Review Essay

What's Not To Like About Being a Lawyer?

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Lawyer: A Life of Counsel and Controversy. By Arthur L. Liman. New York: Public Affairs, 1998. Pp. 386. \$30.00.

In the late twentieth century, everyone complained about the decline of the legal profession. Law professors told us that lawyers had lost their souls, their sense of craft, and their aspiration to be statesmen.¹ One academic traced the decline to law students who matriculated after the Vietnam War, claiming that, unlike members of earlier generations, they “were not especially keen to acquire specialized professional skills.”² Others identified greed as the culprit.³ Still others, joined by reflective

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1. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1 (1993); see also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 1 (1998) (reporting that law school and law practice destroy young people's hopes of contributing to society).

2. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 200 (1994).

3. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 706 (1998); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 895-903 (1999) [hereinafter Schiltz, *On Being*]; see also MARK PERLMUTTER, *WHY LAWYERS LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR* 69-75 (1997) (discussing greed in the legal profession); Roger C. Cramton, *Professionalism, Legal Services and Lawyer Competency*, Address at the London Sessions of the ABA Annual Meeting (July 17, 1985), in *AMERICAN BAR ASS'N, JUSTICE FOR A GENERATION* 144, 153 (1985) (claiming that, in the 1980s, young lawyers embraced a “narcissistic and self-indulgent

judges and practitioners, blamed advertising,⁴ contingent fees,⁵ billing pressures,⁶ critical legal studies,⁷ the law-and-economics movement,⁸ lateral mobility, competition,⁹ "eat what you kill" compensation,¹⁰ and the "sue first, ask questions later" mentality.¹¹ Even more troubling were complaints from economists who claimed that the exploding population of lawyers discouraged technological innovation and slowed economic growth.¹² By century's end, the conventional wisdom was that too many people were practicing law while too few were pursuing careers in science and engineering.

The popular media served up even worse complaints about attorneys. There, an assortment of paid political flacks,¹³ ideological

individualism that emphasizes rights, downplays responsibilities, and constantly whines 'what's in it for me?"; Harry T. Edwards, *A Lawyer's Duty To Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1153 (1990) ("The eighties . . . marked a celebration of self-advancement and self-concern, and it is not surprising to think that these developments also affected lawyers' attitudes.").

4. See GLENDON, *supra* note 2, at 54-56. In fact, advertising has helped the profession's public image. See Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503 (1998) [hereinafter Cebula, *Does Lawyer Advertising Adversely Influence?*]; Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315 (1998) [hereinafter Cebula, *Historical and Economic Perspectives*].

5. The leading critic of the contingent fee is Lester Brickman, an author of the Manhattan Institute's proposal, *Rethinking Contingency Fees*. See, e.g., LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* (1994); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996). Brickman's assertions have been convincingly refuted by Herbert Kritzer, the leading empirical researcher. See, e.g., Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998).

6. Schiltz argues that lawyers are unhappy because they work too much, and that it is unethical for lawyers to work so long. See Schiltz, *On Being*, *supra* note 3, at 888-95, 908-10; see also RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 80-87 (1999) (discussing billing pressures and abuses inspired by the hourly rate).

7. See GLENDON, *supra* note 2, at 210-15.

8. See KRONMAN, *supra* note 1, at 225-64; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 47-50 (1992).

9. See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 759 (1990) (arguing that the "increasingly competitive and intense" nature of law practice "makes it more difficult for lawyers to be honest").

10. See Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 311 (1997) (encouraging law firms to build teams by emphasizing collective marketing rather than the individualistic, entrepreneurial, "eat what you kill" approach); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 299 (1998) (claiming that "eat what you kill" compensation arrangements reflect and reinforce trends that have made the practice of law more competitive and less secure).

11. See SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 9-20 (1994).

12. See, e.g., Stephen P. Magee, Letter to the Editor, *How Many Lawyers Ruin an Economy?*, WALL ST. J., Sept. 24, 1992, at A17.

13. These come in diverse shapes and sizes, ranging from media consultants to official spokespersons. Some combine multiple roles. Ted Delisi, the official press spokesman for Texas Attorney General John Cornyn and a full-time state employee, was paid almost \$1.7 million for

commentators,¹⁴ candidates pandering for votes,¹⁵ propagandists working out of think tanks,¹⁶ and sundry extremists¹⁷ churned out anti-lawyer diatribes in volume. They blamed lawyers for everything. The litigation explosion,¹⁸ the frivolous lawsuit against McDonald's by the grandmother who spilled hot coffee in her lap,¹⁹ rising insurance premiums,²⁰ reduced access to an array of products and services,²¹ moral decay leading to the

political consulting services rendered to Governor George W. Bush's presidential campaign. See Ken Herman, *Political Consultant Resigns Post with Attorney General*, AUSTIN AM.-STATESMAN, Jan. 5, 2000, at B6. Delisi resigned from his position with the Attorney General's office in the midst of controversy concerning his dual roles. See *id.*; see also Robert Bryce, *Million-Dollar Man*, AUSTIN CHRON., Nov. 5, 1999, at 34 (describing the controversy surrounding Delisi's dual roles). Both Cornyn and Bush have anti-lawyer agendas and support tort reform. See, e.g., Bush for President, Inc., Governor Bush Proposes Bold Agenda To Reform America's Civil Justice System (Feb. 9, 2000) (press release, on file with *The Yale Law Journal*) (announcing Governor Bush's proposed crackdown on frivolous lawsuits and excessive legal fees).

14. See, e.g., sources cited *infra* notes 159, 161.

15. See, e.g., sources cited *infra* notes 162-163.

16. The worst of these is Walter Olson of the Manhattan Institute. To read Olson's columns is to enter a fantasy world where urban legends about trial lawyers and the civil justice system are true. The name of Olson's website, www.overlawyered.com, demonstrates his disconnection with reality. Empirical studies debunking the myth that the United States has too many lawyers have been around since the 1970s, and the few scholars who once took seriously the "too many lawyers" hypothesis have all but conceded the debate. See studies cited *infra* note 145. Yet Olson presents myth as fact and simply ignores contradictory evidence.

17. A search of the Internet turned up Tom Bielavitz, *Time To Kill (Lawyers, That Is)* (visited Nov. 21, 1999) <<http://www.crank.com/crank3/cmk3-16.htm>>; I Hate Lawyers Club of America, *I Hate Lawyers Club Home Page* (visited Nov. 21, 1999) <<http://www.ihlca.com>>; and People Before Lawyers, *People Before Lawyers* (visited Nov. 21, 1999) <<http://www.perkel.com/pbl>>.

18. See WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991). For a critique of Olson's thesis, see Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

19. For sources, see Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731-33 (1998).

20. The Insurance Information Institute reports that "[t]he American civil liability system costs twice as much as that of other industrialized nations" and that "U.S. consumers pay for the high cost of going to court directly in higher liability insurance premiums." Insurance Info. Inst., *The Liability System* (visited Nov. 1, 1999) <<http://www.iii.org/media/issues/liability.html>>. In fact, the cost of insuring against liability risks in the United States is both low and falling. See Michael Bradford, *Lower Liability Outlay Cut Cost of Risk: Study*, BUS. INS., Feb. 8, 1999, at 1; Michael Bradford & Michael Prince, *Continued Savings Seen in Competitive Market*, BUS. INS., Jan. 11, 1999, at 3; see also Galanter, *supra* note 19, at 737.

21. The U.S. Chamber of Commerce asserts that "[e]xcessive product liability litigation and resulting insurance costs caused 47 percent of American businesses to cut product lines and/or raise prices, greatly reducing competitiveness." U.S. Chamber of Commerce, *Legal/Tort Reform* (visited Nov. 1, 1999) <<http://www.uschamber.com/policy/1-legalreform/tba/tbatortreform.htm>>. No authority for this claim is given. Walter Olson periodically lists things that were available before Americans became lawsuit-crazy but that, according to him, no longer are. See, e.g., Walter Olson, *More Things You Can't Have* (Sept. 27, 1999) <<http://www.overlawyered.com/archives/99sept2.html>> (stating that unpasteurized apple cider is no longer available from Connecticut farmers' markets because of a fear of lawsuits). The Chamber's webpage contains a link to Olson's site, www.overlawyered.com. See U.S. Chamber of Commerce, *Legal Reform: Related Links* (visited Nov. 1, 1999) <<http://www.uschamber.com/policy/1-legalreform>>.

massacre at Columbine High School²²—these and a vast array of other problems were said to be lawyers' fault.²³

In this super-heated atmosphere, Arthur Liman's memoir,²⁴ which was polished and published after his death, arrived like a cooling breeze. Liman was fiercely proud to be an attorney, and he found the practice of law moral, worthwhile, and fulfilling. His enthusiasm spanned an incredibly broad range of experiences. Liman tried big civil cases, including New York City's lawsuit against Grumman over defective subway cars.²⁵ He settled big lawsuits, too, once devising a workout that helped keep American Express from going belly up.²⁶ He testified as a witness in *Pennzoil v. Texaco*, until recently the largest civil suit of all time.²⁷ Liman handled criminal matters too, on both sides of the "v." Early on, he spent three years pioneering securities-fraud cases under Robert Morgenthau.²⁸ Later, he defended Michael Milken against fraud charges and was heartbroken when Milken, whom Liman regarded as a man of integrity and a financial genius, went to jail.²⁹

Liman had a corporate practice that any lawyer would envy. He helped leading executives and their companies—including Samuel Heyman of GAF Corp.,³⁰ Steve Ross of Time-Warner,³¹ Charles Bluhdorn of Gulf & Western,³² and William Paley of CBS³³—make acquisitions, fight takeovers, deal with regulators, resolve crises, and handle delicate matters of corporate succession. He took pride in his business judgment, but he declined many opportunities to move in-house. Not cut out to be a manager,

22. The Columbine shootings provoked an enormous outcry against the American Civil Liberties Union (ACLU). No less a personage than Dr. Laura Schlessinger claimed that, by litigating against prayer in schools, the ACLU contributed to the atmosphere of violence and godlessness in which the massacre was conceived. See Dr. Laura, *Terrorism Begins at Home*, JEWISH WORLD REV. (June 1, 1999) <<http://www.jewishworldreview.com/dr/laura060199.asp>>. The editorial staff of the *Augusta Chronicle* sarcastically derided the ACLU for not suing the Columbine students who "huddled in prayer while warped gunmen were mowing down their fellow students." *Will ACLU Sue?*, AUGUSTA CHRON. (Ga.), May 7, 1999, at 4A. Jerry Falwell, the evangelist, did the same. See Jerry Falwell, *Listen America* (May 21, 1999) <http://www.listenamerica.net/la_site/pages/recap/archive/re19990521.html>.

23. Marc Galanter is the leading collector, investigator, and debunker of anti-lawyer myths. See, e.g., Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998) [hereinafter Galanter, *The Faces of Mistrust*] (discussing the role of lawyers in creating trust among transacting parties); Galanter, *supra* note 19 (cataloguing folklore regarding the American civil justice system); Galanter, *supra* note 18 (listing and debunking current anti-lawyer myths).

24. ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998).

25. See *id.* at 195-208.

26. See *id.* at 67-71.

27. See *id.* at 239-48.

28. See *id.* at 42-53.

29. See *id.* at 265-93.

30. See *id.* at 249-50.

31. See *id.* at 125-58.

32. See *id.* at 96-106.

33. See *id.* at 159-68.

Liman was a “big trouble” lawyer³⁴ who needed and treasured the independence that came with being a partner in an elite law firm. Among lawyers, he also felt at home. His memoir often places him with the partners and associates at Paul, Weiss, Rifkind, Wharton & Garrison, whom he learned from, cared for, and admired.³⁵ The mind’s eye sees him at the firm that was a fixture in his life, studying his seniors, tutoring his juniors, and arguing happily with everyone over lunch.

Senator Joseph McCarthy’s ruthless campaign against communists cemented Liman’s interest in law and, oddly enough, his faith in lawyers as well.³⁶ While a student at Harvard, Liman watched McCarthy and his lawyer sidekick, Roy Cohn, threaten and abuse the timid academics whom McCarthy derisively labeled “Fifth Amendment communists.”³⁷ The demagoguery, lawlessness, and amorality of McCarthy and Cohn appalled Liman.³⁸ So did the timidity of the witnesses’ attorneys. Liman thought they should have protected their clients much more aggressively.³⁹ He was greatly pleased when Joseph L. Welch, the Army’s lawyer, turned the tide against McCarthy and helped end the witch hunt.⁴⁰

The McCarthy hearings taught Liman that lawyers representing individuals must stand with them through thick and thin, and also that government lawyers must temper their zeal with a strong dose of liberal morality. These lessons served Liman well throughout his professional life, but they failed him when he was chief counsel for the Senate investigation into the Iran-Contra affair.⁴¹ Wanting to distinguish himself from the amoral Cohn, Liman bent over backwards to be fair to witnesses and wound up being outfoxed.⁴² His strong belief in the rule of law prevented him from seeing that law and politics converge at the top. Nor did he realize that unless he played the politics correctly, other messages would overwhelm him. When Liman had to be Machiavellian, his conscience got the better of him. In the public’s mind, the hero of the day was Lt. Col. Oliver North, not Liman, and the message was patriotism, not the importance of the rule of law. Liman owns up to the failure quite honestly, stating that he “share[d] responsibility for making [North] into a national hero.”⁴³

Liman candidly expresses the disappointment and frustration that he experienced during the Iran-Contra investigation. He also reflects on his

34. *Vanity Fair* once described him thus. *See id.* at 94.

35. *See, e.g., id.* at 57-66.

36. *See id.* at 3-14.

37. *E.g., id.* at 5.

38. *See id.* at 8-9.

39. *See id.* at 12-13.

40. *See id.* at 14.

41. For Liman’s account of the Iran-Contra investigation, *see id.* at 297-355.

42. *See, e.g., id.* at 330 (reporting that Liman, unlike Cohn, refrained from harassing a witness who “took the Fifth”).

43. *Id.* at 336.

successes and his conduct more generally. These reflections are worth considering. Liman the lawyer handled an amazing variety of engagements, and he found everything interesting and worthwhile, except filling out time sheets. He claims to have regarded public service as his highest calling,⁴⁴ but his enthusiasm for making deals, interacting with regulators, defending accused criminals, and litigating civil claims was equally strong. Liman also had tremendous admiration for lawyers. He had harsh words for Cohn and others who lacked a moral compass, but in his memoir the good lawyers—the Simon Rifkinds and the Robert Morgenthau—greatly outnumber the bad.

Liman's pride in his own accomplishments and his admiration for other attorneys are noteworthy. At the end of the twentieth century, when lawyers were said to be less popular than ever and the profession was thought to be in crisis, an intelligent and morally sensitive man delivered the message that his career was fulfilling and that other lawyers' efforts were worthy of praise. We share these views. We are proud to be lawyers, and we believe that lawyers do an extraordinary amount of good.

Law professors have a special obligation to be clear on these points. Our professional lives consist largely and importantly of preparing young people to practice law. Are we sending them into the world to do harm? Do only a fraction of our students—for example, those who litigate on behalf of poor people or undocumented immigrants or minorities or inmates on death row—lead moral and fulfilling lives? Few lawyers do these things. Most work in the private sector structuring transactions, crafting estate plans, taking companies public, helping businesses comply with regulations, arranging financing, collecting debts, working out bankruptcies, settling civil claims, perfecting security interests, handling divorces, lobbying public officials, reviewing insurance agreements, defending condemnation actions, and doing thousands of other things.⁴⁵ Do

44. See, e.g., *id.* at 174.

45. For studies of the demographics of the legal profession, see sources cited *infra* notes 181, 187-191.

When lawyers appear on both sides of a matter, be it a lawsuit or a transaction, it is always tempting to think that one or the other must be doing something immoral or unreasonable. The temptation should be resisted, for neither lawyer is likely to deserve a reproach. Opposing parties often disagree legitimately and for good reasons. We would not condemn principals for asserting legitimate interests, developing their positions, and working toward a resolution. Consequently, we should not condemn lawyers who help clients do these things.

An example may clarify the point. Insurance companies often suspect foul play when buildings catch fire, because arson is common. It is therefore reasonable, even mandatory, for insurers to investigate before paying on fire-related claims. Unfortunately, arson investigations anger policyholders who are innocent of wrongdoing. They suspect insurers of delaying payments unnecessarily and of attempting to escape responsibility for covered losses. Neither an insurer's wish to ferret out fraud nor an innocent owner's desire for prompt payment is unreasonable, yet the desires plainly conflict.

Lawyers appear mainly in situations in which interests conflict and large amounts of money or other valuable resources are at stake. A policyholder wants a payment from an insurer. A

these lawyers also make important contributions? If not, why do we prepare students to perform these jobs?

Liman's memoir provides an ideal opportunity to reflect upon the morality of lawyering. Liman was proud of his career. He believed that, across a diverse range of public, private, and pro bono engagements, he consistently served clients well. He also felt that he made the world better by doing so. Was he right or merely deluded?

In this Review Essay, we explain why we believe that lawyers make exceptionally valuable contributions to economy and society. In Part I, we examine the morality of lawyering in the private sector, where most lawyers work. Our thesis is that lawyers who help paying clients with private matters make valuable microeconomic contributions by helping create and maintain the world of commerce and valuable micropolitical contributions by maintaining a culture in which people actively create and use legal rights. In Part II, we tackle certain anti-lawyer assertions made by the political Right, including the claim that the United States has too many lawyers. These assertions have no basis in theory or fact. We then defend the profession from the less vicious attack mounted by the political Left, whose members criticize lawyers for doing too little pro bono work for the poor and for performing too little public service. Part III examines the morality of pro bono legal work. Part IV focuses on public-sector work. The argument of both Parts is that all forms of legal work are good for the same reasons. Two consequences of this view are that there is no reason to elevate pro bono legal work above other forms of charity and that public-sector legal work done for free or at submarket rates poses an unappreciated threat to democracy. We expect these conclusions to be controversial.

I. THE MORALITY OF PRIVATE-SECTOR LEGAL WORK

Lawyers and law professors often denigrate the contributions that lawyers make by representing paying clients in the private sector.⁴⁶ Some describe private engagements as amoral. The following passage by Dean Anthony Kronman is typical:

[U]nless the practice of law is tempered by a concern for the public good, it can never be anything but an amoral tool for the

carrier wants protection against fraud. Lawyers appear for both contracting parties to see that neither tramples the other. The clients bear the expense because the lawyers can do the job better and more cheaply than the clients can themselves. Lawyers add value by helping resolve the conflicts that are the stuff of modern economic life.

46. Thus, David Luban writes that Louis Brandeis "saw nothing wrong with being a corporation lawyer, just with being only a corporation lawyer, that is, with promoting private wealth without adopting the morally activist stance that attempts to sway the client in the direction of the public good." DAVID LUBAN, *LAWYERS AND JUSTICE* 238 (1988).

satisfaction of private needs [Unfortunately,] the level of public-spiritedness within the profession is today dismally low and needs to be increased. Lawyers should spend more time on law reform and the *pro bono* representation of worthy causes and clients.⁴⁷

“Amoral” is a funny word. Sometimes it means “neither moral nor immoral”—morally neutral, one might say.⁴⁸ Other times it means immoral and expresses condemnation.⁴⁹ What does Kronman mean when he says that lawyers who further solely clients’ private interests practice law amorally? Does he mean that they act in ways that are morally neutral or morally bad? It is hard to be sure. Sometimes, Kronman seems to assert that they act dishonorably.⁵⁰ Other times, he accuses them of leading empty lives, if not necessarily evil ones.⁵¹ Either way, it seems safe to attribute to him the belief that “normal work” for private-sector clients “is not really something to brag about.”⁵²

We hold a far more positive opinion of private-sector lawyering. We think that, as a general matter, lawyers’ use of law as a “tool for the satisfaction of private needs” is morally good. Anyone with utilitarian leanings should agree, “[t]he moral impulse of utilitarianism [being] to define the right as good consequences.”⁵³ Speaking generally, meeting private needs is a good thing.⁵⁴ Acts of charity are good for this reason. So is private-sector legal work that helps the well-to-do. One need not be a

47. KRONMAN, *supra* note 1, at 365.

48. WEBSTER’S NEW WORLD DICTIONARY 46 (3d ed. 1994).

49. Liman employed the word in the latter sense when discussing Roy Cohn. After the McCarthy hearings ended, he encountered Cohn in several litigation matters. Once he told Cohn, “[I]t was because of you that I became a lawyer.” LIMAN, *supra* note 24, at 14. Liman recounted, “Arrogant as always, Cohn was delighted. He took it as a compliment, a way of praising his skill in the courtroom. It was unimaginable to him that I might loathe his brutal tactics, his dishonesty, his contempt for fairness, and above all else his amorality.” *Id.*

50. See *supra* text accompanying note 47.

51. See, e.g., KRONMAN, *supra* note 1, at 2-3 (alleging the existence of “a crisis of morale” that is the “product of growing doubts about the capacity of a lawyer’s life to offer fulfillment” and that results from the demise of the lawyer-statesman ideal, and discussing the “yearning to be engaged in some lifelong endeavor that has value in its own right” that lawyers can no longer satisfy through professional work); *id.* at 16 (noting that “the ideal of the lawyer-statesman . . . affirmed the self-worth of lawyers as a group”). Dean Kronman’s remarks contribute to the impression that “at our elite law schools, most professors teach a quite cynical view of the law and the work of lawyers—at least those representing the productive sectors of the economy.” Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism? A Retrospective*, 21 HARV. J.L. & PUB. POL’Y 607, 612 (1998); see also Edwards, *supra* note 8, at 35 (reporting “countless” comments depicting elite law faculties as “disdainful of the practice of law”).

