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## THE LEGAL PROFESSION AS A BLUE STATE: REFLECTIONS ON PUBLIC PHILOSOPHY, JURISPRUDENCE, AND LEGAL ETHICS

Russell G. Pearce\*

### INTRODUCTION

Many conservative commentators view the legal profession as a Blue State—as a captive of the Democratic Party and political liberalism.<sup>1</sup> They assert that most lawyers vote for Democratic presidential candidates.<sup>2</sup> They attack the American Bar Association for supporting abortion rights and equal rights for lesbians and gays and argue that it gives preferred treatment to Democratic nominees to the federal courts.<sup>3</sup> Many opposed the nomination of Harriet Miers to the Supreme Court on the ground that she lacks “the spine and steel necessary to resist the pressures that constantly bend the American legal system toward the left.”<sup>4</sup> They create law schools

\* Edward & Marilyn Bellet Professor of Legal Ethics, Morality, and Religion, Fordham University School of Law. I presented earlier versions of this essay at the Fordham Law School Symposium *The Internal Point of View in Law and Ethics*, at a George Washington Law School Faculty Workshop, and as the Louis D. Brandeis Lecture at Pepperdine Law School. I would like to thank all who attended these presentations for their helpful comments. I would also like to thank Bruce Green, Gene Harper, Sam Levine, Andy Perlman, Ed Purcell, Becky Roiphe, Amy Uelmen, and Rob Vischer for their wise insights.

1. See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 Geo. L.J. 1167 (2005); Editorial, *The ABA's Liberal Agenda*, Tampa Trib., Aug. 12, 2001, at cm1, p. 2; John R. Lott, Jr., *Pulling Rank*, N.Y. Times, Jan. 25, 2006, at A21; Robert F. Nagel, *The Problem with The Court: Well, the Justices, Being Lawyers, Think Like Them*, Nat'l Rev., Nov. 21, 2005, at 43; Hans Bader, *Why Stop with Non-Judges?*, Competitive Enter. Inst., July 18, 2005, <http://www.cei.org/gencon/019,04690.cfm>.

2. See, e.g., Joshua Rozenberg, *Why the White House Wants to Judge Judges: Back in Office with Scores to Settle, The Republicans Are Determined that "Left-Leaning Liberals" at the American Bar Will No Longer Hinder Judicial Appointments*, Daily Telegraph (London), Mar. 27, 2001, at 17; Bader, *supra* note 1.

3. See, e.g., William C. Duncan, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 B.Y.U. J. Pub. L. 137 (2001); Justin Katz, *An Invidious Prohibition, Building Bias into the Judiciary*, Nat'l Rev. Online, Oct. 4, 2004, <http://www.nationalreview.com/comment/katz200410040858.asp>; Lott, *supra* note 1; Editorial, *supra* note 1.

4. Kenneth R. Bazinet, *Bush On Defensive: Sez Nominee 'Best Person I Could Find'*, N.Y. Daily News, Oct. 5, 2005, at 23 (quoting David Frum). For similar observations regarding the leftward drift of the legal system, see, for example, Bader, *supra* note 1 (“Judges typically drift to the left after being appointed to a high-profile post.”); Nagel, *supra* note 1 (discussing the contention that conservative judges “are subjected to intense

affiliated with religious conservatives to create lawyers free of the politically liberal taint.<sup>5</sup>

I would like to suggest that this affinity between the legal profession and a Blue State, which often manifests itself in differences on substantive issues of policy and law, has its roots in conceptions of public philosophy,<sup>6</sup> jurisprudence, and legal ethics. In particular, I would like to focus on the way that people who express a priority for moral values are far more likely to be part of Red State America.<sup>7</sup> Although this distinction undoubtedly glosses over some nuances, such as the Republican allegiance of economic libertarians<sup>8</sup> and the strong values commitments of religious liberals<sup>9</sup> and secular humanists,<sup>10</sup> it does offer a reasonably accurate description of what Michael Barone has described as "two Americas . . . of different faiths."<sup>11</sup> Indeed, as a general matter, Blue State voters are less friendly to the

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pressure to undergo radical ideological changes," much of it from "read[ing] the Washington Post [and] socializ[ing] with liberal law professors").

5. Francis M. Lazarus, *Genesis of a Conference*, 78 Marq. L. Rev. 397 (1995); Jane Lampman, *Bringing the Case Against Judges*, Christian Sci. Monitor, Apr. 13, 2005, at 15; Adam Liptak, *Giving the Law a Religious Perspective: Falwell's School Says Its Mission Is to Train "Ministers of Justice"*, N.Y. Times, Nov. 22, 2004, at A16; Emma Schwartz, *Falwell's School Joins Others in Teaching Law to Their Flocks: The Legal Program at the Reverend's University Represents the Latest Effort by the Religious Right to Change American Society*, L.A. Times, Nov. 21, 2004, at A24.

6. I use this term in the same way Michael Sandel employs it to indicate philosophical approaches that "blur the line between political commentary and political philosophy." Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* 5 (2005). The goal of this essay is to identify the outlines of the dominant political philosophies that have provided the foundation, at least in broad strokes, of prevailing political perspectives.

7. See David Brooks, *One Nation, Slightly Divisible*, Atlantic Monthly, Dec. 2001, at 53; William Safire, *Battleground: Those "Swing States" Neither Red nor Blue*, N.Y. Times, § 6 (Magazine), at 32; Katharine Q. Seelye, *Moral Values Cited as a Defining Issue of the Election*, N.Y. Times, Nov. 4, 2004, at P4; see also Michael Barone, *The 49 Percent Nation*, Nat'l J., June 9, 2001, at 1710, 1716. When using the terms Red State and Blue State, the essay refers to the contrasting approach to moral values and not to any particular geographic area. The title of the essay refers to the legal profession as an institution that supports Blue State values.

8. See, e.g., William Safire, *Inside a Republican Brain*, N.Y. Times, July 21, 2004, at A19; Randy E. Barnett, *Keeping Libertarians Inside the Tent*, Nat'l Rev. Online, Nov. 22, 2002, <http://www.nationalreview.com/comment/comment-barnett112202.asp>; Patrick Hynes, *Hurting the Ones You (Ought to) Love*, Am. Spectator Online, June 27, 2006, [http://www.spectator.org/dsp\\_article.asp?art\\_id=10013](http://www.spectator.org/dsp_article.asp?art_id=10013).

9. See, e.g., Caryle Murphy & Alan Cooperman, *Religious Liberals Gain New Visibility: A Different List of Moral Issues*, Wash. Post, May 20, 2006, at A1; *Red and Blue Religion? Faith Leads the Devout to Different Sides of Political Divide*, Dallas Morning News, Sept. 1, 2004, at 23A (interview with Joseph Hough and Gary Bauer); Religious Action Center of Reform Judaism, *The First Session of the 107th Congress: The Legislative Agenda of the Religious Action Ctr.* (Mar. 2001), <http://rac.org/advocacy/reviewagenda/agenda107-1/>.

10. See, e.g., Am. Humanist Ass'n, *Humanism and Its Aspirations* (2003); Caroline Hsu, *Joining the Humanists*, U.S. News & World Rep., Aug. 8, 2005, at 46.

11. Barone, *supra* note 7, at 1716; see also Brooks, *supra* note 7; Thomas L. Friedman, *Two Nations Under God*, N.Y. Times, Nov. 4, 2004, at A25; Seelye, *supra* note 7.

promotion of moral values through the public sphere.<sup>12</sup> In contrast to Red State voters, they are more likely to embrace a liberal public philosophy that emphasizes a conception of individual freedom grounded in the "basic principle of human dignity, [that] no person or group has the right deliberately to impose personal ethical values . . . on anyone else."<sup>13</sup>

The dominant—although not exclusive—modern conception of the lawyer as a hired gun tracks this commitment to removing personal ethical values from politics. It asserts that the proper functioning of the legal system requires lawyers to remove personal ethical values from their work.<sup>14</sup> Their role is to function as extreme partisans without moral accountability for their own conduct or even that of their clients so long as both have not definitively crossed the bounds of the law.<sup>15</sup> In this role, they are to be morally neutral. As Sanford Levinson has observed, the dominant conception requires "'bleaching' out of [the] merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our 'conscience.'"<sup>16</sup>

A powerful illustration of the confluence between the conception of the lawyer's role and the Blue State approach to values is a recent decision of

12. Barone, *supra* note 7, at 1716. As Michael Sandel has observed, "The Democrats have ceded to Republicans a monopoly on the moral and spiritual sources of American politics." Friedman, *supra* note 11 (quoting Sandel); see also Brooks, *supra* note 7. But see Gary Langer, *A Question of Values*, N.Y. Times, Nov. 6, 2004, at A19; Dick Meyer, *The Anatomy of a Myth*, Wash. Post, Dec. 5, 2004, at B1.

13. Ronald Dworkin, *Who Should Shape Our Culture?*, L. Sch., Autumn 2005, at 20, 21; see also Sandel, *supra* note 6, at 149 (noting that liberals assert that "the state should not impose on its citizens a preferred way of life, but should leave them as free as possible to choose their own values and ends, consistent with a similar liberty for others"); Barone, *supra* note 7, at 1716. Interestingly, some critics—often liberals—argue that liberals do indeed have values and that the Red State/Blue State distinction based on the polling question regarding values is the result only of a "poorly devised" question. See, e.g., Langer, *supra* note 12. In fact, this critique only underscores the accuracy of the distinction. As conservative commentators have pointed out—and more liberal commentators have recently acknowledged—political liberals do possess strongly held values. See *infra* note 183-86 and accompanying text. But what the polling question revealed is important data about how Blue State voters generally think. They view their own policy prescriptions as neutral with regard to values at the same time that they believe that politically conservative perspectives wrongly impose values on the public sphere in ways that are intolerant and impermissibly limit individual freedom.

