The Death of an Honorable Profession

CARL T. BOGUS*

INTRODUCTION

The legal profession is dead or dying. It is rotting away into an occupation. On this, those assembled at the bedside concur, though there is much about which they disagree. "The law has become a business like any other," writes Anthony T. Kronman.[1] "The loss of this culture is final," he continues, "and the only choice that lawyers now have is whether to struggle futilely against their fate or accept it with a measure of dignity."[2] Mary Ann Glendon has not given up all hope. We are, she writes, only on "the edge of chaos."[3] The profession is sinking fast, to be sure, but the disease is only thirty years old, which, Glendon reminds us, is "a short span in the life of traditions that have been evolving since the thirteenth century, when lawyers began to congregate in inns near the King's Courts at Westminster."[4]

In the baek of the sickroom, others watch the events with flushed excitement, as if anticipating large bequests from a distant relative whom thcy never much liked. Richard A. Posner, who has little affection for either the law or the profession, awaits the end eagerly. According to Posner, law lacks "real intellectual autonomy" and is properly giving way to "scientific and other exact modes of inquiry," such as economics, which have more authority.[5] The law is fantasy, merely politics and rhetoric masquerading as something more.[6] Posner believes that the legal profession was built upon selfishness, that it is a cartel benefiting from noncompetitive pricing and monopolistic practices.[7] The death of the profession will end these restrictive practices. Laymen will be able to compete with lawyers, and traditional legal education will become optional.[8] George L. Priest holds similar views. The legal systcm is not best understood by lawyers, but by social scientists, he argues.[9] "As a legal scholar becomes serious about some behavioral seience and sophisticated in its practice, he is pulled away from the law as a distinct subject and even as an interesting subjeet," writes Priest. "Indeed, the more seriously the

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* Associate Professor of Law, Roger Williams University School of Law (commencing fall 1996); J.D., 1972, Syracuse University; A.B., 1970, Syracuse University. The Author practiced law in Philadelphia for eighteen years. The Author thanks Christian C. Day, Edward J. Eberle, Cynthia J. Giles, Michael deCourcey Hinds, Lisa G. Lerman, Michael A. Livingson, Nancy J. Moore, Rand E. Rosenblatt, and William G. Ross for their helpful comments on a previous draft of this Article.

1. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 370 (1993).

2. *Id.*

3. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 285 (1994).

4. *Id.* at 288.

5. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 768, 772-73 (1987). Posner is Chief Judge on the United States Court of Appeals for the Seventh Cireuit and a leading figure in the law and economics movement.

6. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 35-37 (1993). Posner attributes the current state of affairs to inconsistent demands on the legal profession. The public expects judges to procure certain political results in areas such as abortion. Yet, courts are supposed to "find law" rather than to "make law." These contrary demands lead lawyers and judges to engage in shallow crafting. *Id.*

7. *Id. passim.*

8. *Id.* at 36 (describing a future with paralegals competing with lawyers, business persons influencing the development of law, and legal education focusing on practical training).

9. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 438 (1983). Priest is the John M. Olin Professor of Law and Economics at Yale Law School.

scholar takes the behavioral theory, the more difficult it becomes to justify why law is a subject worthy of study at all."[10]

Respect for lawyers seems everywhere on the decline. The percentage of Americans who give lawyers high ratings for honesty and ethical standards has fallen from an already unimpressive 27% in 1985 to 17% in 1994.[11] Lawyer bashing is all the rage. This is not new, of course; even Shakespeare knew he could count on a lawyer joke for laughs.[12] What may be new, however, is the concerted, political attack on lawyers. Speaking to the annual meeting of the American Bar Association on August 13, 1991, Vice President Dan Quayle called the civil justice system "a self-inflicted competitive disadvantage,"[13] asking, "Does America really need 70 percent of the world's lawyers?"[14] Never mind that in fact the United States has somewhere between 25% and 35% of the world's lawyers.[15] Quayle's speech tapped a nerve,[16] and lawyer bashing became a political weapon. In his acceptance speech at the 1992 Republican National Convention, George Bush ridiculed Bill Clinton as the candidate supported "by every trial lawyer who ever wore a tasseled loafer," and he repeatedly attacked the "crazy, out-of-control legal system" in his standard stump speech.[17] Two years later, Republicans included as one of ten legislative proposals in their *Contract With America* a so-called Common Sense Legal Reforms Act, which they said was "to stem the endless tide of litigation."[18]

The "current attack on lawyers" may be "a well-orchestrated campaign being conducted by business interests," as Alan M. Dershowitz asserts,[19] but the fact remains that it sells. Even lawyers can cash in on lawyer bashing. A book arguing that "modern law has set out to ban all human judgment"[20] and titled *The Death of Common Sense: How Law Is Suffocating America* became a national bestseller,[21] a rarity for a book dealing with the arcane subject of laws and regulations.[22] Its author, New York lawyer Philip K. Howard, was catapulted into near-celebrity status—he met with the President, the Senate Majority

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10. *Id.*

11. Leslie McAneny & David W. Moore, *Annual Honesty & Ethics Poll: Congress and Media Sink in Public Esteem*, GALLUP POLL MONTHLY, Oct. 1994, at 2. By way of comparison, pharmacists enjoy high ratings of 62% for honesty and ethics by the public. Other professions rate as follows: medical doctors 47%, police officers 46%, business executives 22%, real estate agents 14%, insurance salespeople and members of Congress 9%, car salespeople 6%. *Id.* at 2.

12. WILLIAM SHAKESPEARE, THE SECOND PART OF HENRY THE SIXTH act 4, sc. 2.

13. David Margolick, *Address by Quayle On Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, at A1, A14.

14. *Id.*

15. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 647 (1994).

16. Saundra Torry & Mark Stencel, *Bush, Quayle Find Voters Respond to Anti-Lawyer Theme*, PHILA. INQUIRER, Aug. 29, 1992, at A4; *see also* Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992) ("Cynical pundits suggested the Vice-President was testing how 'lawyer bashing' would play with the American public in the upcoming elections.").

17. Aaron Epstein, *Several Misfires as the Bush Camp Aims at Lawyers*, PHILA. INQUIRER, Sept. 17, 1992, at A9; *see also* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 5-7 (1995) (describing Republican support of tort reform efforts).

18. CONTRACT WITH AMERICA 11 (Ed Gillespie & Bob Schellhas eds., 1994).

19. Alan M. Dershowitz, *Heroes and Hired Guns*, A.B.A. J., Oct. 1991, at 72, 73.

20. *See* Nina A. Burleigh, *Breaking the Rules*, A.B.A. J., May 1995, at 74, 76 (quoting from an interview with Philip Howard, author of THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994)).

21. As of July, 1995, *The Death of Common Sense* had been on the nonfiction bestseller list for 22 weeks. *Best Sellers*, N.Y. TIMES BOOK REV., July 16, 1995, at 30.

22. *See* Richard Lacayo, *Anecdotes Not Antidotes*, TIME, Apr. 10, 1995, at 40, 40 ("Not just anybody can make a best seller out of the bone-dry topic of regulatory law.").

Leader, the governors of four states, and appeared on *Oprah* and *Nightline*—even as others discovered that some of the stories Howard relates in his book are "partial or misleading," while others are "flatly wrong."[23]

Meanwhile, lawycrs express increasing misery in their work. The percentage of lawyers in private practice who say they are "very satisfied" plunged 20% in just six years, from 1984 to 1990.[24] Since 1973, lawycrs have progressively worked longer hours[25] and made less money.[26] Although associates of the largest firms are more highly paid than ever before, they too suffer malaise. The zeitgeist is captured by a former associate in a New York firm who said, "We were paid so much because this is work no one really wants to do."[27] Experts are empaneled to analyze the "identity crisis" in the legal profession.[28] There is general agrcement about the core of the problem: the practice of law is suffering from increascd commercialization.[29] This is not a new concern; for at least one hundred years, people have worried that the profession was turning into a business.[30] "What is unique about the prcsent," writes Rayman L. Solomon, "is that concern over commercialism has become a crisis."[31]

The commercialization of the practice of law is often attributed to increased eompetition. Forces responsible for intensifying competition include changes in the law, particularly decisions by the Supreme Court striking down minimum fee schedules[32] and restrictions on lawyer advertising and solicitation.[33] We might add as well that the Supreme Court has decided that lawyers have a First Amcndment right to comment publicly on pending cases.[34] Lawyers now advertise on billboards, publish discount coupons in yellow page advertisements, and appear on *Larry King Live*, all unheard of twenty years ago.[35] But the factor gcnerally accordcd the greatest weight in increasing

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23. Burleigh, *supra* note 20, at 75; Lacayo, *supra* note 22, at 40.

24. GLENDON, *supra* note 3, at 87.

25. According to an ABA study, "the number of lawyers working more than 200 hours per month" increased from 35% in 1984 to 50% in 1990. Nancy D. Holt, *Are Longer Hours Here to Stay? Quality Time Losing Out*, A.B.A. J., Feb. 1993, at 62, 64.

26. James Lyons, *Law & Economics 101*, FORBES, Feb. 4, 1991, at 91.

27. James Lyons, *It's Not a Wonderful Situation*, FORBES, Feb. 4, 1991, at 90, 91.

28. *E.g.*, ABA Journal Roundtable, *Identity Crisis*, 74 A.B.A. J., Dec. 1994, at 74 (empaneling experts to discuss the theory that professionalism is giving way to commercialism).

29. Galanter, *supra* note 15, at 670.

30. *See, e.g., id.* at 670.

31. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144, 173 (Robert L. Nelson et al. eds., 1992).

32. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

33. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977). A shift may be under way in this area, however. Dissenting in *Shapero*, Justice O'Connor argued that the Court took a wrong turn in *Bates* when it decided that restrictions on the advertising of professional services should be evaluated on the same basis as general commercial advertising. *Shapero*, 486 U.S. at 487-91. In Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995), she mustered a majority for this view and wrote the Court's opinion holding that a state could prohibit lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.

34. Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

35. The Court's potential change of direction in the advertising cases, *see supra* note 33-34 and accompanying text, is motivated not by a concern about the evils of competition but by a worry that advertising and solicitation injure the dignity of the profession. *Went For It, Inc.*, 115 S. Ct. at 2380. For two reasons, however, *Gentile* is even more damaging to the dignity of the profession. First, it dissolved a barrier between court proceedings and street talk. As "officers of the court," lawyers used to consider it their professional duty to refrain from "trying cases in the press" but lawyers now

competition—and hence commercialism—within the bar is the enormous growth in the number of lawyers over the past two decades.

Between 1970 and 1990, the number of law schools in the United States increased from 145 to 182.[36] During the same time, most of the previously existing schools substantially increased the sizes of their student bodies. The combined effect resulted in the number of lawyers and judges in the United States expanding from 320,000 in 1972[37] to 815,000 in 1993.[38] In 1972, there was one lawyer or judge for every 656 Americans; by 1991, the ratio was 1:310.[39] As measured strictly by these figures, therefore, competition became more than twice as stiff for lawyers over the past two decades, and with law schools now producing 38,000 new lawyers annually,[40] the screw is tightening every year.

Change is continuous and inevitable, and we must ask whether the profession is dying or merely changing. That, of course, requires us to ask what we mean by *profession* in the first place. This essay explores these and related questions. Part I uses fiction to examine the changing image of lawyers—both self-image and public image, which of course are intertwined. It shows that the lawyer's image has changed dramatically over the last two generations. Part II presents an indictment. It shows that a significant segment of the bar routinely and patently pads bills and defrauds clients, and it argues that the profession's silence in the face of open and endemic fraud is evidence of its own death. Part III considers what it means to say a profession has died. It wrestles with the question: What is a profession? It looks not inward but outward and considers why journalism—despite building an infrastructure of professional institutions and promulgating a code of ethics—has failed to become a profession. Part IV uses these insights to begin a discussion of how to resurrect the honorable profession of law. Part V offers concluding thoughts.

I. THE CHANGING IMAGE OF LAWYERS IN FICTION

Fictional characters are often archetypes of their times, and they are particularly revealing because key traits are exaggerated.[41] Consciously or unconsciously, writers often create stories that are, on one level, fables or parables about important issues of the

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litigate in the courtroom during the day and on television at night. Second, in contrast to lawyer advertising, which is practiced more aggressively by the lower strata of the bar, *prominent* lawyers promote their clients' causes (and not incidently themselves) in press conferences and on *Larry King Live*. Indeed, this behavior today is what makes lawyers prominent.

36. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1994 Table No. 295, at 191 (114th ed. 1994) [hereinafter 1994 CENSUS].

37. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1981 Table No. 675, at 402 (101st ed. 1981) [hereinafter 1981 CENSUS].

38. 1994 CENSUS, *supra* note 36, Table No. 637, at 407.

39. This ratio is based upon the total U.S. population as reported by Bureau of the Census. *Id.*, Table No. 2, at 8.

40. *Id.*, Table No. 637, at 407.

41. As legal historian Lawrence M. Friedman put it:

> The lawyers of *L.A. Law* are caricatures; but caricatures are always caricatures *of* something, and that something has to be real. The imagery of *L.A. Law* reflects, very likely, real changes in the modal personalities of lawyers, or at least business lawyers—changes that can be linked to changes in litigation and litigation style in recent years.

Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1589, 1600-01 (1989) (emphasis in original).

day. With some deconstructing the allegorical nature of the stories, the hopes, fears, and beliefs of the times can be revealed. As Alfred North Whitehead once wrote, "It is in literature that the concrete outlook of humanity receives its expression."[42]

It is quite easy to select two lawyers from the world of fiction, one epitomizing the lawyer of the last generation, and another from the generation entering practice today. The choices all but suggest themselves: Atticus Finch, created by Harper Lee in *To Kill a Mockingbird*, published in 1960,[43] and Mitchell Y. McDeere from John Grisham's 1991 novel *The Firm*.[44] There was something in each of these works, and in each of these characters, that resonated with a wide audience, and with lawyers in particular.[45] Both books propelled previously unknown authors high into the stratosphere of literary fame.[46]

To Kill a Mockingbird stands as one of the classic works of contemporary American literature and cinema. Lee's novel received the Pulitzer Prize for Fiction in 1961[47] and is so admired that it is still required reading in high schools throughout the land. The movie version[48] is a classic in its own right; it won three Oscars, including Best Actor for Gregory Peck's portrayal of Atticus Finch, and is considered by some to rank among the finest films ever made.[49] John Grisham's work has achieved a different kind of success. With more than seven million copies in print, *The Firm* is one of the most widely read novels of recent times,[50] and it too has a highly successful screenplay adaptation.[51]

The world of the lawyer was well known to both writers and is central to both works. Harper Lee, born in 1929, studied law for several years at the University of Alabama and as an exchange student at Oxford University, although she never earned a degree.[52] Lee patterned Atticus Finch after her father, who practiced law with Lee's elder sister in Monroeville, Alabama, and who, like Atticus, served in the Alabama legislature.[53] John Grisham, born in 1955, graduated from the University of Mississippi School of Law and practiced law in Southaven, Mississippi from 1981 until publication of *The Firm* in 1991.[54]

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42. ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 75 (1925).

43. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

44. JOHN GRISHAM, THE FIRM (1991).

45. Atticus Finch may hold the unique position among fictional lawyers in serving as the subject of law review articles. *See* Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981).

46. *To Kill a Mockingbird* was Lee's first and only novel. Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 398-99 (1994) *See generally* Symposium, *To Kill a Mocking bird*, 45 ALA. L. REV. 389 (1994) (symposium dedicated to legal analysis of Atticus Finch and *To Kill a Mockingbird*). Grisham's only previous work, *A Time to Kill*, sold only a few thousand copies. 138 GALE RESEARCH CO., CONTEMPORARY AUTHORS 196 (Donna Olendorf ed., 1993).

47. 15-16 GALE RESEARCH CO., CONTEMPORARY AUTHORS 261 (James M. Ethridge & Barbara Kopala eds., 1966).

48. TO KILL A MOCKINGBIRD (Universal Pictures 1962).

49. *See, e.g.*, THE GREATEST MOVIES OF ALL TIME 136 (2d ed. 1991).

50. Tom Mathews, *Book 'Em*, NEWSWEEK, Mar. 15, 1993, at 78, 81.

51. THE FIRM (Paramount Pictures 1993). With an all-star cast including Tom Cruise as Mitch McDeere, "The Firm" became one of the biggest box office draws of 1993 and top rental movies in history. WORLD ALMANAC AND BOOK OF FACTS 1995, at 301 (1994).

52. CURRENT BIOGRAPHY YEARBOOK 1961, at 260 (Charles Moritz ed., 1961). A standard reference about authors states: "She considers the law, with its emphasis on logical thought, an excellent training for the writer." GALE RESEARCH CO., *supra* note 47, at 261.

53. Hoff, *supra* note 46, at 393-94.

54. His later novels, THE PELICAN BRIEF (1992), THE CLIENT (1993), and THE RAINMAKER (1995), have also been enormously successful, but *The Firm* remains the biggest seller. *See* Mathews, *supra* note 50, at 81.

To Kill a Mockingbird takes place during the Depression in the fictitious town of Maycomb, Alabama, which is said to be a "tired old town" and a county seat in rural Alabama.[55] Atticus Finch, a widower who lives with his two children—Jem, age ten, and Scout, the precocious six-year-old narrator of the story—practiced law in Montgomery before returning to practice in his home town of Maycomb. During his first years of practice, Atticus "practiced economy more than anything"[56] to help send his younger brother to medical school. Later, however, Atticus is able to "derive a reasonable income from the law."[57] Not all of Atticus' clients can pay with money, and sometimes his children discover a load of stovewood in the back yard or a sack of hickory nuts on the back steps. "Did you know," Atticus tells Scout, "that Dr. Reynolds works the same way? He charges some folks a bushel of potatoes for delivery of a baby?"[58]

Atticus walks every day to his modest office in the Maycomb courthouse and periodically drives to Montgomery, where he represents Maycomb County in the state legislature. He spends his evenings at home reading, either to himself or to his children. Although it becomes apparent to the reader that Atticus is held in high esteem by the community, he successfully avoids instilling any sense of status or privilege in his children. "You, Miss Scout Finch, are of the common folk," Atticus tells his daughter.[59]

Despite his strong distaste for criminal law, Atticus is appointed by the court to represent a black man who is charged with raping a white woman. It is a hopeless undertaking from the start; in any swearing contest between a black and a white, a Maycomb jury will always render a verdict favoring the white. Even worse, the assignment will inevitably subject both Atticus and his children to hatred and abuse from a community that will resent anyone who defends a black man. "Lemme tell you somethin' now, Billy," Scout overhears one man tell another, "you know the court appointed him to defend the nigger."[60] "Yeah," the second man replies, "but Atticus aims to defend him. That's what I don't like about it."[61]

Scout is surprised to learn that her father had been appointed by the court. He never mentioned this fact to her, and she could have used it when classmates, and in some instances adults, taunted her for having a nigger-lover for a father. Atticus told Scout that he took the case because "if I didn't I couldn't hold my head up in town, I couldn't represent this county in the legislature, I couldn't even tell you or Jem not to do something."[62] Scout told Atticus he must be wrong. "How's that?" he asked her. She explained, "Well most folks seem to think they're right and you're wrong." Atticus replied, "They're certainly entitled to think that, and they're entitled to full respect for their opinions . . . but before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience."[63]

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55. LEE, *supra* note 43, at 11.
56. *Id.* at 10.
57. *Id.* at 11.
58. *Id.* at 25.
59. *Id.* at 33.
60. *Id.* at 151.
61. *Id.*
62. *Id.* at 73.
63. *Id.* at 99.

One night, Atticus sits unarmed by himself in front of the jail to protect his client from a lynch mob. He succeeds with the unplanned help of Scout who happens upon the scene and, with little understanding of what is taking place, shames one of the leaders of the mob by asking about the man's son, who is one of Scout's classmates.[64] This scene, in particular, gives new meaning to a quotation attributed to Charles Lamb that Harper Lee set forth on the reverse side of the dedication page: "Lawyers, I suppose, were children once."[65]

At trial, Atticus persuades everyone that his client has been wrongly accused but his only victory is that the jury deliberates for several hours before returning the inevitable guilty verdict. Shortly thereafter, Atticus' client is shot to death in a desperate escape attempt. Yet Atticus' struggles have not been in vain. "[W]hat else do they want from him . . . what else?" asks Atticus' sister Alexandra, who put a high premium on social acceptance and disapproved of much of what her brother did.[66] "I mean this town," she continues, "[t]hey're perfectly willing to let him do what they're too afraid to do themselves—it might lose 'em a nickel."[67] "Be quiet, they'll hear you," Maudie, Finch's neighbor, replies. "Have you ever thought of it this way, Alexandra? Whether Maycomb knows it or not, we're paying the highest tribute we can pay a man. We trust him to do right. It's that simple."[68] "Who?" Alexandra asks. "The handful of people in this town who say fair play is not marked White Only; the handful of people who say a fair trial is for everybody, not just for us," Maudie replies.[69] The reader realizes that Atticus' efforts have caused this handful of people to grow, both in numbers and in commitment to social justice.

As Lloyd Bentsen might have said, Mitch McDeere of *The Firm* is no Atticus Finch. John Grisham's novel begins with a job interview, in which McDeere—number three in the third-year class at Harvard Law School—is being interviewed by lawyers from the firm of Bendini, Lambert & Locke of Memphis, Tennessee. "We offer the highest salary and fringes in the country, and I'm not exaggerating," one of the interviewers tells McDeere early in the session.[70] The interviewing lawyers begin the session by asking Mitch a set of personal questions concerning his marriage and religion, explaining that, "We want stable families. Happy lawyers are productive lawyers."[71] Mitch is put off by neither the intrusiveness itself nor the explanation for it; he just believes the topic is premature. "Money, that was the big question, particularly how it compared to his other offers. If the pay is attractive, *then* we can discuss families and marriages and football and churches," he thinks.[72] The firm tells Mitch it will give him a first-year salary of $80,000 plus a bonus, two country club memberships, and a new BMW.[73] Mitch is suddenly seized by a strong desire to visit Memphis.

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64. *Id.* at 140-44.
65. *Id.* at 6.
66. *Id.* at 215.
67. *Id.*
68. *Id.* at 216.
69. *Id.*
70. GRISHAM, *supra* note 44, at 4.
71. *Id.* at 6. The firm also values health because a "healthy lawyer is a productive lawyer." *Id.* at 27.
72. *Id.* at 8.
73. *Id.* at 7.

Mitch ultimately joins Bendini, Lambert & Locke, and finds that, except in some rather strange ways, it is the prototypical firm of the times. The offices are plush;[74] the associates are focused on becoming partners;[75] partners maneuver for corner offices.[76] And as Mitch quickly learns: "Billing was the lifeblood of the firm. Promotions, raises, bonuses, survival, success, everything revolved around how well one was billing."[77] Mitch's mentor speaks in glowing terms about a particular lawyer in the firm, but it is not this lawyer's judgment, skill, or legal accomplishments that are most admired; it is the fact that he "worked at three hundred an hour, sixty, sometimes seventy hours a week."[78] That's hard, Mitch is told, but not as hard as it seems. "Most good lawyers can work eight or nine hours a day and bill twelve. It's called padding," a colleague explains to Mitch.[79] "It's not exactly fair to the client, but it's something everybody does."[80] Soon Mitch is working late while his wife Abby eats dinner and goes to bed alone.[81]

Meanwhile, Mitch is instructed in other aspects of the firm's culture. A partner describes the firm's clientele and relates how the firm views its role in representing its clients:

> Some of our clients are high rollers—wealthy individuals who make millions, spend millions and expect to pay little or no taxes. They pay us thousands of dollars to legally avoid taxes. We have a reputation for being very aggressive, and we don't mind taking chances if our clients instruct us to.[82]

The Firm takes off on a joyride that will not be recounted here other than to say that it turns out that Bendini, Lambert & Locke is owned and controlled by the Mafia.[83] The story has a happy ending of sorts. Rather than becoming a government witness and relying on the government to protect him, Mitch steals eight million dollars from the Mob, buys a forty-foot schooner, and literally sails off into the sunset with Abby. "There are worse things than sailing around the Caribbean with eight million bucks in the bank," Mitch tells Abby.[84] Then he adds: "The truth is, I never wanted to be a lawyer anyway."[85] This is meant to be a joke: Mitch had very much wanted to be a lawyer; this is his way of telling Abby that he now realizes how foolish that had been.

The most striking difference between Atticus Finch and Mitch McDeere concerns their respective values. Mitch is a materialist. He begins his professional career with the principal objective of obtaining wealth, and his basic values are largely unchanged at the story's end. Atticus does not have a materialistic bone in his body. However, *To Kill a Mockingbird* and *The Firm* should not simply be read as stories about two different

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74. Even Mitch's office is done with the help of a decorator. *Id.* at 55. Partner offices are "decorated to each individual's taste with no expense spared." *Id.* at 19.
75. *Id.* at 57.
76. *Id.* at 19.
77. *Id.* at 51.
78. *Id.*
79. *Id.* at 58.
80. *Id.*
81. *Id.* at 79-83.
82. *Id.* at 108.
83. *Id.* at 198.
84. *Id.* at 421.
85. *Id.*

personalities; whether or not the authors consciously intended it, these novels are parables of the legal profession. Both communicate important truths about lawyers during a particular time in America. Indeed, it is almost inconceivable that a writer—particularly one as knowledgeable about lawyers as either Harper Lee or John Grisham—would create an Atticus Finch-type character today. Although Atticus is a plausible character in 1960, today he would lack verisimilitude. Readers still enjoy *To Kill a Mockingbird* but they see it as a period piece. For our purposes, however, it is important to recognize that the period is not the 1930's—the time in which the novel is set—but the 1950's, when Harper Lee wrote it. Lee, after all, was a novelist, not an historian, and she is reflecting the image of the lawyer as she knew it.

Harper Lee came of age at a time when the image of lawyers was deservedly high. During the late 1940's and early 1950's, a courageous band of lawyers—among them Charles Hamilton Houston and Thurgood Marshall—waged a legal crusade for racial equality that culminated in 1954 when another small band of lawyers, the nine justices of the Supreme Court, handed down their unanimous decision in *Brown v. Board of Education*.[86] All of this seems inevitable in retrospect, but it was a difficult, uncertain, and dangerous undertaking at the time.[87] Writing only years after *Brown* was decided,[88] Harper Lee imagined how a lawyer—not a prominent individual such as Thurgood Marshall, who directed the work of the NAACP Legal Defense and Education Fund and argued leading cases before the highest courts in the land, but a lawyer like her father, working in the obscurity of a small town—might have participated in advancing the cause of racial justice. The vision, of course, is idealized; Atticus Finch is wiser and stronger than any mortal has a right to be. Yet Atticus does not work legal miracles. He merely does his job.

But why does Atticus do his job? By taking the assignment, Atticus put not only himself but also his children in jeopardy. Why would a character who has been described as "one of the most admirable fathers in American literature"[89] do such a thing? It is not because of some personal loyalty to the man he was assigned to represent; Atticus barely knew him. Nor is it from a desire to save an innocent man from a miscarriage of justice; Harper Lee makes it clear that Atticus knows the case is hopeless. Atticus represents this client not *in spite of* his children but *for* his children; he is doing his part so that they may inherit a society ruled by law.

Some years ago, Chief Justice Rehnquist gave a speech that he titled "The Lawyer-Statesman in American History."[90] Rehnquist spoke about heroic figures such as Thomas Jefferson and Alexander Hamilton. In his book, *The Lost Lawyer*, Anthony Kronman carries the theme of the lawyer-statesman further:

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86. 347 U.S. 483 (1954).

87. On one occasion, for example, Thurgood Marshall was almost lynched. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 31-32 (1994).

88. Lee submitted her first manuscript for *To Kill a Mockingbird* to her publisher in 1957 and reworked it over the next two-and-a-half years. CURRENT BIOGRAPHY YEARBOOK 1961, *supra* note 52, at 261.

89. MAJOR CHARACTERS IN AMERICAN FICTION 257 (Jack Salzman & Pamela Wilkinson eds., 1994).

90. William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986). While it would be preferable to use a term more gender neutral than "lawyer-statesman," nothing else captures the concept as succinctly without a forced awkwardness.