52. Silberman, *supra* note 51, at 612.

53. RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* 3 (1988) (emphasis omitted).

54. See generally DAVID BRAYBROOKE, *MEETING NEEDS* (1987).

Benthamite to agree that, from a moral perspective, the tendency of actions to make people better off is a plus, not a minus.⁵⁵

Obviously, actions that advance private interests can be morally bad. Fraud, theft, and murder are not justified when they make perpetrators rich, and these acts do not become morally acceptable when principals use agents to commit them. That one is a lawyer (or an agent of any kind) is no justification for helping a principal commit an immoral act. Our point is only that the tendency of an action to further a private interest or to satisfy a personal need weighs in its favor. That offsetting considerations such as harms to others sometimes shift the balance in the opposite direction should not be allowed to obscure this important point.

The morality of lawyering is deeply tied to the morality of conduct that affects clients' personal interests and needs. Lawyers are agents,⁵⁶ and principals use agents when and because agents can do things more efficiently than principals can themselves. When it would be morally good for a principal acting alone to meet a personal need or further a private interest, it would ordinarily seem to be as good, if not better, for a principal to do so using a more efficient lawyer-agent. It also would seem to be morally appropriate for the lawyer-agent to help. Except when a principal's personal involvement is essential, having an agent do the work should not change the moral quality of the act.

Philosophical liberals would agree with this. Liberals distinguish acts that are mainly self-regarding from acts that expose third parties to significant risks. They then reserve the self-regarding realm for private decisionmaking, on the theory that the absence of externalities eliminates the justification for collective regulation.⁵⁷ Liberals also believe that the freedom of contract should be mostly unfettered when the contracting parties bear and consent to all the significant risks, again because third parties need not be protected from these transactions. As a general matter,

55. Others have drawn attention to this simple point. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 3 (1995) ("At a time when lawyers have come to doubt the professional conception of their calling, the self-confidence that grows out of a focus on value creation may provide a much needed counterweight.").

56. For discussions in diverse contexts of the importance of the fact that lawyers are agents, see David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959 (1998) (limited performance contracts); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) (settlement duties); Charles Silver & Ellen Smith Pryor, *Defense Lawyers' Professional Responsibilities, Part I—Excess Exposure Cases*, 78 TEX. L. REV. (forthcoming 2000) (insurance defense); and Charles Silver & Michael Sean Quinn, *Are Liability Carriers Second-Class Clients? No, but They May Be Soon—A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers*, COVERAGE, Mar./Apr. 1996, at 21 (same).

57. This is the famous thesis of John Stuart Mill's classic, *On Liberty*. See JOHN STUART MILL, ON LIBERTY 4 (David Spitz ed., W.W. Norton & Co. 1975) (1859).

liberals must therefore think it fine for agents to help principals satisfy private interests and needs with self-regarding acts.

The better the legal system functions, the larger the realm of self-regarding conduct should be. An important purpose of the legal system is to encourage people to handle risks contractually.⁵⁸ The better the system works, the more actions there should be whose significant risks affect only people who agree to bear them. If the system worked perfectly, which of course it does not, all acts would be self-regarding. All costs would be internalized and consented to in advance. As a justification for public regulation, the need to protect third parties from risks would largely disappear.

To modern ears, this classical liberal account of rights-based legal systems may sound strange. We now defend free markets by citing their tendency to maximize wealth. However, not even this economic justification requires private decisionmakers to contemplate a larger public interest. Economists usually assume that people are self-interested, not public-spirited, and that they rely on local knowledge rather than knowledge of system-level effects. Wealth maximization does not occur because anyone consciously seeks it. It is an unintended by-product of acts performed for selfish reasons.⁵⁹ This is fortunate. There are profound limits on the ability of ordinary persons to predict or evaluate the distant consequences of acts.⁶⁰

Liberals and economists thus share the belief that people can and often do act in socially beneficial ways while considering only private interests and using only local knowledge. John Stuart Mill, the liberal utilitarian, said so explicitly. He considered it

a misapprehension of the utilitarian mode of thought, to conceive it as implying that people should fix their minds upon so wide a generality as the world, or society at large. The great majority of good actions are intended not for the benefit of the world, but for that of individuals, of which the good of the world is made up; and the thoughts of the most virtuous man need not on these occasions travel beyond the particular persons concerned, except so far as is necessary to assure himself that in benefiting them he is not violating the rights, that is, the legitimate and authorised expectations, of any one else . . . [T]he occasions on which any person (except one in a thousand) has it in his power . . . to be a

58. See William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1226-29 (1994) (arguing for the priority of contract law over tort law when the rules internal to contract law apply to the allocation of rights).

59. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 492 (1988) ("Adam Smith described the participants in a competitive market, who consciously pursue their private interests, as directed by an 'invisible hand' to serve the public good.").

60. For a discussion, see HARDIN, *supra* note 53, at ix-x.

public benefactor, are but exceptional; and on these occasions alone is he called on to consider public utility; in every other case, private utility, the interest or happiness of some few persons, is all he has to attend to. Those alone the influence of whose actions extends to society in general, need concern themselves habitually about so large an object.⁶¹

Plainly, Mill and other liberal utilitarians would reject Kronman's assertion that "unless the practice of law is tempered by a concern for the public good, it can never be anything but an amoral tool for the satisfaction of private needs."⁶² Private-interest lawyering can contribute to the public good by making people better off. As Aaron Director emphasized, "The main tradition of economic liberalism has always assumed a well-established system of law and order designed to harness self-interest to serve the welfare of all."⁶³

Many institutions serve (or attempt to serve) the harnessing function that Director identified. Social norms and conventions promote the public good by coordinating expectations and relying on people to act self-interestedly.⁶⁴ Markets involving repeat players with reputational interests yield exchanges, honesty, cooperative ventures, trust, and better resource use, all of which have positive spillover effects.⁶⁵ Families and social groups build relationships of responsibility and affection that motivate individuals to house, clothe, feed, cleanse, nurture, and protect themselves and their loved ones. Political arrangements, including elections and open-

61. JOHN STUART MILL, *Utilitarianism*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 1, 22-23 (A.D. Lindsey ed., E.P. Dutton & Co. 1951) (1861).

62. KRONMAN, *supra* note 1, at 365.

63. Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 2 (1964).

64. See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969); THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* (1978).

65. This point is the subject of two recent academic books. See JOHN MUELLER, *CAPITALISM, DEMOCRACY AND RALPH'S PRETTY GOOD GROCERY* (1999); JOHN P. POWELSON, *THE MORAL ECONOMY* (1998). Mueller explains how capitalism tends to encourage honesty, fairness, civility, and compassion. See MUELLER, *supra*, at 23-36. While recognizing that there are successful capitalists who do not share these traits, their behavior "is, on balance and in the long run, economically foolish." *Id.* at 48. The encouragement of these traits might be deontologically objectionable, but Mueller explains that this is often the case and observes that "under a growing capitalist economy, desirable (or at any rate desired) goods and services tend to become cheaper, better, more abundant, and more widely dispersed." *Id.* at 47. Powelson argues that higher morality will evolve when people learn "that it is good business to be just and considerate toward one's neighbors; to solve quarrels peacefully; to be held accountable for the efficient use of resources (both public and private); and to abide by modes of behavior (or institutions) that have been negotiated and agreed by interested parties." POWELSON, *supra*, at 192 (quoting JOHN P. POWELSON, *CENTURIES OF ECONOMIC ENDEAVOR: PARALLEL PATHS IN JAPAN AND EUROPE AND THEIR CONTRAST WITH THE THIRD WORLD* (1994)). He notes that in Western Europe and Japan, respect for human rights developed in tandem with and in part because of the growth of capitalism. See *id.* at 184-85. When morality is established in such a bottom-up fashion from individual transactions, it tends to be sturdier than when established top-down by the government. See *id.* at 189.

government laws, try with varying degrees of success to make it personally advantageous for public officials to help rather than exploit the people they rule.⁶⁶ In diverse contexts, a well-ordered society relies on the pursuit of private interest to yield public gains.

Private interests also matter when it comes to determining what the public interest is. Kronman is certainly right to point out that the public interest is not simply the sum of individuals' utilities.⁶⁷ However, it is a considerable leap from this starting point to the conclusion that, when assessing the public interest, the welfare of individuals can be ignored. It is one thing to undertake a public project that will help most people and that enjoys overwhelming support. It is quite another to embark on a project that will harm many and that is strongly opposed. Although the content of the public interest can always be a legitimate subject of debate and disagreement, no reasonable person can dissent from Mill's view that "the good of the world is made up" of the good of individuals.⁶⁸ From what else could it be made?

Liman firmly grasped certain of these private-public connections. His judgment as an attorney and his assessment of the morality of lawyering both reflected this:

Some critics of the profession—Ralph Nader comes to mind—have complained that corporate counselors do nothing but find loopholes in the law for their clients. This is not the way I see it or have experienced it. Yes, if there is a way to do a transaction lawfully, the lawyer will guide the client to and through it. But he will also tell the client when over-aggressive tactics are inappropriate and may well backfire. *More often than not, the socially responsible act turns out to be the right thing for the client, and the good lawyer will so advise.*⁶⁹

This confluence may explain why Simon Rifkind, Liman's mentor, believed that a "lawyer's job was to represent an individual client with a particular problem" and why Rifkind was wary of class-action lawyers "who claimed to represent the public interest."⁷⁰ If the connection between private interest and public interest tends to be a close one, a lawyer who

66. This idea in Jeremy Bentham's thought is sometimes referred to as the Interest and Duty Principle. For examples of this idea in his work, see JEREMY BENTHAM, *Deontology*, in DEONTOLOGY TOGETHER WITH A TABLE OF THE SPRINGS OF ACTION AND THE ARTICLE ON UTILITARIANISM 117, 121 (Amnon Goldworth ed., Oxford Univ. Press 1983) (1834); and JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION ch. 17, § 1 (Laurence J. LaFleur ed., Hafner Publ'g 1948) (1789).

67. See, e.g., KRONMAN, *supra* note 1, at 30-34.

68. MILL, *supra* note 61, at 21.

69. LIMAN, *supra* note 24, at 64 (emphasis added).

70. *Id.* at 211.

helps a client solve a private problem has some assurance of helping the public as well. Class-action lawyers therefore have no monopoly on the pursuit of the public good. To the contrary, because class-action lawyers are not constrained by their clients' interests, the case for their service to the public actually is harder to make. In theory, they can pursue a conception of the public good that is not grounded in the well-being of anyone.⁷¹

Liman's grasp of private-public connections also may account for an odd feature of his memoir: his failure to describe any instance in which a concern for the public interest led him to refuse to help a client. The omission is glaring. When writing reflectively, Liman emphasizes the importance of telling clients "no," and Dean Kronman, who contributed a foreword to the book, assures us that in real life Liman was exceptionally firm.⁷² Why, then, are there no examples in the book? Story after story demonstrates Liman's devotion to his clients. He defends Joseph Kosow, an obvious perjurer, through a seven-week trial and subsequent appeals instead of pressuring him to plea-bargain.⁷³ He foils Rupert Murdoch's plan to take over his client, Warner Communications, by arranging a strategic deal between Warner and Chris-Craft.⁷⁴ He stands by Michael Milken after Milken's partners desert him.⁷⁵ He hangs an Old Testament sampler that reads "Fear Thou Not, For I Am With Thee" behind his desk.⁷⁶ Yet, in no story does he tell a client to go to hell.

Liman could have justified doing so in certain contexts in which he remained loyal. One instance was the Kosow representation. There, he forced the prosecutors to jump through every hoop even though he knew that, on one charge at least, his client was guilty. Another was the deal he struck with Chris-Craft to frustrate Murdoch's attempted takeover of Warner Communications. The sole purpose of the deal, which gave Warner an interest in television stations, was to invoke federal regulations that prohibited foreigners like Murdoch from getting into that business. The maneuver did not help Warner's stockholders. They lost once when the Chris-Craft deal, which had no obvious economic advantage, was struck, a second time when Murdoch's tender offer was thwarted, and a third time when Murdoch made "a huge profit" on his own shares by selling them

71. See JOHN C. COFFEE, JR., CLASS ACTION ACCOUNTABILITY: RECONCILING EXIT, VOICE, AND LOYALTY IN REPRESENTATIVE LITIGATION 15-24 (Center for Law & Econ. Studies, Columbia Univ. Sch. of Law Working Paper No. 156, 1999) (critiquing the theory that classes are entities that exist apart from class members); see also Jules L. Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102 (1986) (discussing the connection between justice and the uses made of class-action settlement funds).

72. See Anthony Kronman, *Foreword* to LIMAN, *supra* note 24, at vii, viii.

73. See LIMAN, *supra* note 24, at 88.

74. See *id.* at 145.

75. See *id.* at 265-93.

76. See *id.* at 63.

back to Warner at an inflated price.⁷⁷ Nor is it obvious that the tactic helped the public at large.

Liman's lifetime of involvement in mixed-motive interactions may have colored his judgment on these occasions. These games afford many opportunities for opposing players to gain by cooperating.⁷⁸ Over time, lawyers become adept at spotting these opportunities and at helping clients who are negotiating with each other take advantage of them.⁷⁹ This is one way that lawyers contribute value. Liman understood this perfectly. Consider what he wrote of the lawyers who, by striking a deal that ended litigation arising out of the great salad-oil scam, kept American Express solvent: "Trained as we were to see all sides of an issue, we realized that compromise was in the best interests of all our clients, and we exercised a moderating influence on some understandably high emotions in order to get there."⁸⁰ The resolution is a fine example of lawyers' helping clients caught in an *n*-person Prisoner's Dilemma cooperate and contract for a superior result.⁸¹ Liman pulled the rabbit out of the hat again when Time and Warner Communications merged. He found a resolution to a delicate problem of management succession.⁸²

Lawyers devote their professional lives to solving problems that arise in contexts in which solutions make the persons involved better off. In most such instances, lawyers act morally by finding solutions because the immediate effects on the participants matter most and the participants give their consent. In other words, private interests and the public interest are not routinely opposed, especially when institutions operating in the background are thought to create invisible hands.

The danger is simply that lawyers may become too accustomed to solving problems and too blasé about private-public connections. The private-public overlap is not perfect, especially when deals significantly affect the interests of third parties who are not at the table. It takes extra

77. *Id.* at 145. Liman's willingness to engage in pro bono efforts on behalf of capital defendants in New York State—efforts that made death cases "too costly to take . . . to trial"—also says something about his commitment to the public interest. *Id.* at 219. Was he right to regard raising the public's costs as "part of [his] mission"? *Id.*

78. See Dean Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 296 (1992) ("It is wrong to see the work of lawyers as essentially restricted to assisting in zero-sum games . . .").

79. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509 (1994) (contending that clients employ lawyers with reputations as cooperative problem solvers to signal the desire to cooperate and that the presence of such lawyers in lawsuits facilitates mutually advantageous bargaining); see also Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 *J. LEGAL STUD.* 331 (1997) (reporting the results of an experimental study of the use of cooperative agents).

80. LIMAN, *supra* note 24, at 71.

81. Similar difficulties arise in transactions that occur outside litigation. See Gilson & Mnookin, *supra* note 55, at 10-11.

82. See LIMAN, *supra* note 24, at 147-52.

effort to recognize situations in which the ordinary links are broken. In the press to get things done, lawyers may side with clients too often, especially in marginal cases where the balance of good and bad is unclear. Arguably, the habit of solving problems occasionally led Liman astray.

What we have written about transactional matters is true of litigation matters as well. The overwhelming majority of lawsuits settle,⁸³ and settlements are exchanges. Usually, settlements affect mainly the parties (or their insurers), and the aim is to structure deals that parties prefer to continued fighting. This typically means developing the facts of a case and bargaining over the distribution of the savings that can be realized by settling instead of litigating. These are straightforward matters when claims are small. In large cases that involve multiple parties, however, building settlement coalitions is an art.⁸⁴ This is another species of problem solving at which litigators become adept and that can be a source of excessive zeal.

In view of the talent that private-sector lawyering requires and the importance of the problems that private-sector lawyers deal with, we think it odd to contend, as Kronman seems to, that lawyers who help clients with private matters lead empty professional lives. Why should this be? Kronman believes that, to be fulfilled, lawyers must advise clients about ends as well as means, have a concern for the public, and help maintain fraternal relations among persons whose ends conflict.⁸⁵ Assuming that he is right about all this, many private representations give lawyers opportunities to do these things. For example, lawyers who create estate plans for people with families enjoy all three experiences. They discuss clients' goals and dreams, help clients provide for loved ones and perform acts of charity, and work through emotional disagreements between testators, within families, and among trustees and beneficiaries.⁸⁶

Liman had greater regard for lawyers in private practice than Kronman seems to. He praised John Wharton, an entertainment-law specialist who helped found his firm, for "pioneer[ing] the use of a uniform partnership agreement" for theatrical productions and for "devis[ing] a contract that

83. See CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 2 (1999).

84. On the difficulty of building settlement coalitions in litigation, see Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 51 (David A. Anderson ed., 1996); and Silver & Baker, *supra* note 56, at 749-55.

85. See KRONMAN, *supra* note 1, at 106, 109, 288.

86. It is also worth considering the implications of Kronman's views for other agents who use specialized skills to provide goods and services that people value. If lawyers cannot be satisfied without discoursing about ends, pursuing the public good, and nurturing political fraternity, can other agents? Fulfillment is a human experience. If lawyers can enjoy it only under Kronman's conditions, the same would seem to be true of others, there being no respect in which lawyers, as persons, differ from doctors, builders, plumbers, investment bankers, real estate agents, salesmen, gardeners, or engineers. Conversely, if other agents can and do take pride in the work they do for paying clients, why cannot attorneys do so as well?

allowed an author to sell motion picture rights to a play before it was produced on the stage.”⁸⁷ He worshipped Simon Rifkind. Yet Rifkind appears in the book mainly as a litigator who represented enormous companies in antitrust cases and commercial disputes, often with the government or a “little guy” on the other side.⁸⁸ When Liman writes that it is in the role of counselor that “the lawyer may well perform his highest service,” he is discussing corporate representations.⁸⁹

Liman also derived great pleasure and fulfillment from his corporate practice. Consider what he says about his representation of the Continental Grain Company and its owners, the Fribourg family, a relationship that lasted for many years: “[I]f . . . my practice had not allowed for this sort of relationship”—one that had Liman “guiding and nurturing” the company and “preserving its reputation”—“I would have lost something of enduring value.”⁹⁰ At least one intelligent and thoughtful lawyer found work for a paying client immensely gratifying. We suspect that Liman has lots of company in the corporate bar.⁹¹

Given the importance people attach to personal interests and private projects, it is odd to think that agents who help them meet their needs and fulfill their dreams would have empty careers. It may be a relatively simple act to prepare a health-care power of attorney, but can it not also be satisfying to put a client who is about to undergo risky surgery at ease? Cannot a lawyer take pride in negotiating and drafting a joint venture agreement that gets a start-up company off the ground? What could be more rewarding than helping an industrious client with a new idea make the vision of going into business a reality? How about helping an unhappy couple divide their assets, provide for their children, and separate peaceably? Is that not worthwhile? What about getting a fresh start for an insolvent client through bankruptcy? What of enabling accident victims to get back on their feet by filing and settling tort claims? These services matter to clients. Lawyers who provide them have every reason to be proud.⁹²

87. LIMAN, *supra* note 24, at 18.

88. See, e.g., *id.* at 27-29 (defense of criminal antitrust case); *id.* at 31 (“Goliath-against-David” commercial dispute).

89. *Id.* at 63.

90. *Id.* at 124. Liman’s work for these clients consisted of collecting debts, defending civil suits, and helping with matters of corporate governance.

91. In the *American Lawyer*’s survey of partners at large law firms, “[a]bout two-thirds” of the responding partners said that what they like about the practice is “the problem solving.” Aric Press, *The Good Life*, AM. LAW., June 1, 1999, at 75, 75. In the corporate world, there is no shortage of problems to solve.