14. See, e.g., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 622; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wisc. L. Rev. 29, 36; Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. Colo. L. Rev. 1, 7 (2003); see also Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 Case W. Res. L. Rev. 127, 142-45 (2004).

15. David Luban, *Lawyers and Justice: An Ethical Study* 20 (1988); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 671 (1978).

16. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1578 (1993); see also Pearce & Uelmen, *supra* note 14, at 142-45.

the Tennessee Supreme Court's Board of Professional Responsibility.<sup>17</sup> A Catholic lawyer who believed that abortion was murder sought to avoid a court appointment to represent a teenage girl seeking court permission to obtain an abortion without her parents' consent or, in the alternative, to recommend to his client that it would be better for her to seek parental consent and explore alternatives to abortion.<sup>18</sup> Even though a literal reading of the applicable rules would appear to have permitted, though not endorsed, either course of action, the Board found that if the lawyer were to make a recommendation to his client based upon his personal beliefs, or even if he were to withdraw representation, his conduct would improperly create the risk of imposing his values upon the client or upon the legal system.<sup>19</sup> Even in the Red State of Tennessee, the legal profession felt bound to follow a Blue State approach to values.

This approach to values was not always the dominant approach of the legal profession. Indeed, until the 1960s, the leading American conception of the lawyer's role required lawyers to bring their conception of the public good into their work as lawyers.<sup>20</sup> In 1984, Chief Justice Warren Burger complained that lawyers had forsaken their obligation to place the public good above their self interest and declared a "crisis of professionalism."<sup>21</sup> Since that time, leaders of the bench, bar, and academy have sought unsuccessfully to revive that duty.<sup>22</sup>

One source of this failure has been a mistaken understanding of the development and decline of lawyers' commitment to the public good. Many bar leaders and academics persist in repeating a version of the account that bar leaders first presented in the late nineteenth century as part of the justification for the creation and empowerment of bar associations.<sup>23</sup>

17. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 96-F-140 (June 13, 1996), available at [http://www.tsc.state.tn.us/OPINIONS/Ethics/BdofProResp/\\_PDF\\_Files/92-99/96-f-140.pdf](http://www.tsc.state.tn.us/OPINIONS/Ethics/BdofProResp/_PDF_Files/92-99/96-f-140.pdf).

18. *Id.* at 2-3.

19. *Id.* at 2-5; see also Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 Wake Forest L. Rev. 635, 642-43 (1997); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. Pa. L. Rev. 661, 681-82 (2001); Pearce & Uelmen, *supra* note 14, at 143-45.

20. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. Chi. Roundtable 381 (2001).

21. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62; see also Pearce, *supra* note 20, at 410-11.

22. See, e.g., Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1347 (1997); Eugene R. Gaetke, *Renewed Introspection and the Legal Profession*, 87 Ky. L.J. 903, 909-10 (1999); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 Md. L. Rev. 217 (2002); Pearce & Uelmen, *supra* note 14, at 148-49; Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 Fordham L. Rev. 1543, 1556 (2002).

23. See, e.g., Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 93 (1983) (noting that bar leaders "accepted as axiomatic that bar standards had declined between 1840 and 1870"); Charles Warren, *A History of the American Bar* (1911).

With some variations in the chronological periods covered and explanations emphasized, the story they tell is as follows. The pre-Revolutionary American bar continued the English traditions of a self-regulating guild and the noblesse oblige responsibility of the gentleman. Sometime during the early nineteenth century, the bar began to decline as it became easy to become a lawyer and the sense of public responsibility collapsed. The creation of bar organizations after the Civil War revived standards for admission and ethics, including renewal of the public responsibility, and this success continued through the start of the crisis of professionalism.<sup>24</sup> All that needs to be done to end the crisis is to teach professionalism to lawyers.<sup>25</sup>

As this essay describes, the dominant story begins with assumptions that leading historians have rejected for at least 40 years. Beginning with Perry Miller,<sup>26</sup> and continuing through the tremendously influential work of Gordon Wood,<sup>27</sup> these historians have identified the period following the Revolution as the moment of creation of a uniquely American understanding of lawyers as a necessary governing class in a democracy.<sup>28</sup>

24. The classic statement of the history is Roscoe Pound's observation that "[t]he high point [of the American bar] at the beginning is on the eve of the Revolution. The lowest point is immediately after the Civil War." Roscoe Pound, *The Lawyer From Antiquity to Modern Times* 223 (1953). Elements of this story are found in the mythology of the bar. See, e.g., Report of the Task Force on Law Schools and the Profession: *Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum* 103-20 (1992) [hereinafter MacCrate Report]. Elements are also found in the work of distinguished scholars. See, e.g., Richard L. Abel, *American Lawyers* 40-48 (1989); Lawrence M. Friedman, *A History of American Law* 226-49, 463-500 (3d ed. 2005). Instead of examining the dominant understandings of lawyers and judges, these commentators use the rigor of standards for admission as the determinant of how well the bar was fulfilling its public role.

25. See, e.g., MacCrate Report, *supra* note 24.

26. Perry Miller, *The Life of the Mind in America from the Revolution to the Civil War* (1965).

27. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 403-09 (1969) [hereinafter Wood, *Creation*]; Gordon Wood, *The Radicalism of the American Revolution* 104-07, 253-55, 346 (1991) [hereinafter Wood, *Radicalism*]; see, e.g., William Michael Treanor, *Judicial Review Before Marbury*, 58 *Stan. L. Rev.* 455, 462 (2005) (describing Gordon Wood as "the leading historian of the framing"). But while Gordon Wood's analysis has dominated the approach of historians to this era, not all agree with him. See, e.g., Christopher Flannery, *Tender of the Flame*, *Am. Scholar*, Spring 1997, at 310, 311 (reviewing Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (1995)) (describing Wood as having "established the leading historical paradigm for founding studies for the past thirty years" but criticizing his work).

28. Miller, *supra* note 26, at 99-206; Wood, *Radicalism*, *supra* note 27, at 254, 323. In the legal literature, see Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1, 14 (1988) and Pearce, *supra* note 20, at 384-92, especially 387 n.53. Although his earlier work rejects a strong antebellum connection between lawyers and the public good, see Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *Fordham L. Rev.* 1397 (2003) [hereinafter Spaulding, *Myth of Civic Republicanism*]. Norman Spaulding's more recent work at least rejects the standard bar notion that the antebellum connection was largely nonexistent. Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 *Wm. & Mary L. Rev.* 2001, 2029-39 (2005) [hereinafter Spaulding, *Discourse of Law*].

From this vantage, the post-Civil War period, rather than serving as the high point of lawyers' commitment to the public good, actually began a period of narrowing conceptions of the capacity of lawyers and the nature of the public good that continued through the 1960s.<sup>29</sup> When the final collapse of lawyers' commitment to the public good occurred in the 1960s, it represented the victory of a view that rejects the idea that any conception of the public good is necessarily superior to another, much like the understandings that are dominant among Blue State voters.<sup>30</sup> Not surprisingly, lawyers with these views are largely immune to efforts to preach professionalism.<sup>31</sup>

In this essay, I extend my previous work on the origins of the "governing class" perspective and its demise in the 1960s.<sup>32</sup> The essay incorporates jurisprudence and public political philosophy into the analysis and offers a more nuanced account that explains the gradual erosion of the commitment to the public good that preceded its collapse. In addition to offering a more complex historical account, the essay also concludes by suggesting the framework for a normative obligation of lawyers to the public good grounded not in the mythology of an idealized past<sup>33</sup> but in the reality of contemporary moral challenges.

A few caveats are also in order. First, the essay is written from the perspective that ideas matter and that they shape how we understand our place in the world. It rejects the view that our actions are determined exclusively by material self-interest. Second, the essay does not provide a complete account of the history of public political philosophy, jurisprudence, or legal ethics. It follows dominant trends and changes in "emphasis and proportion."<sup>34</sup> It does not explore the many gradual and fluctuating changes that comprise these trends and does not offer a full account of the variety of nuances within either dominant or minority perspectives. Third, the essay examines how lawyers understand their work, not how they actually perform it.<sup>35</sup> To construct lawyers' understanding of the place of the public good in their representation of clients, the essay looks to ethics rules and treatises, as well as the published

29. See *infra* Part II.

30. See *infra* Part III.

31. See *supra* notes 14-16 and accompanying text.

32. See, e.g., Pearce, *supra* note 20; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1995) [hereinafter Pearce, *Professionalism Paradigm Shift*]; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992) [hereinafter Pearce, *Republican Origins*].

33. As Brian Tamanaha observes, these romantic jurisprudential perspectives "invoked abstractions and offered accounts of law and judging that, in hindsight, appear patently implausible. Nonetheless, they were widely espoused and sincerely believed, especially by the legal elite." Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* 4 (2006). Tamanaha's work parallels this essay. In describing the shift to an "instrumental view of the law," he focuses on a different aspect within the same general trends. *Id.*

34. *Id.* at 2.

