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A Dissenter's Commentary on the Professionalism Crusade

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A DISSENTER'S COMMENTARY ON THE PROFESSIONALISM CRUSADE*

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The Solemn League and Covenant
Now brings a smile, now brings a tear.
But sacred Freedom, too, was theirs:
If thou'rt a slave, indulge thy sneer.[1]

Introduction

In 1986 the ABA Commission on Professionalism issued a report entitled *"...In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism.*[2] This report fanned into flame a concern that

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[1] Robert Burns, "The Solemn League and Covenant." In *The Poems and Songs of Robert Burns* 361 (James Barke, ed., 1960).

[2] American Bar Ass'n. Commission on Professionalism, *"...In the Spirit of Public Service:" a Blueprint for the Rekindling of Lawyer Professionalism* (1986), reprinted in 112 F.R.D. 243. [hereinafter ABA COMMISSION]

had been smoldering since the late 1960s. Anointed with this Pentecostal fire, apostles of professionalism have enlisted an imposing army of converts. State and local bar associations, even a federal judicial circuit, have offered their constituents an array of plans for retaking the Holy Land of legal practice, and particularly its most sacred shrines, the courts of law, from a host of infidels, heretics, and apostates.[3] The word from the academic cloister has generally been one of benediction, if not quite enthusiasm; even those who come to scoff at particular proposals generally stay to praise the crusade's spirit and ideals.[4]

With respect (and not entirely without reverence), this paper registers a deeper protest. It does not suggest that we burn the ABA's professionalism bull, which contains some insightful, even inspired, ideas. But it does post several theses for discussion: in particular, the crusade's implicit assumption of one true professional faith and its tendency to condemn categorically certain modes of conduct as unprofessional.

[3] See, e.g., Committee on Civility, Seventh Federal Judicial Circuit, *Final Report* (1992), reprinted in 143 F.R.D. 441; Commission on Lawyer Professionalism, Florida Bar, *Professionalism: A Recommitment of the Bench, the Bar and the Law Schools of Florida* (1989)[hereinafter Florida Commission]; Special Committee on Professionalism, Illinois State Bar Ass'n, *The Bar, the Bench and Professionalism in Illinois*, 76 ILL. B.J. 441 (1988)[hereinafter Illinois Committee]. For an extensive listing of additional codes and creeds, see Patrick E. Longan, "The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials." 35 ARIZ. L. REV. 663, 681 n.98; Catherine Therese Clarke, "Missed Manners in Courtroom Decorum." 50 MD. L. REV. 945, 949 n.10 (1991); 1 *The Professional Lawyer* 12-13 (1989-90). For a compilation of professionalism reports, see Clarke, supra, at 1012 n.320.

[4] Ronald D. Rotunda, "Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism." 18 LOY. U. CHI. L.J. 1149, 1179 (1987) (criticizing some of the ABA Report's proposals, but "applaud[ing] the effort it represents"); Nancy J. Moore, "Professionalism Reconsidered." 1987 AM. B. FOUND. RES. J. 773 (criticizing ABA Commission's inattention to scholarly studies of professionalism, but hailing its effort to call lawyers back to their moral obligations). See also Timothy P. Terrell & James H. Wildman, "Rethinking 'Professionalism.'" 41 EMORY L.J. 403 (1992).

These religious metaphors are borrowed from the professionalism movement itself. Its formal proposals tend to call for a return to a common professional faith, the supposedly shared beliefs and commitments of which are enshrined in documents described as "creeds," "oaths," and "pledges" of professionalism. Even when these documents are called codes, they are codes that read more like the Decalogue than the UCC or, for that matter, the *Model Code of Professional Responsibility*.[5] The former titles imply, with perhaps a profounder accuracy than their authors intended, that the documents they describe are articles of faith.

My borrowing of the crusade's religious imagery is not the irreverent parodying of an unsympathetic outsider. Along with the crusaders, I believe that drafting and promulgating such statements is an entirely appropriate undertaking, and, more generally, that a revival of professional commitments is much to be sought. These quests are, however, fraught with dangers. I am afraid the present crusaders are not entirely aware of these dangers; my choice of religious metaphors is designed to underscore them and to suggest a way to avoid them without ignoring the positive aspects of the crusaders' message.

One danger is that pious pronouncements may mask purposes of an altogether different kind. We have it on the authority of the Old Testament Prophets and the New Testament Gospels that the purest forms of sincerity and selflessness exist in close, and perhaps inseparable, proximity to the crassest forms of hypocrisy and self-aggrandizement. Like patriotism and religion, professionalism, too, may be a popular refuge for scoundrels, but can scarcely be condemned in its entirety on their account. Nor is much to be gained by inspecting their eyes for motes or their hearts for ulterior motives.

But to eschew looking into the hearts of others is not to recommend ignoring the contents of our own. Thus, in assessing the professionalism crusade, we would do well to be mindful of the agonizing observation of

[5] Except, tellingly, for the Code's "Ethical Considerations," which have no analogue in the *Model Code*'s successor, the ABA's 1983 *Model Rules of Professional Conduct*.

Eliot's St. Thomas à Becket: "The last temptation is the greatest treason: To do the right deed for the wrong reason."[6] Humility is in order, of course, for dissenters as well as crusaders. Even those who admire Luther's reformation must be haunted by Charles V's words to a mere Saxon monk: "Are you alone wise?"

Another danger is that those who object to the present professionalism crusade will be denounced as heretics, enemies of a shared professional faith. Mindful of this, I have chosen to describe the position from which I comment on the crusade as that of a dissenter. To accept the sincerity, even virtue, of the crusade while pointing rather insistently to its dangers and false assumptions is to adopt the position of a dissenter. The dissenter's position vis-à-vis orthodoxy, like mine vis-à-vis the crusade, has an essential duality. Most obviously, it bespeaks disagreement, and disagreement rooted in what the dissenter perceives as an unfortunate departure on the part of the orthodox. More fundamentally, however, dissent implies underlying agreement, agreement on the common ground from which the dissenter believes the erring orthodox have strayed.

So it is with my dissent from the current crusade. Our common ground is what I shall refer to as "liberal legalism."[7] For present purposes, its basic assumptions can be reduced to these: our society and its legal system are basically just,[8] their imperfections are to be corrected by institutionally authorized mechanisms of reform (including civil disobedience), and the

[6] T. S. Eliot, *Murder in the Cathedral.*

[7] Identifying liberal legalism as the faith I share with the proponents of the professionalism crusade relieves me of the task of debating the merits of that faith with outsiders. For present purposes, it is a given, not because it is or can be proved, but because it is the shared belief of my primary audience. Nevertheless, this discussion has an implicitly extra- as well as intra-mural aspect. As I shall argue below, part of the task of liberal legalism is to decide how to deal with outsiders, and part of the commitment of liberal legalism is to reach that decision in dialogue with them.

[8] I am borrowing the notion of an acceptable approximation to justice from Rawls, who uses the shorthand expressions "near justice" and "reasonably just."

result of that reform should be recognizable as an elaboration of values already widely shared by the citizenry and at least inchoately present in existing laws. As particularly relevant to lawyers, liberal legalism entails the notion that the lawyer's proper role is derivative from, and subordinate to, the goal of achieving just outcomes through the existing legal system or its reformed successors.

The crusade falsely assumes that conscientious lawyers agree on their proper role in liberal legalism to a much greater extent than is actually the case. My dissent from the professionalism crusade is premised on the belief that there are other and perhaps better understandings of the lawyer's role in liberal legalism than the crusade implies. The model of lawyering that the crusade holds up as its standard is certainly not the only one available, and arguably not the best.[9]

Talk of the common ground underlying orthodoxy and dissent implies the existence of some who do not share that ground, those who are outside the fold, if not beyond the pale. Here lies a third danger: crusades are not noted for their generosity in dealing with those they identify as infidels. Those who would spread the Gospel of professionalism would do well to bear in mind that lawyers and others of good faith may not share their faith.

Here the religion metaphor approaches reality. At least since the late Enlightenment, one serious strand of theological thought has come to see religion as having to do less with our orientation toward the divinity and

John Rawls, *A Theory of Justice*, 350-55 (1971). This is not to say, however, that all adherents to liberal legalism agree that it is Rawls's particular notion of the justice that our society does or should approximate.

[9] Terrell and Wildman, supra note 4, at 413-14, 422-24, emphasize the rising moral diversity of the bar as a critical factor in the decline of professionalism and urge re-emphasis of lawyers' common commitment to the rule of law as the needed corrective. They overlook, however, what I shall emphasize below: the diversity of views among those committed to the rule of law on what mode of lawyering follows from that commitment.

the hereafter, and more with our orientation toward what ultimately concerns us, what we are fundamentally committed to.[10] These concerns and commitments may, but need not, refer to the objects of conventional religious faith. In that sense, the mode of professional life to which we as lawyers commit ourselves is analogous to, if not indistinguishable from, a religious commitment.

As in matters of religion, so in matters of professional aspiration, we are unlikely to come to full agreement, and we are almost certainly not going to be able to bring other conscientious people to our belief by force of either argument or arms. This is, of course, precisely the premise reached by English liberals of Locke's generation in the wake of the Puritan Revolution and the Stuart Restoration. They, accordingly, legalized most forms of religious dissent, and their American emulators went further, enshrining not only freedom of religious exercise, but also disestablishment of religion, in the First Amendment.

My dissent from the professionalism crusade takes the religion parallel seriously by treating various visions of professionalism as competing faiths. On the analogy of the First Amendment's Establishment Clause, I recommend that agencies of the state, particularly the courts and unified bar associations, refrain from punitively enforcing particular visions of professionalism, except to the extent necessary for the administration of justice. Voluntary bar associations would be free to enforce their particular creeds upon their members and to expand their membership by proselytizing. The merits of particular professional creeds should

[10] The phrase "ultimate concern" is from Paul Tillich, one of the leading exponents of this perspective. Paul Tillich, *The Shaking of Foundations* 63-66 (1962). The concept is traceable back at least as far as Ludwig Feuerbach's 1841 *Essence of Christianity*. James C. Livingston, *Modern Christian Thought: From the Enlightenment to Vatican II* 186-87 (1971). See also United States v. Seeger, 380 U.S. 163, 180 (1964) (citing theological views of Tillich as falling within the definition of "religious" for purpose of determining conscientious objector status).

be discussed freely among students and teachers in law schools and among clients, counsel, and judges to a much greater extent than at present.