92. According to *Dailyrating.com*, recently identified as the “virtual mood ring” for the United States, lawyers are happier than accountants, product managers, and finance officers. Bruce Headlam, *A Virtual Mood Ring Tracks Nation’s Emotions*, N.Y. TIMES, Dec. 16, 1999, at G3; *Dailyrating.com*, *30 Day Trend for Lawyer* (visited Dec. 19, 1999) <<http://www.dailyrating.com/cgi-bin/byOccupation.cgi>>.

There is a risk of becoming bored with or exhausted by private-sector legal work. Boredom is to be expected when lawyers work at franchise law firms that provide only standardized services, when associates do little more than push papers, and when lawyers work in isolation from their peers.⁹³ Exhaustion can occur as a result of overwork, a chronic problem in an era dominated by hourly rate billing arrangements.⁹⁴ Like everyone else, lawyers occasionally need a change of pace or a new occupation. They also need time to spend with loved ones, to play, to enrich themselves intellectually and spiritually, and to do the many other things that make for a happy life. However, to need a break, a change of careers, or time away from the office is a symptom of being human, not of having trivial employment. People with important jobs get tired, too.

Lawyers who wonder about the value or moral worth of work for private clients might do well to think of themselves as architects, engineers, or builders. Like members of these occupations, lawyers design and create structures and devices within, through, and by means of which human beings live, interact, and prosper.⁹⁵ The structures we work on are incorporeal, but they are as real and as important as buildings, bridges, and roads. The devices are intangible, too, but they can be as useful as any piece of earthmoving equipment or tool. The work that lawyers do for private clients "enormously expands [the] field of action, allowing [them] to do things that [they] couldn't have done otherwise—to draft wills, adopt children, make contracts, limit liability."⁹⁶

Consider a few of the ways that structures and tools built by lawyers facilitate a construction project. Credit pays for labor and supplies, and credit is a creature of the legal system.⁹⁷ Commercial financing arrangements help people obtain money by moving resources, creating repayment obligations, and endowing lenders with security interests. Insurance protects investors, engineers, architects, builders, subcontractors, workers, suppliers, and passersby from assorted risks. A deed secures the

93. Working conditions in franchise law firms are discussed in JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* (1997).

94. Professor Glendon seems to think that the rise of alternatives to the hourly rate is responsible for the decline of the profession. See GLENDON, *supra* note 2, at 28-32. We believe, to the contrary, that flat fees, contingent fees, and other value billing arrangements may rejuvenate lawyers by rewarding them for their contributions instead of time on the job.

95. See Clark, *supra* note 78, at 281 (observing that lawyers "create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions. . . . [T]hey are specialists in normative ordering. . . .").

96. LUBAN, *supra* note 46, at 247. Despite making this point, Luban misses the centrality of law to wealth creation. When arguing for mandatory pro bono, he writes that "[t]he grocery business could exist without state participation; the state's licensing function is used only for consumer protection." *Id.* Groceries as we know them could not exist without a substantial variety of legal arrangements and underpinnings.

97. See, e.g., Joseph H. Sommer, *A Law of Financial Accounts: Modern Payment and Securities Transfer Law*, 53 BUS. LAW. 1181 (1998).

underlying property; title insurance protects its owner. A corporation limits the liability of the investors who want to build, provides for day-to-day control of the project, and allocates ownership interests. A lease agreement enables the investors, via the company, to build on the land. Agreements establish relationships with the general contractor and subcontractors. Leases establish relationships with tenants. Other contracts provide for supplies and services that are needed to keep the building running: electricity, water and sewage, janitorial services, maintenance, beautification, security, and communications.

In a developed economy, lawyers make essential contributions to the creation of physical structures. Unfortunately, when one looks at a construction site or a building, one sees only the bricks and mortar, the workers, the cranes, the splendid architecture, and the engineering miracles. The myriad legal structures and devices are invisible. Consequently, their importance and economic value are missed, even though the building would not be there without them. This is why even intelligent people complain that high salaries have created a "regrettable situation" in which "the best and brightest young minds [are being lured] away from science, engineering, education, and public service and into the legal profession and business."⁹⁸ They do not see the contributions that lawyers make. "The available evidence strongly suggests that large lawyer numbers do *not* harm economic growth by diverting talent from other occupations."⁹⁹

Lawyers who are dispirited about the profession should test themselves every so often. Go to a museum, a park, a city street, a bank, or a school—any pleasant place—and try to identify every feature of the surroundings for which lawyers can take some credit. Indoors, examine the sprinkler system and wonder whether it would be there or whether it would put out fires as effectively without the threat of liability.¹⁰⁰ Breathe the air and notice that it is free of tobacco smoke. Examine the directory of tenants and try to count the number of leases. Look at the workers and wonder how many have pension plans, benefit plans, or employment contracts that lawyers drafted. Outside, imagine the zoning regulations or restrictive covenants that govern the buildings, the bond issues that enabled the municipality to purchase the land or lay the streets, and the innumerable easements. Lawyers help build the world. Lawyers who remember this may feel better about their profession.

98. Clark, *supra* note 78, at 278 (citing Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983)). Clark disagrees with Bok, by the way. Clark's essay is an important contribution to the literature on private lawyering.

99. Frank B. Cross, *Lawyers, The Economy, and Society*, 35 AM. BUS. L.J. 477, 503 (1998) (emphasis added).

100. See Roberto Cenicerros, *Sprinkler Heads Under Fire: Company Reserves \$4 Million To Douse Safety Fears*, BUS. INS., Aug. 18, 1997, at 1 (discussing a manufacturer's efforts to improve defective sprinklers so as to avoid future liability).

Also remember that lawyers help to create and protect important civil liberties. They do this in many ways, most famously by employing the procedural system on behalf of persons who are oppressed. However, lawyers also help to preserve important liberties by working with clients on private-sector matters. It is this neglected contribution that we wish to stress.

In modern America, some liberties are said to be extremely important, while others are held in less esteem. Liberties relating to the market for ideas fall into the first category. "Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil and the like."¹⁰¹ As this statement implies, economic and commercial freedoms fall into the second category. Among law professors, governmental intrusions upon the market for goods provoke mainly yawns.

It has fallen to economists like Aaron Director to point out that the tendency to rank ideas ahead of goods in importance

does not accord with a proper respect for the ordinary activities of the bulk of mankind . . . [who] will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.¹⁰²

Ronald Coase puts the point even more strongly. He contends that, "[f]or most people in most countries (and perhaps in all countries), the provision of food, clothing, and shelter is a good deal more important than the provision of the 'right ideas.'"¹⁰³ Those who denigrate economic needs and interests typically do not want for material well-being.

We do not argue for exalting economic rights constitutionally; rather, we quote Director and Coase for two other reasons. First, the erroneous¹⁰⁴ belief that politics and ideas are inherently more important than commerce

101. *Beauharnais v. Illinois*, 343 U.S. 250, 286 (1952) (Douglas, J., dissenting).

102. Director, *supra* note 63, at 6.

103. R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 386 (1974); *see also* Clark, *supra* note 78, at 291 (observing that "[a]s more people satisfy their basic needs for food, shelter, and the like, they move on to previously neglected desires," such as better health care and a cleaner environment).

104. Not all would endorse this characterization. *See, e.g.*, KRONMAN, *supra* note 1, at 41 ("[O]n Aristotle's view, politics is the most important of all deliberative activities, for its end—the good of political association—is the greatest and most inclusive one that human beings can have.").

contributes to the tendency to denigrate the contributions that lawyers make by working on private-sector matters for paying clients. That some governmental intrusions are policed more rigorously than others does not necessarily say anything about the relative importance of political and economic activity. It may speak to the relative fragility of political liberties instead. If there is no reason to rank one activity above the other in importance, then there is no reason to look down upon lawyers who spend their days toiling in the economic realm.

To the contrary, there is reason to praise them. Economic liberties are very secure in the United States. One often hears that it is impossible for our government to accomplish much by prohibiting market conduct because people find ways around the legal barriers that the government imposes. Outlawing booze, marijuana, gambling, prostitution, guns, or abortions does not prevent people from getting these goods and services. It just raises prices and drives transactions underground.¹⁰⁵ Why? An important reason is that Americans exercise their economic freedoms regularly and are accustomed to making commercial decisions for themselves. Being independent and self-reliant, Americans are disinclined to respect prohibitions. We are 275 million potential sources of resistance. Government must therefore expend real resources to obtain popular compliance with restrictive mandates, including resources invested in public education as well as those devoted to putting violators in jail. This greatly restricts the government's ability to meddle in economic affairs.

By contrast, the market for political speech and ideas appears to be less robust. One often hears that regulations have a significant "chilling effect" on political conduct.¹⁰⁶ Not that prohibitions on speech work perfectly. The Soviet Union had *samizdat* manuscripts and underground presses.¹⁰⁷ These would exist in the United States, too, under a repressive regime. The point is just that restrictions on speech are relatively effective and cheaply enforced, especially when they attempt to stifle unpopular views. One reason for this is that Americans are less self-reliant in the political realm, the habit of engaging in politics being less well ingrained. Few people speak publicly about controversial issues, vote, participate in collective governance, stay on top of political news, run for office, or write to their

105. Thus, despite an enormous budget of \$17.8 billion, law enforcement agencies have wholly failed to restrict the flow of illegal drugs into the United States. Recent information suggests that cocaine is being imported at a rate three times as great as officially estimated. See Eric Lichtblau & Esther Schrader, *Bad Count on Cocaine May Shake Drug War*, AUSTIN AM.-STATESMAN, Nov. 15, 1999, at A1.

106. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down a statute intended to protect minors from exposure to pornography on the Internet, partly because the vagueness of the prohibition combined with the threat of criminal penalties would chill free speech).

107. See Transcript of the Conference on the Bibliography of Soviet *Samizdat*, St. Antony's College, Oxford (Sept. 30-Oct. 4, 1991) (on file with *The Yale Law Journal*).

representatives. Restrictions on political activities also work relatively well because people lack incentives to disobey them. Political activity addresses needs that, for most people, are relatively remote, and many products of the political system are available to free riders.

If the market for goods is more robust than the market for political speech and ideas, the latter must be protected from ill-advised regulations more zealously than the former. If all Americans were like the extremists who attempted to set up the Republic of Texas,¹⁰⁸ this might not be so, for there would then be 275 million active opponents of governmental control of speech and other political conduct. In fact, we are far more docile and manipulable, and we therefore require greater protection by our courts.

Our second reason for citing Director and Coase is to remind readers of the utilitarian tradition of political economy to which they belong. This tradition emphasizes that a free society requires citizens who are industrious and accustomed to taking responsibility. This is why John Stuart Mill argued against public provision of services even "though individuals may not do the particular thing so well, on the average, as the officers of government."¹⁰⁹ Private provision educates citizens, gives them opportunities to exercise judgment, and gives them the experience of making decisions.¹¹⁰ It thereby creates a culture of independence and decentralized decisionmaking authority that helps keep a limited government from expanding.

Lawyers who assist clients with private matters help maintain this independence of spirit. People use private law to take charge of their lives. They assume obligations and responsibilities to others and make others beholden to them. They take risks. They build joint enterprises, including clubs, churches, and social organizations, as well as partnerships, corporations, and industries. They provide for loved ones, for important personal needs, and for the future. They create decentralized loci of power

108. The founders of the Republic of Texas believe "that the United States illegally annexed Texas in 1945," "that the Lone Star State is really still a separate nation," and that they "are the real governing body of Texas." Scott Parks, *Court Reverses Convictions of Separatists: Republic of Texas Kidnapping Charges Weren't Proved, Appeals Panel Rules*, DALLAS MORNING NEWS, Aug. 28, 1999, at 35A.

109. MILL, *supra* note 57, at 101.

110. It was clear to Mill that private industriousness contributes greatly to the security of liberty in the United States:

What the French are in military affairs, the Americans are in every kind of civil business; let them be left without a government, every body of Americans is able to improvise one, and to carry on that or any other public business with a sufficient amount of intelligence, order, and decision. This is what every free people ought to be: and a people capable of this is certain to be free; it will never let itself be enslaved by any man or body of men because these are able to seize and pull the reins of the central administration. No bureaucracy can hope to make such a people as this do or undergo anything they do not like.

Id. at 104.

and become accustomed to using the powers they have. Lawyers help them do these things by making laws work for them.

Some readers may feel that our rhetoric is overblown. Are lawyers for private clients really creating independent sources of power that are counterweights to governmental intrusions on individual liberties? We are talking, after all, about lawyers who draft contracts and wills, who apply for patents and trademarks, and who handle initial public offerings. The connection between these activities and liberty seems fairly remote.

These readers might usefully reflect on Liman's experience in representing Kaye, Scholer, Fierman, Hays & Handler.¹¹¹ Kaye, Scholer was one of the many law firms that represented the Lincoln Savings Bank, operated by Charles Keating. The Office of Thrift Supervision (OTS) had shut Lincoln down and had accused Kaye, Scholer of abetting Keating's illegal activities. Then OTS took the "unprecedented" step of issuing an executive order freezing the law firm's assets.¹¹² The need for the writ was unclear:

The OTS couldn't seriously have believed that Kaye Scholer's partners would en masse flee in the middle of the night with their assets. They all had spouses, children, and homes, and their only means of support was to practice law in New York City. If they hid assets, they would face immediate and certain disbarment.¹¹³

Needed or not, the order was utterly effective. "[W]ith its assets frozen, Kaye Scholer couldn't continue to practice—a fact of which the OTS was certainly aware—and its only choice was surrender. Within seventy-two hours, the firm capitulated, and we agreed to a multimillion-dollar settlement."¹¹⁴ Liman viewed the payment as "ransom."¹¹⁵

The persuasiveness of freeze orders forces one to wonder why the government does not beggar its opponents in civil litigation more often. Federal prosecutors use the forfeiture remedy aggressively against drug dealers and white-collar criminals.¹¹⁶ State and local prosecutors are fond of

111. See LIMAN, *supra* note 24, at 231-32.

112. Many have used this word to describe the freeze order. See, e.g., Keith R. Fisher, *Neither Evaders nor Apologists: A Reply to Professor Simon*, 23 L. & SOC. INQUIRY 341, 344 (1998); Geoffrey P. Miller, *Kaye Scholer as Original Sin: The Lawyer's Duty of Candor and the Bar's Temptations of Evasions and Apology*, 23 L. & SOC. INQUIRY 305, 311 (1998); see also Jonathan R. Macey, *Professor Simon on the Kaye Scholer Affair: Shock at the Gambling at Rick's Place in Casablanca*, 23 L. & SOC. INQUIRY 323, 326 (1998) (describing the freeze order as a "bizarre litigation tactic").

113. LIMAN, *supra* note 24, at 232.

114. *Id.*

115. *Id.*

116. The Office of National Drug Control Policy reported that seized assets worth approximately one billion dollars were on deposit in the Assets Forfeiture Fund. See OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: BUDGET SUMMARY

it too.¹¹⁷ New York City recently began seizing cars operated by drunks.¹¹⁸ By issuing a freeze order against Microsoft, the government might have avoided one of the great trials of the century.¹¹⁹ Why, then, in civil litigation, is the power to freeze assets rarely employed?

The answer must be that business will not stand for it. The Constitution allows the use of freeze orders in civil cases.¹²⁰ The remedy could therefore be available in all federal lawsuits, including antitrust, securities, tax, and environmental proceedings. Yet, the freeze order against Kaye, Scholer was without precedent, and Congress is cutting back on the forfeiture remedy in civil cases, not expanding it.¹²¹ Why? For no better reason than that business interests, including small-business owners, do not want the federal government to have this much leverage over them.¹²² Republicans are leading the rollback,¹²³ and conservatives like Steve Forbes are backing them.¹²⁴ Businesses also have undertaken a campaign to prevent states from retaining private attorneys on a contingent-fee basis, the compensation arrangement that enabled the attorneys general to bring the tobacco companies to their knees.¹²⁵ At stake in this epic struggle is nothing less than the balance of power between the private and public sectors.

1999, at 108 (1999); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 31 (1997) (discussing the government's "strong incentive" to use forfeiture laws against criminal defendants with access to money).

117. See Andrew L. Subin, *The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 SEATTLE U. L. REV. 253, 254 (1996) (quoting BRENDA GRANTLAND ET AL., FORFEITURE AND DOUBLE JEOPARDY: HOW TO TURN PROSECUTORIAL OVERREACHING INTO RELEASE OF PRISONERS OR RETURN OF SEIZED PROPERTY 5 (1994)); see also Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 456-73 (discussing the application of forfeiture statutes against innocent owners in recent cases).

118. See John Marks, *Car Keys, Please*, U.S. NEWS & WORLD REP., Mar. 8, 1999, at 30, 30 (reporting that Mayor Rudolph Giuliani ordered New York City police officers to confiscate cars when drivers fail sobriety tests).

119. Macey suggests that the freeze order against Kaye, Scholer was motivated by OTS's desire to avoid a trial in a dicey case. See Macey, *supra* note 112, at 327.

120. See John C. Coffee, Jr., *What Constitution Says on Freeze Orders*, NAT'L L.J., June 8, 1992, at 18. For an argument that the courts should recognize constitutional restrictions on the use of freeze orders, see Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183 (1996).

121. The Civil Asset Forfeiture Reform Act (H.R. 1658) passed the House by a 375-48 vote on June 24, 1999. See 145 CONG. REC. H4844, H4878 (daily ed. June 24, 1999). If enacted, it would limit the availability of the forfeiture remedy and subject the federal government to penalties for wrongful confiscation. See H.R. 1658, 106th Cong. §§ 2, 3(b)(1) (1999).

122. The House Report describes instances in which innocent operators of a landscaping business, an air charter service, a pizzeria, and a motel had their assets seized. See H.R. REP. NO. 106-192, at 6-11 (1999).

123. Representative Henry Hyde sponsored the Civil Asset Forfeiture Reform Act. See H.R. 1658.

124. See Steve Forbes, *Fact and Comment*, FORBES, July 26, 1999, at 31, 32 (stating that existing forfeiture laws are "more appropriate for the old Soviet Union than for America").

125. See Barry Meier & Richard A. Oppel Jr., *States' Big Suits Against Industry Bring Battle on Contingency Fees*, N.Y. TIMES, Oct. 15, 1999, at A1.

Every citizen is as vulnerable as Kaye, Scholer was.¹²⁶ A person who has no assets to begin with or who is unceremoniously stripped of them cannot long withstand a public prosecution. Fortunately, most Americans enjoy considerable security against this fate. Being economically active and successful, we have the resources and the will to oppose political threats to economic freedoms. Private-sector legal work really does create decentralized loci of power that help preserve liberty. "[T]he rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them."¹²⁷

In sum, there is no necessary minimum frequency with which lawyers must pursue something called "the public interest" that stands apart from and is at odds with the private interests of their clients. Lawyers who use lawful means to help clients meet personal needs and pursue private dreams can enjoy professional lives that are morally good and personally fulfilling. Certainly, when a client asks a lawyer to undertake a project that is unlawful or immoral, a lawyer must draw the line, but it is morally good and lawful to help clients advance and protect private interests most of the time. It also is an important means of preserving the culture of private decisionmaking and personal responsibility that keeps state power in check.

II. PROTECTING THE PROFESSION'S RIGHT FLANK: ANTI-LAWYER MYTHS SPREAD BY POLITICAL CONSERVATIVES

Arthur Liman was not a lawyer-basher. He was proud to be an attorney. However, he unknowingly bought into several anti-lawyer myths. For example, when discussing the cost of legal services, Liman made unwarranted generalizations about discovery abuse.¹²⁸ Apparently, his own litigation practice, which focused on the kind of high-dollar, multi-party commercial cases in which excessive discovery is common, gave him a jaundiced view of the world. He did not know that many lawsuits end with no formal discovery at all.¹²⁹ Liman also mistakenly believed that excessive

126. By pointing out Kaye, Scholer's vulnerability, we are neither defending Kaye, Scholer's actions, nor defending Charles Keating, nor condemning the OTS. We are merely making a point about the capacity of individuals to resist assertions of government power.

127. JOHN STUART MILL, *Representative Government*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT, *supra* note 61, at 235, 279 (1910).

128. See LIMAN, *supra* note 24, at 234-35.

129. See Susan Keilitz et al., *Is Civil Discovery in State Trial Courts out of Control?*, ST. CT. J., Spring 1993, at 8, 9-15 (examining statistics); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 790-91 (1998) (summarizing empirical studies); Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432-43 (1994) (summarizing studies).

jury verdicts are common.¹³⁰ Empirical studies do not confirm this. They repeatedly show that undercompensation is a far greater problem in the tort system than overcompensation and that awards of punitive damages are both infrequent and small.¹³¹

That Liman, a proud attorney and a liberal Democrat, made these errors may show how remarkably effective the right-wing attack on the legal profession has been. Lawyers are on the defensive everywhere, even in law schools. The *American Lawyer* recently dubbed a law professor, of all people, the legal profession's new "Public Enemy No. 1."¹³² Anti-lawyer myths have been repeated so often and with such intensity that even lawyers have been convinced. This is why lawyers are forever wringing their hands and wondering whether yet another rewrite of the ethics rules would redeem the bar's reputation.

