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The Law: From a Profession to a Business

Norman Bowie

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I. INTRODUCTION

The public believes that the practice of law has become a business. They also believe that lawyers are in the profession for the money and that everything a law firm does is motivated by greed—well not everything, in *L.A. Law* lawyers are motivated by greed and lust. Allegedly, lawyers overcharge, create work, and delay in order to make more money. In return lawyers produce nothing useful; they do not make cars, steel, or heavy machinery. They are perceived by many as social parasites who make a handsome living off the productive labor of others. Economists note that the United States' workforce has a higher percentage of lawyers than that of Japan.[1] Economists argue that it would be better for American business if more of our best and brightest would be engineers rather than lawyers.[2] Arguably, lawyers merely redistribute income. Because the best lawyers work for powerful corporations where the money is, the legal profession as a whole shifts money from the poor to the rich.[3] The public perceives lawyers as being worse than business people because in addition to being motivated by greed—as business people are—lawyers produce nothing useful.

The public's perception is easily dismissed as being uninformed.

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* Director, Center for the Study of Values, University of Delaware; author, BUSINESS ETHICS (1982).

1. *See* R. REICH, THE NEXT AMERICAN FRONTIER 159 (1983).

2. *Id.*

3. One corporate atterney argues that the public's perceptions are too simplified. For instance, corporate attorneys sometimes prevent corporations from taking actions they want to take—actions that would benefit the corporation at the expense of the poor.

Whenever the public, correctly or incorrectly, suspects the motives of a profession, it is prudent that the profession sit up and take notice. Apparently some members of the American Bar Association have taken notice. In 1986 the Commission on Professionalism issued a report to the House of Delegates. The report challenged lawyers to "*restor*[*e*] a high level of professionalism . . . both in fact and in the perception of others."[4] The report begins by posing the question of whether the legal profession has abandoned principle for profit and professionalism for commercialism.[5] The report catalogues the reasons why the general public answers that question in the affirmative. First, lawyers are blamed for some serious social problems—for example, medical malpractice litigation and the skyrocketing price of liability insurance in general.[6] Second, litigation is seen to consume vast quantities of time and money.[7] Third, lawyers are lacking in character.[8]

The Commission makes a number of recommendations for law schools, the practicing bar, bar associations, and judges: (1) preserve and develop within the profession integrity, competence, fairness, independence, courage and a devotion to the public interest; (2) resolve to abide by higher standards of conduct than the minimum required by the *Code of Professional Responsibility* and the *Model Rules of Professional Conduct*; (3) increase the participation of lawyers in pro bono activities and help lawyers recognize their obligation to participate; (4) resist the temptation to make the acquisition of wealth a primary goal of law practice; (5) encourage innovative methods that simplify and make less expensive the rendering of legal services; (6) educate the public about legal processes and the legal system; and (7) resolve to employ all the organizational resources necessary in order to assure that the legal profession is effectively self-regulating.[9]

These recommendations must be put into a theoretical framework. The remainder of this Article seeks to establish the rationale for adopting these recommendations. Part II of this Article provides the classic account of a professional. This account demonstrates why so many people no longer view lawyers as professionals. Part III compares the traditional view of the profession with the traditional view of business. It is undesirable for lawyers to behave like traditional business persons.

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4. American Bar Association, Commission on Professionalism, ". . . *In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in* 112 F.R.D. 243, 250 (emphasis added).

5. *Id.* at 251.

6. *Id.* at 253.

7. *Id.* at 253-54.

8. *Id.* at 254.

9. *Id.* at 296-304.

Rather, business should abandon the traditional business model and seek to become a profession. The motto of the Harvard Business School, "To Make Business a Profession," should be taken seriously. Only if business becomes a profession will a trend for the law to emulate business be a good one. Part IV describes what constitutes a professional commitment to altruism in the law. Part V criticizes the economic analysis of law as being especially detrimental and a major contributor to the legal profession's current problems.

II. The Definition of a Profession

Abraham Flexner[10] gave the classic definition of a profession over seventy years ago. To qualify as a profession Flexner claimed that an occupation must: (1) possess and draw upon a store of knowledge that was more than ordinarily complex; (2) secure a theoretical grasp of the phenomena with which it dealt; (3) apply its theoretical and complex knowledge to the practical solution of human and social problems; (4) strive to add to and improve its stock of knowledge; (5) pass on what it knew to novice generations not in a haphazard fashion but deliberately and formally; (6) establish criteria of admission, legitimate practice, and proper conduct; and (7) be imbued with an altruistic spirit.[11]

The traditional professions were medicine, law, teaching, and the ministry. Since the remuneration for teaching and the ministry was low seventy years ago and has remained relatively low, little doubt exists that teaching and the ministry easily meet the definition. Doctors and lawyers have always done relatively well financially, and hence, it has been incumbent upon them to prove that their primary motivation was altruism.