Part I identifies what "professionalism" has come to mean in the context of the present crusade, as distinguished in particular from a broader sense of the word current in economics and sociology. Part II briefly sets out the history of the perception that lawyer professionalism has been on the decline and outlines the various remedial proposals with which the bar and bench have responded. We shall see in Part III that problems with the methods of earlier professionalism crusades have led to efforts to identify common values and restore a commitment to them, to rekindle a shared professional faith. That approach, I will try to show, fails to take account of a multiplicity of modes of lawyering, some conscientiously practiced, some not. In Part IV, I identify those modes; in Part V, I show how the crusade fails to deal with them adequately. Finally, in Part VI, I sketch how the trinity of institutions generally invoked by the crusade—bar associations, the courts, and law schools—could better advance those aspects of the professionalism crusade that are consistent with, if not constituent of, the faith of liberal legalism.

I. The Elusive Meaning of "Professionalism."

The first thing we need to note is the confusing contemporary meaning of "professionalism." Even the ABA *Blueprint*,[11] one of the canonical sources of the crusade, Delphically declares that "'Professionalism' is an elastic concept the meaning and application of which are hard to pin down." Similarly, the Report of the Florida Bar Commission on Professionalism[12] admits "There is no universally accepted definition of 'profes-

[11] ABA Commission, supra note 2, at 10.

[12] Florida Commission, supra note 3, at 11; Cf. Illinois Committee, supra note 3, at 451, stating: "[The Special Committee on Professionalism] feels that the need for promoting professionalism, *however defined*, is important to the bar and the public, relevant to every area in which Illinois lawyers are active and likely to be needed indefinitely." (emphasis added).

sionalism.'" More pointedly, a recent article[13] observed that "[L]awyers have sought a cure for a disease before agreeing on its nature, symptoms, and cause."

For our purposes, it is useful to distinguish between a broad and a narrow sense of the term "professionalism." The broad sense is one familiar to sociologists and economists of the professions. For them, a profession is an occupation that enjoys special privileges, such as exclusive licensing and self-regulation, justified by a claim to be operating in the public interest. Professions exist, in this view, to provide services that are not adequately available in an essentially unregulated market, usually owing to information asymmetries between the providers of the service and its consumers.[14] Social scientists, it is fair to say, debate inconclusively among themselves whether and to what extent the special privileges professionals enjoy are warranted and the asserted public service is a justification or an excuse.[15]

[13] Terrell & Wildman, supra note 4, at 403. See also Rotunda, *Lawyers and Professionalism*, supra note 4, at 1157-59 (criticizing ABA Report's amorphous conception of professionalism); Moore, *Professionalism Reconsidered*, supra note 4, at 777-88 (same).

[14] This is a drastic simplification; for a useful overview of the received wisdom, see Deborah L. Rhode & David Luban, *Legal Ethics*, 33-62 (1992); Moore, supra note 4, at 782-84.

[15] With the standard defenses of professionalism as publicly beneficial, cf., e.g., Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (1977); Richard L. Abel, "United States: The Contradictions of Professionalism." In 1 *Lawyers in Society: The Common Law World* 186-243 (Richard L. Abel & Philip S.C. Lewis eds., 1988). For criticisms aimed at the American Bar's recent reform efforts, see Richard L. Abel, "Why Does the ABA Promulgate Ethical Rules?" 59 TEX. L. REV 639 (1981); Deborah L. Rhode, "Why the ABA Bothers: A Functional Perspective on Professional Codes." 59 TEX. L. REV. 689 (1981); Ted Schneyer, "Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct." 14 LAW & SOC. INQUIRY 677-737 (1989). For a balanced response to the critics, see Robert W. Gordon & William H. Simon, "The Redemption of Professionalism?" In *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* 230-35 (Robert L. Nelson et al. eds., 1992).

I do not mean to enter that debate here;[16] I want to take the professional status of lawyering as given, and focus on a particular set of concerns that have come to be placed under the heading of professionalism in a second, narrower, sense. Most simply put, it is that part of professionalism that lies beyond what is enforceable by hard-and-fast, binding legal rules. These rules are embodied in the official lawyer codes of the fifty states and the District of Columbia, and in other state and federal law governing the practice of law, a corpus that has come to be known as "the law of lawyering."[17] This body of law requires lawyers to give competent

[16] It bears mention, however, that the truth almost certainly lies somewhere between the extreme positions staked out by some participants in the debate. Only the most cynical reductionist can dismiss all regulation of the practice of law as monopolistically motivated and ignore evidence of public-spirited activity on the part of official bar organizations and elite lawyers. See Gordon & Simon, supra note 16; Marvin E. Frankel, "Why Does Professor Abel Work at a Useless Task?" 59 TEX. L. REV. 723 (1981). Market failures, in particular information asymmetries and externalities (both positive and negative), mark the delivery of legal services as appropriate targets for corrective measures, see Thomas D. Morgan, "The Evolving Concept of Professional Responsibility." 90 HARV. L. REV. 702, 710-11 (1977) and altruistic motivations on the part of lawyers, individually and collectively, cannot be discounted altogether without risk of reductionism or circular reasoning. See Rhode & Luban, supra note 15, at 60. On the other hand, much historical regulation can best be seen as self-aggrandizing or, at best, paranoidly self-defensive. And some of the classic pronouncements of lawyerly selflessness transcend hyperbole and approach inadvertent humor. See, e.g., Roscoe Pound, *The Lawyer From Antiquity To Modern Times*, 5 (1953) (tellingly subtitled "With particular reference to the Development of Bar Associations in the United States"): "The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood." It is hard to see what the current professionalism crusade hopes to gain by its frequent allusions to this kind of moral over-reaching. See Illinois Committee, supra note 3 (quoting Dean Pound); ABA Commission, supra note 2 (incorporating into title and quoting more fully in text).

[17] See, e.g., Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 101 (2d ed.

representation,[18] forbids them to be actively dishonest,[19] and, more generally, insists that they obey other laws.[20]

If you subtract this "law of lawyering" from the broad meaning of "professionalism," the residue is the narrower meaning of professionalism on which I want to focus. It has to do with things like tacky advertising; sharp or abusive, but not quite illegal, practices; and incivility toward judges, witnesses, opposing counsel, and opposing parties. To sum up this distinction with something of a paradox, professionalism in the narrow sense covers those obligations of lawyers as lawyers that are not legally enforceable. Lawyers are thought to be bound by the standards of professionalism, but the binding force of these standards does not derive from their legal enforceability.

II. Origins of the Current Professionalism Crusade.

The current professionalism crusade focuses on professionalism in the second, narrow sense that I have identified. Politically, the crusade has its roots in reaction to the radical politics of the 1960s, especially the disrespect some radical lawyers showed toward the judicial system. They were contemptuous of it, and they were fairly frequently held in contempt, in both the legal and the lay sense of the term.[21] This aspect of the crusade

1990 & Supp. 1993); Restatement (Third) of the Law Governing Lawyers (Tent. Draft No. 5, 1992).

[18] *Model Rules of Professional Conduct*, Rule 1.1. (1983).

[19] *Model Rules of Professional Conduct*, Rule 8.4(c) (1983).

[20] *Model Rules of Professional Conduct*, Rules 1.2(d) and 8.4(b) (1983).

[21] See, e.g., Norman Dorsen & Leon Friedman, *Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct* 3-9 (1973) (reporting widespread concern based on a few highly publicized trials like those of the Black Panthers and the Chicago Seven, but finding relatively few incidents of politically motivated disruptive courtroom conduct). Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 288-92 (1976); See also Alexander M. Bickel, *Watergate and the*

is quite evident, for example, in Justice Burger's 1971 speech on civility to the American Law Institute.[22]

Broader, and I think more significant, have been the economic and sociological changes in the practice of law, particularly since mid-century. These include the burgeoning number of lawyers, the weakening of social and personal ties between lawyers, and the increasing economic competitiveness of the practice. Cumulatively, these changes have made traditional, informal methods of socializing and controlling lawyers less effective[23] and have led to calls for redoubling efforts to uphold professional standards.[24]

Typically a state bar association will launch a special commission on professionalism, which dutifully produces a report bemoaning the decline in professionalism; detailing the sins of the bar itself, law schools, and the judiciary; and prescribing a regimen of penance for each of the three guilty institutions. These regimens vary in their particulars, but in broad outline involve pretty much the same features.

Let us look first at the role of the organized bar. The professionalism commission becomes, generally at its own recommendation, a permanent

Legal Order, 57 Commentary 19 (1974); Clarke, "Missed Manners in Courtroom Decorum," supra note 3, at 952.

[22] Warren E. Burger, "The Necessity for Civility." 52 F.R.D. 211, 213 (1971) ("At the drop of the hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a 'political trial.' This seems to mean in today's context—at least to some—that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant."). See also id. at 217-18 ("Some few of them [i.e. uncivil lawyers] seem bent on destroying the system and some are simply ill-mannered and undisciplined noisemakers.").

[23] Murray L. Schwartz, "The Death and Regeneration of Ethics." 1980 AM. B. FOUND. RES. J. 953, 959.