> To be sure, few lawyers ever reached the level these hero figures occupied, and most understood as clearly then as they do now that the mundane business of earning a living in the law offers little opportunity for the exercise of statesmanship on a grand scale. But however far short of this ideal they fell in their own work, many nineteenth-century lawyers continued to look up to it as a standard of professional excellence and to invoke the lawyer-statesman as a model when they wanted to express, in concrete terms, their common aspirations. The lawyer-statesman—possessed of great practical wisdom and exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements—is in fact a stock figure in the hortatory literature of the early-ninetcenth-century bar, and however sanctimonious or self-congratulatory that literature now seems, it suggests how lawycrs of the period wished, at least, to see themselves.[91]

Atticus Finch is the quintessential lawyer-statesman. He sees the law as a noble calling and he practices law with nobility. He uses the skills he has acquired in his profession—among them the capacity for clear thinking and good judgment—for the benefit of the community in other ways as well. One imagines Atticus to be one of the wisest members of the state legislature.

To Kill a Mockingbird—and other stories from the same period[92]—tell us that, at least as of 1960, the lawyer-statesman was not only a plausible image, but a powerful one. *The Firm*—and other stories of the 1980's and 1990's[93]—tell us something else.[94] Even

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91. KRONMAN, *supra* note 1, at 12.

92. Other than Atticus Finch, the most famous fictional lawyer of the 1950's and 1960's was undoubtedly Perry Mason, who was created by Erle Stanley Gardner in a series of mystery books and later portrayed by Raymond Burr in a television series. Perry Mason was aggressive, to be sure, but he clearly followed in the tradition of lawyer-statesman. On one occasion he explained his role as follows:

> I'm somewhat in the position of a physician who has to treat a patient. He doesn't tell the patient everything he knows. He prescribes treatment for the patient and does his best to see that the patient gets the right treatment. . . . That doesn't mean he necessarily has to do what the client wants or what the client's friends may want.

ERLE STANLEY GARDNER, THE CASE OF THE GILDED LILY 82, 146 (1956). In other popular television shows of the era, such as *The Defenders* and *Owen Marshall*, lawyers come from the lawyer-statesman mold.

93. Other stories delivering the same message include:

THE VERDICT (Twentieth Century Fox 1982). After graduating second in his class and serving on the law review at Boston College, Frank Galvin (Paul Newman) joined an elite Boston firm. Stunned to discover that a senior partner engaged in jury tampering to win a case, Galvin informed the firm he was going to report the misconduct hut, before doing so, he was himself indicted for the crime. Charges were dropped when Galvin signaled that he would keep quiet, but Galvin's life was ruined: his wife left him; his firm fired him; no one else would hire him. The story line begins years later when Galvin, now an alcoholic ambulance-chaser, strives to redeem himself in a malpractice case. Galvin's opposing counsel, Ed Concannon (James Mason), the head of one of Boston's largest firms, surreptitiously induces Galvin's expert witness to leave the country just as the case is called for trial and hires Laura Fisher (Charlotte Rampling), a young lawyer who will soon join his firm, to seduce and spy on Galvin. On one level, therefore, the story is about the struggle between the honest lawyer and the corrupt firm.

CLASS ACTION (Twentieth Century Fox 1990). Jedediah Ward (Gene Hackman), a plaintiff's trial lawyer, and his daughter, Maggie Ward (Mary Elizabeth Mastrantonio), an associate in a large firm that represents an automobile manufacturer, wind up on opposite sides of a lawsuit patterned after the Ford Pinto case. Maggie sees the case as her "partnership express" but faces a dilemma when she learns that a partner with whom she is romantically involved has destroyed evidence. In an allusion to the billing issue, *see infra* part II, colleagues speculate about whether Maggie and the partner record the time they spend sleeping together as billable hours. Again, the struggle is between the honest individual and the corrupt firm. The story ends when Maggie's choice—to do the right thing—is dramatically revealed.

L.A. Law (NBC television broadcast). A continuing undercurrent of this long-rnnning television series—now in syndication—is a tug of war between idealistic young lawyers such as Michael Kuzak (Harry Hamlin) and Victor Sifuentes (Jimmy Smits) and their more materialistic and decadent colleagues, principally Douglas Brackman (Alan Rachins) and Arnie Becker (Corbin Bernsen). At the center of the rope is Leland McKenzie (Richard Dysart), the leader of the firm. Some young lawyers cannot tolerate the struggle and choose government practice, such as Grace Van Owen (Susan Dey),

putting aside the part about Bendini, Lambert & Locke being controlled by the Mafia, we find that the lawyers in that firm have a different professional vision. Kronman calls this "the narrow view of law practice"[95] and describes it as follows:

> The narrow view insists that a lawyer is merely a specialized tool for effecting his client's desires. It assumes that the client comes to his lawyer with a fixed objective in mind. The lawyer then has two, and only two, responsibilities: first, to supply his client with information concerning the legal consequences of his actions, and second, to implement whatever decision the client makes, so long as it is lawful.[96]

The "lawyer-technician" may be a better label for this professional model. Lawyer-technicians see themselves as sellers of expertise. A client desires a particular objective; the lawyer-technician advises him how to reach that objective and provides services to help him do so. In this respect, the lawyer-technician is no different from any other seller of services. The attorneys of Bendini, Lambert & Locke illustrate their adherence to this model when they explain to Mitch that they represent "very sophisticated businessmen who understand risks" and who pay the firm handsomely "to legally avoid taxes."[97] There is nothing shocking in this conversation. The Bendini approach is consistent with the Model Rules of Professional Conduct, which state: "A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value."[98]

This principle, however, is relatively new. It first appeared in the Model Rules adopted by the ABA in 1983. Prior standards promulgated by the ABA allowed—and in spirit may be read as urging—lawyers to bring moral and ethical considerations to the attention of clients, including those who might prefer to ignore such matters.[99] The earlier standards made it plain that a lawyer might withdraw when a client insists on proceeding in a manner contrary to the lawyer's advice, even when the lawyer would not be called upon to violate any rules. Some lawyers would find it "unbearable" to continue representing a client in such a circumstance, the standards noted.[100] This gave lawyers a tool for moral persuasion. A lawyer was able to tell a client who was overreaching or

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or solo practice such as Abbey Perkins (Michele Greene). Sometimes the struggle is internal to one of the characters, often Anne Kelsey (Jill Eikenberry), who is capable of being seduced by wealth or power but is generally saved by her husband, Stuart Markowitz (Michael Tucker). For more about *L.A. Law*, see Stephen Gillers, *Taking* L.A. Law *More Seriously*, 98 YALE L.J. 1607 (1989) and Charles B. Rosenberg, *Inside L.A. Law*, A.B.A. J., Nov. 1, 1988, at 56.

94. As others have noted, *e.g.*, Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987), fictional lawyers often reflect society's ambivalence, not only to lawyers, but to cultural values, and lawyers can be found in the role of hero or villain in the fictional works of any era. I submit that, nevertheless, there is a distinct shift in the predominant fictional image of lawyers over the past 30 to 40 years.

95. KRONMAN, *supra* note 1, at 127.

96. *Id.* at 123.

97. GRISHAM, *supra* note 44, at 108.

98. However, a lawyer is not constrained from raising moral considerations with a client inexperienced in legal matters. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 3 (1995).

99. The Code of Professional Responsibility, adopted in 1969 and revised in 1983, states that "it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983).

The ABA's first professional standards, adopted in 1908 and revised in 1969, state: "A lawyer should use his best efforts to restrain and prevent his clients from doing those things which the lawyer himself ought not to do. . . . If a client persists in such wrongdoing the lawyer should terminate their relation." CANONS OF PROFESSIONAL ETHICS Canon 16 (1969).

100. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 n.20 (1983).

unnecessarily harming others that while it might be perfectly lawful to proceed in such a fashion, the client was going to have to do so with someone else's assistance. This was a tool that many lawyers did not hesitate to use, often quite effectively.[101]

The lawyer-technician might find it anachronistic—even unethical—to withdraw because the client rejected his advice. He may believe it arrogant for a lawyer to expect a client to follow the lawyer's moral compass and improper to use the lawyer-client relationship as a lever to nudge the client into doing what the lawyer wants. He may, of course, also consider it bad business. The lawyer-technician model has the advantage of relative simplicity. The role of lawyer-statesman is complex and ambiguous, for the lawyer-statesman serves two masters —the client and the law—and is something of a "double-agent"[102] striving to reconcile the interests of two principles.

One can no more imagine Atticus Finch dedicating his career to helping high-rollers avoid taxes than one can imagine Mitch McDeere asking a client to consider the moral dimensions of setting up off-shore trusts in order to avoid U.S. taxes. The vision of the lawyer-statesman is dimming, and as with Mitch McDeere, lawyers are increasingly acculturated in the role of lawyer-technician. *The Firm* is a parable about the consequences of this shift. The Mafia is a metaphor for a systemic corruption that is real, present, and widespread, particularly within large firms, and it is to this we now turn.

II. AN INDICTMENT

Padding time records is "something everybody does," a senior associate tells Mitch McDeere in *The Firm*.[103] Lamentably, his remarks ring true not only within the fictitious firm of Bendini, Lambert & Locke, but in the real world as well. Padding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic: the realization of what has occurred is so unwelcome that it is largely ignored.

A little history is necessary to explain what has come to pass. Forty years ago, legal billing was an art.[104] A billing partner would consider the amount of work that was done for the client, the results obtained, the value of those results to the client, and the client's ability to pay. If the firm had drafted a contract for a client, for example, it might well render a significantly higher bill if the deal was successfully completed and was expected to be profitable for the client than if the deal had not been consummated, even though the firm's work had been the same under both circumstances. Lawyers sometimes also quietly applied a Robin Hood factor: wealthy clients were charged more than those of less means, scoundrels more than the worthy. Fees were not calculated objectively—not truly calculated at all—but rather were the product of professional judgment, and the typical

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101. A sense of shame often did the trick; clients were embarrassed to conduct themselves in a way that was repugnant to someone they respected. Clients also feared that their lawyer's withdrawal would send a signal of disapproval to the court or others, or that they would have trouble engaging another attorney with professional stature.

102. KRONMAN, *supra* note 1, at 18 (quoting Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1900*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 53 (Gerard W. Gawalt ed., 1984)).

103. *See* GRISHAM, *supra* note 44, at 58.

104. *See generally* GLENDON, *supra* note 3, at 29-30.

bill stated a single, round figure with no more explanation than "For Professional Services Rendered." Billing was one of the ultimate tests of professionalism; lawyers took pride in being able to be fair to both the client and themselves, despite their self-interest. This worked by and large because lawyers believed that it was more important to be fair than it was to maximize income in the short run. In part, fairness was good business strategy, but it was also driven by the satisfaction that lawyers derived from being professionals.

Two interrelated forces—the rise of large law firms, and the introduction of computerized time-keeping—caused all of this to change. In the early 1960's, there were only 38 firms in the entire country with more than fifty lawyers.[105] By 1988, more than 500 firms had more than fifty lawyers, and more than 100 of these had more than 200 lawyers.[106] A number of reasons exist for the growth of large firms[107] but none more important than the fact that lawyers can earn more money from the labor of others than from their own.[108] Law firms therefore hired increasingly large numbers of associates, and firms grew at unprecedented rates.

This inevitably led to the bureaucratization of the practice of law.[109] Billing attorneys had to justify their bills to managers, who were responsible for ensuring that the firm's most costly resource, its pool of associates, was profitable. Associate profit is a function of the number of associates—more precisely, the ratio of associates to partners—and the difference between associate salaries and billings.[110] Firm managers learned that to maintain a desirable profit level, each associate had to bill three times his or her salary.[111] Managers became increasingly unsympathetic when lawyers wanted to write off associate time, and the subjective art of billing was ultimately rejected as backward. In the 1970's, courts also adopted the modern view when they determined that the "lodestar" of a reasonable attorney's fee was to be the product of the number of hours expended multiplied by hourly billing rates.[112]

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105. A majority of these firms were in New York City. Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 31, at 45.

106. More than 2000 firms had more than 20 lawyers. *Id.*

107. Among them are the rise of large corporations; the post-New Deal increase of governmental regulation of business; and the introduction of computers, which made it possible for firms to collate and bill a client for the work of multiple attorneys. *See generally* RICHARD L. ABEL, AMERICAN LAWYERS 183 (1989).

108. Even the hardest working lawyer can produce only so much work herself. However, an attorney can make vastly more money on the work of other lawyers, varying with how many lawyers she employs. *See generally id.* at 190-99.

109. While only a fraction of the total lawyer population practices in large firms, the influence that these lawyers have on the profession is disproportionate to their numbers. *Id.* at 182.

110. Law firms were told that in order to maximize profits they should resemble pyramids, with partners comprising the small top of the pyramid and associates the larger base. A 3:1 associate-to-partner ratio was considered ideal. The problem with the pyramid model, however, was that as associates moved up to partnership level, the 3:1 ratio could only be maintained by hiring three new associates for each associate promoted to partner. Thus, the base had to grow continuously and exponentially. This could only go on for so long; eventually there would not be enough business to feed the growing pyramid. This led firms to increase associate attrition rates, reneging on the traditional understanding that associates were hired with the expectation that they would eventually become partners.

111. "[P]artnership incomes reflect the surplus value law firms extract from associates—the disparity between the rate at which associate time is billed to clients and the salaries associates are paid—traditionally a ratio of about three to one." ABEL, *supra* note 107, at 192.

112. *See* Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 BUFF. L. REV. 1, 58 n.324 (1993).

Thus, lawyers came to live under the tyranny of the time sheet. Bills were now governed by arithmetic rather than judgment, and over time this affected how lawyers viewed the value of their own work. Lawyers reflected less on what they produced for the client or how efficiently they produced it; indeed, an incentive emerged to be inefficient and run up billable hours. The Robin Hood factor no longer existed. Clients and work were fungible. Clients requested legal services; attorneys provided the services; clients paid for the services by the hour. The lawyer-statesman metamorphosed into technician, the professional into provider.

Meanwhile, something else was taking place. Aecording to the best available data, when computerized time records were first introduced in the 1960's the median number of billable hours was about 1500 per year for partners and associates alike.[113] For reasons about which we can only speculate,[114] billable hours increased dramatieally over time.[115] According to a national survey by a legal consulting firm, the median annual billable hours is now 1700 for partners and 1826 for associates.[116] Variances exist among cities, among firms of different sizes within the same city, and, perhaps most significant of all, among individual firms and lawyers.[117]

Even more dramatic are the startlingly high numbers of billable hours recorded by a signifieant segment of the bar. According to one study, 30% of both partners and associates regularly bill more than 2000 hours.[118] Among assoeiates alone, 48% bill at least 2000 hours, 20% bill more than 2400 hours, and 4% bill more than 3000 hours.[119]

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113. ABEL, *supra* note 107, at 192 (reporting that, in the 1960's, studies showed a median of 1450 hours in Florida and 1500 hours in South Carolina, but noting that these may not be the most competitive markets). Only the most technologically progressive firms used computers to collate time records in the 1960's, however. Although firms increasingly required their lawyers to record time manually throughout the 1960's and early 1970's, using computers to collate this information—and to generate annual totals for individual lawyers—did not become widespread until the late 1970's and early 1980's. *Id.* at 196.