In truth, partisan lawyer-bashers are a far greater danger to America than are lawyers. For reasons of ideology and self-interest, they spread misinformation about attorneys and the civil justice system, including unverifiable "urban legends" and lies that they concoct themselves.¹³³ Lawyers should not receive these pronouncements as truths but instead should expose them as falsehoods.¹³⁴ The world may then see that most lawyer-bashers are political partisans who serve identifiable interest groups.

A. *Myth #1: The United States Has Too Many Lawyers.*

When it comes to debunking anti-lawyer myths, as good a place to start as any is the widely reported assertion that the United States has too many

130. See LIMAN, *supra* note 24, at 84.

131. For an excellent survey and analysis of the empirical literature, see Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992). See also Peter H. Schuck, *The Problem with Punitive Damages*, AM. LAW., May 1999, at 97, 97 ("Most punitive awards are modest, proportionate to actual harm (the median punitive award is only 40 percent above the compensatory one), and almost always for egregiously reprehensible conduct.").

132. *Of Money and Misery*, AM. LAW., Apr. 1999, at 31, 31 (interviewing Professor Patrick Schiltz).

133. See Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1004 (1998) ("The American Tort Reform Association spends millions of dollars to popularize poignant illustrations of the costs of liability insurance." (citing PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 58 (1997))).

134. Consider Walter Olson's statement that Vice President Dan Quayle made an "educated guess" by claiming that "litigation may be costing this country \$300 billion a year." Walter Olson, *Slowing the Recovery: Too Many Lawsuits*, SAN DIEGO UNION-TRIB., May 3, 1992, at C1. This figure, which Peter Huber, also of the Manhattan Institute, appears to have dreamed up, has no empirical basis. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83-90 (1993); cf. Rhode, *supra* note 133, at 993-99 (discussing myths of over-litigation and exorbitant jury awards).

lawyers.¹³⁵ An open-minded person with a modicum of respect for markets would presume against the accuracy of this claim. The legal sector is the fourth largest part of the service economy, with revenues in excess of \$140 billion.¹³⁶ The most obvious explanation for its tremendous size is that clients want and are willing to pay for the services that lawyers provide.¹³⁷ Moreover, the legal sector and America's economy have grown hand in hand. The correlation was especially clear in the 1990s when both the economy and the need for corporate legal services grew dramatically.¹³⁸

135. The leading academic proponent of the "too many lawyers" hypothesis is Stephen Magee. See STEPHEN P. MAGEE ET AL., BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY 111-121 (1989); Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 L. & SOC. INQUIRY 667 (1992). Magee has made some very dubious claims. For example, he once asserted that those who believe that "the more lawyers a country has, the better its economy performs" must conclude that "everyone in the labor force should be a lawyer." Magee, *supra* note 12. This is silly. Larger economies also may have more plumbers, doctors, bankers, architects, barbers, or grocers than smaller ones. Does this mean that everyone should be a plumber, a doctor, a banker, an architect, a barber, or a grocer? No. A mix of employments is required. The tendency to take seriously assertions about lawyers that would be laughed at if made with regard to other occupations shows the extent to which the lawyer-bashers have succeeded in softening people's minds.

136. See U.S. CENSUS BUREAU, 1998 SERVICE ANNUAL SURVEY DATA TABLES tbl.1.1 (1999).

137. This is why venture capitalists pay premium rates for lawyers' time in Silicon Valley. They know that "Silicon Valley lawyers actively facilitate the functioning of the region's venture capital sector . . . [by] absorb[ing], suppress[ing], and avert[ing] crucial uncertainties that might otherwise elevate transaction costs, imperil economic activity, and foster interorganizational discord." Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 L. & SOC. INQUIRY 679, 679 (1996).

138. See, e.g., John E. Morris, *Firing on All Cylinders*, AM. LAW., July 1999, at 71, 71 ("[D]emand for the most sophisticated kinds of [legal] advice is, for the moment, insatiable. Big firms are pulling away from the rest of the law business, which has grown at a rate much closer to that of the economy as a whole, according to government figures."); American Bar Found., *The Legal Profession* (visited Dec. 8, 1999) <<http://www.abf-sociolegal.org/1998rep/legalprof.html>> ("The corporate sector of practice has grown far more rapidly than the personal client sector. In 1975, the corporate hemisphere received about 54% of Chicago lawyers' time and the personal client fields about 40%; in 1995, the comparable percentages are 61% and 29%."). The 100 largest law firms, which represent mainly corporate clients, accounted for 18% of gross revenues generated by private law firms in 1998, up from 14% in 1995. See Morris, *supra*, at 71. Law firms headquartered in Washington, D.C., grew less quickly and were less profitable than other large firms in the late 1990s. See *id.* at 72. Presumably, the D.C. firms are more closely connected to the government sector. This suggests that growth and profitability of large firms were driven more strongly by the corporate sector than by public expenditures or regulatory activity.

On changes in the market for corporate counsel, see Galanter, *supra* note 18, at 677; and Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 354-59 (1994). For data on the numerical and economic growth of the profession, see Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431 (1989). They report that from 1967 to 1982, "[p]ersonal legal services grew at an average rate of 11.7% per year (about 4.7% after adjusting for inflation), while business legal services grew 15% per year (a real rate of 8%)." *Id.* at 440-41; see also *id.* at 475 ("[T]he demand for legal services has grown more rapidly in the business sector than in the consumer sector; indeed, it has probably grown most rapidly among large corporations.").

The recent history of Japan, which lawyer-bashers often tout as a model for the United States, does not alter this impression.¹³⁹ For most of the last decade, Japan's economy was in recession, while the United States, said to be staggering under the weight of seventy percent of the world's attorneys,¹⁴⁰ experienced strong peacetime growth and exceptional increases in productivity.¹⁴¹ Again, a strong economy and strong demand for legal services went hand in hand.¹⁴² In the early 1980s, Russell Baker joked that the United States should offer Japan lawyers for cars.¹⁴³ Today, Japan should offer the United States cars for lawyers.¹⁴⁴

In the end, only rigorous empirical studies can determine whether America has too many lawyers, but the studies conducted to date have not shown this to be so.¹⁴⁵ In 1977, the economist Peter Pashigian looked at the

139. Dean Clark describes the comparison to Japan as a "grenade of an argument" that "has been lobbed into debates countless times." Clark, *supra* note 78, at 279. Two articles that recently appeared side by side on the front page of the *New York Times* suggest that the grenade-lobbers are in danger of being killed. Compare Robert D. Hershey, Jr., *Economy Proving It's More Robust than Anticipated*, N.Y. TIMES, Nov. 25, 1999, at A1 (discussing the remarkable and continuing record of U.S. economic growth in the 1990s), with Stephanie Strom, *Economic Stimulus in Japan*, N.Y. TIMES, Nov. 25, 1999, at A1 (describing Japan's "maddeningly lifeless economy").

140. For a debunking of Dan Quayle's assertion that the United States has 70% of the world's lawyers, see Galanter, *supra* note 19, at 734-35.

141. See Peter Coy, *A New Calculus for the New Economy*, BUS. WK., Nov. 8, 1999, at 34, 34.

142. Cf. Clark, *supra* note 78, at 289 ("Any increase in the volume and rate of interactions among business transactors leads to greater demand to structure relationships—to impose rules and guidelines on them so that they work without too much uncertainty and friction."); Cross, *supra* note 99, at 501 ("Studies have shown that high rates of economic growth require significant increases in lawyer numbers, which suggest the possibility that high lawyer numbers reflect the demand of a growing economy driven by productive research and development.").

143. See Russell Baker, *Lawyers for Cars*, N.Y. TIMES, June 8, 1983, at A23, cited in Thomas E. Baker, *Tyrannous Lex*, 82 IOWA L. REV. 689, 693 (1997). Professor Baker's article is the best tongue-in-cheek treatment of the overlawyering controversy.

144. American lawyers are, in fact, an export commodity. See John E. Morris, *Just When You Thought It Was Safe . . .*, AM. LAW., Apr. 1999, at 5, 5 ("[T]he English have continued to hire American lawyers in both London and New York—particularly securities and project finance specialists.").

145. Many empirical studies have rebutted the assertion that lawyers are a drag on the U.S. economy. See Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645, 672-83 (1992) [hereinafter Cross, *Kill All the Economists*] (reporting a multiple regression finding no negative effect of lawyers on growth); Cross, *supra* note 99, at 487-509 (analyzing different data sets and variables and finding no robust negative effect of lawyer numbers or tort litigation costs on economic growth); Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17 L. & SOC. INQUIRY 585, 596-616 (1992) [hereinafter Epp, *Do Lawyers*] (reanalyzing data and finding no significant effect of lawyers on growth); see also Charles R. Epp, *Counterpoint: Let's Not Kill All the Lawyers*, WALL ST. J., July 9, 1992, at A15 (reporting that an application of Stephen Magee's model using better data showed that "[a] higher ratio of lawyers to white-collar workers is associated with faster rates of economic growth cross-nationally in the 1980s").

The empirical results could be challenged. For example, Magee has taken issue with Epp's analysis and claimed that the evidence still shows that an excess of lawyers harms growth. See Magee, *supra* note 135, at 668. Magee has never attempted to reply, however, to any of Professor

data and concluded that, for the better part of the century, “there [were] on balance too *few* lawyers” in the United States.¹⁴⁶ Because artificial constraints restricted entry to the legal profession for much of this period, this is exactly the result one would expect. Pashigian dismissed claims of a lawyer glut as having no support in the “historical record.”¹⁴⁷

Today, the “too many lawyers” hypothesis remains unproven. The best studies, those that use the most reliable data and the most thoughtful models, find either a positive relationship between the size of the lawyer population and the rate of economic growth or no relationship that is significant.¹⁴⁸ The most recent evidence comes from Michael Porter, the renowned professor at the Harvard Business School, who, in 1999, studied per capita gross domestic product (GDP) in fifty-eight nations.¹⁴⁹ Porter found a positive association between “adequacy of private sector legal recourse” and societal wealth.¹⁵⁰ In size, the beneficial effect was comparable to those of infrastructure quality, public investment in research and development, quality of scientific research institutions, and financial market sophistication.¹⁵¹

The longitudinal evidence is clear that the number of lawyers parallels overall economic wealth.¹⁵² Empirically, a larger GDP means a larger population of lawyers. This may be because lawyers produce wealth, because wealth creates demand for legal services, or for both reasons concurrently. The consistent correlation of number of lawyers and economic wealth strongly suggests an association between the two. Stephen Magee, the most prominent of the academic lawyer critics, has affirmatively recognized this point. While he still believes that the United States has too many lawyers, he nevertheless acknowledges that private

Cross’s analyses, although he is well aware of them. The most recent study shows that Magee’s results can be replicated, but only using a particular set of years and a particular set of control variables. *See* Cross, *supra* note 99, at 491. Magee’s results are not robust and disappear, even for his selected time period, when one introduces independent control variables for trade and investment. *See id.* If one studies a different set of years, uses different independent variables, or uses different economic dependent variables, there is no negative association between lawyers and economic well-being. *See id.*

146. B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53, 81 (1977) (emphasis added).

147. *Id.*

148. *See* Epp, *Do Lawyers*, *supra* note 145, at 615 (“These results indicate that larger lawyer populations are not associated with slower economic growth in my sample of countries. In fact, larger lawyer populations are associated with faster rates of economic growth.”).

149. *See* Michael E. Porter, *Microeconomic Competitiveness: Findings from the 1999 Executive Survey* (visited Nov. 7, 1999) <<http://www.weforum.org/publications/gcr/PorterGCR99.pdf>>.

150. *Id.* at 34.

151. *See id.*

152. *See, e.g.,* Richard L. Abel, *Comparative Sociology of Legal Professions*, in 3 *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 80, 110-11 (Richard L. Abel & Philip S.C. Lewis eds., 1989) (reviewing European studies with the same conclusion); Pashigian, *supra* note 146, at 73 (finding GNP to be a crucial determinant of the demand for lawyers).

lawyering contributes a net \$1.2 trillion to the nation's economy.¹⁵³ He observes that the economic benefits of lawyering include "frauds that were deterred; inventions that were protected; consumers who were sheltered from harmful products; and property that was secured against economic predators."¹⁵⁴

For reasons suggested in Part I, lawyers also strengthen a country's attachment to civil liberties.¹⁵⁵ Americans enjoy greater personal freedom than citizens in other countries partly because we have easier access to legal services. Empirically, there is "a remarkably strong relationship between lawyerification and political freedom."¹⁵⁶ Lawyers promote democracy and civil liberties in part because litigation is a critical avenue through which such rights may be defended. A conservative economist, Gerald Scully, has found that the private lawyering associated with common-law nations (and lamented by many conservatives) is the feature that causes these countries to have higher levels of political and civil liberties.¹⁵⁷

Because so little evidence supports the "too many lawyers" hypothesis, it amazes us that political conservatives are the fiercest critics of a free market in legal services.¹⁵⁸ Who thinks there are too many lawyers? Right-wing pundits William F. Buckley,¹⁵⁹ Walter Olson,¹⁶⁰ and George Will,¹⁶¹ former President George Bush,¹⁶² former Vice President Dan Quayle,¹⁶³ and

153. See Magee, *supra* note 135, at 667.

154. *Id.* at 670.

155. The Japan-touters always fail to point out the shortcomings of that country's legal system. For example, because it is so difficult to sue there, tort victims frequently use mobsters instead of lawyers to secure compensation. See Cross, *Kill All the Economists*, *supra* note 145, at 679. Japan also has little regard for civil rights. See Richard S. Miller, *Apples vs. Persimmons: The Legal Profession in Japan and the United States*, 39 J. LEGAL EDUC. 27, 33 (1989).

156. Cross, *Kill All the Economists*, *supra* note 145, at 678; see also David W. Barnes, *The Litigation Crisis: Competitiveness and Other Measures of Quality of Life*, 71 DENV. U. L. REV. 71, 74 (1993) ("Perhaps having more rights does require more lawyers."); Cross, *supra* note 99, at 508-11 (updating the prior study and concluding that "lawyers have a significant positive effect on freedom that is independent of a nation's wealth").

157. See Cross, *supra* note 99, at 511 (discussing GERALD SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 148-65 (1992)).

158. Not all conservatives favor regulation. For example, Richard Epstein has written that the increase in the number of lawyers may be "just a sign of the importance of legal services to those who receive them," and has noted that the "increase over the past thirty years in expenditures on computer services, home video movies, or recreational vehicles far outstrips those on legal services." RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 8-9 (1995).

159. See William Buckley, *Invisible Hand Tripped Up by Burden of Lawyer Glut*, AUSTIN AM.-STATESMAN, Oct. 30, 1991, at A19.

160. See, e.g., OLSON, *supra* note 18; Olson, *supra* note 21.

161. See George Will, *The West's Water Wars*, WASH. POST, Mar. 28, 1991, at A23 ("You cannot fling a brick in this city without hitting a water lawyer, which strikes some people as a good reason for brick-flinging."). Amazingly, the thesis of this Op-Ed is that market forces, not regulators, should control the use of water.

162. See Galanter, *supra* note 18, at 652 (quoting an address of President George Bush to the American Business Conference).

163. See Kelly Flaherty, *Dan Quayle: Lawyers Are the Root of All Social Evil*, RECORDER (S.F.), May 20, 1999, at 6. Quayle's remarks were parodied in the *National Law Journal*:

U.S. Court of Appeals Judge Laurence Silberman, an alumnus of the American Enterprise Institute.¹⁶⁴ Who wants to impose price controls on plaintiffs' attorneys? The *Wall Street Journal*,¹⁶⁵ the Manhattan Institute,¹⁶⁶ the U.S. Chamber of Commerce,¹⁶⁷ and industry-backed groups advocating tort reform.¹⁶⁸ Who thinks that the spirit of the entrepreneur and the spirit of the lawyer are incompatible? Lester Brickman,¹⁶⁹ Warren Burger,¹⁷⁰

At a speech on May 21 to the Commonwealth Club in San Francisco [sic], [Dan Quayle] blamed much [sic] of the country's problems on a 'legal aristocracy' that, he said, has undermined parental authority, school discipline, and religious freedom; caused global warming; put flouride [sic] in the water; and is behind violent Hollywood movies and most of bad things you can think of. Or some of that, anyway.

"*The Rute of All Evil*," NAT'L L.J., May 31, 1999, at A8. One wonders how many of the grammar and spelling errors in the quoted passage were intended.

The media do publish correctives from time to time. See, e.g., *Legal Legends: A Quiz*, AUSTIN AM.-STATESMAN, June 15, 1999, at A8 (discussing myths about the civil justice system).

164. See Silberman, *supra* note 51; see also *Too Many Lawyers?*, DAILY OKLAHOMAN, June 28, 1999, at 8 (reporting on an address by Judge Silberman).

165. The *Wall Street Journal* has repeatedly run editorials and featured commentaries that contain anti-lawyer themes and that call for regulation of legal fees. See *infra* note 169; see also Max Boot, *Rule of Law: A Texas-Sized Class Action Fraud*, WALL ST. J., May 22, 1996, at A23 (attacking small-claim class actions); Holman W. Jenkins Jr., *Beginning of the End for the Scariest Special Interest?*, WALL ST. J., Dec. 1, 1999, at A27 (offering a series of anti-lawyer invectives and praising presidential candidate Governor George W. Bush for having lawyers as "enemies"); *Taken for a Ride*, WALL ST. J., Oct. 23, 1996, at A22 (attacking a "brash young lawyer" who brought a class action in a sweetheart forum against insurance companies that were only following regulator's orders); *The Trial Lawyer Congress*, WALL ST. J., June 3, 1998, at A18 (attacking Congress for proposing to pay large fees to lawyers who handle states' tobacco cases).

166. See, e.g., BRICKMAN ET AL., *supra* note 5.

167. The webpage for the U.S. Chamber of Commerce declares that "[f]rivolous law suits and excessive litigation cost[] U.S. businesses and consumers \$160 billion every year." U.S. Chamber of Commerce, *Legal Reform* (visited Nov. 1, 1999) <<http://www.uschamber.com/policy/1-legalreform/content.html>>. The source for the figure is not given. It also indicates the Chamber's support for "reform [of] rules pertaining to punitive and non-economic damages and contingency fees." U.S. Chamber of Commerce, *Legal/Tort Reform*, *supra* note 21.

168. Texas is blessed with several of these groups, many of which are fighting the payment of fees to the private attorneys who represented the state in its lawsuit against the tobacco industry. See, e.g., Harvey Kronberg, *Shielded Documents: Trial Lawyers Try To Keep Legal Proceeding from Public View* (visited Nov. 1, 1999) <<http://www.calahouston.org/shielded.html>> (article posted on the website of Citizens Against Lawsuit Abuse); *Texans for Lawsuit Reform* (visited Nov. 1, 1999) <<http://www.tortreform.com/new.html>>; *Texans for Reasonable Legal Fees* (visited Nov. 1, 1999) <<http://www.tortreform.com/page2b.html>>. A strategy memo for one of these groups candidly identifies the political aims of "reestablish[ing] trial lawyers as the big bad guys" and preventing trial lawyers from "com[ing] off as latter day Robin Hoods" by attacking the payment of fees to the private lawyers in the Texas tobacco case. *Texans for Law Suit Reform*, Planning Document 1998, at 12-13 (draft on file with *The Yale Law Journal*).

169. Brickman, an author of the Manhattan Institute's proposal to cap contingent fees, has decried market regulation of fees charged by plaintiffs' attorneys on numerous occasions. He is especially vexed by the fees that states are contractually bound to pay in their settled tobacco cases. See, e.g., Panel Discussion, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827 (1999) (including remarks by Brickman); Lester Brickman, *Want To Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A11; Lester Brickman, *Will Legal Ethics Go Up in Smoke?*, WALL ST. J., June 16, 1998, at A18.

170. See Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 63 (seeking a return to prohibitions on advertising); see also Harry L. Carrico, *The New Professionalism*, N.Y. ST. B.J., Jan. 1990, at 11, 11 (urging lawyers not to market their services openly); W. Ward

Michael Horowitz,¹⁷¹ Amy Moritz Ridenour,¹⁷² and Stuart Taylor, Jr.¹⁷³ These right-wingers endorse regulations that would make legal services more expensive or, in the case of fee caps, harder to find, and that would make lawyers less responsive to clients' wishes and needs. Yet they claim the high ground for themselves by arguing for restraints in ethical terms. Apparently, client interests do not weigh heavily in their ethical calculus, at least not when clients are tort plaintiffs, poor people, or members of the middle class.