In both medicine and law, the general practitioner is disappearing. Individual lawyers are specializing in particular areas of the law and are joining large multipurpose law firms or corporate legal staffs. If this were all that "law becoming a business" amounted to, there would not be much concern. The tendency to organize into multiple practice firms is driven less by the efficiencies of business practice than by the requirements of specialization. Indeed, the requirements of the profession may mandate specialization—Flexner's first four criteria for a profession require the mastery of a complex body of knowledge. Moreover, Walter Metzger, addressing the question "What Is A Profession?," argued that "the paramount function of professions . . . is to ease the

10. Flexner was an aide to the Rockefeller and Carnegie Foundations. *See* Flexner, *Is Social Work a Profession?*, *quoted in* Metzger, *What Is A Profession?*, 52 C. & U. 42-45 (1976).

11. *See* Flexner, *supra* note 10.

problems caused by the relentless growth of knowledge."[12]

Metzger casts the epistemological function into a moral framework.[13] In a complex world, people become increasingly ignorant of information necessary to run their lives.[14] The job of the professional is to protect the client from his or her own ignorance. Metzger subscribes to two interlocking propositions. The first proposition is that as the amount of knowledge increases so does the amount of ignorance, since each man can only know a decreasing fraction of what can be known. The second proposition is that as knowledge grows more specialized, it also grows more potent and more capable of being used for ill or good.[15]

In these interlocking propositions, Metzger spells out the relation between professional knowledge and the altruistic spirit of a genuine profession. The chief function of a professional is not to use her specialized knowledge to maximize her income; rather it is to use her specialized knowledge to protect ignorant clients from exploitation. What has gone wrong with the law is that most lawyers are using their specialized knowledge to enable the rich and powerful to exploit the poor and ignorant while enriching themselves in the process.

Metzger was hardly the first to urge lawyers to protect the innocent. Louis D. Brandeis took a similar tact in a 1905 speech to the Harvard Ethical Society.[16] Brandeis warned of the dangers of law becoming too closely allied with business. Brandeis believed that the great opportunity of the American Bar is to protect the aspirations and interests of the people.[17]

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12. *See* Metzger, *supra* note 10.
13. *Id.*
14. *Id.*
15. *Id.* at 8-9. Metzger stated:

I subscribe to these interlinked propositions: that, as the amount of knowledge increases, so too does the relative amount of ignorance, for each man can know only a decreasing fraction of what can be known; that knowledge, as it grows more specialized, also tends to grow more potent, more capable of being used for ill or good; that, as a consequence, there comes into being not a mass society but a lay society - a society, that is, in which each is potentially at the mercy of someone more thoroughly in the know; that these mutual dependencies grow more dangerous as knowledge, which had once been held by holy men, kin and neighbors, passes into the hands of strangers, and as the customary means of assuring its benign uses - parental love, communal sanctions, religious discipline - tend increasingly not to work. It is to avert a Hobbesian outcome that society urges occupations to tie their expertise to honorableness, to accord even ignorance moral claims. In that urging the professional ideal is born.

Id.

16. L. BRANDEIS, *The Opportunity in the Law*, in BUSINESS—A PROFESSION (1914).
17. *Id.* at 323, 321. Brandeis stated:

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. . . . We hear

Inspired by Brandeis, Professor David Luban refers to Brandeis' ideal as "progressive professionalism" and identifies six points constituting progressive professionalism: first, that professionalism is better than commercialism; second, that lawyers are mediators between public and private interest; third, that lawyers therefore have a special responsibility to the common good; fourth, that the common good will be realized by blunting class antagonisms within a fundamentally capitalist framework; fifth, that in an era of high capitalism, class antagonisms must be blunted by promoting the interests of the people against those of the corporations; sixth, that lawyers are peculiarly suited by training and cast of mind to this task.[18]

A long tradition exists identifying the characteristics of a profession, and the most important characteristic is the altruistic spirit. The problem with law becoming a business is not that lawyers are specializing and hence are becoming associated with larger firms. That trend is inevitable and indeed required by the very purpose of a profession. What is problematic is that even the pretense of altruistic motivation is disappearing. It is not the personal wealth of lawyers that is offensive. Plato stated that you can often do good and do well.[19] The greater concern is that the profession's loss of altruistic motivation is contributing to the gap between the rich and the poor in this country.

III. The Function of Business

Traditionally, business has not been viewed as a profession. The chief characteristic that distinguishes it from a profession is the motivation of business people. Business people are egoistic; their primary motivation, according to economic theory, is to maximize their self-interest. This lack of altruistic spirit is sufficient to distinguish business from the professions.

Arguably, the competitive egoism of the market is better for the public than altruism. Adam Smith is the father of this view and Milton Friedman is the most famous of his progeny. Business contributes to the public good whether or not it is considered a profession.

Lawyers might apply this same rationale. If lawyers give up the pretense of being altruistically motivated and admit that they are in it

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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.

