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## The Noblesse Oblige Tradition in the Practice of Law

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# The *Noblesse Oblige* Tradition in the Practice of Law

David Luban\*

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## I. INTRODUCTION

In 1905 Louis D. Brandeis delivered a talk entitled *The Opportunity in the Law* to the Harvard Ethical Society.<sup>1</sup> It was delivered as a pep-talk, what Harvard Law Professor Duncan Kennedy, seventy-six years later, would refer to as “the old address to the troops.”<sup>2</sup> Brandeis hoped to rally law students to his vision of the moral possibilities of legal practice—specifically, the elite corporate legal practice into which Brandeis could assume his audience would enter. Brandeis was concerned that elite lawyers were becoming thralls of robber-baron capitalists, that they were ignoring the possibilities of law practice as a kind of public service and redefining the ethics of their profession to encompass

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1. L. BRANDEIS, *The Opportunity in the Law*, in BUSINESS—A PROFESSION 315 (1914).

2. Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 33 HARV. L. SCH. BULL. 36, 36 (1981).

little more than the principle of unadulterated loyalty to their clients—a redefinition that, not incidentally, generated great personal wealth for the lawyers themselves.

My purpose in this Article is to elaborate and defend a version of Brandeis' vision of the opportunity in the law. What was this vision? What transformations and redefinitions has it undergone? Why is it—as I believe—in contemporary eclipse? Most importantly for the subject of this Symposium: can this vision be resurrected as a public philosophy for the legal profession or, at least, for the influential stratum of the legal profession consisting of large-firm corporate lawyers?<sup>3</sup>

## II. THE LAWYER AS AN ARISTOCRAT

We begin, as is customary and inevitable, with de Tocqueville's famous description in 1835 of the legal profession as the American aristocracy. De Tocqueville had in mind by this metaphor the fact that lawyers predominated in American public life in much the same way that aristocrats predominated in the public life of the *anciens régimes*; lawyers were a kind of functional equivalent of the aristocracy. According to de Tocqueville, this functional equivalence extended beyond activity in public life: lawyers and nobles also shared a "conservative and anti-democratic" cast of mind and a "secret contempt of the government of the people."<sup>4</sup> In addition, both lawyers and aristocrats valued order above liberty; lawyers were "less afraid of tyranny than of arbitrary power."<sup>5</sup> As Judith Shklar comments on de Tocqueville's point: "if they [lawyers] fear tyranny, it is because it tends to be arbitrary, not because it is repressive."<sup>6</sup> From de Tocqueville's point of view, this predilection for order over liberty made the lawyers an ideal group to beat down the people's ill-considered enthusiasms and thereby curb "encroaching democracy." According to de Tocqueville, lawyers are intermediate between the government and the people, because lawyers "belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes in society."<sup>7</sup> The functional role played by lawyers in de Tocqueville's conservative scheme was to blunt or miti-

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3. Little of the historical story I have to tell in this Article is original. I draw my inspiration in large part from R. Gordon, *Lawyers as the American Aristocracy* (unpublished lectures, used with the author's permission). I have also been influenced by Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985). My hope is to make explicit the philosophical and social-theoretic underpinnings of the vision of law practice that emerges in Brandeis' speech and Gordon's larger narrative.

4. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273-74 (P. Bradley 1st ed. 1945).

5. *Id.* at 275.

6. J. SHKLAR, *LEGALISM* 15 (1964).

7. 1 A. DE TOCQUEVILLE, *supra* note 4, at 275-76.

gate class conflict by pressing state violence into the mold of legality and legality into the service of antipopulism.

Like so much else in *Democracy in America*, de Tocqueville's analysis amounts to a prescription cloaked as narration or travelogue. Split apart for analytic purposes, it encompasses six propositions: first, lawyers, like aristocrats, have a calling higher than mere bourgeois commercialism; second, lawyers mediate between the government and the people; third, lawyers, like aristocrats, assume a responsibility for the common good through public life; fourth, the common good will be realized by "mitigating the tyranny of the majority"<sup>8</sup> and repressing popular liberty in the name of order, while rendering princely power regular and nonarbitrary; fifth, the tyranny of the majority must be mitigated by curbing the people; and, sixth, lawyers are peculiarly suited by training and cast of mind to this task.

### III. THE LAWYER AS A PUBLIC AND PRIVATE SERVANT

The pre-Civil War American lawyers fulfilled their public role as de Tocqueville suggested they would—through participation in public life, primarily by holding public office. After the war, however, the elite bar ended its specifically political involvement and went to work instead for robber-baron capitalists. The modern corporate lawyer was born.

Our stereotype of these original corporate lawyers is not a pleasant one. We think of them primarily as lackeys of the most vile sort, typified by William C. Guthrie telling the Pinkertons in 1885 that they had a constitutional right and perhaps a duty(!) to shoot down the Knights of Labor at Homestead. The historian Mark DeWolfe Howe refers to this episode as "Guthrie's efforts to cut the constitutional cloth to the measure of his clients' needs."<sup>9</sup>

According to this stereotype, in the words of Howe, "lawyers lost the persuasion of their ancestors that the profession possesses other responsibilities than those owing to their clients."<sup>10</sup> The transformation of the lawyer-as-quasi-autonomous-advisor, who could be a public actor as well as private counsel, into the lawyer-as-hired-gun is typified above all by the introduction of a formal ethical duty to maintain client confidences—a duty that was wholly absent from the primary pre-Civil War treatises on legal ethics.<sup>11</sup>

8. *Id.* at 271.

9. Howe, Book Review, 60 HARV. L. REV. 838, 841 (1947) (reviewing 1 R. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947* (1946)).

10. *Id.* at 840.

11. See Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 942-43 (1980). Later, Patterson suggests an interesting argument that the duty of undivided loyalty

Robert Gordon's research on the New York City bar, however, demonstrates that this stereotype is misleading. The elite Wall Street bar was in fact heavily involved in the Progressive and Mugwump reform movements, even when these activities ran counter to the interests of their clients. According to Gordon,

Wall Street lawyers were primarily responsible for creating the state commissions regulating railroads (Simon Sterne), city subway construction (Edward Sheperd), public utilities (Charles Evans Hughes and a corps of young lawyers pulled out of practice onto his Governor's staff), . . . and at the federal level probably the most important and permanently influential work of bureaucratic architecture of the time was the effort of two more Wall Street lawyers, Elihu Root and Henry Stimson, to centralize professional control over the War Department and remove it from Congressional influence. . . . The entire leadership of the New York bar in the 1880s and 90s, almost 200 lawyers, was active in law reform, social reform, and political reform movements. . . .<sup>12</sup>

Now it would surely be false to see these lawyers as unalloyed do-gooders, just as it is wrong to see them as mere lickspittles of laissez-faire. No matter how impressive his Progressive credentials, Elihu Root is remembered primarily for his Guthrie-like adage that "[t]he client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how."<sup>13</sup> Perhaps it would be most accurate to view the elite late-nineteenth-century bar as a somewhat schizophrenic mix of public spirit and private service—and its ideology an equally bewildering mix of progressivism and Mr. Herbert Spencer's social statics.

