence. Even economists once given to seeing in business life nothing more than the clash of self-interest have again begun to recognize what their classical predecessors took for granted and the Japanese economic successes have dramatized. That is, markets cannot operate on purely self-seeking opportunism and strategic behavior; rather, they require an underlying substratum of moral conventions—norms of trust, loyalty, honesty, and reciprocity of dealing. 54 As a method of settling commercial disputes, for example, untempered adversarial advocacy of the kind that exploits every opportunity offered by formal legalism may have long-run corrosive effects on this infrastructure of conventions, and thus should be avoided where possible. On this view, one purpose of legal advice is to remind clients who may be tempted to ignore the infrastructure for the sake of short-term profits of the usefulness of underlying business conventions (e.g., to tell a client who is either about to break a contract or sue a trading partner that the client is being "unreasonable" in a way that will hurt the client's reputation and invite retaliation) as well as of the explicit rules of the legal framework. In other words, lawyers are sometimes in the best position to know when some of the strategic tools of law—formalism, proceduralism, an adversarial attitude—will defeat their clients' overall goals by poisoning the cultural environment in which the clients operate. 55

A final argument that lawyers have made for their independence is one that seems powerful today without any translation: a country lacking a tradition and a prospect of a strong civil service needs a cadre of competent professionals to staff the upper political posts in the bureaucracies and, in or out of office, to give policy advice. 56 Because lawyers more often than any

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54 See A. Fox, Beyond Contract 66-119 (1974) (analyzing dynamics and models of trust relations); I. Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations 1 (1980) ("Contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without language is impossible; and contract without social structure and stability is—quite literally—rationally unthinkable. . . ."); Durkheim and the Law, supra note 21, at 192-237 (discussing principles underlying our conception of contracts as binding); McKean, Economics of Trust, Altruism, and Corporate Responsibility, in Altruism, Morality, and Economic Theory 29 (E. Phelps ed. 1970) (discussing the dependence of the private enterprise system on altruism and relations of mutual trust).
55 I have tried to provide a fuller account of the tensions between capitalism and legalism in R. Gordon, Virtue, Commerce and Lawyers (1987) (unpublished manuscript).
56 Cf. R. Ferguson, supra note 38, at 11-33.
other occupational group are called upon for such service, it would be better for everyone if their perspective were broader than that of their factional clienteles.

(d) Implications of the Ideal for Practice. Many lawyers, perhaps most, are willing to swear allegiance to the political ideal of independence when it is very generally stated. Indeed, lawyers resisting regulation often claim that they must retain exclusive power of corporate self-regulation and individual control over their work in order to perform properly their political roles as the guardians of individual rights, the defenders of the legal framework, and the balance wheel of society.\(^5^7\)

It is when the issues become concrete that arguments start. In grappling with defined problems of professional obligation, lawyers differ greatly on

\(^{57}\) See supra notes 6-13 and accompanying text; see also Pickholz, The Proposed Model Rules of Professional Conduct—and Other Assaults Upon the Attorney-Client Relationship: Does “Serving the Public Interest” Disserve the Public Interest?, 36 BUS. L. 1841 (1981) (arguing that the Model Rules’ modification of the attorney-client privilege laid out in the Model Code of Professional Responsibility does a disservice to the public interest because it inhibits lawyers’ independence). These claims are not always plausible. Immunity from outside supervision of their work may in fact make it easier for attorneys to compromise the interests of clients for the sake of high turnover and continuing good relations with judges and opposing lawyers. See, e.g., Blumberg, The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession, LAW & SOC’Y REV., June, 1967, at 15, 22-24 (arguing that criminal defense lawyers, often insulated from outside pressure by the criminal justice system’s structure and organization, are ultimately concerned with maximizing the number of pleas rather than defending their clients to the full extent of the law). Similarly, autonomy in work and professional standard setting does not by any means make it easier for lawyers to assert independence from the pressure of clients. Indeed, some types of autonomy, like an attorney’s freedom to choose clients, can transform into the freedom to allow a single powerful client or faction to dominate an attorney’s entire working life. Lawyers whose practices are regulated from the outside—by the SEC’s Rule 2(e) or the IRS’s TEFRA regulations of tax shelter opinions, for example—are less autonomous in some ways but more so in others, for they can convince their clients that their advice is not an exercise in prissy moralizing, but necessary to save the lawyer’s license to practice. Furthermore, corporate house counsel increasingly subjects large-firm lawyers to “regulation” by imposing on them budget ceilings, detailed reporting requirements, breakdowns of travel and xeroxing expenses, and itemized lists of which associates are working on a problem. Corporate counsel’s supervision undoubtedly subverts the outside lawyers’ control over the transaction, but it greatly improves that of the in-house lawyers, whose recent growth in budget, staff, and authority, and professional calibre have naturally tended to increase their influence in corporate decisionmaking.

Autonomy in organizational form, autonomy in setting the conditions of individuals’ work, and autonomy in the larger political economy are really very different forms of professional independence. It just invites confusion to blur them all together.
how much stress to give each of the two basic and fundamentally conflicting ideals of political independence. One stresses loyalty to the client, even at the cost of some warping of the legal framework. The other emphasizes fidelity to the framework and its improvement, even at the cost of sometimes having to resist the pressures of clients.

As we have seen,58 the liberal advocacy ideal prescribes the barest obligations to the framework. Lawyers should not commit crimes or help clients to plan crimes. They should obey only such ethical instructions as are clearly expressed in rules and ignore vague standards. Finally, they should not tell outright lies to judges or fabricate evidence. Otherwise they may, and if it will serve their clients' interest must, exploit any gap, ambiguity, technicality, or loophole, any not-obviously-and-totally-implausible interpretation of the law or facts.

The difficulty with such an ethic, as its critics have often pointed out,59 is that it is a recipe for total sabotage of the legal framework. In most of the ordinary situations where people face legal regulation, like paying taxes or refraining from theft, the legal system counts on most people to internalize the norm and comply voluntarily. If clients really acted as some legal economists think they do—that is, if they treated all legal rules simply as the prices of misconduct discounted by the probability of their enforcement—and kept consiglieri on the payroll to drive up the costs of detection and enforcement, the rich clients alone could rapidly exhaust the resources of most public agencies and civil adversaries. In countless situations calling for compliance with legal rules despite the insignificance of the risk that someone will notice noncompliance and impose a sanction accordingly, nobody would ever bother to comply. Moreover, proponents of the liberal advocacy ideal should consider a consequence of their view that is more important and more likely than those raised by the neo-Hobbesian nightmare of a world populated wholly by amoral calculators. If clients, including those who prefer to be law-abiding even when nobody is likely to know when they are not, habitually consult lawyers who recommend only the most literal forms

58 See supra text accompanying notes 20-24.
59 I have to admit that some weariness descends at the prospect of having to explain again, as many have far more ably than I have done in the past, why the Adversary-Advocacy model of lawyering, outside of certain highly structured contexts, is severely deficient as a practical method of realizing any theory of the goals of universal access, even-handed administration of the laws, or simply the goal of client autonomy, in a liberal legal system. See, e.g., Luban, The Adversary System Excuse, in THE GOOD LAWYER 83 (D. Luban ed. 1983); Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 31. But this model continues to dominate lawyers' public discourse about ethics, often without any accompanying recognition of the arguments that may be made against it. See Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274 (1986). So perhaps it's worth trying another restatement of those arguments.
of compliance and widen every loophole far enough to drive a truck through, the lawyers will end up effectively frustrating the purposes of their clients as well as the legal rules. The lawyer under such an ethical regime is by vocation someone who helps clients find ways around the law.

Defenders of the advocacy ideal can respond in two ways. First, they might contend that adversaries can correct for law-evading tactics and interpretations with excesses of their own. In addition, they might insist that both sides can and should leave it to official decisionmakers, not to lawyers, to find the midpoint that fulfills the “purposes” of the laws. This response assumes a clear division of labor in the legal system: “private” lawyers bend the law and facts to help their clients; “public” officials bend them back. But this happy equilibrium only results—if it ever does—where adversaries and officials learn about the bending and have the resources to correct it. It may result in the criminal prosecution context because the state has already detected the potential violation, has overwhelming resources compared to the defendant’s, and can impose horrific penalties on defendants who force it to commence troublesome and expensive all-out adversary procedures. In the full-scale civil trial between corporate giants, such an equilibrium may result if the judge assumes tight control of the case, or if the procedural maneuvers and discovery tactics of the two sides approximately cancel each other out.60 There may be corrective mechanisms outside the trial context as well.61 Vigilant and zealous IRS officials with allies in Congress may be able

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60 Some observers of the full-scale adversary trial, most notably Judge Marvin Frankel, have sharply questioned whether an approximately fair resolution of contending forces usually results even in that context. See Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975); M. Frankel, Partisan Justice (1980).

61 In the English institutional context in which the advocacy ideal of loyalty to the client was classically articulated, the equilibrating mechanism is the “cab-rank” principle, requiring the barrister to take the brief next offered and to argue that client’s position, whatever it may be. Not only will the opposing position be heard in court, but the same barrister may be arguing the other side in the following week. The cab-rank principle was one of several that English lawyers adopted to achieve independence from powerful client-patrons. See generally W. Boulton, A Guide to Conduct and Etiquette at the Bar of England and Wales 6, 32-41 (6th ed. 1975); D. Duman, The English and Colonial Bars in the Nineteenth Century, 40-50 (1983). For a concise description of the cab-rank principle and its role in preserving the independence of barristers, see Alexander, The History of the Law as an Independent Profession and the Present English System, in The Lawyer’s Professional Independence: Present Threats/Future Challenges 14-18 (1984).

Obviously the advocacy ideal has a completely different meaning in a system where the lawyer is hired only for the single case and is institutionally precluded from continuously arguing the same positions. See generally id. Under the English system, theoretically, the resources of advocacy cannot be concentrated in the hands of those
to spot and close some tax loopholes almost as quickly as the tax bar and accountants open them up. The adversaries may be represented by lobbies who can seek legislative amendments or administrative rule changes or interpretations favoring their side. Yet in the great mass of routine legal counseling situations, few or none of these corrective influences can be brought to bear.

Standard legal ethics ideology provides two different ways to solve this problem: "schizoid" lawyering and "purposive" lawyering. "Schizoid" lawyers divide themselves (and the private bar generally) into two capacities or roles, a private and a public. In the private role they continue to bend the legal framework to help their clients. But in contexts where they cannot count on corrective forces to bend it back, they are obliged to help produce the corrections—to work on bar committees, testify before legislatures, work for or help support underrepresented interests, and engage occasionally in public service. The classic example of the schizoid lawyer is David Dudley Field. As lawyer for the Erie Railroad, he exploited loopholes inadvertently left in the Code of Civil Procedure which he himself had drafted; he also sought injunctions before judges he had reason to suspect had been bribed to grant them, but offered to join bar association campaigns to remove corrupt judges. Schizoid lawyering reconciles the liberal adversary and public interest models by mandating conformity to both, but on different occasions.

The schizoid model clearly improves on the pure liberal advocacy position clients best able to pay for them. I say "theoretically" because in fact the English and American systems converge much more than a superficial description implies. The cab-rank principle applies only to barristers; solicitors may and do continuously represent the same clients and positions. Solicitors in turn establish continuing relations with barristers' chambers. See J. Flood, Barristers' Clerks 69-81 (1983). And the cab-rank rule is widely circumvented through having barristers' clerks tell solicitors that the boss is "too busy" at the moment to take the brief of an undesirable client. See id. at 80. For a fascinating account of these doorkeepers, see generally id.

This ethic is embodied, though in permissive rather than mandatory form, in Model Code of Professional Responsibility EC 7-17 (1981) ("While a lawyer must act always [so that] his conduct will not adversely affect [his client] . . . he may take positions on public issues and espouse legal reforms . . . without regard to the individual views of any client."); id. at EC 8-1 ("[Lawyers] should participate in proposing and supporting legislation and programs to improve the system without regard to the general interests or desires of clients. . . .").

For a detailed account of the Erie litigation and the events surrounding it, as well as of David Dudley Field's controversial actions and beliefs, see G. Martin, Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970 4-15, 29-30, 55-67, 87-103, 142-57 (1970); see also High Finance in the Sixties: Chapters From the Early History of the Erie Railway (F. Hicks ed. 1929).
by placing some responsibility for promoting the purposes of legal rules on lawyers as well as public officials. But it too has problems. Even lawyers who believe in the schizoid duties are likely to think the duty to client interests is mandatory, while that of correcting the distortions arising from performing it merely permissive, as well as difficult to give much definite content. Performing the public function generates no fees and is in most cases an occasional after-hours hobby. Also, the lawyer’s greatest expertise and potential influence will be on issues that lie at the heart of the lawyer’s practice and the lawyer’s clients’ welfare. Quite aside from formal conflicts of interest considerations, few lawyers will feel like engaging in highly visible public campaigns to make life harder for their clients. Most likely they won’t want to anyway, having come to identify with most of their clients’ views on the policy issues. Finally, the schizoid model seems a rather inefficient mechanism—having lawyers running around solving problems they helped to create seems a little wasteful. It is natural to wonder whether they should have helped to create the problems in the first place.

The model of “purposive” lawyering stands opposed to the schizoid model. A lawyer adopting the purposive perspective would strive to maintain the spirit of the laws both inside and outside the context of representation, to assist in carrying out their “essential purposes” or “social functions,” or at the very least to refrain from acting so as to subvert and nullify the purposes of the rules. The purposive lawyer does not split private and public roles, but rather tries to unify them by seeking ways to harmonize the client’s business plans with the purposes of the legal framework. Outside

64 The Model Code of Professional Responsibility certainly demonstrates the permissive, loosely structured nature of the schizoid lawyer’s public function. See supra note 62.


66 See infra note 198 and accompanying text.

67 My label and description of the model are taken from Simon, supra note 59. See also Garth, Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite, 62 IND. L.J. 183 (1986) (exploring possible ways for lawyers to link their legal expertise and their political values); Simon, Babbit v. Brandeis: The Decline of the Professional Ideal, 37 STAN. L. REV. 565 (1985) (discussing the Progressive-Functionalist vision of professionalism).

68 See Model Code of Professional Responsibility EC 7-8 (1981) (“[I]t is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”); Fuller & Randolph, Professional Responsibility: Report on the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958) (“The lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.”).

69 Even a purposive lawyer, however, may act like an “adversary at any cost” in
client representation, the purposive lawyer has the same obligations as the schizoid one. Purposive lawyers must repair damage to the framework done by factional interests and their advocacy-minded lawyers, assist in reforming the legal structure to meet its purposes when conditions change, and serve as an official and unofficial policy intelligentsia. They should be the social curators of the values of legalism—promoting understanding and respect for the values of human rights, due process, equal legal treatment, universal access to justice, and coming to the aid of persons injured by the deprivation of these rights.

The ideology of purposive lawyering has in one form or another prevailed among elite lawyers of this country since its inception—at least in their ceremonial rhetoric. But it has always had to compete with the advocacy ideal and with a view far less public-spirited than that ideal. That is, many lawyers (especially business lawyers) believe they have no special obligations toward or special capacity to recognize the public interest, that they are and should be business people whose sole task is to serve their clients’ interests. In this “market model,” as John Leubsdorf calls it, assumption of any public functions is an arrogant “aristocratic” presumption out of place in a democracy, where individuals pursuing self-interest in the market on the one hand, and elected officials on the other, are uniquely privileged to make social decisions. This view, in short, challenges the image of lawyers as “republican” citizens having public duties with an image of them as private “liberal” individuals, contracting like every other market actor for their services. In the early nineteenth century, journeymen practitioners used the market model as an ideological weapon against the pretensions of the elite bar. In more recent times it has invaded the citadels of the elite bar itself, and now appears to have become the reigning ideology of the managers of the great metropolitan firms.

settings such as criminal defense work, where both a tradition of exceptional solicitude for the rights of clients in extreme peril and the practical opportunities for equilibrating correction argue for unusual latitude to the advocate.

70 See, e.g., Blueprint, supra note 27, at 47; Brown, supra note 5, at 23.

71 Leubsdorf, supra note 7, at 1026-35.

72 “To the mass of practitioners, the law is not, except on some rare occasions, an intellectual pursuit. . . . We are clever men of business, as a mass, and no more. It is our BUSINESS TALENTS, our PROMPTNESS, ACCURACY, and DILIGENCE that commands success, respect, and influence.” Office Duties, 4 Am. L. Reg. 193, 193 (1856), quoted in M. Bloomfield, American Lawyers in a Changing Society 150-51 (1976).

73 Cf. Leubsdorf, supra note 7, at 1027-35.

74 See id. at 1026-35.


76 See, e.g., Fried, The Trouble With Lawyers, N.Y. Times, Feb. 12, 1984, § 6 (Magazine), at 56, 61, 63.
I'd like to postpone my general assessment of the liberal or market model of law practice and focus for now on one of its central claims. According to the market model, lawyers are neither entitled nor qualified to make political judgments about how client actions will affect the "public interest." Rather, they must function simply as neutral extensions of their clients' wills. I believe, however, that no matter how much lawyers would like to restrict their role this way, as doubtless many would, it's simply not a feasible option.