Id.

18. Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, *supra* 41 Vand. L. Rev. 717, 725 (1988).

19. This is one of the central messages of Plato's *Republic*. In that work Plato argues that it is never in a person's interest to be unjust—not even a tyrant.

for the money, the public still benefits. Self-interest causes zealous client advocacy, which in turn promotes legal justice. Through a kind of "invisible hand"—the clash of lawyers jealously advocating client interests—the appropriate decision is reached. Lawyers increase their income by defending their clients zealously but this zealous advocacy contributes to the public good.

Smith and Friedman are wrong.[20] The "invisible hand" argument is not convincing in the case of lawyers. For example, zealous client advocacy would require that an appropriate defense in a rape trial is to try to show that the alleged victim was "a loose woman." Recently, a murder trial was held in New York City in which the defendant alleged that he accidentally killed his victim in self-defense.[21] She became too rough during their sexual encounter. The defense seemed spurious because the defendant was a young, tall, athletic male, and his victim was a rather petite female. Yet the defense attorney tried to buttress it by establishing that the victim liked "kinky sex." Is it plausible to believe that such zealous defenses are really in the public interest?

Moral doubts about the limits of zealous advocacy are not limited to philosophers. The profession itself continues to debate the extent to which a lawyer should serve as a zealous advocate for her client. However, even if zealous advocacy contributes to the public good, the egoistic motivation would be sufficient to prevent the law from being a profession.

It may be of interest to lawyers to realize that many in the business community argue that business persons should be more altruistic.[22] Business persons should not simply focus on maximizing profits. These people argue that business persons should behave more like professionals in the classic sense and less like traditional business persons. Among the more professional alternatives to the profit maximization theory are the following:

1. The corporation should seek profits so long as it does not cause avoidable harm or unduly infringe upon human rights;[23]

2. The corporation should seek to do social good as well as seek profit;[24]

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20. *See* N. BOWIE, BUSINESS ETHICS 18-31 (1982); *see also* N. BOWIE, *The Paradox of Profit*, *in* PAPERS ON THE ETHICS OF ADMINISTRATION (forthcoming).

21. N.Y. Times, Jan. 4, 1988, at B1, col. 5; *see also* Linden, *The Preppie Killer Cops a Plea*, TIME, Apr. 4, 1988, at 22 (reporting that the defendant, Robert Chambers, pleaded guilty to first degree manslaughter).

22. *See infra* notes 30-60.

23. *See, e.g.*, J. SIMON, C. POWERS & J. GUNNEMANN, THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITY (1972).

24. *See, e.g.*, Davis, *Five Propositions for Social Responsibility*, 18 BUS. HORIZONS 19, 19-24 (1975).

3. The corporation should seek to produce life sustaining and enhancing goods and services;[25]
4. The corporation should seek to maximize the interests of the various corporate stakeholders rather than simply the interests of the stockholders;[26]
5. The purpose of the corporation is to provide meaningful work for employees.[27] Each of these alternatives recognizes that there is more to business than making a profit. Adoption of the first view, however, does not go far enough in making business a profession; the motivation is still not sufficiently altruistic. This view places the same type of limits on business that are put on all other activities.[28] Applying this criterion, any vocation can meet the moral dimension of professional conduct simply by following a moral minimum. The problem with the second view is that, in contrast with the first view, too much is asked rather than too little. It imposes an open-ended obligation to do good. Hence, a theory of the function of business that permits business to qualify as a profession must be one of the last three.

The third view is preferable because it focuses on the human being as producer. The corporation focuses on its employees—the producers of the goods and services—rather than on its customers—the consumers of the goods and services. The fourth theory is flawed because not all stakeholders should be considered equal. Indeed, both economic and ethical reasons exist in support of this view.[29] The real success story of American capitalism is its success in providing jobs for people because people cannot develop fully as human beings unless they have a job. But they need more than just a job. They need a job that enhances their self-respect.

But this is not the place to defend one particular professional theory of business over others. The adoption of any of the last four theories would change substantially the motivation for pursuing a career in business. The adoption of any of those professional alternatives also would change the focus of current business education. By focusing on an altruistic goal rather than on profit maximization, business education would meet the criterion that could enable business to be a profession in the traditional sense. Business disciplines already emphasize the mastering of a specialized body of knowledge. Business disciplines are highly quantified and esoteric. What is missing is any attempt to edu-

25. Camenisch, *Business Ethics or Getting to the Heart of the Matter*, 1 BUS. & PROF. ETHICS J. 59, 59-69 (1981).
26. *See* R. FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).
27. See N. BOWIE, *The Paradox of Profit*, *supra* note 20, for a defense of this view.
28. *See supra* note 23 and accompanying text.
29. *See* N. BOWIE, *The Paradox of Profit*, *supra* note 20.

cate for a spirit of altruism—the kind of education that is traditionally associated with the liberal arts. Emphasizing the liberal arts indicates which skills and attitudes the business community values. A knowledge of our history, some knowledge of other cultures, but, most importantly, some insight into what it means to lead a fully human life are the hallmarks of the liberal arts education of business managers. Business can carry out its function of providing meaningful work only if it understands the ideals and aspirations of human life.