This sets the context for Brandeis' Harvard talk. It is important to realize that Brandeis himself has always been considered a kind of Golden Age hero, who was able to hold together the conflicting ideals of public and private practice in a magnificent synthesis or dynamic tension. To many lawyers Brandeis is still the ideal of what greatness is: worldly success combined with public service. No one was better suited to articulate the public philosophy of his profession.

#### IV. THE BRANDEIS VISION AND PROGRESSIVE PROFESSIONALISM

##### A. Brandeis' Harvard Speech

Brandeis began his Harvard talk by outlining the ways in which a lawyer's training "fits him especially to grapple with the questions

was created by the robber-baron era corporate bar, introduced for the convenience of those clients. *Id.* at 948-55. I believe that the duty of confidentiality owed to organizational clients has little to recommend it. D. Luban, *Lawyers and Justice: An Ethical Study* ch. 10 (forthcoming) (duty of confidentiality arises from the demands of individual human dignity; these demands do not transfer to the organizational client); see also *supra* Shaffer, 41 *VAND. L. REV.* 697, 698-709 (1988).

12. R. Gordon, *supra* note 3, at 25.

13. 1 R. SWAINE, *supra* note 9, at 667.

which are presented in a democracy."<sup>14</sup> In Brandeis' view, the unique combination of abstract reasoning ability and empirical keenness, coupled with the necessity of reaching conclusions in real time, perfectly suits the lawyer for public life. Moreover,

[i]f the lawyer's practice is a general one, his field of observation extends, in course of time, into almost every sphere of business and of life. . . . He not only sees men of all kinds, but knows their deepest secrets; sees them in situations which "try men's souls." He is apt to become a good judge of men.<sup>15</sup>

Finally, "the practice of law tends to make the lawyer judicial in attitude and extremely tolerant."<sup>16</sup> Taken together, these traits make the lawyer an embodiment of Aristotelian *phronesis*, "practical wisdom." For this reason, "the lawyer has acquired a position materially different from that of other men. It is the position of the adviser of men."<sup>17</sup>

The obvious element of wishful overstatement in Brandeis' characterization of lawyers should not detract from its element of truth. Brandeis' notion of "the opportunity in the law" is derived from his account of the lawyer's unique credentials: lawyers have the opportunity to make the law better by engaging in law-reform activity, and to make their clients better by acting as advisors to awaken clients to the public dimension of their activities and to steer clients in the direction of the public good. Rather than acting as a hired gun for the client, the lawyer should occupy a more judicious (and judicial) role, and become what Brandeis later came to call the "lawyer for the situation."<sup>18</sup>

The invocation of those hoary twins, law reform and client counseling, is enough to bring a yawn to the face of many people. But Brandeis suggests more than a pair of vacuities; he is also clear about the direction that law reform and client counseling should take: "We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people."<sup>19</sup> In Brandeis' view, the private sector in an industrial democracy raises political threats comparable to those that democrats faced in their confrontations with the various *anciens régimes*. Behind Brandeis' call for

14. L. BRANDEIS, *supra* note 1, at 315.

15. *Id.* On the lawyer's *phronesis*, see Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 846-73 (1987).

16. L. BRANDEIS, *supra* note 1, at 317.

17. *Id.*

18. Brandeis coined the term "lawyer for the situation" at his confirmation hearings for the Supreme Court. When accused of unethical law practice for simultaneously representing several parties to the same transactions, Brandeis replied that he viewed himself as counsel for the situation rather than for any single party. See Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

19. L. BRANDEIS, *supra* note 1, at 321.

his audience to become people's lawyers as well as corporation lawyers is his idea that the people's struggle with the corporations is one more step in the centuries-old battle against absolutism.

It is important to realize, though, that Brandeis did not view the requirement to become a people's lawyer as arising from any partisanship for the people. In this respect, Brandeis is more closely aligned to de Tocqueville than their diametrically opposed views of which side the lawyer should take in the class struggle (and why not use this term?) might initially lead us to believe. Brandeis was worried about civil unrest, and possibly revolution:

The immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed, through the respect for law, *as the excesses of democracy were curbed seventy-five years ago*. There will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the abler lawyers is essential.<sup>20</sup>

This passage indicates that Brandeis was concerned with saving capitalism by giving it a human face: he was not concerned first and foremost with "the people" as such. Indeed, the emphasized phrase shows that, if circumstances (such as what H.L. Mencken called the "Jacksonian *jacquérie*" of de Tocqueville's time) dictate, the lawyer should weigh in on the side of wealth, *against* "the people." Brandeis' political philosophy was in fact a mixture of democratic ideals and social engineering.<sup>21</sup> The passage quoted above emphasizes the latter in a rather unalloyed form: the lawyer stands outside the fray, observing the clash of interest-groups, then makes the proper adjustments in order to stabilize the mechanism. This is truly the "lawyer for the situation."

A remarkable instance from Brandeis' own career illustrates what he meant by "lawyer for the situation." Brandeis was retained by William McElwain, owner of a large shoe company, to assist in a labor dispute that arose when McElwain's employees refused to accept a wage cut he proposed during the 1902 business downturn. Brandeis visited the factory and discovered that though McElwain's employees were paid at a high rate when they worked, their work was seasonal and irregular.

He was shocked to find that McElwain did not know his workers' yearly income. "You say your factory cannot pay the wages the men have been earning," he thundered at McElwain. "How much money do they lose through irregularities in their work? You don't know? Do you undertake to manage this business and to say what wages it can afford to pay while you are ignorant of facts such as these? Are not these things that you should have understood and that you should have seen

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20. *Id.* at 323 (emphasis added).

21. *But see* P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 406-16 (1984) (emphasizing the democratic elements in Brandeis' thinking).

that your men too understood, before you went into this fight?" He called in John Tobin, the head of the International Boot and Shoe Workers' Union, who was acting as the striking workers' representative. Tobin's version of the situation—relatively high but seasonal wages—was the same as McElwain's. When Tobin finished his recital, Brandeis, the employer's lawyer, startled the labor leader by commenting, "You're perfectly right."<sup>22</sup>

Brandeis gave McElwain detailed advice about how to spread the work out over the year. "The net result was that the factory was kept operating 305 days every year, wages were both substantial and regular, the business prospered, and McElwain, Tobin, and the workers were satisfied."<sup>23</sup>

A memorandum entitled "The Practice of the Law," in Brandeis' own handwriting, virtually blueprints Brandeis' handling of this matter. In part, the memorandum reads: "Don't believe client witness—Examine Documents . . . Know not only those facts which bear on direct controversy, but know all facts that Surround. Advise client what he should have—not what he wants."<sup>24</sup> Brandeis' approach to McElwain's problem perfectly exemplifies the startling mix of humanitarianism and disinterested social engineering that together constituted the "lawyer for the situation" who would save capitalism from itself.