For one thing, many business executives want their lawyers to exercise political judgment, to serve as the "corporate conscience," to monitor middle-managers tempted to cut legal corners to meet profit targets, to follow the spirit as well as the letter of the law in order to preserve employee morale as well as a public image of civic leadership. Even if the client calls for no such advice, the lawyer might still plausibly assume, unless expressly told otherwise, that the client's "overall" or "long-term" interest lies in following the spirit as well as the bare letter of the laws, and so feel obliged as a fiduciary to give advice based on that assumption. The lawyer could further assume that regardless of what the company's managers say they want, the lawyer-client contract, like every other contractual relation, implies a host of standard duties appropriate to the social roles of the parties. Indeed, lawyers might consider certain professional duties so important for the protection of the parties or potentially affected outsiders that they should be nondisclaimable. The contractual regime could require the lawyer to give "purposive" advice, just as the doctor must warn the patient of risks in seeking consent to the operation, regardless of whether the client waives the benefit of such advice. In other words, it's very easy to fold the whole

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77 See infra notes 252-57 and accompanying text.
78 See, e.g., de Butts, The Clients' View of the Lawyer's Proper Role, 33 Bus. Law. 1177, 1183-85 (1978) (corporate lawyers should play an array of roles as advocates, counselors, and activists in shaping the law and its processes); Rast, What the Chief Executive Looks for in his Corporate Law Department, 33 Bus. Law. 811, 813-15 (1978) (listing eight expectations for corporate counsel: that they give advice upon which the corporation can act, that their advice be sound and practical, that they can prevent legal problems from arising, that they have expertise in specialized areas, that they be objective, that they solve problems in a manner compatible with the law and consonant with corporate claims, that they select outside counsel carefully when needed, and that they have a high sense of honesty and fairness). But cf. A Businessman's View of Lawyers, 33 Bus. Law. 817, 819 (1978) (one member of a panel of businessmen stating that he wants no business or ethical advice from lawyers).
79 Cf. Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1982) (defense of paternalist motives underlying contract and tort law). Leubsdorf points out that under a purely contractual regime of lawyer-client relations (which Leubsdorf does not recommend),
model of Purposive Lawyering into the model of liberal contracting—to argue that the express or implied terms of the contract require purposive advice, and that lawyers who fail to give such advice neither serve their clients' interests nor enhance their clients' capacities for autonomous decision-making.

My point, however, is a broader one: political judgments are virtually inescapable. Take one of the most routine contexts of business law practice, compliance counseling. The client hopes to seize a profitable opportunity. The plan is routed through the lawyer's office and is seen to pose a potential problem: some legal doctrine or regulation arguably prohibits the plan. What can the lawyer do? Here is a simple, nonexhaustive array of the types of advice a lawyer can give in the context of compliance counseling. The lawyer might advise that:

a) The plan in its current form is prohibited;
b) The plan is clearly prohibited, but the risk of detection is slight or, if significant, expected profits will still exceed the likely penalties;
c) Same as (b) except that the lawyer advises that there is a non-negligible risk of getting caught and being exposed to later liabilities, so that prudence dictates forbearance;
d) The form of the plan is clearly prohibited, but can be cosmetically recast in another form that will accomplish its essential purposes;
e) The substance of the plan is clearly prohibited, but can be made legal if altered in some substantive particulars;
f) The plan contravenes the regulations' basic purposes, but it technically complies with the regulations, and is legal;
g) Same as (f), except that the lawyer advises that the plan is illegal;
h) Same as (f), except that the lawyer advises that the plan is only technically legal, and that there is some risk that the regulators or courts will be interested in substance rather than form;
i) Same as (f), except that the lawyer advises that although adoption of the plan is technically legal, outsiders may perceive it as immoral or unscrupulous, so that for the sake of appearances or morale the plan should be altered or abandoned;

[The duties a lawyer owes to a client [would] be as negotiable as their price. If a client can have an untrained lawyer to transact his legal business, he should also be able to hire a lawyer who will devote only a few hours to the case. Conversely, the lawyer should be able to insist on skimpy representation as a condition of accepting the case. . . . Even the lawyer's duties of loyalty and confidentiality, as traditionally conceived, might be bargained away. Leubsdorf, supra note 7, at 1031 (footnotes omitted). Yet even under such a regime, there must be regulatory ground rules specifying the presumptive or "default" obligations to clients—those duties that will bind the lawyer unless the lawyer effectively disclaims or the client effectively waives them. And, of course, there must be rules defining what constitutes an effective disclaimer or waiver.

80 For a much more powerful and elegant formulation of advice options, see Simon, Ethical Discretion in Lawyering, 102 HArV. L. Rev. 1083 (1988).
j) Same as (f), except that the lawyer advises that the plan, though it may survive technical review, is wrong—violation of general norms of responsible social conduct expressed in existing or emergent legal tendencies—and should not be adopted;

k) Same as (f), except that the lawyer recommends an alternative business plan that accomplishes most of the purposes of the original while also promoting the underlying spirit of the law;81

l) Though the plan conforms to the underlying purposes of the law, some regulator may disapprove it on technical grounds, and the company should not (or may not want to) take the risk of sanctions;

m) Because the plan complies in spirit, sanctions would be an unfair form of harassment by narrow-minded, overly-zealous regulators or opportunistic adversaries; as such, the plan should be adopted and sanctions aggressively resisted;

n) The plan does not comply with the law, but because the law is an unfair and misguided interference with business judgments, the lawyer will work for legal reform through the lawyer’s bar association, suggest changes to the trade association’s lobbyists in the capital, recommend nonenforcement strategies to or seek exemptions from influential administrators, etc.

And so on.

Suppose the lawyer expresses opposition to the plan in deliberations, but is overruled. Once again, several courses of action are available to the lawyer, who might:

81 This is the form of purposive “counseling for the situation” for which Louis Brandeis is deservedly famous.

Two examples best depict Brandeis’s approach. The head of a large shoe manufacturing company, beset by labor problems with his workforce, called on Brandeis for assistance. The client wanted to cut employee wages. The client argued that in lean times he could no longer afford to pay the rate to which he had previously agreed. Brandeis discovered the workers were subject to long layoff periods so that although their hourly rates were high, their annual wages were low. After studying the economics of the shoe industry, Brandeis proposed that the client revamp his operations, accepting orders long before proposed delivery and then rescheduling operations to eliminate the layoff periods. Both the client and the employees profited from Brandeis’s advice.

Brandeis took a different approach to the labor problems of E.A. Filene’s department store. He recommended establishing the Filene Cooperative Association. This association helped to institute democratic reforms in the workplace, establish joint worker-management committees and reduce labor problems.

In these cases, Brandeis did not act as “just a law lawyer.” He used economics and industrial psychology to resolve potential legal problems. He did not practice law as a differentiated specialist. He led his clients to reconceive their interests so that he could, then, comfortably espouse them. Furthermore, he sought solutions that satisfied, to a degree, the interests of potentially opposing parties.

a) acquiesce in the adverse decision at the first sign of opposition;
b) press the point, using the techniques of advocacy to try to induce a
c) continue to oppose the plan, carrying objections to a higher level of
    d) acquiesce, and zealously help to execute the plan;
    e) seek discreetly to modify the obnoxious features of the plan, perhaps
    f) insist upon recording objections, reservations, or adverse-risk assess-
    g) refuse to participate further in implementing the plan, but agree to
    h) withdraw from the representation of that client entirely;
    i) whether or not the lawyer withdraws, warn that if the client goes ahead
        with the plan the lawyer will disclose;⁸²
    j) continue to represent the client, but work through writings, bar associa-
        tions, political pressure groups, public interest lobbies, advice to political
        candidates, influence with officials, etc., to tighten regulation of the conduct
called for by the plan.

These are naturally just a tiny handful of the choices to be made regarding
the form and content of advice given in the course of compliance counseling,
the persons in the organization to whom such advice is given, the tactics one
can resort to if one meets opposition. All these choices—except disclosure
and withdrawal, which may be regulated—are well within the conventional
boundaries of the counselor's role. Which choices are actually made will be
a function of the lawyer's situation and convictions, the lawyer's personal
courage and confidence, the relations of authority and trust the lawyer has
with the managers involved, the lawyer's own position in the hierarchy of
the company or outside firm, the importance of the client to the firm, the
firm's place in the legal services market, the lawyer's degree of practical
knowledge of the business (which will crucially affect the lawyer's ability to
suggest alternatives), the form of advice managers prefer to hear from their
lawyers, and the general compliance culture of the company (does it walk
the line and play hardball with regulators or try to anticipate regulatory
problems and initiate its own solutions?).

Obviously most lawyers, or at least lawyers for big, powerful companies,
will avoid abrasive and unnecessary confrontations with their clients. They
will phrase negative advice as prudential rather than moralistic, supporting
their recommendations with reasons that sound much more like statements
of technical rules or empirical predictions of risks and results than political
or moral judgments. But even such tactful and delicate counseling involves

⁸² Of course, this last option will be the subject of ethical rules and other regula-
tions mandating, permitting, or prohibiting disclosure.
discretion, and every exercise of that discretion entails making "political" decisions. For even if the lawyer wanted to, the lawyer simply could not neutrally, objectively, inform the client what the probable legal implications would be if the client followed its proposed plan. The "law" of the situation is always ambiguous. That is, the law might consist only of a set of penalties or it might also include a set of norms; it might call for compliance only with formal rules or for conformity to its purposes or brooding tendencies. Moreover, the law is alterable by the interpretive spin, the degree of avoidance or resistance, and the political manipulations that the lawyer and others can persuade the client to bring to bear upon it. The life of the law, as the Legal Realists and Law and Society movement keep reminding us, is in interpretations and applications, where the practices of clients amplify, alter, and nullify formal rules. The very language and tone in which lawyers speak of the law to their clients is a local political action that subtly reinforces or subverts the legitimacy of the regulatory state. When they speak of the law deferentially, they imply that it is a set of authoritative norms with which everyone will want to comply. When their tone is cynical and contemptuous, they implicitly portray law as harassment by petty bureaucrats enforcing the legislation of populist demagogues. And when they adopt a neutral attitude toward the law, they convey an idea of law as a set of external nuisances and hurdles completely divorced from their own and their clients' membership in a common political community.

I am not arguing that lawyers should speak of every rule of law with reverence and deference. On the contrary, it is entirely appropriate to treat different types of legal rules differently, and lawyers habitually do so. Few lawyers asked for advice by clients contemplating murder, for instance, would respond simply that no penalty will be imposed so long as the client takes care not to leave behind proof beyond a reasonable doubt. Some tax lawyers, on the other hand, are quite willing to phrase advice in the "neutral" form that the penalties-discounted-by-audit-risks of their proposed illegal scheme are lower than its expected profits. But other attorneys consider such advice highly improper, and some of them will contribute to the tax bar's collective effort to draw lines distinguishing "avoidance" from "evasion" and setting standards for tax opinions. Though the form and

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83 For an account of the difficulties that lawyers face in attempting to quantify the probability that regulators or courts will deem proposed client conduct illegal, see Vagts, Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie?, 34 Bus. Law. 421 (1979).


content of advice may vary, the choice of how to characterize the law to the client inevitably implicates political judgment.

The client's "interest" is as malleable a concept as the "law"—never infinitely manipulable, of course, but material that can be shaped in a number of ways. The interest—and the "client," the different levels and divisions of the company—does not arrive on the lawyer's desk in a fixed and objective form, but is something that the lawyer molds and influences through advice. Lawyers plainly influence the compliance culture of corporate clients. Attorneys can submit to what seem to be the prevailing company norms. They can side with one department or set of managers against another. They can work to change the culture by exploiting whatever little leverage points they can find. Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves by failing to recognize or admit that clients will process their advice differently depending on the form and manner and setting in which they give it.86

Lawyers, then, do influence their clients to some extent, whether they want to or not. Their advice communicates by implication many political judgments about the legitimacy of legal norms and regulations and about the normative value of complying with them, whether they want it to or not. They can't choose not to be influential; they can only decide not to care or think about their influence and whether they should exercise it differently. The ideal of independence reflected in the model of purposive lawyering, however, requires lawyers to reflect and deliberate about the nature and results of their influence, as well as to act prudently, either within or without the context of representation, to change whatever results of that influence they think are bad ones.

II. CONDITIONS OF POLITICAL INDEPENDENCE

Suppose that you are provisionally willing to accept some of the arguments just given for why lawyers should feel free, and on some occasions even obliged, to promote legal viewpoints and policies differing from those which their clients might perceive to be in their immediate interests. Under what circumstances are lawyers likely to experience this sense of freedom and obligation, and to act on it? By exploring what seem to have been the historical conditions of professional independence and then asking whether such conditions (or plausible equivalents) still exist today, we may be able to glean some insight into the widespread perception that lawyers' opportunities and motivations for the exercise of independence have declined.

Unfortunately, such a historical sociology must be very speculative. There's not much to draw upon save a few studies of lawyers in scattered

86 See generally R. Rosen, supra note 81.
times and places, some legal biographies and studies of the legal profession, and the contributions of the new legal journalism. These are too few shards and fragments to assemble into any very large or detailed mosaic. Moreover, the main concepts we are working with ("independent viewpoints," "clients' interests") are ineluctably fuzzy. Also, and I regret this, almost everything said here will relate to a small and entirely unrepresentative segment of the bar, its metropolitan elite, and to its corporate rather than individual clienteles. I'm not focusing on this elite because I consider it uniquely worth attending to, but because the ideology of lawyers as a separate estate in society originated with and has tended most to flourish around the elite bar. Moreover, it seems fair to assume (although this may be a big mistake) that the people who occupy the top positions within the conventional prestige structure of their profession will have the most authority and latitude to assert independent positions. Finally, such sparse materials as exist for understanding what lawyers do mostly relate to this group. In any case, it is the only group I happen to know enough about to attempt even a speculative sociology. With all of these qualifications in mind, I will now attempt to specify the components of the lawyer's professional independence.

A. Some Social Factors Affecting Independence

1. Motivation and Attitude

Before they can assert positions independent from their clients', lawyers have to want to do so. One way of analyzing the endless debate among lawyers about whether law has become a business, and if so whether that is wonderful, terrible, or just a fact of life, is as a clash between people with very disparate images of and aspirations for their core social identities. The profession of law as the generalist career open to talent has of course always attracted social types on both sides of this debate. On the one hand it has been an avenue of entry for commercially ambitious people, initially without any but human capital, who hope to find in law practice the social contacts, investment opportunities, and financial and management experience that will lead to wealth, rank, and influence in the business world. The profession has also attracted people who will always measure their success in life by

87 In 1980, only 7.3 percent of all private practitioners worked in firms of 50 or more lawyers; all such firms, in turn, were located in metropolitan areas. B. Curran, K. Rosich, C. Carson & M. Puccetti, The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s 12-15, 51-55 (1985).

88 For instance, the legal profession has historically supplied a significant proportion of top management for big corporations. See, e.g., Miller, American Lawyers in Business and Politics: Their Social Backgrounds and Early Training, 60 Yale L.J. 66, 75-76 (1951).
how much money they make. On the other hand, there are people of an entirely different bent who go into law precisely because they are looking for a working milieu different from what they perceive to be that of business, organized (so they hope) around the "professional" values of craft excellence, intellectually interesting work, collegial esteem, and public service rather than the commercial value of profit-seeking. Still others view law practice primarily as a stepladder to (or way-station between episodes of) activity in politics. Obviously, many lawyers have mixed ambitions; for example, many undoubtedly seek commercial success via interesting work nicely garnished with public service. But which set of aspirations predominates very likely affects one's position on the issue of independence. Those lawyers who feel most distant from the profit-seeking culture and who fear submersion in it will be most anxious to distance and differentiate their professional roles and practices from their clients'. Historically, the social sources of such distance have varied. As I suggested earlier, in the early years of the republic the upper bar was dominated by gentlemen who thought of law not only as a living, but as a branch of statesmanship and high culture. The revival of professionalism in the late nineteenth century was largely accomplished by an aspirant WASP middle class, mobilized to preserve for itself sources of status and social influence distinct from business success, and career paths outside and not

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89 See generally J. Auerbach, supra note 11, at 130-57.
90 According to a 1973 study, a large percentage of law students choose to attend law school because they wish to enter the public service sector and seek intellectual stimulation. Stevens, Law School and Law Students, 59 VA. L. REV. 551, 624 (1973); see also J. Auerbach, supra note 11, at 158-90; Erlanger & Klegon, Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns, 13 LAW & SOC'Y REV. 11, 18-19 (1978). This is not to say that law students are actually more likely to find a greater emphasis on "professional" as opposed to "commercial" values in law firms than in business firms. Several of my friends and classmates report leaving law practice for business jobs precisely so they can find, at last, colleagues who consider their work both interesting and socially worthwhile, and don't stick with it just for the sake of money and prestige.
91 Samuel J. Tilden, a leading lawyer and state chairman of the Democratic party in New York, passionately articulated this view of the law:

I do not desire to see the Bar combined, except for two objects. The one is to elevate itself—to elevate its own standards; the other object is for the common and public good. For itself, nothing; for that noble and generous and elevated profession of which it is the representative, everything.

G. Martin, supra note 63, at 37 (quoting speech by Samuel J. Tilden). Similarly, Dos Passos insisted that in ante bellum America, the legal profession "justly carried with it the right to occupy the highest social and political positions." J. Dos Passos, The American Lawyer: As He Was—As He Is—As He Can Be 25 (1907). See also sources cited supra note 45.
INDEPENDENCE OF LAWYERS

subordinate to the new giant corporate hierarchies. In this century, both patricians (for example, Henry Stimson, Grenville Clark, Francis Biddle, Dean Acheson) and middle-class WASPs (for example, Elihu Root, John J. McCloy, David Lilienthal, Jr., A.A. Berle, Jr., W.O. Douglas) have embraced the ideal of independent lawyering. The ideal also has found some of its greatest exponents among Jewish lawyers (for example, Louis Brandeis, Louis Marshall, Felix Frankfurter, Jerome Frank), who, excluded from the inner circles of the WASP elite, had the vantage point of marginality to scold that elite for selling out its public service traditions to big business clients.

But leanings toward public service and noncommercial values, even when combined with alienation from business culture, can never constitute sufficient conditions for mobilizing lawyers to assert their political independence. After all, there are many other ways to deal with dissonance between one's practical situation and professional ideals. Lawyers can adjust their ideals to the situation, or leave corporate practice for teaching or government service or a judgeship, or leave law entirely, or (among corporate lawyers a very common strategy) narrow their conception of professionalism to technical skill, or simply cultivate an alienated ironic distance from their work and seek satisfaction in personal life. Unless lawyers possess exceptional force of individual character, mere motivation, though indispensable, is not enough. Neither is exhortation enough. To have any real force, the norms of independent practice need to be authoritatively declared and promoted, acted upon by powerful lawyers, and institutionalized in elite legal practice. Thus we need to examine the institutional conditions necessary to foster an ideal of independence that lawyers not only pay homage to, but also rely on for practical guidance in concrete situations.