Just as there is a tendency for lawyers to think more like traditional business people, there is, ironically, an opposing trend for business people to think less like traditional business people and more like traditional professionals. Many business people are taking a more altruistic perspective. If the law were to emulate these business persons rather than egoistically motivated business people, the convergence of law and business would be productive.

IV. Recalling the Altruistic Function of Law

If the law is to remain a profession in the traditional sense, it must not lose its traditional mission. That is the danger in the era of specialization, large firms, and association with corporate clients.

The functions of the law are: to enable a large mass of diversified human beings to live together,[30] to serve as a repository of society's most cherished values,[31] and to promote justice.[32] Lawyers behave altruistically so long as they enter the profession and make legal decisions with an eye toward promoting human interaction, society's cherished values, and justice.

In his important book *The Morality of Law*, Lon Fuller defines "law" as "the enterprise of subjecting human conduct to the governance of rules."[33] But to what end? To the end of enabling people to accomplish their objectives. Fuller then asks what the law must be like if it is to accomplish its purpose. He sets out eight criteria that an effective legal system must meet. Laws must be general, be clear, not require the impossible, not be retroactive, not be contradictory, be constant through time, be public, and be administered consistently with what the law says.[34] This view of the law presupposes a certain concept of human nature, whereby human beings are autonomous, responsible, moral agents.[35]

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30. *See infra* notes 33-59 and accompanying text.
31. *See infra* notes 33-36 and accompanying text.
32. *See infra* notes 37-39 and accompanying text.
33. L. Fuller, The Morality of Law 109 (rev. ed. 1969).
34. *Id.* at 39.
35. *Id.* at 162 (stating that "[t]o embark on the enterprise of subjecting human conduct to

Fuller adopts the approach of Greek philosophy that analyzes the goodness of something in terms of its function.[36] A good X is one that performs its function well. A good legal system is one that enables the memhers of society to accomplish their purposes—for example, making wills, selling property, registering a motor vehicle. Fuller recognizes that every legal system generally must meet certain criteria, which he calls the "inner morality of law." He also recognizes that this view of the law requires that we see human beings as autonomous, responsible, moral agents. If human beings were robots or chickens, it wouldn't make any sense to speak of goals and purposes. Rational agents have goals and purposes because they make choices. Rational agents are autonomous. But since they are autonomous, they can be held responsible. Unless human beings are autonomous, responsible agents, the application of such legal concepts as "fault," "proper care," "negligence," "the reasonable person," and "the prudent investor" would not make any sense.

The economic theory of law has a very different perspective. Rather than emphasize fault and responsibility, the economic theory emphasizes efficiency. Rather than determining what people are owed, economic theorists look to the future and ask what decision will maximize utility or personal wealth. This approach changes the way legal problems are treated. Fuller states:

> I should like instead to recall what we would lose if the concept of responsibility ever disappeared completely from the law. The whole body of the law is permeated hy two recurring standards of decision: *fault and intent*. . . .
>
> Notice what happens when these two tests, and their near relatives, fail completely. . . . In the law of property our familiar standards fail when nature intervenes and takes control, as when a river shifts its course, removing twenty acres from A's land and adding twenty-five to B's. In cases like these the litigants do not appear as responsible agents, but as the helpless victims of outside forces. We can no longer ask: Who was to blame? What did they intend? Since our usual standards of justice fail us, we are at a loss to know what justice requires. If we were to lose throughout the law the view of man as a responsible center of action, all legal problems would become like those I have just suggested.[37]

Under the classical view of the law, a lawyer must ask whether a proposed legal position undermines the purpose of law. Would the legal position violate any of Fuller's eight conditions? Would it undermine our view of persons as responsible autonomous agents? If the answer is in the affirmative, the legal position should not be advanced. This is

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the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent").

36. *See generally* PLATO, PROTAGORAS (C. Taylor trans. 1976); PLATO, REPUBLIC (A. Lindsay trans. 1957); ARISTOTLE, POLITICS (T. Saunders trans. 1981).

37. *See* L. FULLER, *supra* note 33, at 167.

taking an altruistic view of the law.