### B. *Progressive Professionalism*

As William Simon points out, Brandeis and the other progressive lawyers shared a set of beliefs that has much in common with functionalist sociology,<sup>25</sup> especially that of Talcott Parsons. According to the functionalists' public philosophy, professional structures emerge in response to social needs, rather than professional self-interest. The functionalists stressed that the professional's specialized knowledge itself mandates certain behavior that has nothing to do with the professional's economic enrichment. This functionalist philosophy is reminiscent of de Tocqueville as well as Brandeis, and we may distill several functionalist elements from Brandeis' speech that correspond to de Tocqueville's six propositions.

First, both the functionalists and the progressive lawyers insisted that the profession must not be commercialized, that purely economic motivation was either pernicious<sup>26</sup> or fictitious.<sup>27</sup> Second, both the func-

22. *Id.* at 96-97.

23. *Id.* at 97.

24. *Id.* at 40. This last sentence forms an astounding counterpoint to Elihu Root's "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." See *supra* text accompanying note 13.

25. Simon, *supra* note 3.

26. See E. DURKHEIM, *DIVISION OF LABOR IN SOCIETY* 1 (G. Sünpsen trans. 1933). I regard Durkheim as a proto-functionalist.



tionalists and the progressive lawyers viewed the legal profession as a link between private and public interests, with the former personified by clients and the latter by the laws.<sup>28</sup> Third, because of this unique position, members of the legal profession have an ethical responsibility to counsel clients and modify laws for the common good.<sup>29</sup> Fourth, the common good will be realized, in a society such as the United States, by blunting or mitigating conflict, specifically class conflict;<sup>30</sup> Brandeis espoused this theme as did de Tocqueville.<sup>31</sup> Fifth, this mitigation of class conflict will be accomplished by eradicating extremes of wealth and poverty; thus Brandeis' progressive call for elite lawyers to become people's lawyers as well as corporation lawyers (although, as we have seen, this is not because of any identification with the people). The most conspicuous element of Brandeis' public philosophy is a commitment to progressive politics, that is, a politics of redistribution within the framework of capitalism. It is a distinctively liberal public philosophy.

One important difference between Brandeis and the functionalists lies in their respective analyses of why lawyers should play the crucial role proposed for them. The functionalists ascribed the legal profession's fitness for the task of reconciling public and private interests to the centrality of law—in Gordon's words, "the belief that a legal system pursues, and its products reveal, immanent social purposes; that to all social conflicts there are efficient structural-functional solutions that harmonize with these purposes—the long-run needs of the society and its evolving public values."<sup>32</sup>

27. See T. PARSONS, *The Motivation of Economic Activities*, in *ESSAYS IN SOCIOLOGICAL THEORY* 50-68 (rev. ed. 1954); see also *id.* at 62-64 (discussing the professions). In the title essay of *Business—A Profession*, *supra* note 1, Brandeis argues that even businessmen should not be motivated primarily by a spirit of commercialism.

28. See T. PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY*, 370, 375, 384 (rev. ed. 1954).

29. A.A. Berle, Jr. was perhaps the leading exponent of the ethical importance of client counseling. See, e.g., Hazeltine, Radin & Berle, *Legal Profession and Legal Education*, in 9 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 345 (1933); Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 *HARV. L. REV.* 1365, 1371-72 (1932).

30. T. PARSONS, *supra* note 28, at 378 (indicating that "[j]ust as from a certain point of view the law-making process itself is a mechanism for settling conflicts in the society and establishing rules, so then the legal profession is a kind of 'secondary' line of defense against the disruptive consequences of conflict").

31. This is one of the most ancient conceptions of the function of law, appearing originally in *PLATO, THE LAWS OF PLATO* (T. Pangle trans. 1980). Plato argued that a communist society would be best, *id.* at 739c-d, but is too utopian to hope for, *id.* at 739d-e. Hence there must be unequal classes. *Id.* at 744b. Because factionalism and class war will inevitably destroy a city unless it is governed by the rule of law, not of men, *id.* at 715d, the lawmakers must attempt to reconcile the conflicting elements of society, even at the expense of justice. *Id.* at 627a-28c. Lawmakers will effect this reconciliation by eradicating extremes of wealth and poverty. *Id.* at 744d-e.

32. R. Gordon, *supra* note 3, at 21-22. For the view that a legal system pursues and reveals immanent social purposes, see E. DURKHEIM, *supra* note 26, in which the author claims method-

Brandeis, on the other hand, does not ground the central role he ascribes to lawyers in a social theory of the legal system as such; rather, as we have seen, he derives it from the fact that the lawyer possesses *phronesis*. It is the lawyer's cast of mind, not the central position of the legal system, that suits the lawyer so very well to public service. In this respect, Brandeis is closer to de Tocqueville than to the functionalists. Indeed, the six elements I have just enumerated, with the striking exception of political progressivism, are virtually identical to those we found in de Tocqueville's description of the American legal profession. I might add that this difference between Brandeis and the functionalists redounds to Brandeis' benefit. The functionalist claim that the legal system represents society's collective consciousness, or is central to the normative integration of society, is open to serious doubt, while Brandeis' enumeration of the lawyer's special qualities of mind—logical thinking, a nose for facts, good judgment of people, toleration—rings true.<sup>33</sup>

In sum, the public philosophy for the legal profession proposed by Brandeis consists of these six beliefs: first, professionalism is better than commercialism; second, lawyers are mediators between public and private interests; third, lawyers therefore have a special responsibility to the common good; fourth, the common good will be realized by blunting class antagonisms within a fundamentally capitalist framework; fifth, in an era of high capitalism, class antagonisms must be blunted by promoting the interests of the people against those of the corporations; and, sixth, lawyers are peculiarly suited by training and cast of mind to this task. In the remainder of this Article, I shall refer to this constellation of six elements as "progressive professionalism."<sup>34</sup>

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ologically that the law is a manifestation of the collective consciousness. For the belief in efficient solutions, see also T. PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34 (rev. ed. 1954).