114. One reason may be the increased competition among firms resulting from the recession, but another may be that as firms increased associate attrition rates, the previously collegial relationship among associates soured into intense competition, and associates sought to outdo one another in billable hours. *See supra* note 110.

115. Partner time appears to have remained unchanged through 1985, when average billable hours among 25- to 29-year partners was still 1538 per year. In contrast, the average billable hours among five-year associates had increased to 1838 per year by 1985. Just the opposite has occurred since 1985: partner hours usually increased each year while associate hours have fiuctuated within a range of 1838 and 1881 hours. ALTMAN WEIL PENSA, INC., THE 1995 SURVEY OF LAW FIRM ECONOMICS VII-11 (1995) [hereinafter 1995 ALTMAN SURVEY].

116. *Id.* at I. Other surveys generally confirm these numbers: NATIONAL SURVEY CENTER, PARTNER, ASSOCIATE AND LEGAL ASSISTANT BILLING RATE SURVEY: PHILADELPHIA LAW FIRMS I4 (1994) (reporting averages of 1692 for partners and 1802 for associates); NATIONAL SURVEY CENTER, PARTNER, ASSOCIATE AND LEGAL ASSISTANT BILLING RATE SURVEY: WASHINGTON, DC/MD/VA LAW FIRMS 20 (1994) (reporting averages of 1680 for partners and I743 for associates); NATIONAL SURVEY CENTER, PARTNER, ASSOCIATE AND LEGAL ASSISTANT BILLING RATE SURVEY: CHICAGO LAW FIRMS (1994) (reporting averages of 1693 for partners and 1776 for associates).

117. The lowest number of annual billable hours appear in Boston firms in the five-to-nine lawyer range (partners 1393; associates 1640) and the highest in New York City firms in the 30-to-49 lawyer range (partners 1918; associates 1960). However, the number of firms participating in the survey in those two groups were six and eight respectively, and since this survey is based on averages rather than medians the differences may reflect aberrant numbers at one or two firms. NATIONAL SURVEY CENTER, PARTNER, ASSOCIATE AND LEGAL ASSISTANT BILLING RATE SURVEY: BOSTON FIRMS 14 (1994); NATIONAL SURVEY CENTER, PARTNER, ASSOCIATE AND LEGAL ASSISTANT BILLING RATE SURVEY: NEW YORK CITY FIRMS 23 (I994).

118. More precisely, 30% of associates billed at least 2000 hours in beth 1989 and 1990, and 20% billed at least 2400 in 1990. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, I5 n.78 (1991).

119. *Id.* In a second survey that William G. Ross conducted in 1994-95, 51% of associates and 23% of partners reported billing at least 2000 hours in 1993; 8% of associates reported billing more than 2400 hours. WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 27 (1996).

In some firms, partners and associates both average more than 2000 billable hours a year.[120] Some firms require associates to produce 2200 billable hours;[121] some have maximum billable hours set at 2400.[122] A few lawyers publicly boast of recording 3000 billable hours a year.[123] Numbers above a certain level, however, are, quite literally, incredible.

Consider for a moment how long a lawyer must work to generate a billable hour. No human being can be productive every minute of the workday. Lawyers must eat, interact socially with co-workers, walk down the hall for a cup of coffee, speak on the phone with spouses or friends, and conduct personal business with people who can be seen or reached only during business hours.[124] None of this time can be recorded. Lawyers must also devote time to client development,[125] administrative matters,[126] and professional activities.[127] Although some firms may consider a few of these activities to be "billable hours" even though they are not charged to clients, the vast majority of such time falls outside any firm's definition of billable time.[128]

To extrapolate how many hours lawyers work per day from the total billable hours per year, assume that, on average, lawyers: (1) convert 70% of their work time into billable hours;[129] (2) do not work on eight public holidays;[130] and (3) take a total of three weeks

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120. ABEL, *supra* note 107, at 193 (reporting that a survey of four Chicago firms found that all lawyers averaged 2097 billable hours per year, with associates averaging 76 more hours than partners).

121. James E. Brill, *The Secret of Success*, A.B.A. J., Oct. 1992, at 100.

122. Kelley Fox, *Who's the Largest of Them All?*, ILL. LEGAL TIMES, July 1994, at 1.

123. *Stamaniacs: How Do You Measure Up?*, AM. LAW., Jan./Feb. 1995, at 15.

124. These people include doctors, dentists, bankers, stockbrokers, car mechanics, plumbers, electricians, and hair stylists.

125. Examples include meeting with potential clients to discuss the possibility of representation; serving on corporate or philanthropic boards for the purpose of meeting potential clients; attending bar association meetings to become acquainted with potential referrers of business; writing articles for legal or trade publications or lecturing at seminars to enhance one's visibility; and more direct forms of marketing.

126. Examples include discussing work procedures with one's secretary, the office manager, or other firm personnel; completing formal evaluations of such personnel, or other forms; reading a continuous flow of memoranda dealing with office policies; and attending firm meetings.

127. Examples include reading advance sheets and other professional literature; attending continuing legal education programs; engaging in bar association activities; and doing pro bono work.

128. Many firms have no written guidelines and are reluctant to tell associates whether, and to what extent, they are given credit for nonbillable work. *See generally* John E. Morris, *Writing Their Own Rules*, AM. LAW., June 1995, at 5.

129. While the conversion rate is a critical part of the calculation, it has not been the subject of empirical study and, indeed, probably cannot be reliably measured. My selection of a 70% conversion rate is based on 18 years experience practicing law and filling out time sheets, and it is consistent with rates suggested by others. *See* Ross, *supra* note 118, at 14 (stating that attorneys normally spend three hours in the office for every two billable hours). Ross observes that "[s]ince routine distractions and administrative tasks are likely to consume a relatively fixed amount of time, the percentage of productive time may well exceed two-thirds of an attorney's time after he reaches about 1,500 hours." *Id.* However, because countervailing factors come into play—for example, as the work day stretches past a certain point, the lawyer must eat two meals at the office rather than one; as fatigue grows, the need for breaks increases; as time outside the office diminishes, more personal business must be conducted from the office—I am not persuaded that billable hours can increase much beyond 70%. *See also* GLENDON, *supra* note 3, at 30 (stating that "it often takes 9 to 12 hours in the office to yield 7 hours of billable time" and thus placing the productivity percentage between 58% and 77%); Lisa G. Lerman, *Fee-for-Service Clinical Teaching: Slipping Toward Commercialism*, 1 CLINICAL L. REV. 685, 688 (1995) (accepting, for purposes of analyzing the workload of clinical law teachers, Ross' conclusion that a lawyer must work three hours for every two billed); *cf.* Alan C. Page, *The Law—More than Being a Lawyer, the Choice Is Yours*, 47 SMU L. REV. 1879, 1881 (1994) (stating that even the most productive lawyers cannot convert more than 80% of work time into billable hours).

130. Some lawyers work on some of the official holidays, but lawyers often take off other days, such as the Friday after Thanksgiving, Good Friday or Yom Kippur, and Rosh Hashana.

per year for vacations, personal and sick days.[131] Based on these assumptions, lawyers generating 1500 billable hours per year—the average when computerized timekeeping was introduced—need to work either nine hours per day, five days a week, or seven and half hours per day, six days a week. Those are long hours, for lawyers or members of any other occupation. But lawyers do work hard, some extraordinarily hard.

Once we move beyond perhaps 1800 billable hours per year, however, we are entering different terrain. A lawyer working six days a week needs to work ten hours a day to produce 2000 billable hours per year, eleven hours a day to produce 2200, and twelve hours a day to produce 2400. While people may work oppressively long hours in short bursts, it is impossible to work these kinds of hours—day in and day out, year in and year out—and maintain a personal life. For example, a lawyer billing 2200 hours a year who left home at 8:00 a.m. every morning and had a half-hour commute to work would not arrive home until 8:00 p.m., six days a week. Chief Justice Rehnquist observed that a firm that requires its associates to bill more than 2000 hours a year "is treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal."[132] He added: "[I]f one is expected to bill more than two thousand hours per year, there are bound to be temptations to exaggerate the hours actually put in."[133] Yet about a quarter of all partners and half of all associates are now billing more than 2000 hours per year.[134]

There are two issues here. The first relates to quality of life for lawyers, their families, and their communities. Do we want lawyers to enjoy family life? Do we want them to be involved parents? Do we want them to participate in civic, philanthropic, religious, or political activities? Do we want them to be able to choose as spouses or companions people who have active careers themselves; or are the demands of work to be so great that lawyers must find mates willing to take on all of the chores of daily life? The second issue, stated bluntly, is this: What becomes of a profession that teaches recruits to lie? What happens to a profession that closes its eyes to a pattern of deceit?

If this sounds extreme, consider another case. A prominent partner in one of Chicago's largest and most prestigious firms recorded an average of 5941 billable hours per year for four consecutive years.[135] The firm knew of this but did nothing. Word had swept the firm grapevine several years earlier when the partner's billable hours climbed above 4000 per year.[136] The matter came to light only after an anonymous source furnished journalists with copies of firm documents reflecting the lawyer's time.[137] The lawyer in question claims he did not take a single full day off during those four years.[138] Even if that were true, and even if he were able to convert every minute of work into billable time, this lawyer—who, incidently, was a forty-four-year-old father of four, and lived ten miles

131. This number is conservative. Most lawyers take at least two, many three, and some four weeks of vacation per year.

132. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 153 (1987); *see also* ROSS, *supra* note 119, at 27.

133. *Id.* at 155.

134. *See supra* note 119.

135. Karen Dillon, *6,022 Hours*, AM. LAW., July/Aug. 1994, at 57.

136. *Id.* at 58.

137. *Id.*

138. *Id.*

from the office[139]—would still need to work an average of 16.3 hours per day, 365 days a year, to produce 5941 billable hours. What are we to say to a man who, for a period of four years, may have only occasionally seen his wife and children awake?[140] Of course, it would be impossible for this man to convert every second of his work day into billable hours, especially since all of his personal activities—haircuts, visits to doctors, dentists, optometrists, shopping for clothes, even eating or exercising—must be carved out of work time. If we make the standard assumption that 70% of work time is converted into billable hours, this lawyer needed to work 23.3 hours per day, 365 days a year, leaving just enough time for a round-trip commute home but not enough time to enter the house.

The problem is not so much the behavior of one lawyer—there is a bad apple in every bushel—as it is the conduct of the firm. Law firm partners have au obligation to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[141] And the Rules of Professional Conduct, of course, prohibit charging unreasonable fees[142] or engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.[143] Nearly everyone finds 5941 billable hours preposterous,[144] yet the firm was apparently content to be paid for these hours.

It is not only time in the 6000 hour range that is implausible, however. Chief Justice Rehnquist is right when he says that lawyers producing more than 2000 billable hours per year are bound to be tempted to inflate their time.[145] That is not to say that no individual can honestly produce more than 2000 billable hours in a single year or even several years running, but the burden is so great that few people will carry it much longer. Whenever hours at this level become routine, therefore, they should be considered suspect. If anything, 2000 hours is a high threshold of suspicion. In order to generate 1850 billable hours per year, a lawyer must work eleven hours per day, five days a week.[146] Most people who are forced to work at this pace over long periods will succumb to the temptation to relieve some of the pressure by padding time. That does not mean that such a lawyer will not be working hard. A lawyer may put in ten-hour days—enough to honestly generate only 1650 billable hours—and rationalize adding an extra 200 hours to the time sheets. And in interviews[147] and surveys,[148] lawyers admit to padding time.

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139. *Id.*

140. He claims his typical routine was to arrive at the office between 5:00 and 6:00 a.m. and leave between 11:00 p.m. and midnight. *Id.* at 58.

141. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1994).

142. *Id.* Rule 1.5(a). The Rule is phrased in terms of a positive duty—"[a] lawyer's fee shall be reasonable"—and thus is arguably stronger than a rule prohibiting unreasonable fees.

143. *Id.* Rule 8.4(c).

144. *See* Dillon, *supra* note 135, at 58 (reporting that "none of three dozen . . . lawyers interviewed for this article . . . believe [the lawyer's] feat is possible.").

145. *See supra* note 133 and accompanying text.

146. *See supra* notes 129-31 and accompanying text.

147. *See* Lisa G. Lerman, *Gross Profits? Questions About Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645 (1994); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 709-13 (1990). Lerman, one of the few people who have courageously addressed this problem, conducted confidential interviews with practitioners and described many of the techniques lawyers use to pad time.

148. In a confidential survey of private practitioners that William G. Ross conducted in 1991, only 7.3% of respondents said they believed that lawyers never deliberately pad their billable hours and 64.5% said that they had specific knowledge of instances of padding. Ross, *supra* note 118, at 93. Since only 12.3% of the respondents said that they thought lawyers frequently padded their hours, Ross believes the survey indicates that padding is not epidemic. *Id.*

Yet many law firms not only shut their eyes to patently extravagant time, they encourage it. The lesson that Mitch McDeere learned in a fictitious firm controlled by the Mafia—"[m]ost good lawyers can work eight or nine hours a day and bill twelve"[149]—is taught to young lawyers every day. Many young lawyers must feel like they are watching the emperor model invisible clothes: they know that padding time cannot truly be what *good* lawyers do, yet there is no dissent. At first, many young associates in firms with a culture of padding will try mightily to put in the required hours; but eventually they will leave the practice of law, take a job in the public sector, move to a firm with different values, or succumb. The lawyers who succumb swallow a sinister poison, one that dissolves integrity while coaxing its victims to employ rationalizations and psychological avoidance mechanisms to remain consciously unaware of how they have changed.

A healthy profession would not tolerate a scandal of this magnitude. Legal educators would denounce the abuses in classrooms and law reviews; bar associations would condemn them in formal resolutions; law firm leaders would take action or be replaced. Bar disciplinary authorities or prosecutors might launch investigations, and perhaps even prosecute malefactors. None of this has happened. There is largely silence.