35. *Id.* at 4.

pronouncements of lawyers. Beyond that, it is impossible as a historical matter to compare the actual conversations between lawyer and client over time. With its main focus on how lawyers understand their relationship to the public good, the essay also does not determine whether lawyers actually fulfilled their aspirations to the public good or whether their views of the public good are the same as ours today. Certainly, they are not. While lawyers throughout American history may share general commitments to the rule of law and individual rights, today's understandings of the public good—disputed as they are—would converge in rejecting notions of the superiority of whites, of Protestants, and of men that were widespread among bar leaders from the late nineteenth through the twentieth centuries.<sup>36</sup> Nonetheless, as with the aspirations in our Declaration of Independence and Constitution, the fact that the public good was historically associated with tarnished ideas does not mean we should abandon it altogether.<sup>37</sup> To do so would mean losing a valuable and necessary resource for understanding the role and responsibilities of the modern lawyer.<sup>38</sup>

### I. FROM GUILD TO GOVERNING CLASS

The conception that lawyers were the American governing class with the primary responsibility for the public good emerged in the constitutional period. It borrowed from the English guild notion that lawyers were above self-interest, but claimed a far more ambitious societal role for lawyers than the English guild conception recognized. The American construct reflected the demands of an elite political philosophy that embraced majority rule but

36. See, e.g., Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 5, 25-30, 51, 100 (1976); Report of the Thirty-Fifth Annual Meeting of the American Bar Association 12-16 (1912) (resolution stating that "it has never been contemplated that members of the colored race should become members of this Association"); Tamanaha, *supra* note 33, at 35; Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legalism*, 47 *Am. J. Legal Hist.* 1, 3-16 (2005); Deborah L. Rhode, *Perspectives on Professional Women*, 40 *Stan. L. Rev.* 1163, 1167-73 (1988); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 *Stan. L. Rev.* 1915, 1920-23 (2005).

37. Martin Luther King, Jr., for example, relied on the general commitment of the Declaration of Independence and the Constitution to human dignity and equality to argue that their spirit supported equal rights for African Americans even though the documents themselves were written, in part, by slaveholders and did not abrogate—but actually permitted—slavery. Martin Luther King, Jr., "I Have A Dream," Address Delivered at the March on Washington for Jobs and Freedom 1 (Aug. 28, 1963), available at [http://www.stanford.edu/group/King/publications/speeches/address\\_at\\_march\\_on\\_washington.pdf](http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf) (transcript) ("When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir."); see also Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* 8-11 (2006) (defending the "greatness" of the founders even though they "do not share our modern views about important matters, about race, the role of woman, and equality").

38. For a similar argument regarding a noninstrumental approach to the law, see Tamanaha, *supra* note 33, at 250.

found it incompatible with the public good and rule of law absent a governing class to manage it.

#### A. *The English Guild*

In colonial America, the legal profession largely borrowed from the English guild model. Society trusted guilds to rise above self-interest and to police themselves. In turn, the government permitted the guilds autonomy in membership, production, and marketing.<sup>39</sup> Although English craft guilds had largely lost their authority by the eighteenth century,<sup>40</sup> the guild continued to provide the organizational basis for the professions. In the legal profession, this meant that lawyers would perform their obligations to the legal system with excellence and integrity.<sup>41</sup>

But English lawyers were not the governing class.<sup>42</sup> Their commitment was to what H.L.A. Hart termed an "internal point of view," faithfulness to the secondary rules that society maintained for resolving disputes, not to maintaining the public good.<sup>43</sup> Although lawyers came from the social class of "gentlemen," possessed of "good behavior, well bred, amiable, [and] high-minded,"<sup>44</sup> the task of governing fell to aristocrats and their oldest sons who assumed their place, not their younger sons who might become lawyers.<sup>45</sup> Accordingly, although Blackstone's natural law jurisprudence included an expansive commitment to the public good that lawyers would have to understand, the primary responsibility for identifying and pursuing the good for society fell to the gentry and not to the community of lawyers. As Perry Miller observed, "Blackstone tailored his masterpiece to the needs on an eighteenth-century England, wherein the gentry still ruled as justices of the peace, with the House of Commons as their club."<sup>46</sup>

#### B. *The Original American Understanding*

The development of a uniquely American ethic for lawyers began around the time of the Constitution's ratification. The republican ideology of the American Revolution viewed society as organic.<sup>47</sup> Although "commerce and the attendant pursuit of self interest [posed] a threat to proper

39. Elliot A. Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* 2-6 (1996).

40. *Id.* at 7.

41. See, e.g., Samuel Haber, *The Quest for Authority and Honor in the American Professions, 1750-1900*, at 74-78 (1991).

42. See, e.g., *id.* at 67; Robert Robson, *The Attorney in Eighteenth-Century England* 82-83 (Wm. W. Gaunt & Sons, Inc. 1986) (1959); Alexis de Tocqueville, *Democracy in America* 268 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

43. H.L.A. Hart, *The Concept of Law* 88-91, 116-17 (2d ed. 1994).

44. Wood, *supra* note 37, at 14.

45. See, e.g., Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640*, at 87 (1986); Tocqueville, *supra* note 42, at 268.

46. Miller, *supra* note 26, at 144; see also Tocqueville, *supra* note 42, at 267-68.

47. Miller, *supra* note 26, at 144.



governance and to virtue,"<sup>48</sup> the deliberative process would enable "the people . . . to perceive the common good and to define the limits of individual rights."<sup>49</sup> Majority rule would provide the "voice of the people"<sup>50</sup> that would establish a government responsible for "fostering virtue, of making the individual unselfishly devote himself to the common good."<sup>51</sup>

The experience of republican government after the American Revolution shattered the elite's faith in the ability of individuals and majorities to overcome their selfish interests. "[P]rivate interest," they concluded, "ruled most social relationships," and the expectation that "most people [would] sacrifice their private interests for the sake of the public good was utopian."<sup>52</sup> Observing that legislatures disregarded property and individual rights in expropriating land and in making biased or corrupt decisions, the elite no longer believed that deliberative democracy would result in virtuous government for the benefit of the public good.<sup>53</sup> Instead, they came to fear that unchecked majority rule would result in tyranny of the majority.<sup>54</sup>

They turned instead to a public political philosophy that combined both liberal and republican impulses. Retaining the republican goal of government as promoting the public good, they tended to define that good in liberal terms, such as "security, justice, prosperity and liberty."<sup>55</sup> At the same time, they maintained the republican distrust of commerce and of self-interested factions.<sup>56</sup> They embraced checks and balances as a roadblock to tyranny of the majority and concluded that majority rule would only coincide with the public good, including rule of law and protection of minority rights, so long as an elite governing class provided leadership to the majority.<sup>57</sup> In the view of the framers, professionals, as the sector of society that pursued the public good and not self-interest, were best suited to this role.<sup>58</sup>

Antebellum jurisprudence assigned this vital governing class role to lawyers on account of their virtue and their central role in governance.

48. Pearce, *Republican Origins*, *supra* note 32, at 251.

49. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 701 (1985).

50. *Id.*; see also Wood, *Creation*, *supra* note 27, at 134.

51. Treanor, *supra* note 49, at 699; see also Wood, *Creation*, *supra* note 27, at 60-68, 162-65; Wood, *Radicalism*, *supra* note 27, at 104-06, 188-89; Treanor, *supra* note 27.

52. Wood, *Radicalism*, *supra* note 27, at 252-53.

53. Wood, *Creation*, *supra* note 27, at 403-09; William Michael Treanor, *Taking the Framers Seriously*, 55 U. Chi. L. Rev. 1016, 1033 (1988).

54. Wood, *Creation*, *supra* note 27, at 403-09; Treanor, *supra* note 53, at 1033.

55. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 179 (1990).

56. Wood, *Radicalism*, *supra* note 27, at 253-54.

57. *Id.* at 253-58; see also Nedelsky, *supra* note 55, at 170-83; Pearce, *supra* note 20, at 386.

58. The Federalist No. 35, at 257 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); see also Wood, *Radicalism*, *supra* note 27, at 253-58; Pearce, *supra* note 20, at 386.

Virtue inhered in lawyers both in their status as professionals and in the nature of legal practice.<sup>59</sup> Americans transformed the English notion of lawyers as gentlemen by class into a conception of lawyers as gentlemen as a moral badge of their ability to rise above self-interest, whatever their class origin.<sup>60</sup> Ensuring lawyers' virtue was the practical wisdom necessary to succeed in their work of representing clients.<sup>61</sup> This work required an ability to master both natural law and empirical knowledge. As Joseph Story wrote, "'The Law of Nature[] . . . lies at the foundation of all other laws, and constitutes the first step in the science of jurisprudence.'" <sup>62</sup> Nonetheless, the appropriate methodology for applying this science to a particular case was "instrumental and pragmatic," <sup>63</sup> grounded ultimately in "experience" <sup>64</sup> that reflected "social context," <sup>65</sup> and not "jurisprudential theory" <sup>66</sup> alone. Story viewed the common law as "constantly expanding . . . with the exigencies of society," such as its "commercial needs." <sup>67</sup>

59. See *infra* notes 60-61 and accompanying text.

60. Wood, *supra* note 37, at 14-16. This transformation helps explain the contrast between the English preference for the landed gentry to assume political leadership, see *supra* notes 45-46 and accompanying text, with the American preference for professionals, see The Federalist No. 35, *supra* note 58 (identifying professionals as preferred political leadership though finding the landed gentry superior to merchants).