To argue that the law is a repository for society's most cherished values may seem naive and idealistic. But a short excursion into jurisprudence should convince even the most skeptical that pivotal legal decisions reflect this view. The proper entry to this issue is the discussion of the relation between law and ethics. Fuller draws a distinction between the morality of duty and the morality of aspiration.[38] The morality of duty has to do primarily with our obligation to avoid harm. Other writers have referred to this morality of duty as a "moral minimum."[39] The notion of a moral minimum is crucial to a society. H.L.A. Hart implicitly adopts this notion when he argues that social life clearly requires rules that at a minimum restrict the free use of violence and require some form of honesty and truthfulness when dealing with others.[40]

These elementary rules are enshrined in the law and are found in every legal system. However, our own society includes more than this moral minimum in its list of cherished values and in its legal tradition. This expanded view is best articulated by Ronald Dworkin.[41]

Legal realists contend that the law is what the judge says it is.[42] This view is too simplistic because judges are bound by the plain meaning of statutes, by precedent, by legislative intent, and by other maxims of interpretation. However, in difficult cases in which the law is ambiguous many argue that the law is what the judge says it is.

Dworkin's view is very different. He contends that in difficult cases the judge should first appeal to legal principles such as principles of interpretation and legislative intent. However, if these legal principles cannot resolve the issue, then the correct legal decision is reached by appealing to the political and moral tradition in which the law is embedded.[43] He also seems to claim that the law must be consistent with

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38. *Id.* ch. I.

39. J. SIMON, C. POWERS & J. GUNNEMANN, *supra* note 23, at 16-21.

40. H. HART, THE CONCEPT OF LAW 167 (1961). Hart wrote:

> Among such rules obviously required for social life are those forbidding, or at least restricting, the free use of violence, rules requiring certain forms of honesty and truthfulness in dealings with others, and rules forbidding the destruction of tangible things or their seizure from others. If conformity with these most elementary rules were not thought a matter of course among any group of individuals, living in close proximity to each other, we should be doubtful of the description of the group as a society. . . .

Id.

41. Ronald Dworkin's theory of law is found in three books: LAW'S EMPIRE (1986); A MATTER OF PRINCIPLE (1985); TAKING RIGHTS SERIOUSLY (1977).

42. The best known American realists are Oliver Wendell Holmes, Jr. and John Chipman Gray.

43. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 41, ch. 4; LAW'S EMPIRE, *supra* note 41, chs. 6 & 10.

those political and moral traditions. Even if Dworkin does not go that far, adherents to the natural law theory of jurisprudence surely would. The question now becomes what are these cherished moral values?

Much of the law governing business transactions and relationships rests on the moral notion of fairness. Fairness is defined in the business sense as a contract that is made without coercion among people with approximately equal bargaining strength.[44] For example, in a classic case, Mr. Henningsen purchased a Plymouth from Bloomfield Motors.[45] Later, Mrs. Henningsen was injured when the car suddenly ran off the road, presumably as a result of a defective steering mechanism. The defendants, Chrysler Corporation and Bloomfield Motors, denied responsibility due to a lack of privity between the defendants and Mrs. Henningsen. Chrysler had not sold Mr. Henningsen the car and neither Chrysler nor Bloomfield had sold the car to *Mrs.* Henningsen. In *Henningsen v. Bloomfield Motors Inc.* the New Jersey Supreme Court rejected this defense:

> Both defendants contend that since there was no privity of contract between them and Mrs. Henningsen, she cannot recover for breach of any warranty made by either of them. On the facts, as they were developed, we agree that she was not a party to the purchase agreement. Her right to maintain the action, therefore, depends upon whether she occupies such legal status thereunder as to permit her to take advantage of a breach of defendants' implied warranties. . . . We are convinced that the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile.[46]

Manufacturers have also used warranties in the effort to limit legal liability. In *Henningsen* the defendants argued that no express or implied warranties existed other than one providing for the replacement of defective parts. Again, the court appealed to canons of justice in deciding for the plaintiffs:

> [W]hat effect should be given to the express warranty in question which seeks to limit the manufacturer's liability to replacement of defective parts, and which disclaims all other warranties, express or implied?. . .
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> . . . .
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> The warranty before us is a standardized form designed for mass use. . . . He [the buyer] takes it or leaves it, and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial — simply to deliver it. . . .
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> . . . .
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> The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of the express warranty. . . .

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44. Bowie, *Fair Markets*, J. BUS. ETHICS (forthcoming).
45. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
46. *Id.* at 99-100 (citation omitted).

> . . . .
> *In the context* of this warranty, only the abandonment of all sense of justice would permit us to hold that, as a matter of law, the phrase "its obligation under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile. . . .
> . . . .
> . . .The verdict in favor of the plaintiffs and against Chrysler Corporation establishes that the jury found that the disclaimer was not fairly obtained.[47]

Another court decision that demonstrates an appeal to general principles of justice is *E.I. duPont de Nemours & Co. v. Christopher.*[48] In Beaumont, Texas, the Dupont Company was constructing a new plant for making methanol. An unknown third party hired the defendants, Rolfe and Gary Christopher, to fly over the facility and take photographs. The flyover was discovered, and Dupont sued. In response, the Christophers said they had done nothing wrong.