[24] Here again, former Chief Justice Burger's voice has been prominent. See, e.g., Warren E. Burger, "The State of Justice." 70 ABA J. 62 (1984).

committee of the sponsoring bar association.[25] The committee's mandate is to further the goals of the crusade on an on-going basis, and in particular to oversee the implementation of its proposals. Though these often refer to the need to tighten existing standards or increase enforcement efforts, the recognition of the limits of these approaches is frequently explicit. More typical methods of the crusade are exhortation and instruction; the committee is to function less as an inquisition, ferreting out heresy, and more as an Office for the Propagation of the Gospel, encouraging the faithful and converting the heathen. In the case of the ABA, the committee produces its own periodical, *The Professional Lawyer*.[26]

In conjunction with these latter aims, the sponsoring bar association promulgates one or more unenforceable sets of supplementary standards, generally redactions of the ABA's "creeds," "pledges," "oaths," or "codes" lightly edited by the professionalism commission for local consumption. The ostensible function of these supplementary standards varies somewhat. Sometimes they are just to serve as "guidelines" or "bases for discussion," a catechizing function.[27] But sometimes adherence is to be a

[25] See, e.g., Florida Commission, supra note 3, Recommendation 25, at 28 ("The Florida Bar should create a standing committee on lawyer professionalism the purpose of which would be to assist in the implementation of programs designed to encourage professionalism."); Illinois Committee, supra note 3, at 451 (proposing appointment of a two-year task force on professionalism to "recommend an appropriate structure for an ongoing I[llinois] S[tate] B[ar] A[ssociation] promotion of professionalism").

[26] Special Coordinating Committee, American Bar Association, THE PROFESSIONAL LAWYER (published quarterly).

[27] Thus, at its August 1988 meeting, the ABA House of Delegates officially recommended that state and local bar associations "encourage their members to accept as a guide for their individual conduct, and to comply with, a lawyer's creed of professionalism." To that end, the House of Delegates voted to disseminate a "Lawyer's Creed of Professionalism" drafted by the ABA Torts and Insurance Practice Section and a "Lawyers' Pledge of Professionalism" drafted by the ABA Young Lawyers Section. The House of Delegates was, however, quite explicit that

condition of entrance or continued membership,[28] a kind of forced baptism. Finally, the sponsoring bar association solemnly pledges to cooperate with the other relevant institutions, the judiciary and the law schools, to promote the principles of professionalism.

The judiciary, for its part, is to support the canons of professional conduct, either at the behest of the bar or, occasionally, on its own initiative. This support is to take the form of fatherly and informal warnings to the offenders against civility, or of sterner measures up to and including use of the contempt power, somewhat inconsistently enforcing "soft" rules with "hard" sanctions[29]—the professionalism crusade's equivalent of burning heretics. Judicial support may also take the form of imposing courses on professionalism as prerequisites to bar admission or as continuing legal education requirements.[30]

Law schools, for their part, are to lay the moral and social foundation for the sacred vocation of law, properly catechizing the novitiate in reverence, decorum, and deportment. This is to be done not just in mandatory courses on legal ethics and professional responsibility, but

these actions were not intended to alter a lawyer's enforceable professional obligations in any way. See ABA/BNA *Lawyers' Manual on Professional Conduct* 01:401 (1994).

[28] See Committee on Civility, supra note 3, FINAL REPORT 9 (1992) (Final Recommendation 2) (requiring adherence as condition of bar admission).

[29] See Dondi Properties Corp. v. Commerce Savings and Loan Assoc, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (calling for full range of Rule 11 sanctions for incivility).

[30] See, e.g., The Florida Bar Continuing Legal Education Committee and the Trial Lawyers Section, "Taking the High Road" (March 18 and 19, 1993) (bar-sponsored seminar in which, according to promotional material, "Some of the most talented, well-respected trial lawyers in Florida will discuss how professional conduct is more effective with judges and jurors, how unprofessional conduct adversely affects clients, and will reveal techniques for dealing with unprofessional conduct."); Clarke, "Missed Manners," supra note 3, at 950 (reporting that Maryland requires all new members of the bar to take a course on civility).

throughout the curriculum. And the curriculum is to be supplemented by visits of judges and practitioners who will bear testimony to the virtues of professionalism and the evils of its opposites. Typical of this trilateral effort to create the appropriate professional atmosphere is the new passion for Inns of Court programs.

III. The Proposed Solutions and Their Problems.

The current crusade, with its emphasis on communal recommitment to shared values embodied in creeds, pledges, and oaths, is usefully seen as a response, perhaps not entirely conscious in some quarters, to deficiencies in other available approaches.

A. Legalism and Its Limits.

The first remedial method is what I will call "legalism," which involves bringing legally enforceable prescriptions or proscriptions to bear on the problem. For those trained in law, this is particularly appealing. If things are not going as they should, then fire off a law requiring that they shall. This was the principal method of earlier professionalism crusades; they gave us the present system of mandatory legal education, virtually universal bar admission exams, and three ABA-promulgated lawyer codes in this century.[31]

With respect to the last of these developments, dissatisfaction with the open texture and hortatory tone of each code was specifically cited as part

[31] Auerbach, *Unequal Justice*, supra note 21, at 94-102; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983); Robert Stevens, "Democracy and the Legal Profession; Cautionary Notes." 3 LEARNING & L., Fall 1976, at 12, 16. The ABA's three codes are: *Canons of Professional Ethics* (1908); *Model Code of Professional Responsibility* (1969); *Model Rules of Professional Conduct* (1983).

of the reason for drafting a successor; the answer to leaky legal rules was to shore up and plug gaps with new and tighter rules.[32]

Efforts in this direction continue in the present crusade. The bar, for example, is still trying to channel, if no longer to dam, the spate of lawyer advertising, and both the bench and the bar still try to forbid frivolous litigation. Federal Rule of Civil Procedure 11, which deals with this problem, has been overhauled twice in the last decade.[33] What this approach does, obviously, is to roll back the residual, narrow category of "professionalism" by increasing the range of professional conduct that is subject to binding legal regulation.

There are, however, problems with this legal irredentism, problems implicitly recognized in the crusade's shift to other emphases. Some conduct long denounced as unprofessional by the bar is now protected under the Constitution or other federal law. Thus, for example, a broad range of lawyer advertising is now protected as commercial speech under *Bates v. State Bar of Arizona*[34] and its progeny,[35] and price competition enjoys the protection of the Sherman Antitrust Act after *Goldfarb v.*

[32] See, e.g. Abel, "Why Does the ABA Promulgate Ethical Rules?" supra note 15, at 642 n.21 (1969 drafting committee's criticism of vagueness of 1908 canons); Walter P. Armstrong, "A Century of Legal Ethics." 64 ABA J. 1063, 1069 (1978) (citing ABA President Powell's call for the standards to be "capable of enforcement").

[33] 97 F.R.D. 165 (U.S. April 28, 1983) (Supreme Court ordering amendment of numerous provisions of Federal Rules of Civil Procedure, including Rule 11, effective August 1, 1983); 61 U.S.L.W. 4365 (U.S. April 22, 1993) (Supreme Court ordering further amendments to Federal Rules, again modifying Rule 11, effective December 1, 1993).

[34] 433 U.S. 350 (1977) (newspaper advertising of set fees for routine services).

[35] See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (including accurate statements of law in newspaper advertising); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (direct mail advertising); Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, 496 US. 91 (1990)

Virginia State Bar.[36] In these and other areas,[37] the bar's strategy of forbidding all that federal law has not protected has at best covered a hard-fought, and not entirely heroic, campaign of retreats, reverses, and rear-guard actions.

More significantly, some of the conduct is difficult to define under clear and enforceable legal rules—the "know-it-when-I-see-it" problem.[38] This problem has two aspects relevant to our purposes. The first has to do with vexatiously motivated or legally unwarranted claims, defenses, and other filings; the second has to do with incivility. In dealing with each aspect of this problem, legalism encounters a paradox. With respect to the first, the paradox is the need to draft and implement black-letter rules that enjoin obedience to the spirit, as well as the letter, of the law.[39] If, as I suspect, there is wisdom in the dictum that the letter kills while the spirit gives life, we cannot expect much vitality, or even coherence, in the letter

(identifying certification as trial specialist by National Board of Trial Advocacy on letterhead); In re R.M.J., 455 U.S. 191 (1982) (listing areas of practice in print advertisements).

[36] 421 U.S. 773 (1975).

[37] See *Model Code of Professional Responsibility*, supra note 32, DR 2-103(D)(4) (1969) (addressing group legal service plans, explicitly forbidding what is not constitutionally protected).

[38] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (J. Stewart, concurring). See also 1 Hazard and Hodes, supra note 17 at 560 (alluding to Justice Stewart's pornography standard in frivolous litigation context).

[39] This approach is reflected not only in official commentary on the law of lawyering—see, e.g., *Model Rules of Professional Conduct*, "Preamble: A Lawyer's Responsibilities" ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."); *Model Rules*, "Scope" ("The Rules of Professional Conduct...should be interpreted with reference to the purposes of legal representation and of the law itself.")—but also in the black letter rules themselves. See, e.g., Model Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); Model Rule 3.5 (c) ("A lawyer shall not...engage in conduct intended to disrupt a tribunal."); Model Rule 4.4 ([a] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person....").

of a law that directs our attention above and beyond itself, upon pain of punishment here and now.[40]

Incivility, like frivolity, presents legalistic reformers with the "know-it-when-I-see-it" problem. What strikes us as uncivil varies with subtle differences in tone, context, and intent that are difficult to capture in black-letter rules, other than very vague rules of reason. Moreover, with respect to incivility, there is a related paradox: the effort to give formerly informal, extra-legal sanctions the force of law runs the risk of killing civility in order to save it.

B. The Equitable Alternative.

This problem, legalism reaching its logical limits, gives rise to the second remedy for declining professionalism, which I call the "equitable," as opposed to "legal," approach. Following an oscillation evident in other areas of law,[41] the professionalism crusade swings from reliance on sharp-edged legal rules to a more or less frank default to "know-it-when-I-see-it" standards that confer extensive discretion on the decision maker. Both the bar's professionalism studies and scholarly articles are replete with calls for this approach, sometimes joined with rather impatient suggestions that this is an inherent job of the judiciary on which judges have recently been slacking.[42]

[40] This is evident, for example, in the burgeoning of Rule 11 satellite litigation. Saul M. Kassin, *Empirical Study of Rule 11 Sanctions* (1985), conducted under the auspices of the Federal Judicial Center, found close to the maximum level of statistical uncertainty in a wide range of hypothetical sanctioning cases submitted to federal district judges.

[41] Carol M. Rose, "Crystals and Mud in Property Law." 40 STAN. L. REV. 577, 583-85 (1988); Duncan Kennedy, "Form and Substance in Private Law Adjudication." 89 HARV. L. REV. 1685 (1976).