B. *Myth #2: Competition Has Ruined the Practice of Law.*

The legal profession is far more businesslike than it used to be. As barriers to entry and other anticompetitive constraints eroded throughout the middle of the century,¹⁷⁴ supply expanded and prices fell.¹⁷⁵ As a result, institutional purchasers—insurance companies, product manufacturers, and the like—got more bang for the buck.¹⁷⁶ Recent proposals to allow lawyers to practice in partnership with nonlawyers¹⁷⁷ and

Reynoldson, *The Case Against Lawyer Advertising*, A.B.A. J., Jan. 1989, at 60 (arguing that advertising has sullied the profession).

171. Michael Horowitz, formerly of the Manhattan Institute and now of the Hudson Institute, believes that Congress should impose an excess-profits tax on fees earned in the states' tobacco cases. His theory is that because lawyers are fiduciaries, not venture capitalists, they should be subject to the same "excess benefits" provisions of the tax code that apply to directors of charities, pension funds, and foundations. See James Freeman, *Ever Heard of a Greedy Lawyer?*, USATODAY.COM (last modified Dec. 10, 1999) <<http://www.usatoday.com/news/comment/columnists/freeman/ncjf40.htm>>. The same belief led Horowitz to argue for contingent-fee regulations and to co-author the Manhattan Institute's proposal for contingent-fee reform. See Michael Horowitz et al., *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 (1995).

172. Ridenour, president of The National Center for Public Policy, a right-wing think tank, has repeatedly inveighed against market regulation of fees in the states' tobacco cases. See, e.g., Amy Ridenour, *Should Attorneys' Huge Tobacco Suit Fees Be Subject to Windfall Profits Tax?*, SALT LAKE TRIB., Mar. 7, 1999, at AA5; Amy Ridenour, *Trial Lawyers Rolling in Clover over Tobacco*, SACRAMENTO BEE, Sept. 20, 1997, at B7.

173. See Stuart Taylor, Jr., *Tobacco Fees: The Rewards of Winning*, 22 NAT'L J. 1222, 1222 (1998) (denying that plaintiffs' attorneys compete for business).

174. For an overview of these changes, see Richard L. Abel, *The Transformation of the American Legal Profession*, 20 L. & SOC'Y REV. 7 (1986).

175. See Sander & Williams, *supra* note 138, at 451 (reporting a decline of approximately 10% in the average price of legal services from 1970 to 1985); see also RICHARD A. POSNER, *OVERCOMING LAW* 67 (1995) (citing Sander & Williams, *supra* note 138).

176. See Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 216-17 (1997); Mike France, *Legal Spending Slowdown*, NAT'L L.J., Oct. 16, 1995, at A1.

177. See ABA Comm'n on Multidisciplinary Practice, *Report to the House of Delegates* (visited Nov. 7, 1999) <<http://www.abanet.org/cpr/mdprecommendation.html>>; see also John Forry, *Perfect Match*, INT'L ACCT. BULL., Mar. 25, 1998, at 8 (describing "a global strategy for cooperation between accounting and law firms in a specific line of business—infrastructure project development and finance"); Siobhan Roth, *Plan for Law Firm-Accounting Hybrids Faces Internal Heat, Political Hurdles*, LEGAL TIMES, June 14, 1999, at 1 (describing reactions to a recommendation that would allow lawyers to practice with accountants, financial analysts, and

mergers of American and European law firms¹⁷⁸ should help this trend continue.

A less publicized but equally important development was that access to legal services for individuals also improved.¹⁷⁹ "In a 1986 *National Law Journal* (NLJ) poll, roughly half of American adults reported professional contact with a lawyer within the preceding five years In the 1993 NLJ poll, the portion who had used a lawyer rose to 68%" ¹⁸⁰ Individuals had better access to legal services for many reasons: The number of lawyers grew;¹⁸¹ prices fell;¹⁸² franchise law firms and prepaid legal plans made basic services available to the middle class;¹⁸³ advertising spread information;¹⁸⁴ and lawyers explored new markets¹⁸⁵ and cut costs.¹⁸⁶

other professionals); Ritcheny A. Shepherd, *Lawyers, Accountants and Beyond*, NAT'L L.J., June 21, 1999, at A1 (discussing the likely impact of the ABA Commission's recommendation, particularly on sparking efforts at multidisciplinary firms). For continuing coverage of the debate, see the *New York Law Journal*'s webpage at www.nylj.com/aba/99/mdpindex.html.

178. See *New Life for Lawyers*, TIMES (London), July 12, 1999 (reporting that a proposed merger of law firms in three countries would create "the world's largest law firm by the time it starts work next January . . . with turnover of more than \$1 billion, 30 offices worldwide, and a team of 2,700 lawyers").

179. Galanter states that "[l]egal representation of victims is more available and more competent." Galanter, *supra* note 18, at 676.

180. Galanter, *The Faces of Mistrust*, *supra* note 23, at 808. In both surveys, the majority of clients reported that they were pleased with the service they received. See *id.*

181. In 1951, there was one lawyer for every 695 members of the U.S. population. In 1991, the ratio was one for every 313 persons. See BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S*, at 1 (1994).

182. Solo practitioners, the lawyers who primarily serve individuals, "are most deeply affected by competition from new entrants, who engage in advertising and price cutting." Abel, *supra* note 174, at 12. Thus, their incomes fell more steeply than those of other lawyers. See Sander & Williams, *supra* note 138, at 475. Few proponents of the "too many lawyers" hypothesis recognize that more lawyers means easier access to legal services for ordinary people or that the downside of reduced supply would be less access. See, e.g., John Forry, *Trade Barriers*, INT'L ACCT. BULL., Feb. 17, 1999, at 6 (commenting that "many within and outside the U.S. legal profession believe there are already too many U.S. lawyers" and observing that "U.S. lawyers seem to be available at every governmental hearing, courthouse, church meeting, cocktail party and family reunion").

183. For information on the availability of low-priced legal services, see HOY, *supra* note 93; Carroll Seron, *Managing Entrepreneurial Legal Services*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 63 (Robert L. Nelson et al. eds., 1992); Buck Wolf, *HMOing the Law: Can Prepaid Legal Services Counteract Rising Attorney Fees?*, ABCNEWS.COM (last modified Apr. 19, 1999) <http://www.abcnews.go.com/sections/us/DailyNews/prepaid_law_990415.html>.

184. See Cebula, *Does Lawyer Advertising Adversely Influence*, *supra* note 4; Cebula, *Historical and Economic Perspectives*, *supra* note 4.

185. In Maryland, entrepreneurial lawyers now charge clients a flat fee of \$30 for basic legal advice provided over the telephone. Other law firms provide similar services by fax or online. See David Hyman, *A Second Opinion on Second Opinions*, 84 VA. L. REV. 1439, 1443 n.20 (1998); see also Mark Thompson, *Settling Online: Litigation Without Lawyer Noise*, RECORDER (S.F.), Apr. 22, 1999, at 4 (discussing an innovative on-line claims-settlement facility that expedites settlement by minimizing personality conflicts and splitting small differences).

186. Competition has encouraged lawyers to use low-cost providers, including secretaries, legal assistants, and paralegals, to handle routine tasks. Between 1983 and 1997, the number of legal assistants increased 270%, from 128,000 to 346,000. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1998, at 418 tbl.672 (1998). The population of

Expansion also brought women and minorities into the legal profession in record numbers. Texas, our home state, now has 17,000 female attorneys, a threefold increase since 1982, and women are projected to "account for close to 40 percent of all State Bar of Texas members by the year 2005."¹⁸⁷ Minority enrollment in the Texas bar rose 47% between 1993 and 1998.¹⁸⁸ Similar trends were in evidence nationwide.¹⁸⁹ In 1983, women and Hispanics constituted, respectively, 15.3% and 0.9% of employed attorneys in the United States. In 1997, the corresponding figures were 26.6% and 3.8%.¹⁹⁰ Barbara Curran was right to predict that "the overall proportion of women in the profession . . . [would] continually increase throughout the 1980s and into the 1990s."¹⁹¹ Women and minorities may continue to be less than proportionally represented, but their participation has improved remarkably.¹⁹²

Law looks more like a service industry than before, and lawyers look more like America. Does this mean that everything is sweetness and light in the legal profession? No. Many associates spend long hours doing tedious work in isolation. Many clients are obnoxious. Most lawyers are feeling enormous pressure to reduce costs, and many have seen their incomes fall.¹⁹³ For these lawyers, times are hard, and for this reason, they are

paralegals with Associates of Arts degrees is predicted to grow by 68% in the 1996-2006 period. *See id.* at 420 tbl.673; *see also* Sander & Williams, *supra* note 138, at 443 ("By 1986, the number of paralegals reached 176,000—a remarkable increase of 128% in six years."); Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1397-98 (1999) (commenting on the enormous staff-to-attorney ratios at plaintiffs' firms that represent clients en masse); Beth W. Herman, *Treating Paralegals as Professionals*, LEGAL TIMES, June 7, 1999, at 54 (discussing the high demand and salaries for paralegals).

187. CYNTHIA L. SPANHEL ET AL., ANNUAL REPORT ON THE STATUS OF WOMEN IN THE STATE BAR OF TEXAS, 1998-99, at 1 (1999).

188. *See* CYNTHIA L. SPANHEL & CAROL L. CANNON, STATISTICAL PROFILE OF THE STATE BAR OF TEXAS MEMBERSHIP, 1998-99, at 2 (1999).

189. For data on women lawyers, *see* Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 L. & SOC'Y REV. 19, 42-49 (1986).

190. *See* U.S. CENSUS BUREAU, *supra* note 186, at 417 tbl.672.

191. Curran, *supra* note 189, at 49. The cover of the *American Lawyer* recently identified the entry of women into the profession as "the story of the century." AM. LAW., Mar. 1999.

192. President Clinton recently admonished the bar to open itself further to minorities. *See* Greg Mitchell, *Clinton To Issue Call for Legal Diversity*, RECORDER (S.F.), July 20, 1999, at 4. However, the day before his address, an article in the *National Law Journal* reported that few successful minority-owned companies send their legal work to minority attorneys. *See* Arthur S. Hayes, *Non-Affirmative Actions*, NAT'L L.J., July 26, 1999, at A1. This suggests the existence of an economic impediment that, if not removed, will continue to limit minority participation in the bar.

193. *See* American Bar Found., *supra* note 138 ("The real earnings of solo practitioners in the Chicago samples, in 1995 dollars, declined from a mean of \$116,490 in 1975 to \$80,929 in 1995, a 30% decline. Median incomes declined from \$99,159 to \$55,000, a 45% decline."). From 1972 to 1982, "partner incomes fell 15%, and incomes of sole proprietors fell a remarkable 46%!" Sander & Williams, *supra* note 138, at 449-50. These numbers reflect income figures adjusted for inflation and calculated as a three-year moving average. These numbers also mask significant differences within areas of practice. For example, salaries at elite law firms rose, even though average partner income declined. *See id.* at 474; *see also* Renee Deger, *Gunderson Hikes 1st-Year Pay to \$145K*, RECORDER (S.F.), Dec. 23, 1999, at 1.

complaining.¹⁹⁴ The economic growth that occurred in the late 1990s eased the financial pressures somewhat and made lawyers happier than they were,¹⁹⁵ but many attorneys continue to grumble about billing pressures, long hours, boredom, ungrateful clients, and frustrated expectations.¹⁹⁶

This residual dissatisfaction seems utterly predictable to us:¹⁹⁷

The practice of law has become more competitive Naturally it is less fun. Competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus and in more or less time to drive the less efficient producers out of business.¹⁹⁸

Like other service providers, lawyers have to compete hard for business and work hard to please clients. They also have to do paperwork, due diligence,

194. Scholars have taken lawyers' complaints as a sign that the profession is in crisis. See, e.g., GLENDON, *supra* note 2, at 86-89; KRONMAN, *supra* note 1, at 370-73 (stating, for example, that "[t]o the ultimate question of life's meaning, it is now unthinkable that one can find even the smallest part of an answer by choosing a legal career").

195. See John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 736 (1999) ("When we asked Chicago lawyers how satisfied they were with their jobs, 84% reported that they were either satisfied or very satisfied—about 10% were neutral, 5% were dissatisfied, and only 1.6% were very dissatisfied."); Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971, 975-76 (1999); Michael D. Goldhaber, *Is the Promised Land Heav'n or Hell?*, NAT'L L.J., July 5, 1999, at A17 (reporting the assessments of John P. Heinz of the American Bar Foundation that earlier studies reporting high levels of dissatisfaction "reflected a weak economy," that these studies were unreliable because "of their low response rates," and that "[a]ll the best studies show that practicing lawyers are as happy as any other workers"). As the *American Lawyer* noted:

The partners are happy. That is the clear message of the 1999 *American Lawyer* survey of 624 partners sprinkled across the Am Law 100 law firms. In overwhelming numbers they report that they find their work stimulating, enjoy the life of the large firm, consider their partners to be friends or at least trustworthy colleagues, and, for the most part, are satisfied with their compensation (which averages, by their report, a very satisfying \$526,000). No matter how we tortured the numbers, the results were the same. Young and old, men and women, New York and Los Angeles, litigators and transactional lawyers—the partners are content.

Press, *supra* note 91, at 75.

196. See, e.g., *Associates Like the Profession, but Not Their Jobs*, N.Y. L.J. (Aug. 10, 1999) <<http://www.lawnewsnetwork.com/stories/A5491-1999Sep10.html>> (surveying 150 associates at New York law firms and finding that although 89.3% enjoy working as lawyers, 38.9% of those working at large firms expected to change jobs in the next 12-18 months); Michael D. Goldhaber, *Waging a War of Attrition*, NAT'L L.J., Dec. 13, 1999, at A1 (reporting that, "on average, 18.5 percent of associates at large firms left last year for other work").

197. Not everyone agrees with this. See, e.g., Schiltz, *On Being*, *supra* note 3. There also remain some odd statistics to explain. For example, the suicide rate among male lawyers is reportedly twice that of the general population, a statistic that puts lawyers in a category that includes health care workers, psychologists, police officers, and farmers. See Laura Gatland, *Dangerous Dedication*, A.B.A. J., Dec. 1997, at 28-29.

198. POSNER, *supra* note 175, at 92; see also MILTON C. REGAN, JR., LAW FIRMS, COMPETITION PENALTIES, AND THE VALUES OF PROFESSIONALISM 11 (Working Paper Series in Law in Bus. & Econs., Georgetown Univ. Law Ctr. Working Paper No. 184280, 1999) (reporting on a study showing that "law firm profit margins have fallen from about 33% to the range of 10-15%").

and other boring tasks. There are bound to be many unhappy campers. But no one ever said that lawyers are entitled to be happier, richer, or more satisfied with their careers than people in other occupations.

The changes that occurred during the middle of the twentieth century made legal services easier to find because they forced lawyers to serve clients more economically. This made life harder for lawyers, but it made clients happier.¹⁹⁹ And is not making clients happy, in the main, what professionalism is about?²⁰⁰ Anticompetitive regulations may have boosted lawyers' earnings and morale and enabled them to be more statesman-like and less service-minded than lawyers are today, but only a person with a lawyer-centric view of the world would find these compelling reasons to mourn the past.²⁰¹

III. THE MORALITY OF PRO BONO LEGAL WORK²⁰²

Right-wingers are not the only ones who attack attorneys. Left-wingers do too. In fact, some of the most fervent critics of the legal profession are liberal law professors and bar leaders who accuse lawyers of shirking the moral obligation to help the poor.²⁰³ The statistics certainly show that most

199. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 191 (1999) ("The increase in competition" that has occurred since the 1960s "has forced lawyers to serve their clients better and so to rely less on mystique and more on specialized knowledge that has genuine value to the client.").

200. See REGAN, *supra* note 198, at 35 ("The first value expressed by the idea that the lawyer is a professional is devotion to the client."); see also Gilson & Mnookin, *supra* note 55, at 4 (observing that recent accounts of the alleged decline of the profession employ a "legal centric" analysis that "embrac[es] an unremitting belief that the profession itself controls the operative conditions of its own professionalism"). Various components of professionalism are discussed in Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993).

201. Glendon's book, *A Nation Under Lawyers*, is a lengthy plea that the economic conditions of law practice should always remain as they were from 1920 to 1960, when restraints on competition enabled lawyers to make money without really trying and "upwardly mobile men and women" who lacked rainmaking skills but "were simply good at practicing law" routinely became partners and enjoyed the benefit of "lockstep" compensation. GLENDON, *supra* note 2, at 20-24. Why lawyers should be insulated from economic forces to which doctors, engineers, and other service providers are exposed we cannot say. However, we do remember a parody that Allan Sherman, the Borscht Belt singer-comedian, wrote to the tune of the Gilbert and Sullivan song *The Modern Major General*: "When I was a lad I went to Yale, and I knew then that I could never fail. For I studied very hard and, furthermore, I polished up the apple for the professor." ALLAN SHERMAN, *When I Was a Lad*, on *THE BEST OF ALLAN SHERMAN* (Atlantic Records 1990); see also *Funny Music Lyrics* (visited Nov. 21, 1999) <<http://www.geocities.com/SunsetStrip/4656/demento/04lysher.htm>> (listing the lyrics of *When I Was a Lad*). Today, a law degree, even one from Yale, no longer guarantees financial success. For trenchant criticisms of Glendon, see POSNER, *supra* note 199, at 194-200; and Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996).

202. For purposes of this article, we distinguish public service from legal assistance for the poor, which we refer to as pro bono work.

203. This lawyer-bashing from the Left sometimes is accompanied by a defense of lawyers against charges from the Right. See, e.g., Rhode, *supra* note 133, at 990-99 (attacking

lawyers do little pro bono work.²⁰⁴ This is why advocates for the poor lobby for minimum pro bono requirements.²⁰⁵ They know that few lawyers will provide pro bono legal services unless the obligation to do so is quantified and enforced.

Arthur Liman believed quite strongly that lawyers have a moral duty to assist the poor:

In a civilized society, it is simply unacceptable that the only time a poor person can get into court is when he commits a crime. Those who look upon free legal services for the poor as a luxury we can't afford don't have the slightest understanding of what it means to be a member of the profession of law It means defending the rights of the helpless, not just the mighty. It means sometimes taking on the government . . . for the economically disadvantaged, which arouses controversy.²⁰⁶

Liman put his money where his mouth was. He helped found the Legal Action Center, which sued public entities in an effort to find jobs for former convicts and drug addicts and fought discrimination against persons with HIV and AIDS.²⁰⁷ He served as president of the Legal Aid Society of New York—as he put it, “the largest criminal-defense law firm in the United States.”²⁰⁸ He chaired the board of directors of the Capital Defender Office, an organization created after New York State had adopted the death penalty.²⁰⁹ His law firm also did a substantial amount of pro bono work.²¹⁰

We applaud the efforts that Liman and thousands of other lawyers have made to meet the legal needs of the poor. Even so, we see no reason to encourage lawyers to make donations of legal services their preferred form of charity. Many poor people need money, hot meals, home repairs, medical assistance, transportation, and help with chores far more than they need legal services. Lawyers should provide the forms of charity that poor people need most, especially gifts of cash.

conservative politicians for spreading myths about litigation); *id.* at 1013-18 (criticizing lawyers for failing to help middle- and low-income Americans).

204. See Rhode, *supra* note 10, at 291-92 (discussing statistics). Reports sent voluntarily to the State Bar of Texas show that members of the Texas bar performed a median of 20.5 hours of pro bono work for the period from June 1997 through May 1998. See DEPARTMENT OF RESEARCH & ANALYSIS, STATE BAR OF TEX., ANNUAL VOLUNTARY REPORTING, JUNE 1997 THROUGH MAY 1998, at 3.

205. See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999). Rhode received a special award from the ABA in honor of her efforts to encourage lawyers to work for the poor. See Elizabeth Amon, *ABA Cites 7 for Pro Bono Work in '98*, NAT'L L.J., July 12, 1999, at A14.

206. LIMAN, *supra* note 24, at 214.

207. See *id.* at 210-12.

208. *Id.* at 213.

209. See *id.* at 217-18.

210. See *id.* at 172-74 for a description of Paul, Weiss's pro bono activities.

It is perilous to treat the subject of pro bono work in a serious academic way. The belief that indigent persons have strong claims to free legal assistance seems to be more a religious dogma than a policy stance. As academics, however, we are committed to free inquiry. The claim that lawyers and law students should be required or encouraged to donate legal services is like any other call for regulation. It must be dispassionately assessed.

Serious discussion may proceed more easily if readers remember that the question we are posing is not whether lawyers should help the poor but *how* they should do so.²¹¹ All persons of means should be charitable, especially to widows, orphans, the handicapped, and others whose poverty results from circumstances that are largely or wholly beyond their control.²¹² However, not all forms of charity are equally efficacious, and we see no reason to encourage lawyers to do pro bono work when other forms of charity do more to help the poor.

We begin the discussion of the morality of pro bono work by reiterating our belief that private-sector lawyering makes an enormous economic contribution to social welfare, including the welfare of the poor. By negotiating and arranging efficient, wealth-creating transactions, lawyers help our economy grow, producing jobs and making people's lives better.

