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Introduction

What Good Are Lawyers?

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INTRODUCTION

What good are lawyers? It depends, of course, on whom you ask. Most Americans are ambivalent: When they are in need of help, they call a lawyer – and when they do, they are, more often than not, happy with the services that their lawyers provide.¹ Nonetheless, Americans generally hold lawyers as a group in low repute, suspecting that they are more concerned with collecting fees than serving the public good.²

This public cynicism reflects a fundamental paradox at the heart of the legal profession. The very notion that lawyers are members of a “profession” suggests a delicate balance of incentives and duties that pull in different directions. In the United States (as in most countries), lawyers are freely engaged in the commercial enterprise of rendering services for a fee. They are permitted – and indeed encouraged – to make money, often lots of it,³ within the boundaries of broad rules, such as those limiting overly aggressive (or misleading) solicitation and advertising.⁴ As professionals, they are accorded wide discretion to define their own standards for admission and rules of conduct in order to promote craft expertise and quality service. In exchange for this privilege, lawyers are expected to embrace a set of public values – a code of “professionalism” defined by a commitment to competence, independence, and public service – distinguishing them from “mere” commercial actors. They are asked, in short, to be “public citizens” with a special obligation to promote the “administration of justice.”⁵ This dual status – in the market, but above it; diligent servants of clients, but also special guardians of the “public interest” – raises our

¹ LEO J. SHAPIRO & ASSOCIATES, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 19 (Am. Bar Ass’n 2002), available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>.

² *Id.* at 7.

³ In 2009, the average profit per partner at the Am Law 100 firms was \$1.26 million.

⁴ See MODEL RULES OF PROF’L CONDUCT R. 7.2, 7.3.

⁵ MODEL RULES OF PROF’L CONDUCT, PREAMBLE: A LAWYER’S RESPONSIBILITIES.

expectations of lawyer conduct. And it inevitably causes disappointment when our expectations are not met.⁶

Over the past half-century, scholars have struggled with the fundamental professional paradox and the disappointment that it has produced. A core debate within this literature focuses on which facet of legal practice – the public-regarding or the self-interested, the political or the commercial – constitutes the central aim of the professional project.⁷ Put simply, is the professional project a political one – defined by the protection and extension of fundamental rights and equality under law – or is it instead a commercial one – determined by lawyers' material interest in maximizing the return on their services? Do lawyers stand for justice? Or are they an impediment to its full realization?

The answers to these questions are more complex than such simple dichotomies suggest. What we know is that different lawyers, at different times, in different places stand for different projects. This is true both within countries and across them. No one would mistake the central project of contemporary American lawyers with that of their Pakistani counterparts, many of whom so prominently took to the streets and risked their lives in 2007 to protest General Musharraf's disregard for judicial independence. Professional projects, therefore, vary based on political and economic conditions, and change over time: It matters whether lawyers operate in a less developed authoritarian state or in a highly developed liberal democratic one, whether they are part of a political epoch powered by the struggle for new democratic possibilities or mired in affluent complacency. Projects, like the profession itself, are also internally differentiated. Whereas we may speak of a plurality of legal professions, we may also identify a plurality of competing projects – some oriented toward more money and power, others toward more equality and empowerment. This does not mean that there are no commonalities or structural trends. Nor does it suggest the absence of a central professional logic operating under certain conditions – such as an advanced capitalist economy conjoined with a liberal democratic state. To the contrary, our recognition of competing projects implies that there are winners and losers, and that we may ultimately tally score.

It may also be the case that the *same* lawyers simultaneously pursue different – and perhaps – competing projects. For instance, their actions may both enhance civil and political rights while undercutting economic and social ones; they may both promote access to justice through pro bono service while undermining it through practice restrictions. This duality also leaves open the possibility that individual lawyers may *believe* that they are advancing the cause of justice, when other observers would argue that they in fact are thwarting it. This disagreement could be a result of

⁶ See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 1 (1998).

⁷ RICHARD L. ABEL, *AMERICAN LAWYERS* 20 (1989).

contested normative views – a liberal lawyer’s project clashes with her conservative counterpart’s. It could also be a product of false consciousness on the part of lawyers, whose subjective beliefs about the social value of their professional contributions could be falsified by objective measurement.