33. For very different attacks on the functionalist claims, see R. UNGER, *LAW IN MODERN SOCIETY* chs. 2, 3 (1976), and some of the writings of Niklas Luhmann, who is the most distinguished contemporary functionalist; see, e.g., N. LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* 230-73 (E. King & M. Alhrow trans. 1985); N. LUHMANN, *Positive Law and Ideology* and *The Autonomy of the Legal System*, in *THE DIFFERENTIATION OF SOCIETY* 90, 122 (S. Holmes & C. Larmore trans. 1982); Luhmann, *The Legal Profession: Comments on the Situation in the Federal Republic of Germany*, 20 *JURID. REV.* 116-32 (1975).

34. I use this term rather than Gordon's "Progressive Purposivism," *supra* note 3, at 21, or Simon's "Progressive Functionalism," *supra* note 3, at 565-68, because of the sixth element of the constellation, which is different from the functionalist and purposivist views. While these views stressed the role of law as a mode of social integration, Brandeis stressed the mental qualities of lawyers.

C. *The Technocratic and Legitimacy Visions of Progressive Professionalism*

Brandeis' Harvard speech promoted what I will call the "technocratic vision" of progressive professionalism. Implicit in this view is the notion that lawyers should use their unique position in society to engineer social change. However, Brandeis' is not the only version of progressive professionalism. Another member of the legal pantheon, Reginald Heber Smith, a corporate lawyer from Harvard who created the modern legal aid movement, offered a different version of progressive professionalism.<sup>35</sup> In his celebrated book *Justice and the Poor*, Smith wrote:

The essentially conservative bench and bar will vehemently deny any suggestion that there is no law for the poor, but, as the legal aid societies know, such is the belief to-day of a multitude of humble, entirely honest people, and in the light of their experience it appears as the simple truth.

. . . .  
 . . . The end of such a course is disclosed by history. Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end.<sup>36</sup>

Smith, like Brandeis, was worried about class war and revolution. But unlike Brandeis, Smith was not concerned with social unrest as merely an engineering problem that required re-equilibration of the machine. Smith was concerned, rather, that the existing situation was unjust and unfair.

To register this contrast, let us call Smith's version of progressive professionalism the "legitimacy vision" just as Brandeis' version is the "technocratic vision."<sup>37</sup> Implicit in Smith's book is the idea that, barred from access to the law, the people would be *right* to revolt.<sup>38</sup> At issue is the legitimacy of government, and that legitimacy must be tested against the life experience of the least-well-off in society.<sup>39</sup> According to

35. For a description of Smith's role in the history of legal aid in the United States, see E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974).

36. R. SMITH, *JUSTICE AND THE POOR* 11-12 (3d ed. 1924) (footnotes omitted).

37. Let me emphasize that Brandeis was also a democrat, and I am highlighting the technocratic strain in his thought because it is the only one apparent in *The Opportunity in the Law*, *supra* note 1. For further discussion of Brandeis and technocracy, see Luban, *The Twice-Told Tale of Mr. Fixit: Reflections on the Brandeis/Frankfurter Connection*, 91 *YALE L.J.* 1678, 1697-1707 (1982).

38. I have defended this idea in *Political Legitimacy and the Right to Legal Services*, 4 *Bus. & Prof. Ethics J.* 43 (1985).

39. The legitimacy vision eventually reaches theoretical fruition in Rawls' Difference Principle, J. RAWLS, *A THEORY OF JUSTICE* 75-78 (1971), as the technocratic vision does in pluralist political science.

the legitimacy vision, there is no question of a lawyer standing outside the fray; there is no question of a lawyer sometimes siding against the people; there is no question of a lawyer engaging in a physicist's balancing of interest groups, all of them in principle equally important. Instead, a lawyer is fully and frankly an advocate for the people, with whom a lawyer must side, because the people occupy a privileged position in determining the legitimacy of government.

In Brandeis' view, the primary activities of progressive professionalism were to be law reform and counseling clients away from immoral or socially pernicious projects. The legitimacy vision adds one further activity to the roster: advocacy for "the people," in the form of legal aid work and pro bono practice on behalf of the poor.

#### *D. Law Reform*

Beginning roughly with the New Deal, progressive professionalism underwent a sort of mutation. It began with a momentary ascendancy of the legitimacy vision, which soon transmuted to the technocratic vision, and eventually decayed into corruption.

The Democratic Party's coalition between farmers, labor, ethnic minorities, and (more generally) "the people," created a new role for lawyers sharing the legitimacy vision of progressive professionalism: government service. Now a people's lawyer could happily become a government lawyer, because, with the election of Franklin Roosevelt, it was a people's government. One noteworthy outcome of Brandeis' 1905 Harvard speech was the recruitment of a brilliant student, Felix Frankfurter, to Brandeis' philosophy. By the 1930s Frankfurter had become a Harvard professor and a good friend of Roosevelt. Frankfurter put the philosophy into practice by helping to place a large number of lawyers, who were formerly his students, in important positions in Roosevelt's New Deal Administration.<sup>40</sup>

At the same time, however, that the government bar was so astoundingly active, the private elite bar disengaged itself from public service. This separation can be explained, in part, by the uneasy and unstable mix of the client-loyalty ethic with progressive professionalism: a large number of lawyers adhered to the former and not the latter. In addition, there was little about public life in the New Deal to attract Republicans. Finally, the opportunities of government service were such as to make it more attractive to progressive professionals than remaining "behind" in private practice. Thus, the progressive professionalist

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40. E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 283-86 (1966); A. SCHLESINGER, *THE COMING OF THE NEW DEAL* 50 (1958). See generally P. IRONS, *THE NEW DEAL LAWYERS* (1982).

vision was pried loose from its social base in elite law firms.

The New Deal lawyers may well have been unclear or undecided initially about whether their version of progressive professionalism embraced the technocratic or the legitimacy vision, the latter of which was represented in the Public Utility Holding Company Act,<sup>41</sup> the Tennessee Valley Authority,<sup>42</sup> and the Agricultural Adjustment Agency under Jerome Frank.<sup>43</sup> Inevitably, however, government service and political conflict blunted the "people's lawyer" edge of the New Deal lawyers, even those who adhered to the legitimacy vision. The government lawyer, simply by working in government, was transformed from an "advocate for the forgotten man" to a detached, technocratic problem-solver.

Eventually, private practice lured the New Deal lawyers away from government service. Peter Irons' study of eighty-two New Deal lawyers found that only twelve remained in government service, while two-thirds went into private practice.<sup>44</sup> They became "revolving door" lawyers, cashing in on their agency expertise and insider connections by representing corporate clients before the agencies and lobbying on behalf of their corporate clients. In the backwash of the Michael Deaver affair and the scores of other sordid scandals associated with the Reagan Administration, it has become abundantly clear that the revolving door is an invitation to corruption. Nevertheless, we must remember that the corruption in question has been with us for a long time, and not always in the form of overt or unlawful conflict of interest. Thurman Arnold was a Jerome Frank disciple in the first New Deal and a trust-buster in the second, only to found a private law firm that, like all major Washington firms, devotes the bulk of its practice to navigating business clients through the regulatory agencies that Arnold knew so well from the inside. No one would argue that this is corruption in any legal sense of the notion, but it is undeniable that such practice amounts to a kind of "insider trading" in the world of power, rather than finance, and exhibits a disquieting agnosticism about the common good.<sup>45</sup> Tommy "the Cork" Corcoran, whose New Deal prominence gave

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41. See W. DOUGLAS, *DEMOCRACY AND FINANCE* (1940).