In delivering his decision, Judge Goldberg admitted that the Christophers had neither trespassed, breached a confidential relationship, nor engaged in other illegal conduct. Judge Goldberg then invoked the rule from the *Restatement of Torts* that provides: "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means." Judge Goldberg continued,

> The question remaining, therefore, is whether aerial photography of plant construction is an improper means of obtaining another's trade secret. We conclude that it is and that the Texas courts would so hold. The Supreme Court of that state has declared that "the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world."[49]

A standard defense in a violation of trade secrets case is to show that the defendant did not protect the trade secret in question. Justice Goldberg totally rejected that defense in this case.

> To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a person or corporation to take unreasonable precautions to prevent another from doing that which he ought not do in the first place.[50]

Further support comes from the highly controversial Delaware decisions regarding defenses against hostile takeovers.[51] Unocal Corporation fought off a bid by T. Boone Pickens Jr.'s Mesa Petroleum Co. by

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47. *Id.* at 84-96 (emphasis in original).
48. 431 F.2d 1012 (5th Cir. 1970).
49. *Id.* at 1015 (quoting Hyde Corp. v. Huffines, 158 Tex. 566, 581-82, 314 S.W.2d 763, 773 (1958)).
50. *Id.* at 1016-17.
51. Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

offering to buy the shares of all stockholders except those held by Mesa. In other words, the Board of Directors created two distinct classes of Unocal stockholders and treated them differently. The law permits such disparate treatment only for a valid corporate purpose; the directors cannot use it simply to keep themselves in power. Moreover, the moral principle of "treat equals equally" would prima facie condemn such a two-tier classification of stockholders.

Much to the dismay of many in the business and financial community, the Delaware Supreme Court supported Unocal.[52] It did so on the ground that Unocal's defense was legitimate and proper given the nature of the Mesa threat. In other words, Mesa's behavior was sufficiently unfair and therefore permitted this extraordinary defense.

That the offer was deemed unfair can be extracted from the court's comments on the case. Central to the issue of fairness was Mesa's two-tiered stock offer. For the first sixty-four million shares of Unocal stock, Mesa offered fifty-four dollars a share. For the remaining shares, Mesa would offer securities allegedly worth fifty-four dollars a share. In fact, the backing on the remaining shares was such that both the market and the court termed the securities "junk bonds."[53]

In its decision the court acknowledged the coercive nature of the tender offer.[54] Given the nature of the threat, the Unocal response was legitimate: "Thus, while the exchange offer is a form of selective treatment, given the nature of the threat posed here the response is neither unlawful nor unreasonable."[55]

These cases indicate that a court will view suspiciously a business deal which seems coercive or which takes undue advantage of inequality of bargaining power. This demonstrates that the law enshrines some of our central values. In addition to fairness, the notions of equality before the law, procedural due process, individual freedom, equality of opportunity, and justice are other examples of cherished moral values enshrined by the law.

What does this mean with respect to altruistic motivation? An attorney must ask whether a proposed legal position would undermine any of society's cherished values. Would the proposed position undermine equal opportunity, procedural due process, or fairness? If the answer is in the affirmative, the legal position should not be undertaken.

Many societies, including our own, consider justice to be funda-

52. *Id.* at 956.

53. *Id.*

54. *Id.* (stating that "[i]t is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction").

55. *Id.* at 957.

mental. Nearly all anthologies in jurisprudence contain a section on justice. Nearly all philosophy of law texts discuss the role of the law in the promotion of justice.[56] Unfortunately, many competing theories of justice exist. Plato and Aristotle defined justice as giving each person their due.[57] Although that is probably correct, the difficult question is just postponed. What are people due? An influential contemporary philosophical account analyzes justice in terms of fairness.[58] The court cases cited above show that the notion of justice as fairness fits well within our tradition. Another traditional view of justice focuses on equal treatment. The great inequality of bargaining power in business seems to violate fairness. Equal treatment before the law is an explicit moral value of the legal profession.

In the United States equal treatment involves at least a commitment to equal opportunity. Historically, equal opportunity has been viewed as the mechanism needed to ensure that all Americans really do have certain inalienable rights. In fact, America has been characterized as the land of opportunity because the only constraints on success were effort and ability. In theory, class or status were irrelevant. Thus a person's happiness depended on what he or she did rather than on characteristics over which a person had no control, such as the status of his or her parents. Recently, however, the commitment to equal opportunity has been criticized as insufficient for achieving justice.[59] Even if these critics are right, there is a consensus that equal opportunity is at least a necessary condition for justice. To what would equal opportunity amount in the context of law?

A person has equal opportunity before the law only if he or she has access to legal advice. How can a client have equal opportunity before the law if he or she cannot afford an attorney? Society supports equal opportunity by providing public education on the grounds that equal opportunity does not amount to much in the absence of a basic education. Similarly, society should ensure that legal assistance is available for all. In the age of specialization, people are legally ignorant and especially in need of counsel.[60] Without access to legal advice, equal opportunity before the law does not exist.