III. PROFESSIONAL CALLING

A. What Is a Profession?

What does it mean to say that a profession has died? Obviously, there will continue to be lawyers. They will still attend law school, receive degrees, sit for bar examinations, be admitted to practice, join bar associations, have their names enshrined in legal directories and on engraved stationery, and make livings practicing law. They will almost certainly continue to call themselves professionals, and think of themselves as professionals as well. Yet the very idea of *profession* has changed, and lawyers no longer consider themselves professionals in the same sense of that term.

There are, of course, different definitions of the word profession and different theories of professions. One theory, which is often associated with the philosophy of Max Weber, revolves around the concept of cartel.[150] It holds that the primary feature of a profession is that it enjoys a monopoly over providing a particular kind of service, and consequently Weberians generally attribute problems in the legal profession to a weakening of its cartel. The enormous surge in the number of lawyers—combined to some extent with increased competition from accountants, paralegals, mediators, do-it-yourself books—have caused the monopoly power of lawyers to deteriorate. The lot of lawyers

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at 16. His survey may underestimate padding, however. Ross' question reads: "To what extent do you believe lawyers deliberately 'pad' their hours to bill clients for work that they do not actually perform." The question bas a strong intention component; it uses the word *deliberately* and stresses that the purpose is *to bill clients*. However, many lawyers pad time reluctantly and unhappily, not to bill clients—they may in fact regret that clients will be charged for the padded time—but to satisfy the firm. The phrase "*for work that they do not actually perform*" is also problematic because some respondents may distinguish this from exaggerating time for work performed. The distinctions may be disingenuous, but padding time is so painful that lawyers will take almost any route to deny, diminish, or rationalize the conduct.

149. *See* GRISHAM, *supra* note 44 at 58.

150. ABEL, *supra* note 107, at 17-30.

is no longer as comfortable as it was. Increased competition means that lawyers must work harder, worry more about financial matters, and suffer a loss of collegiality. The crisis in the legal profession relates to the unhappiness of being subjected to market forces, or so the argument runs.[151] There is, however, a problem with placing the cartel at the center of professional theory. Addressing much the same argument regarding the medical profession, sociologist Paul Starr put it this way:

> Much recent writing on the medical profession portrays it as a cartel, which for a while it became. But this was only a secondary part of its success. Moreover, the problem is to explain how the profession's power was generated in the first place; it does no good to explain the cause by one of its results.[152]

Conversely, Weberian theory has a difficult time explaining why a cartel would cripple itself with increased membership. Since the profession controls the accrediting of law schools, why accredit so many new law schools, allow existing schools to increase dramatically in size, or permit schools to reduce their traditionally high attrition through grade inflation?[153] If law schools cannot be controlled, why not lower the pass rate on bar examinations?[154]

Weberians argue that occupations transform themselves into professions by way of a concerted "professional project" aimed at controlling the market and enhancing professional status.[155] The project often includes erecting barriers of entry to the profession—such as requiring long periods of formal study or apprenticeship and the passage of difficult examinations for admission, or even imposing quotas on new admissions—and by employing other anticompetitive techniques such as price fixing and legislation prohibiting nonmembers from competing with credentialed professionals. The law, however, was a profession—in any commonly understood sense of that term—long before any kind of professional project was instituted. There were no law schools before 1817, and as late as 1923 not a single state required that candidates for admission to the bar attend law school.[156] There were no formal bar examinations or bar associations before 1870, and no national bar association until the American Bar Association was established in 1878.[157] In the early 19th century, most states relaxed requirements for admission to the bar, and several states eliminated all requirements entirely.[158] As legal historian Lawrence M. Friedman describes it:

> Under the pressure of American practical politics, it would have been surprising if a narrow, elitist profession grew up—a small, exclusive guild. No such profession developed. There were tendencies in this direction during the colonial period; but after

151. *See generally* Posner, *supra* note 5.

152. PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 16 (1982).

153. *See infra* notes 243-46 and accompanying text.

154. In 1985, the national bar examination pass rate was 66%. Although this does represent a 10% drop since 1976—a fact seized upon by Weberians as confirmation of their theory—Weberian theory fails to account for a steady rise in the pass rate from 59% in 1956 to 76% in 1973. ABEL, *supra* note 107, at 68, 228-29, 269.

155. *Id.* at 25-26.

156. *Id.* at 40, 42.

157. *Id.* at 45, 63.

158. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 316-17 (2d ed. 1985).

> the Revolution the dam burst, and the number of lawyers grew fantastically. It has never stopped growing.[159]

Nevertheless, lawyers enjoyed a special status from the very beginning of the Republic. Twenty-five of the fifty-two men who signed the Declaration of Independence were lawyers.[160] Many highly regarded—even revered—figures were lawyers, among them Jefferson, Hamilton, Marshall, John Adams, and Daniel Webster. From 1790 to 1930, two-thirds of all U.S. senators and roughly half of all members of the House of Representatives were lawyers; since 1937, lawyers have made up between half and three-quarters of the Senate, more than half of the House, and more than 70% of all presidents, vice presidents, and members of the cabinet.[161] At present, the President and more than half of all U.S. senators and state governors are lawyers.[162]

It has not been merely an elite subgroup of the bar that has enjoyed special status. More than three-quarters of the lawyers who are currently serving as U.S. senators or governors are graduates of nonelite law schools.[163] The law, in fact, has been a profession that continually has attracted young men—and over the past twenty years, women as well—from all social classes. This is not to say that the law has not always had its share of upper-class entrants. During the first half of the 19th century, for example, about a quarter of the graduates of eight of the most prestigious colleges became lawyers.[164] Yet a survey of death notices of lawyers during the same period showed that lawyers were not only the sons of ministers, physicians, and lawyers but the sons of farmers and mechanics as well.[165] This is not to say that there is no stratification in the profession. Quite the contrary, young men and women from professional families are more likely to attend elite

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159. *Id.* at 304. Friedman continues:

> By the early 19th century, the bar was, formally speaking, an undifferentiated mass. There were rich and poor lawyers, high ones and low; but all were members of one vast sprawling profession. The few primitive bar clubs, associations, and "moots" did nothing to provide real cohesion or self-control. The bar was very loose, very open.

Id. at 315 (footnote omitted). By 1830, there were already 500 lawyers in New York City, then a city of only 200,000. *Id.* at 310-11.

160. ABEL, *supra* note 107, at 175. By contrast, four were physicians. STARR, *supra* note 152, at 83.

161. ABEL, *supra* note 107, at 175; *see also* FRIEDMAN, *supra* note 158, at 647.

162. *See* PHILIP D. DUNCAN & CHRISTINE C. LAWRENCE, CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA 1996: THE 104TH CONGRESS (1995). A great deal of attention has been paid to the question of why so many public officials have been lawyers, but most of it focuses on recruitment, that is, explaining why lawyers choose to enter public life. Linda L. Fowler and Robert D. McClure argue that lawyers have traditionally been active in politics because campaigning provided them with an acceptable way of advertising themselves, they benefited from the perception of being politically connected, and they had the flexibility of structuring their time to make room for political activity. But, the authors say, the "increasingly corporate structure and mentality" of law practice makes it "less feasible to serve two masters—the client and the voter—to whom a lawyer who is an elected official must bow." LINDA L. FOWLER & ROBERT D. MCCLURE, POLITICAL AMBITION: WHO DECIDES TO RUN FOR CONGRESS 127-28 (1989); *see also* Michael Cohen, *Lawyers and Political Careers*, 3 J.L. & SOC'Y REV. 563 (1969). This view predicts that the participation by lawyers in politics will decrease, a fact not yet observed. Studies indicate that only a small fraction of lawyers are active politically, and those who are "will engage in political activity in institutional settings that are meaningful while eschewing such activity or office-holding if the political institution is weak." John R. Schmidhauser, *The Convergence of Law and Politics Revisited: The Corporate Law Firm as a Case Study*, 1 J.L. & POL. 133, 161 (1983). The more important question may be not why lawyers choose to run for office, but why voters elect them.

163. *See* DUNCAN & LAWRENCE, *supra* note 162. I count the elite schools as Boalt Hall (Berkeley), Chicago, Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Northwestern, N.Y.U., Pennsylvania, Stanford, Texas, Vanderbilt, Virginia, and Yale.

164. STARR, *supra* note 152, at 82.

165. FRIEDMAN, *supra* note 158, at 305.

law schools, join large law firms, and have higher incomes than their peers from working-class families.[166] Nevertheless, the backgrounds and incomes of lawyers have always been so diverse that it is difficult to define the legal profession as a whole in terms of wealth or status. And while professions have arisen in areas that are considered too important to be subject entirely to market forces, it is by no means clear that professions uniformly have been able to create cartels or reap benefits from restrictive practices.[167]

The fact that professions can be sustained without monopoly power is good news because the day has ended when professions can insulate themselves from economic forces. Two decades ago, professions were considered to have a de facto exemption from the antitrust laws, at least insofar as they could explain restraints in trade as a way to maintain the profession's ethical standards.[168] The Supreme Court has since held that the professions cannot insulate themselves from competition by, for example, promulgating minimum fee schedules[169] or by prohibiting professionals from advertising[170] or engaging in competitive bidding.[171] One decade ago, social historian Charles E. Rosenberg observed that the hospital system in the United States essentially had carte blanche to fund its own growth. "Like the U.S. Defense Department, the hospital system has grown in response to perceived social need—in comparison with which normal budgetary constraints and compromises have come to seem niggling and inappropriate."[172] Obviously, no one today considers it niggling or inappropriate to try to control medical or defense spending. In part this has resulted from changed circumstances such as the end of the Cold War and new resolve to balance the federal budget, but attitudes have changed as well. Special protection for elites is too inegalitarian. If professions are to have a future, therefore, they must sustain themselves by other means.

Does it matter whether professions have a future? Should we care whether a particular occupational group is a profession? What does it mean to be a profession in the first place? Here, perhaps, people divide more upon faith than logic. To some, the issue is

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166. *Id.* at 305-06; *see also* ABEL, *supra* note 107, at 87-90, 218, 236. In 1985, the *National Law Journal* profiled 100 lawyers whom it believed exercised different types of power that affected the profession, major institutions, and the public. Thirty-five of these 100 were graduates of the three most elite schools: Harvard, Yale, and Columbia. A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 804 (1987) (citing Couric, *Special Report*, NAT'L L.J., Apr. 15, 1985, at 19-20). And a degree from an elite law school is all but essential for appointment to a law school faculty. Indeed, nearly one-third of law professors graduated from just five law schools: Chicago, Columbia, Harvard, Michigan, and Yale. GLENDON, *supra* note 3, at 218.

167. Richard L. Abel, who is himself an adherent of the cartel theory, nonetheless concedes that "[i]t is extraordinarily difficult to determine whether supply control enabled the [legal] profession to extract monopoly rents (prices for its services exceeding what would be paid in a freely competitive market)." ABEL, *supra* note 107, at 158.

168. For example, the following appears in one of the leading antitrust treatises of the time:

> Rules of conduct for professional bodies in connection with the maintenance of ethical standards, even though they might have restrictive aspects, would probably not be challenged—it is not perhaps surprising that the legal profession seems to have been immune—but in general it appears that the commercial aspects even of the learned professions may come within the scope of the Sherman Act.

A.D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA: A STUDY OF COMPETITION ENFORCED BY LAW 8-9 (2d ed. 1970).

169. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Attempts at fixing professional prices and wages are still being swept away. *See, e.g.*, Steven A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, N.Y. TIMES, June 28, 1995, at A1 (reporting that the Justice Department forced the American Bar Association to discontinue including minimum faculty salaries and benefits in law school accreditation requirements).

170. Shapero v. Kentucky State Bar Ass'n, 486 U.S. 466 (1988); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

171. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

172. CHARLES E. ROSENBERG, THE CARE OF STRANGERS: THE RISE OF AMERICA'S HOSPITAL SYSTEM 350 (1987).

merely semantic: How is *profession* defined? Some see the issue only in terms of the self-image or status of those who wish to consider themselves professionals, and therefore find it a matter of indifference. But others believe that, somehow, a healthy profession will spawn more Atticus Finches and fewer Mitch MeDeeres. From Alexis de Tocqueville[173] forward, many have marveled at the enormous contributions that lawyers have made in America, not only within the legal system but in many walks of life.[174] No effort to explain this mystery has been entirely successful, but it is generally assumed that professional culture is an important influence.[175] Sociologists and social historians have attached importance to the professions as a whole, and sociologists wrestled to define the term *profession* and identify the occupations that can be considered professions.[176] Certainly, lawyers have placed considerable importance on being part of a profession.[177] It is important to think through the question *What makes a profession a profession?* because, in the process, something may be learned about how to restore the special qualities that have enabled the legal profession to make so many significant contributions.

It is, however, a difficult question. It has been said that there are four "true professions"—law, medicine, divinity, and the military[178]—but there is no obvious and common set of elements that separates these from other occupations.[179] Some argue that professionals exercise independent judgment on behalf of a client,[180] yet in some religious orders members of the clergy are required to adhere strictly to prescribed doctrine when counseling parishioners or conducting ceremonies. Sometimes it is said that professionals

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173. Tocqueville noted that lawyers not only operated the judicial system but filled the legislatures and conducted the administration. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 207 (Henry Steele Commager ed. & Henry Reeve trans., abr. 1961) (1840). He believed this was beneficial, even necessary, for American democracy. "[T]he authority [Americans] have intrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy." *Id.* at 200.

174. *See, e.g.*, E. DIGBY BALTZELL, PURITAN BOSTON AND QUAKER PHILADELPHIA 336-52 (1979); GLENDON, *supra* note 3, at 12-13; KRONMAN, *supra* note 1, at 273; *supra* notes 161-64 and accompanying text (discussing the influence of lawyers in public life and private life).

175. Tocqueville stressed the unity and culture of the profession. Lawyers "naturally constitute a body, not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their proceedings connect their minds together, as much as a common interest could combine their endeavors." TOCQUEVILLE, *supra* note 173, at 201. In what has perhaps become his most quoted sentence about the legal profession, Tocqueville wrote: "If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar." *Id.* at 205.