This book is about the role of lawyers in constructing a just society. Its central objective is to provide a deeper understanding of the relationship between lawyers’ commercial aims and public aspirations. Toward this end, it presents original theoretical and empirical research by some of the world’s leading scholars of the legal profession addressing the field’s fundamental question: whether lawyers can transcend self-interest to meaningfully contribute to systems of political accountability, ethical advocacy, and distributional fairness. Drawing on interdisciplinary and comparative perspectives, the book’s contributors offer evidence that although justice is possible, it is never complete. And in the ongoing struggle for justice, lawyers are complicated allies, often necessary – but never sufficient – for its achievement. As the essays demonstrate, lawyers take the most powerful stands for justice claims that are compatible with their collective interests, though episodically there are some who emerge as agents of transformative politics. Ultimately, how much – and what type of – justice prevails depends on how lawyers respond to, and reshape, the political and economic conditions in which they practice. The possibility of justice is diminished as lawyers pursue self-regulation in the service of power; it is enhanced when lawyers mobilize – in the political arena, workplace, and law school – to contest it.

PRACTICAL CONTEXT: PROFESSIONAL CRISIS AND THE POSSIBILITY OF JUSTICE

“You never want a serious crisis go to waste.”⁸ As political pundits know, crises are useful because they can convey messages – in simple, powerful terms – that expose underlying vulnerabilities, highlight the urgency of reform, and mobilize outrage to effectuate change. Reformers of the U.S. legal profession have long followed this piece of political wisdom.⁹ Watergate helped spawn the American Bar Association (ABA) Model Rules of Professional Conduct and the modern system of professional ethics training in law school.¹⁰ Enron brought significant changes to the professional rules governing when lawyers can break corporate client confidences.¹¹

⁸ *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2 (quoting Rahm Emanuel, White House Chief of Staff).

⁹ Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809 (1998–1999).

¹⁰ See Carrie Hempel & Carroll Seron, *An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law* (in this volume).

¹¹ MODEL RULES OF PROF’L CONDUCT R. 1.13.

The idea for this volume came at a moment of “crisis” for the legal profession in the United States and many other countries around the world caused by the global financial meltdown of 2008. Crisis talk, of course, is as old as the profession itself, so one should not overstate the peril of the current moment or rush to proclaim the end of old paradigms.¹² However, crises should serve a purpose and not be allowed to quietly recede in the rush to return to business as usual. In particular, they should be evaluated not just for what they demonstrate about how systems respond to extreme shock, but for what they reveal about the underlying distortions and contradictions that allowed pressure to build and the shock to have such destabilizing consequences. In this spirit, I describe the evolution of the U.S. model of dispensing “equal justice,” not as a representative case, but a cautionary tale with important lessons about the impact of the professional project on the quantity and quality of legal services.

The 2008 recession posed a fundamental challenge to both the private and public interest sectors in the United States – and highlighted potential new synergies between them. The large law firm – the pinnacle of professional wealth and power – underwent a major restructuring characterized by partner terminations, salary reductions, and associate layoffs and deferrals. In the face of this upheaval, many large firms turned to temporary public interest placements as a way station for incoming or currently underemployed associates.¹³ Large firms also increased their pro bono contributions, in part as a way to train underutilized associates. Yet, despite this short-term infusion of resources, legal aid and public interest organizations struggled to respond to low-income and underserved community needs, which were exacerbated by the recession. Public interest groups confronted their own deep staff and infrastructure cuts caused by a decline in law firm donations, foundation grants, and federal and state funding. At this moment of crisis, the contours – and vulnerabilities – of the U.S. public interest law system were thrown into sharp relief: Dependent on the monetary and volunteer resources of the private bar, nonprofit public interest groups rode their wave of support in good times and braced against their retrenchment in bad. How did this come to pass?

The seeds of this dilemma were sown in the previous decades by important changes in the structure of the American legal profession that expanded the role of the private sector in the delivery of public interest law services – both legal aid and

¹² Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK L. REV. 549 (1996).

¹³ See Susan Dominus, *\$80,000 for Year Off from Law? She'll Take It!*, N.Y. TIMES, Apr. 13, 2009, at A1; Jonathan D. Glater, *The Lawyer Squeeze: Layoffs and Closings in a Field Thought to Resist Downturns*, N.Y. TIMES, Nov. 12, 2008, at B1; Karen Sloan, *Trying to Make Deferrals into Something Positive*, NAT'L L.J., Apr. 13, 2009, at 6.

cause-oriented. One trend has been the relative growth in private practice. In the United States – as in many other countries around the world¹⁴ – the number of lawyers has increased significantly since mid-century: more than fourfold, from 221,605 in 1951 to 1,066,328 in 2000,¹⁵ and then to 1,180,386 in 2008.¹⁶ This increase, which is more than double the rate of population growth, has rested on a fragile foundation. First, there has been an increase in entry to the profession. Law school enrollment – powered by the dramatic rise in the admission of women¹⁷ – has grown from slightly more than 17,000 in 1951 to roughly 43,500 in 2000; by 2008, enrollment was just less than 50,000.¹⁸ As student enrollment increased, so did tuition and, as a result, debt: increasing by 2005 to an average of over \$50,000 for graduates of public law schools and nearly \$80,000 for graduates of private ones.¹⁹ Saddled with more debt after graduation, greater numbers entered private practice, which grew relative to the nonprofit and government sphere. And within private practice, the large firm, powered by its tournament model of growth,²⁰ expanded in relation to other private practice sites – from housing 7 percent of private sector lawyers in 1980 to 28 percent in 2000.²¹