2. Institutional Conditions of Independence

The institutional prerequisites to the exercise of independent legal judgment can be grouped into two main categories. The first consists of factors facilitating independence from clients in the course of representation. I have called this type of independence purposive lawyering or public-minded counseling. The second category is comprised of factors facilitating indepen-

92 See B. Bledstein, supra note 46, at 1-45, 80-128, 171-96.
93 For an anecdotal survey of these lawyers' views on professional independence, see generally J. Auerbach, supra note 11.
94 See id.
96 See supra notes 67-70 and accompanying text.
pendence from clients in settings extrinsic to representation. Both the "schizoid" and the purposive model of lawyering call for this type of independence.

(a) Conditions of Independence in the Course of Representation.

(i) Strong norms, strongly institutionalized. The first requisite of independence is that the lawyer have some source of norms, rules, or conventions to refer to in resisting client pressures. These include both norms governing the clients, such as the ordinary rules of substantive law as applied by regulatory agencies or courts, and those governing the lawyers, such as rules of practice before agencies or courts, liability rules for neglect or malfeasance, professional ethical codes, and standards of practice drawn up by bar committees. Strong professional norms of autonomy may also come from ideologies of legalism, both "traditional" and "technocratic." The second requisite of independence, which historically has been a lot harder to achieve, is to create norms powerful enough to constrain the lawyer's conscience and calculations, especially outside practice settings such as the courtroom where unprofessional conduct is easily detected. Informal norms and conventions are sometimes more powerful than formal ones. Lawyers riding and dining on circuit together in the last century, for example, were able to enforce upon each other conventions restricting advantage-taking through procedural or pleading maneuvers. Lawyers in the upper echelons of their markets can set the standards distinguishing proper from sleazy practice for the rest of the profession.

(ii) Organization of practice. As mentioned earlier, professionals resisting bureaucratization like to argue that autonomy in the sense of self-employment is a precondition to independence from clients. If true, this argument would suggest that solo or small firm practice would be a more solid foundation for independence than large firm practice. But except to the extent that small firm practice may attract more independent spirits who are more inclined to sacrifice income for their principles than big firm lawyers, there is little reason to condition independence on a particular organizational structure. Eliot Freidson points out that "in the case of law, it is not difficult to find circumstances in which the self-employed were dominated and controlled by their clients." Freidson then mordantly remarks that "[i]n a market economy one's labor is a commodity whether one sells it to an employer or a customer." Thus, "the more critical matter is the relationship one has to the market."
(iii) Market position. This factor may seem crucial:

When one's goods or services are so valuable on the market as to make consumers supplicants, then one can exercise considerable control over the terms, conditions, content, and goals of one's work. But when one's goods or services are not in heavy demand, then one can only be a desperate supplicant of indifferent consumers or employers.104

Yet in actuality the relationship between market position and political independence in the course of representation is obscure. In fact, the degree of a lawyer's independence may not correlate very reliably with demand for the firm's services. Law firms in great demand can always just turn down clients they don't like instead of trying to influence them through counseling. Lawyers who value independence highly may not respond strongly to profit incentives. From the client's side, the lawyer's potential independence may not figure very prominently in the client's choice of lawyers, at least until the client starts getting advice the client does not want and thinks another lawyer might be better. In any case, exercises of independence are as likely to be covert as overt, secreted in the interstices of prudential counseling. Perhaps most importantly, if counseling is genuinely influential, then by hypothesis the client will value it, come back for more, and refer other business to the firm.

Still, common sense suggests that among the big firms, market position strongly affects one crucial variable—the attitudes of lawyers on the management committee—which creates the dominant firm culture. Only when firms are relatively comfortably entrenched in their markets (and often not even then)105 will the more profit-oriented partners, who consider independence a luxury, be likely to tolerate the influence of colleagues with developed political agendas.106

104 Id.

105 Instead of a philanthropic, civic-minded, entrepreneurial, and politically ambitious "Boston" elite, advantageous market position may produce a stuffy, snobbish, cautious, and ingrown "Philadelphia" elite. For these ideal types, see generally E. Baltzell, Puritan Boston and Quaker Philadelphia: Two Protestant Ethics and the Spirit of Class Authority and Leadership (1979); Hobson, Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 14-16 (G. Gawalt ed. 1984).

106 In this respect, law and business firms are similarly situated; a company occupying a position in an oligopoly is more likely to consider its social responsibilities in the decision-making process than is a corporation in a highly competitive industry. See Mashaw, The Economic Context of Corporate Social Responsibility, in CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES 55, 60 (K. Hopt & G. Teubner eds. 1984); McKie, Changing Views, in SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT 17, 30-31 (J. McKie ed. 1974); cf. Matzko, supra note 48, at 79 ("The more affluent the lawyer, the greater the possibility that he would engage in social activities which had at least an aura of serious purpose about them.").
(iv) Client base. It should help the cause of independence to have a client base that is as diverse as possible in its interests and ideologies. With such a base, lawyers will not risk losing all their clients if they argue for a position that one of the clients dislikes. A lawyer is less likely to become an ideological captive of a heterogeneous clientele. The English bar since the early nineteenth century, for example, has manifested its reliance on this principle by trying to enforce client diversity through the principle that the barrister must take any case that is offered.107
Yet lawyers with a diverse client base are just as likely, if not more so, to espouse an unqualified advocacy ideal, press each client’s claims to the utmost, and try to avoid developing any deliberative viewpoint of their own. Moreover diverse practices may not involve many of the continuous relationships of trust that provide opportunities for influential counseling. More important than diverse clients, surely, are receptive clients, those with strategically placed officers who can be led toward creative voluntary compliance with the spirit of regulatory regimes rather than of formal perfunctory compliance or intense scorched-earth guerrilla resistance.

(v) Long-term continuing relations with clients. Brandeis used to stress the importance of thorough knowledge of the client’s business operations as the precondition to influential counseling.108 According to Brandeis, only such knowledge could place the lawyer in a position to devise creative alternatives to the client’s plans which would harmonize the clients’ interests with long-run social purposes expressed in law.109 Brandeis’s theory remains persuasive today.
It also helps the lawyer to be able to draw on a reservoir of trust, derived from successful past representations. Frequent contacts may result in the personal intimacy that permits candor. As a means of building trust and knowledge, long-term lawyer-client associations clearly encourage independent legal judgment. Unhappily it is just such associations that are likely to weaken independence by making lawyers reluctant to risk a good source of business and personal friendships by giving offensive advice.110

(vi) Social influence over clients. Historically it has been of considerable importance that leading corporate lawyers were also famous citizens, men who at some time had held high public office, had directed armies or foreign relations or the national treasury.111 Such grandees were not likely to be

107 See supra note 61.
108 See P. Strum, supra note 81, at 38-41.
109 See id.
110 Cf. Brudney, The Independent Director—Heavenly City or Potemkin Village, 95 Harv. L. Rev. 597 (1982) (demonstrating that corporate directors remaining in one position for a long period of time are frequently an inadequate mechanism for controlling corporate misconduct because of their close relationship with management).
overawed by business and financial tycoons, however rich and powerful, but rather able to invest their counseling with special authority.\textsuperscript{112}

(vii) Authority deriving from special knowledge or contacts. Opportunities for influence (as for mystification and malfeasance) multiply as the client's dependence on the lawyer's special knowledge increases—as the content of representation moves away from the client's familiar turf onto the lawyer's. Litigation is the prime example: in the labyrinth of pretrial maneuvers and especially in the trial itself the client is helpless without a guide. White-collar criminal defendants, no matter how mighty in ordinary life, must submit humbly to their lawyers' tutelage on when to speak, how to sit, what to wear, what's a good or bad deal in the circumstances. Appellate litigation is also a context in which the lawyer's arguments are expected to foster public values and policies as well as the client's private ones, so that the lawyer has more and the client less legitimate control over which arguments to press.

Often the lawyer's special knowledge is cosmopolitan; the lawyer has not only pierced the veil of legal mysteries but also has access to persons and milieux exotic to the relatively provincial client. Lawyers might acquire such contacts and knowledge through government service, involvement in political campaigns, or just from having been on the scene. Wall Street lawyers throughout much of this century, for example, knew their way around Europe and banking circles and served as intermediaries between manufacturing clients and New York and foreign financial communities.\textsuperscript{113} Likewise, Washington lawyers have served as intermediaries between corporations and government agencies.\textsuperscript{114}

(viii) Client's need for approval of third parties. Possibly the most potent of all sources of influence is the client's need to impress or reassure third parties of the soundness or legitimacy of its conduct. Potential investors, for example, often need assurance that the bond or securities issue is legal, that the IRS is not likely to disapprove the tax break, that the claims of prospective economic performance are realistic, or that the collateral for the loan is real. Regulatory agencies with authority to deny antitrust clearance or capital gains treatment need to know that facts are as the client represents them. Agency or legislative staffs plotting tough regulation may be mollified by advice that nothing so draconian is needed because the industry can reform itself. Judges or agencies contemplating consent decrees want to be told that the client can be trusted to live up to the terms of its bargain. Municipalities contemplating subsidies or tax exemptions need assurance that the client will not just take the money and leave town. News media reporting allega-

\textsuperscript{112} Cf. id.

\textsuperscript{113} See generally id.

tions of corporate scandal or misfeasance want proof that the company is not engaged in a cover-up.

When called upon to certify to such outsiders the legality and respectability of a company’s past or future conduct, one of the assets lawyers (or their firms) can bring to their representation is a reputation for integrity and independence. The outsiders recognize that some lawyers will not knowingly certify a scam. If lawyers want to preserve that reputation against devaluation in future transactions, they will have to assert enough control over their clients to be satisfied that they are not being used as an instrument for deceiving others, and insist on verification or security or special procedures to ensure that their word will be made good.

Still more important, the outsiders’ threats of adverse action can open up tremendous opportunities for a creative lawyer to preempt the threat. Many of the institutions of the modern regulatory state were devised by or with the help of corporate lawyers, who argued to their clienteles that such institutions were needed to stave off something worse. Worker’s compensation boards, for example, were sold as a means of preventing expanded employers’ tort liability and labor insurrections. The discretionary space for lawyers naturally widens if their ability to assess the magnitude and significance of the threat exceeds that of their clients.

(ix) Professional culture. Above all, for the public-minded counseling model of lawyers’ work to take effect, lawyers must see it as an appropriate and admirable part of their professional role. Law schools, especially in clinical courses, can help to impart the model’s values and to soften the ferocious adversary tactics that law students seem almost automatically to assume are those of “real world” lawyers. But ultimately it is the successful lawyers, the ones with power in the firms and bar groups, who pour content into professional roles by teaching and example. This means not only rhetorically invoking the ideal of independence at bar dinners and ethics discussions, but also rewarding it with both promotion within the firm and public honor—especially honor to those lawyers who have conspicuously forgone income to serve the ideal.

(b) Conditions of Independence Extrinsic to Representation.

(i) Time. One of the reasons that lawyers have been able to serve as a leadership elite in politics and community affairs is that unlike many other business people, they are in a position to control their time. Early nineteenth century law practice, for instance, was structured so as to leave lots of leisure time for other pursuits—politics, writing, cultural affairs—that were conventionally integrated into a lawyer’s life. A typical law office consisted of three men: the senior partner who handled the office’s big clients

117 See, e.g., R. Ferguson, supra note 38, at 24-28, 66-72.
and trials and argued appeals of public moment, the junior partner who took care of the bread and butter work of the firm, and the law student or clerk who did the copying. As one's career progressed more time was expected to open up for projects outside practice. In current large-firm practice, of course, the amount of one's own or one's associates' time that can be released from hours billed to clients is no longer a purely individual but rather a collective decision, a function of the internal culture and politics of the firm.

(ii) Financial base. Like any type of law practice, public interest work requires money. How may lawyers fund their public-interest practices today? A short list: (a) they may be the kind of people that Federalists like Hamilton thought would staff political leadership elites, people of independent wealth; (b) more likely they may be individuals at a stage in their careers where they have either already made enough money to satisfy their needs for private consumption, or simply are willing to forgo a lot of private consumption for the satisfactions of working for public causes; (c) even if not well-off themselves, they may belong to a collective, such as a law firm with a strong public interest orientation or a two career marriage, which is well-off, and whose members are happy to trade off some joint income for the chance for some of them to engage in public service—in effect the members rely on their profitable pursuits to subsidize their unprofitable work; (d) they may take on public interest lawsuits which, if successful, will yield lawyers' fees; (e) they may donate money to other organizations such as public interest firms; (f) they may donate their own or their associates' services to public interest or legal services groups largely funded by other sources, such as foundations or direct-mail solicitations; (g) they may use their influence in bar groups to lobby for fee award or legal services legislation, to encourage the use of bar funds (such as interest on lawyers' trust accounts) to subsidize public interest or legal services organizations, or to defend such organizations against attempts to defund them; (h) they may use their contacts to raise private or foundation funds for public interest groups.


119 Some firms refuse to take an explicit collective position about pro bono and public-interest practice: if partners and associates want to do it, fine; if not, also fine. Neutrality in principle, however, usually works against pro bono and public interest work in practice, since unless the firm is willing to support such work by counting it toward billable-hours quotas it puts lawyers who choose to do it at a competitive disadvantage.

Face it: the key ingredient on this list is willingness to forgo individual or individual-share-of-group income. I know that to many it will seem incredible that lawyers in a position to make a lot of money would sacrifice it to other goods. "If that's what it takes," they will say, "forget it." All I can do is point out that historically lawyers have sacrificed income repeatedly. I will give only a few examples among many. In the midst of his extremely lucrative practice, Hamilton took time off to hold public office, even though he had no other source of income and died without enough to pay his debts.  

Brandeis articulated an explicit theory that the purpose of private practice income was to permit the independent lawyers to engage in public causes; he followed his own preaching, living ascetically and taking on his major public causes without fee. Antebellum lawyers expected to spend a large part of their working lives in politics and public office.  

To a large extent, public activity was instrumental to their private ambitions, for politics brought them public exposure and contacts with important potential clients (just as today young lawyers often do a stint at the SEC or the Antitrust Division of the Justice Department as preparation for private practice). But clearly to some extent it wasn't, because lawyers would return to the public realm after their careers were made, at considerable sacrifice to their fortunes. My own research on the New York City corporate bar of 1870-1910 shows that at least 67 of the most successful members of that elite were heavily involved in legal, social, and political reform movements while in practice. Today, lawyers still trade law-firm partnerships for judgeships or administrative posts paying a quarter to a tenth as much.

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122 See A. Mason, Brandeis: A Free Man's Life 640 (1946); P. Strum, supra note 81, at 61-62, 70.
123 See A. Mason, supra note 122, at 92; P. Strum, supra note 81, at 61-62.
124 See G. Gawalt, The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840 39, 74 (1979). According to Gawalt, 44.2% of all Massachusetts lawyers were elected to public office between 1760 and 1810, and 32.9% held office between 1810 and 1840. Id. at 68. Some lawyers, however, felt that they had to choose between law and politics. Rufus Choate discussed this dilemma in his journal:

If I myself could be permanently and happily in the Senate... I should like that better than anything in the world; but to be just enough in the Senate to be out of the law and not enough in the Senate to be a leader in politics, is a sort of half-and-half business very contemptible.

J. Matthews, supra note 36, at 106; see also id. at 27-28.
Clearly we need to develop a much richer sociology of professional aspirations than is provided by the banal observation that people pursue their self-interest. Granted that is so, what is it that lawyers perceive to be in their self-interest: do they want to maximize only wealth, or some other goods such as power, status, honor, fame, exciting work, and the sense that their lives are meaningful and worthwhile? If at any particular time and place some segments of the bar turn out to be interested in making money to the exclusion of other interests, that in itself is a striking cultural phenomenon that requires explanation. To find such an explanation, we need to turn once more to an examination of professional culture.

(iii) Professional culture. Again I want to underscore the importance of collectively maintained conventional expectations of professional roles and careers. In the early nineteenth century, law practice for its leading practitioners was plainly instrumental (and often indeed incidental) to other goals. It provided the social contacts, the location in a center of political and commercial networks, and the financing, for engagement in public life. In the New England of 1800, for example, the list of bar leaders is virtually identical to the roster of the Federalist party leadership cadre.

Perhaps most importantly, there were criteria of professional success other than wealth; professional recognition of a lawyer’s skill and the public causes or offices that a lawyer was asked to undertake measured success as well. Memorial tributes in the antebellum period, for example, quite frequently commented on the modest means of the eminent departed, proving not only that successful people did not need to become rich, but indeed could be admired for not being so.

(iv) Avoiding or handling conflicts with clienteles. How can lawyers feel free to pursue public projects independent of their clients’ interests without driving their clients away? As usual, there are many possibilities; I will describe some of the basic options open to lawyers who want to retain both clients and independence:

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127 For a theory of public involvements as a consumption good, as well as an analysis of the dialectic between private pursuits and public activism, see A. HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTERESTS AND PUBLIC ACTION (1982).

128 Chancellor Kent, for example, thought of law practice as “a sure road to personal prosperity, and to political eminence and fame.” J. MATTHEWS, supra note 36, at 28; see also G. GAWALT, supra note 124, at 5 (“Men began to study law, not to practice it, but as a first step into the political arena.”).


a) Lawyers could avoid altogether permanent entanglements with clienteles. Some American lawyers have adopted a version of the British solution to this problem,\(^{131}\) taking the advocacy ideal to mean that to preserve their independence, lawyers must avoid continuous ties to or identification with any single faction—refuse retainers, and not only be willing to argue any position but actually seek a variety of clients and positions to represent.\(^{132}\) By taking on clients only for specialized one-time transactions, such as trials or appeals, lawyers will not create continuing dependencies on any single source of business.

b) Lawyers could also choose public interest projects remote from areas of client interest. This category probably accounts for the bulk of corporate lawyers’ pro bono and public service involvements, such as criminal justice reform, court reform, welfare or social service reform, civil liberties, international human rights, delivery of legal services to low income people, and so forth.

c) Alternatively, lawyers could choose projects that mesh well—or at least are not inharmonious—with the general interests and ideologies of (at least some sectors of) their clientele. For example, corporate lawyers of the Progressive era helped design the worker’s compensation system.\(^{133}\) Sometimes, of course, the corporate clienteles themselves pressed for regulation as a means of controlling competition or containing threats from labor or the populist left.\(^{134}\) The most dramatic example of public projects which accord with the general interests of corporate clients is the contribution of members of Wall Street’s international business establishment to building the national security and foreign policy structures of the twentieth century.\(^{135}\) Many of these men were lawyers (Root, Stimson, McCloy, Acheson, Dulles, Dean, Vance, Warnke, etc.) who shared with their multinational business and banking clients a cosmopolitan, Eurocentric, Anglophilic perspective. They believed in what they considered a pragmatic and unhysterical anti-Communism, mistrustful of Soviet intentions but ready to do business and negotiate, as well as a general commitment to a world order of free trade secured by international law. They advocated military alliances with Europeans, generous but not wasteful expenditures on armaments and Third World regime stability, and prudence in the commitment of national force

\(^{131}\) See supra note 61.