61. 1 David Hoffman, A Course of Legal Study, Addressed to Students and the Profession Generally 26-27 (2d ed. Baltimore, Joseph Neal 1836) (observing that "[t]o be great in the law . . . it is essential that we should be great in every virtue; skilled in many, and somewhat improved in most of the departments of knowledge, for 'it applies the greatest powers of the understanding to the greatest number of facts,' and embraces nearly the entire extent of human actions and concerns").

62. Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387, 1414 (1997) (omission in original) (quoting Justice Joseph Story).

63. *Id.* at 1411.

64. *Id.* at 1401.

65. *Id.* at 1398.

66. *Id.* at 1404.

67. *Id.* at 1415 (quoting Justice Story in part). Morton Horwitz uses Story's concern with "commercial needs" as evidence that the antebellum jurisprudence "reshaped ["the legal system"] to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society." Morton U. Horwitz, *The Transformation of American Law, 1780-1860*, at 253-54 (1977); see also Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (1973). Even assuming that Horwitz is correct both with regard to the instrumental approach and the negative impact of that approach on society, the subject of this essay is how Story and other jurisprudential thinkers of the time understood the nexus between lawyers and the public good, not whether they in fact were promoting the public good. As Brian Tamanaha points out, Story and his peers uniformly described themselves as applying natural law in a noninstrumental way. Tamanaha, *supra* note 33, at 24-28, 33-35. This essay also follows Stephen Feldman's approach in identifying antebellum jurisprudence as containing both natural law and empirical elements. See Feldman, *supra* note 62, at 1404-05 (seeking to "reconcile" commentators, such as William LaPiana and G. Edward White, who emphasize the primacy of natural law analysis with commentators, such as Robert Gordon, Morton Horwitz, Karl Llewellyn, and Grant Gilmore, who emphasize the primacy of pragmatic considerations).

As the custodians of the formal and informal institutions of governance, lawyers applied their ability to identify and promote the public good to providing the leadership necessary to ensure that laws would be consistent with the public good and that the majority would respect the rule of law.<sup>68</sup> Within the formal government, lawyers "controlled the judicial branch and dominated the legislature and the executive."<sup>69</sup> Equally important, as representatives of clients and as members of the community, they also served as intermediaries between the formal institutions of government and the people. In "counsel[ing] clients, making arguments in court to judge[s] and jur[ies]," and participating in civic life, they "sought to gain the confidence of and 'to diffuse sound principles among the people.'"<sup>70</sup>

The governing class conception embraced a necessary connection between lawyers' ethics and the public good. Commentators agreed that legal ethics required moral counseling, moral considerations in deciding who to represent, respect for court and colleagues, and personal integrity.<sup>71</sup> Beyond these axioms, the two leading American ethicists disagreed on how to reconcile republican and adversarial obligations. David Hoffman urged lawyers not to pursue a defense or claim that they believed "cannot, or rather ought not, to be sustained,"<sup>72</sup> including the Statute of Limitations when based on the "mere efflux of time."<sup>73</sup> In a criminal case "of the deepest dye," where the lawyer believed the client guilty, Hoffman argued that it would be unprofessional to apply "ingenuity . . . beyond securing to them a fair and dispassionate investigation of the facts of their cause."<sup>74</sup> In contrast, George Sharswood urged lawyers to zealously put the prosecution to its proof in order to protect the defendant's liberty interests, even where the crime was heinous.<sup>75</sup> In civil matters too, Sharswood, in contrast to Hoffman, believed that liberty and property rights of defendants required lawyers to defend an "unrighteous claim."<sup>76</sup> Nonetheless, Sharswood limited advocacy of that claim "to assuring the defendant 'a fair trial'" and advised lawyers to refrain from assisting a client in "frustrat[ing] legitimate property rights, such as . . . the 'just demands of creditors.'"<sup>77</sup>

68. Pearce, *supra* note 20, at 387-92.

69. *Id.* at 387; see also Friedman, *supra* note 24, at 110; Hon. George Sharswood, An Essay on Professional Ethics 25, 30-31 (5th ed., Fred B. Rothman & Co. 1993) (1896).

70. Pearce, *Republican Origins*, *supra* note 32, at 256; see also Sharswood, *supra* note 69, at 30-31, 53-54.

71. Pearce, *supra* note 20, at 388-91; Pearce, *Republican Origins*, *supra* note 32, at 258-66.

72. David Hoffman, *Resolutions in Regard to Professional Deportment*, in 2 Hoffman, *supra* note 61, at 752, 754 (Resolution XI).

73. *Id.* (Resolution XII) (emphasis omitted).

74. *Id.* at 755-56 (Resolution XV) (emphasis omitted).

75. Pearce, *Republican Origins*, *supra* note 32, at 265-66, 265 n.193 (citing Sharswood, *supra* note 69).

76. Sharswood, *supra* note 69, at 98; see also *id.* at 95-99; Pearce, *Republican Origins*, *supra* note 32, at 265-66 (explaining the civil context).

77. Pearce, *Republican Origins*, *supra* note 32, at 266 (quoting Sharswood, *supra* note 69, at 98-99, 112).

The commitment to the public good in legal ethics, grounded in jurisprudence and public political philosophy, withstood pressures from both inside and outside the legal profession. Throughout the antebellum period, some argued that lawyers were business people.<sup>78</sup> Still others argued for a hired gun perspective.<sup>79</sup> They endorsed Lord Brougham's well-known maxim that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."<sup>80</sup> Hoffman and Sharswood expressly rejected these approaches.<sup>81</sup>

During the Jacksonian era, prevailing public sentiment rejected the notion that lawyers, or any other elite group, had a superior ability to identify and pursue the public good.<sup>82</sup> As a result of this egalitarian impulse, many states abolished or minimized the qualifications for becoming a lawyer. Rather than accept these critiques, the dominant thinkers in the bar continued to rely on the teaching of natural law jurisprudence and elite political philosophy. Indeed, the Jacksonian era was the time when Hoffman and Sharswood published their legal ethics treatises articulating the governing class approach to the lawyer's role.<sup>83</sup>

78. Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876*, at 150-51 (1976); Wood, *Radicalism*, *supra* note 27, at 284.

79. See, e.g., Miller, *supra* note 26, at 100-04, 187, 203-06. Norman Spaulding has argued that the "civic republican" conception of lawyering and a "client-centered" approach were dominant in the antebellum period. See Spaulding, *Myth of Civic Republicanism*, *supra* note 28, at 1399-1400. By creating a straw man of "civic republicanism" grounded in modern arguments for moral activism, he mistakenly classifies perspectives, such as Sharswood's, that integrate advocacy with a strong commitment to the public good as exclusively client centered and he fails to recognize that commentators he describes as client centered expressly reject the amoral perspective of the hired gun. *Id.* at 1442-43. Spaulding describes as a defender of "client-centered, ethically neutral lawyering," *id.* at 1440, a commentator who asserted, "[Clients] have purchased your services, but not your consciences. You are not responsible for the goodness of their cause; but you are responsible for the means you use to gain it." *Id.* at 1442 (quoting T. Walker, *Advice to Law Students: Being the Substance of a Valedictory Address to the Graduates of the Law Class in the Cincinnati College, Delivered March 3, 1838*, 1 W. L.J. 481, 483 (1844)). Perhaps one of the grounds for these erroneous readings is his attempt to place the antebellum conception of republican lawyering in the context of the "civic republicanism" of the Revolution and of contemporary discourse, rather than the more complex liberal republicanism that was dominant among the elites in the antebellum period. See *supra* notes 54-57 and accompanying text. Interestingly, Spaulding's later work acknowledges the power of obligations to the public good in the antebellum period, though he does so by reading the late nineteenth century conception of professionalism into the earlier period. Spaulding, *Discourse of Law*, *supra* note 28, at 2029-39.

80. David Mellinkoff, *The Conscience of a Lawyer* 189 (1973) (quoting Brougham). For a recent debate regarding Henry Lord Brougham, compare Fred C. Zacharias & Bruce A. Green, "Anything Rather Than A Deliberate and Well-Considered Opinion"—Henry Lord Brougham, *Written By Himself*, 19 Geo. J. Legal Ethics 1221 (2006), with Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 Geo. J. Legal Ethics 1213 (2006).

81. See Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 Md. L. Rev. 673, 684 (1979); see also Sharswood, *supra* note 69, at 84-97; Pearce, *Republican Origins*, *supra* note 32, at 257-58.

82. See Bloomfield, *supra* note 78, at 84; see, e.g., Friedman, *supra* note 24, at 236-37.

83. See *supra* notes 71-77 and accompanying text; see also Spaulding, *Discourse of Law*, *supra* note 28, at 2029-39 (discussing professionalism in the Jacksonian era).

## II. REDEFINING AND LIMITING THE DUTY TO THE PUBLIC GOOD

In the period from the Civil War through the 1960s, the duty of lawyers to the public good narrowed both in terms of defining the public good and in terms of lawyers' capacity for pursuing the good. Promoting this redefinition was the shift in the dominant jurisprudence from natural law to empiricism, a shift that reflected the increasing influence of liberalism in the larger society.