During this time, law firms have become larger and more profitable. In the late 1950s, there were thirty-eight law firms with over fifty lawyers.²² By 1990, over 600 firms had more than sixty lawyers and several had more than 1,000.²³ Not only did

¹⁴ See Marc Galanter, *More Lawyers than People: The Global Multiplication of Legal Professionals* (in this volume).

¹⁵ CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 1 (2004). The success of supply control in the first half of the twentieth century artificially constrained the number of lawyers per capita; as this control eroded in the second half of the century, it helped unleash dramatic growth. See ABEL, *supra* note 7, at 280 tbl. 22.

¹⁶ Am. Bar Ass'n, Lawyer Demographics, available at http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf.

¹⁷ CARSON, *supra* note 15, at 3.

¹⁸ BETTE H. SIKES, CLARA N. CARSON & PATRICIA GORAI, THE 1971 LAWYER STATISTICAL REPORT 20 (1972); Am. Bar Ass'n, Enrollment and Degrees Awarded, 1963–2008 Academic Years, available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>. On the other end of the career cycle, more lawyers are living and working longer, leading to the growth of lawyers 65 or older. Leigh Jones, *Law Firm Retirement Policies Expected to Be Hot Issue at Annual ABA Meeting*, NAT'L L.J., Aug. 7, 2007 (“By some estimates, a full quarter of the country’s 1 million attorneys – or 250,000 – will be at least 65 by 2011.”); see also Marc Galanter, “Old and in the Way”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081 (1999).

¹⁹ EQUAL JUSTICE WORKS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 3 (2006).

²⁰ MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1994).

²¹ CARSON, *supra* note 15, at 8.

²² See GALANTER & PALAY, *supra* note 20, at 46.

²³ See Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 629–30 (1994).

large firms grow in number, they also grew in size through mergers, satellite offices, and aggressive entry-level and lateral hiring.²⁴ In 1991, the average size of the Am Law 100 law firms was 375; by 2001, it was 621 and by 2008, 820.²⁵ As the big firms grew bigger, they also performed better, evident in increasing gross revenues and profits per partner.²⁶ Associate salaries also rose dramatically; in turn, billable hours increased.²⁷

As large firms grew larger and more influential, they also came to play a greater role in the public interest law system. Indeed, one of the most significant trends over the past two decades has been the rise of pro bono activity, powered by the institutionalization of large-firm pro bono programs.²⁸ At the large-firm level, recent research on Am Law 200 firms shows that the total pro bono hours produced by such firms increased by nearly 80 percent between 1998 and 2005, while the per-lawyer average increased by five hours.²⁹ Between 2005 and 2008, total pro bono hours increased nearly 50 percent and the average hours per attorney grew by ten hours.³⁰ Among large firms, economic performance is positively correlated with pro bono service.³¹ Firms that “do well” generally are better at “doing good.”

The rise of pro bono has resulted from interlocking trends. First, law firm growth itself laid the groundwork for an institutionalized structure of pro bono activity. As firms grew bigger and more bureaucratic, it became harder to maintain decentralized systems with lawyer-initiated volunteer work, in part because of the difficulties it posed for tracking cases.³² Such systems were ill-suited to prevent potential conflicts

²⁴ See Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 9 (1999).

²⁵ 2009 Am Law 200 Data (on file with author); 2002 Am Law 200 Data (on file with author); 1992 Am Law 200 Data (on file with author).

²⁶ Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 37 (2004).

²⁷ *Id.*

²⁸ *See id.*

²⁹ Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 145 & fig. 7.2 (Robert Granfield & Lynn Mather eds., 2009).

³⁰ Total hours increased from 3,768,510 to 5,567,231; average hours grew from 38.25 to 48.77. The average hour-per-lawyer figure includes those firms that are in the ranking but did not report data and therefore are included as reporting 0 hours. If the average is taken based only on firms that reported data, the increase is 12 hours, from 40.48 in 2005 to 52.73 in 2008. *Compare* 2009 Am Law Pro Bono Survey (on file with author), *with* 2006 Am Law Pro Bono Survey (on file with author).