\(^{132}\) This was, for example, the position of John G. Johnson of Philadelphia, one of the last of the old-style individualists among corporate bar leaders. See B. Winkel-MAN, JOHN G. JOHNSON 146-47, 182-83 (1942).

\(^{133}\) See supra note 115 and accompanying text.


but willingness to use force to keep commitments. Like the lawyer-architects of the regulatory state, this foreign policy elite has had its own political agenda and plenty of internal divisions—it strains conspiracy theory too far to analyze all its programs as nothing more than the political action arm of economic imperialism. But that agenda, building a stable framework for collective international security, harmonized quite nicely with that of capital-intensive international business, so that business lawyers were able to pursue it without breaking ideologically with their class or clients. Even under FDR, the State and War Departments recruited Republicans and were considered thoroughly respectable.

Contrast, to underscore the point, the domestic New Deal, which many business constituencies (wrongly, as it turned out) perceived to be sufficiently anticapitalist so that at least initially corporate lawyers who wished to serve it, such as Jerome Frank, Francis Biddle, or Lloyd Garrison, had to leave their practices and break with their backgrounds to do so. Many of the New Deal lawyers with corporate practice backgrounds had already broken with that world to go into law teaching (James Landis, A.A. Berle, Jr., William O. Douglas, Thurman Arnold, etc.), which was just then becoming a refuge for left-of-center public-policy-minded exiles from practice. Labor law practice was another such refuge, and it too supplied some of the eminent New Dealers (David Lilienthal, Jr., Harold Ickes, Donald Richberg). New Deal regulation was quickly enough normalized, however, so that corporate lawyers could begin or crown a career in a federal regulatory agency without being thought to have crossed class lines. Few of the New Deal lawyers stayed in government service. Some ventured into teaching, while most went into private corporate practice as founders of the modern Washington bar. From their point of view there was no hypocrisy or inconsistency in this: having made capitalism safe for democracy through regulation, they were free to play the other side of the regulatory street.

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136 For discussion of the debate among historians over whether or not the Marshall Plan was at root a Wall Street-directed capitalist scheme to repel socialist influence and labor militancy in Europe, see id. at 156-61.

137 For an in-depth analysis of the role of lawyers in the New Deal, see P. Irons, The New Deal Lawyers (1982).

138 The exception was service as an attorney with the National Labor Relations Board, whose reputation was one of a hotbed of radicals, and which in fact tended to attract lawyers with deep commitments to unionism, as well as lawyers marginal for other reasons: brilliant Jews and women excluded from the mainstream legal job markets. See J. Auerbach, supra note 11, at 187-89; I J. Gross, The Making of the National Labor Relations Board 169-70 (1974).

139 Again the major exception were the Labor Board attorneys, who were more likely to stay in public service, or if they left for private practice to continue to work on the labor side. See J. Auerbach, supra note 11, at 227-29; P. Irons, supra note 137, at 298-300.
Choose projects that can be defended in the idioms of legalism or technocratic policy science. One might call this strategy "the politics of no-politics." Lawyers have sometimes felt free to adopt public positions quite sharply different from those of business clients if those positions could be legitimated by reference to the rule of law or the prescriptions of scientific policymaking. Traditional legalism mobilizes lawyers to protect rights, technocratic legalism to promote efficiency.

The safest kind of independent political activity for lawyers is legalistic politics—politics in the name of formally equal application of the laws and access to justice, protection of constitutionally guaranteed individual rights, procedural safeguards against arbitrary official action. Legalism can of course take very conservative forms, but not necessarily pro-business ones. Some of the elite lawyers of the last century, for example, came to believe that because large scale corporate enterprise was radically incompatible with individual freedom and property rights, it had to be broken down into small competitive units. Some corporate lawyers have so hated regulation or informal administrative action on principle that they have gone on crusades either to have it declared unconstitutional or to require agencies to use trial-type procedures in their adjudicative and rule-making processes—even when business elites actually favored the regulation and liked dealing informally with bureaucrats. Legalist proposals sometimes have broad-based middle class support. But relative to prevailing political standards, and especially the politics of business groups, such proposals can be quite radical and require considerable courage on the part of their backers. The moderately conservative Eisenhower-appointed federal judges who dismantled the institutions of Southern segregation in the 1960s placed themselves outside

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140 See generally J. Foster, The Ideology of Apolitical Politics (1936).
141 For modern statements of this view of legalistic public service, see, for example, Halpern & Cunningham, Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy, 59 GEO. L.J. 1095, 1109 (1971); Hegland, Beyond Enthusiasm and Commitment, 13 ARIZ. L. REV. 805 (1971).
143 See, e.g., Dulles, Administrative Law: A Practical Attitude for Lawyers, 25 A.B.A. J. 275 (1939) (discussing lawyers' condemnations of administrative agencies, but warning against doctrinaire opposition to the administrative state); S. Tolchin & M. Tolchin, supra note 134, at 185-87 (example of corporate counsel advising executives not to deal with agency staff even when doing so might have benefited corporations).
INDEPENDENCE OF LAWYERS

the social pale in most districts. The corporate lawyer Moorfield Storey, a doctrinaire laissez-faire reactionary and counsel for the notorious American Banana company in his regular practice—sailed well beyond the normal politics of his business clients when he assumed the Presidency of the NAACP. So too did Francis Biddle when he aggressively promoted civil liberties in FDR's Cabinet and sat on the first Labor Board, and Grenville Clark when he tried to open the parks of New Jersey to labor organizers. Using the legalist idioms of due process and access to justice, moreover, concerned lawyers have induced normally conservative bar groups such as the ABA to support procedural protections for victims of loyalty-security purges and Congressional committee witnesses in the 1950s, as well as to defend legal services programs from demolition in the 1970s and 80s. Legalist values have motivated a good deal of the political activism that can nowadays be found among the elite bar, as for instance in the lawyers' committees for the protection of international human rights.

Technocratic legalism is an even more interesting and potent source of autonomous professional norms and political action programs than traditional legalism. For legal technocrats, law is a form of apolitical social engineering: it is the job of trained lawyers, economists, and other policy specialists, both in and out of office, public and private together, to collaborate on framing "efficient" solutions to social problems. Lawyers and legal

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144 See generally J. Bass, UNLIKELY HEROES (1981). Admittedly, however, these judges had the assurance of life tenure to accompany their courageous efforts; practicing lawyers who joined the desegregation enterprise in the 1960s, on the other hand, probably risked losing all or most of their business clients.

145 For a biography of Moorfield Storey, see M. DeWolfe Howe, PORTRAIT OF AN INDEPENDENT: MOORFIELD STOREY 1845-1929 (1932).

146 See F. Biddle, IN BRIEF AUTHORITY 3-51 (1962); Biddle, Civil Rights and the Federal Law, in SAFEGUARDING CIVIL LIBERTIES TODAY 109 (1945).

147 See G. Dunne, GRENVILLE CLARK: PUBLIC CITIZEN 102-09 (1986).


149 See, e.g., Cramton, Crisis in Legal Services for the Poor, 26 VILL. L. REV. 521, 553-55 (1981); Halpern & Cunningham, supra note 141, at 1109 ("But the underlying commitment of the new practice is not to specific social platforms, whether liberal or conservative; it is, rather, to the adversary system itself, and specifically, to the principle that everyone affected by corporate and bureaucratic decisions should have a voice in those decisions, even if he cannot obtain conventional legal representation."); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); cf. Hegland, supra note 141 (recognizing that the goal of public interest law is to ensure adequate representation for currently underrepresented groups but questioning whether public interest law firms can accomplish that goal).

150 For a discussion of the ideology of professionalism and the international human rights movement, see Garth, supra note 67, at 203-10.
thinkers as diverse as Charles Francis Adams, Jr., Louis Brandeis, A. A. Berle, Jr., James M. Landis, Robert Bork, Richard Posner, and Bruce Ackerman have articulated this view.

Technocratic lawyering is usually somewhat parasitic on the dominant form of economic thinking. Classical constitutional and common law thought borrowed from the Americanized versions of classical political economy. Progressive legal technocrats relied upon the Wisconsin-school institutional economics of John Commons and Richard T. Ely. And current law-and-

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151 See, e.g., Adams, Railroad Inflation, 108 N. Am. Rev. 130, 163-64 (1869) (advocating use of specialized commissions to provide legislatures with expert, scientific advice on questions of policy); see generally T. McCraw, Prophets of Regulation 1-56 (1984) (describing Adams's role as architect of early railroad regulation).

152 See T. McCraw, supra note 151, at 111-12 (discussing Brandeis's endorsement of creation of a federal regulatory commission to administer the Sherman Antitrust Act).

153 See, e.g., A. A. Berle, Jr., Navigating the Rapids 1918-1971 32, 46-50 (1973) (reprinting 1932 memorandum urging adoption of “scientific policies” of industrial regulation as solution for the crisis of economic depression); A. A. Berle, Jr., The Twentieth Century Capitalist Revolution 45-52 (1954) (describing and approving of use of regulatory mechanisms to rationalize markets destabilized by “imperfect competition”).

154 See, e.g., J. Landis, The Administrative Process 6-46 (1938); see generally T. McCraw, supra note 151, at 181-203 (discussing Landis's role in the design and administration of the SEC).


economics technocrats premise their scholarship on neo-classical welfare and antitrust theory.\(^{160}\) It is fascinating to see what kinds of projects come to be considered, even if at the time of their development they are actually the subject of intense partisan controversy, as so plainly called for by dispassionate analysis that their opponents can be dismissed as partisan, short-sighted, and obviously misinformed about the facts. Such serene certainty is bound to be a powerful stimulus to independent activism. For a good part of this century, for instance, it was common wisdom among lawyers self-styled as social engineers that both court-administered common law and statutory labor injunctions, as well as the alternatives of unregulated capital-labor warfare or socialism, were absurdly foolish as a means of regulating labor relations. The diehard employers and militant unions who fought for such regimes were being dumb, ideological, counterproductive. Instead, thought these technocrats, we should create expert-supervised administrative frameworks to secure industrial peace: worker’s compensation, compulsory arbitration, supervised collective bargaining, and so forth.\(^{161}\) Similarly, the 1920s and 30s brought some convergence of expert opinion around various forms of corporatism, the wisdom of “stabilizing excess competition” through state-managed or—by way of antitrust exemptions—state-tolerated cartel coordination.\(^{162}\) More recently, the pendulum has swung back to a consensus in favor of a moderately paced dismantling of much of the Progressive New Deal apparatus of economic regulation and centralized bureaucratic administration.\(^{163}\)

Sections of the corporate bar are sometimes willing to work to implement such a technical consensus, even when doing so may adversely affect their


\(^{161}\) Brandeis was one of the first prominent champions of enlightened, state-regulated labor relations. See L. Brandeis, Business—A Profession 1-98 (1933) (several essays) (collecting Brandeis’s addresses on labor relations, collective bargaining, social insurance, and hours of labor). For a contemporary account of the progressive reshaping of labor law during the early twentieth century, see W. McNaughton, The Development of Labor Relations Law (1944). See generally P. Irons, supra note 137, at 203-89 (political and legal history of the Wagner Act and the National Labor Relations Board); Labor and the New Deal (M. Derber & E. Young eds. 1957).


current clients. Thus, the elite tax bar may interest itself in "reform," meaning a conceptually "clean" Code, free from special interest provisions and loopholes that defeat its main purposes. Or the antitrust bar may support an approach to enforcement that, although it permits marginally more or fewer mergers, more closely aligns doctrine with current economic orthodoxy.

In these and other instances, lawyers have managed to take independent political action by tapping into strong autonomous fields of normative force that derive their power from their putatively uncontroversial nature. Even when in the process of being reduced to conventional interpretation and application they turn out to be very controversial indeed, their provenance warrants their purity. The people who use the discourses of legalism and technocracy do not feel they are being political. They are simply being sensible.

B. The Declension Thesis

I began with an array of quotations that suggested that the political independence of lawyers had lamentably declined, both as an ideal and as a set of practices. Proponents of this thesis make three distinct supporting arguments. First, they say that the conditions that once engendered independence no longer prevail. Second, they claim that lawyers are now less inclined to take advantage of whatever opportunities for independence they may have. Finally, they make a normative argument that the decline of lawyers' political independence is undesirable, so that steps should be taken to arrest or reverse it. I will blend discussion of the first two historical assertions in this section, and postpone discussion of the last until the Conclusion.

Once more, however, I have to begin by expressing some reservations about this enterprise. I mentioned in the last section how speculative any sociology of political independence must be, given the fuzziness of the

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164 See Hoffman, The Role of the Bar in the Tax Legislative Process, 37 Tax L. Rev. 411, 492-520 (1982) (providing a detailed account of the leading role played by the tax bar in passage of the Installment Sales Revision Act of 1980); see also Paul, The Responsibilities of the Tax Advisor, 63 Harv. L. Rev. 377, 386-89 (1950) (article by former general counsel of the Treasury Department urging tax lawyers to "aid the public interest" by involving themselves in efforts to make tax law simpler and more equitable).


166 See supra notes 1-5 and accompanying text.

167 See supra text accompanying notes 2-3.

168 See supra text accompanying note 1.

169 See supra text accompanying note 4.
concepts and the difficulties of getting “hard” or sufficient evidence. Evidence relating to independent counseling is particularly hard to come by, for such counseling occurs in confidential lawyer-client interactions seldom set down on paper. Even where records are available, independent counseling is most likely to take covert prudential forms. That is, lawyers may inform their clients that “the risks of exposure attendant on following Plan A may be minimized by restructuring the Plan as follows” or—and surely there is plenty of this in any epoch of the history of legal advice—they may just state that the client’s impulse to litigate or to ignore some new regulation, though understandable, probably should be suppressed given the costs and risks involved. There is just no way to tell whether such advice incorporates a calculated judgment about the social consequences of the client’s action or the purposes of the law involved. I can therefore only examine the degree to which the social conditions favoring influential counseling have prevailed, and uncover contemporary lawyers’ assessments of their professional cultures.

Yet almost everyone reacts to such assessments with instinctive skepticism. There are particularly good reasons for skepticism about the laudator temporis acti, the old fellow complaining about how much better it was in the old days. For one thing, the rhetoric of decline is so continuous (I started with twentieth century examples but the genre is an ancient one). Can things really have been declining for so long? Also, laudators sometimes compare the expressed rhetorical ideals of the earlier age to what they perceive to be the actual practices of their own. (OK, so we all concede that lawyers of an earlier age talked up a public service storm, but how did they really act?) Or they compare the greatest lawyer-statesmen of the earlier age to the average practitioner of today. (OK, so we don’t have a bar full of Hamiltons and Brandeises, but neither did they.) Or they compare public service contributions of the bar during great national crises that drove all available

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170 Richard Olney, counsel for the Chicago, Burlington, and Quincy Railroads, held this view. He believed that “[c]orporations are to the legislator like a red rag to a bull and ought not to display themselves any oftener or any earlier than is necessary.” Letter from Richard Olney to Charles E. Perkins (Feb. 2, 1891), quoted in G. Eggert, Richard Olney 25 (1974). After the practice of issuing free passes had been made a criminal offense, Olney stated that he would “like to see the C., B. & Q. go on issuing passes if . . . that course would promote its pecuniary interest.” Yet he saw no way to advise his client to continue issuing free passes “because the penalties of the law are severe and fall upon the personal offenders and not upon the corporation itself.” Letter from Richard Olney to Charles E. Perkins (Jan. 20, 1892), quoted in Gordon, Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920, in Professions and Professional Ideologies in America 137 n.84 (G. Geison ed. 1983).

171 Even Plato believed that the lawyer was like a slave, lacking “growth and uprightness and independence.” See Plato, Theatetus, in The Dialogues of Plato 271-72 (B. Javett trans. 1964).
talent into public service—the Revolution, the Confederation period, the Great Depression, World War II—with periods of business as usual. Furthermore, it often turns out, upon closer inspection, that the speaker's lofty conception of professional ideals conceals a narrow or unattractive factional interest. When speakers complain that law has turned from a profession to a business, their real complaint is that accountants and title insurance companies are stealing lawyers' work, or (if they represent defendants) that lawyers take cases on contingent fees and are overaggressive in discovery tactics, or that new immigrant ethnic groups are beginning to compete with their own, or just that ungrateful clients are beginning to ask for some cost-accounting instead of unquestioningly paying bills "For Professional Services."\(^{172}\)

Sometimes, however, objections to the Declension Thesis are more fundamental. Even when the speakers truly are addressing broader concerns (as most of the lawyers quoted here certainly were), their notions of proper professional behavior often imply a particular, and quite controversial, political agenda. Brandeis's belief in a type of counseling that harmonizes the long-term interests of client and society stemmed from a developed set of specific moral and economic ideas.\(^{173}\) Berle disparages the failure of corporate lawyers to serve as the intellectual vanguard for his vision of socially responsible managerialism under a regime of indicative national economic planning.\(^{174}\) How legitimate are such complaints about lapses from professional norms if those norms rest on such obviously contestable political visions? I plan to defer responding to these difficult questions—which are really questions about the validity of the ideal of political-independence itself—to the Conclusion.