176. *See, e.g.*, BALTZELL, *supra* note 174, at 335-69; STARR, *supra* note 152, at 3-29 (chapter entitled "The Social Origins of Professional Sovereignty"). Starr defines "profession" as "an occupation that regulates itself through systematic, required training and collegial discipline; that has a base in technical, specialized knowledge; and that has a service rather than profit orientation, enshrined in its code of ethics." *Id.* at 15.

177. Two of a nearly infinite number of examples are: ABA Comm'n on Professionalism, "... *In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261-63 (1986); *An Ancient and Honorable Profession*, 11 MARQ. L. REV. 113 (1927); *see also* Solomon, *supra* note 31, at 146.

178. Jewell v. Maynard, 383 S.E.2d 536, 546 (W. Va. 1989).

179. Although today law and medicine are most often considered the two main professions, that has not necessarily always been the case. In the mid-19th century, theology and law were the most popular callings with graduates of the most prestigious colleges. STARR, *supra* note 152, at 82.

180. Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION, *supra* note 31, at 177, 181.

are not regulated by the state,[181] but what about military officers, who are as regulated by the state as any group? Some argue that a profession requires "a prolonged course of specialized intellectual instruction or study"[182] as opposed to skill acquired on the job, but does this description fit military officers better than, for example, pharmacists or veterinarians?

It does not serve our purposes to pursue the discussion along these lines, however. We are not as interested in defining "profession"or developing a definitive list of the professions as we are in investigating the special characteristics that influence an occupational group to make the kinds of contributions that professions make. This may be a tautological statement in that it says a profession is an occupation that produces professional results, but it has meaning nonetheless: for while we may have trouble defining the term, we intuitively know what we expect of a profession. Put somewhat differently: What is it about a profession that produces Atticus Finches? One way to go about this is to consider an occupational group that works in a socially important area and has sought to elevate itself to professional status, and ask whether it has succeeded, and if so, how, and if not, why not. The next section of this essay ponders these questions with respect to journalism.

B. Journalism's Failure

The importance of the Fourth Estate in a democratic society has long been recognized, and, of course, the press is the only occupational group specially protected by the Constitution of the United States. Journalists, however, are not credentialed, and traditionally received no formal training. When Joseph Pulitzer wanted to help establish the first school of journalism in 1904—predicting that "before the century closes schools of journalism will be generally accepted as a feature of specialized higher education, like schools of law or medicine" and will "raise journalism to the rank of a learned profession"—he had trouble persuading a university to accept a two-million-dollar gift for that purpose.[183] One might as well set up a graduate school of swimming, a New York newspaper editor sniffed.[184] Harvard turned Pulitzer down, and at first Columbia did too, although Columbia changed its mind after the University of Missouri opened the first journalism school in 1908.

We are now nearing the close of the century, and journalism programs may be found at no less than 414 American colleges and universities.[185] Some of these schools are

181. This is usually expressed in terms of the profession being self-regulating. *See, e.g.*, STARR, *supra* note 152, at 37; Solomon, *supra* note 31, at 146.

182. Hashop v. Rockwell Space Operations Co., 867 F. Supp. 1287, 1296 (S.D. Tex. 1994) (discussing whether network communications systems instructors, who train ground personnel for the space shuttle program, are professionals within the meaning of regulations promulgated pursuant to the Fair Labor Standards Act ("FLSA")).

183. Michael Lewis, *J-School Confidential*, NEW REPUBLIC, Apr. 19, 1993, at 20, 22.

184. *Id.* at 22.

185. However, less than 100 schools are accredited by the American Council on Education in Journalism and Mass Communications. *Id.* at 23.

flooded with applications from the best and brightest students.[186] Nevertheless, while an increasing number of journalists hold baccalaureate or master's degrees from schools of journalism,[187] the value of a degree remains controvcrsial. "[T]he trade has somehow sustained a robust contempt for the credential," one journalist wrote of journalism degrces not long ago,[188] and some of the nation's best known journalists never graduated from college, or even high school.[189] The view that "the only practical school of journalism is the newspaper office"[190] remains strong.

The Columbia Journalism School has tried to respond by becoming practical. Sevcral years ago, Columbia made a deliberate decision to adhere to the trade school model.[191] Rather than educating students about thcory or ideal forms of journalism, the school would provide skills training. Instruction would consist mainly of practicing under simulated real-world conditions, including heavy work loads, daily deadlines, little time for background research, and low assumptions about the taste and sophistication of the audience.[192] What this mcans, one journalist has written, is that Columbia students spend much of their time "attempting to replicate mediocrity."[193] Meanwhile, the University of Michigan recently announced plans to eliminate its journalism programs.[194] The university's action represented a "decision that the eollege should expose students to thought and not methodology," the director of Michigan's graduate journalism program said.[195] Not everyone agrees that journalism education must be inherently nonintellecutal. Some academic journalists believe that good journalism education teaches critical thinking—"We teach students how to evaluate issues, not just how to use the computers," the chair of one program put it[196]—but the dominant school of thought seems to be that journalism education should consist primarily of skills training.

Journalists have not merely been technicians, of course. Some of the most respected and influential voices in the public forum have belonged to journalists—from the late Walter Lippmann, whom some consider "perhaps the most important Amcrican political thinker of the twentieth century";[197] to investigative reporters such as Bob Woodward and Carl Bernstein, who ferreted out the key facts of Watergate and helped bring down an administration; to William F. Buckley, who perhaps is more responsible than any other

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186. The journalism schools at Columbia, Florida, Missouri, Northwestern, Syracuse, and Texas are among the most prestigious. M.L. Stein, *J-Schools Besieged, Not Endangered*, EDITOR & PUBLISHER, Aug. 27, 1994, at 11; *see also* Kevin Whitelaw, *Is J-School Worth It?*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 98, 99.

187. Stephanie Gutmann, *The Breeding Ground*, NAT'L REV., June 21, 1993, at 47, 54.

188. Lewis, *supra* note 183, at 23.

189. Freeman v. National Broadeasting Co., 846 F. Supp. 1109, 1155 n.122 (1993) (stating that John Chancellor of NBC News does not hold a college degree, and Peter Jennings of ABC did not graduate from high school).

190. Sun Publishing Co. v. Walling, 140 F.2d 445, 449 (6th Cir.) (attributing this view to "editors of long experience and trained judgment"), *cert. denied*, 322 U.S. 778 (1944); *see also* Gutmann, *supra* note 187, at 50 ("[J]ournalism isn't rocket science. There isn't much to learn that you couldn't learn better at a small paper—getting paid for your time.").

191. Gutmann, *supra* note 187, at 53.

192. *Id.*

193. *Id.*

194. William Honan, *Journalism Dropped*, N.Y. TIMES, Oct. 25, 1995, at B9 (regarding graduate program); Allan Wolper, *Double Up on Journalism?*, EDITOR & PUBLISHER, Sept. 9, 1995, at 16 (regarding undergraduate program).

195. Honan, *supra* note 194, at B9.

196. Wolper, *supra* note 194, at 16 (quoting Tom Dickson of Southwestern Missouri State University).

197. THE ESSENTIAL LIPPMANN: A POLITICAL PHILOSOPHY FOR LIBERAL DEMOCRACY xi (Clinton Rossiter & James Lare eds., 1982).

single individual for the conservative ascent to power in contemporary America; to many other commentators, past and present, whose work has had social and political significance. On the other hand, the public does not express strong confidence in the institutions of the press or great faith in the honesty and ethical standards of journalists—although lawyers are held in lower esteem on both counts.[198]

More important than measures of public confidence, however, is a disturbing trend in journalism: an ever-increasing blurring of the boundary between news and entertainment. It is becoming more difficult to find a line between serious journalism—which perceives itself as fulfilling a public service mission—and vehicles driven principally by commercial objectives. If *Meet the Press* is a news broadcast on which journalists interview newsmakers, what is *Crossfire* or *Equal Time*? If *This Week with David Brinkley* and *60 Minutes* are news broadcasts, what about *Capital Gang*, *Dateline NBC*, *48 Hours*, *Hard Copy*, or *Rescue 911*? If Ted Koppel is a journalist, is Larry King a journalist? What about Barbara Walters, Geraldo Rivera, or Rush Limbaugh?

The line between journalism and entertainment is dissolving even within traditional news formats. NBC executive Reuven Frank has decreed that every news story should "display the attributes of fiction, of drama. It should have structure and conflict, problem and denouement, rising action and falling action, a beginning, a middle and an end."[199] This philosophy has had an enormous effect on the news. Professor Thomas E. Patterson of Syracuse University has pointed out that during political campaigns the press increasingly prefers stories that can fit into a strategic schema, that is, stories that are focused on who is winning and who is losing.[200] Early in the century, fewer than five percent of stories about presidential campaigns were primarily focused on strategic issues; this rose to nearly twenty percent by 1960, and to nearly one-third by 1984.[201]

This has happened both in broadcast and print journalism. During a three-week period shortly before the 1988 presidential election, poll results appeared in more than one-third of all *New York Times* stories about the election and in more than half of all *Washington Post* stories.[202] Gaffes are also an increasingly popular theme in campaign stories. In one study, Patterson found that the television networks gave extended coverage to more than sixty-five percent of stories involving gaffes and only ten percent of stories involving policies.[203] Roger Ailes, who became famous as Richard Nixon's media consultant in 1968 and now manages the CNBC cable network, explains this phenomenon with an Orchestra Pit Theory: "If you have two guys on a stage and one guy says, 'I have a

198. McAneny & Moore, *supra* note 11, at 2 (reporting that among 26 occupations, the public rates the honesty and ethical standards of different fields as follows: pharmacists first, clergy second, medical doctors sixth, TV reporters and commentators twelfth, journalists thirteenth, lawyers seventeenth, car salespeople twenty-sixth). When asked how much confidence they have in institutions, the public expresses the greatest confidence in the military and the second greatest in the church or organized religion. The Supreme Court, television news, the medical system, and newspapers all fall within a broad middle range. The criminal justice system rates dead last. Frank Newport & Lydia Saad, *Confidence in Institutions*, GALLUP POLL MONTHLY, Apr. 1994, at 5.

199. THOMAS E. PATTERSON, OUT OF ORDER 80 (1993).

200. *Id.* at 57.

201. *Id.* at 68.

202. *Id.* at 81.

203. Extended coverage was designated as running at least one story for two consecutive days. *Id.* at 153.

solution to the Middle East problem,' and the other guy falls in the orchestra pit, who do you think is going to be on the evening news?"[204]

Matters of policy get increasingly short shrift. In 1968, the network newscasts generally showed presidential candidates speaking, and on the average a candidate was shown speaking uninterrupted for forty-two seconds. Over the next twenty years, these sound bites had shrunk to an average of less than ten seconds.[205] This phenomenon is by no means unique to broadcast journalism; there has been a parallel decline in substance in print journalism as well. Even in the *New York Times* the average continuous quote or paraphrase of a presidential candidate's words has shrunk from fourteen lines in 1960 to six lines in 1992.[206] The aversion to substance is not limited to *how* events such as presidential campaigns are covered, but also affects *what* stories are covered. Each year Professor Carl Jensen and a team of collaborators[207] identify stories of great importance that are unreported or underreported by the mass media—some because they do not easily fit into a traditional story format with a beginning, middle, and end; others because they are deemed too complex for the general public[208]—while "sensationalized, personalized, and homogenized inconsequential trivia" are grossly overreported.[209]

The fusing of news and entertainment is not accidental. "I make no bones about it—we have to be entertaining because we compete with entertainment options as well as other news stories," says the general manager of a Florida TV station that is famous, or infamous, for boosting the ratings of local newscasts through a relentless focus on stories involving crime and calamity, all of which are presented in a hyperdramatic tone (the so-called "If It Bleeds, It Leads" format).[210] There was a time when news programs were content to compete with other news programs, and networks did not expect news divisions to be profit centers, but those days are over. The change may result in part from the fact that news organs of all types—print as well as broadcast—increasingly exist within corporate conglomerates which evaluate all units in terms of bottom-line performance.[211]

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204. *Id.* at 152.

205. *Id.* at 74.

206. *Id.* at 75. This is the case for newspapers generally. *Id.* at 160. Patterson's research shows that the strategic schema also dominates campaign coverage in *Time* and *Newsweek*. *Id.* at 116-25.

207. Jensen, a professor of Communications Studies at Sonoma State University, established "Project Censored" in 1976. Each year the project publishes a yearbook identifying the top 25 "censored" stories of the year. For purposes of the project, "censorship" is defined as "the suppression of information, whether purposeful or not, by any method—including bias, omission, under-reporting, or self-censorship—which prevents the public from fully knowing what is happening in the world." CARL JENSEN & PROJECT CENSORED, CENSORED: THE NEWS THAT DIDN'T MAKE THE NEWS—AND WHY 27 (1994).

208. *Id.* at 28.

209. *Id.* at 142. Jensen and his colleagues call this "Junk Food News" and consider stories about Amy Fisher and Joey Buttafuoco, Woody Allen and Mia Farrow, John and Lorena Bobbitt, President Clinton's $200 haircut, Dan Quayle's misspelling of potato, and the William Kennedy Smith rape trial, among many others, to fit within this category. *Id.* at 144. We were, of course, recently served the greatest helping of Junk Food News in modern history: the O.J. Simpson trial.

210. Larry Platt, *Armageddon Live at 6!*, FORBES MEDIACRITIC, Summer 1995, at 53, 55.

211. HOWARD KURTZ, MEDIA CIRCUS 312-15 (1993). Time, Inc. merged with Warner Brothers; NBC is part of the General Electric Company; Walt Disney Company bought ABC; and Westinghouse Electric Company bought CBS. Even the *New York Times* and the *Los Angeles Times*, both of which used to be family owned and operated, are now part of large and diversified corporate structures. HOOVER'S HANDBOOK OF AMERICAN BUSINESS 321, 545, 809, 1028, 1030 (1995); Geraldine Fabrikant, *CBS Accepts Bid by Westinghouse; $5.4 Billion Deal*, N.Y. TIMES, Aug. 2, 1994, at A1; *see also* Max Frankel, *Long Live the Monarchy!*, N.Y. TIMES MAG., Apr. 7, 1996, at 20.