A. *The Decline of the Public Good in Elite Public Political Philosophy*

After the Civil War, the increasing influence of liberalism undermined the republican faith in an organic community that promoted the public good.<sup>84</sup> While liberalism encompassed a variety of particular political prescriptions, its fundamental emphasis was promoting freedom of the individual.<sup>85</sup> At its core, liberalism conceived of the individual as fundamentally self-interested and viewed the role of government as permitting individuals the greatest freedom possible.<sup>86</sup> When individuals maximized freedom, they would also maximize what was best for society through the invisible hand of the market<sup>87</sup> or through the democratic electoral process.<sup>88</sup> As a political philosophy, liberalism did not, at its core, include a conception of the public good independent of individual freedom.<sup>89</sup>

This absence permitted the development of hybrid public political philosophies that combined liberalism with conceptions of the public good that were not apparently inconsistent with the logic of liberalism. Prior to liberalism, dominant philosophies tended to view society as having an organic component that was more than the compilation of individual self-interest and as having a goal of promoting the public good.<sup>90</sup> As liberalism advanced, some public political philosophies sought to accommodate the reality of individual self-interest that liberalism identified with the goal of

84. For republicanism, see *supra* text accompanying notes 47-51.

85. See, e.g., John Gray, *Liberalism*, at ix-xi, 26-36, 82 (1986); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 9 (1990); Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 4-7 (1996); Raymond Williams, *Keywords: A Vocabulary of Culture and Society* 181 (rev. ed. 1983).

86. See, e.g., Gray, *supra* note 85, at ix-xi, 82; Richard A. Posner, *Overcoming Law* 23-24 (1995).

87. See, e.g., Gray, *supra* note 85, at 62-72; Posner, *supra* note 86, at 24-25.

88. See, e.g., Sandel, *supra* note 85, at 5. Majority rule offers a method for aggregating individual preferences. *Id.* Although many liberal theorists emphasize that democracy may in fact undermine individual freedom, Posner, *supra* note 86, at 25-29; Gray, *supra* note 85, at 73-78, the emerging preference for deference to majority rule reflected that it was—at least implicitly—becoming a higher good than limited government. See *infra* notes 97-99 and accompanying text.

89. Alasdair MacIntyre, *Whose Justice? Which Rationality?* 334-38 (1988); Sandel, *supra* note 85, at 7-8.

90. See, e.g., Gray, *supra* note 85, at 7-25, 45-56. For a discussion of civic republicanism, see *supra* note 79.

promoting the public good.<sup>91</sup> For example, as discussed above, liberal republicanism in the antebellum period derived a conception of the good from natural law that included the liberal commitment to individual freedom, a conception of justice that transcended individual self-interest, and an elite governing class that placed the public good above self-interest.<sup>92</sup>

Nonetheless, the logic of liberalism made individual freedom primary. As liberalism extended its influence, hybrid approaches like liberal republicanism were less persuasive. First, they were inconsistent with the core of liberalism. The insistence on a public good independent of the pursuit of individual self-interest prevented the maximization of individual freedom. Second, they were unnecessary. Although liberalism may have needed justifications grounded in natural law when it was a less powerful force,<sup>93</sup> as it became dominant it no longer needed external sources of support.

The two most significant changes in public political philosophy that would influence the understanding of the function of lawyers related to knowledge of truth and faith in majority rule. In the antebellum period, access to truth required both virtue and empirical knowledge.<sup>94</sup> Following the Civil War and continuing through the 1960s, empirical knowledge became by far the more dominant way of establishing the truth, at least in elite culture, and the influence of ethics grounded in virtue diminished considerably.<sup>95</sup> Higher education, for example, shifted from a primary emphasis on moral development of the student to a primary—and later almost exclusive—emphasis on empirical knowledge.<sup>96</sup>

As belief in virtue as the source of knowledge declined, the trends in public political philosophy following the Civil War minimized or eliminated surviving republican notions. A more liberal and democratic sense of capacity for self-rule challenged the belief that a particular class in society was qualified to provide elite political leadership.<sup>97</sup> If an elite class

91. Sandel, *supra* note 85, at 4-7; *see also supra* notes 84-89 and accompanying text.

92. *See supra* text accompanying notes 55-58.

93. *See supra* notes 91-92 and accompanying text.

94. Tamanaha, *supra* note 33, at 63; Feldman, *supra* note 62, at 1400-14. For example, in the antebellum period, a scientific approach consisted of knowledge acquired through both virtue and empiricism. *See, e.g.,* Miller, *supra* note 26, at 158-59; Feldman, *supra* note 62, at 1400-14.

95. *See, e.g.,* Michal Alberstein, Pragmatism and Law: From Philosophy to Dispute Resolution 21 (2002) (noting that, from the late nineteenth century, "anything not scientifically constructed, logical, argumentative, or structured will be considered outside the discourse"); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 *Stan. L. Rev.* 379, 380 (1988) (noting that as a result of this shift "[b]y the 1920s, nearly every respectable scientist claimed to believe that no statement about any subject, including humanity and society, was meaningful unless it could be empirically proven or disproven").

96. *See, e.g.,* George M. Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (1994); Purcell, *supra* note 67, at 7-8, 15.

97. *See, e.g.,* Macedo, *supra* note 85, at 97-98 (describing liberalism's rejection of elite political leadership); Feldman, *supra* note 62, at 1417-19.

was not better able to identify the truth, majority rule shifted from a source of mistrust to grounds for celebration. Indeed, majority rule offered a way, roughly analogous to the market, for self-interested individuals to exercise their political freedom in a way that reconciled their preferences.<sup>98</sup> Where the elite's liberal republicanism had required an elite governing class to make democracy function properly, in the period following the Civil War and continuing through today, the dominant understanding, even among the elite, was that majority rule was an unqualified good and that arguments for limiting majority rule faced a heavy burden.<sup>99</sup>

Ironically, the increasing influence of liberalism in promoting empiricism and belief in majority rule coincided with a declining commitment to the vision of maximizing economic freedom through laissez-faire economics. By the late nineteenth century, the prevailing conception of natural law enshrined the "ideal that government should not interfere in the natural workings of the market."<sup>100</sup> Proponents rejected government regulation of "property rights and the right to contract."<sup>101</sup> Incorporating a strong conception of individual self-reliance and construing contract solely as an individual right, they condemned labor unions as interfering with natural law and urged courts to employ natural law conceptions to strike down legislation regulating business or empowering unions.<sup>102</sup> By undermining the existence of a public good independent of self-interest and embracing deference to majority rule, the emerging dominant liberal approach either permitted these types of government intervention in the name of limiting judicial discretion or encouraged them in order to pursue an empirically justified social good.<sup>103</sup>

#### B. *The Diminishing Role of Lawyers in Jurisprudence*

Reflecting these shifts, jurisprudential commentators redefined the role of lawyers in a way so as to minimize—or in some cases eliminate—their role as the governing class. The natural law-based jurisprudence of James Kent and Joseph Story<sup>104</sup> gave way to empirically grounded approaches like the pragmatism of Oliver Wendell Holmes, the formalism of Christopher

98. See, e.g., Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* 82-85 (1995).

99. See, e.g., Feldman, *supra* note 62, at 1417-19, 1425; Treanor, *supra* note 27, at 464 (identifying leading commentators and judges of this period who developed arguments for limiting judicial review).

100. Tamanaha, *supra* note 33, at 38; see, e.g., Hovenkamp, *supra* note 95, at 402-04.

101. Tamanaha, *supra* note 33, at 38; see also Hovenkamp, *supra* note 95, at 411-20.

102. Tamanaha, *supra* note 33, at 40; see also Hovenkamp, *supra* note 95, at 387-89. Herbert Hovenkamp notes that the activism of the courts should not be exaggerated since they did refuse to overturn a number of regulatory statutes. *Id.*

103. See, e.g., Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 58-63, 102-03 (1997); Treanor, *supra* note 27, at 464.

104. Miller, *supra* note 26, at 166-67; Feldman, *supra* note 62, at 1396-1404.

Columbus Langdell, and the sociological jurisprudence of Roscoe Pound.<sup>105</sup> As they rejected the natural law basis of antebellum jurisprudence, they also rejected its suspicion of majority rule. Indeed, the empirical schools strongly embraced majority rule.<sup>106</sup>

The change from natural law to empiricism as the dominant basis for jurisprudence was not seamless. Judges who had been educated in the natural law approach persisted in employing substantive due process to strike down progressive legislation despite the increasing influence of empirical jurisprudence as the dominant jurisprudence of the twentieth century.<sup>107</sup> Even Lon Fuller, the most influential of the twentieth century natural law scholars, adopted a largely procedural version of natural law that embraced majority rule in the same way as did the empirically grounded jurisprudential commentators.<sup>108</sup>

In these approaches to jurisprudence, lawyers were no longer central actors. If the majority could be trusted, threats to the rule of law were the exception and not the rule. As virtue became marginal to jurisprudence, so did the need for lawyers as a virtuous leadership class to maintain the public good and rule of law. As the role of lawyers diminished, or disappeared altogether, jurisprudence no longer focused on how the lawyer should combine virtue with empirical knowledge to ascertain the law. Instead, the dominant subject became law as "what the judges say it is."<sup>109</sup>

Lawyers played a supporting role as technicians whose task was to study and anticipate the decisions of judges, a role that required no particular commitment to the public good in either Langdell's formalism or Holmes's pragmatism.<sup>110</sup> Pound's sociological jurisprudence nonetheless continued to afford lawyers some important public responsibilities. While judges played the lead role, lawyers who applied scientific methods to legal structures could provide them with beneficial support.<sup>111</sup>

105. See, e.g., Alschuler, *supra* note 103, at 10 (discussing Oliver Wendell Holmes's "revolt against natural law"); Tamanaha, *supra* note 33, at 61-65; Feldman, *supra* note 62, at 1417-46.