\(^{172}\) See, e.g., J. Auerbach, supra note 11, at 106-29 (declension rhetoric as symptom of class and ethnic prejudice); J. Dos Passos, supra note 91, at 181-82 (discussing ethical objections to contingent fees); Bristol, The Passing of the Legal Profession, 22 YALE L.J. 590 (1913) (decline attributed to legal profession’s loss of business to insurance and mortgage companies). A recent ABA report contains a fascinating mixture of major structural concerns and miscellaneous petty grievances, all grouped under the rubric of unprofessional conduct. See generally Blueprint, supra note 27.

\(^{173}\) For Brandeis, businesses with large market shares were inherently inefficient, were inappropriately dominated by finance-capitalist managers, and sapped the self-reliant independence of the employees, suppliers, customers, and competitors whom they dominated. Republican ideals could be achieved in the modern industrial workplace only through a combination of democracy and technocracy, worker self-management plus Taylorist scientific-management. See Louis K. Liggett Co. v. Lee, 288 U.S. 517, 564-67 (1933) (Brandeis, J., dissenting); P. Strum, supra note 81, at 159-95, 339-53.

\(^{174}\) See Berle, For Whom Corporate Managers Are Trustees: A Note, 45 Harv. L. Rev. 1365 (1932).
All of the concerns just raised must be kept in mind throughout this article. Nevertheless, I think that the rhetoric of decline has captured something real. Analysis of changes in the social conditions arguably facilitating political independence can lend fairly strong support to the view that, at the level of elite private practice, such conditions have indeed eroded in this century, and perhaps eroded most rapidly during the revolution in the organization of large firm practice that has occurred in the last ten years. Consider the following (again I deal first with the conditions for independent counseling, then with those for independence outside representation):

1. Conditions of Independence In the Course of Representation

(a) Autonomous Authoritative Knowledge and Norms. If lawyers' advice is to come from a perspective independent of their clientele's, that perspective must be cultivated. Lawyers have to find some community given to theorizing (however loosely and informally) about legal practices, fitting them into some vision of what a better society might look like, reflecting in practical ways on consequences, and imparting rough guidelines and working methods for conduct. The usual candidate for such a community is the law school. But as the case method began to predominate, legal educators gave up trying to teach about law's relation to political, social, economic, and moral life. There have been periodic attempts to turn law schools into public policy schools throughout this century, but ultimately none of them came to much. In the last fifteen years the situation has actually improved considerably—how nice to be able to note some progress!—as law teachers have revived interest in fitting their technical subjects into general perspectives on law, society, and economy, thereby exposing students to a real diversity of political views.

175 I am not arguing, however, that the independent lawyer needs a highly systematic theory of social action such as those of classical Marxism or neo-classical economics. Such theory can be as much an obstruction as a guide to reflective pragmatic action.


177 See W. Chase, supra note 176, at 46-59 (discussing Frank Goodnow's hope that law school would offer opportunities to analyze political problems and Ernst Freund's attempt to place the study of administration on an equal footing with traditional legal subjects); L. Kalman, Legal Realism at Yale, 1927-1960 (1986); Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buffalo L. Rev. 459 (1979) (examining origins and decline of empirical legal research by Yale Realists as example of continuing confrontations between law and the social sciences).

178 See, e.g., Kennedy, Legal Education as Training for Hierarchy, in The Poli-
But school is school, and practice practice; students leaving the academy experience a terrific shock of discontinuity. Nothing has prepared them for the professional culture they now inhabit. If they are going to find a standpoint for criticism and revision of what they do, they will have to be able to find it in ordinary occupational occasions. Such occasions were more common in the nineteenth century, when regular commercial practice brought most elite lawyers a fair amount of litigation on general issues of legal and constitutional policy. Argument and oratory relied on common backgrounds in history, classical studies, political theory, and political economy.

The rise of modern corporate law practice, however, changed the nature of the commercial law. Courtroom practice of any kind became increasingly rare. With the gradual demise of judicial review of economic regulation, constitutional law faded out as a source of norms and interest for corporate lawyers. Above all, the new practice became so technical and specialized that its ethical and political significance was often utterly obscure—not nonexistent, for every social practice implicates a larger set of meanings, but buried under mountains of detail. Only economists and a few economically-minded lawyers even tried to theorize about it, and for a long time most lawyers paid almost no attention to economists except as expert witnesses, even in fields like antitrust where their theories are clearly relevant.

Some lawyers expect that economic theory can and will become a new source of general organizing perspectives on corporate practice, a "new language of power," in Bruce Ackerman's words. The utilitarian discourse of economics does indeed provide powerful leverage to understand the technical work of lawyers. Yet it is also a notoriously limited and impoverished discourse, historically, sociologically, and philosophically illiterate, without a vocabulary for any norm but efficiency, and—though there is nothing in the least necessary about this feature—habitually given an apologetic ideological spin in practice.


TICS OF LAW: A PROGRESSIVE CRITIQUE 40, 46-50 (D. Kairys ed. 1982) (arguing that there is no real distinction between legal reasoning and political discourse).

179 One should not exaggerate this contrast. Most law practice then, as now, consisted of routine repetitive business that did not implicate large policy issues.

180 B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 3 (1984). Ackerman, of course, recognizes the difficulties of using tools of economic analysis to resolve issues of social justice. See id. at 80-93.


182 See, e.g., B. ACKERMAN, supra note 180, at 80-93.
(b) Knowledge Of and Trust Relations with Clients. In the last fifteen years it has become much harder for outside counsel to acquire the intimate knowledge of the client's business plans and the trust relations with members of the client's organization that would facilitate both an understanding of how the counselor's advice will be used and the framing of alternatives that would serve the client's long-term interests. House counsel now spreads specialized fragments of the company's legal business around to many different firms.\textsuperscript{183} Thus the business that law firms receive from corporations increasingly tends to consist of one-shot transactions—an initial public offering, a big lawsuit, a takeover contest.\textsuperscript{184} Clients are highly mobile, no longer loyal to particular firms. Of course, the new system has real advantages to clients in controlling the cost and quality of their legal services.\textsuperscript{185} But it generally leaves outside counsel, theoretically placed in the best position to give independent advice, too much in the dark to know what good advice might be.\textsuperscript{186}

(c) Comparative Advantage in Special Knowledge and Contacts. Here the trends are more mixed. Now more than ever, lawyers operate on specialized turf.\textsuperscript{187} On the other hand, corporate clients have many more in-house resources for learning about the world than they did in the early twentieth century, when tycoons had to rely on their lawyers to interpret the mysteries of government or to communicate with bankers and financiers. Now political affairs specialists, trade association lobbyists, financial managers—all of whom are frequently far more cosmopolitan than technically specialized lawyers—perform these roles.\textsuperscript{188} Indeed, it may be that lawyers will be most

\textsuperscript{183} An ABA task force has noted that "[a]s corporate in-house staffs increase in size, corporations may require less full-service, general support from firms. This could lead economically-minded businesses to shop outside of a headquarters city for quality, specialized external counsel and, thus, increase competition among law firms for corporate clients." Task Force on the Role of the Lawyer in the 1980s, \textit{Report of the Task Force on the Role of the Lawyer in the 1980s}, A.B.A. Sec. Gen. Prac. & Young Law. Div. Rep. 8 (1981).

\textsuperscript{184} According to one study, "[l]aw firms are still kept on retainer for many routine tasks, but since the mid-1970s they have had to bid for work, especially when special services are required, on a case-by-case basis." \textit{J. Flood}, \textit{The Legal Profession in the United States} 11 (3d ed. 1985).

\textsuperscript{185} Indeed, "it is possible for a corporation to cut [legal] costs by as much as half by having its own corporate law department." \textit{Id.} at 21. \textit{But cf.} Chayes & Chayes, \textit{Corporate Counsel and the Elite Law Firm}, 37 Stan. L. Rev. 277, 290-91 (1985) (contending that corporate decisions to use in-house rather than outside counsel are not based solely on economic criteria).

\textsuperscript{186} See Chayes & Chayes, supra note 185, at 293-98.


\textsuperscript{188} For an empirical study of how and why lawyers have been squeezed out of their intermediary roles in Washington, see Laumann & Heinz, \textit{Washington Lawyers and
frequently asked to interpret general policy trends when a field of regulatory policy is new and therefore unsettled; once enforcement becomes routine, new specialties develop to handle it and the value of lawyers' inside knowledge depreciates.

(d) Market Position. Compare opportunities for independence under two different regimes. In the first, typical of many big firm corporate law markets before the 1970s, a sort of bilateral-monopoly relation developed, in which the corporate client hired one outside firm to handle virtually all its legal work. The chosen law firm depended greatly on the client’s good will, for losing such a mammoth source of business would be a disaster. But the client had a lot invested in the lawyers too: firm-specific knowledge and long-term personal relationships, partners on the client’s Board, associates lured or thrown away to the client’s management. The second regime, in which various outside firms compete vigorously for pieces of corporate legal business, is typical of the present day. If clients don’t like the advice they get, they feel free to shop around for the most permissive advice, the most favorable opinion letter, or the most hardball attitude toward regulators or adversaries. Consequently, there is no time to build the kind of relationship in which counsel may suggest that the client’s initial construction of where its “interest” lies may be short-sighted and self-defeating.

(e) Professional Identity Separate from Clientele’s. American lawyers long ago abandoned the British recipe for independence, according to which solicitors deal with the grubby business of clients and fees while barristers avoid (in theory) any identification with the client’s factional interest by working exclusively in the courtroom and selling their talents only by the case. This structure did not survive the Revolution. As early as 1800, lawyers accepted retainers from clients such as insurance companies, banks, mercantile houses, and (later) manufacturers and railroads. In fact, these

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189 See supra note 184.

190 See supra notes 183-184 and accompanying text.

191 Of course, lawyers are no more loyal to their firms than the clients are; they can and do move if they don’t like firm policies, including policies that might drive away clients. The new regime has naturally brought client-getting partners to power on law firm management committees, whence they have changed compensation schemes to reward those who produce the most income for the firm. See generally Gilson & Mnookin, supra note 181 (analyzing strengths and weaknesses of seniority-based and productivity-based partnership compensation schemes in different types of law firms).

retainers were the foundation of professional success, though to be regarded as real leaders of the bar lawyers still had to try big cases and fight for important public causes.

In addition, the American bar began to specialize by clienteles quite early in its history. Moving up the ladder meant representing creditors rather than debtors. Later in the century, lawyers on regular retainers, especially railroad lawyers, came to be completely identified with, and indeed seen as extensions of, their clients. They represented their clienteles before legislatures as well as courts, and often continued to serve their clients’ interests from elective or appointive office. In this century the client base of elite law firms has become even less diverse. Tort, antitrust, corporate, and securities litigation split into a plaintiffs’ and a defendants’ bar, labor relations between a labor and a management bar. Social barriers of class background and ethnicity as well as ideology, outlook, and professional styles contributed to this segregation (the plaintiff’s bar sees itself as the populist champions of the little person against the corporate system, the defendant’s bar as the preservers of corporate stability and prosperity). Heinz and Laumann’s exhaustive study of the Chicago bar of the 1970s found that the place of lawyers in professionally established hierarchies of prestige derived mainly from who their clients were. Nothing else, not even how much money they made, and certainly not how many important public questions they argued, was nearly as important. Lawyers representing individuals in trouble had the lowest prestige. Lawyers doing technically complex work (tax, securities) for very large corporations had the highest.

For example, Richard Olney was still general counsel for the Burlington Railroad when, as U.S. Attorney General, he brought the federal injunction action restraining Debs and the Pullman union from their strike against, among others, his client’s line. G. Eggert, supra note 170, at 166. And Senator Daniel Webster sponsored a bill to appropriate money to pay off the Boston merchants whose Spanish war claims he had argued before the claims commission. 2 Legal Papers of Daniel Webster 251-52 (A. Konefsky & A. King eds. 1983).

See J. Heinz & E. Laumann, Chicago Lawyers: The Social Structure of the Bar 90-134 (1982). There is something strange as well as sad about this phenomenon, which exists in nonlegal professions as well. The prestige hierarchies of doctors, for example, have their own pathologies, such as the tendency to rank technological above preventive and caring skills, regardless of which actually heals more patients. But the freeing of medicine from direct client funding has to some extent emancipated doctors from having to derive their professional standing from the wealth and power of their patients. Cf. id. at 333-42 (comparing legal and medical professions).

See id. at 90-134. Some lawyers like to explain prestige hierarchies by reference to technical complexity alone: interesting, intellectually demanding work commands the highest respect. This is not very convincing, even if one concedes that technical complexity is likely to correlate with the client’s wealth, because although in theory
(f) Desire for Autonomy from Clienteles. I have been suggesting that the regime of continuous long-term relations between law firms and their corporate clients provided more opportunities for independent counseling than today's regime of law firm competition for purely transactional work. But how often did lawyers in the old regime take advantage of such opportunities? There is really no way to know. Erwin Smigel's study of Wall Street lawyers of the early 1960s accepted those lawyers' reports that independent counseling was an important part of their function.196 On the other hand, many lawyers with a different bias, including those who left practice for teaching or public service, contend that lawyers have become too obsequiously subservient to their clients to assert an independent point of view.197

Of course, the problem might be that lawyers have no such point of view to assert. A host of recent studies of autonomy suggest that the basic issue is lack of disagreement, not lack of spine to disagree. According to these studies, most corporate lawyers simply find nothing to challenge in the way their clients present their interests; because they have been thoroughly absorbed into the political ideologies and strategies of the clienteles, they believe they have no role to play save that of executing their clients' interests efficiently.198

It does seem to be true, and is certainly not surprising, that lawyers who begin practice with an anticorporate animus and a feeling that they are betraying their social commitments, tend to soften those feelings over time.199 Life gradually comes to seem much more morally ambiguous, and

any legal problem has infinitely complex ramifications, most people cannot afford to frame their problems as complex ones. See id. at 129. Much corporate work, though complex, is proofreading the boilerplate—mind-numbingly tedious, requiring intense concentration but no imagination. Much legal-services work for poor clients in fields like welfare and housing law, on the other hand, is both complex and fascinating.

To me the single most dispiriting finding of the Chicago Bar study was the revelation of how little respect the generality of the bar had for fellow lawyers who were sacrificing income to pursue independent ideals of legality and the public interest. Specialties such as civil-liberties practice were ranked very low in prestige, see id. at 113, even though such work calls for a high degree of intelligence and craft skill as well as dedication. It is in such small signs as this that one finds most cause to be concerned about the degradation of professional ideals.

197 See, e.g., J. AUERBACH, supra note 11, at 169, 174, 181; see also supra text accompanying notes 1-3.
one's early reservations appear rather feeble in the face of the surrounding culture's aggressive certainties. The clients seem often to be decent people, not monsters in human shape. It is only natural that lawyers making a commitment to a career want to reduce dissonance, to think their work is not harmful, that their clients are mostly doing good things. These are powerful motives for avoiding a critical standpoint.

This explanation, however, is incomplete. There is other evidence, some from the studies just cited, and some you could gather from talking to any random group of lawyers you know, that the political culture of law firms is by no means always identical to that of their clienteles. (Doubtless there is some tendency for like to attract like, genteel and socially responsible clients to gravitate to similar firms.) Lawyers tend to be somewhat more liberal, to be somewhat more favorable to regulation, to identify (sometimes due to early service with an agency) somewhat more with the purposes of regulation, than their clients. Indeed it is not uncommon for lawyers to despise some among their clients as boorish, greedy, amoral social menaces. But such antagonism does not necessarily, or even usually, mean that lawyers who have chosen practices that expose them to such clients will construct an alternative set of objectives, or a counterculture of values, or will translate their criticisms into political action. The much more common response to dissonance is to withdraw into technique, into the professional cult of craftsmanship and competence for its own sake, or just into the cynicism that seems to be our profession's main defense mechanism. If you like your clients, there is no reason to assert an independent view. If you don't, there seems to be no point.

There is, however, still another cause of lawyers' uncritical acquiescence in their clients' plans. That cause is the professional ideology itself: that many lawyers consider it illegitimate to adopt an attitude of discretionary judgment toward their clients' (not blatantly illegal) ends. This ideology of advocacy is plausibly just as much a cause of lawyers' dependency on clients as a rationalized result of that dependency.

Whatever the explanation for the relative passivity of corporate lawyers, it

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201 See, for example, Felix Frankfurter's remarks about Joseph P. Cotton, a Cravath partner who had also been President Hoover's Undersecretary of State: Cotton was a gifted fellow, an attractive fellow, and he made a great deal of money in what he called the "green goods business" meaning that he was legal adviser to big financial interests in affairs that ran into the millions, and therefore, the lawyers' fees were correspondingly large. . . . He also had scholarly interests and a hankering for public affairs. He was very critical of the work he was doing and, on the whole, despised his rich clients. He squared his conscience by charging them very heavily, and since he was very good anyhow, that made them respect him more and more.

F. FRANKFURTER, Joseph P. Cotton, in FRANKFURTER REMINISCES 218-19 (H. Phillips ed. 1960); see also Nelson, supra note 198, at 537.
has produced a dramatic paradox: we belong to a profession in which higher status correlates with diminished autonomy.\textsuperscript{202} Influence varies inversely, subservience directly, with professional standing. Lawyers for tort plaintiffs, small businesses, or divorcing spouses, exert considerable control in their relations with clients.\textsuperscript{203} Lawyers for big corporations exert relatively little. Even when top management would prefer that their lawyers serve as the corporate superego, there is a deliberate shrinking from that role.\textsuperscript{204}

\textbf{(g) Corporate Self-Regulation as an Autonomous Source of Practice Standards.} Toward the end of the nineteenth century, elite lawyers grew alarmed at their increasing public identification with and subservience to big business.\textsuperscript{205} In consequence, they formed bar associations with the hope of cartelizing practice standards that would protect them from their own temptations to dependency.\textsuperscript{206} This project has notoriously failed, at least in its original ambitious form. Even when still dominated by elites, bar association members could not agree on how to regulate or find the will to discipline lawyers like themselves.\textsuperscript{207} Their ethical codes focused on defining as misconduct practices such as ambulance chasing which were not exactly big temptations for the upper bar.\textsuperscript{208} As bar associations became more heterogeneous, they could no longer agree on much of anything except the need to control competition for legal services and to resist outside regulation.\textsuperscript{209}

Still, this picture is not quite as gloomy as it looks. The failure of self-regulation through bar association ethical codes and disciplinary machinery does not mean all self-regulation will fail. In all professions, informal conventions about what constitutes ethical, fastidious, and conscientious practice develop, thereby setting limits on how far one can go on a client's behalf without feeling one has crossed the frontiers of self-respect, sliding into sleaziness. A good example, once again, is the tax bar's attempts to define

\textsuperscript{202} For effective statement of the paradox, see J. HEINZ AND E. LAUMANN, supra note 194, at 380.