Some will argue that journalism has failed to achieve full professional standing beeause, since journalists cannot be licensed, and anyone may call herself a journalist, it lacks the ability to create a cartel. However, occupations can, and do, develop effeetive private credentialing systems.[212] Why then has a journalism degree not become the sine qua non for employment in journalism? The principal reason seems to be that journalists themselves do not value formal journalism education.[213] The failure to make education more important in journalism should come as no surprise in light of the limited view that journalists have of their work. The Dean of the Graduate School of Journalism at the University of California at Berkeley recently testified that journalism involves clearly observing and describing events and does not depend heavily on invention, imagination, or talent.[214] One might say he looks upon journalists as technicians.

Some journalists have a different vision—a journalist-statesman vision, if you will—but often they do not seem to understand what it takes to bring real substance to their work. Reccntly, for example, Ted Koppel and David Brinkley took part in a proceeding at Barry College in Florida, later broadcast on C-Span.[215] After a formal eeremony (in which Koppel received an award named after Brinkley), Koppel and Brinkley sat on a stage and answered questions from students and faculty. Questions were put to them along the entire spectrum of public affairs; some dealt with journalism but others with politics, economics, foreign affairs, military matters, social problems—there was virtually no subject on which Koppel and Brinkley were reluctant to give an opinion. No one would dispute that these are two intelligent, articulate, urbane, and gcnerally well-informed men. But how can they be experts in the whole panorama of human activity? One might dismiss this as an episode when the celebrity status of the participants temporarily got the better of everyone, except that it is routine for panelists on the journalist roundtable-type shows broadcast on the commercial networks to discuss the full spectrum of eurrent affairs regardless of whether they have covered the events they discuss.[216]

Has journalism fulfilled Joseph Pulitzer's dream of beeoming a profession? It has the kind of infrastructure of other professions—associations,[217] a code of ethics,[218] journals,[219] and schools—but it lacks something else, a critical intangible that, for want of a better term, we can call *professional calling*. Professional calling is based on a particular cluster of beliefs and attitudcs: a belief that the field of work has special importance to the public welfare; a belief that those engaged in this work can, for better or worse, affect the public good, and that therefore it is important that they consider themselves to be engaged in a

212. *See, e.g.*, Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 283 (3d Cir. 1978); *cf.* WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 147-48 (1968).

213. Another factor may be that publishers and broadcasters have no interest in promoting a system that would increase the wages of journalists.

214. Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1067 (1st Cir. 1995).

215. *See Award Launched from One Anchor to Another*, PLAIN DEALER (Cleveland), Apr. 6, 1995, at 2A.

216. An exception is PBS' *Washington Week in Review*, which requires that journalists have personally covered the stories they discuss on the air. Byron York, *Washington Week in Review*, FORBES MEDIACRITIC, Summer 1995, at 66.

217. The most prominent is the Society of Professional Journalists. Others include the American Society of Newspaper Editors and the National Press Club.

218. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1987) [hereinafter SPJ CODE OF ETHICS].

219. Among them are *American Journalism Review*, *Columbia Journalism Review*, *Journalism History*, *Journalism Quarterly*, *Nieman Reports*, *Washington Journalism Review*, and *Quill*.

form of public service; a belief that the work is complex and performing it well is not easy, and that it is important that those performing it be competent and dedicated to performing at a high level; and a belief that through continuous and collective improvement the profession can make increasingly valuable contributions to the public good. This collection of beliefs leads to a sense that those engaged in the work hold a sacred or public trust, and that it is a privilege to be allowed to do so. While an individual may have a *professional attitude*, a professional calling is established collectively.

Professional calling need not be maintained solely by altruism. When a professional attitude is admired—when, in the law, those who are perceived to be legal statesmen are respected by colleagues, accorded deference by judges, and thus come to be sought after by clients—professionals will work to reflect these values for selfish reasons as well.[220] Professionals themselves may not understand to what extent they are motivated by a desire to serve others and to what extent a desire to serve themselves, and in this regard altruism and the need for achievement blend. It is a potent brew.

Journalism has not yet become a profession because it has failed to establish professional calling. Many journalists are personally committed to practicing journalism as a profession; however, professional calling is not established until both those engaged in the occupation and the public at large are convinced that a professional attitude prevails within the profession as a whole. The journalistic community itself appears to recognize this. The Code of Ethics of the Society of Professional Journalists echoes the idea of professional calling, stating for example that the "overriding mission" of journalists is to serve the public's right to know and that the "purpose of distributing news and enlightened opinion is to serve the general welfare."[221] Yet the overall tone of the Code seems to reflect a sad recognition that professional calling has not yet been established. "Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust," the Code states.[222] It concludes with an exhortation to encourage individual journalists to adhere to ethical tenets and to encourage publishers and broadcasters to respect their doing so.[223]

If professional calling were established, journalism would be getting progressively more substantive, not less. Journalists would be striving to do an increasingly better job of educating the public and elevating the level of public discourse. Sound-bites would not be getting shorter. Journalism would not be melting into the world of entertainment. Of course, the public is not demanding more. Most people probably would be no happier with commentary based on thorough research and rigorous analysis and explained in a fashion that conveys the complexity and nuance of the subject. Indeed, most are apt to like it less.

One may argue that journalism and law are different enterprises. Journalists sell products; their livelihood depends on enticing customers to purchase their newspapers or magazines or tune into their broadcasts. Lawyers, on the other hand, sell services.

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220. Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 783 (discussing the work of sociologist Talcott "T" Parsons, who wrote the classic 1951 sociological work *The Social System* as well as studies on the sociology of economics, the family, and politics and also translated the German works of sociologist Max Weber).

221. SPJ CODE OF ETHICS, *supra* note 218, art. I.

222. *Id.*

223. *Id.* art. VI.

Moreover, legal services cannot be designed merely to be pleasing to the client because their raison d'etre is to perform a function, such as demonstrating a client's compliance with the law or persuading a judge that a particular position should prevail. It is a mistake to conclude from this, however, that journalism is inherently driven by the demands of the marketplace but law is not. Journalists weigh the demands of the marketplace on a wholesale basis in that they must calculate what will motivate large numbers of people to buy newspapers and to tune into broadcasts while lawyers make retail-type decisions. The choices journalists and lawyers face are different in kind but not in nature. It is just as difficult for a lawyer to tell an important client that she will not prosecute a particular claim because she believes the client is overreaching or will not employ a particular tactic because she considers it abusive as it is for a journalist to reject a marketing consultant's advice to devote less space to issues and more to the "horse race" aspect of political campaigns.

What makes it possible to make difficult choices is the belief that one's professional colleagues, one's competitors, will also resist a client's overreaching or a dilution of journalistic substance. When professional calling is strong, professionals can have a degree of confidence that their colleagues will strive to maintain certain standards. And therein lies the rub. It is professional calling that allows professionals to deliver what they realize the public needs rather than what the public will take.[224] Without professional calling, the demands of the marketplace reign supreme.

IV. PROFESSIONAL THERAPY

Psychotherapists tell us that striving to find meaning in one's life is the primary motivating force of human existence.[225] One may try to find meaning in achievement orientation, either by acquiring money or status or by serving a cause greater than oneself.[226] Traditionally, professionals have chosen the latter. They may have been coaxed into this choice by the selfish desire to earn respect and status,[227] but eventually they succumb to the feeling of personal fulfillment that comes from living a professional life.[228] This is what has given them the dignity that we associate with true professionals.[229] Something, however, has gone astray in the legal profession. It is evident in the plague

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224. In this vein, Robert Nelson and David Trubek write:

> A profession is an alternative to both the market and the state. Professions mediate between individuals or private organizations and society.... Therefore, legal professionalism means the provision of services that will ensure that individual and organizational actions are consonant with social demands and norms.... [The lawyer must have] freedom from the client's definition of the situation and the client's desire for a favored outcome. If the lawyer ... simply gives the client what he or she wants, the lawyer has failed to perform the mediating function and the society's normative system will fail to constrain behavior.

Nelson & Trubek, *supra* note 180, at 180-81.

225. VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING 121 (Washington Square Press rev. ed. 1985) (1959).

226. *Id.* at 129, 133.

227. *See supra* notes 42-93 and accompanying text.

228. As Kronman puts it: "The culture of professionalism ... [offers] practitioners the kind of personal fulfillment that makes it possible for them to find the meaning of their lives in their careers." KRONMAN, *supra* note 1, at 371.

229. *See id.* at 176.

of fraudulent billing, in the silenee about that plague, and in the general state of demoralization and depression that afflicts this once proud profession.

It is difficult to fix the time when the profession took the wrong turn or declare why it did so. The reasons will be subject to debate for a long time. Perhaps the bureaucratization of the law was a factor, forcing lawyers to become less the servants of their own professional judgment and conscience and more subject to control by managers. Perhaps it was the times—the *Bonfire of the Vanities* decade—when it seemed that everyone was seduced by the pursuit of wealth. Perhaps it is the times in a broader and more profound sense. Since the end of World War II, the advanced Western societies have become increasingly prosperous and increasingly depressed.[230] The rate of increase in depression has been highest in the United States, where people born after 1945 are ten times more likely to suffer depression than those born fifty years earlier.[231] Political scientist Robert E. Lane associates this with consumerism and the idea that one becomes happier with the ability to acquire more. Lane calls this the "economistic fallacy"[232] since studies show that above the poverty level there is not much of a correlation between income and happiness.[233] In fact, people of all incomes tend to believe that with just a twenty-five percent increase in income they could finally achieve happiness, a belief that persists even as incomes rise and targets rise with them.[234] Lawyers may simply have been seduced by the same false gods as the general population, but it has cost them more dearly.

The therapy is the reestablishment of professional calling, but how can it be accomplished? There is only one place to begin—in the law schools. Ideally, one might want to start much earlier, in kindergarten, preschool, or at the parent's knee, but law school is the first place where the profession can try to influence its future generations. How then are the law schools to instill the cluster of beliefs and attitudes that constitute professional calling?

Let us think about this by returning briefly to journalism. How should journalism schools go about trying to instill a sense of professional calling? It would be presumptuous of a lawyer to suggest courses journalism schools should offer, and the precise collection of courses does not matter a great deal.[235] However, there is in all professional schools what some eall a "hidden currieulum"[236] comprised of values which are communicated informally about what it means to be a member of a particular profession. Here, important recommendations can be made.

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230. Robert E. Lane, *The Road Not Taken: Friendship, Consumerism, and Happiness*, 8 CRITICAL REV. 521, 522-27, 541 (1994).

231. *Id.* at 523.

232. *Id.* at 527.

233. *But see* James Q. Wilson, *Wealth and Happiness*, 8 CRITICAL REV. 555 (1994).

234. Lane, *supra* note 230, at 543.

235. What is taught, in fact, is likely to be of far less importance than who is teaching. Speaking about law school, Page Keeton, who was Dean of the University of Texas Law School during its rise to national prominence, wrote that curriculum "is of minor importance" and "should be for the most part what the particular collection of legal scholars at a specific law school would prefer to have." Page Keeton, *Legal Education: Developments, Objectives, and Needs*, 20 ARK. L. REV. 31, 33 (1966). He did not advocate this as a mere convenience to the faculty but because he believed that "[t]he first task of any law school should be that of providing effective and inspiring teachers," and that teachers are most effective when teaching about what interests them. *Id.*

236. Nelson & Trubek, *supra* note 180, at 186.

Journalism schools ought to be more than trade schools. They should not merely teach technique: how to write and edit copy, conduct interviews, or read from a teleprompter. Employers may want graduates to be immediately productive, but if journalism schools are to build a profession they must see their primary mission not in terms of serving the economic interests of employers—or even of making their graduates more immediately employable, which is the same thing—but of raising the level of journalism. To do this, they must give students not merely a head start in developing technical skills but an appreciation of what quality journalism means. This is not to say that craftsmanship is not important—it is. But in journalism (or law) craftsmanship is part of the delivery system; the primary concern must be with what is being delivered. These goals can only he met within a curriculum that is primarily substantive.

Journalism schools should be rigorous as well. Substance and rigor go hand in hand. The principal deficiency in how journalism is being practiced today is its superficiality. One often gets the impression that journalists do not know what it is like to dig deep, and in significant part, the blame for this state of affairs—or at least the responsibility for trying to correct it—must be laid at the feet of the journalism schools.[237]

What does this have to do with values and the "hidden agenda"? Values cannot be taught directly. Values are only instilled indirectly. A substantive and rigorous program sends the message that the school believes that the work its students will eventually undertake is important and demanding and that it is preparing students to assume positions of public responsibility.

Does such a program fill students with false pretensions? Rather than unearthing the facts of Watcrgate for the *Washington Post* or reporting international affairs for *Newsweek*, will most journalism graduates wind up covering school board meetings? Such questions miss the point that nearly all subjects are potentially important. Society has a strong interest in how well the national press covers Congress, but it also has a strong interest in how well the local press covers school boards. Even as seemingly frivolous a subject as sports can be reported in a way that matters. A recent obituary of a sports journalist stated that his "supreme achievement was to transform TV sports coverage from a shallow specialty in which hacks fawned over and covered up for athletes into a serious pursuit in which reliable and analytical announcers did their best to illuminate the games and leagues they covered."[238] This, of course, was Howard Cosell, who was educated not in journalism school but in law school.[239]

The same holds true for lawyers. Very few lawyers will sit on the United States Supreme Court, but there is little work that lawyers do that is not crucial to the people they represent. Professionals at all levels can strive to perform their work in a socially beneficial way. Kronman captured this spirit when he described how 19th-century lawyers admired prominent lawyer-statesmen of the day, and how—though they may not have had the opportunity to exercise statesmanship on as grand a scale as did Webster,

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237. Jon Meacham argues that journalists lack the level of sophistieation necessary to understand and thus adequately cover complex issues such as those involving the federal budget. Jon Meacham, *Myth Information: How an Unwitting Press Gets Policy Wrong*, WASH. MONTHLY, July/Aug. 1993, at 20, 21.