42. David Lilienthal—one of the lawyers placed by Frankfurter—became the exponent of the TVA as a form of "grass-roots democracy." A. SCHLESINGER, *supra* note 40, at 331-33.

43. I am indebted to Robert Gordon for stressing to me the importance of the legitimacy vision to William Douglas, David Lilienthal, and Jerome Frank.

44. P. IRONS, *supra* note 40, at 298-300.

45. Arnold's career is well known. For an appreciation of Arnold, emphasizing his commitment to public service—his continuity with the *noblesse oblige* tradition—see Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *YALE L.J.* 988 (1970). Fortas (who had been Arnold's law partner) focuses on his firm's impressive pro bono work, and says little about the commercial side of Arnold's practice. But even Fortas makes it clear that Arnold's stock in trade was insider expertise. "Washington know-how was in demand. . . . Lawyers who were veterans of the New Deal and government service were presumed to be qualified to find their way through the maze, to guide and

him the connections to become a successful lobbyist, ended his career ignominiously when Woodward and Armstrong revealed in *The Brethren* that he had once tried to lobby Supreme Court Justice William Brennan on behalf of one of Corcoran's clients.<sup>46</sup> In an uncomfortably accurate phrase, the *New Republic* characterized the tertiary-stage government lawyer as "the indulgence seller."<sup>47</sup> That is the dissolution of progressive professionalism.<sup>48</sup>

### E. Client Counseling

What about the other half of the progressive professionalist ideal—not law reform, but client counseling on behalf of worthy social goals? Talcott Parsons, we recall, insisted that "the lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interest,"<sup>49</sup> a view that is also incorporated into the professional codes. The Model Code of Professional Responsibility, for example, provides that:

In assisting his client to reach a proper decision, 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. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.<sup>50</sup>

And "when an action in the best interest of his client seems to him to

assist companies which had unfamiliar problems." *Id.* at 991. As Fortas expounds his view, Arnold adhered to a value-neutral role for the lawyer: "the social implications of the position to be taken on the client's behalf were submerged by the lawyer's dedication to the value of the legal and constitutional system as he saw it, to the duty of the advocate, and to the obligations of advocacy in an adversary system." *Id.* at 996. And again: "Every person, poor or rich, criminal or corporation, is entitled to the services of a lawyer. . . . [The lawyer] should not—he may not—ignore the basic principle of our system that the corporation, whatever the issue may be, is entitled to counsel." *Id.* at 997.

Dare we suggest that this alleged value neutrality is a bit disingenuous? For one thing, as Fortas knew full well, in our "constitutional system" only criminal defendants are "entitled to counsel," and so only criminal defense lawyers have a straightforward claim to value neutrality. In non-criminal matters the claim of value neutrality is harder to justify. If 90% of a lawyer's clients are women's rights plaintiffs, surely we are entitled to conclude that the lawyer's practice *taken as a whole* manifests a value orientation in favor of women's rights. Who could doubt that the lawyer is engaged in a feminist law practice? Similarly, a Washington lawyer who builds a major law firm by representing the regulated against the regulator cannot disconnect himself from the social consequences of the practice *taken as a whole* by appealing to value neutrality.

46. B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 79-85 (1980).

47. *The Indulgence Seller*, *THE NEW REPUBLIC*, Sept. 1, 1979, at 3 (referring to Lloyd Cutler).

48. For a discussion of the role of lawyer-lobbyists in contemporary political corruption, see E. DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 57-66 (1983).

49. T. PARSONS, *supra* note 28, at 384.

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983) [hereinafter MODEL RULES].

be unjust, he may ask his client for permission to forego such action."<sup>51</sup> An early official statement of the American Bar Association and the Association of American Law Schools on professional ethics emphasizes the same points.<sup>52</sup>

For obvious reasons, empirical evidence on how lawyers counsel their clients is difficult to obtain. Erwin Smigel's 1964 study of the Wall Street lawyer cited Parsons approvingly and suggested that the lawyers Smigel studied lived up to this ideal of professional autonomy.<sup>53</sup> Smigel believed Wall Street firms to be wealthy enough, with a diversified enough clientele, that they can easily weather the loss of a client; moreover, a firm can exercise leverage because the client's need for the firm is great.<sup>54</sup> But Smigel offers no hard data, and the most recent research of which I am aware points in the opposite direction. A recent survey indicates that a large minority of 222 large-firm lawyers have never given advice to their clients about nonlegal matters, and the bulk of nonlegal advice that the majority of lawyers gave concerned personal investments or business decisions, rather than public concerns (though clearly advice about business decisions might include public concerns).<sup>55</sup> Moreover, half of the lawyers who said that they had never given a client nonlegal advice attributed this to the fact that they have no client contact; another fifteen percent said it is not a lawyer's responsibility.<sup>56</sup> Both of these explanations are devastating to the progressive professionalist model of the trusted advisor oozing with *phronesis*.

One explanation for this finding is that the client counseling half of progressive professionalism has always been largely a myth.<sup>57</sup> A different and incompatible explanation is that progressive professionalism has decayed since its heyday, or even since Smigel's study. A third explanation is that the structure of lawyer-client relationships in large law firms has changed over the last few years: in-house counsel have become much more important and taken over the supervision, and many of the advisory tasks, of outside counsel, which would explain why so many of the lawyers who have never provided extra-legal advice to clients say it

51. MODEL CODE, *supra* note 50, EC 7-9; see also MODEL RULES, *supra* note 50, Rule 1.2(c).

52. Fuller & Randall, *Professional Responsibility: Report of the Joint Conference of the ABA-AALS*, 44 A.B.A. J., 1159 (1958).

53. E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 293 (1964); see *supra* note 49 and accompanying text.

54. E. SMIGEL, *supra* note 53, at 293.

55. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 533 (1985).

56. *Id.*

57. R. Gordon, *supra* note 3, at 30-32.

is because they have no client contact.<sup>58</sup> A final explanation is that, *phronesis* or no *phronesis*, corporate clients just do not want their lawyers' nonlegal advice.<sup>59</sup>

Whatever the explanation, however, the fact that lawyers do not give their clients nonlegal advice shows why, with the decadence of progressive professionalist government practice, idealistic lawyers would have to seek "The Opportunity in the Law" outside of establishment institutions altogether: neither government practice nor elite private practice offered that opportunity.