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56. In addition to R. DWORKIN, *supra* note 41; L. FULLER, *supra* note 33; and H. HART, *supra* note 40; see READINGS IN PHILOSOPHY OF LAW (J. Arthur & W. Shaw eds. 1984); M. GOLDING, PHILOSOPHY OF LAW (1974); and E. KENT, LAW AND PHILOSOPHY: READINGS IN LEGAL PHILOSOPHY (1970).

57. ARISTOTLE, NICOMACHEAN ETHICS bk. V, *reprinted in* THE BASIC WORKS OF ARISTOTLE (R. McKeon ed. 1941); PLATO, THE REPUBLIC ch. XII (F. Cornford trans. 1967).

58. J. RAWLS, A THEORY OF JUSTICE ch. 1 (1971).

59. *See, e.g.*, J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY (1983); K. NIELSEN, EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM (1985); Schaar, *Equality of Opportunity and Beyond*, in *Equality* NOMOS IX (J. Pennock & J. Chapman eds. 1967).

60. *See supra* note 15 and accompanying text.

A more complicated issue arises when one focuses on the quality of legal advice. Not only should all people have access to legal advice, they should have access to good legal advice. What constitutes good legal advice? Do corporate clients and the clients of overburdened public defenders receive the same caliber of legal advice? This is a difficult issue, but the legal profession should address it.

We can now summarize what altruistic motivation in the law amounts to. In addition to asking whether a proposed legal position undermines the purpose of law or society's cherished values, the legal community must also ask whether its organization and structure undermine justice—particularly equal opportunity before the law.

This analysis provides the theoretical grounds to endorse the general recommendations of the Commission on Professionalism. The Commission's recommendations are consistent with the professional view of law. More specifically, these recommendations would assist the legal profession to meet its obligations to support the moral and political values that underlie the law—especially the values of equal opportunity, fairness, equality before the law, and justice. The Commission reminds lawyers of their obligation to the public interest and to participate in pro bono activities. Perhaps more should be done. The ABA might levy a tax on major law firms the proceeds of which would subsidize firms specializing in defending the poor.

V. A Critique of the Economic Analysis of Law

Whereas the traditional account of law supports professionalism in the classical sense, the economic analysis of law undermines professionalism. Let us contrast the traditional approach with the economic analysis of law. Among the defenders of the economic approach is Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit.[61] The best known spokesperson, however, is Judge Richard A. Posner, and the classic text is his *Economic Analysis of Law*.[62] According to economic theorists, legal conflicts are to be resolved efficiently, and efficient solutions are determined by the willingness of people to pay. To determine the efficient allocation of tax dollars for medical research and highways, the economic theorist needs to know how much people are willing to pay for medical research and highways. Posner's approach to law is to treat legal issues analogously to these. Three examples should illustrate Posner's approach.

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61. Academic defenders include: Gary S. Becker, Guido Calabresi, Isaac Ehrlich, Richard A. Epstein, Victor Goldberg, Werner Z. Hirsch, and Oliver F. Williamson.

62. R. Posner, Economic Analysis of Law (1972). The second edition was published in 1977 and is the edition most often cited.

First, when Congress granted the Federal Communications Commission (FCC) the power to allocate broadcast frequencies, rights were granted to those who could persuade the FCC that granting them a license would promote the public interest. Moreover, Congress provided expressly that licensees were to have no property rights in the frequencies assigned to them. Posner argues that such regulation is inefficient and notes that, in fact, the granting of licenses approximates the willingness to pay criteria.[63]

Second, Posner would permit more discrimination than is traditionally allowed. The traditional view argues that race, creed, color, sex, or national origin are to be considered irrelevant in employment, education, or for equal treatment under the law in the absence of a compelling state interest. But Posner argues that such an attitude is inefficient in those cases in which a characteristic like race is correlated positively to some undesirable characteristic. In such cases it is justified statistically to discriminate on the basis of race.[64]

Posner appeals to the notion of statistical discrimination. "Statistical discrimination" occurs whenever an individual is judged on the basis of the average characteristics of the group, or groups, to which he or she belongs rather than upon his or her own personal characteristics. The judgments are correct, factual, and objective in the sense that the group actually has the characteristics that are ascribed to it, but the judgments are incorrect with respect to many individuals within the group."[65] Although Posner will not say that all such instances of statistical discrimination are lawful, he contends that many such cases might be upheld on efficiency grounds.[66]

Third, to see how far Posner is willing to take that analysis, consider his argument on behalf of legalizing baby sales. Briefiy but fairly summarized, Posner argues as follows: First, the supply of babies for adoption is too low because of the availability of contraception and abortion and the fact that there is no longer much stigma to being an unwed mother.[67] Also, there are many people who have children but do not want to raise them.[68] If you had a market in babies, more people could adopt children at a lower cost "since the costs of production by the natural parents are typically much lower than the value that many childless people attach to the possession of children. There is in fact a

63. R. POSNER, *supra* note 62, at 31-34.

64. *Id.* at 533-38.