How greatly does economic growth help the poor? Liman seemed to believe that the impact is negligible: "History tells us," he writes, "that no invisible hand looks after the disadvantaged."²¹³ In fact, the invisible hand of private enterprise helps the poor considerably. There is a close correlation between a nation's score on the United Nations Human Development Index (HDI), which measures basic human welfare, and a nation's overall wealth.²¹⁴ Nations with market economies also have better HDIs than others.²¹⁵ Focusing on the poor more narrowly, a recent analysis found that overall GDP has a strongly positive and significant correlation with statistical measures that target the welfare of indigent populations or nations' welfare expenditures.²¹⁶ "[G]reater levels of national wealth are

211. It also may help to give readers another target to shoot at. In this spirit, we quote Judge Silberman's remark that "[m]uch pro bono work . . . is really an effort to seek redistribution of money or power by circumventing the political process." Silberman, *supra* note 51, at 611-12. By comparison to Judge Silberman's views, ours are the picture of moderation.

212. On the duty to redistribute income to the poor, we commend the works of Brian Barry and Robert Goodin. See, e.g., *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* (Brian Barry & Robert E. Goodin eds., 1992).

213. LIMAN, *supra* note 24, at 173.

214. The HDI considers literacy, life expectancy, and per capita GDP. See MARC M. LINDENBERG, *THE HUMAN DEVELOPMENT RACE* 16-17, 20 (1993) (summarizing the HDI and noting the close association between per capita GDP and levels of literacy and life expectancy).

215. See *id.* at 30.

216. The HDI and five other measures are summarized in Frank B. Cross, *International Determinants of Human Rights and Welfare: Law, Wealth or Culture*, 7 *IND. INT'L & COMP. L. REV.* 265, 270, 274 (1997).

associated with higher levels of individual freedom and overall human welfare, notwithstanding distributional and other problems”²¹⁷ The relationship between wealth and the welfare of the poor and disadvantaged is not linear; the poor are better off in some wealthy nations than in others. But the empirical evidence shows quite clearly that economic prosperity helps the poor.

If private-sector economic activity helps the poor, private-sector lawyering that helps the economy grow does so too. When considering the morality of ordinary legal work, it is important to keep this in mind. Everyone knows that private-sector legal work consumes a far larger portion of lawyers’ time than does pro bono work.²¹⁸ Yet the widely held impression, which Liman shared, is that pro bono work accounts for most of the contribution that lawyers make to the welfare of the poor.²¹⁹ The truth may be that private-sector work accounts for the lion’s share of the benefit by promoting economic expansion. In 1998, economic growth “lifted 1.1 million Americans out of poverty,” and “[t]he percentage of people below the official poverty line fell to its lowest level since 1989.”²²⁰ Growth helped the hardcore poor as well as those on poverty’s fringes.²²¹ A rising tide raises many boats.

Liman was not satisfied by the indirect contributions that lawyers make to the poor by toiling in the private sector. Neither are scholars like Deborah Rhode and David Luban. They want bar associations to require lawyers to do pro bono work.²²² They also want law schools to set minimum pro bono standards for law students.²²³ Philosophical liberals and utilitarians

217. *Id.* at 276; see also Krishna Mazumdar, *Measuring the Well-Beings of the Developing Countries: Achievement and Improvement Indices*, 47 SOC. INDICATORS RES. 1 (1999) (noting that research has shifted from the study of per capita GDP to indices of human well-being but that GDP tends to correlate closely to well-being).

218. See *supra* text accompanying note 204.

219. See, e.g., LIMAN, *supra* note 24, at 214-16.

220. Geneva Overholser, *Rising Incomes Only Widen Gap*, AUSTIN AM.-STATESMAN, Oct. 17, 1999, at G3; see also Tony Pugh, *U.S. Poverty Rates Fall to 1989 Levels*, SAN DIEGO UNION-TRIB., Sept. 25, 1998, at A1 (reporting that economic growth has reduced poverty, notwithstanding the effects of welfare reform); Tim Smart et al., *Working Their Way Up*, WASH. POST, Sept. 12, 1999, at H1 (reporting how economic growth has helped the poor, especially minorities).

221. See Dirk Johnson, *Tight Labor Supply Creates Jobs for the Mentally Disabled*, N.Y. TIMES, Nov. 15, 1999, at A1 (reporting that strong demand for labor caused employment among the mentally disabled to skyrocket, increasing “more than 300 percent” in just eight years). For a more detailed study of the impact of economic growth on the poor, see Center on Budget and Policy Priorities, *Poverty Rates Fall, but Remain High for a Period with Such Low Unemployment* (last modified Oct. 8, 1998) <<http://www.cbpp.org/9-24-98pov.htm>>.

222. See, e.g., David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 801 n.31 (1991); Rhode, *supra* note 205, at 2418-25.

223. See, e.g., *Report of the Working Group on Representation Within Law School Settings*, 67 FORDHAM L. REV. 1861, 1865-66 (1999) (discussing the consensus reached by the working group at the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues, held at Fordham University, which included Luban and Rhode as participants); Rhode, *supra* note 205, at 2433-36.

will be put off by these proposals. John Stuart Mill and Jeremy Bentham believed in helping the poor, but neither recommended conscripting the labor of the rich for that purpose.²²⁴ The idea of forcing people to help others also will seem jarring to anyone who is familiar with American legal traditions. Although this country has many anti-poverty programs, it has few "bad Samaritan" laws that punish individuals for failing to come to the rescue of others.²²⁵ A pro bono requirement for lawyers would be a significant departure from this country's tradition, which is to assign the duty to render aid to the moral rather than the legal realm.²²⁶

Society certainly could do more to assist the disadvantaged. It does not follow, though, that legal services are what the poor need most. Of social programs that target the poor, those that provide financial assistance do the best job of alleviating poverty.²²⁷ Social security payments lift millions of people, including many children, above the poverty line every year, and they do so with remarkably little waste.²²⁸ The superiority of cash transfers should not be surprising. The signature of poverty is too little wealth. Cash transfers address the shortage directly by making poor people richer.

We know of no data showing that pro bono legal assistance offers the same return as contributions of cash or other services. Professor Rhode asserts that "[a]ccess to the justice system is particularly critical for the poor, who often depend on legal entitlements to meet basic needs such as food, housing, and medical care."²²⁹ Liman also says as much.²³⁰ But the

224. Bentham devoted great effort to reform of England's poor law and to the creation of institutions that would provide meaningful poverty relief. For a description and critique of Bentham's project, see CHARLES F. BAHMUELLER, *THE NATIONAL CHARITY COMPANY: JEREMY BENTHAM'S SILENT REVOLUTION* (1981). Mill believed that taxation was an appropriate means of transferring wealth to people who were too poor to pay for their children's education. See MILL, *supra* note 57, at 97-99.

225. See POSNER, *supra* note 199, at 109.

226. See *id.* at 108-09.

227. See Center on Budget and Policy Priorities, *Government Benefits Programs Cut Poverty Nearly in Half, Analysis Finds* (last modified Mar. 9, 1998) <<http://www.cbpp.org/snd98.htm>>; Center on Budget and Policy Priorities, *The Safety Net Delivers: The Effects of Government Benefit Programs in Reducing Poverty* (last modified Nov. 15, 1996) <<http://www.cbpp.org/SAFETY.htm>>; Center on Budget and Policy Priorities, *Strengths of the Safety Net: How the EITC, Social Security, and Other Government Programs Affect Poverty* (last modified Mar. 9, 1998) <<http://www.cbpp.org/snd98-rep.htm>>.

228. In 1996, Social Security payments raised more than 11 million elderly Americans out of poverty. See Gene Koretz, *The Sturdiest Safety Nets*, BUS. WK., Mar. 23, 1998, at 24, 24. Without such payments, about half of the elderly would live in poverty. See U.S. GEN. ACCOUNTING OFFICE, *SOCIAL SECURITY: ISSUES IN COMPARING RATES OF RETURN WITH MARKET INVESTMENT 2* (1999). Social security transfers also provide a considerable benefit to the non-elderly beneficiaries of the program. Around 7.5 million Americans get survivors benefits while over six million receive disability benefits. See SOCIAL SEC. ADMIN., *THE FUTURE OF SOCIAL SECURITY 2* (1999).

229. Rhode, *supra* note 205, at 2418; see also LUBAN, *supra* note 46, at 243 (emphasizing the unmet legal needs of the poor).

230. See LIMAN, *supra* note 24, at 214-15 (elaborating on the statement that "[t]he poor have legal problems of the most urgent nature").

assertion is not supported with data that demonstrate the power of legal services to help feed, house, or medicate the poor or the efficiency with which they do so. Insofar as housing is concerned, there even is evidence that lawsuits and regulations intended to help the poor have harmed them by limiting their options and discouraging employers from providing free shelter for migrant workers on site.²³¹ The tendency of economic growth and cash transfers to reduce poverty is supported by considerable empirical evidence. The tendency of legal services to do so is not.

From the standpoint of efficiency, one would expect pro bono activities to make society poorer than equally beneficial cash transfers would. In markets, services migrate to purchasers who are willing and able to pay for them. Pro bono efforts divert legal services from these buyers to consumers who are unable or unwilling to pay market rates. The reassignment moves resources from higher-valued uses to lesser-valued ones. It would be more efficient to transfer cash from lawyers to the poor while leaving the market for legal services undisturbed.

It may be helpful to reconsider the problem just mentioned from two other perspectives. First, there is a need to guard against waste. In first-party transactions, prices serve this function by discouraging overconsumption. In third-party-payer situations, other devices must be employed. Thus, health-care insurers require policyholders to meet deductibles and make copayments. Without these deterrents, doctors' offices would be filled with hypochondriacs, lonely persons wanting company, people with minor ailments, and others who should not be there.²³² Pro bono representations are third-party-payer arrangements. Therefore, unless one assumes that all possible pro bono representations yield benefits that exceed their costs—an assumption that legal aid lawyers and law professors reject²³³—surrogates for prices are needed to distinguish between matters that are and are not worth lawyers' time.

231. The combination of civil litigation and regulation "turned out to be a singularly rotten strategy" for housing the poor. David Hyman, *Accountable Managed Care: Should We Be Careful What We Wish for?*, 32 MICH. J.L. REFORM (forthcoming 1999) (manuscript at 24; on file with *The Yale Law Journal*). For supporting authority, see Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947 (1991); Werner Z. Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 CORNELL L. REV. 604 (1984); Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931 (1991); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 558-62 (1984); Jason DeParle, *Slamming the Door*, N.Y. TIMES, Oct. 20, 1996, § 6 (Magazine), at 52; and Steven Greenhouse, *U.S. Surveys Find Farm Worker Pay Down for 20 Years*, N.Y. TIMES, Mar. 31, 1997, at A1.

232. The classic essay explaining the need for deductibles and copayments to limit overconsumption of medical services is Mark V. Pauly, *The Economics of Moral Hazard*, 18 AM. ECON. REV. 531 (1968).

233. Legal aid lawyers screen cases carefully. So do contingent-fee lawyers and others who offer free initial interviews. See Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, WIS. LAW., Mar. 1997, at 10, 13 (reporting that Wisconsin contingent-fee lawyers reject over 70% of requests for representation). Often, they use secretaries to identify

Second, there is the problem of Pareto-inferiority. A poor person who attaches positive value to legal services may value other goods and services more highly.²³⁴ Even if legal assistance is a fundamental interest, it may pale in comparison to other interests of the poor. Are legal services as important to the poor as food, housing, transportation, or medical care? Not if revealed preferences provide any insight into the matter. The average poor person spends a minuscule portion of his or her budget on legal services. Outlays for food, health care, shelter, clothing, education, entertainment, transport, alcohol, and many other goods and services are far greater.²³⁵

To us, it seems odd to suggest that lawyers should be required, or even encouraged, to donate legal services when poor people would rather have other things.²³⁶ Why not have lawyers donate money? Allowing cash transfers would create opportunities for Pareto improvements. Suppose that a lawyer's hourly income is two hundred dollars but that a poor person would rather have fifty dollars than an hour of the lawyer's time. If the lawyer were to work an extra hour for a paying client and donate fifty dollars to the poor, the lawyer would be better off and the donee would be happier, too.

Poor people often would rather have the cash value of a donor's time than the donor's personal assistance. To make the point extravagantly, suppose Bill Gates volunteered to spend eight hours helping out at a soup kitchen. According to the Bill Gates Wealth Index, his time is worth about one million dollars per hour.²³⁷ A savvy charity administrator might suggest

and weed out inappropriate clients. See HOY, *supra* note 93, at 54-56. Many lawyers who represent the poor also require clients to pay something—the equivalent of a copayment or a deductible—and contract for the right to withdraw from the nontrivial fraction of clients who turn out to be irresponsible. See LUBAN, *supra* note 46, at 279 (discussing the review of requests for pro bono representation); cf. Stephen Yelenosky & Charles Silver, *A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney Fee Provisions*, 28 CLEARINGHOUSE REV. 114, 130, 132 (1994) (obligating the client to "timely inform the case handler of all changes of client's address and telephone number" and authorizing legal services program to withdraw if it "is not able to contact client despite reasonable efforts").

234. The policy decision to provide specific entitlements instead of cash has led to "[o]rganized welfare racketeering." Erik G. Luna, *Welfare Fraud and the Fourth Amendment*, 24 PEPP. L. REV. 1235, 1240-41 (1997).

235. The Bureau of Labor Statistics tracks spending patterns by income level in its annual Consumer Expenditure Surveys. Legal services constitute so small a fraction of consumer outlays that they do not merit even a separate line entry. See Bureau of Labor Statistics, *Consumer Expenditure Surveys: Standard Bulletin Tables* tbl.2 (visited Nov. 23, 1999) <<http://stats.bls.gov/csxstd.htm>>. Some who advocate increased pro bono efforts admit that other kinds of assistance may be more valuable. See, e.g., Nelson, *supra* note 138, at 382 ("While legal services may not be as high a priority for the poor as employment, medical care, food, or shelter, to the extent that the less privileged need legal representation, lawyers should do more to provide it.").

236. To be clear, we are not arguing that pro bono legal work is bad. We are arguing only that it may not be the best option for providing charity.

237. See *Bill Gates Wealth Index* (visited Sept. 29, 1999) <<http://www.templetons.com/brad/billg.html>>. Obviously, the one-million-dollars-per-hour figure refers to Gates's wealth, not the salary he earns as Microsoft's CEO.

that Gates spend one or two hours chopping vegetables and doing dishes so as to get the symbolic, inspirational, or public-relations value that his personal involvement would yield, but make up the rest of the time in cash. Gates can help the poor far more by managing Microsoft and giving away his wealth than by donating services worth only the minimum wage.²³⁸

An example involving Bill Gates may seem fanciful.²³⁹ Not even the lawyers who stand to collect billions in fees in the states' tobacco cases have hourly rates approaching his. But it does not take Gates-like earning potential to enable one to help the poor more by giving them cash rather than services. In Texas, lawyers reported a median hourly rate of \$150 in 1996.²⁴⁰ Query: Would a poor person waiting for help at a legal aid office rather have twenty hours of a lawyer's time—the figure usually suggested as the minimum annual pro bono requirement—or \$3000?²⁴¹ To be eligible for legal aid today, a person must have an income near the poverty level.²⁴² Three thousand dollars would be a lot of money for so poor a person to pass up.

Many lawyers charge far more than \$150 per hour. In 1996, five percent of Texas lawyers charged over \$250 per hour.²⁴³ As one moves up the scale, the number of poor people who are more desperate for a lawyer's time than for his or her money surely plummets. Rare indeed is the indigent person who would rather have twenty hours of a lawyer's time than \$5000.

It also seems odd to suggest that lawyers who have no expertise in legal areas that are important to the poor—landlord/tenant law, family law, immigration law—should divert themselves from the subjects in which they

238. Gates recently established a charitable foundation with an endowment of \$17 billion. See Pandora, *Comment*, INDEPENDENT (London), Sept. 2, 1999, at 4. The foundation could do enormous good for the poor, far more than Gates himself could have done had he toiled for the poor every day of his life from dawn to dusk.

239. In fact, it is not. Billionaire philanthropist George Soros helped fund 70 two-year public-interest fellowships for recent law school graduates who wish to help battered women, homeless persons, Native Americans, and migrant farm workers. See Tony Mauro, *Billionaire To Help Young Lawyers Aid the Poor*, USA TODAY, June 2, 1998, at 1A. With Soros's help and additional funding from more than 100 law firms, corporations, and bar associations, the National Association for Public Interest Law developed "the nation's largest postgraduate, public service, legal fellowship program," one that "puts scores of lawyers to work" in "low-income and other needy communities." National Ass'n for Pub. Interest Law, *Welcome to NAPIL Fellowships for Equal Justice (NFEJ)* (visited Dec. 15, 1999) <<http://www.napil.org/MAINNFEJ-FM.html>>. Soros could not have made this massive contribution had he not made a fortune in commerce.

240. See DEPARTMENT OF RESEARCH & ANALYSIS, STATE BAR OF TEX., 1997 ATTORNEY ECONOMIC SURVEY: HOURLY RATES IN TEXAS LAW FIRMS 4 (1997).

241. Is 20 hours too high a number? When arguing for mandatory pro bono, David Luban states that "[s]ome cases require more than forty hours." LUBAN, *supra* note 46, at 280 (emphasis added).

242. For example, Gulfcoast Legal Services, Inc., which operates out of Florida, set an eligibility guideline of \$20,563 for a family of four in 1999. See Gulfcoast Legal Servs., *Guidelines for Determining Client Eligibility* (visited Dec. 9, 1999) <<http://www.gulfcoastlegal.org/guidelines.htm>>.

243. See DEPARTMENT OF RESEARCH & ANALYSIS, *supra* note 240, at 4.

specialize. Certainly, these lawyers could retool, but why have them do so? At best, they are likely to become journeymen whose assistance would be less valuable than the services that specialists would provide. It would make more sense to have poor people represented by lawyers who practice in their areas of concern full-time.

The buyout options that some pro bono proposals contain are an attempt to deal with some of the problems we have identified.²⁴⁴ In Florida, for example, the program now on the table would "encourag[e] lawyers to contribute at least 20 hours of direct legal service to the poor or, alternatively, [to make] a payment of \$350 to legal services providers."²⁴⁵ The assumption appears to be that, in terms of value to the poor, the two options are equal. If so, every lawyer whose after-tax earnings exceed \$17.50 per hour should make the cash contribution. Lawyers will be better off. Their paying clients will be happier. And the poor, who will be represented by experts instead of journeymen, will not miss the conscripted lawyers' time.

Finally, when deciding whether lawyers should prefer pro bono legal work or other charitable acts, one must wonder whether there is any reason to prefer poor people with law-related needs to poor people with needs of other kinds. Suppose that a lawyer has two options: to spend twenty hours working on a habeas petition for a death row inmate, or to help an infant obtain a life-saving operation by working twenty hours for a paying client and donating the earnings to a charity hospital in cash. We do not see that the first option is necessarily better than the second. Nor, in our judgment, is it obviously better for a lawyer to defend an indigent person who is charged with a lesser felony than to volunteer as a Big Brother or Big Sister to a poor child or to help build a Habitat for Humanity home for an indigent family. There may be many reasons to rank the latter activities ahead of the former.²⁴⁶

244. Buyout options do not address the need for case-sorting mechanisms or solve the bang-for-the-buck problem. However, they are clearly superior to mandatory personal service. Another possibility for avoiding waste is to allow lawyers to perform pro bono work for non-profit corporations.

245. Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, FLA. B.J., Apr. 1999, at 12, 13.

246. Giving money to the poor enables them to prioritize their needs and purchase legal services in the amounts they desire. One might object by suggesting that flaws in the market for legal services could preclude this benefit. Perhaps there are not enough lawyers serving the poor, but the availability of additional cash to pay for legal services should reduce this problem, as demand creates supply. It is mandatory pro bono that would potentially destroy the supply of lawyers serving the poor, because it would provide free government-directed competition in the market. Perhaps the poor are ill-informed about their need for and the availability of legal services to address their needs. Consequently, they might buy too few legal services for their own good. While this is undoubtedly true to a degree, it evades the true question: Who is better able to discern the needs of the disadvantaged—the disadvantaged themselves or a situationally distant lawyer? Surely to ask the question is to answer it. Only the most arrogantly paternalistic would

The tradeoffs we have posed are real, not hypothetical. When Paul, Weiss “agreed to take on the docket of cases brought by prisoners in the U.S. district court in Manhattan,” its lawyers helped poor people with legal needs instead of poor people who needed food or medicine.²⁴⁷ When the same lawyers became “leaders in representing death row inmates in habeas corpus petitions,”²⁴⁸ they spent resources that could have paid for dental care or school supplies. When the Legal Action Center, which Liman helped run, brought class actions against public employers, it may have helped end employment discrimination against former drug and alcohol abusers, but it built no Habitat homes.²⁴⁹ Were these the best ways to use the available resources? It may be reassuring to answer “yes” without investigating the costs and benefits, but it would be foolish to do so. It also would be inconsistent with the goal of helping the poor.