\textsuperscript{203} In fact, such lawyers often exercise too much control over clients. See id.; Kagan & Rosen, On the Social Significance of Large Law Firm Practice, 37 Stan. L. Rev. 399, 427 (1985). See infra text accompanying notes 242-44.

\textsuperscript{204} See E. SPANGLER, supra note 198, at 97.

\textsuperscript{205} See, e.g., J. HURST, supra note 118, at 251-52; G. MARTIN, supra note 63, at 3-39.

\textsuperscript{206} See G. MARTIN, supra note 63, at 3-86; Matzko, supra note 48, at 75.

\textsuperscript{207} See, e.g., G. MARTIN, supra note 63, at 55-60, 91-103 (historical account of bar association members' disagreements over whether and how to discipline David Dudley Field).


\textsuperscript{209} Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 653-66, 671 (1981) (on A.B.A. codes); Rhode, Why the ABA Bother?, A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 702-06, 714-20; Rhode, supra note 59, at 274.
boundaries between avoidance and evasion, and to set standards for tax opinions. Sometimes a fastidious faction manages to capture a bar committee or law reform project and to codify its views as rules of practice or procedure, or at least as expressive norms. The issue then becomes how well can such weakly institutionalized norms stand up to increasing competition for clients' business and all the temptations to ignore such norms which that competition entails? An emerging, albeit very tentative and experimental, solution is to shift the main responsibility for declaring and enforcing practice norms from regular bar groups to the judiciary, new regulatory boards partially composed of lawyers, and regulatory agencies.

2. Conditions of Independence Outside Representation

(a) Time, Working Conditions, and Professional Culture. Until the late nineteenth century, private practice was for most lawyers simply not a full time occupation, but rather an adjunct to participation in politics and advocacy of public causes. That changed when the legal needs of a single corporate client could require full-time attention from a lawyer, and later from an entire team of specialized lawyers. One company could need lawyers to maneuver for control of hundreds of trunk railroads or oil wells to consolidate a corporate empire; to develop and implement the legal strategy to crush a big labor strike, to defend an antitrust prosecution, or to negotiate agreements with dozens of creditors' and stockholders' committees in a bankruptcy reorganization. Such work not only involves processing documents in hitherto unimaginable volumes, but is also work against the clock: hurrying to file a bankruptcy petition, racing to stack a stockholder’s meeting, or timing stock issues for a rapidly fluctuating capital market. Nevertheless, even the busiest bar leaders of 1880-1900 continued to be immersed in politics and law reform causes, and their names were well known to the public. But soon thereafter—it is hard to pin down the dates—the balance in elite lawyers' lives between private and public practice shifted decisively toward the private. More lawyers spent more of their careers in practice and

210 See supra notes 111-12 and accompanying text.
211 A retiring partner from a large law firm recognized the implications of this new kind of practice:

These days you get a very narrow conception of the role of the lawyer. . . . I think today that the lawyer is more concerned with technical compliance, about the complexities of the law, rather than how things should be done. The fact that law has become so much more complex, there are so many technical details to do in this legal climate, means the lawyers don't have the time to take a broader view of things.

212 See Gordon, supra note 125, at 51; Hobson, supra note 105, at 3, 14; Matzko, supra note 48, at 75.
less in public positions, and while in practice they devoted less time to public causes.213

The period from 1900-1975 may look thin on public service compared to 1770-1860 or 1880-1900, but to many older lawyers it seems a true Golden Age compared to the present. To say that current conditions of large-firm practice are not very conducive to outside commitments would be an understatement. Only firms that have managed to preserve strong collegial cultures supporting engagement in politics and public service have resisted the trend. Elsewhere, the new interfirm mobility of lawyers, the breakdown of ethics of loyalty and collegiality within firms, as well as the increasing competition of firms for clients, of partners for a share of the take, of associates for partnerships, and of firms for new associates, all conspire to discourage the development of any values besides making money for the collective. The pressures to seek and take on new clients and to pile up billable hours214 wipe out most of the time and energy that lawyers might otherwise have for outside activities. Firms treat the partner engaged in politics and the associates who want to do pro bono work as parasites, free riders on the income-producing efforts of others. The lawyer at any level who risks offending a client is an Enemy of the People.

The decision by Cravath, Swaine and Moore to inflate the salaries of first-year associates, a move instantly imitated by other New York firms and later by firms in other cities, has been one of the most antisocial acts of the bar in recent history.215 It further devalues public service by widening the gulf—until recently not very large—between starting salaries in private practice and in government and public interest law. It drives impressionable young associates toward consumption patterns and expectations of opulence that will be hard to shake off if they want to change careers. It forces every lawyer in the firm, especially the associates who are its supposed beneficiaries, to pay heavily for it in extra billable hours and, insofar as high incomes for the partners depend upon low partner-associate ratios, in reduced prospects of reaching partnership.

No wonder lawyers exposed to such regimes are leaving them for investment banking and other businesses.216 Young professionals in the business world have real decisionmaking responsibility, quite different from the detailed technical tasks involved in executing the decisions of others. And

213 This is the trend remarked on by Berle and Stone, see supra note 3 and accompanying text, as well as by Hurst in his great study of the legal profession. See J. Hurst, supra note 118, at 295-305. I expect to be able to provide some plausible quantitative support for the development of this trend through an analysis of elite lawyers' biographies, not yet completed.


business employers sometimes pay even more than law firms. Other than greater job security (another vanishing feature of the old practice), the comparative advantages that law used to offer folks with professional aspirations who had chosen law over business school—such as concern for collegiality in the organization of work, intellectual stimulation, opportunities for public service, association with older people who had seen such service themselves, and values besides profitability—are getting harder to find all the time.

Law firms commonly restrict the independence of their members in ways more direct than the creation of a set of working conditions and incentives that effectively preclude other involvements. Sometimes they explicitly prohibit other activities, such as pro bono activities or political causes or even just publishing law review articles, that might create a potential “business” conflict—that is, not a properly disqualifying conflict of interest, but merely the risk of loss of business from having a firm member be perceived to adopt a policy position that one of the firm’s clients might not like.²¹⁷ What is especially interesting about such prohibitions is not so much that partners impose them, but that the partners are so unembarrassed about doing so, even though the practice violates—in addition to the formal provisions of some codes of ethics²¹⁸—even- conceivable traditional ideal of indepen-

²¹⁷ For some examples of this phenomenon from the heyday of pro bono public interest involvement of corporate firms, see F. Marks, The Lawyer, The Public and Professional Responsibility 256-64 (1972). Two of the many anecdotes I have recently collected also illustrate such practices: (1) A citizens action group, organized to arrest uncontrolled private real estate development of public property in a major city, recently sought advice on the likely impact of the (then pending) tax reform bill on municipal financing of such development. The group located nine associates, practicing with seven different firms, with both the requisite expertise and the desire to be helpful. All seven firms prohibited their associates from taking on the group as a pro bono client, in order to avoid the risk of offending real estate developers whom the firm represented. (2) One of my colleagues told me of an instance in which one of his students, employed part time in a downtown law firm, was instructed by a partner not to write a course paper on a legal issue of interest to some of the firm’s clients.


The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must always act with circumspection in order that his conduct will not adversely affect the rights of a client in a matter that he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

But see Friedman, Limitations on the Corporate Lawyer’s and Law Firm’s Freedom to Serve the Public Interest, 33 Bus. Law. 1475 (1978). Friedman infers a broad duty of loyalty to a general client whom the firm is representing generally and continuously, rather than in a discrete transaction. This duty would prevent lawyers in the
dence their profession has ever entertained. The practice directly contravenes the Advocacy Ideal, according to which clients retain a lawyer’s loyalty only for the case because the lawyer must be free to argue the other side the next day.\(^\text{219}\) The practice is completely insensitive to the Political Ideal, which prescribes that lawyers are supposed to work for law reform even against the wishes of their clients, that they must avoid capture by a faction so they can function as independent citizens, and that personal political commitments are inalienable, not for sale.\(^\text{220}\) The practice also has the practical effect of further concentrating specialized legal resources in the hands of the wealthy. As John Leubsdorf puts it, when a “new area opens up, as a result of the environmental or civil rights or women’s movements, some firm lawyers get involved in it on the public interest side. [Then] because of their expertise or the area’s growth, paying clients hire the firm on the private side. Further public interest involvement is then suppressed, as a conflict of interest or business.”\(^\text{221}\)

Why don’t more law firms get off of this treadmill? Why isn’t the practice more differentiated? Why don’t firms offer partners and associates a differ-

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\(^{219}\) For the English method of implementing this ideal, see supra note 61. The Advocacy Ideal has been the subject of controversy in a recent case involving Skadden Arps, Slate, Meagher, and Flom. Some members of the legal community chastised Skadden when it simultaneously recommended the use of “poison pill” takeover defenses to some of its clients and argued the unconstitutionality of those defenses on behalf of another client. See Waldman, Skadden Arps’ Poison Pill Stance Raises Conflict-of-Interest Concern, Wall St. J., July 23, 1983, at 23, col. 4. Those who chastised Skadden, of course, might have been imposing a requirement of Political Independence in arguing high policy to courts, i.e., your opinion on these matters does not belong to your client; therefore you must say what you truly think. But they might also have been enforcing a norm of client loyalty: once you’ve taken X position for A, you can’t take non-X for B, because that will make your representation of A (or A’s side) less effective in the future. Such a stance requires the very identification with clienteles that the Advocacy Ideal is supposed to discourage. It locks lawyers into one side of an issue. For a debate on whether the same firm should be entitled to argue opposing general legal positions on behalf of two different clients that it is simultaneously representing, see Legal Ethics Forum, 66 A.B.A. J. 97 (1980) (conducted by S. Kaplan). There is, however, astonishingly little discussion of the conflicts between political independence and client loyalty in the professional ethics literature.

\(^{220}\) See supra text accompanying notes 25-32.

\(^{221}\) Private communication from John Leubsdorf to Robert Gordon (September, 1987).
ent mix of goods, such as lower profits and salaries in exchange for lower billable time quotas, flexible work, the privilege of exercising a fastidious preference for socially responsible clients, firm-sponsored public interest projects, a firm culture encouraging public interest, pro bono and political involvements in practice, as well as sabbaticals to pursue such projects? There are some such firms, why aren't there more? I ask this question of lawyers in big firm practice all the time. Some of the answers I get frame the problem as one of collective choice. These responses typically take the following forms: (a) We'd love that, but the partners who pull in most of the business for the firm would leave, and we can't afford that. (b) Big clients are attracted to firms with a reputation for giving 100 percent to their clients. They hate it if the lawyers assigned to their transactions are not constantly on call. (c) It's the partners who want 100 percent control over associates' time. They can't bear the idea of somebody not being instantly available when wanted. (d) Too many of the most talented associates we would like to attract to the firm only pay attention to the bottom line, so we have to match what other firms are paying. (e) Even in firms with a strong commitment to public interest work and political involvement, the associates can never be sure how their work for any but paying clients will affect their chances to become partners, and their unwillingness to take risks drives them out of the public interest and political arenas. (f) The lawyers committed to other values besides money-making, even if there are in fact a lot of them, tend to believe that they are unusual and that almost everyone else cares only about money. Thus firms end up being single-mindedly driven by values which many of their members would prefer not to adopt as exclusive ends.

Yet other explanations for the homogeneity and profit orientation of large law firms sound both less rationalistic and closer to the heart of the matter, explanations like: "The practice of law is going through a crazy phase. There's a hysteria out there. Some lawyers are making fortunes, while other firms are going under. People feel they have to grab everything they can. As long as new business comes in, they can't turn it down. It's out of control."

(b) Autonomous Norms. I have suggested that historically it has been easier for lawyers to buck the opinion of their clienteles in their public policy positions if they could invoke norms that sounded professional and apolitical, such as the norms supplied by traditional and technocratic legalism. Indeed, the appeal to rights and policy science remains today the customary strategy of politically active lawyers. But, as Bryant Garth has recently pointed out in a brilliant article on this subject, lawyers using this time-honored strategy have run up against two difficulties.

The first is that the appropriate content of rights and economic science is

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222 This creates a bias against part-time work as well as outside legal involvements.
223 See Garth, supra note 67.
now so conspicuously contested.\textsuperscript{224} Of course it has always been contested—different factions have always disagreed about what the Constitution or efficient administration of government and economy entailed. But in the present era, many of the participants in these debates have lost all confidence that they embody some theory that smart and impartial people will someday reach consensus about if they have not done so already.\textsuperscript{225} “Rights” can be interpreted broadly or narrowly; they can stress vested property, sexual preferences, “social” goods like employment and housing and education, or welfare entitlements. “Policy science” long ago lost the innocent Progressive certainty that accurate processing of “facts” would reveal immanently optimal regimes of social regulation: it has become a witches’ brew of clashing values, methods, and empirical claims. The notion that there might be some normative objectivity at the end of the rainbow, some apolitical way to choose sides in these battles, seems like a premodern fairy tale to many (though by no means all) of us.

The second problem, Garth points out, is that one of the current heavyweight contenders among ideologies of rights and policy science holds that lawyers perform their most socially desirable functions by aggressively promoting the interests and values of their business clienteles.\textsuperscript{226} The best politics, argue proponents of this credo for the 1980s, lies in relinquishing any conception of professional ideals save that of making as much money as you can by doing what your clients want. You do good \textit{through} doing well.

Accounts like Garth’s of the difficulties involved in any attempt to ground independent politics in autonomous professional norms strike many lawyers (though not Garth himself\textsuperscript{227}) as support for their belief that independence has become an undesirable ideal as well as one that is hard to realize under modern conditions.\textsuperscript{228} I will discuss this belief, and the premises underlying

\textsuperscript{224} See id. at 205-07.
\textsuperscript{225} I offer this very tentatively, not at all sure it’s right. Announcements of the death of absolutist convictions in the post-modern age have a way of turning out to be premature, as such convictions linger on and even strongly revive. Consider fundamentalist Christianity and—among the legal elite—Chicago-style rights-based libertarianism and law and economics. No crisis of self-doubt there.
\textsuperscript{226} See Garth, \textit{supra} note 67, at 209-10, 214.
\textsuperscript{227} See id. at 210-14.
\textsuperscript{228} As John Leubsdorf put it when commenting on a draft version of this piece: Like the conflict of interest rules, this belief promotes peace of mind. You do not have to face those troubling questions: What is the public interest? How far should I push the client’s interests? How vigorously should I press public interest advice? Is my professional life helping or hurting the world? How much risk of not making partner am I willing to take? The moral life, nowadays, is likely to lead \textit{away} from an untroubled conscience—virtue is its own punishment.

Private Communication from John Leubsdorf to Robert Gordon (September, 1987).
it, in the concluding section. Before getting into the debate over whether independence is desirable, however, I want to suggest another way of looking at the rather sketchy evidence of its decline.

3. An Alternative Interpretation: No Decline, Just Relocation.

Perhaps the Political Ideal has not eroded, but only shifted location into other more specialized segments of practice. For example, the notion of a "public" role for the legal profession originated in a period of an undeveloped or immature state, the "state of courts and parties," as Stephen Skowronek has nicely called it. In America the private bar took on work for which bureaucracies were responsible in Europe—helping judges to articulate the basic frameworks of constitutional and common law, drafting legislation, staffing (often as unpaid volunteers) some of the first regulatory commissions. But America now has large public bureaucracies and public legal staffs to do these jobs. Similarly, it may be true that a smaller proportion of the elite bar is politically active. But that is because politics has become both democratized and professionalized: the age of the gentleman-amateur has passed.

Alongside new public bars (composed of bureaucrats and politicians) there are new private legal specialists performing public functions. In the midst of their laments, Berle and Stone noted that the new breed of law professors had picked up some of the traditional legal jobs that business lawyers had dropped—assessing regimes of common law doctrine and regulation from relatively broad historical, interdisciplinary, logical, and consequentialist perspectives, as well as taking the intellectual leadership in law reform, and even (during and after the New Deal) supplying some of the cadres for public service. Also, new entities have emerged to represent points of view other than those of business constituencies. The legal world now includes a full-time labor bar, civil rights and civil liberties organizations such as the ACLU and NAACP Legal Defense Fund, the National Lawyers Guild, and the public interest organizations of the 1970s and 80s—the Legal Services Corporation, Nader's groups, environmental groups, and small firms that take employment discrimination and civil rights claims.

229 See infra notes 242-75 and accompanying text.
231 See Friedman, On Legalistic Reasoning—A Footnote to Weber, 1966 Wis. L. Rev. 148 (arguing that classical legal formalism was a rough preliminary substitute for the administrative state).
232 For a discussion of this view of the law teacher's role, see Berle, supra note 3, at 341-42, and Stone, supra note 3, at 11-12.
Proponents of the "relocation" thesis could also argue that the potential for an "independent counseling" role is still very much alive. Granted, the recent reorganization of corporate legal services has eliminated most of the opportunities, regardless of how frequently they were seized, for outside law firms to influence their clients. But the reorganization has also vastly increased the number of such opportunities for in-house counsel, whose recent growth in budgets, staff, and professional calibre have naturally tended to enhance their influence in corporate decisionmaking. Some legal departments have even organized themselves to mimic the forms of independent "firms" within the corporation.\(^2\)

A house counsel's office with good connections to the CEO and Board of Directors can carry a lot of weight, at least against middle management. Moreover, corporate counsel now can and do decide when and where to send work to outside law firms, and often exercise tight controls over those firms' costs and working methods. Hence, house counsel not only speak with an independent voice inside the organization, but can also order up as much outside independence as they need. If their own office is too much a part of the team to conduct, for example, an independent investigation of alleged misconduct, or an independent audit of compliance with regulations, they can commission an outside firm known for its integrity to do the job.