³¹ *See* Boutcher, *supra* note 29, at 149; *see also* Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007). For other discussions of the relationship between profitability and pro bono contributions, *see* Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 82–83 (1994); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD 19, 44 tbl.2–3, 45 tbl.2–4, 46 (Robert A. Katzmann ed., 1995).

³² *See* Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1695 (2002) (suggesting that a “laissez faire” approach to pro bono activity works against substantial commitment).

of interest. As large firms became increasingly organized around departments, specialties, and functional roles, the institutionalization of formal, centralized pro bono programs seemed less of a leap.³³ Firm growth also created more revenue and “organizational slack,” which could be used to subsidize additional unpaid work.³⁴ Finally, increases in size, particularly at the bottom of the firm pyramid, created new challenges for professional development. Large numbers of associates required opportunities for training and significant responsibility. Pro bono work was a way to provide them.

The rise of organized pro bono was also linked to a rise in demand. Although direct historical comparisons are not possible, the available data point to growth in both the number and size of public interest law groups over the movement’s lifespan. In the mid-1970s, there were roughly 100 public interest law groups (excluding legal aid organizations) with approximately 6 attorneys per group;³⁵ in addition, there were over 850 legal aid offices with 3 attorneys per office.³⁶ According to Nielsen and Albiston’s most recent figures, the number of public interest law organizations, including legal aid groups, has surpassed 1,000, and the average number of lawyers per group has nearly doubled since 1974, from 7 to 13.³⁷ Based on the early data, a rough estimate of the total size of the public interest bar in the mid-1970s was 3,600; in contrast, projecting from the 2004 data places the total figure at 13,000. During this period, the proportion of public interest lawyers in the total lawyer population has remained relatively constant at about 1 percent.

As the public interest law sector has developed, it has confronted economic challenges that have heightened the importance of private sector alliances. In Rhode’s study of public interest law groups, almost all reported major challenges raising revenue, particularly for general operating expenses and litigation.³⁸ The strain on resources has created challenges in recruiting and retaining talented public interest lawyers whose salaries are low (at \$38,500, average entry-level salaries of public interest lawyers are the lowest of any practice setting according to the *After the JD*

³³ For a general overview of the transformation of large firms, see ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 172–80 (1988).

³⁴ Sandefur, *supra* note 31, at 93 (quoting RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 37 [1963]).

³⁵ NAN AARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* (1989) (reporting as of 1975).

³⁶ EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 188 (1978) (reporting as of 1972).

³⁷ Laura Beth Nielsen & Catherine Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006).

³⁸ Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2056–57 (2008).

research³⁹) and whose debt loads have increased.⁴⁰ In the face of economic constraints, public interest lawyers have relied heavily on pro bono support for their work. Rhode's study showed that about four-fifths of leading public interest groups reported extensive or moderate collaboration with the private bar.⁴¹

Constraints on federally funded legal aid have also contributed to greater demand for pro bono services. The erosion in legal aid for the poor has resulted from reductions in federal funding and restrictions on advocacy. By 1996, congressional authorization for legal services had fallen to a level 50 percent below its peak in 1980.⁴² That same year, Congress banned federally funded programs from engaging in a range of activities including litigation involving class actions, the representation of aliens, and recovery of court-awarded attorney's fees.⁴³ Legal services programs receiving federal subsidies were also prohibited from using nonfederal funds to engage in any of the banned activities.⁴⁴ Such limitations forced poverty lawyers to seek other revenue sources.⁴⁵ Despite successful efforts to diversify funding, the current civil legal aid system has remained chronically underfunded and, as a result, unable to adequately serve its client constituency.⁴⁶

³⁹ RONIT DINOVIETZ ET AL., AM. BAR. FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 43 (2004). Public interest salaries have declined in relation to law firm salaries. In the early 1970s, the ratio of private firm to public interest salaries was 1.5:1. In 2004, the ratio of private firm (more than 20 lawyers) to public interest salaries was roughly 3:1; the ratio of big firm (more than 250) to public interest salaries was 3.6:1. Compare Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 83 (Burton A. Weisbrod et al. eds., 1978), and DINOVIETZ ET AL., *supra*, at 43.

⁴⁰ EQUAL JUSTICE WORKS, *supra* note 19, at 1.

⁴¹ Rhode, *supra* note 38, at 2070.

⁴² See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1222 (2002). As of 2008, federal funding was nearly fifty-three percent below what it was in 1980 when adjusted for inflation. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 13 (2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf>.

⁴³ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a) (7), (11), (13), 110 Stat. 1321, 1321-53 to -55.

⁴⁴ See BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 7 (2000), available at http://brennan.cdn.net/3cbbcedd52806583b1_0sm6blo8g.pdf.