[42] ABA Commission, supra note 2, at 42 (recommending more extensive use of sanctions under Fed. R. Civ. P. 11 and state analogues); Florida Commission, supra note 3, at 29 ("Judges of the state and federal courts should be encouraged to enforce the Standards of Professionalism."); Committee on Civility, supra note

But here again, there are problems. Judges have evinced, and occasionally expressed, reluctance to enter the lists, sometimes because they are individually risky, especially where judges face elections and bar polls,[43] sometimes because they are institutionally inappropriate, wasteful of their time, beyond their expertise, or otherwise inappropriate.[44] Behind this reluctance may lie a more fundamental problem: Who judges the judges, and in what terms, if the judges are by definition being asked to apply ineffable standards?[45] Abusive judges exist, even if they do not

3, at 7 (noting calls of "[s]everal commentators [on an interim draft]...urging the judiciary to assume a leadership role and serve as the principle example of courtesy, dignified courtroom conduct, restraint, and tolerance...."); Dorsen & Friedman, *Disorder in the Court*, supra note 21 (especially chapter 9, "The Responsibility of Judges," and chapter 10, "The Contempt Power"); Clarke, "Missed Manners in Courtroom Decorum," supra note 3 ("Etiquette Breaches, Contempt of Court, and Judges' Discretion to Decide").

[43] See ABA Commission, supra note 2, at 44 ("[J]udges are far less likely to punish misconduct and take other tough action if they must run for re-election or retention every few years."); Florida Commission, supra note 3, at 23 ("[M]any judges are uncomfortable in the role of disciplinarian....").

[44] See Robert E. Keeton, "Times are Changing for Trials in Court." 21 FLA. ST. U. L. REV. 1, 15 (1993) ("I believe judges in general have neither the time, the resources, nor the will to undertake this responsibility" i.e., "to control and punish hardball lawyers"); Clarke, "Missed Manners in Courtroom Decorum," supra note 3, at 954 (with some notable examples of impatience like the Dondi case, "Courts generally are reluctant to impose formal rules of courtroom conduct.") This reluctance seems evident, also, in the judiciary's reluctance to expand Rule 11's scope from "gate-keeping"—screening out frivolous claims—to "ethical policing"—monitoring a wider range of sanctionable misconduct. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); See Rhode & Luban, *Legal Ethics*, supra note 14.

[45] See Illinois Prof. Com. Report, Recommendation No. 34, supra note 3, at 450-51 "Frivolous Lawsuits, Committee Comment" ("Because the respective state and federal rules potentially give the courts deleterious power of intimidation, the committee recommends an empirical study of the rules.... Absent such a study, immeasurable damage could result in the court's expansive use of sanctions against alleged frivolous conduct.").

abound.[46] And there would be variation even among conscientious judges, as the history of Federal Rule of Civil Procedure 11 amply demonstrates.[47] Equity, remember, is notorious for varying with the chancellor's foot.

C. Non-binding Self Regulation.

So where are we, if hard legal rules will not work, and squishy equitable standards will not work either? We are at the threshold of the professionalism crusade. This is the professional equivalent of a religious revival, relying on legally non-binding "self" regulation—codes, creeds, and pledges of professionalism—to supplement the existing regulatory framework of binding disciplinary rules and restore an informally enforced professional community.

This new approach has much to commend it. On the one hand, it recognizes, if only implicitly and imperfectly, the limits of the command-and-control approach to professional reform. On the other hand, it offers the promise, though not yet the product, of avoiding the bar's all too familiar resort to platitudes and preachments. It offers, in its place, evidence of an effort to re-build the kind of professional community on which enforcement of informal sanctions depends. There are, however,

[46] Dorsen & Friedman, *Disorder in the Court*, supra note 21, at 199-205, 233-38; Clarke, "Missed Manners in Courtroom Decorum," supra note 3, at 945, 1004ff. ("Breaches of Etiquette by Judges").

[47] See Lawrence C. Marshall et al., "The Use and Impact of Rule 11." 86 NW. U. L. REV. 943, 965-75 (1992) (identifying its application as uneven); William W. Schwarzer, "Rule 11 Revisited." 101 HARV. L. REV. 1013, 1016 (1988) ("Although the standard that governs attorneys' conduct is objective reasonableness, what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination."); Kassin, *Empirical Study of Rule 11 Sanctions* 45, supra note 40 ("[T]here is a good deal of interjudge disagreement over what actions constitute a violation of the rule....").

serious problems with the emerging approach; it is to these that we must now turn.

IV. The Fallacy of the One True Way.

The major problem is what I call the fallacy of the one true way, the implicit—and demonstrably erroneous—premise that conscientious lawyers agree on the way to be a good person and a good lawyer, or that a single kind of lawyering is right and all others wrong. This flawed premise undermines all the various ways suggested for promoting the values of professionalism: Before we can teach professionalism, or reward it or punish it or make people promise to do it, we have to get clear on what "it" is. To better get at why we are not clear on what it is, I want to examine a tripartite taxonomy of lawyers. Each type fits quite comfortably within the law, and each has both scholarly defenders and practicing exemplars. Yet each incorporates a very different vision of the lawyer's professional obligations.

There is, of course, nothing inherently sacred about the number three. Robert Nozick, best known outside academic philosophy for his *Anarchy, State, and Utopia*, gives a wonderful warning about why theorists do not use two- or four-part classifications:

> Dyadic classifications...have less interest, while quadratic ones apparently are too complicated for most people to keep in mind, which is why there is no holy Quadrinity.[48]

With that warning, on to my rather unholy trinity of lawyer types.

[48] Robert Nozick, *Philosophical Explanations* 557 n.* (1981).

A. A Taxonomy of (Arguably) Legitimate Modes of Lawyering.

1. *The Neutral Partisan (or the Hired Gun).*

The first type is known in scholarly circles as the neutral partisan.[49] This type is also known, more popularly, as the hired gun,[50] and, more recently, as "Rambo."[51] The basic operating premise here is that anything a lawyer does for a client within the strict letter of the law, whether procedural or substantive, is at least morally and professionally OK, and perhaps even laudable; a lawyer may (or perhaps should) use any legally permitted means to assist any client to achieve any arguably legal end.

This model of lawyering, which has ancient roots, has three basic modern justifications. It is sometimes said to be an inevitable corollary of the adversarial system, which is itself defended as the best means of

[49] See Rhode & Luban, *Legal Ethics*, supra note 14, at 132; Deborah L. Rhode, "Ethical Perspectives on Legal Practice." 37 STAN. L. REV. 589, 605 (1985). This position is also described as the lawyer's amoral ethical role, see Stephen L. Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities." 1986 AM. B. FOUND. RES. J. 613; the traditional conception, see Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation." 85 YALE L.J. 1060, 1061 (1976); the standard conception, see David Luban, *Lawyers and Justice: An Ethical Study* xix (1988); the full advocacy model, see Alan H. Goldman, *The Moral Foundations of Professional Ethics* 92 (1980); and the libertarian approach, see William H. Simon, "Ethical Discretion in Lawyering." 101 HARV. L. REV. 1083, 1084-85 (1988), Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*. I follow Rhode and Luban's choice of terms to emphasize the two key elements of this model and the fact that this model is not the only option available to lawyers in our culture. Rhode & Luban, supra note 14, at 132-33.

[50] See Charles W. Wolfram, *Modern Legal Ethics* § 10.3.1 (1986)(noting ambivalence of lawyers toward the term, some associating it with "servile acts of immorality and lawlessness"; others with "the macho heroics of the frontier").

[51] See, e.g., Committee on Civility, supra note 3, at 6 (criticizing "'Rambo'-style discovery").

discovering truth and protecting individual rights.[52] More recently, it has been defended as analogous to personal friendship. Just as friends may legitimately act on behalf of friends in ways that would not be appropriate on behalf of strangers, the argument runs, so lawyers may assist clients in accomplishing legal but immoral ends, since lawyers are their clients' "special purpose friends" in such matters.[53] Finally, neutral partisan lawyering is said to be justified as a necessary means for clients to exercise their rights within the law. Without lawyers, clients could not discover the sphere of autonomy reserved to them by law in a complex modern state. Indeed, if lawyers were to decline on moral grounds to help clients exercise that legally defined autonomy, they would to that extent be usurping the function of the law itself in setting the bounds of appropriate individual conduct.[54]

Scholars have criticized each of these defenses of neutral partisanship—as a corollary of the adversarial system,[55] as an analogue of friendship,[56] and as a necessary means to individual autonomy[57]—

[52] See Monroe H. Freedman, "Judge Frankel's Search for Truth." 123 U. PA. L. REV. 1060 (1975).

[53] See Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," supra note 49.

[54] See Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities," supra note 49.

[55] David Luban, *Lawyers and Justice* 50-103 (1988); David Luban, "The Adversary System Excuse." In *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83 (David Luban ed., 1984); Thomas L. Shaffer, "The Unique, Novel, and Unsound Adversary Ethic." 41 VAND. L. REV. 697 (1988).

[56] Susan Wolf, "Ethics, Legal Ethics, and the Ethics of Law." In *The Good Lawyer* 38, 59 n.4, supra note 55; Simon, *The Ideology of Advocacy*, supra note 49, at 108-09; Rhode & Luban, *Legal Ethics*, supra note 14, at 151-53; Edward A Dauer & Arthur A. Leff, "Correspondence: The Lawyer as Friend." 86 YALE L.J. 573; Sanford Levinson, "Testimonial Privileges and the Preferences of Friendship." 1984 DUKE L.J. 631, 639-40.

[57] David Luban, "The Lysistratian Prerogative: A Response to Stephen Pepper." 1986 AM. B. FOUND. RES. J. 637.

severely and, I think, compellingly. But—and this is a significant point—conscientious people could nonetheless think otherwise. Indeed, one of the critical failings of the present crusade is to overlook those whom I will describe as conscientious type 1 lawyers.