## V. THE NEW WAVE OF PROGRESSIVE PROFESSIONALISM

What I shall call the New Wave of progressive professionalist lawyers forms the dominant contemporary image of "public interest law," which reached its zenith in the late 1960s and early 1970s. This New Wave practice included lawyers representing poor people, political and cultural dissidents, and consumer and environmental interests.<sup>60</sup> One could take, as an example of the first type of New Wave practice, Gary Bellow, who co-founded California Rural Legal Assistance (CRLA), the legal aid organization whose successes are the source of President Reagan's bitter and uncompromising hostility to publicly funded legal services for the poor. Bellow later became perhaps the most distinguished clinical law teacher in the country, co-authored the major clinical textbook,<sup>61</sup> and is currently a Harvard Law School professor. William Kunstler is probably the best-known example of the second form of New Wave practice; and Ralph Nader is a splendid example of the third.

One characteristic of the New Wave practice was the absence of a Brandeis or a Heber Smith: blue-chip lawyers who became people's lawyers in their spare time. Things seemed much more of an either-or proposition—you were either on the bus or off the bus. However, it is important to notice that the New Wave practice attracted many blue-chip dropouts and law *students*. Jim Lorenz, who co-founded CRLA

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58. On the expanding role of in-house counsel, see Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 427-28 (1985). It is important to note, however, that Nelson's research revealed that 65% of associates and 87% of partners *do* report that they have opportunities to give nonlegal advice to corporate clients. Nelson, *supra* note 55, at 532.

59. The chairman of AT&T wrote that he would not want a lawyer who wished to be a "corporate conscience." De Butts, *The Client's View of the Lawyer's Proper Role*, 33 BUS. LAW. 1177 (1978); see also Kagan & Rosen, *supra* note 58, at 423-27.

60. This typology comes from what is still the best description of the New Wave: Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

61. G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).



along with Bellow, began as a large-firm corporate lawyer, and described as "revolutionary" the fact that CRLA adopted the large firm's standard of quality.<sup>62</sup> And a glance at the first list of Reginald Heber Smith Fellows—Legal Services Program fellowships in poverty law—shows that, in 1967, twenty-one out of fifty fellows graduated from the Harvard, Chicago, Columbia, Yale, and Penn law schools (plus one each from Virginia, Michigan, and Boalt Hall).<sup>63</sup>

The reasons for this striking abandonment of establishment legal practice are relatively clear. First, the New Wave sensibility was bottom-up democratic and rigidly anti-elitist, which meant rejecting the technocratic vision of progressive professionalism in favor of the legitimacy vision (though, as I shall suggest, it is unclear how much progressive professionalism the New Wave lawyers were prepared to embrace under either vision). Second, the New Wave sensibility was anti-capitalist and anti-corporate. The corporate camel was beyond salvation, incapable of passing through the eye of the needle, and the New Wave lawyers viewed the corporate counseling function of classic progressive professionalism as false consciousness, self-deception, or even sheer lying by professional elites concerned with preserving the myth that they had not sold their souls. Third, the New Wave sensibility was enmeshed in what Theodore Adorno calls "the jargon of authenticity"—a Woodstock Nation loathing of the institutional role playing expected of Wall Street lawyers.<sup>64</sup> Some of the most intense debates among New Wave lawyers concerned whether to "dress straight."<sup>65</sup>

The New Wave practices' was clearly more committed to the legitimacy vision—power to the people!—than the technocratic vision of progressive professionalism. But New Wave social theory in fact involved deep tensions with several propositions of classical progressive professionalism, which cast doubt on whether the New Wave practice was in fact part of the progressive professional tradition at all. The New Wave practice had no difficulties, of course, with the rejection of commercialism (proposition one), nor with partisanship on behalf of the people against corporate power (proposition five). New Wave lawyers may have disagreed that lawyers have a *special* responsibility to the common good (proposition three)—resolutely insisting, depending upon the nature of the lawyer's radicalism, that the responsibility belongs to everyone, or to the victims, or to the proletariat. Nevertheless, New Wave lawyers would never have doubted that their own talents were devoted

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62. Comment, *supra* note 60, at 1075.

63. The list was provided to me by Clinton Bamberger.

64. T. ADORNO, *THE JARGON OF AUTHENTICITY* (1973).

65. Comment, *supra* note 60, at 1137-45.

to the pursuit of the common good.

The New Wave lawyers' reaction to the functionalist belief that lawyers mediate between public and private interests (proposition two) is more complex. Some New Wave lawyers, with either a liberal-Christian or a Marxist perspective, viewed their clients' interests as universal interests within society; thus these lawyers could advance the public interest simply by pursuing their clients' interests. Other New Wave lawyers reached the same conclusion by more mainstream analytic strategies. Those lawyers who represented "discrete and insular minorities" could describe their activities as an attempt to perfect classical interest-group politics by ensuring that their clients were heard in the public forum.<sup>66</sup> Since discrete and insular minorities are unrepresented in legislatures, they have no political clout; pursuing a litigation strategy allows discrete and insular minorities access to the law making process via the judiciary. Similarly, lawyers who represented consumer or environmental interests could explain that they were responding to economic or political market failures that prevent dispersed majorities from having a voice in either legislatures or the courts.<sup>67</sup> While it is too expensive for individual consumers with only a small stake in, say, a rate-hike decision to organize politically, public interest lawyers can overcome this market failure by filing lawsuits. In any case, the New Wave lawyers would have accepted the proposition that they "mediate" between private and public interests only in the trivial sense that they believed that private and public interests were simply identical in the New Wave practice.

Most problematic for New Wave lawyers would have been the idea that the common good is achieved by blunting class conflict (proposition four). While they were likely to accept that their reformist activities would blunt class conflict, the New Wave lawyers hated the fact that this was true. Indeed, one of their basic fears was that working-within-the-system reformism such as theirs would pull the fangs of The Movement: "such work is counterproductive, in their view, for while it can make the system slightly less oppressive, it defuses efforts for more

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66. The "discrete and insular minorities" analysis originates in Footnote 4 of *United States v. Carolene Products*, 304 U.S. 144 (1938), and has been developed into a full-fledged theory of judicial review in J. ELY, *DEMOCRACY AND DISTRUST* (1980); for a skeptical analysis, see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

67. See Comment, *supra* note 60, at 1096-97; see also Weisbrod, *Problems of Enhancing the Public Interest: Toward a Model of Governmental Failures*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 30 (B. Weisbrod, J. Handler & N. Komesar eds. 1978); Trubek, Trubek & Becker, *Legal Services and the Administrative State: From Public Interest Law to Public Advocacy*, in 1 *INNOVATIONS IN THE LEGAL SERVICES* 131-60 (E. Blankenburg ed. 1980). See generally R. NEELY, *HOW COURTS GOVERN AMERICA* (1981). I develop both analytic strategies in chapter 16 of *Lawyers and Justice*, *supra* note 11.