106. See, e.g., Alschuler, *supra* note 103, at 58-59.

107. See, e.g., Tamanaha, *supra* note 33, at 43-52; Hovenkamp, *supra* note 95, at 393-94. Hovenkamp describes how the views of the Justices in *Lochner v. New York*, 198 U.S. 45 (1905), as well as the state court judges who struck down state regulations, derived from their training in a natural law-based understanding of political economy and law "taught in American universities in the 1870s and 1880s." Hovenkamp, *supra* note 95, at 400-01. Hovenkamp also describes how, through the late nineteenth century, American legal and economic commentators relied on a natural law approach that the English had generally abandoned for more empirical approaches, such as utilitarianism, in the early nineteenth century. *Id.* at 402-03, 415-16.

108. Lon L. Fuller, *The Morality of the Law* (1964).

109. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 196 (1993).

110. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

111. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).



These trends continued through the early 1960s. Empirical approaches to jurisprudence, such as the legal realist, legal process, and positivist perspectives, continued to focus on judges and to minimize the significance of the lawyer's role.<sup>112</sup> Even legal process, which highlighted the contribution of lawyers as problem solvers, limited the scope of this function to the technical resolution of challenges facing individuals and not the engineering of societal structures.<sup>113</sup>

Fuller's natural law jurisprudence continued to place lawyers in a governing class role, but a far narrower one than that proposed by antebellum thinkers. Embracing majority rule and lacking a broad conception of lawyers' virtue, Fuller largely found the public good in the "internal morality of the law"<sup>114</sup> and lawyers' roles in protecting process.<sup>115</sup> This was far less ambitious than the antebellum understanding that lawyers identified and promoted the substantive, as well as the procedural, public good and guided majority rule.<sup>116</sup>

*C. Professionalism Both Preserves and Narrows Lawyers' Obligation to the Public Good*

With these changes in public political philosophy and jurisprudence, lawyers had to rethink their connection to the public good. Like all professionals, in the late nineteenth century they faced a challenge to their status grounded in the assertion that they were just as self-interested as business people and therefore deserving of no special authority.<sup>117</sup> Resentment of the privileges of professionals in general and lawyers in particular became widespread. Robert Wiebe observed that "[w]ith the exception of bankers, no group late in the nineteenth century stood in lower public repute [than lawyers]."<sup>118</sup>

In contrast to the Jacksonian era, lawyers could no longer mobilize jurisprudence and elite public political philosophy to justify their claim to serving as a virtuous governing class. As a result many lawyers joined the public in bemoaning lawyers' failure to deserve the professional status they claimed. Robert Gordon has described "the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles

112. See, e.g., Kronman, *supra* note 109, at 187-226.

113. Alberstein, *supra* note 95, at 167; Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 174-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 1994) (1958).

114. See Fuller, *supra* note 108, at 96.

115. See Lon L. Fuller, *Philosophy for the Practicing Lawyer*, in *The Principles of Social Order* 282, 290 (Kenneth I. Winston ed., 1981); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

116. See *supra* notes 59-70 and accompanying text.

117. See, e.g., Robert H. Wiebe, *The Search for Order: 1877-1920*, at 17, 116 (1967).

118. *Id.* at 116.

and books—on the theme of the profession's decline from a profession to a business."<sup>119</sup>

In the face of this challenge, lawyers turned to the Progressive Era's ideological embrace of professionalism. Professionalism posited "a bargain between the profession and society."<sup>120</sup> Society would permit the profession autonomy in exchange for the promise to use its skills for the good of its clients and the public.<sup>121</sup> Justifying this bargain were two factors. One, the esoteric knowledge of lawyers made it difficult, if not impossible, for lay people to evaluate their services and to regulate them.<sup>122</sup> Two, the altruism of lawyers—the fact that they worked primarily for the public good in contrast to business people who worked for self interest—guaranteed that society could trust lawyers to regulate themselves.<sup>123</sup>

While continuing to find importance in lawyers' commitment to the public good, professionalism nonetheless offered a more circumscribed understanding both of lawyers' capacity and their societal function. Where Hoffman and Sharswood had identified lawyers' innate virtue as the source of their superior ability to identify and pursue the public good,<sup>124</sup> professionalism made the empirically grounded claim that these characteristics derived from lawyers' training and experience.<sup>125</sup> Professionalism also had less confidence in the commitment of the individual lawyer. In contrast to the republican faith in the individual lawyer and the policing power of reputation, the rhetoric of commentators like Brandeis conceded that the standards of the profession had fallen and sought to restore them.<sup>126</sup> Professionalism recognized that lawyers' commitment to the public good could only be guaranteed through self-regulating bar associations that controlled admission to the bar, educated lawyers to their ethical duties, and enforced proper conduct through discipline.<sup>127</sup>

119. Robert Gordon, "The Ideal and the Actual in the Law": *Fantasies of New York City Lawyers, 1870-1910*, in *The New High Priests: Lawyers in Post-Civil War America* 51, 61 (Gerard W. Gawalt ed., 1984) (internal quotation marks omitted); see also Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 158 (1955); Pearce, *supra* note 20, at 396.

120. Pearce, *Professionalism Paradigm Shift*, *supra* note 32, at 1238.

121. *Id.*

122. *Id.* at 1239; see also Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* 90 (1976); 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* 146 (Robert L. Nelson et al. eds., 1992) (citing ABA, *Report of the Commission on Professionalism* 10 (1986)).

123. Pearce, *Professionalism Paradigm Shift*, *supra* note 32, at 1239-40.

124. See 1 Hoffman, *supra* note 61, at 26-27; Pearce, *Republican Origins*, *supra* note 32, at 259-60.

125. See Louis Brandeis, *The Opportunity in the Law*, in *Business—A Profession* 329, 331-335 (Hein 1996) (1914); see also Pearce, *supra* note 20, at 399-403.

126. Brandeis, *supra* note 125, at 329.

127. Pearce, *Professionalism Paradigm Shift*, *supra* note 32; Pearce, *supra* note 20, at 399.

Like the conception of lawyers' capacity for the public good, the conceptions of lawyers' function also narrowed. The antebellum notion that lawyers were a governing class responsible for maintaining the public good and the rule of law gave way to a perspective that defined a more limited scope for the governing class role. Pound's view of lawyers as "social engineers"<sup>128</sup> retained the aspiration that "lawyers [should] lead the people . . . instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists."<sup>129</sup> But where the antebellum view understood leadership as defining the public good for the people, Pound viewed it as an "adjustment of the relations of men to each other and to society as conforms to the moral sense of the community."<sup>130</sup> Brandeis articulated a similar notion that retained lawyers as a governing class charged with balancing the competing interests of rich and poor in order to maintain a fair and stable social order.<sup>131</sup> At the same time that Brandeis and Pound articulated a narrower, but still robust, conception, Holmes appeared to abandon the governing class project altogether in describing the entire role of lawyers as predicting legal consequences for their clients.<sup>132</sup>

While a view consistent with that of Holmes would ultimately prevail, the bar of his time preferred the governing class vision that Brandeis and Pound articulated. In 1908, the American Bar Association promulgated the Canons of Ethics, the first national code of ethics for lawyers.<sup>133</sup> The preamble to the Canons stated expressly that "[t]he future of the republic, to a great extent, depend[ed] upon [lawyers'] maintenance of Justice pure and unsullied" through "conduct and the motives [that] merit the approval of all just men."<sup>134</sup> Although the promulgation of the Canons as a formal code of ethics reflected a lesser degree of confidence in the individual lawyer than that of Sharswood's general guidance, the Canons themselves largely adopted Sharswood's approach to balancing duties to clients and the public.<sup>135</sup> The Canons stated that "The Lawyer's Duty in Its Last Analysis"<sup>136</sup> was "the countermajoritarian obligation of loyalty to the law and the judicial system despite the contrary urging of any 'client, corporate or individual, however powerful, nor any cause, civil or political, however

128. See, e.g., Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. Pub. L. 292, 292 (1954).

129. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607, 612 (1907).

130. *Id.*

131. See, e.g., Brandeis, *supra* note 125, at 337.

132. Holmes, *supra* note 110, at 458; see also Alschuler, *supra* note 103, at 139-40.

133. See, e.g., Haber, *supra* note 41, at 219 (describing Holmes's general views as "anomalous" in his time).

134. Canons of Prof'l Ethics pmbl. (1908).

135. Pearce, *Republican Origins*, *supra* note 32, at 267-72; see also James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395 (2003); Bloomfield, *supra* note 81; Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 Law & Soc. Inquiry 1 (1999).

136. Canons of Prof'l Ethics Canon 32.

important . . ."<sup>137</sup> At the same time, they urged "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability."<sup>138</sup> The Canons expressly stated that this zealousness did not require the "lawyer to do whatever may enable him to succeed in winning his client's cause."<sup>139</sup> Indeed, the Canons provided that "[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."<sup>140</sup> The lawyer "must obey his own conscience and not that of the client."<sup>141</sup>

In the period from the early twentieth century through the 1960s, the rhetoric of aspiring to the public good remained consistent, while the understanding of lawyers' function continued to narrow. Toward the end of this period, growing support for the hired gun role<sup>142</sup> led the American Bar Association to restate the profession's commitment to the public good. In 1958, the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, for which Fuller served as co-reporter, declared the "lawyer's role" as a "trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."<sup>143</sup> Erwin Smigel's study of Wall Street lawyers, published in 1964, confirmed that elite lawyers endorsed a similar understanding.<sup>144</sup> The lawyers Smigel interviewed described themselves to be "guardians of the law,"<sup>145</sup> urging their clients to adopt "proper and moral legal positions."<sup>146</sup> Although the Joint Conference did describe a narrower obligation to the public good than that of the early twentieth century, Smigel's Wall Street lawyers kept alive the broader construction of Brandeis.