⁴⁵ Primary sources include grants from state and local governments, interest on lawyers' trust fund accounts, and private donors. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 4 (2003), available at www.clasp.org/admin/site/publications/files/0153.pdf; Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 908 (2009).

⁴⁶ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1-4 (2d ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>.

America's pro bono system has evolved against this backdrop. In 1981, the Legal Services Corporation required that its grantees make a "substantial amount" of funds available for private attorney involvement.⁴⁷ This requirement encouraged the expansion of programs designed to recruit, train, and connect pro bono volunteers with low-income clients. In 1980, about ninety such programs existed.⁴⁸ Today there are approximately 900.⁴⁹ Pro bono contributions to these programs constitute a significant part of the nation's civil legal aid structure, accounting for between one-quarter and one-third of overall legal aid services.⁵⁰ Large-firm lawyers play an increasingly prominent role in this pro bono system overall and provide crucial representation in matters that federally supported programs are barred from accepting.

The organized bar has actively promoted pro bono as a way to shore up gaps in legal aid and public interest representation, focusing special attention on large law firms. The ABA's Model Rule of Professional Conduct 6.1 provides that every lawyer "should aspire to render at least (50) hours of pro bono publico legal services per year," and that a "substantial majority" should assist "persons of limited means" or organizations that help them.⁵¹ Additional assistance should go to activities that improve the law, legal profession or legal system, or that support "civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations" if payment of fees would "significantly deplete the organization's economic resources or would be otherwise inappropriate."⁵² By giving preference to low-income and other underserved clients, the Rule seeks to channel pro bono work toward those who need help most. To encourage compliance with this aspirational standard, the organized bar has relied most heavily on recruitment and recognition initiatives. Professional initiatives have interacted with powerful market-based incentives for public service, particularly law firm rankings by major legal publications. In particular, *The American Lawyer's* 1994 decision to begin publicly ranking firms based on the depth and breadth of their pro bono performance

⁴⁷ LEGAL SERVS. CORP., ADOPTION OF PRINCIPLES ON PRIVATE BAR INVOLVEMENT (1981). Under the program, Legal Services Corporation grantees are required to use 12.5% of their federal funds to support private attorney involvement. 45 C.F.R. § 1614.2 (2009).

⁴⁸ See MEREDITH MCBURNEY, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (2003); see also Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 31, at 59, 75 (putting the number of pro bono programs at about fifty).

⁴⁹ The American Bar Association's current directory of pro bono programs lists approximately 900 groups; there are 96 in California and 66 in New York. American Bar Association, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, Directory of Pro Bono Programs, <http://www.abanet.org/legalservices/probono/directory.html> (last visited Oct. 12, 2010).

⁵⁰ Sandefur, *supra* note 31, at 102.

⁵¹ MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

⁵² *Id.*

dramatically altered firm behavior and contributed to a rise in organized pro bono programs at law firms and an increase in pro bono hours.

The rise of pro bono programs at large firms has not just contributed to a more “market-reliant” system of legal services delivery in the United States;⁵³ it has also reframed the professional project by underscoring new linkages between private lawyers’ commercial and professional aims. A recent study I conducted with Deborah Rhode on the challenges faced by large-firm pro bono programs in the economic recession illuminated these connections.⁵⁴ In the face of the worst economic downturn since the Great Depression, law firms initiated a wave of deferrals, furloughs, and layoffs. As part of this restructuring, in 2009 more than fifty Am Law 200 firms offered incoming associates subsidies of up to \$80,000 to spend a year working for nonprofits or government agencies.⁵⁵ The primary impetus for the placements was economic: Each deferred associate was estimated to save the firm up to \$100,000 because the firms’ costs in terms of salary and support would exceed revenue at junior billing rates. The deferrals would allow firms to quickly restock their associate ranks once the recession passed, with placed associates returning to the firms with relevant skills acquired while working in the public interest. These placement programs therefore underscored the increasing overlap between commercial and professional projects.

In general, the pro bono counsel we surveyed saw temporary placements as opportunities to reinforce commitment to pro bono work and to build a constituency for its support within the firm.⁵⁶ They believed that a stint in public service could make associates “more likely to think of it as a natural part of their practice.” These lawyers could “at the very least be mentors to other lawyers here and . . . continue to do, as part of our pro bono program, the types of work they did during [their placement] year.” Counsel were eager to take advantage of the knowledge accumulated during the year away from the firm: “My hope is that I have all these [associates] with areas of expertise [who] will come back knowing what it is to be a [public interest] advocate, [and who will] . . . continue to have deeper connections with groups that they went to work with.” Other counsel hoped that the placements would influence associate attitudes concerning not only pro bono practice, but also professional life more broadly. At a minimum, the experience might “put to rest” the notion that “public interest lawyers are lazy and not effective.” It might also reduce “feelings of entitlement” and provide skills that would give associates a competitive career advantage.