radical change."<sup>68</sup>

Lastly, New Wave lawyers would have disagreed about whether lawyers are specially well-suited for the tasks confronting them. Some would enthusiastically have said yes, but more radical lawyers argued that lawyers were merely brakes and liabilities, since the primary task confronting The Movement was political organization and direct action.<sup>69</sup>

## VI. THE DECLINE OF PROGRESSIVE PROFESSIONALISM

Despite these tensions with classical progressive professionalism, there is enough overlap between the altruistic, politically charged outlook of the New Wave practice and the views of Brandeis and de Tocqueville to place them in the same tradition. De Tocqueville would have analogized the New Wave lawyers to the radical lawyers of the French Revolution who, he warned, would emerge whenever the government gives lawyers insufficient influence.<sup>70</sup> But the New Wave is now Old Hat—many of the New Wave lawyers have gone back into private practice or sought refuge in law school faculties, where they are now a classic example of "old turks teaching young fogies." Since the collapse of '60s radicalism, we have witnessed, in the last decade, a loss of faith in the progressive professionalist vision. This loss of faith originated from several directions. First, the populist, anti-elitist mistrust of the technocratic vision has persisted, and not just among left-leaning lawyers: in the new conservatism, government bashing, lawyer bashing, and expert bashing (since the experts are members of the "New Class," *i.e.*, liberals) are tiresome mainstays.

Second, Reaganism has launched an all-out attack on the legitimacy vision. The basic maneuver—highly visible in Ronald Reagan's 1984 presidential campaign against Walter Mondale—is to deny that the least well-off have any kind of privileged position in determining the legitimacy of institutions. *The poor, minorities, farmers, and labor (the New Deal coalition, "the people") are now just some more interest groups.* This redefinition, of course, is fatal, because in a pure clash of interest groups, the relatively powerless ones are inevitably doomed.

Third, the elite private bar, in the meantime, shows decreasing interest in public interest work and greater concern for the bottom line. It is a constant refrain among elite lawyers in the 1980s that the salad

68. Comment, *supra* note 60, at 1094.

69. For an especially vituperative attack on the assumptions lawyers bring to radical politics, see Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970); see also Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125 (1968).

70. 1 A. DE TOCQUEVILLE, *supra* note 4, at 284-85.

days of large law firms in the 1970s are over, and that it is now necessary for large firms to become increasingly profit conscious. This profit consciousness manifests itself in every aspect of practice, even the most trivial. August large firms conduct their photocopying centers as profit making enterprises; typical numbers are those of a Los Angeles firm that bills clients twenty-seven cents a page for photocopying that would cost ten cents a page commercially. Since corporate litigation can often involve a million pages of photocopying, we are talking about hundred-thousand-dollar rip-offs. The same firm bills clients for parking in the firm's garage without telling the clients that it is doing so, and meters the lawyers' telephones from the moment a call is made, so that clients are billed for calls even when the calls are not completed.

These are the minor matters. Much more important is the insane spiral of pressure on large-firm associates. Ten years ago associates with whom I spoke knew that they had to bill at least 1600 hours a year to have a prayer of making partner. Today, associates in some Washington firms tell me that the minimum plausible amount is 2200 hours, and the average associate bills around 2400 hours. Not every hour at work is billed, of course, and so work days are often over twelve hours long. These are, to say the least, tense and demanding hours. It is small wonder that associates who leave for work before their children wake up in the morning and return home hours after the *au pair* has tucked them into bed have no singular desire to busy themselves with law reform or pro bono activities.

It is a noteworthy fact, however, that things need not be thus. A partnership could simply hire more associates to do the same amount of work, which would free the Nibelungen to live their own private as well as public lives. The reason this does not happen, of course, is that to pay additional associate salaries and overhead for the same work would decrease partnership shares. The same reason governs the work load of associates; since an associate is usually paid a fixed salary, but bills by the hour, the more hours the associate bills, the more money the partners bank. The associates, who are often bringing in close to two-and-a-half times their own salary to the partnership, acquiesce in the system for the obvious reason that they hope someday to become partners and share in the booty themselves. This is truly a hope against hope, for only a few will make it. Indeed, if the associate-to-partner ratio decreases by the firm promoting a higher proportion of associates, the level of partner incomes, for which the associates are striving, could not be maintained.

In fact, the large law firm is one of the only institutions in contemporary America that fits Marx's theory of exploitation with no fudging required: even the Horatio Alger ideology that "anyone can make it" is

preserved intact like a perfectly shrunken head. The only difference is this: the partners work as hard as the associates, with the additional burden of bringing in business, which requires shmoozing with clients on their off-hours. Corresponding to the intensified pressure on associates is a more competitive ethos among large-firm partners: several with whom I have spoken said that, while in the "good old days" a partner who was liked or respected would not suffer if he brought in fewer clients, this is no longer true. The exploiters suffer alongside the exploited; Alberich sweats beside Mime.

Small wonder that in this atmosphere progressive professionalism does not flourish. As we have seen, the corporate counseling component of progressive professionalism, so prominent and important in theory, takes a back seat in practice. Robert Nelson also reports interesting findings regarding the law-reform component.<sup>71</sup> Although the large-firm lawyers Nelson studied are noticeably more liberal in their general political outlook than one would expect (surely more liberal than their clients), the law reforms these lawyers proposed in their own areas of expertise were almost invariably anti-liberal and in favor of their clients. Nelson comments: "[T]here is not much disparity between client concerns and the lawyers' agenda for change in the legal fields in which they actually practice. . . . Given an unconstrained power to change the law, the majority would change the law to suit the interests of their clients."<sup>72</sup> It is both sad and amusing to compare this observation with the ABA-AALS's official statement regarding the lawyer as law reformer, which urges the lawyer to exploit the bad law on behalf of the client but then bend his personal energies to repealing the law.<sup>73</sup> If Nelson is right, this ideal lawyer would never have made partner on Wall Street, and lawyers are least likely to suggest progressive reforms in matters closest to their practice and expertise.

## VII. PROGRESSIVE PROFESSIONALISM AS A MORAL DUTY

At this point my historical reconstruction draws to a close. It is obvious that my aim in this narrative has been to promote progressive professionalism, particularly the legitimacy vision. I believe that progressive professionalism, though by no means beyond criticism, presents an ideal for elite law firm practice that is infinitely more attractive than the futility, the quietism, the excruciating narrowness of law practice that serves no purpose but to help the rich get richer. To defend this view, unfortunately, is more than I can do here, for it would involve

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71. Nelson, *supra* note 55, at 525.