### III. THE RISE OF THE HIRED GUN

As the influence of liberalism continued inexorably to expand, even this less ambitious commitment of lawyers to the public good would fade. Following the 1960s, while bar leaders retained a rhetoric of professionalism that was necessary to maintain self-regulation, most

137. Pearce, *Republican Origins*, *supra* note 32, at 268 (quoting Canons of Prof'l Ethics Canon 32).

138. Canons of Prof'l Ethics Canon 15. (quoting Sharswood, *supra* note 69, at 78-79); Pearce, *Republican Origins*, *supra* note 32, at 243-47.

139. Canons of Prof'l Ethics Canon 15.

140. *Id.* Canon 31.

141. *Id.* Canon 15.

142. See e.g., Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951).

143. Fuller & Randall, *supra* note 115, at 1162.

144. See generally Erwin Smigel, *The Wall Street Lawyer: Professional Organization Man?* (1964).

145. Pearce, *supra* note 20, at 381.

146. Smigel, *supra* note 144, at 5-6.

lawyers abandoned the notion that they had any special obligation to the public good, and, if they acknowledged it at all, they limited it to the margins of practice.

The 1960s represented a watershed in American culture. While proponents of philosophical liberalism, whether identified politically as liberal or conservative, had been dominant in elite culture since the late nineteenth century, certain pre-liberal conceptions, such as the public good, had continued to coexist in a less ambitious form. The 1960s marked the ascendance of purer forms of liberalism that questioned even a rhetorical commitment to the public good.

On the right, Milton Friedman's libertarianism eventually eclipsed traditional conservatism as the engine for elite conservative political philosophy. While traditional conservatism had valued both economic freedom and the public good, Friedman rejected the public good as subversive of individual freedom.<sup>147</sup> People were fundamentally self-interested. Claims of a public good were false and only interfered with individuals' freedom to maximize their self-interest. Conservative commitment to the public good did not disappear entirely. Traditional conservatism survived, especially among religious conservatives whose views would eventually become very influential among the public.<sup>148</sup> But at the level of elite culture, those views were hard to find. Conservative perspectives that emulated Friedman's gained ascendance in the academy and the larger intellectual community, such as through the rise of the law and economics movement.<sup>149</sup>

On the left, the dominant strains of liberalism also found every individual to be self-interested and applied skepticism to claims of values derived from the public good. The protest movements of the 1960s cast doubt on the legitimacy of established authority, while making the broader claim that no person or group was better able to ascertain and pursue the public good.<sup>150</sup> The liberal goal was a public square that maximized individual freedom by

147. Milton Friedman, *Capitalism and Freedom* (1962); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times, Sept. 13, 1970, § 6 (Magazine), at 32 (deriding those in business who care about social responsibility as socialism's "unwitting puppets").

148. See, e.g., Michael Kranish, *Religious Right Wields Clout: Secular Groups Losing Funding Amid Pressure*, Boston.com, Oct. 9, 2006, [http://www.boston.com/news/nation/articles/2006/10/09/religious\\_right\\_wields\\_clout/](http://www.boston.com/news/nation/articles/2006/10/09/religious_right_wields_clout/); Ramesh Ponnuru, *Secularism and Its Discontents: The Debate over Religion and Politics Is in Desperate Need of Sanity*, Nat'l Rev., Dec. 27, 2004, at 32.

149. See, e.g., Alschuler, *supra* note 103, at 3-7; Kronman, *supra* note 109, at 231 (discussing dominant approach to law and economics); Posner, *supra* note 86, at 1-4. One prominent exception is religious conservative Robert George. See, e.g., Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 Yale L.J. 2475 (1997).

150. Louis Menand, *The Thrashing of Professionalism*, N.Y. Times, Mar. 5, 1995, § 6 (Magazine), at 41.

remaining neutral with regard to "competing visions of the good life."<sup>151</sup> Persons should have the freedom to live their life without others, especially the government, imposing values upon them.<sup>152</sup> Conceptions of the public good should remain in the private realm. Critics of liberalism from the left often went even further. Not content to restrict the pursuit of the public good to the home, they labeled it a subterfuge for the naked exercise of power and sought to banish it entirely.<sup>153</sup>

The dominant trends in jurisprudence reflected those in elite political philosophy. Whether law and economics on the right, liberal jurisprudence in the middle, or critical theory on the left, they either rejected outright the legitimacy of a public good independent of individual freedom or sought to make the concept as thin and private as possible. The rejection of virtue and the acceptance of majoritarianism became so complete that the diminished role lawyers played in earlier jurisprudences, like those of Fuller and of the legal process school, gave way to the dominance of the Holmesian perception that lawyers were mere technicians. Lawyers largely disappeared from jurisprudence altogether as the focus on judges became even more pronounced. For example, in contrast to the significant attention Fuller gave lawyers,<sup>154</sup> even natural law scholars such as Robert George, no longer found it necessary to maintain a virtuous legal elite.<sup>155</sup> The only exceptions to this approach were individual scholars of both jurisprudence and the legal profession, such as David Luban<sup>156</sup> and Anthony Kronman,<sup>157</sup> whose works had little impact on prevailing jurisprudential perspectives.

Not surprisingly, consistent with these developments in jurisprudence and public political philosophy, survey data and anecdotal impressions revealed that the hired gun perspective had become dominant among lawyers.<sup>158</sup> If the concept of the public good did not exist, then lawyers could claim no special relationship to it. If all people were self-interested, lawyers could not claim to be above self-interest. If majority rule could be trusted, society did not require lawyers to serve as an elite leadership class.

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151. Kathryn Abrams, *The Progress of Passion*, 100 Mich. L. Rev. 1602, 1614 (2002); Deborah L. Rhode, *Feminism and the State*, 107 Harv. L. Rev. 1181, 1187 (1994); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 521 (1989); see, e.g., Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 158 (1995).

152. See *supra* note 13 and accompanying text.

153. See, e.g., Alberstein, *supra* note 95, at 178; Alschuler, *supra* note 103, at 7-8; Kronman, *supra* note 109, at 240-41; Tamanaha, *supra* note 33, at 120-23; David Kairys, *Law and Politics*, 52 Geo. Wash. L. Rev. 243, 247 (1984); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stan. L. Rev. 391, 410-11 (1984).

154. See generally Fuller & Randall, *supra* note 115.

155. See, e.g., Robert P. George, In Defense of Natural Law 338 (2001) (lawyers not mentioned in index).

156. See, e.g., Luban, *supra* note 15.

157. See, e.g., Kronman, *supra* note 109.

158. Pearce, *supra* note 20, at 407-09.

The hired gun conception rejected an obligation to the public good and privileged individual autonomy. It required lawyers to advocate zealously for their client's self-interest and to disregard their own values in order to avoid interfering with their client's autonomy.<sup>159</sup> Lawyers' role prescribed extreme partisanship on behalf of clients within the bounds of the law and without moral accountability for their actions or those of their clients.<sup>160</sup>

The bar faced a dilemma. According to professionalism, lawyers' commitment to the public good was a precondition to self-regulation.<sup>161</sup> The bar responded in two ways. First, it continued to employ the rhetoric of allegiance to the public good. When it became undeniable that most lawyers were devoting themselves to their own self-interest and that of their clients, bar leaders declared a crisis of professionalism.<sup>162</sup> They implemented commissions and mandatory classes to remind lawyers of their public obligation.<sup>163</sup> Second, the bar redefined legal ethics and the public good to legitimize the hired gun view.<sup>164</sup>

In its ethical codes, the bar minimized the centrality of the public good and expanded the commitment to promote the client's interests. While the 1970 Code of Professional Responsibility echoed the 1908 Canons in proudly declaring that "[l]awyers, as the guardians of the law, play a vital role in the preservation of society,"<sup>165</sup> the 1983 Model Rules of Professional Conduct identified the lawyer's first role as "a representative of clients" and only after that "a public citizen having special responsibility for the quality of justice,"<sup>166</sup> a less ambitious role than that of a leadership class upon which the very "preservation of society"<sup>167</sup> depended.

Moreover, both the Code and the Rules accommodated the hired gun by elevating the lawyer's duty to the client. The Code directed lawyers to "represent a client zealously" within the bounds of the law and required a lawyer "to seek the lawful objectives of his clients through reasonably available means permitted by law and the disciplinary rules."<sup>168</sup> While this

159. *Id.* at 417.

160. See, e.g., Luban, *supra* note 15, at xx; William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998); Schwartz, *supra* note 15, at 671; see also Russell Pearce, *How Law Firms Can Do Good While Doing Well (And the Answer is Not Pro Bono)*, 33 *Fordham Urb. L.J.* 211 (2005); Pearce, *supra* note 20, at 409.