A supporter of pro bono legal work might accuse us of stating a false dichotomy. If many forms of giving are desirable, then lawyers should provide them all. Lawyers should represent indigent defendants, support charity hospitals, be Big Brothers and Big Sisters, *and* hammer nails into Habitat houses. This may be the right answer from a moral perspective, but it is wrong for two other reasons. First, it admits that there is nothing distinctive about legal services as a form of charity. All forms of charity are good because all help the poor, and all charitable acts that cost the same and help the poor to the same extent are equally good. Consequently, there is no obvious reason to elevate pro bono work over other charitable endeavors in which lawyers may engage. Second, the reality may be, and quite likely is, that pro bono efforts shift resources from some forms of charity to others. Is it ludicrous to think that lawyers at Paul, Weiss and other firms with large pro bono programs give less to charity than they otherwise would, precisely because they feel that they are helping the poor through pro bono programs? The observation that “there’s no such thing as a free lunch” may be as true of charitable giving as it is of other things.

The possibility of shifting resources away from other forms of charity may not trouble those who want lawyers to do more pro bono legal work. They may believe that poor people need legal services far more than they need help of other kinds. We suggested above that the spending habits of the poor do not support this conclusion. If given cash, poor people would purchase legal services in minute amounts. Those who persist in thinking that legal services are more important than other forms of charity must overcome this finding. They must show a need for paternalism.

claim that a rich lawyer better understands the overall needs of the poor than do the poor themselves.

247. LIMAN, *supra* note 24, at 173.

248. *Id.*

249. *See id.* at 211.

The paternalists also must keep in mind the danger of self-delusion. As lawyers and law professors, we naturally place great value on legal services and emphasize the good that law can do for people. However, we should be slow to substitute our assessments of the value of goods and services for those of the people we want to help. As a class, poor people are needy, not incompetent. If they value television sets, clothing, legal services, or health care differently than we do, the appropriate presumption is that they know what is best for them.

It is especially odd for a *lawyer* to be paternalistic. As an agent and a member of a service profession, a lawyer must respect a client's wishes and not assume that a client is incompetent. It is important to maintain this attitude of deference in the pro bono context because pro bono clients lack the most potent weapons that principals normally use to keep agents in line. The threat of being fired by a pro bono client is meaningless. From a lawyer's perspective, discharge may even be a plus. A pro bono client's threat to withhold payment or to sue for breach of duty is equally silly. Because pro bono clients have so little leverage over attorneys, the danger of disloyalty is relatively great. A pro bono client needs an especially respectful and deferential lawyer, not a paternalistic one.

The leading arguments for having lawyers do pro bono work are not paternalistic. According to Deborah Rhode, a law professor at Stanford who made service to the poor the focus of her term as president of the Association of American Law Schools (AALS), "The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available."²⁵⁰ We have already questioned the accuracy of the first proposition. For the moment, though, we will suppose with Rhode that poor people need legal services as much as or more than they need other things, and that it is better to help those with unmet legal needs than those who need transportation or help around the house. It remains to consider why she believes that the burden of helping the legally needy should fall disproportionately on attorneys.

Rhode gives three reasons. First, because "the legal profession has a monopoly on the provision of essential services," it is appropriate in her judgment to impose a burden that is proportionate to the economic gain that this monopoly enables lawyers to enjoy.²⁵¹ Second, "[b]ecause lawyers occupy . . . a central role in our governance system, there is also particular value," she believes, "in exposing them to how that system functions, or

250. Rhode, *supra* note 205, at 2418. Rhode's efforts to encourage pro bono work in law schools are reflected in a 1999 report entitled *Learning To Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities* that is available from the American Association of Law Schools.

251. Rhode, *supra* note 205, at 2420.

fails to function, for the have-nots To give broad segments of the bar some experience with poverty-related problems and public interest causes may lay critical foundations for change.”²⁵² Third, “pro bono work . . . [benefits] lawyers individually and collectively.”²⁵³ Individually, she claims, it gives lawyers “intrinsic satisfactions,” “valuable training, trial experience, and professional contacts,” and helps “build problem-solving skills.”²⁵⁴ Collectively, it “is a way for the bar to improve the public standing of lawyers as a group” because “nearly half of nonlawyers believe[] that providing free legal services would improve the profession’s image.”²⁵⁵

These are unpersuasive reasons. Consider the contention that pro bono work is intrinsically satisfying and a source of valuable training and contacts. If this were true, lawyers would be tripping over each other in a mad rush to do pro bono work. Lawyers are always looking for ways to build valuable skills and drum up business, yet, as Rhode points out,²⁵⁶ most do little pro bono work. The natural inference is that lawyers do not find this work particularly rewarding. More precisely, whatever rewards it generates fail to offset the detriment of not being paid.²⁵⁷

Nor is Rhode obviously right in claiming that pro bono work is the ticket to improving the profession’s standing in public-opinion polls.²⁵⁸ Many pro bono engagements are unpopular. People complain when lawyers represent undocumented aliens or file habeas corpus petitions on behalf of death row inmates.²⁵⁹ Civil rights representations also make enemies for the

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *See supra* note 204 and accompanying text.

257. We do not deny that pro bono work offers younger lawyers who work at large law firms opportunities to gain experiences and satisfactions that are missing from their practices. Our point is only that these upsides appear not to motivate lawyers very strongly.

258. For the record, we agree neither that lawyers are especially unpopular nor that action of any kind is needed to raise the profession’s standing in public-opinion polls. Market measures of popularity show strong support for the profession. Consumer demand for legal services is at an all-time high. Students compete for opportunities to enter the profession and pay enormous amounts in tuition and opportunity costs for the privilege. Charitable giving to law schools is constantly setting new records. Why these data should be ignored in favor of opinion polls is a mystery to us.

259. An incident that occurred a few years ago in Austin, Texas, demonstrates the unpopularity of some pro bono criminal-defense representations. Attorney Nona Byington represented Kathy Henderson, a babysitter alleged to have abducted and buried the infant Brandon Baugh. When it was revealed that Byington possessed a map showing the location of the grave, an immense public outcry against the lawyer arose, and the county sheriff illegally entered and searched her office. *See* Bob Banta, *Byington Files Suit Against Sheriff Keel; Attorney Says She Was Defamed, Illegally Detained During Search for Brandon Baugh*, AUSTIN AM.-STATESMAN, Nov. 5, 1994, at B1; Dave Harmon, *Murder Appeal Centers on Map; Conviction in Slaying of Baby Brandon Baugh Could Crumble if State Loses Right to Document*, AUSTIN AM.-STATESMAN, June 9, 1997, at B1; Mike Todd, *Federal Officials Close Investigation of Keel*, AUSTIN AM.-STATESMAN, Nov. 14, 1996, at A1; Mike Todd, *Suit Against Sheriff Settled for*

profession. When lawyers at Skadden, Arps, Slate, Meagher & Flom worked pro bono in support of an anti-bilingualism measure in California, the intense publicity led a partner to suggest that the firm would "reconsider its policy of allowing its lawyers to handle such controversial matters."²⁶⁰ And imagine how the public would react if lawyers were to announce a campaign to defend poor people who are accused of being drunk drivers, wife beaters, child molesters, deadbeat dads, or ritual vivisectionists. We suspect that the response would be something other than widespread applause.

Rhode cannot seriously dispute the unpopularity of pro bono legal services. She recently quoted a Denver legal aid lawyer to the effect that "the only thing less popular than a poor person these days is a poor person with a lawyer."²⁶¹

It may be sad, but it is nonetheless true, that in this democracy of ours, legal aid agencies are poorly funded and greatly constrained because many people dislike what they do.²⁶² The abstract idea of free legal services for the poor has widespread appeal because, like "compassionate conservatism" and other empty slogans, it can mean all things to all people. The concrete reality of a poor person armed with a lawyer is less nebulous, however, and is far more often opposed. Landlords dislike lawyers who advocate for tenants. Farmers dislike lawyers who press the claims of migrant workers. Taxpayers dislike lawyers who represent plaintiffs clamoring for social services. And so on. Politicians understand this. They give legal aid offices lukewarm support and limited tax dollars because they know that lawyering for the poor is controversial.²⁶³

Lawyers could do more to elevate their standing in the polls by letting the world know how charitable they already are and by making it their objective to be more charitable per capita than any other profession.²⁶⁴

\$100,000; *Lawyer Who Claimed Keel Abused Power To Get County Funds, Written Apology*, AUSTIN AM.-STATESMAN, Oct. 3, 1995, at A1.

260. Mark Thompson, *Pro Bono Incognito*, RECORDER (S.F.), Sept. 20, 1999, at 1; cf. Susan Hansen, *Backlash on the Bayou*, AM. LAW., Jan./Feb. 1998, at 50, 51 (discussing the political controversy surrounding the efforts by Tulane Law School's environmental-law clinic to block the construction of a \$700 million polyvinyl chloride plant).

261. Rhode, *supra* note 10, at 295.

262. Rhode recognizes this. See Rhode, *supra* note 205, at 2424 ("[T]he funding increase that would be necessary to meet existing demands [for legal aid] does not appear plausible in this political climate."). On the controversy surrounding the federal funding for legal services, see, for example, VIRGINIA THOMAS & RYAN H. ROGERS, TIME FOR CONGRESS TO HOLD THE LEGAL SERVICES CORPORATION ACCOUNTABLE 1 (Heritage Found. Backgrounder No. 1312, 1999) (arguing against federal funding).

263. See Alan W. Houseman, Center for Law & Soc. Policy, *Can Legal Services Achieve Equal Justice?* (visited Dec. 9, 1999) <<http://www.clasp.org/pubs/legalservices/dialogue.htm>>.

264. Lawyers themselves are well aware of this fact, as they have sought to enhance their public image. The Louisiana Bar Association, for example, has produced a promotional video that focuses on "earnest lawyers feeding the homeless at a soup kitchen; empathetic lawyers strolling with AIDS patients; and wise lawyers teaching children about the legal consequences of illicit

Imagine the press that lawyers would receive if bar associations across the country challenged groups of doctors, engineers, architects, accountants, investment bankers, realtors, dentists, and other wealthy professionals to match their charitable contributions. Lawyers would become famous for building more Habitat houses, supplying more food banks, making more recordings for the blind, or sending more needy children to camp than anyone else. The enormous public-relations potential of general giving can be realized without incurring the downside risks that legal services for the poor often entail.

Now consider Rhode's attempt to ground a pro bono requirement in the monopoly that lawyers are said to have on the practice of law.²⁶⁵ If she means that lawyers possess a monopoly in the ordinary economic sense, she is greatly mistaken. As Richard Abel pointed out in the mid-1980s, "the entry barriers" that lawyers "painfully constructed over half a century have failed to withstand the assaults by the growing numbers aspiring to become lawyers. This should not be surprising. Supply control in a capitalist economy can never be more than temporary; its very success engenders more vigorous attacks."²⁶⁶ Others have described the "inability to control entry to the profession" as "the most telling weakness of the organized bar," and have observed that "nothing has curbed the steady expansion of the profession in recent years."²⁶⁷

The monopoly that lawyers supposedly have on the practice of law probably has few significant economic effects. Neither individual lawyers nor lawyer groups have enough market power to extract monopoly rents. David Luban asserts the contrary but offers no supporting evidence.²⁶⁸

Both within the bar and between the bar and parallel professions, competition for business is fierce. The lawyer population soon will hit the

drug use." David Wallis, *Biting Back; Some Lawyers Try To Make Nice*, N.Y. TIMES, Nov. 28, 1999, § 4, at 3. The same article notes that, while people hold critical views of the profession, they are happy with their own lawyers. *See id.* This suggests that the sort of ordinary private lawyering that we have applauded best elevates the standing of the profession.

265. Luban makes the same argument. *See* LUBAN, *supra* note 46, at 286-87.

266. Abel, *supra* note 174, at 10.

267. Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession to LAWYERS' IDEALS/LAWYERS' PRACTICES*, *supra* note 183, at 1, 7. Lawyer-bashers seem unable to make up their minds whether lawyers have constrained entry to protect their incomes or used the political process to maximize the number of attorneys. *Compare, e.g.,* BRICKMAN ET AL., *supra* note 5 (arguing that a lack of competition explains the prevalence of a standard one-third contingent fee), *with* Magee, *supra* note 12 (arguing that lawyers in Congress have caused the population of lawyers to expand by creating work for lawyers and that, for this reason, "the usual market forces of supply and demand" cannot be relied upon "to control [lawyers'] numbers").

268. *See* LUBAN, *supra* note 46, at 246-47 ("By restricting the practice of law to members of the bar, of course, a professional monopoly is guaranteed and a higher-than-otherwise level of lawyers' fees is maintained.").

one million mark.²⁶⁹ No group this large could possibly maintain a price-fixing conspiracy. Nor could a conspiracy within any practice area succeed, there being few barriers to lateral movement within the profession. If plaintiffs' attorneys were earning inflated fees, other lawyers would enter the field and lure away clients by charging less. Clients also could obtain legal services from other suppliers if lawyers overcharged. Our competitors include accountants, financial planners, tax preparers, independent paralegals, public and private claims adjusters, real estate agents, sports and talent agents, investment bankers, title companies, on-line settlement services, and book publishers.²⁷⁰ Lawyers may once have possessed and exploited an economic monopoly, but they certainly do not do so today.

Luban bases his argument for pro bono on a monopoly of a different sort, which Rhode also may have in mind. He asserts that lawyers have a monopoly in the distribution of a good—law—that is supplied by the state:

Rather than a relationship between private producer and private consumer, with the state looking on from outside, the "law economy" (the system by which the benefits of law are produced, distributed, and consumed) should be modeled differently: as a relationship between the state as producer, its citizens as beneficiaries, and lawyers who act as trustees administering the actual distribution of law.²⁷¹

Luban then draws the inference that the state can properly impose a tariff—a pro bono obligation—in return for granting lawyers an exclusive license to market its product.²⁷²

Luban's argument has many problems, not the least of which is that its premise is false. Lawyers have nothing that even remotely resembles a monopoly on the use of law or the distribution of its benefits. Any adult can use the law without asking a lawyer for permission or help, and the vast majority do so daily. Every cash transaction transfers a license to sue from one person to another.²⁷³ Every credit card transaction creates a legal obligation to pay. Every time someone buys an automobile, takes a job, signs a lease, starts a business, borrows money, contracts for insurance, applies for a driver's license, registers to vote, settles a claim with an

269. Rhode knows well the enormous size of the profession. See Rhode, *supra* note 133, at 990 (pointing out that "[t]he number of lawyers in America has almost tripled over the last three decades and now approaches 900,000").

270. Liman understood that the lawyer's turf often overlaps with that of other professionals. He contrasted American lawyers like himself, who provide advice on business, law, and public relations, to "European lawyers," who "confine[] themselves solely to legal questions." LIMAN, *supra* note 24, at 110.

271. David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 63 (1999).

272. See *id.* at 65.

273. See Joseph H. Sommer, *Where Is a Bank Account?*, 57 MD. L. REV. 1, 10-18 (1998).

insurer, renegotiates a deal, pays taxes, or registers for Social Security, the legal world changes. Few people consult lawyers before doing these things. Our private-law system empowers everyone to change the legal landscape. Lawyers have no monopoly.

What lawyers do have is special training, knowledge, and experience that enables them to use law efficiently and expertly. This is why clients find their services worth paying for. It is true that lawyers are licensed by the state, but this effort at consumer protection does not warrant a decision to place a special burden on lawyers to meet the legal needs of the poor.

Finally, turn to Rhode's claim that there is "particular value" in showing lawyers how the justice "system functions, or fails to function, for the have nots."²⁷⁴ "[E]xperience with poverty-related problems and public-interest causes," she contends, "may lay critical foundations for change."²⁷⁵ The assertion appears to be that pro bono experiences will move lawyers politically to the left. The implicit normative premise is that, if there were more left-liberal lawyers around, the world would be a better place.

We do not know whether pro bono experiences would convert lawyers into lefties. We suspect that the effect would not be uniform. Some pro bono representations involve accused murderers, thieves, rapists, wife-beaters, child molesters, drug dealers, and gang-bangers—bad people who do bad things. After getting to know these individuals, some lawyers may favor the death penalty more strongly than before.

Lawyers lucky enough to represent more attractive clients also can emerge from pro bono experiences with mixed emotions. Many poor people have problems because they make bad choices. Unemployment sometimes occurs because employees have engaged in illegal or irresponsible behavior at work. Alcoholism and drug addiction sometimes persist because abusers have refused treatment or surrounded themselves with temptations. Diseases sometimes occur because people are ignorant, superstitious, obese, inert, promiscuous, unclean, or unreliable with medications. Excessive debt sometimes reflects immoderate spending. Will lawyers who are required to represent clients who make poor choices move to the left politically? Or will the experience of representing people whose values are unlike theirs and who fail to help themselves harden them against the poor? We will not pretend to know.

For the sake of argument, we are willing to concede that the experience of representing the poor might motivate lawyers to change the legal system in ways that could help the poor. We will even concede the separate point that lawyers' efforts might pay off, that is, that the legal system might be

274. Rhode, *supra* note 205, at 2420.

275. *Id.*

reformed. The question remaining is whether this predicted benefit justifies Rhode's proposed regime of mandatory pro bono or even a special obligation on the part of lawyers to help meet the legal needs of the poor. It is impossible to answer affirmatively, we believe, without knowing far more about the reforms. Are we talking about more lawyers for criminal defendants? For abused spouses? For impoverished tenants? For welfare claimants? For somebody else? How many people will be helped? How greatly will they be assisted and at what cost? Without specifics, there is only speculation.

Moreover, this defense of mandatory pro bono has a manipulative quality that will offend many people and that, in our judgment, is both illiberal and dangerous. The assertion is that people who do not share Rhode's strong desire to help the poor should be required to do so because pro bono experiences would strengthen their commitment to this cause. This is not a nonsensical claim. A person who agrees that helping the poor is the morally right thing to do but who lacks the will to put the belief into action might seek out character-building experiences. However, Rhode is not arguing that weak-willed people should volunteer for training. She wants governmental bodies to require people to have experiences that, she hopes and believes, will transform their values and political beliefs.²⁷⁶ This seems both condescending and authoritarian to us, even though we agree that wealthy people have moral duties to help the poor.

We imagine that Rhode would react with great hostility if people with right-wing views were to propose analogous uses of governmental power. Antiabortionists are convinced that their beliefs are morally sound. Should the states or the federal government therefore compel women to endure experiences that would make them less likely to terminate pregnancies? Members of the Christian Coalition oppose atheism and homosexuality on moral grounds. Should government therefore craft mandatory programs to encourage faith in God and discourage same-sex intimacy? We do not think so, and we do not think that the reason has anything to do with the possibility that Rhode may be smarter than the right-wingers. In a liberal society, everyone has to recognize that the government will generally refrain from attempting to engineer the moral and political values of adults. To make lefties out of lawyers, Rhode is free to argue and persuade, but, when she attempts to enlist government support for her cause, she oversteps the line.

276. *See id.*

IV. THE MORALITY OF PUBLIC SERVICE

Arthur Liman had a lifelong connection to Paul, Weiss. However, he sometimes left the firm for long periods of public service. His initial stint as a government lawyer came early in his career, when he joined Robert Morgenthau's office as an Assistant U.S. Attorney and prosecuted securities fraud.²⁷⁷ Later, Liman served on the McKay Commission that investigated the prison riot at Attica that ended so bloodily.²⁷⁸ Later still, he served as chief counsel for the Senate's Iran-Contra investigation.²⁷⁹ He also handled New York City's lawsuit against Grumman.²⁸⁰ The City charged that Grumman provided defective trucks for subway cars, and Liman convinced a jury to award the City approximately \$80,000,000.²⁸¹

Liman regarded public service as an especially high calling. He devoted an entire section of his memoir to these engagements.²⁸² The section begins with a lofty appeal:

Public service also has its risks. It often brings criticism, sometimes from a lawyer's own clients. But if we care about society, we must be willing to take those risks. Public service, in my view, is a lawyer's privilege, one of the rewards of the profession. It is not an act of duty or charity. For a lawyer, public service is as natural as breathing. It is what we do when we're at our best.²⁸³

Liman lived by this creed even when representing private clients. For example, while defending clients against charges of wrongdoing by the SEC, he advised the agency through the back door, suggesting how it might usefully reform the securities laws.²⁸⁴

Liman's public-service engagements were interesting and useful. However, we would describe his many private representations the same way. What puzzles us is his belief, which others share, that public service is a higher calling than other legal work. Our own diverse experiences provide no basis for this conclusion. One or the other of us has advised legislative committees, submitted uncompensated *amicus curiae* briefs, represented plaintiff classes, helped Texas win its historic lawsuit against the tobacco

277. See LIMAN, *supra* note 24, at 33-53.

278. See *id.* at 175-94.

279. See *id.* at 300-16.

280. See *id.* at 195-208.

281. See *id.* at 207.

282. See *id.* at 175-225.

283. *Id.* at 174.