Theoretical critiques of Type 1 lawyering are fairly new, and the elaboration of alternative models, newer still. As the untenability of the Type 1 position and the availability of viable alternatives become more widely known among practicing lawyers, adherence to the Type 1 model may well diminish. Type 1 behavior, however, is likely to persist for other, less laudable reasons than the lag time of its criticism's dissemination. At the risk of approaching the *ad hominem*, it must be pointed out that Type 1 lawyering offers its adherents a most attractive view of the world, if not a lawyers' Shangri-La. Its fundamental message, after all, is that whatever a lawyer does for a client within the letter of the law is virtuous, however much it may violate the moral rights of third parties or the interests of the public at large. From this perspective, the trying moral dilemmas of law practice simply disappear; the lawyer's professional role is explicitly defended as amoral. This, perhaps, gives its theoretical defenses a psychological appeal out of proportion to their abstract merits, even in the minds of the conscientious. Forgive George Eliot, if not me, for observing that "the egoism which enters into our theories does not affect their sincerity; rather, the more our egoism is satisfied, the more robust is our belief."[58]

Finally, even I must be forgiven for pointing out the obvious: not all lawyers are conscientious. Some, one suspects, are looking for rationalizations, not reasons, for their anti-social conduct; others are no doubt happy to operate up to the margins of legality without any excuse, conscientious or contrived. Among the latter, we can expect to find not just stretching the borders of the law, but also self-serving transgressions of ordinary civility. Lawyers of this ilk may not justify their Type 1 behavior by even a self-

[58] George Eliot, 2 *Middlemarch: A Study of Provincial Life* 83 (Everyman's Library ed., 1991).

serving reference to dubious theories; they may feel no need to justify it at all. They are what I call unscrupulous Type 1 lawyers.

Consider a few illustrations of the Type 1 lawyer. In fiction the paradigm is Polly Biegler, in Robert Traver's *Anatomy of a Murder* (played by Jimmy Stewart in the movie version). He was the defense counsel who pressed the edge of subornation of perjury to suggest to his client a dubious but successful insanity defense to murder. In fact, the pantheon is crowded, but the archetype is perhaps Bruce Bromley, a litigation partner with Cravath, Swaine, and Moore, who was noted for his dilatory tactics in major antitrust suits.[59] Here is how Bromley described himself and his methods in a 1958 speech to a conference of judges:

> Now I was born, I think, to be a protractor. ...I quickly realized in my early days at the bar that I could take the simplest antitrust case that Judge Hansen could think of and protract it for the defense almost to infinity. ...Promptly after the answer was filed I served quite a comprehensive set of interrogatories on the Government. I said to myself, "That'll tie up brother Hansen for a while," and I went about other business.[60]

There is today a chair honoring Bromley at the Harvard Law School[61]—

[59] See Philip M. Stern, *Lawyers on Trial*, 151-52 (1980) ("When it comes to legal delaying maneuvers, one of the kings (in all likelihood *the* self-proclaimed king) was the late Bruce Bromley. ...To Bromley, the delaying game was precisely that—a game—and not one to be in the least ashamed of. On the contrary, it was a skill to be proud of, to boast of publicly....").

[60] Bruce Bromley, "Judicial Control of Antitrust Cases." 23 F.R.D. 417, 420 (1958).

[61] American Association of Law Schools, *Directory of Law Teachers: 1993-94* at 60. Cf. Rotunda, *Lawyers and Professionalism*, supra note 4, at 1165 (expressing hope that everyone now recognizes Bromleyan tactics as professionally improper).

testimony to the appeal of this model, or to the availability of secular indulgences.

2. *The Officer of the Court (or Law's Acolyte).*

Type 2 lawyers see themselves as "officers of the court"; their detractors see them as quasi-bureaucrats or as aspiring acolytes in the temple of justice.[62] The central belief of the Type 2 lawyer is this: Normative limits narrower than the letter of the law sometimes constrain what a lawyer may properly do for a client; a lawyer should properly decline to assist clients in achieving some ends, by some means, even though these are strictly legal, if they violate other identifiable public norms.[63]

So, for example, the Oath of Admission to The Florida Bar says "I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust.... I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor...."[64] Ends are to be measured against justice, not the letter of the law alone; means against truth and honor, not mere legality.

Like the Type 1 model, Type 2 is not monolithic. Differences in the theoretical basis of Type 2 lawyering matter more for our purposes than those of Type 1, because the different theoretical underpinnings give rise to different ranges of permissible conduct. We must, accordingly, distin-

[62] Simon, *The Ideology of Advocacy*, supra note 49, at 61-67 ("the lawyer as para-bureaucrat"), 91-94 ("the lawyer as acolyte").

[63] William Simon urges that lawyers be guided by the spirit of the law, see Simon, "Ethical Discretion in Lawyering." 101 HARV L. REV. 1083 (1988); David Luban points them to ordinary morality, see David Luban, *Lawyers and Justice* (1988), supra note 55.

[64] Supreme Court of Florida, *Rules Regulating the Florida Bar* 275 (D & S 1987).

guish two primary subclasses in this regard, Type 2 proceduralists and Type 2 substantivists.

Type 2 proceduralists find limits short of the letter of the law as to procedure, but not as to substance.[65] In general, they believe that lawyers should use procedural laws—rules of evidence and practice, for example—according to their purpose, which is to resolve issues fairly and expeditiously on their merits. As to substance, on the other hand, they believe it is the job of the tribunal, not the lawyer, to decide what the purpose of the law is. They would, in other words, press any non-frivolous claim, irrespective of their private opinion as to its merits, and leave the substantive decision on the merits entirely to the finder of fact or law. In that respect, Type 2 proceduralists are indistinguishable from conscientious Type 1 lawyers.

Type 2 substantivists, on the other hand, believe that the lawyer is constrained by "public" limits short of the letter of substantive as well as procedural law. Substantivists would, accordingly, decline to bring non-frivolous claims that did not also meet other, more restrictive, criteria. These additional criteria are to be found in the spirit or purpose of the law[66] or in the dictates of ordinary morality.[67] Stated most generally, the lawyer is to pursue justice, not just legally permissible outcomes. In more sophisticated versions of the substantivist Type 2 model, substance and procedure are subtly coordinated. Thus, where the procedural mechanisms can be depended on to ensure a fair adversarial presentation of differing positions on the merits, and where the tribunal is an appropriate one for

[65] The paradigm of this position is Lon L. Fuller and John D. Randall, "Professional Responsibility: Report of the Joint Conference." 44 ABA J. 1159, 1161 (1958).

[66] Simon, "Ethical Discretion," supra note 63.

[67] Luban, "Lysistratian Prerogative," supra note 57; *Lawyers and Justice*, supra note 55.

making such decisions, then the lawyer can take more dubious substantive positions and can press them more aggressively than would otherwise be the case.[68]

The paradigm Type 2 lawyer is Louis Brandeis, playing two roles he created for himself, "lawyer for the situation" and "the people's lawyer." In the former role, Brandeis tried to bring antagonistic private parties together on mutually beneficial accommodations.[69] In the latter role, Brandeis tried to temper his representation of the emerging corporate giants of his day with concern for the under-represented interest of the public at large.[70] This is the vision the bar generally holds up to its members, and it is the vision toward which most lawyers aspire, at least in their more beatific moods.

3. *The Moral Individualist (or Lawyer Vigilante).*

The third type of lawyer I call the moral individualist; my students prefer the term "lawyer vigilante." The basic operating premise here is that lawyers may violate the spirit of both substantive and procedural law (e.g., to exploit loopholes) so long as they do not transgress the law's letter, and as long as they are laboring in a good cause, by their own lights. Lawyers may, indeed should, pursue justice but, in contrast to Type 2s, by their own lights, not by any set of shared public norms like the spirit of the law or ordinary morality. This permits lawyers to pursue any legal ends that they believe to be morally right, by any means that meet the same criteria.[71]

In this category, as in Types 1 and 2, we must note an important subdivision. Some Type 3 lawyers seek to work within the context of liberal legalism, stretching the law's outer bounds for the advantage of particular clients, without meaning to subvert the legal system as a

[68] Simon, *Ethical Discretion*, supra note 63.

[69] Wolfram, *Modern Legal Ethics*, supra note 50, § 13.6 at 730.

[70] Louis D. Brandeis, *Business: A Profession* 329-43 (Hale, Cushman & Flint 1933) (1914); David Luban, *Lawyers and Justice*, supra note 55 at 169-74.

[71] For a defense of this model, see Rob Atkinson, "Beyond the New Role Morality for Lawyers." 52 MD. L. REV. 853 (1992).

whole.[72] Others, by contrast, oppose liberal legalism itself. They seek to exploit the play in its joints to cripple or kill what they think is a beastly system. Here we reach the ultimate paradox—for the latter Type 3 lawyers, the processes that constitute liberal legalism are to be used as the means of delegitimating and eventually overthrowing the system as a whole.

For fictional examples of this type, think of Portia, in Shakespeare's *Merchant of Venice*, defending her lover's friend from forfeiture of "a pound of flesh nearest the heart." It hardly troubles her to prevail by arguing for a judicial construction of that phrase not contemplated by either contracting party, even if that means denying Shylock his legal due.[73] For nonfiction exemplars, think of Clarence Darrow, in his withering and humiliating Scopes trial cross examination of William Jennings Bryan. But also bear in mind more ambiguous role models like William

[72] This may seem, on first face, to violate the widely (though not universally) accepted principle of universalizability as a criterion of moral conduct. In its classic formulation, Kant's categorical imperative, one should act only according to that maxim which one could at the same time will that it should be a universal law. The problem here is that, if all lawyers pressed all clients' ends as aggressively as the Type 3 lawyers press theirs, severe systemic harm, if not gridlock, would result. The response of conscientious Type 1 lawyers, of course, is to deny the conclusion and to insist that social good, rather than harm, will result. The response of Type 3 lawyers is to narrow the principle's practical scope while preserving its universalized form, along these lines: All lawyers should press aggressively only the claims of those clients who are especially needy, threatened, or deserving. The paradigm of such clients is the indigent criminal defendant, a hard-pressed individual facing the vast resources of the state at risk of losing the most cherished human values, liberty and life.