161. See Pearce, *Professional Paradigm Shift*, *supra* note 32, at 1239-40.

162. Pearce, *supra* note 20, at 410-15; Pearce, *Professionalism Paradigm Shift*, *supra* note 32, at 1254-57.

163. See, e.g., ABA Comm. on Professionalism, "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism (1986); ABA Ctr. on Prof'l Responsibility, *A Guide to Professionalism Commissions* (2001), available at [http://www.abanet.org/cpr/professionalism/scop\\_commission\\_guide.html](http://www.abanet.org/cpr/professionalism/scop_commission_guide.html); Rhode, *supra* note 22, at 1556 (describing the development of "a cottage industry of bar committees, conferences, commissions, and centers [focusing] on this 'crisis of professionalism'").

164. See *infra* notes 165-76 and accompanying text.

165. Model Code of Prof'l Responsibility pmbl. (1983).

166. Model Rules of Prof'l Conduct pmbl. (2003).

167. Model Code of Prof'l Responsibility pmbl. (1983).

168. Model Code of Prof'l Responsibility Canon 7, DR 7-101(A)-(B).

language could have been read to permit lawyers broad discretion,<sup>169</sup> lawyers understood it as a command to serve the client as a hired gun.<sup>170</sup> The Model Rules continued to privilege this vision. Indeed, for the first time in an ethical code, the ABA identified client representation, and not commitment to the public good, as lawyers' primary obligation.<sup>171</sup>

The bar further accommodated the hired gun ideal by shifting responsibility for the public good from the average lawyer to the public interest practitioner. In the 1960s, public interest law emerged as a separate field of practice. It expanded from a few, small groups, such as the NAACP and the ACLU, to include significant numbers of lawyers engaged in a variety of causes. The bar came to embrace public interest work and to identify public interest lawyers as role models. In doing so, the bar located responsibility for the public good in the aptly named public interest bar and discarded it from its historical place in ordinary practice.<sup>172</sup>

The bar also encouraged lawyers to remove any remaining personal obligation they felt to the public good from their everyday work and place it in the limited confines of the new ethical duty of pro bono. Although free legal services for those who could not afford them had long been one part of the larger governing class ideal, the idea of the pro bono duty as a separate ethical obligation arose in the 1970s.<sup>173</sup> In 1970, the Code of Professional Responsibility became the first legal ethics code to articulate a separate, though aspirational, ethical duty to provide pro bono legal services.<sup>174</sup> While the duty remained aspirational, it received greater attention and more detailed consideration in the Model Rules.<sup>175</sup> Commitment to provide a minimum number of pro bono hours, often in conjunction with public interest firms, became a major preoccupation of the bar's professionalism campaign, thereby compartmentalizing the public good into the few hours a lawyer devoted to pro bono and further legitimizing the hired gun approach to representing clients.<sup>176</sup>

But the bar's strategy of combining the rhetoric of the public good with the hired gun perspective took a toll on lawyers and society. Professionalism's promise that lawyers' work contributed to the public good had provided earlier generations of lawyers with a coherent

169. Pearce, *Republican Origins*, *supra* note 32, at 273-74, 273 nn. 266-68.

170. *Id.* at 276-78; see also text accompanying *supra* note 159.

171. Model Rules of Prof'l Conduct pmbl. *But see* Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* 87-89 (2d ed. 2002) (arguing that the Model Rules require less zealous advocacy than the Model Code).

172. Pearce, *supra* note 20, at 417-19.

173. *Id.* at 419-20. See generally Howard M. Erichson, *Doing Good, Doing Well*, 57 Vand. L. Rev. 2087 (2004); Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 Tul. L. Rev. 91 (2002).

174. Model Code of Prof'l Responsibility EC 2-25 (1981).

175. See Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 331-41 (discussing Model Rule 6.1 and its legislative history).

176. Pearce, *supra* note 20, at 419-20.



understanding of why their work was important. As lawyers came to view themselves as largely self-interested, the rhetoric of professionalism rang false.<sup>177</sup> Absent an alternative approach to finding fulfillment in their stressful practices, lawyers had difficulty finding reward in their work. Their rates of job dissatisfaction, substance abuse, and anxiety-related mental illness exceeded those for other occupations.<sup>178</sup>

Lawyers also failed their obligation to society. Even though the hired gun ideal denied it, lawyers continued to serve as the governing class. Aside from their continued overrepresentation in the formal institutions of government,<sup>179</sup> they remained the primary intermediaries between the people and the law through their representation of clients and their community leadership. In that role, lawyers brought disrespect to the law and the legal system when they pursued self-interest at the same time as they claimed to serve the public good. To the public and to themselves, lawyers appeared to be "hypocrites, cynics, or fools."<sup>180</sup>

Moreover, as hired guns who denied moral accountability, lawyers taught clients to view the law instrumentally and to devalue obligations to conscience and community. This approach only benefited society under a rather pure libertarian view, like that of Milton Friedman,<sup>181</sup> which defined a just society as one where individuals pursue their own self-interest within the bounds of the letter of the law and reject the existence of moral obligations derived from a public good. Most Americans, even those who employed Blue State rhetoric, did not actually accept individual freedom as the complete measure of a just society.<sup>182</sup> To them, the hired gun's amorality undermined the responsibilities a community rightfully demanded from its members.

Even within the legal system itself, the hired gun approach failed to satisfy lawyers' responsibilities. The adversarial legal system delivers justice and truth when each party has an equal opportunity to promote its interests to the court. This can only occur if each party has equal access to

177. Pearce, *Professionalism Paradigm Shift*, *supra* note 32, at 1250-52.

178. Russell G. Pearce, Brian Danitz & Romelia S. Leach, *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 *Widener L.J.* 907, 914 & n.37.

179. For example, although lawyers comprise only .7% of the employed population, *see* U.S. Census Bureau, *Statistical Abstract of the United States*, 2006, at tbl.604 (2006), available

at [http://www.census.gov/compendia/statab/labor\\_force\\_employment\\_earnings/employed\\_persons/](http://www.census.gov/compendia/statab/labor_force_employment_earnings/employed_persons/) (showing that lawyers represented 954,000 out of 139,252,000 employed civilians in 2004), lawyers represented approximately 40% of the members of the House of Representatives and 64% of the Senate for the 109th Congress. *See* Harold W. Stanley & Richard G. Niemi, *Vital Statistics on American Politics 2005-2006 Online Edition*, at tbl. 5-3 (2006), <http://library.cqpress.com/vsap/document.php?id=vsap05tab5-3&type=toc&num=5>.

180. Pearce, *Professionalism Paradigm Shift*, *supra* note 32, at 1274.

181. *See supra* note 147 and accompanying text.

182. *See, e.g.*, Thomas Frank, *What's the Matter with Kansas?: How Conservatives Won the Heart of America* (2004); Jim Wallis, *God's Politics: Why the Right Gets it Wrong and the Left Doesn't Get it* (2005); Sheryl Gay Stolberg, *Democrats Getting Lessons in Speaking Their Values*, *N.Y. Times*, Feb. 11, 2005, at A20.

the same quality of legal services. Otherwise, unequal justice will result. In our current system, where access to legal services is pervasively unequal, the hired gun exacerbates injustices that a commitment to the public good could possibly mitigate.

#### CONCLUSION

In a society where deep divisions exist regarding fundamental value questions, lawyers have failed to provide leadership in healing those divisions. A legal profession identified with the Blue State vision of excluding values from the public square has little to contribute if the public square is inevitably full of value conflict and debate. Indeed, even those in the Blue State camp have begun to recognize this dilemma.<sup>183</sup> An increasing number of politically liberal commentators are acknowledging what conservative and progressive critics of liberalism have long argued:<sup>184</sup> that the asserted effort to prevent the "impos[ition of] personal ethical values"<sup>185</sup> actually conceals value judgments grounded in specific visions of the public good.<sup>186</sup> The legal profession, too, must abandon the Blue State rhetoric if it is to play a leading role in helping transform value conflicts from culture wars to civil and respectful disagreement.

All people, lawyers or not, are morally accountable for their work at the same time as they balance their duty to the public good with their self-interest. What makes lawyers different is not their superior moral capacity, as lawyers have historically claimed. Rather, it is their work. As the intermediaries between the law and the people, lawyers have both an individual and collective responsibility for the health of the legal system and society. Unless lawyers believe, like Milton Friedman, that the public good consists of nothing more than maximizing individual freedom, they must find a way to translate their public responsibility into their everyday work. That would not require dictating to clients or overriding their choices. It would require counseling clients on the moral implications of their choices.

To effectively perform that role, lawyers would have to revive their capacity to serve as a political leadership class. Engaging clients in moral counseling would require lawyers to develop the ability to promote dialogue among and between people of differing values. If lawyers incorporated this ethic into their role as intermediaries between the people

183. See, e.g., George Lakoff, *Don't Think of an Elephant!: Know Your Values and Frame the Debate* (2004); Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 43-69 (2006); Paul Waldman, *Being Right Is Not Enough: What Progressives Must Learn from Conservative Success* 97 (2006); Stolberg, *supra* note 182; Jim Wallis, *The Message Thing*, N.Y. Times, Aug. 4, 2005, at A19.

184. See, e.g., Sandel, *supra* note 6, at 122-55, 211-47.

185. Dworkin, *supra* note 13, at 21.

186. See *supra* notes 183-84 and accompanying text; see also *Romer v. Evans*, 517 U.S. 620, 652-63 (1996) (Scalia, J., dissenting); Macedo, *supra* note 85, at 260-65.

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and the law, they would better serve their governing class function and make a valuable contribution to healing the Blue State-Red State divide.