284. See *id.* at 95-96. Liman thus acted as Robert Gordon thinks all corporate lawyers should. See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 287 (1990) (encouraging lawyers involved in takeovers to "giv[e] some relatively disinterested advice to policy-makers on how to regulate them").

industry, worked for and against insurance companies, and served as a government lawyer. We would be hard-pressed to say that our acts of public service were intrinsically more important, valuable, or fulfilling than our private legal engagements, our teaching, or our scholarship.

To us, doing government work usually is like doing law for any other client. Often, the same work is done in the public and private sectors at the same time.²⁸⁵ Consider Liman's representation of New York City in the subway case. It may have been fine for Liman to represent the city, but to us his actions seem no more praiseworthy than those of other civil litigators, including, for example, the lawyers for Grumman.

Nothing about the lawsuit itself lent any particular moral virtue to Liman's side. The lawsuit was an \$80,000,000 breach-of-contract action between two massive corporate entities. Its purpose was to transfer money from one entity to the other, so that Grumman's shareholders would bear the loss instead of New York City's taxpayers or subway riders. As a contract action, the lawsuit is hardly unique, and, insofar as it involved large corporate entities, it is positively common. The late twentieth century witnessed an explosion of such litigation.²⁸⁶ Indeed, although it is commonly supposed that personal-injury lawyers are to blame for most of the discovery abuse and other troubles that beset the nation's courts, corporations are the real culprits.²⁸⁷ It takes large claims to create large lawsuits and large amounts of resources to fund them. It is no wonder that large commercial cases mean the most work for lawyers and the courts.

The object of the lawsuit—to protect New York City's taxpayers and subway riders—does not make Liman's involvement especially praiseworthy either, unless one takes the view that the economic interests of these persons are automatically more important than those of Grumman's shareholders. In practical terms, the lawsuit meant only a few dollars per taxpayer, rider, or shareholder, so the proposition that individual members of either group had much at stake cannot be maintained. Moreover, the fact that a public entity was involved on one side and a private entity on the other seems purely an accident of fate. Private companies provide and manage transportation services, so the controversy could have involved private companies on both sides. It is a fact, then, but not one with any particular moral weight, that New York City operates its subway system publicly. If and when the economics tip far enough in the right direction,

285. Thus, we teach at a state-sponsored university while other law professors work at private institutions. We would be hard-pressed to argue that being state employees makes our teaching and scholarship uniquely valuable.

286. For sources, see Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1413-17 (1993). The authors report that an increase in litigation by corporate plaintiffs accounts for most of the growth in punitive damages awards. See *id.* at 1411.

287. See Silver, *supra* note 186, at 1395 n.66 (citing sources).

the city will outsource the operation. In the meantime, it is hard to see how the city's involvement could have turned a business dispute into a moral crusade or elevated Liman's involvement to a higher moral plane.

There is a lesson to be learned about the morality of government employment from this. New York City could have used publicly employed attorneys to prosecute its lawsuit against Grumman. Paul, Weiss was brought in because New York City's Mayor, Ed Koch, and the city's attorney, Alan Schwartz, "concluded that the city did not have the requisite legal staff for what promised to be a stiff legal battle."²⁸⁸ In other words, the city outsourced the legal function instead of providing for its needs internally in an effort to achieve a better result.

Outsourcing is increasingly common. Most states used private attorneys in their tobacco cases, thereby handing off both the supply of legal services and much of the litigation risk.²⁸⁹ Cities, counties, and other public entities that engaged in tobacco litigation did so as well,²⁹⁰ and some are also using private attorneys in their gun lawsuits.²⁹¹ Municipalities in Texas pay lawyers contingent fees to collect taxes.²⁹² The smallest Texas towns use private attorneys to do everything, having too little legal business to employ salaried lawyers full-time.²⁹³ Some public entities employ full-time public defenders to handle criminal cases.²⁹⁴ Others pay private lawyers to do the same job.²⁹⁵

In Texas, the state also uses publicly employed attorneys to do private-interest work. The largest department in the Attorney General's Office,

288. LIMAN, *supra* note 24, at 196-97.

289. In testimony to Congress, Lester Brickman reported that 36 states had engaged outside lawyers on contingency. See *Attorney's Fees and the Proposed Global Tobacco Settlement: Hearings Before the Subcomm. on Courts and Intellectual Property of the House of Representatives Comm. on the Judiciary*, 105th Cong. 2 (1997) (statement of Lester Brickman, Professor of Law, Cardozo School of Law).

290. See Joe Steinbaker, *Attorney in Tobacco Deal Reduces Fee to \$10 Million*, HOUSTON CHRON., July 25, 1998, at 1.

291. Cities' efforts to hire outside lawyers on contingency has met with stiff resistance from gun interests. See, e.g., Violence Policy Ctr., *National Rifle Association and the Gun Industry Launch Double-Barreled Attack on Legal Rights of Gun Violence Victims* (visited Dec. 9, 1999) <http://www.vpc.org/fact_sht/nralitfs.htm>.

292. The Texas Property Code authorizes municipal taxing units to "contract with any competent attorney" to collect delinquent taxes and to pay the attorney "20 percent of the amount of delinquent tax, penalty, and interest collected." TEX. TAX CODE ANN. § 6.30(c) (West 1997).

293. Documents provided to Professor Silver in connection with expert witness testimony on class-action issues showed that many small cities have legal budgets under \$100,000. See *Houston Lighting & Power Co. v. City of Wharton*, No. 01-96-00642-CV, 1996 WL 600931, at *1-2 (Tex. App.—Houston [1st Dist.] Oct. 17, 1996, writ dismissed w.o.j.) (discussing the testimony of Professor Silver).

294. See Kelly A. Hardy, Comment, *Contracting for Indigent Defense: Providing Another Forum for Skeptics To Question Attorney's Ethics*, 80 MARQ. L. REV. 1053, 1053-57 (1997).

295. See *id.*

housing over half the attorneys it employs, is the child-support division.²⁹⁶ Attorneys in this division do exactly what their counterparts in the private sector do.²⁹⁷ One could say that all these attorneys, public and private, do public-interest work because unsupported mothers and children often become burdens on the state. This would not show that the work of government lawyers is uniquely important or praiseworthy, however; it would show the reverse, namely, that lawyers working in the private sector also further the public good.

Any discussion of the moral value of public service must come to grips with the fact that lawyers in government service and private attorneys are fungible. The decision to draw legal services from one source rather than another is simply a choice. In competitive markets, it reflects the relative advantage of integrating horizontally versus using the price mechanism to obtain services from an external source.²⁹⁸ In government, it reflects a wider range of considerations, including political and other noneconomic variables. In both contexts, the choice of a particular supplier has no obvious bearing on the importance, value, or praiseworthiness of the work to be performed.

When discussing the moral basis of public service, one sometimes hears that it is admirable because lawyers do it for free or at reduced salaries. Kronman talks of a lawyer-statesman's willingness to make sacrifices for the public good.²⁹⁹ Liman pointed out that his firm represented New York City in the subway lawsuit "at a reduced rate"³⁰⁰ and that he took a substantial cut in pay when he joined Morgenthau's office.³⁰¹ Legal aid lawyers might be said to be especially noble because they are so dismally paid.³⁰²

We are not persuaded. First, a lot of public service is done at market rates.³⁰³ This includes, for example, government work for which private

296. See Janet Elliott, *Supporting Cast: AG's Troops Fight Child Support War One Battle at a Time*, TEX. LAW., Aug. 23, 1999, at 1 (reporting that the child support division employs 1800 assistant attorneys general, each of whom is responsible for 6659 cases).

297. The services available through the child support division include locating a noncustodial parent, establishing paternity, establishing and enforcing child support orders, establishing and enforcing medical support orders, reviewing and adjusting child support payments, and collecting and distributing child support payments. See Office of the Attorney Gen. of Tex., *Texas Attorney General Child Support Program* (visited Sept. 29, 1999) <<http://www.oag.state.tx.us/child/mainchil.htm>>.

298. See RONALD H. COASE, *The Nature of the Firm*, in THE FIRM, THE MARKET, AND THE LAW 33 (1988).

299. See KRONMAN, *supra* note 1, at 14 ("The outstanding lawyer . . . cares about the public good and is prepared to sacrifice his own well-being for it").

300. LIMAN, *supra* note 24, at 197.

301. See *id.* at 35.

302. See D'Alemberte, *supra* note 245, at 27 n.21 (contending that "legal services lawyers often forgo lucrative law firm job offers to earn starting salaries of \$16,000 to \$20,000").

303. Precisely what market rates should be for public employees is, of course, something that the market decides by forcing workers to choose between public- and private-sector jobs.

attorneys compete and government positions that attract large numbers of applicants. The pay-cut approach concedes that government work done at market rates is not uniquely praiseworthy despite being public service.

Second, by charging less than market rates, lawyers subsidize public activities for which taxpayers would otherwise foot the bill. Is this redistribution desirable? Government legal departments contain disproportionately large numbers of women and minorities.³⁰⁴ One may even hope that these offices will become established routes for women to distinguish themselves, it being difficult for women rearing children to prosper at private firms.³⁰⁵ Legal aid offices also employ many female and minority attorneys.³⁰⁶ Why should these people sacrifice earnings for the benefit of taxpayers in general? We see no obvious moral justification for this.

Third, private subsidies of public activities raise thorny political issues and, for this reason, are tightly controlled. Under Texas law, for example, a person who gives cash or goods to a public official for use in connection with an official's job makes a political contribution that must be reported.³⁰⁷ The same law forbids corporations from giving public officials cash for such a purpose and from lending them the unpaid assistance of their employees.³⁰⁸ Only committees set up for the purpose of making political contributions can do so,³⁰⁹ and they must file reports with the Texas Ethics Commission.³¹⁰

Presumably, those who opt for public-sector work think that the experience, working conditions, or job satisfaction justify the wage loss. We note for the record that in some states public-sector lawyers are represented by unions that bargain for them collectively and that, presumably, seek to maximize their compensation. See Catherine Bridge, *State Attorneys Union Votes In New Leadership*, RECORDER (S.F.), Sept. 17, 1999, at 2.

304. See CURRAN & CARSON, *supra* note 181, at 10 fig.5 (showing that female lawyers were relatively more likely than male lawyers to be employed in government); CYNTHIA L. SPANHEL & JANIS A. PRINCE, ANNUAL REPORT ON THE STATUS OF RACIAL/ETHNIC MINORITIES IN THE STATE BAR OF TEXAS, 1998-99, at 3 (1999) (reporting that "[m]inorities are disproportionately represented among government lawyers—20 percent of minority lawyers compared with 11 percent of all Texas attorneys work for a branch of government"); SPANHEL ET AL., *supra* note 187, at 3 (reporting that "[w]omen attorneys are less likely to work in private law practice than their male counterparts—56 percent of female lawyers compared with 71 percent of male lawyers are private practitioners," and that "[m]ost of the difference is accounted for by the higher percentage of women working as government attorneys (19 percent of females compared with nine percent of males)"); see also Curran, *supra* note 189, at 45 (reporting that women were disproportionately overrepresented in areas other than private practice, the judiciary, and private industry).

305. See GLENDON, *supra* note 2, at 87-88; see also Hope Viner Samborn, *The Pressure's Off: Staff Attorney Positions Offer Lawyers a Niche and a Life*, A.B.A. J., Mar. 1999, at 82 (discussing the attractions of staff attorney positions).

306. See *Divergent Paths: Gender Differences in the Careers of Urban Lawyers*, RESEARCHING THE LAW: AN ABF UPDATE, Summer 1999, at 1, 4 (reporting that "women are . . . overrepresented in the government and public interest law sectors").

307. See TEX. ELEC. CODE ANN. §§ 253.062, 254.001 (West 1986 & Supp. 1999).

308. See *id.* §§ 253.091, 253.093-.094, 253.103.

309. See *id.* §§ 253.037, 253.092, 253.100-.101.

310. See *id.* §§ 254.001, 254.031, 254.121, 254.151.

Subsidies are regulated for many reasons. The most obvious purpose is to guard against hidden attempts to purchase influence. A second reason, more relevant here, is to force public officials to face up to the real costs of their decisions. When public projects are paid for with public funds, taxes must be raised, money must be borrowed, or other projects must be cut. In any event, politics will occur along standard lines. Funds will be appropriated (or not), bonds will be authorized (or not), and priorities will be debated and assigned. Private subsidies circumvent these processes. They free holders of executive offices from the constraint of appropriation that ordinarily binds them. This is not necessarily a good thing: Requiring executives to seek legislators' approval is a primary means of keeping executives in line.

In this respect, a darker side of Paul, Weiss's representation of New York City emerges. Ed Koch, a Democrat, was Mayor of New York City when the lawsuit was waged. Liman too was a Democrat, and his firm supported many Democratic causes.³¹¹ By representing the city at a submarket rate, Liman freed Koch from having to raise money, pay a contingent fee, or divert government attorneys from other tasks. Any of these actions would have been politically costly for Koch to take, for the city was in terrible financial shape.³¹² Thus did a Democrat who was a private citizen free a Democratic mayor from having to develop support for his policies.³¹³

Many readers may not find Paul, Weiss's donation to Koch disturbing. How could it be wrong to help out the mayor of a financially strapped city by providing legal services at a cut rate? New Yorkers seem not to have minded, and, after all, Koch was responsible to them.

We wonder whether these readers also feel positively about the contributions that funded covert activities in the Iran-Contra affair, the investigation of which capped Liman's career. There, wealthy Americans donated more than six million dollars for the support of the Nicaraguan Democratic Resistance, commonly called the "contras."³¹⁴ Foreign governments like Saudi Arabia and South Korea pumped in millions more. By obtaining funds from these sources, officials in the Reagan Administration nullified Congress's control of the purse. Not only had Congress refused to help the contras; it had prohibited any use of federal funds for that purpose.³¹⁵ Lt. Col. Oliver North and others circumvented this restriction by obtaining monies elsewhere.

311. Cf. LIMAN, *supra* note 24, at 27, 171-72.

312. *See id.* at 197.

313. To be clear, we are not asserting that the decision to file the lawsuit was a poor policy decision. In retrospect, it clearly was not. We are saying only that there is an issue of checks and balances to be addressed.

314. *See LIMAN, supra* note 24, at 301.

315. *See id.*

North's efforts to fund the Nicaraguan contras differed in many important respects from Liman's efforts on behalf of Mayor Koch. Congress expressly opposed President Reagan's efforts to support the contras. Liman does not report that New York City voiced any opposition to Mayor Koch's suit against Grumman. North broke many laws. As far as we know, Liman broke none. North's activities endangered human life. Liman's activities endangered \$8,000,000 held by Grumman. North acted in secret. Liman's representation of New York City was publicly known. The list of differences could be greatly extended.

That said, it remains true that, in both contexts, private-sector resources were used to fund governmental operations. This is not obviously a good thing. The power of the purse is an extraordinarily important constraint on the behavior of public officials. *The Federalist* describes it as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."³¹⁶ North's activities neutralized it. By using resources gathered from nongovernmental sources, he created an executive who, for the purpose of supporting a war, was not dependent on Congress for money. This creature is unknown to the U.S. Constitution.³¹⁷

Liman's donation of services affected New York City's political structure analogously, if less dramatically. That the funding branch of New York City's government did not expressly oppose the lawsuit against Grumman may raise one's comfort level—the problem seems to have been a lack of cash rather than strong opposition to litigation. However, this only forces one to ask a harder question. When a legislative body holds the purse strings, is an executive free to do anything that the legislature does not expressly oppose, so long as operating costs can be off-loaded to the private sector? Or may an executive proceed only with operations that the legislature agrees to fund?

This question is of great and continuing importance. Consider President Clinton's stated aim of suing the tobacco companies. Although he announced the lawsuit with great fanfare, the Senate Appropriations Committee refused to provide the \$20,000,000 he requested to cover legal fees and expenses. To prevent the Justice Department from pursuing the litigation, the Committee's report even stated that "[n]o funds are provided for expert witnesses called to provide testimony in tobacco litigation."³¹⁸ The appropriations bill later enacted neither provided the funding the

316. THE FEDERALIST NO. 58, at 356, 359 (James Madison) (Clinton Rossiter ed., 1961).

317. See LIMAN, *supra* note 24, at 299.

318. S. REP. NO. 106-76, at 25 (1999); see also *Obstacle to a Tobacco Suit*, N.Y. TIMES, July 7, 1999, at A20 (condemning the Senate Appropriations Committee's actions to block a federal government lawsuit against the tobacco companies).

President requested nor precluded the use of funds for tobacco litigation.³¹⁹ Is this showing of opposition strong enough that President Clinton should not proceed with the lawsuit, even with the help of private-sector lawyers and expert witnesses acting pro bono? Or does Congress's failure to enact a resolution akin to the Boland Amendment, which prohibited President Reagan from using federal funds to support the contras, leave him free to do so? Democrats and Republicans would probably answer these questions differently.

Donations of private services to public officials raise difficult problems of public choice. It is one thing to block funding for a project by lobbying members of a committee. It is another thing, usually more difficult, to convince a legislature to enact a law or adopt a resolution prohibiting an executive from doing something. If we say that an executive is constrained in only the latter situation, we will have a relatively strong executive and a form of legislative politics that limits the power of blocking coalitions. If we say that the mere failure to appropriate is a constraint, we will have a relatively weak executive and a legislative politics that empowers blocking coalitions.³²⁰

We do not know how powerful a blocking coalition should be under the U.S. Constitution. Nor do we know whether national political institutions and local ones should operate the same way. Fortunately, we need not resolve these knotty questions to make the point that private-sector contributions to public officials are a mixed blessing. We need only point out that they have the potential to free public officials from financial constraints that political arrangements normally impose. If the purpose of these constraints is to create a link between officeholders and the people they govern—as, for example, compensation arrangements are supposed to align the interests of agents with those of principals—then private contributions that weaken or alter them cannot be presumed to be good. This is so even though donations are made with the best of intentions, such as the feelings of patriotism that inspired wealthy Republicans to give money to Lt. Col. North or the commitment to public service that led Liman to help Mayor Koch.

319. See President's Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000, 35 WEEKLY COMP. PRES. DOC. 2458, 2461 (Nov. 29, 1999).

320. Daniel Farber and Philip Frickey write that "committees may also give some degree of veto power to the constituencies most vitally affected by certain legislation, giving them a form of insurance against adverse government actions." DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 56 (1991). Private contributions to executives reduce the value of this insurance by making legislative committees weaker.

V. CONCLUSION

Political movements need manifestos. The anti-lawyer movement has many, including works by academics who accuse lawyers of diverse sins. The pro-lawyer movement has none. Even scholarly writings that defend the profession by showing, for example, that lawyers are not a drag on the economy, that the “too-hot-coffee” lawsuit against McDonald’s was not frivolous, or that large awards of punitive damages are rare, usually have a negative focus. They rebut charges of wrongdoing but they do not offer a positive program of their own. Yet it must be apparent to everyone that “Lawyers: We’re not as bad as you think!” is a pathetic rallying cry. It also is a poor reason for training students to become attorneys.

Arthur Liman’s memoir is not the manifesto that the legal profession needs. It is, however, an abundantly positive tract that motivates the thoughtful reader to attempt to draw from it a pro-lawyer message that justifies the enormous resources that legal services consume and that should make all attorneys proud. The message we have extracted is not “Lawyers: We do pro bono work” or “Lawyers: We do public service.” These justifications cover activities that few lawyers perform. It is “Lawyers: We solve problems and help people build the world they want to live in.” Lawyers do with law what doctors do with medicines and builders do with cranes.

Law professors are ideally placed to create the body of empirical evidence that is needed to support this message, to refine it, and to show lawyers how to make more valuable contributions to society in the future. Some academics already are doing these things. They are teaching law students how to identify differences that create opportunities for advantageous exchanges and how to negotiate. They are encouraging law students to develop specialized bodies of knowledge that have real value for clients. They are studying what lawyers actually do and how justice systems actually work. More of these constructive, empirically minded scholars are needed.³²¹

Lawyers also can help by doing what Arthur Liman did, by saying that they are proud to be members of the bar and explaining why. These expressions need not appear in written memoirs. Books take too long to write, and few people read them anyway. Better for the remarks to occur in the conversations about lawyers that take place every day. For most people, anti-lawyer sentiments are only skin deep. These sentiments reflect ignorance, propaganda, and a belief that lawyers are safe targets. Lawyers who know the facts and who are proud to be able to help their clients can

321. Cf. POSNER, *supra* note 199, at 228-39 (discussing the need for more “pragmatic legal scholarship”).

easily dispel the rumors just by speaking up. As individuals, lawyers are accustomed to standing up for clients. They must now stand up for themselves.