Despite the increased independence of in-house counsel, the outside firms themselves have not lost all opportunities for influential counseling. They are still retained to extricate companies from major crises in their corporate existences—attempted takeovers, strikes, antitrust suits, massive citations for occupational health or environmental violations, class action suits for employment discrimination, mass tort litigation—and in those capacities have great potential influence to shape litigation and settlement strategies as well as the structures to prevent recurrences.\(^3\) Outside lawyers are already used, and could be used a lot more, to audit companies that have been caught committing major illegalities in order to find out what went wrong and how to avoid it in the future.\(^4\)

Furthermore, as big law firms have lost more of their old Fortune 500 company business to inside counsel, they have picked up a lot of new legal

\(^{2}\) See, e.g., M. Stevens, Power of Attorney 80-94 (1987) (describing Peter DeLuca's controversial attempt to structure the legal department of General Foods Corporation like a private firm).

\(^{3}\) For a discussion of the attorney's role in restructuring delinquent corporations, see generally C. Stone, Where the Law Ends: The Social Control of Corporate Behavior (1975).

business representing much smaller companies—high-technology start-up companies, for instance, or Health Maintenance Organizations. Such clients rarely have the experience and inside resources of huge corporations. For them, their lawyers are still sources of general business advice, contacts with financial institutions, and interpreters of the mysterious ways of government.\footnote{237}{See Pirie, Friedman & Gordon, Law, Lawyers and Legal Practices in the Silicon Valley, in Silicon Valley: The Future (R. Gordon ed.) (forthcoming); Csaplar, A Preliminary Study of the Macro-Economics Forces Molding the Large Business Law Firm (1984) (working paper, Harvard Law School Program on the Legal Profession).} It was in representing such businesses that Louis Brandeis was able to give content to his vision of socially responsible counsel \"for the situation.\"\footnote{238}{See supra note 81.}

This alternative interpretation is encouraging but hardly justifies a Panglossian euphoric confidence that, one way or another, a society always gets as many lawyers to pay attention to values and interests different from those of major business groups as it needs. We have developed bureaucracies, but they are nothing like the prestigious and powerful civil services of Europe or Japan. Even the best government legal jobs are absurdly underpaid compared to private ones at the entry level. And most—though happily by no means all—of the ambitious and well-qualified lawyers who enter public service do so only as a stepping-stone to private practice.\footnote{239}{See e.g., R. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy 79-82 (1986) (reporting results of study indicating that young attorneys recruited to serve in the FTC’s Bureau of Competition viewed government service as a route to careers in the private sector); S. Weaver, Decision to Prosecute: Organization and Public Policy in the Antitrust Division 36-44 (1977) (same for lawyers joining Antitrust Division of Justice Department).} The legal resources of public agencies remain pitiful compared to those of their corporate adversaries, and are kept that way in part through the political activity of the lawyers for those adversaries.\footnote{240}{See e.g., C. Noble, Liberalism at Work: The Rise and Fall of OSHA 99-120 (1987) (discussing emergence in the 1970s of corporate-sponsored organizations that mounted successful legal and ideological attacks on the Occupational Safety and Health Act and the regulatory bureaucracy created to enforce the Act).} Law teachers have indeed taken up some of the public functions of the bar, but their influence is limited by their marginality: they are \"academic,\" \"theoretical,\" \"idealistic,\" lacking the authority of veterans of the \"real world\" and usually lacking the regular personal and professional contacts with leading business people that would make their influence felt in specific decision-making processes. Legal services organizations, noncorporate interest groups, and public interest firms inevitably operate on sharply limited budgets that disable them from all but a
few carefully chosen legal engagements. They depend upon sources of funding such as governments, foundations, membership subscriptions, and attorney fee awards, but such funds are highly unstable—indeed likely to dry up altogether if their work gives too much offense to powerful interests—and severely restrict the kinds of causes they select.241

Ultimately, no outsider, either bureaucrat or academic, can substitute for the insider, the business lawyer actually on the scene, both at the moment where the insider’s advice makes the most difference and in confidential planning and strategy sessions far removed from any public forum. According to the alternative interpretation, new opportunities for independent counseling have arisen to take the place of old and obsolescing ones. This view is heartening indeed, but it does not tell you anything about where the normative push—the personal motivation and professional culture and political vision—is going to come from to ensure those opportunities are acted on.

III. CONCLUSION: CRITIQUES AND DEFENSES OF LAWYERS’ INDEPENDENCE

Political independence is far from every lawyer’s ideal. It has severe critics, probably more now than ever in this country. The critics argue that the exercise of independence produces bad or unethical law practice, bad social policy, or futile cosmetic change that is worse than none at all. Some of these critiques I think trivial and plainly wrong. Some cut deeply. In this concluding section I want to raise and discuss some of the more frequent and disturbing critiques of independence.

A. The Quality-of-Services Critique

Quality-of-services critics point out that lawyers’ autonomy has a dark side: independence is not an unambiguous good. The dark side is revealed most clearly in the practices of lawyers who deal with clients less informed or of lower status than themselves—lawyers who preempt virtually all of the decision-making authority, keep information to themselves, don’t spread a full range of choices before their clients or heavily bias the choices they do present, don’t tell clients what is happening in their cases, patronize their clients and view them as overemotional and dumb laypeople who can’t possibly know what legal options will serve them best, or presume that they know what’s in their clients’ best interests (criminals must want to get off as lightly as possible, rather than relieve their minds through confession or atone for their crimes; divorcing spouses must want to take their ex-partners

241 See Settle and Weisbrod, supra note 120, at 532, 533-39; Rabin, supra note 233, at 258-61.
for everything they can get) without even trying to explore the complexities of the clients' intentions and desires.\textsuperscript{242}

According to this critique, the lawyer who forsakes the unalloyed ideal of client loyalty to counsel "for the situation" may be particularly prone to confuse independence with self-interest. Consumer debtors' lawyers, for instance, often fail to raise available defenses, telling their clients it would be "unreasonable" or "unrealistic" to litigate rather than pay. They do so partly because they genuinely believe people should pay their debts and that most defenses are bad forms of regulation, but mainly because it would cost more than the case is worth to contest it and because the lawyers would risk bad relations with the merchants who give them repeat business.\textsuperscript{243} Similarly, such lawyers want to maintain good relations and a reputation for reasonableness with the judges and officials with whom they often deal. Consequently, they will often cool out clients' more intemperate claims and their own more aggressive tactics,\textsuperscript{244} and may even sell one-shot clients down the river in order to win for the big ones when they come along.\textsuperscript{245}

Some critics are especially scornful of any attempt to romanticize as a Golden Age of law practice the locked-in relations between firms and corporate clients that prevailed before the 1970s. These critics allege that taking an "independent" view of craft excellence could rationalize all sorts of undesirable practices: overlawyering every transaction, redrafting every document seventeen times with five layers of review, billing thousands of dollars for time spent drafting clauses concerning risks of remote or insignificant contingencies, pulling out all stops to litigate every case to the hilt, even though early settlement would result in greater net saving or gain after taking attorneys' fees into account, raising unhelpful conservative objections to clients' legitimate goals without suggesting any alternatives. For the object of delivering creative cost-effective legal services, the critics say, the regime of independence was a world well lost.\textsuperscript{246}

To these critics, the ethical and public service ideals of the old order are as suspect as its claim to high professional standards. The latter claim, these critics allege, is the product of a "tired monopoly" of another kind: that of the genteel patricians who hoped to maintain elite law practice as a sort of

\textsuperscript{242} See, e.g., D. Rosenthal, supra note 19 ("traditional" model of the lawyer's independence compared to "participatory" model in which clients exercise greater control); Hegland, supra note 141, at 811-17.


\textsuperscript{244} See Blumberg, supra note 57, at 28-31.


\textsuperscript{246} For an informed and useful insider's critique of the inefficiency of the old regime, see J. Bartlett, The Law Business: A Tired Monopoly 25-38 (1982).
exclusive club for people like themselves—staid, locked in to traditional ways of doing business that were unexacting enough to leave plenty of time for other commitments, white, male, Ivy, Protestant, and upper-class. For those who see almost nothing but hypocrisy and the defense of established privilege in the old-line values, the unabashed free-wheeling money-making ethic of the present day seems as refreshing as (and somehow connected to) the new diversity of classes, races, sexes, and ethnic groups in law practice.247

These critiques, though valid as far as they go, are not entirely logical. "Independence" isn't like pureed baby food—you don't have to swallow all the ingredients if you only like some of them. Of course independent lawyers may abuse their discretion to serve their self-interest—they may even spin out complex ideologies of how valuable their abuses are—but that's not an argument against autonomy, only against bad exercises of it. Besides, intense competition for and subservience to the wishes of clients foster pathologies of their own. When firm lawyers tell me that their litigation machine, now boosted by computers and paralegals and retooled to run on the thin fuel of budget constraints imposed by corporate counsel, is more powerful and effective than it ever was in the old days, I see no reason to disbelieve them. When the same lawyers, or others from the same firm, tell me that they are now issuing tax opinions that ten years ago they would have classified as schlock-firm products bordering on the unethical, I believe them too. Indeed, the skills it takes to sell the firm to new clients may be antithetical to those required to give that client sound advice. The firm may promise more personal attention from the star partners than it can deliver, thereby leading overextended lawyers into practicing on the wing. It may recruit the client with a show of militant support for its desire to aggressively resist regulation or crush its enemies through litigation, when what the client needs most is to be guided toward compliance or compromise. It may become so busy impressing the client with its adversary machismo, cutting corners and bending rules to obtain immediate advantages, that it may goad courts or regulatory authorities into imposing punitive sanctions. It may squander in a few months its valuable reputational capital for fair and honest dealing with authorities and adversaries by promoting a firm culture tolerant of distortion, nondisclosure, game-playing, and false assurances in negotiations and discovery.248

247 This diversity should not be exaggerated. Law practice, especially at the partner level, remains highly stratified by class, ethnic group, and gender. See, e.g., J. HEINZ & E. LAUMANN, supra note 194, at 10-17, 109-113.

248 For one among many recent examples of the problems that firms are experiencing as they try to adjust to the pressures of the newly competitive practice environment, see Gray, Legal Nightmare: Multiple Allegations of Impropriety Beset Sullivan & Cromwell, Wall St. J., Aug. 3, 1987, at 1, col. 6.
All of these possibilities point toward a special illogic in dismissing the ideal of public service as undetachable from a sort of snobbish-exclusive-patrician-WASP sensibility of noblesse oblige. Even if it were merely that, it is hard to see why the glamorizing of money and power for purely selfish ends would be preferable. Granted, the service ethic originated in the ideology of a privileged class, the Federalist gentry. It is also true that the public service ethic continued to justify the privileges of that class even when most of its members did little to live up to it. But public service is hardly the credo or aspiration of a particular class. It is just as illogical for the new breed lawyers to give public service the taint of snobbery as it would be for old-line lawyers to blame the decline of the service ethic on the increasingly diverse composition of the bar.

Today, the association of public service with snobbery is untenable as well as illogical. By the late nineteenth century, the middle class had already internalized the public service ethic. In the twentieth, that ethic has been completely democratized: the lawyers who seek fulfillment in public service are the children of patricians, professionals, academics, union members, political activists, members of victimized minority groups, graduates of elite and non-elite schools alike. The great political movements in which lawyers have played a big part in this century, from the New Deal to Civil Rights and Women's movements and beyond, have in fact drawn disproportionately from groups marginal to the dominant culture: Jews, blacks, women.

B. The Illegitimacy Critique

Probably the most common critique of the independence ideal is that it either conflicts with the ideal of client loyalty or arrogates to lawyers an improper role in political decisionmaking, or both. I discussed this view already in Part I, but want to amplify and add to that discussion here.

Underlying the illegitimacy critique is the central belief that lawyers' roles begin and end with vigorously pursuing their clients' interests within the limits of the law. Rather than injecting any of their own political views into the lawyering process, they should simply function as an extension of their

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249 Nevertheless, the Federalists put their money where their mouths were and lived up to their ethic. For a discussion of Federalist views on public service and public administration, see White, Public Administration Under the Federalists, 24 B.U.L. REV. 143, 172-86 (1944). See generally L. White, The Federalists: A Study in Administrative History (1956).

250 Patrician lawyers have, unfortunately, had a habit of doing exactly this. See, e.g., J. Auerbach, supra note 11, at 102-29.

clients’ interests, accepting those interests according to the terms the clients use to characterize them. Outside of their professional lives, lawyers are as free as other citizens to take part in or stay out of politics: they have neither special obligations nor special privileges in the political arena.

Although this position is very commonplace, I think it rests on incoherent premises and leads to indefensible conclusions. As pointed out in Part I, the position appears to license an untempered adversarial advocacy which when aggregated could easily nullify the purposes of any and every legal regime. Take any simple case of compliance counseling: suppose the legal rule is clear, yet the chance of detecting violations low, the penalties small in relation to the gains from noncompliance, or the terrorizing of regulators into settlement by a deluge of paper predictably easy. The mass of lawyers who advise and then assist with noncompliance in such a situation could, in the vigorous pursuit of their clients’ interests, effectively nullify the laws. The only justification for their doing so would have to be their confidence that the system was self-equilibrating, so that some countervailing force would operate to offset their efforts. But such confidence is unfounded. Examples of aggressive advocates virtually precluding the fulfillment of any conceivable purposes of a legal regime—except of course the purpose of enacting symbolic laws never intended to have any effect—are plentiful.252 Even when legislatures prodded by mass opinion have moved to stiffen penalties and strengthen enforcement, lawyers have moved to nullify that too. It is at least questionable whether a social system maintained primarily through the internalization of legal norms rather than state terror can survive much of such behavior.253 Yes, lawyers must pursue clients’ interests within the framework of the rules of the game. But the issue of lawyers’ public responsibility is precisely that of what their position should be vis-à-vis those rules.

The principal fallacy implicit in the view of lawyering underlying the illegitimacy critique, is that lawyers must reconcile two sets of social purposes—clients’ interests and the law’s plain meaning—that arrive at their offices already fully formed and filled in with some definite determinate

252 See, e.g., B. Bringhurst, Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911 (1979) (analyzing failure of antitrust laws); C. Noble, supra note 240, at 99-120 (discussing aggressive resistance to OSHA); Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA, 96 Harv. L. Rev. 1769, 1769-1803 (1983) (arguing that decline in union membership is attributable to aggressive resistance of employers to unions which the NLRA representation process fosters). Examples like these can be multiplied whenever lawyers and clients opposing specific regulations are able to overwhelm enforcement resources. For a view that at least one agency, the FTC, was intentionally endowed with powers that are more symbolic than real, see Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1191-97 (1973).

253 Because many societies obviously do function without a high degree of observance of formal legal rules, the question might be whether such a social system can survive as a self-consciously law-abiding society.
content. But in fact part of the lawyer’s job is to interpret both sets of purposes. At the barest minimum lawyers have to translate clients’ desires into something processable by the legal system, and investigate the various ways in which legal officials might, in turn, process them. Usually they must go well beyond that, translating clients’ interests into a number of possible alternatives that until that moment might never have been thought of, then asking for a ranking of alternatives, and then estimating the possible consequences of each. Through this back-and-forth dialectical interaction, both the client’s “interests” and the “law” governing the situation will gradually take the shapes sculpted by the social agents who interpret and transmit them.

But the critic then says: all right, lawyers play legitimate roles in helping both to define the clients’ interests and to predict the legal consequences likely to flow from various definitions. But in this capacity lawyers have no right to intrude their opinions, their influence, their political values. They are neither elected officials nor their agents; lawyers have no special authority to go around telling people how they should behave.

The traditional response to this is simple: lawyers do indeed have an official status as licensed fiduciaries for the public interest, charged with encouraging compliance with legal norms. In contexts like counseling, where there is no official third party like a judge to oversee the interaction between the client and the state, the lawyer is not only supposed to predict the empirical consequences of certain behavior, but also to represent the viewpoint of the legal system to the client. Lawyers can’t coerce anyone; they can only advise and persuade, sometimes only under the threat of resignation rather than disclosure. Surely the right of the lawyer to encourage compliance with the law’s purposes through persuasion is at least as clear as the client’s right to demand the lawyer’s help in exploiting the law’s ambiguities and procedural opportunities and in engaging in strategic behavior designed to evade the law. The other and even better response to the critic is that even conceding that lawyers have no special authority to guide their clients, neither do they have any special immunity from responsibility for the things they help their clients do.\(^{254}\)

Critics may still want to defend their conception of the lawyer’s role by arguing that the legitimacy of lawyers exercising independent judgment has been undermined by the vanishing of a broad consensus on the goals of law. When the law applicable to the client’s situation is full of gaps, unresolved conflicts, and ambiguities, where can the lawyer find the authority to support an interpretation that may not harmonize with the client’s immediate wishes? As mentioned earlier, the most plausible sources of autonomous professional norms, such as those embedded in traditional and technocratic legalism, have become politicized and contested.\(^{255}\)

\(^{254}\) On this last point, see especially Luban, *supra* note 59, at 83.

\(^{255}\) See *supra* text accompanying notes 223-229.
One way to respond to this argument is historical: lawyers’ interpretations of legal purposes have always been controversial, not least so when lawyers most vigorously sought to promote them. Obvious examples are the Federalist lawyers’ contentions that the Constitution was law, enforceable by judicial process against state legislatures and courts and even the Congress, and that constitutional provisions implied expansive national power over the economy. Though these positions have achieved some general if unstable acceptance, at the time of their formulation they were fiercely contested and figured among the big issues dividing the first political parties.256

More fundamentally, it seems rather extreme to refrain from trying to develop and act on a commitment to a particular view of legal purposes simply because others may arrive at a different view. That may be a reason for caution, for avoiding dogmatism, for empathizing with and taking account of the views of opponents, but not for paralysis. After all, as William Simon points out, the legal system routinely grants judges and administrators discretionary authority to interpret legal purposes. Judges and administrators, in turn, routinely engage in such interpretive exercises, believing that they can do so reliably despite their knowledge that other judges and officials are constantly disputing them and reaching contrary views.257

C. The Competence Critique

The position that lawyers have no special competence to bring to counseling, nor any special contribution to make to political life, makes sense as a critique of the most pompously inflated view of political independence. According to that view, expressed in the nineteenth century, lawyers belong to a distinct elevated estate uniquely endowed with political wisdom and insight into everybody’s long-term best interests.258 That was always ridiculous, and has become more so with the specialization of the profession. We are bright technicians, for the most part, not philosopher-kings (or queens).