[73] Portia might also plausibly be characterized as a Type 2 substantivist, on the view that she thought the liquidated damages clause was unconscionable as a matter of law, see Simon, "Ethical Discretion," supra note 63, or that she believed such an award would violate not merely her own profound personal affection for the victim, but also the dictates of ordinary morality in such matters. See Luban, *Lawyers and Justice*, supra note 55. It is these distinctions, not the characterization of a particular case, that concern us here.

Kunstler of the Chicago Seven trial, who purports to "only defend those I love"[74] and who has no love lost for liberal legalism.

B. Illustration of the Lawyer Types.

To recapitulate the three lawyer types, they are the Type 1, the neutral partisan or hired gun, who goes full bore for any client or cause; the Type 2, the officer of the court, or acolyte of the law, who tries to moderate all private representations with an infusion of public values; and the Type 3, the moral individualist or lawyer vigilante, who goes full bore, but only for virtuous clients and causes, personally and perhaps idiosyncratically defined. To get clearer on these three breeds of lawyering and their respective subspecies, let us put them through their paces in an extended example.

The case involves wetlands development. These are the background facts: A developer wants to dredge and fill part of an ecologically sensitive wetland and put in high-rise condominiums. (My senior colleagues tell me that this used to happen occasionally in the state of Florida.) Opposing the development is a local, underfunded environmental group. The state's permitting agency is overworked and understaffed; the outcome will depend very much on the cases made by the parties.

Let us consider the conduct of the three types of lawyers at various points in the proceedings, beginning with the initial interview, in which the prospective clients present their positions and on the basis of which the lawyer will decide whether to take the case. The Type 1 lawyer will most likely wind up representing the developer, and will go full bore at all phases, by all means, irrespective of the merits of the project in his or her private opinion. He or she may tell us that this is because every legal viewpoint deserves a good lawyer and, if a conscientious Type 1, may cite

[74] Auerbach, *Unequal Justice*, supra note 21, at 290.

scholarly articles on the point.[75] For the unscrupulous, on the other hand, the prospect of a tidy fee will more than compensate for short-changing high theory.

The Type 3 lawyer, at the other pole, will most likely be found representing the environmental group. The critical point to note is that what he or she does for the environmental group will not differ much from what the Type 1 does for the developer—it will be a ruthless, no-holds-barred representation. But he or she will claim to be motivated by belief in the cause. And we have pretty good evidence of sincerity here—clients like this do not tend to pay top dollar.

That brings us to the Type 2 lawyer, the more complex and interesting case. At the very outset, the Type 2 may decline the representation altogether, on grounds of public policy or personal morality. And he or she may decline either side for those reasons. Money will not be everything here, as it is for the unscrupulous Type 1, or nothing, as it is for the Type 3. Conversely, belief in the substantive justice of the client's case will not be everything, as it is for the Type 3s, or nothing, as it is for the Type 1s, both conscientious and unscrupulous. Rather, money and the merits will both be relevant factors. The Type 2 lawyer is painfully aware that if you are too scrupulous in turning down distasteful clients, you simply will not have enough paying clients to sustain a private practice.

Thus, instead of turning down the developers in this case, the Type 2 lawyer is more likely to try to persuade them to do better, or less bad, and to dress up that recommendation in terms that will be meaningful to such a client: public image, community outrage, costly legal battles, and the like.[76] And this will be especially true in the early, advisory phases of

[75] Fried, "The Lawyer as Friend," supra note 49; Pepper, "The Lawyer's Amoral Ethical Role," supra note 49.

[76] Fuller & Randall, "Professional Responsibility: Report of the Joint Conference," supra note 65, at 1161. *Model Code of Professional Responsibility*, Ethical Consideration 7-8, n.19 (citing Fuller and Randall).

representation. The Type 2 lawyer will feel more comfortable taking the client's position if the matter becomes adversarial, on the assumption that competing interests will be similarly represented and that the court or agency has a more direct mandate to achieve just outcomes.

Should the matter go into litigation, the Type 1 lawyer will use every trick in the book. Procedurally, he or she will do anything to inflict cost in terms of time and money and headaches on the other side, operating, for example, up to the edge of sanctionable discovery abuse—recall Bromley's protractor. Substantively, the fuzzy edges of Rule 11's frivolity standard are the Type 1 lawyer's natural habitat. He or she might, for example, file a dubious takings claim, to raise the now-dreaded prospect of retrospective damages against the regulating body,[77] or take intimidating steps against the environmental group.[78] He or she would routinely file Rule 11 claims and disqualification motions against the other side. And he or she would eagerly politicize the process, working press and public opinion without a noticeable distaste for distortion and sensationalism, making dire predictions of the collapse of the local economy if the tree-huggers have their way.

The Type 3 lawyer's tactics would be virtually indistinguishable in substance and in form. Motive, marked perhaps by a measure of sanctimoniousness, is the only real difference. If there is a snail darter, the Type 3s will find it; even if there is not, and no one reasonably thinks there is, they will file interminably for temporary restraining orders while a battery of dubious experts fishes around, literally and figuratively. They will exer-

[77] First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987).

[78] See Jennifer E. Sills, "SLAPPS (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate their Appeal?" 25 CONN. L. REV. 547 (1993); John C. Barker, "Common-Law and Statutory Solutions to the Problem of SLAPPS." 26 LOY. L.A. L. REV. 395 (1993); George W. Pring & Penelope Canan, "'Strategic Lawsuits Against Public Participation' ('SLAPPS'): An Introduction for Bench, Bar and Bystanders." 12 BRIDGEPORT L. REV. 937 (1992).

cise their constitutional right to inform the public, through the press, about the impending environmental apocalypse about to be wrought by the opposing party.

What about the Type 2s? In the adversarial process itself, they will tend to rely more on the system to produce the right result, taking care not to abuse the process. Once the matter is in litigation, Type 2 proceduralists will eschew obstructionist tactics but otherwise put their client's case in the best possible light, even if they doubt its merits, leaving that decision to the court. Thus, for example, if an opponent's request for a stipulation or continuance is reasonable and will not seriously disadvantage the proceduralist's client, Type 2s will go along, or at least urge the client to go along.[79] Beyond that, Type 2 substantivists will accept a measure of direct responsibility for the outcome as well as the fairness of the process by which it is reached. In more sophisticated versions, they will adjust their level of zeal to the adequacy of the other side's representation.[80]

The final aspect of the example I want to focus on is the general tone of the representation, through all its phases, as seen in the routine interaction with other counsel, other parties, and the court, with respect to such things as requests for extensions and stipulations, returning phone calls, and keeping appointments, conduct generally grouped under the heading of civility. It is important to note that attitudes toward civility are not perfectly correlated with the lawyer types. Conscientious Type 1 lawyers, for all their tactical ferocity, may well eschew incivility, at least in their more visible public dealings. The reason may be either a conscientious commitment to civility as such or an effort to cultivate the mystique of elite gentility, the velvet-covered fist. Unscrupulous Type 1 lawyers, on the other hand, may well take the opposite tack, cultivating a

[79] See, e.g., *Model Code of Professional Responsibility*, Disciplinary Rule 7-101(A)(1) (a lawyer does not violate the duty of zealously representing a client "by acceding to reasonable requests to opposing counsel which do not prejudice the rights of his client...").

[80] Simon, "Ethical Discretion," supra note 50.

reputation for incivility, both for the publicity in general and for the particular thing publicized, a devil-may-care attitude toward all but the client. A reputation for toughness, even rudeness, may well be prized, as it is, for example, among debt collection agencies. Hassles and headaches are, on this view, just another way of wearing down the opposition.

Type 2 lawyers, committed as they all are to orderly legal processes, will tend to be committed to an overall tone of civility as well. For them civility is likely to trade as a value independent of its effect in particular clients' cases.[81] The Type 3 lawyer's attitude toward civility is most difficult to generalize. They are more likely to view it as a means toward client ends, rather than as an independent value or a means toward ends beyond those of their clients. If it helps a good client, fine; if its absence hurts a bad opponent, also fine. Among subversives, incivility may be part of their general destabilizing plan. Conversely, civility may be the sheep's clothing in which they try to disguise wolverine or vulpine objectives.

Finally—and this is significant—even lawyers generally committed to civility may operate under only a rebuttable presumption of mutual cooperation, contingent upon the other side's reciprocating. Sometimes enough will be enough. When the environmental group, for example, files to have algae declared an endangered species, it will be time to call them obstructionists (if not pond scum) and to use a tone of voice not commonly heard on Sesame Street.

The point of the lawyer trilogy and the illustrative case is this: We all find aspects of each of the lawyer types tolerable, if not admirable. This is not because we are not quite sure what we want, individually or collectively. What we want is more complex than the paradise of lost innocence that the professionalism crusade promises to regain. The next section tries to clarify, though I am afraid not simplify, what it is that we want. Against that background, the final section discusses why the present crusade cannot satisfy us and how we might reform it.

[81] See, e.g., *Model Code*, Ethical Considerations 7-37 and 7-38 (urging civility toward, and cooperation with, tribunals and opposing counsel).

V. Failings of the Professionalism Crusade.

Most of us think of ourselves as, or recognize important aspects of ourselves in, the Type 2 lawyer, the "officer of the court." Most of us rather prefer that role, seeing ourselves as seeking just outcomes through civil means. But at the same time, most of us at least begrudgingly admire fanaticism for a cause, or are willing to tolerate it within the bounds of law, even though we dislike fanaticism for hire. It is one thing to join the mujahadeen in the mountains; it is quite another to hire out as a mercenary. That is the seductive appeal of Barry Goldwater's slogan: "Extremism in the defense of liberty is no vice. And...moderation in the pursuit of justice is no virtue."[82]

There is a related point here: Even though we do not want to be, or cannot afford to be, fanatics, we accept the need and thus the justification for occasionally acting fanatically. Most of us believe in fighting fire with fire, or at least in returning fire when fired upon, even if we do not believe in scorched-earth tactics as a matter of first resort in *any* cause, however just.