65. L. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 172 (1975).

66. R. POSNER, *supra* note 62, at 537.

67. *Id.* at 111-16.

68. *Id.*

black market in babies with prices as high as $25,000 reported recently."[69] Therefore, according to the economic analysis of law, babies should be bought and sold.

This economic analysis of the law stands in sharp contrast to the traditional view. Judge Easterbrook criticized the traditional view, stating that "[e]conomic analysis helps people shape questions to take maximum advantage of scarce knowledge. If lawyers and judges start from scratch in wrestling with a problem, they will be driven to consult their intuitions for answers."[70]

But of course lawyers and judges do not start from scratch and even in hard cases, they consult the political and legal tradition. Economic analysis is not the only source for objectivity in legal decisions. Precedents, statutes, rules of interpretation, legislative intent, and finally, the political and moral values of the society all provide the required objectivity. The economic analysis of law is flawed not only in its pretentious claim that only it can provide objectivity, but also in its inability to address the issue of altruistic motivation.

A lawyer is altruistically motivated if she tests any proposed legal position or the organization and structure of the law against the purpose of law, society's cherished values, and justice—particularly equal opportunity before the law. What does the economic analysis of law have to say about these three issues?

First, the efficiency criterion is frequently in conflict with the traditional view of law as "the enterprise of subjecting human conduct to the governance of rules."[71] Under that view, the law enables people to accomplish their goals either individually or in interaction with others. If there is a transgression, the law looks back to the transgression to determine whether the individual was at fault or whether there were mitigating conditions. Notions of fault and mitigating conditions are of little interest to those who adhere to the economic analysis of law.

Posner's remarks about a market in babies demonstrate his lack of concern with society's cherished values. The economic analysis of law assumes that the market perspective is the only appropriate perspective for dealing with social problems. Posner completely ignores the fact that this society has decided that the most intimate of human relationships lie beyond the market. Society has decided that a market in sex and a market in babies is illegitimate per se. Moreover, the law has recognized that society can choose to be inefficient.[72]

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69. *Id.* at 113.

70. Easterbrook, *Afterword: Knowledge and Answers*, 85 COLUM. L. REV. 1117, 1119 (1985).

71. *See supra* notes 61-62 and accompanying text.

72. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981).

A view of law that puts a price on everything makes the law unprofessional. Some aspects of life exist in which a market model should not prevail. The law should constrain the market; the law should not be judged on market grounds. Many legal decisions are fundamentally different from economic ones and are not concerned with issues of efficiency. Rather, they are concerned with just compensation and conduct.

The most serious objection to the economic analysts is their propensity to ignore distributional issues totally. For example, in response to the criticism that an efficient solution would put the broadcast industry into the hands of the wealthy, Judge Posner says, "This confuses willingness to pay with the ability to pay."[73] Posner's one sentence assertion does not constitute an argument. It does reflect Posner's general attitude toward the distributional effects of the economic analysis of law.

The failure to consider distributional issues has not gone unnoticed. In a symposium published in the *Columbia Law Review*, Professor Bruce Ackerman noted:

> [W]e must reflect more deeply upon the normative conditions a bargain must satisfy before it should count as "genuine" and demarcate more clearly the legal problems which may appropriately be treated as genuine bargains. . . just as you and I could not have bargained over our primary education, so too we could not have bargained over our initial endowments of material goods or genetic abilities. Yet it is these initial endowments that profoundly shape our success in real-world bargaining throughout our lives.
>
> Is it not past time, then, for lawyer-economists to recognize up front that you and I were not born yesterday?[74]

Indeed, a philosophy of law that refuses to address distributional questions is likely to ignore how proposed legal defenses or the law itself affect equality before the law. It is hard to be concerned about access to legal services if you think such access confuses willingness to pay with the ability to pay.[75]

VI. CONCLUSION

The specialization of lawyers and the growth of large law firms are necessary to meet the epistemological requirements of professionalism. If this makes the law more like a business, there is nothing morally objectionable. However, to the extent that lawyers abandon altruistic motivation and become more like traditionally characterized business

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73. R. POSNER, *supra* note 62, at 31.

74. Ackerman, *Foreword: Talking and Trading*, 85 COLUM. L. REV. 899, 903, 901-02 (1985) (footnotes omitted).

75. In some respects this criticism is a slight over simplification. Posner, for example, does discuss justice, *see supra* note 62, at 22-23, and he has written extensively on justice. His numerous law review and journal articles have been collected in a book, THE ECONOMICS OF JUSTICE (1981).

persons, the profession should feel considerable unease. To ignore the law's impact on the purpose of law, society's central values, and justice—primarily understood as equality before the law—is to abandon one's claim toward being a profession. Society should seek to make business a profession rather than to make law a business.