238. Lee Winfrey, *The Legendary Howard Cosell Dies*, PHILA. INQUIRER, Apr. 24, 1995, at A1.

239. *Id.*

Choate, and Marshall—they sought nevertheless to emulate the lawyer-statesman model in the more mundane business of their own practices.[240]

How does this apply to law schools? It must not escape notice that during the past two decades law schools have become progressively less substantive and rigorous. This need not be overstated. Law schools have not eliminated substance, degenerated into dens of laxity, or become wholly indifferent to the values that they are communicating; but they have moved in these directions. Mary Ann Glendon says that law schools are moving increasingly toward what she calls "credentialing with comfort."[241] It used to be traditional for law school classes to be conducted in a modified Socratic method in which students participated actively in discussion and were constantly challenged by questions designed—as the fictitious Professor Kingsfield told his class in *Paper Chase*—to spin the tumblers of their minds. Over the years, however, classes conducted in the Socratic method have declined while lecture classes have increased.[242]

Grading has become more relaxed as well. Prior to 1970, about a third of law school students never reached their third year of law school.[243] Students, of course, left for many reasons, but a significant fraction flunked out or left because they found law school too rigorous. After 1970, the attrition rate fell below twenty percent, and after 1980, below ten percent.[244] Grade inflation has been in progress for 25 years. At the law school where I recently taught, the portion of grades awarded at or above the grade of "B" rose from 48.5% in the 1970-71 academic year to 73.5% in 1993-94.[245] In many law schools, more than half the class graduates with honors.[246] Law schools need not be boot camps, and the law school experience should be exciting and inspiring, but there is some truth to the adage "no pain, no gain." No endeavor can be exciting and inspiring without also being challenging and demanding. Moreover, the hurdle bar must be set high if law schools are to send the message that members of the profession are engaged in important work and must be prepared to give their best.

Turning from rigor to substance, one cannot help but consider the growth in skills training. Law school curricula now include courses in problem solving, factual investigation, communication, interviewing, counseling, drafting, negotiation, trial advocacy, and in managing legal work, which covers topics such as how to organize office file systems, keep time records, select computers, and devise a marketing strategy.[247] While clinical, skills, and externship courses still occupy a relatively small place in law school curricula, they have grown enormously over the past twenty years[248]

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240. *See supra* note 91 and accompanying text.

241. GLENDON, *supra* note 3, at 227.

242. *Id.*

243. *See* ABEL, *supra* note 107, at 258.

244. *See id.*

245. Rutgers School of Law-Camden, Yearly Distribution of Grades 1970-71 Through 1993-94 (on file with author). Dean Roger J. Dennis offers an interesting theory as a possible explanation for grade inflation. He suggests that the large debt burden law students now carry gives law schools a strong incentive to reduce attrition and, with it, loan defaults. Interview with Roger J. Dennis, Dean, Rutgers School of Law-Camden, in Camden, N.J. (July 25, 1995).

246. Interview with Roger J. Dennis, *supra* note 245.

247. Task Force on Law Schools and the Profession, *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR 255-59 (generally referred to as the "MacCrate Report," after task force chairperson Robert M. MacCrate).

248. *Id.* at 238, 248.

and the MacCrate Report from the American Bar Association recommends further expansion.[249]

The profession needs to reconsider this trend. The journalism model demonstrates the problems with skills-oriented profcssional training. A skills-centered program devalues the formal educational program by making it merely the equivalent of work experience. When evaluating job applicants, how do publishers and broadcasters regard candidates who hold a degree from the Columbia School of Journalism? Some contend that employers actually look less favorably on such candidates[250] while others (the dean of the Columbia School of Journalism among them[251]) argue that the degree is a substantial asset; but most employers largely consider the degree a substitute for two or three years of on the job training—no more, and no less.[252] That is as much as a skills-based program can expect. For the individual who wishes to break into a field, an educational program that puts one on a par with those who have a couple of years of work experience may well be worth the investment. To be of value to a profession, however, cducational training must do more.

The expansion of clinical education has become an objective of the left in the legal academy. In his famous tract, *Legal Education and the Reproduction of Hierarchy*,[253] Duncan Kennedy argued that law schools should provide an opportunity for students on the political left to pursue alternative careers. As things are currently structured, Kennedy wrote, "one learns nothing about practice" in law school.[254] Upon graduation, therefore, young lawyers are forced to become apprentices in established firms, where their work will "consist of providing marginally important services to businesses in their dealings among themselves and with consumers and stray victims."[255] This work is not evil, Kennedy assured us, but merely "socially inconsequential."[256] After a period of time working in such an environment, a young lawyer's idealism will fade. She will merely "drudge" on, solving puzzles and fighting office politics, and her usefulness to the left and social reform will never be realized.[257] Kennedy saw clinical education as a revolutionary tool. If law schools prepare law students "to perform the relatively simple tasks that they will have to perform in practiee,"[258] he argues, young lawyers will be free to hang up shingles or set up firms with political agendas.[259]

Since Kennedy originally published this argument in 1983, skills training and clinical education has enjoyed vigorous support from the left, particularly from members of the critical legal studies movement. That is unfortunate for the profession as a whole and for

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249. *Id.* at 268.

250. Lewis, *supra* note 183, at 26.

251. Joan Konner, Dean, Columbia Graduate School of Journalism, Letter to the Editor, NEW REPUBLIC, May 17, 1993, at 4.

252. I rely in part on the view of Michael deCourcey Hinds (longtime *New York Times* correspondent).

253. *See generally* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983).

254. *Id.* at 17; *see also id.* at 30 (arguing that "[l]aw schools teach so little, and that so incompetently, that they cannot, as now constituted, prepare students for more than one career at the bar").

255. *Id.* at 33.

256. *Id.* at 34.

257. *Id.* at 35.

258. *Id.* at 26.

259. *Id.* at 30.

the left in particular. The capacity of the legal system to counterbalance the forces in American society that are of concern to the left—concentrated wealth, corporate power, and, at times, the passion of a majority inflamed by fear or prejudice—will never depend principally on lawyers working in community law offices or advocacy groups, as important as those lawyers may be. Lawyers on the left may advocate various causes, but they will not prevail unless they persuade their colleagues that the public interest demands such a result and—here is the rub—their colleagues believe that the function of law, and their mission as lawyers, is to serve the public interest.

This is not to suggest that there will be unanimity among lawyers about how best to serve the public interest. Indeed, unanimity would be undesirable; the legal system is a crucible for competing interests and views. The question is how decisions will be made. As long as the system is perceived as a mechanism for serving the public interest, lawyers at the bar will try to explain why a particular result will be consistent with public policy or the opposite result will lead to undesirable consequences, and their colleagues on the bench will strive to make decisions accordingly. That does not mean that the decisionmakers will be free to impose their personal views about public policy in the matters before them. The law can only serve the public interest if certain principles—preserving the Constitution, enforcing legislation, and giving proper weight to precedent, to name only a few—are honored. This is not easy work. Those who engage in it must be able to discern, understand, analyze, and balance complex issues. Yet this is the work of lawyers, notwithstanding Duncan Kennedy's beliefs that the practice of law consists of "relatively simple tasks"[260] and that legal reasoning "is sharply distinguished from law practice."[261]

A substantive system dedicated to the public interest is by no means inevitable. It is all too easy for the law to slide into formalism or place too great an emphasis on technique. Formalism generally serves the status quo; its mumbo jumbo conceals the fact that the system favors unquestioned compliance with rules written by, and for, those in power.[262] While one hopes that lawyers of all political persuasions want a legal system that is substantive and dedicated to the public interest, if any wing of the political spectrum has a particular interest in such a system, it is the left.

Some educators argue that substance and analytical skills can be taught in clinical programs just as well as in substantive courses. That may be the case when clinical courses are exceptionally well taught, but one wonders what attention substance and analysis receive in most skills courses. Were these courses not developed to teach

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260. *See supra* text accompanying note 254-58.

261. KENNEDY, *supra* note 253, at 17.

262. It is interesting to note that Edmund Burke believed that, in part, the French Revolution resulted from the presence of mechanical lawyers in the French National Assembly:

> Judge, Sir, of my surprise when I found that a very great proportion of the Assembly (a majority, I believe, of the members who attended) was composed of practitioners in the law. It was composed, not of distinguished magistrates, who had given pledges to their country of their science, prudence, and integrity; not of leading advocates, the glory of the bar; not of renowned professors in universities;—but for the greater part . . . of the inferior, unlearned, mechanical, merely instrumental members of the profession. . . . From the moment I read the list, I saw distinctly, and very nearly as it happened, all that was to follow.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 39 (Hackett Publishing Co. 1987) (1790).

mechanics and technique, and is that not why students take them? Skills courses have a place, but law schools need to think carefully about how the expansion of such courses affect the hidden curriculum. The message that practicing law is a substantive enterprise and that technique is merely polish on more important skills must not be blurred.

The continuing growth of skills training is not the only threat to the hidden curriculum. Another is the growing disdain for law within the legal academy. The contempt that Richard Posner[263] and George Priest[264] have for the law as a discipline and the condescension that Duncan Kennedy[265] expresses with respect to work of practitioners speak for themselves, but the problem is even more widespread.[266] To some extent, it stems from what Judge Harry T. Edwards describes as "the growing disjunction between legal education and the legal profession."[267] Judge Edwards complains that the legal academy is abandoning practical scholarship, by which he means scholarship useful to judges, legislators, and practicing lawyers. His definition of "practical scholarship" is not a narrow one; it embraces not only doctrine but theory, at least insofar as theory can be used to criticize or develop doctrine or propose change in the system of justice.[268] However, he decries highly abstract scholarship and writings that have only a passing contact with law and ricochet off into philosophy, economics, literary criticism, or some other discipline.[269] Others have reported that while, in 1960, leading law reviews published 4.5 "practical" articles for every "theoretical" article, by 1985 the ratio fell to 1:1.[270]

Nothing can be more demoralizing than for law students to learn that their teachers have low regard for the practice of law. The contempt may seldom be openly expressed—ironically, Kronman himself confesses doing so several years ago[271]—but it is communicated nonetheless. Indeed, this message is more than demoralizing; it is pernicious. It causes law students to have a diminished vision of the practice of law, which in turn will lead them to practice law in a diminished way.

One might expect clinical education would enhance the respectability of practice within the academy but, paradoxically, precisely the reverse is true.[272] Clinical and skills teachers are generally second-class citizens within the academy. At many schools, they are not given tenure-track positions, not evaluated on the same basis as regular faculty, not permitted to teach important (*e.g.*, first year) substantive courses, not expected to contribute to legal scholarship. This only reinforces the view that practitioners are mere

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263. *See* Posner, *supra* note 5.

264. *See* Priest, *supra* note 9.

265. *See* KENNEDY, *supra* note 253.

266. Kronman blames the law and economics and critical legal studies movements as a whole, arguing that both are "inspired by an ideal of legal science that is antagonistic to the common-law tradition and to the claims of practical wisdom which that tradition has always honored." KRONMAN, *supra* note 1, at 267.

267. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

268. *Id.* at 35.

269. *Id.*

270. GLENDON, *supra* note 3, at 204.

271. Scholarship aims at truth while advocacy is concerned merely with persuasion, and thus law professors have a higher and better calling than practicing lawyers, Kronman declared at a symposium at the Yale Law School. KRONMAN, *supra* note 1, at vii. His book, *The Lost Lawyer*, is a passionate recantation of that view.

272. On this point, I part company with Judge Edwards, who recommends more clinical courses. Edwards, *supra* note 267, at 63.

technicians and that while schools are willing to provide adjuncts and skills instructors to give students a head start in developing practice skills, serious faculty are not interested in that enterprise.

The widening gap between academic lawyers and practitioners presents another problem. It may be said that a professional is someone who applies available knowledge to the solution of practical problems.[273] What happens, then, when the door closes between those who develop knowledge and those who employ it?[274] Neither academic lawyers nor practitioners can serve the public interest effectively unless they recognize that they are engaged in a common enterprise.

The law schools may not be primarily responsible for placing the profession on its death bed, and they should not be asked to attend the patient by themselves. The bar has at least an equal responsibility. Many other questions need to be asked; one among them—which in somewhat different ways is of great concern to both the legal and medical professions—is how professional independence can be protected and nurtured in bureaucratic institutions.[275] Nevertheless, nothing is more critical to the health of a profession than the intangible of professional calling—a professional theology, if you will, that law somehow either instills or fails to instill in those who enter the profession.

CONCLUSION

It is not necessary to harbor some illusion of a golden age in the practice of law to realize that something has been lost. The legal profession has, of course, always been far from perfect, and in many ways the profession is better off now than in the past. Among these ways is the fact that it is more open to women, minorities, and Jews than it was thirty years ago. Nevertheless, the profession—as a profession—is *in extremis*. Until this point at least, some have thought claims of crisis were overblown,[276] but that may be because the focus has tended to be on the morale of lawyers and on whether increased commercialism was degrading their quality of life. It is, after all, difficult to become agitated by complaints that a privileged group is not as comfortable as it used to be. But the main issue is not the lot of lawyers; it is whether lawyers will be able to serve society as well in the future as they have in the past.

Lawyers have made exceptional contributions throughout the history of the Republic. They have been able to do so, in large part, because of their powers of critical thinking and practical judgment;[277] but equally important has been the fact that lawyers have

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273. Eliot Freidson, *Professionalism as Model and Ideology*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION, *supra* note 31, at 223.

274. This is a question that plagues other disciplines as well. In the field of psychotherapy, for example, there is said to be an increasing division between researchers and clinicians, and that as a result psychotherapy is losing its vision as a science-based profession. Ellen K. Coughlin, *Psychotherapy Besieged*, CHRON. HIGHER EDUC., Aug. 4, 1995, at A7, A7.

275. With respect to the importance of professional independence in the legal profession, see generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). The rise of managed care, of course, has made the issue of professional independence in the medical profession quite stark.

276. *See, e.g.*, Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer"*, 89 NW. L. REV. 1592 (1995); Moore, *supra* note 220.

277. *See generally* GLENDON, *supra* note 3, at 236-39; KRONMAN, *supra* note 1, at 109, 128, 223-24; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

considered themselves part of a profession entrusted with special responsibilities. They have aspired to be not merely technicians, but statesmen.

A. Leon Higginbotham, Jr. has written:

> If we lawyers are to play the important social and moral roles that I believe we can and should, we must begin by recognizing that our nation's basie problems never have arisen because the legal profession misunderstood Blackstone or the Bluebook, the Uniform Commercial Code or the Federal Rules of Evidence. Poverty, hatred, malnutrition, inadequate health care and housing, corruption in government, and the failures of our public school system continue to haunt us today because those in power often have lacked personal morality or have failed to make real the values that they have professcd to hold in the abstract. To paraphrase Justice Holmes, the life of the law must not be mere logic; it must also be values.[278]

It is difficult to see how a profession that is acculturating its new gcneration within a silent system of fraud will be able play those roles.

278. Higginbotham, *supra* note 166, at 815. Judge Higginbotham emphasizes similar themes in his inspiring open letter to Justice Clarence Thomas. A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).