That is why, I think, we accept, even applaud, Atticus Finch's aggressive trial tactics in *To Kill a Mockingbird*, where he defended a black man falsely accused of rape by the daughter of the town derelict. On the one hand, Atticus destroyed the young woman's credibility by showing how she had tried to seduce the defendant. Though we are moved by her tears, we hardly fault Atticus for his remorselessness in the way that we would had she been innocent. Nor are we troubled that Atticus established the guilt of the real culprit, her father, through crafty cross-examination that entrapped him in his own class resentment. When he leaves the witness stand fuming that "Tricking lawyers like Atticus Finch took advantage of

[82] John Bartlett, *Familiar Quotations* 341 n.1 (Justin Kaplan ed., 16th ed., Little, Brown and Co. 1992).

him all the time with their tricking ways,"[83] he takes little of our sympathy with him.

Let me give you another example, a bit closer to home. Fifteen years ago pretty much to this day, I came across the Creek as an undergraduate senior to hear Geoffrey Hazard, of the law school for which I was soon to be bound, deliver a lecture—a lecture in this series, as well as I recall. I do not have the vaguest notion now what his topic was. But I will never forget something that happened in the question and answer session that followed. The first question came from a senior professor and high administration official known, at least among us undergraduates, for his arrogance and pomposity. The content of his question, like that of Hazard's talk, has long escaped me, but the tone was typically arrogant and pompous. As he spoke, I remember thinking, "that's not how a representative of Washington & Lee should address a guest." But before that thought quite congealed in my mind, Hazard answered, like a thunderbolt. In the undergraduate idiom of that time, Hazard blew him away. In a single brilliant sentence, Hazard illuminated and incinerated his interlocutor's glib arrogance. No one there that day, I would wager against heavy odds, thought that Hazard was out of line or, to use the shibboleth of the professionalism crusade, uncivil. I was reminded of Hazard when I read one of M. Scott Peck's hallmarks of civility: Never hurting another person's feelings—without meaning to.[84] And, most of us would add, except in a good cause.

The professionalism crusade, unfortunately, fails to acknowledge either the multiplicity of conscientious models of lawyering or the context-sensitive nature of civility. With respect to civility, the crusade oversimplifies by categorically condemning all "harsh" conduct, all less than pleasant social exchanges. It calls for us all to act like Mr. Rogers even

[83] Harper Lee, *To Kill a Mockingbird* 180 (Popular Library ed. 1962) (1st ed. 1960).

[84] M. Scott Peck, *A World Waiting to Be Born: Civility Rediscovered* 4-5 (1993).

though we clearly are not living in his Neighborhood. Thus, according to the Creed of Professionalism of the Florida Bar, "I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy."

There are several problems with this unqualified endorsement of what seems to be a kind of Senatorial courtesy. In the first place, insistence on courtesy and decorum have occasionally worked against legitimate demands for structural reform as, for example, in the civil rights movement.[85] Second, and more generally, even the nicest notions of good manners do not dictate universal pleasantness. By at least implying otherwise, the crusade tends to limit the flexibility of the mannerly among us to respond in contextually appropriate ways to the rudeness of others. It calls for unilateral disarmament when surgical strikes seem more appropriate.

Second, the crusade disappoints—I would even say disturbs—in its failure to acknowledge the various competing visions of ethical lawyering. The professionalism crusade, with its creeds and codes and pledges, tends to present itself as the one true way, condemning alternative visions as heretical. Even more problematically, it seeks to become the Established Church. This is especially true where the crusade is taken up by integrated, non-voluntary bar associations and by the courts. It is one thing to be denounced as a heretic by the ABA or the College of Probate Counsel; it is quite another to be denounced by the Florida Bar or the Virginia Bar[86] or the Seventh Circuit Court of Appeals. In the case of the former, voluntary groups like the ABA, the worst they can do is excommunicate you. You can join a new denomination—the National Lawyers' Guild, for example—or start up one of your own. Mandatory state bar associations and the courts, on the other hand, have the power to burn you at the stake, to strip you of your livelihood and even to put you in jail.

[85] William H. Chafe, *Civility and Civil Rights: Greensboro, North Carolina and the Black Struggle for Freedom* 8-10 (1980).

[86] See *Rules of Supreme Ct. of Va.*, PT. SIX (Integration of the State Bar (1993)).

VI. Redeeming the Professionalism Crusade.[87]

The professionalism crusade is not, however, without redeeming social value. It is to be congratulated for underscoring problems, particularly excessive zeal and incivility, that threaten the core values of liberal legalism. And it rightly evinces a growing skepticism about the propriety and capability of coercive legal measures to redress those problems. Finally, it admirably aims at infra-structural reforms and communal edification that are both more radical and more consistent with an appreciation of the ultimate foundations of the liberal legalism it is devoted to preserving. All these positive elements can be preserved, however, while the movement is purged of the problems I have identified.

In terms of content, the crusade can easily abandon its categorical approach to the central problems of incivility and frivolity in favor of the kind of flexibility I have urged. With respect to the former, it could acknowledge that sometimes it is appropriate for lawyers to turn the other cheek; sometimes, to braid a whip and drive the money-changers from the temple (metaphorically, of course). Interestingly, this perspective is included in the Oath of Admission to the Florida Bar, which antedates the present crusade by a good fifty years. The basic oath sounds very much like the professionalism crusade: "I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness...."[88] But in the very next clause, the other shoe falls: "*unless* required by the justice of the cause with which I am charged."[89]

[87] Here again, the religious imagery is not original with me. See Gordon and Simon, supra note 15.

[88] Supreme Court of Florida, *Rules Regulating the Florida Bar*, supra note 64, at 275. See also *Model Code*, Ethical Consideration 7-37 ("A lawyer should not make unfair or derogatory personal reference to opposing counsel.")

[89] See Supreme Court of Florida, *Rules Regulating the Florida Bar*, supra note 64, at 275.

With respect to frivolity, the crusade could recognize that conscientious lawyers differ on the circumstances under which it is appropriate to press the bounds of existing law on behalf of clients, and that identifying the conscientious lawyer is a dangerous job to delegate to organs of the state. This recognition, in turn, would allow the crusade to narrow the excessive scope of its claims. In particular, the crusade could abandon its claim to being the one true way, and its tendency to rely on the state to enforce that way. This would have distinct effects on the role of bar organizations, the courts, and the law schools with respect to the crusade.

A. Bar Associations.

The role of bar associations would depend on their type. Mandatory bar associations, the unified bars that now exist in many states, would ideally disappear in favor of the more typical forms of profession regulation by state agencies.[90] Alternatively, mandatory bars might limit their functions to imposing and enforcing the kinds of minimum standards found in the disciplinary rules of the 1969 *Model Code* and in the 1983 *Model Rules*. These would operate, as originally conceived, as the minimum obligations of a lawyer, a kind of lowest common denominator required to administer justice and overcome information asymmetries and other imperfections in the market for professional services.

Unified bars might supplement this maintenance of minimum order by encouraging discussion of other, more debatable issues such as those I have identified as professionalism in the narrow sense. There is some evidence of this already, if only by default, in the bar's sponsorship of professionalism and civility studies and task forces and its tendency to

[90] See Theodore J. Schneyer, "The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case." 1983 AM. B. FOUND. RES. J. 1 (calling for elimination of unified bars in favor of private voluntary bars and public administrative agencies).

promulgate creeds as "guides" or "discussion drafts" rather than as the basis for sanction or requirements of membership.[91]

Voluntary bar associations, by contrast, could appropriately undertake a much more active role in promoting the shared values of their members, including those of the professionalism crusade. This greater role is appropriate to such organizations because the element of conscience-coercion is absent here; any lawyer who does not like the organization's vision of professionalism can leave or be expelled without loss of license to practice law. Such organizations could be more or less broad in their scope. Some, like the ABA and its state affiliates, could continue to operate as umbrella organizations for a wide range of lawyers holding quite divergent visions of the lawyer's role, but an essential commitment to the basic vision of liberal legalism. Other organizations might require adherence to much narrower or more rigorous understandings of professional obligation. These could exist within more latitudinarian groups like the ABA, as separate orders and fellowships exist in the Anglican and Roman Catholic communions, or as separate, unaffiliated entities, like the denominations and branches of Protestantism and Judaism.

The approach I am suggesting would leave to voluntary lawyers' groups the job of spelling out detailed credal statements for their members, not for the entire bar. This would be analogous to the way in which the various denominations, under the Establishment and Free Exercise Clauses, formulate and regulate the beliefs and practices of their members without state aid or interference. Here the crusade has its proper place, and might do some real good. It might bring like-minded lawyers together, for mutual support and correction, for value clarification and elaboration and promotion.[92] And it might give the public a clearer view of the range of lawyer types available.

[91] See ABA Creed and Pledge of Professionalism, pmbl.

[92] Gordon & Simon, "The Redemption of Professionalism?" supra note 15, at 245-47; Rob Atkinson, supra note 71, at 964-79.

B. The Courts.

For their part, the courts should continue, perhaps even redouble, their present efforts to maintain minimum order, to ensure the administration of justice. To that end, they should employ the full range of their powers, including both civil and criminal contempt. They should be careful, however, in their efforts to police both frivolous litigation and incivility, given the intrinsic limitations we have identified in the use of both bright-line legal rules and broad equitable discretion in addressing those problems. They should, in particular, be wary of using highly coercive penalties in view of the dangers of chilling vigorous advocacy and the difficulties of distinguishing conscientious activism from ill-motivated aggression. Indeed, to the maximum extent consistent with the need to avert the obstruction of justice, they should forebear harshly sanctioning the activities and attitudes of conscientious dissenters, whether of Type 1 or Type 3.

This counsel of caution need not, however, leave judges on the sidelines of the quest for a more nearly optimal professional order. It leaves open to them an important monitoring and admonishing role, with respect to two important constituencies. The first and most obvious of these constituencies is lawyers. Without resort to the more coercive measures available to them, the contempt power, and their inherent authority to discipline lawyers practicing before them, judges can assume the task of educating lawyers, especially younger lawyers, in fulfilling the elusive role of "officer of the court." They can inform lawyers when, in their judgment, lawyers present arguments bordering on the frivolous or engage in conduct at the edge of civility.