⁵³ See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 29, at 95.

⁵⁴ Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

⁵⁵ Rachel Breitman, *Time Well Spent*, AM. LAW., July 2009, at 15, 15.

⁵⁶ Cummings & Rhode, *supra* note 54, at 2418.

Indeed, training was a key reason for the placements.⁵⁷ As surveyed counsel noted, providing placement opportunities for deferred associates enabled them to “continue to build their skills sets” while also meeting the urgent legal needs of vulnerable groups. One counsel summed it up this way: “The firm is pleased to be able to contribute to the public good through its attorneys involved in the placement program. The program also provides a way to develop attorney skill and manage firm resources.” Toward this end, placements were designed to cultivate targeted skill sets. For litigators, pro bono counsel would look for opportunities with “courtroom time. For transactional lawyers, we look for large nonprofits with sophisticated legal departments. Our firm is looking at the back end of this. Otherwise what is the benefit?”

Partly because of the firms’ economic motives, the placement programs generated some tensions, particularly when public interest organizations felt pressure to accept associates whose training, supervision, and administrative expenses would exceed what the groups could effectively supply.⁵⁸ The firms in our survey took different approaches to covering placement-related costs, with only one reporting that it was assuming “all costs associated with placed attorneys.” An additional tension related to the awkwardness of placing junior associates in nonprofit groups to be supervised by senior public interest lawyers whose salaries were less than the associates’ deferral stipend.

While the placement programs revealed some short-term economic benefits from pro bono volunteerism, they also underscored a deeper relationship between private interests and the public good. The institutionalization of pro bono programs has blurred the line between paid and unpaid work as the training, recruitment, and reputational functions of pro bono service are increasingly integrated into the economic framework of large law firms.⁵⁹

Nowhere is this more evident than in the growing linkages between large-firm pro bono and career development programs.⁶⁰ The formality of this linkage between pro bono and training varied, but its importance was clearly apparent in law firms. At the most formal end of the spectrum was a firm that had revamped its first- and second-year associate program to require a substantial pro bono commitment linked to skills development.⁶¹ To enhance its training function, the associate program was

⁵⁷ *Id.* at 2410.

⁵⁸ *Id.* at 2412–13.

⁵⁹ See Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 29, at 115 (referring to pro bono as a possible strategy of “demand creation” for law firms).

⁶⁰ See Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, 12 *SOCIOLOGY OF CRIME, LAW AND DEVIANCE* 145, 154–55 (2009).

⁶¹ Cummings & Rhode, *supra* note 54, at 2426–2427.

being restructured to run like a law school clinic, taught by pro bono counsel in conjunction with another firm lawyer whose background was in clinical teaching. Firm lawyers were selecting pro bono cases not only for their social impact but also for their pedagogical value in enhancing the “skills we want [associates] to get.” Less formally, other firms were using pro bono cases as training vehicles.⁶² One counsel in our study offered a typical description of this objective: “we match [pro bono cases] for three purposes: first, to provide as much free legal services as possible; second, so that lawyers’ interests match; and third, to match lawyers’ professional development goals. . . . I want to maximize interest in developing skills and align it with pro bono work.” The economic crisis had prompted a number of firms to forge closer links between pro bono and training, which some counsel saw as a “long-term positive impact. The synergies between pro bono and professional development have been strengthened. The pressures from business clients not to pay for first- and second-year associates may help in making pro bono more attractive as a training vehicle.” The incentive to mesh pro bono work with training goals was particularly noticeable in firms that had taken associates off lock-step compensation tracks. In the new model, pay reflects the acquisition of core competencies that can be achieved through pro bono cases.⁶³

But training concerns were more pervasive, as was clear in the importance pro bono counsel ascribed to various factors in defining the objectives of pro bono programs and making case selection decisions.⁶⁴ For counsel who run pro bono programs, the primary stated objective is what the term implies: serving the public by assisting underrepresented groups. Making a social impact is also highly valued. Yet the programs also had major pragmatic goals. The most important was training associates, but aiding recruitment and retention, and enhancing reputation and rankings, were also significant. Similarly, for most firms, key factors guiding case selection are opportunities for training and appeal to associates.⁶⁵

A less prominent, although still significant, objective of some firms was to link pro bono activity to fee generation. Our study found that some firms do collect fees when they are awarded by courts in pro bono cases.⁶⁶ And although most donate fees to nonprofit partner organizations, it is not uncommon for firms to keep a portion of fees to cover costs, fund ongoing pro bono program activities, or to pay for part of the attorneys’ time. Although most firms did not think of pro bono in terms of profit potential, there were some that did.⁶⁷ One reported that it was launching

⁶² *Id.* at 2427.