Most of the arguments in favor of lawyers playing an independent role in counseling and politics, however, are much more modest. One such argument concerns the nature of legal training and experience. Legal education is to some extent an education in applied political theory. Lawyers are articulate in one of the major media of public discourse, legal language. They often have diverse experience—government work, different kinds of clients, different kinds of corruption and evil, all the myriad ways in which plans can misfire and go askew. They are professionally capable of detachment, able to see different sides of a problem and analyze motivations. They know power-

257 See Simon, supra note 80, at ___.
ful people and something about what makes them tick and what will move
them. Thus legal training and experience provide a firm foundation for the
exercise of independent judgment.

Arguments from good motivations also have some modest force. The legal
profession attracts, along with a lot of fairly venal and opportunistic types, a
large number of the most public-regarding, socially-conscious people in our
society. It’s a total waste to define a lawyer’s role in a way that will deny
such people the chance to act on altruistic intentions. The lawyers too
diffident to advise are probably the ones whose advice would be most
valuable.

Finally, there are arguments from opportunity. The main idea is just that
the chances to act independently are there. Lawyers are scattered all over
civil society in intermediary and advisory positions from which they have
opportunities to exercise influence.

It’s easy to say lawyering is not a club for superhumans, and that espe-
cially in this century lawyers have been joined, and in many areas of political
life displaced, by rival interpreters and articulators and mediators of social
purposes. What’s absurd is to argue that because of this lawyers are
uniquely disqualified as citizens or moral and political actors—the one group
of individuals in the world who should conscientiously attempt to reduce
themselves to ciphers, pure media of transmission. Why should everybody
else around the corporation—the engineers, the financial people, the safety
and health division—be permitted to deliberate upon and engage in the
internal politics of the corporation to promote their views of its best inter-
ests, but not the lawyers?

D. The Critiques of Consequences

The most interesting of all the critiques asserts that as an ideal, indepen-
dent lawyering is not worth much because its consequences are bad. This
critique takes several different forms, varying with the politics of the critic.

1. The Critique from the Right

According to the critique from the Right, the purposive model of lawy-
ering has typically carried with it the Progressive ideological baggage that, by
favoring legislative and administrative regulation as the response of the
“public interest” against antisocial corporate behavior, promotes enthusias-
tic corporate compliance with such regulation as socially responsible. The
critics contend that much of the regulation the Progressive and New Deal
lawyers favored (including all the licensing conditions they imposed on entry
to the legal profession) was really just “rent-seeking” by regulated indus-
tries trying to set up government-coordinated cartels to protect them from
competition.\footnote{259 See Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI.} The critics from the Right also insist that a large part of the
Progressive-New Deal-Great Society regulatory agenda was based on deficient economic analysis and irrational "populist" hostility to large corporations, a naïve overconfidence in administrative command-and-control regulation, and a failure to appreciate that in this second-best world the attempt to correct even genuine market failure through regulation often imposes enforcement and compliance costs exceeding their benefits. If regulation is inefficient, the last thing society needs is lawyers using their strategic positions in society to get more of it, and more compliance with it.

Picking up on such suggestions, critics of independence like Charles Fried have argued that lawyers perform their most valuable function when they aggressively help their clients deal with pesky bureaucrats on whatever terms the clients want. Fried blends this critique with the Quality-of-Services, Illegitimacy, and Competence Critiques given above, and essentially concludes that whenever lawyers try to think for themselves instead of pushing for clients' interests in every way they can, the results are bad legal advice, inefficient service, presumptuous usurpation of public authority, and bad public policy. The cure is an unrestrained competitive market among lawyers as well as among clients. For such critics, the current trends in corporate practice, especially the substitution of mercenary ethics for public service, have brought about a sort of Yuppies New Jerusalem.

Again, the cure does not always follow very logically from the diagnosis. To the extent that regulation results from antisocial rent-seeking by corporations, lawyers do not promote the public interest by assisting their clients to get more of it. It would be better if, as politically independent citizens, they supported economic deregulation initiatives against their clients' immediate interests. To the extent that regulation addresses "real" market failures and produces "real" public goods, but is inefficient, lawyers should help to lower its costs by encouraging clients to voluntarily comply with its purposes instead of undertaking expensive adversary resistance, and should help design creative alternatives to ponderous, unwieldy regimes of command-and-control rulemaking. I cannot imagine any reasons at all why the intensity with which a corporation wanted to resist regulation would ever bear any but an arbitrary relation to the worth of the regulation, however defined. In fact, the relation may well be positive. The worst


261 See Fried, supra note 76, at 56.

262 Cf., e.g., Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wis. L. Rev. 655, 682-86 (recommending the abandonment of centralized command-and-control regulation in favor of systems of market incentives).
violators, the corporations producing far more than their "optimal" fair share of pollution and sick workers, are also likely to be the hardball adversaries. They have the most to lose from detection and enforcement, and the most to gain from barricading themselves behind lawyers to nullify the laws. It is even harder to understand why having lawyers simply pursue these worst violators' self-interest in a competitive market will produce advice that is optimal for either the client or the society. The advice that the client wants immediately to hear, which is what such a market tends to produce, is not—as "purposive" lawyers keep pointing out—at all necessarily in the client's best interest.263 Beating the rap or the tax this time won't do much good if the evasion either invites a rash of lawsuits or so enrages Congress that it is moved to smash the client with a sledgehammer.

Ultimately, if you accept the premises of the rightwing critique, I think you end up having to argue for more rather than less independent political activity and political judgment in counseling. I cannot honestly argue, however, that the advice likely to be rendered by a more independent corporate bar would much please those conservatives who think lawyers should uncritically assist businesses do whatever they believe to be in their immediate interest. On the contrary, insofar as many laws express collective social purposes that conflict with or qualify those of short-term corporate profit-seeking, the right wing will disapprove of advice that seeks to promote conformity to such purposes.

2. The Critique from the Left

Critics from the Left also rely on history when they contend that the policies recommended by elite lawyers in the name of independence have often been dubious or pernicious—not anything worth emulating. The early prototypes of such lawyers, the Federalist policy elite, were after all very conservative indeed. After the Civil War, the leaders of the urban bar quite consistently supported Federal withdrawal from Reconstruction and the Supreme Court's evisceration of the Civil Rights Amendments.264 The Progressives, including Brandeis himself, invested their energies in building institutions designed to disempower urban majorities, impose their own cultural standards on immigrants and ethnic groups, and contain by cooptation the threat of socialism posed by industrial labor militancy.265 The international lawyers of the Wall Street foreign policy establishment have given us economic imperialism, approval of Japanese relocation camps, the Cold

263 For an interesting analysis of how an employer's policy of racial discrimination might serve its short-term profit interests while working against long-run efficiency objectives, see Donohue, Is Title VII Efficient?, 134 U. Pa. L. Rev. 1411 (1986).
When organized bar groups have mobilized around political positions, their overall record (save for the last 15 years) is overwhelmingly one of support for reactionary causes: hostility to immigrant lawyers and to legal aid, to legislation benefiting labor, to dissidents persecuted as "subversives." On the whole, the left critics say, we might have been better off if elite lawyers had been completely demobilized politically, had thought of themselves as nothing more than functionaries of client interests.

This critique, which I find very powerful, implicates too many complex historical judgments to be dealt with in a short space. My own quick response is that, although we’d have to delve into each case, and could never be sure, I would bet that in at least some of these instances the intervention of conservative but public-minded legal elites probably produced results rather better from a leftist standpoint—relief for the most miserable casualties of market dislocations, moderation of the cruelest excesses of corporate power in labor relations, cautious support for expansion of Black civil rights, and due process protections for radicals—than unmediated pursuit of client interests would have done. Also, the state-institution-building of the Progressive, New Deal, and Great Society generations has occasionally opened up surprising amounts of space for modest progressive political action. I think, for example, of the role that radical New Deal lawyers on Jerome Frank’s AAA staff played in trying to secure a little land tenure for southern sharecroppers, or the work of California Rural Legal Assistance under Office of Economic Opportunity’s Legal Services program.

See, e.g., J. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980) (arguing that American lawyers involved in development assistance programs in the 1960s exported to Latin America models of legality and lawyering conducive to the establishment of repressive and authoritarian legal regimes); P. IRONS, JUSTICE AT WAR (1983) (detailing the role played by John J. McCloy and others in the internment of Japanese-Americans during World War II); T. PATERSON, SOVIET-AMERICAN CONFRONTATION: POSTWAR RECONSTRUCTION AND THE ORIGINS OF THE COLD WAR (1973) (discussing role of legal and foreign policy elites in the conduct of the Cold War); Ameringer, The Panama Canal Lobby of Phillipe Bunau-Varilla and William Nelson Cromwell, 63 AM. HIST. REV. 346 (1963) (examining Cromwell’s role in securing legislative support for the construction of the Panama Canal).


See P. IRONS, supra note 137, at 156-80.

3. The Liberal Critique

Left-liberals sometimes offer an interesting variant of the critique of consequences which goes something like this. We are better off under a regime in which corporate lawyers think about what makes money for them rather than what makes good politics because corporate lawyers—like corporate managers—who are inspired to deliberate over political ends and social responsibilities will usually pick bad ones. A very sophisticated version of this critique (more sophisticated than any I’ve actually heard) might go like this: it might well have been true that socially concerned lawyering in the Progressive and New Deal and Civil Rights generations was more liberal than the conventional legal consensus, represented by the Supreme Court and the American Bar Association. But by now the conventional consensus, which most lawyers will reflexively support because it’s what they are used to, has become saturated with the liberal views of the New Dealers, the Warren Court, the Great Society programs, and the New Social Regulation of the 1970s. Ordinary elite practitioners have no interest in dismantling Social Security, Medicare and Medicaid, affirmative action, environmental regulation, or government-funded legal services. On the other hand, the present day activist lawyer in corporate practice, the lawyer with an independent agenda and ideology, is likely to be a right wing radical. Check out the “public interest” law firms of the present day: they are overwhelmingly fronts for antiregulatory business groups.\footnote{See Houck, With Charity for All, 93 Yale L.J. 1415, 1454-1514 (1984).}

I’m not sure the critique is empirically well-founded. There is some evidence that in the aggregate corporate lawyers are somewhat more liberal than their clients.\footnote{See Nelson, supra note 198, at 511-21.} The political passivity of liberal lawyers only exacerbates many of the social evils perpetuated through the efforts of actively committed conservatives. If the liberals were mobilized, they could make a real difference in the other direction. Moreover, it is hard to see how conservative corporate lawyers could do much more to further the political values and goals of business than they do already, or how any extra intensity that right wing lawyers might bring to their policy advice would add much to the views that corporate executives already hear from themselves and their colleagues.

4. The Critique of Legalism

From many different points on the political spectrum comes the critique that lawyers’ public projects, whatever their political thrust, have the vice of favoring the legalistic solutions familiar to lawyers and congenial to creating legal business: legislation, administrative rule making, cumbersome and expensive lawyer-driven due process machinery, and arcane and involuted legalistic reasoning. There is a general disenchantment with the legalism of
the Progressive period. Conservatives hate the way due process rights undermine traditional authority in schools, hospitals, welfare administration, and prisons. Radicals hate the illusion of legitimacy that enshrines such rights even when they cost too much to vindicate. Almost everyone except the plaintiffs' bar is unhappy with current litigation practice as a mode of dispute settlement.

It's true that lawyers have a bias toward legalism. But they also know the pathologies of legalism better than most people, and in fact have taken the lead in many of the antilegalist reform movements of the present: deregulation, regulatory negotiations, alternative mechanisms of dispute resolution, reform of the tort system, and so forth. Usually the antilegalist leaders come from segments of the bar that have less of a stake in legalism.

5. Refuting the Critiques of Consequences

In the end, refuting the critiques of consequences requires only that we recognize that it is never a sufficient argument against committed and deliberate political action that such action has had, and may have, bad consequences. This is just as true of thoughtless and unreflective action, and for that matter of inaction. The viewpoint that everyone is best off if nobody thinks of anything but making money is indefensible. Moreover, it is incoherent even on its own terms, for the invisible hand only works to maximize welfare within a hypothesized framework of laws, institutions, and morals, which some people must be committed to defending against opportunists and rent-seekers.

E. The Critique from Futility

The last attitude toward lawyer's independence may be the most widely shared of all: What's the point? Corporate practice is the way it is, and not the place to be if you have any commitments to social change. There's nothing that can be done, nothing important anyway.

The best response to this lies in Galileo's reply to the Cardinal's contention that the world stands still: "And yet it moves!" Historically, lawyers have found legal practice not an obstacle to but a congenial platform for pursuing independent politics. Even the recent revolution in big firm prac-

272 One must of course be exceedingly cautious and selective in assessing the many critiques of legalism and litigation, and the many proposals to replace them, since many of these critiques and proposals are thinly disguised devices to deprive relatively powerless groups—like tort plaintiffs, victims of occupational disease or discrimination, welfare benefits recipients, consumer buyers, and battered women—of legal rights that, however costly and cumbersome to vindicate, have given them some leverage to affect how state and corporate bureaucracies control their lives. See Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3, 28-37 (1986).
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tice, as we have seen, has created new opportunities for influence while removing others. Granted, it has also created a professional culture unprecedentedly indifferent or hostile to lawyers reflecting and acting on political commitments. But lawyers can be committed to changing that culture, and some of them are.

Firm lawyers are forming associates’ groups from different firms to talk about the conditions of their practice within the firm and the nature of the work they do for clients, with the aim of figuring out how to change those conditions to make their work more harmonious with their convictions. Sometimes, eminent older partners alarmed at the degradation of the public service ethic support the associates’ efforts. Other associates are breaking away from their employers to form smaller firms with saner work agendas and more modest expectations of profit. Within these smaller firms, lawyers press for an expansive pro bono policy, emphasizing the assistance that they and their litigation facilities can give to projects of existing public interest groups. They also press for a narrow view of client conflicts and for some willingness to take risks in offending clients with their public interest projects. They are active in bar groups, hoping to influence the sections and committees that define practice standards. They have formed alternative bar associations with public interest projects of their own. They give their time and talents to back up centers for legal aid offices. And they are active in more traditional ways, working for political candidates, writing amicus briefs, taking sabbaticals to serve in office.

We are speaking here of very modest steps—local, tactical, bureaucratic maneuvering, incremental moves, interstitial reforms—but the cumulative effects of such efforts over time can be profound (think for example of the revolution in institutions and cultural perceptions brought about by the women’s movement.) Of course the reforms that lawyers urge on their firms, their profession, and their clients are most likely to gain legitimacy if tied to outside political movements of a kind rather quiescent just now; but lawyers can be active in such movements as well.

Many people will continue to argue that the kinds of modest steps I’ve been talking about here are either cosmetic or futile. Surprisingly, orthodox Marxist analysts and liberal lawyers rationalizing their choice of corporate practice somewhat against the grain of their commitments converge here. For both groups, corporate capitalism is a closed system and corporate law practice is part of that system. Everything done inside the system serves to maintain and reproduce it, and it’s naive to think otherwise. Once you’ve committed yourself to working in the system, you have made a compact to serve its purposes in some fashion, however alienated. For trying to deal with this critique (which is closely akin to the Left Critique of Consequences) is a

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very important but also vast project that I cannot undertake here and now. Refuting the critique would essentially involve an attempt to show that there is no system, save as it is constructed through acquiescence, and to demonstrate that we know systems to be transformable because we have seen them transformed. As the great Czech dissident Vaclav Havel has pointed out:

[w]hether it ought to focus on reforming the official structures or on encouraging differentiation, or on replacing them with new structures, whether the intent is to "ameliorate" the system or, on the contrary, to tear it down: these and similar questions, in so far as they are not pseudo-problems, can be posed by the "dissident movement" only within the context of a particular situation, when the movement is faced with a concrete task. In other words, it must pose questions, as it were, ad hoc, out of a concrete consideration of the authentic needs of life. To reply to such questions abstractly and to formulate a political programme in terms of some hypothetical future would mean, I believe, a return to the spirit and methods of traditional politics, and this would limit and alienate the work of "dissent" where it is most intrinsically itself and has the most genuine prospects for the future. I have already emphasized several times that these "dissident movements" do not have their point of departure in the invention of systemic changes but in a real, everyday struggle for a better life "here and now." The political and structural systems that life discovers for itself will clearly always be—for some time to come, at least—limited, half-way, unsatisfying and polluted by debilitating tactics. It cannot be otherwise, and we must expect this and not be demoralized by it. It is of great importance that the main thing—the everyday, thankless and never-ending struggle of human beings to live more freely, truthfully and in quiet dignity—never imposes any limits on itself, never be half-hearted, inconsistent, never trap itself in political tactics, speculating on the outcome of its actions or entertaining fantasies about the future. The purity of this struggle is the best guarantee of optimum results when it comes to actual interaction with the post-totalitarian structures.274

In this passage, Havel is describing part of the way of life he recommends to people living in all "post-totalitarian" societies, whether capitalist or communist. He calls this way of life "living within the truth"—that is, behaving as if the ideals of your society were really accepted and acted upon, and as if you knew that the standard evasions and denials of these ideals were fictions and lies—and gradually, through this behavior, developing in all the institutions of civil society the germs of a "parallel polis" that can, by degrees, come to form the "independent [!] life of society."275

275 Id. at 88.
Havel's point, and my own, is that there are no privileged locations or levers for social change, and also no positions from which pressure for change, involving whatever tiny, modest risks the participants are willing to take, is not possible. What is most puzzling to Eastern European dissidents like Havel, who have so little power and freedom but make every use of it they can, is why Western intellectuals and professionals, who seem to have so much, do so little with what they have and claim to have none. What is needed to produce the "independent life of society" is the will, reflection on how best to use it, collaboration with others, and action.