This kind of informal admonition, of course, will not restrain the truly recalcitrant, much less the revolutionary. It may well, however, both rein in and edify conscientious lawyers of all types who acknowledge some form of extra-legal limits on their lawyerly zeal and who need help in the complex, context-sensitive issues of drawing the line. Again, with particular reference to younger lawyers, judges may need only to point out the long-term harms of a particular course of conduct and the acceptability of

alternative models of lawyering. It is one thing to read about the dubious theoretical foundations of Type 1 lawyering in a law review article; it is rather another to hear them articulated in open court or in chambers by a sitting judge.

The judges' other constituents are litigants themselves, the lawyers' clients. In an increasing range of matters, judges are collectively taking the initiative to go over the heads of lawyers to speak directly to their clients, initially to protect the client from the lawyer, but now sometimes to protect the interests of both particular third parties and society more generally.[93] Clients are, after all, to determine within the law not only the ends their lawyers pursue, but also the means by which they pursue them.[94] As a moral matter, clients are entitled to hear from responsible public officials that some ends and means, though legally available, are too publicly damaging to be appropriately pursued by responsible citizens. It is a profound, if only implicit, insult to citizens' integrity to assume that, when informed of these harms, they will not conscientiously weigh interests of the public and other private parties against their own. More appropriately, judges should invite clients to accept responsibility as citizens for restraining the kinds of lawyerly excesses that are, for reasons we have identified, immune from effective public policing.

C. The Law Schools.

A recurrent theme in the professionalism crusade is the need for law schools to inculcate the virtues of professionalism. This call, however, not

[93] See Committee to Examine Lawyer Conduct in Matrimonial Actions, *Report to the Chief Judge of the State of New York* 6 (May 4, 1993) (recommending that New York courts provide matrimonial litigants with a "Statement of Client's Rights and Responsibilities").

[94] See Model Rule 1.2, Comment, Scope of Representation ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as...concern for third parties who might be adversely affected.").

only tends to overlook the variety of ways currently seen as reflecting conscientious though divergent views of lawyering, it also, and more fundamentally, tends to ignore a fundamental commitment of liberal education, neutrality toward the widest possible range of viewpoints. The point of liberal education is not to insist that any one set of outcomes or social orderings, even liberalism itself, is "right" or "good." Rather, its point is to foster critical examination of the premises and articulations of *all* systems, itself included, secure in the faith that, in a free marketplace of ideas, its own ideals will thrive.

There is, however, a way for legal educators, consistent with this tradition, to play a vital role in reviving and sustaining the values of the professionalism crusade. This role involves both the substance of what they teach and, perhaps more important, the methods by which they teach. With respect to substance, professors should, in fidelity to the tradition of liberal education, eschew insisting that the values of the current professionalism crusade or any particular vision of how to be a good person and a good lawyer is right or true, beyond dissection and critical examination.

In so doing, legal scholars have already revealed fundamental flaws in the laissez-faire Type 1 model, the glib acceptance of which by earlier generations of academics, and with them their students, may have contributed considerably to the present problems of frivolity and incivility. Without pronouncing what right and good ultimately are, they have shown how that system is unlikely to serve well those widely shared values, discovering truth and protecting individual autonomy, that purport to be its *raison d'être*.

Their work, however, should not be, and has not been, merely negative and critical. Rather, in the service of those values, they have identified in the American legal tradition alternative visions of lawyering, visions they have elaborated into alternative models of legal ethics. Students could be presented with those models throughout the curriculum, not just in mandatory professional responsibility courses.

Paradoxically, in declining to present any one way of lawyering as orthodox, and insisting that all models be submitted to impartial scrutiny as to both their aims and their success in serving those aims, the traditional

method of legal scholarship, like that of liberal scholarship generally, is not in fact displaying value neutrality. Rather, it is manifesting a deep-seated, though generally only implicit, commitment to core substantive values prized also by the professionalism crusade. In particular, it shows a commitment to civility, understood as a tolerance for opposing views and a preference for the least coercive means of resolving disputes, intellectual and otherwise.

Thus, when the professionalism crusade calls upon law professors to treat students with respect and courtesy, it is quite rightly calling them back to their own proper role. Conversely, by fulfilling that role, academic lawyers are indirectly inculcating professional values that transcend any particular articulation of the proper lawyerly role. The ultimate message of ethics, secular as well as religious, is not "This Way is Right" but rather "Follow me." Students need to see that the modes of lawyering more acceptable to the professionalism crusade are not just theoretically defensible, but also literally viable, ways that one can really live as a lawyer. An "ought"—even a non-categorical "ought"—implies a "can."

Here, however, legal academics encounter a problem. They can embody the virtues of civil scholarship, and they can apply those virtues to create theoretical justifications for the kind of lawyering the crusade prefers. They cannot, however, themselves put those models into practice. They cannot hold themselves and their colleagues up, even implicitly, as role models for their students, since the vast majority of their students will be practicing, not academic, lawyers.[95]

Literature can help here, particularly the well-wrought stories of the great masters, Dickens and Tolstoy, Faulkner and George Eliot.[96] But the verisimilitude of even the best fiction is still not the real thing. As my students rightly point out, Atticus Finch did not face Lexis fees and

[95] Anthony T. Kronman, "Foreword: Legal Scholarship and Moral Education." 90 YALE L. J. 955 (1981).

[96] Thomas Shaffer has long emphasized the importance of stories, true and fictitious, to training in legal ethics. See, e.g., Thomas L. Shaffer, *Faith and the Professions* 1-38 (1987). See also Robert Coles, "The Keen Eye of Charles

franchised legal clinics. Such stories work better as negative examples than as positive ones, to illustrate the danger or dullness, rather than the safety or excitement, of particular courses. They may forestall certain dangerous forms of living, particularly when students' own trajectories are in other directions. But it may take more to change directions or overcome hesitations, and among many students there is an almost fatalistic sense that they will have to become Type 1 lawyers or sacrifice their livelihoods.

True stories press as better proof against this inertia, but even true stories are not immune to tendentious editing, as students know from a steady diet of appellate opinions. And true stories about Brandeis and Story tend to have a rather hollow, Olympian ring to the mill run of law students. They realize, without the brilliance of Brandeis, that if such brilliance is a prerequisite to a rewarding career as a public spirited private practitioner, the way is effectively closed to them.

Mentoring programs, of the kind occasionally mentioned in the literature of the crusade, are an effort to bridge this gap with local attorneys and alumni, and some such relationships probably approximate the ideal: direct, personal friendship between law students and lawyers leading the kind of professional and personal life to which students can credibly aspire. But one may well doubt how often the ideal is realized. Screening for the appropriate kind of lawyers is tricky, and development of the kind of relationship required takes a great deal of time on the part of both the practitioner and the student. Too many mentoring programs, one suspects, begin and end in awkward lunches with courteous strangers.

We law professors can, however, offer a viable alternative by playing an intermediary role. On the one hand, in the normal course of our teaching and counselling of students, we have unparalleled opportunities to hear their concerns and gain their trust. On the other hand, in our scholarly and

Dickens." 34 HARVARD LAW SCHOOL BULLETIN 30, 31 (Summer/ Fall 1984) ("[T]he novels of Dickens, George Eliot, Tolstoy, Hardy, and Faulkner offer us a great moral resource, one whose presence belongs...in our professional schools.").

law reform work, as well as in our private lives, we have ample occasion to cultivate meaningful, substantive contact with practicing lawyers and sitting judges. Such contacts have long been used, quite appropriately and effectively, to help students find judicial clerkships and permanent jobs. Along very similar lines, they can be used to put students in contact with like-minded lawyers willing to discuss with them fundamental questions about the very nature of being a good person and a good lawyer. Short of that, we can tell our students about such lawyers, vouching for the virtue and authenticity of their lives on our own authority. We can hold them up as living and local examples, attesting to our good faith by putting ourselves at risk that they will let us down.

This last recommendation for law academics takes us to the need, widely recognized in the professionalism crusade, to build a community of conscientious law academics, judges, and practitioners. Here we must avoid two pitfalls: the expectation of universal voluntary membership and the limitation of membership by non-liberal criteria. On the one hand, in view of the conscientious differences of opinion about what ethical lawyering requires, promoters of such a community should not expect universal participation on a voluntary basis, much less try to compel adherence. On the other hand, to the extent that they mean for the program to promote the values of liberalism legalism at the root of the professionalism crusade, they must be careful not to restrict membership on extraneous grounds. In particular, they must avoid the country club atmosphere sometimes associated with traditional bar associations. It can only be a disservice to the cause of liberal legalism to suggest, even implicitly, that the values of civility and the rule of law either have their origins or reach their apotheosis in the culture of the English upper-class.[97] If you will indulge a measure of understatement, a rather different view of the matter prevailed among the founders of the American Republic, those who sought

[97] It is particularly to be hoped that the Inns of Court movement, which most nearly parallels the kind of community-building program needed to inculcate and promote liberal legalism, will foster more than a tweedy mix of formality and familiarity, condescension and obsequiousness. Given its implicit Anglophilia and explicit basis on the English model of legal education, these are not idle fears.

to vindicate the traditional rights of Englishmen as well as those who sought to advance the universal Rights of Man.

Conclusion

The present professionalism crusade is fundamentally flawed in both its content and its tone. Its content is reductionist, even simplistic; it assumes that there is one true way to be a good lawyer and a conscientious lawyer within the bounds of the law. From this assumption flows an intolerant tone and a tendency toward overweening ambition: The crusade seeks to become an established church, a creed to which all lawyers must adhere.

But these flaws, though fundamental, are not fatal. The crusade could readily redeem itself and is central message, the faith of liberal legalism, by renouncing its categorical and universalistic claims. That faith would, indeed, be better advanced by adopting a more tolerant and pluralistic approach. In particular, the crusade could accede to its own disestablishment in favor of voluntary associations of like-minded lawyers co-operating with conscientious judges and liberal educators. Putting the matter that way lets me conclude with a word that I have been yearning to use correctly since the third grade: Beware antidisestablishmentarianism.