⁶³ *Id.* at 2428.

⁶⁴ *Id.* at 2386.

⁶⁵ *Id.* at 2392.

⁶⁶ *Id.* at 2389.

⁶⁷ *Id.* at 2428–29.

a new transactional initiative designed to address “development issues primarily in the third world,” which also had fee-generating potential. As counsel noted, “There is a synergy between pro bono and paying work that can be better combined. So we can expand the reach of pro bono and capitalize . . . by reaching out to groups that could pay fees. . . . There was a recognition by partners, that you could potentially make money while doing good.”

This urge to unite profit and principle presents trade-offs that go to the heart of evaluating a system that relies heavily on market-based delivery. On the positive side of the ledger, private lawyers do a tremendous service representing poor clients in routine matters and lending their institutional resources to support the reform agendas of public interest groups. Their volunteer work ranges from the mundane to the transformative. But the central dilemma of pro bono remains. A system that depends on private lawyers is ultimately beholden to their economic interests. This means that private lawyers will avoid categories of cases that threaten relationships with paying clients. For example, half of the firms in our study indicated that they would not accept pro bono employment and labor cases because of the potential for real or positional conflicts. The importance of economic considerations also means that firms will take on pro bono cases for reasons that are disconnected from the interests of the poor and underserved – and often contrary to them. This is most apparent in the use of pro bono for law firm associate training. Associates who gain skills in the volunteer context may spend time using them to advocate *against* the interests served through pro bono representation.

There are other drawbacks. Pro bono lawyers do not typically invest heavily in gaining substantive expertise, getting to know the broader public interest field, or understanding the long-range goals of client groups. The partiality and narrowness of pro bono representation is striking, particularly in contrast to the way big-firm lawyers seek to understand and advance the goals of their client community. And the disparity in resources devoted to billable versus pro bono work – which, even at the most generous firm, rarely constitutes more than 5 percent of total hours – underscores the vast, persisting inequality in legal services. Indeed, there are no parallel resources available to press the interests of marginalized social groups, who are left to depend heavily on volunteer efforts to respond to their needs – a fact that distinguishes them from their adversaries, who spend lavishly to purchase the best legal counsel money can buy.

As the U.S. example suggests, the clash – and combination – of professional ideals and commercial aims produces a framework for legal services delivery, dependent on large-firm pro bono services, that represents a particular version of justice – one that expands resources for services while constraining their nature. Hence, a central paradox of professionalism: To the extent that lawyers assimilate their political project (doing good) to their commercial one (doing well),

commercial ends define the limits of what legal means can achieve. The relationship between lawyers' political and commercial projects – and which ultimately gains ascendance – therefore has profound consequences for the quantity and quality of justice served.

THEORETICAL FRAMEWORK: WHICH PROFESSIONAL PROJECTS?

In analyzing the clash of professional projects, this volume intervenes in the rich professional and scholarly literature on lawyers. There are two main discussions. One is normative: It asserts that lawyers should be guided by a set of high ethical standards, laments the decline of these standards in the face of increasing commercialism, and offers proposals to “rekindle” the spirit of professionalism.⁶⁸ In this story, there are iconic lawyers – Brandeis, Story, Acheson – whose practice embodied a “lawyer-statesman” ideal of professionalism that rejected “hired-gun” neutrality in favor of independent judgment and public service.⁶⁹ The increasingly cut-throat nature of commercial practice promoted individualism and competitiveness – “eat what you kill”⁷⁰ – that eroded the institutional foundations of this ideal and pushed lawyers toward partisanship rather than public spiritedness, which must be reclaimed.

The other discussion about lawyers is essentially empirical: Rather than approaching professionalism as a theory to be defended, this literature takes professionalism as a set of ideas and practices to be studied. It therefore asks: How do lawyers understand and enact their professional duties in the context of their daily work lives? How should we judge their individual contributions to clients and their collective contributions to society? This empirical perspective still speaks to the desire to hold lawyers to higher standards – measuring the gap between professionalism in theory and professionalism in action may inform proposals for reform – yet the primary focus is on explaining why lawyers' behave as they do in the real world of practice and evaluating their social impact.

A core debate within this empirical domain centers on whether lawyers are, as a functional matter, a force for “justice” – or its foil. Of course, “justice” is, despite its frequent invocation by the bar, a fraught concept. I use it here to refer to two ideas identified in the literature. The first is a macrolevel conception of institutional justice associated with basic rule of law values: individual rights

⁶⁸ See, e.g., AM. BAR ASS'N, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), available at http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf.