72. *Id.*

73. Fuller & Randall, *supra* note 52, at 1162.

defending each of the six propositions that constitute the progressive professionalist vision. This is an argument more elaborate than I can hope to mount in my remaining space, and in any case I accept some of the six propositions only in a qualified form.

Instead of attempting to defend progressive professionalism proposition by proposition, I shall focus on one key point. This is the question of whether progressive professionalism, with its twin components of law reform and client counseling, is intended as, in Lon Fuller's phrase, a "morality of duty" and thus a competitor to the more usual understanding of the lawyer's duty as client loyalty, or a "morality of aspiration"—a moral ideal on a par with loving thy neighbor as thyself, which is commendable but can scarcely be called a strict obligation.<sup>74</sup> Only if progressive professionalism is regarded as a morality of duty does it signify a reevaluation of legal ethics.

I think it is clear that the progressive professionalist's call to lawyers to engage in law reform activities cannot sensibly be anything but a morality of aspiration: the burdens and ignominies of public life are simply too onerous, too little to most people's taste, too exceptional, for it to make sense to call them a duty. Perhaps what Brandeis had in mind was the circumstance that the institutions and conduits of participation in law reform—the bar associations and membership in a community's political and economic establishment—are readily available to elite lawyers. Today, large firm lawyers are routinely involved in bar association activities, and it would take little additional mobilization to give these activities a progressive and reformist twist. This makes Brandeis' exhortation somewhat more understandable, but it is still an exhortation to what is above and beyond the call of duty.

What of the other half of progressive professionalism? One might expect that client counseling, too, is supererogatory: it may be very commendable for a lawyer to remonstrate with a client about the injustice, the harsh consequences, or the immorality of a course of action the client wishes to pursue, but it seems mistaken to require lawyers to do so. But here, I think, the story is very different—here, I think, the lawyer is duty-bound to take the progressive professionalist course, and in that case it truly amounts to a changed vision of law practice.

"Client counseling" is simply a shorthand way of describing a complex kind of lawyer-client negotiation in which the lawyer brings into play his or her *phronesis* in order to divert clients away from projects that harm the common good. Client counseling may mean kindling the clients' consciences, but more often it will mean inventing alternative

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74. The distinction between a morality of duty and a morality of aspiration comes from L. FULLER, *THE MORALITY OF LAW* (2d ed. 1964).

ways for clients to satisfy their interests. Sometimes it means persuading clients that the course of action they propose will harm them even when that is not necessarily so. In other instances, client counseling will require threatening to withdraw from a representation or refusing to follow a client's instructions. In extreme cases, it means telling the client that if he does not back away from a course of action, the lawyer will blow the whistle on him.

In brief, "client counseling" is an abbreviation for a morally activist vision of lawyering in which lawyers take it upon themselves to judge and shape client projects. This is in sharp conflict with the ethic of client loyalty, which combines extreme partisanship on behalf of the client with moral neutrality toward the client's ends and projects.<sup>75</sup> It is often suggested that neutrality is indispensable, that a lawyer cannot be held morally accountable for her client's nefarious schemes. The *Model Rules of Professional Conduct* stipulate that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>76</sup>

In fact, however, the principle of neutrality has come under vigorous attack in recent years, and in my view is completely discredited.<sup>77</sup> Even cases that seem to require neutrality, such as the defense of vicious criminals or the representation of vile clients in order to vindicate an important principle (for example, a Nazi's right to free speech) actually demonstrate the opposite. The criminal defense and civil liberties lawyers point to the moral worthiness of the sixth or the first amendment to absolve themselves of moral blame. Melvin Wulf, former Director of the American Civil Liberties Union, said "Our real client is the Bill of Rights."<sup>78</sup> This statement shows that these lawyers, who deal with cases that seem to require neutrality and nonaccountability, do in fact hold themselves morally accountable for the principles they uphold, and excuse their furtherance of the interests of unsavory clients as an unfortunate but unavoidable by-product of advancing principles to which the lawyers are morally committed. That is, these lawyers appeal

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75. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

76. MODEL RULES, *supra* note 50, Rule 1.2(b).

77. I have ventured a full-scale refutation of the principle in chapters 1-8 of *Lawyers and Justice*, *supra* note 10; the core of this argument has been published in D. LUBAN, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (1983). See also Simon, *supra* note 75, in which the author convincingly demonstrates that neutrality is inconsistent with all of the major jurisprudential positions that have ventured to defend it, and the chapter on lawyers in A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980), in which the author effectively defuses many of the counterarguments against relaxing the principle of neutrality.

78. Quoted in Comment, *supra* note 60, at 1092.

not to neutrality but to something like the just-war doctrine of double effect.

Once these cases are seen to rely on a principle other than neutrality, the neutrality principle looks less plausible. Although space does not permit me to rehearse the many detailed arguments that have ruined the client-loyalty vision of partisanship and neutrality, the general point may be stated briefly—and it is a restatement of progressive professionalism. The client-loyalty ethic requires lawyers to subordinate the common good to the particular interests of their clients. This subordination may nevertheless contribute indirectly to the common good, provided that the aggregate of morally worthy client projects that are furthered thereby is greater in number and import than the morally pernicious projects. For example, the duty of confidentiality requires lawyers to keep client confidences even when doing so harms the common good. The duty of confidentiality may nonetheless be a good thing, provided that the aggregate of “harmful” confidences is small compared with that of “innocent” confidences.

Without some such favorable bookkeeping, the lawyer's partisan role seems hard to defend. The point is not the communitarian or anti-individualist claim that everyone's projects are morally required to contribute to the common good, as though we were all always employees of society. That is a pernicious argument. The point is rather that the legal profession in effect enters a claim that its partisan role is to be judged by different standards than those that apply to nonlawyers. A nonlawyer who bends his or her intelligence, judgment, and persuasive abilities to further another person's project is an *accomplice* of that other person, and must take full moral responsibility for that project. Lawyers must justify the claim that they should be judged by a more relaxed standard by showing that relaxing the standard serves the common good.

But there is no reason to believe that this is so: why suppose that one-sidedly furthering client projects will generally serve the common good? That is where the progressive professionalist solution comes in: it compels the lawyer to act as a buffer who mediates between illegitimate client desires and the social interest.<sup>79</sup> By adopting a morally activist stance, the lawyer helps improve the ratio of worthy to unworthy client projects, vindicating thereby the partisan role that defines the legal profession. In short, either the principle of neutrality is straightforwardly unjustifiable, or its justification requires lawyers to adopt a morally activist stance that is inconsistent with the principle. In either case, the

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79. The word “buffer” comes from T. PARSONS, *supra* note 28, at 384.



partisanship-plus-neutrality vision is unsustainable, and must be replaced by something like progressive professionalism.