⁶⁹ See ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

⁷⁰ MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2005).

enforcement – encompassing both private (contract and property) and public (civil and political) rights, and requiring judicial independence and access to the legal process – as well as political accountability – associated with multiparty democracy, checks and balances, and robust civil society. Within this conception, it is essential that lawyers take a stand for public rights, provide equal access to justice, and serve as checks on political and economic power. The second conception of justice is a microlevel one associated with traditional notions of professionalism within the lawyer-client relationship. Justice in the context of particular matters requires representation by a lawyer who is zealous, competent, and ethical, but also willing to exercise independent judgment to ensure substantively fair and accurate decisions. As “public citizens,” lawyers are asked to stand for these values. Do they?

Early sociologists of the profession presumed the answer to be yes. Lawyers, in a view generally traced back to de Tocqueville and expressed in Parson’s structural functionalism, occupied an elevated social status as guardians of democratic values – a stabilizing force that modulates the passions of the masses while checking abuses of power.⁷¹ Lawyers were accorded autonomy from the state precisely in order to prevent them from being captured by it. It was presumed that their commitment to craft would provide sufficient incentives to police and maintain internal standards of ethicality and expertise.

Yet, in the United States, this benevolent conception of lawyers has long stumbled upon uncomfortable facts: Too often, lawyers have been exposed as agents of abuse rather than champions of justice; manipulators of technicalities rather than promoters of values. Inspiring examples of lawyering for the good are matched by dispiriting stories of lawyering for the bad. The lawyers for Enron, hired to provide a thorough legal evaluation of the company in the face of concerns about “accounting scandals,” famously limited the scope of their investigation to avoid “second-guessing the accounting advice” – placing its legal stamp of approval on the company just before its implosion.⁷² Lawyers in the Bush Administration’s Office of Legal Counsel, charged with giving independent legal advice to the White House, opined – in a striking display of interpretive license – that torture was not technically torture if an interrogator did not specifically intend to cause “severe pain or suffering,” although he knew that it “was reasonably likely to result from his actions.”⁷³

⁷¹ See Robert W. Gordon, *Are Lawyers Friends of Democracy?* (in this volume).

⁷² Dan Ackman, *Enron’s Lawyers: Eyes Wide Shut?*, Forbes.com (Jan. 28, 2002), <http://www.forbes.com/2002/01/28/0128veenron.html>.

⁷³ Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President 3–4 (Aug. 1, 2002).

Even outside individual occasions of misbehavior, broad structural problems persist: Those most in need of help often experience the market for professional services as itself abusive – or at least profoundly unfair. The “justice gap” in the United States is well documented: With one lawyer for every 6,415 poor people, “over four-fifths of the individual legal needs of low-income individuals remain unmet.”⁷⁴ The scarcity of legal services on behalf of the poor contrasts with the deep investments in legal expertise by the powerful and contributes to unequal outcomes.⁷⁵ To make matters worse, even when lawyers are available, they do not always act with appropriate care,⁷⁶ leaving many vulnerable clients worse off: their legal problem unresolved, yet stuck with the lawyer’s bill. What explains this divergence between the ideals of professionalism and the reality?

In the 1980s, Richard Abel set out to answer this question, launching a scholarly project stunning in its ambition, scope, and empirical rigor – one which would fundamentally transform our understanding of lawyers and their social role.⁷⁷ Abel’s theoretical starting point was Weber, who posited that service providers become a “profession” through a project of “social closure” that involves both limiting competition (“market control”) and enhancing status (“collective social mobility”).⁷⁸ Beginning with a review of sociologist Magali Sarfatti Larson’s classic, *The Rise of Professionalism*,⁷⁹ Abel embarked upon a decade-long effort to determine whether social closure could explain the development of legal professions in the United States, England and Wales, and a range of other common and civil law countries. His method was empirically grounded social science, which Abel used to marshal and analyze an enormous amount of data to shed light on the theory’s validity, focusing specifically on how successful the bar had been in controlling entry to the profession (“the production of producers”) and controlling competition within the profession (“production by producers”).⁸⁰ The result was at once brilliant and

⁷⁴ Rhode, *supra* note 45, at 879.

⁷⁵ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

⁷⁶ See RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008); Lynn Mather, *How and Why Do Lawyers Misbehave? Lawyers, Discipline, and Collegial Control* (in this volume); Deborah L. Rhode, *Professional Regulation and Public Service: An Unfinished Agenda* (in this volume).

⁷⁷ Abel’s seminal works during this period, include ABEL, *AMERICAN LAWYERS*, *supra* note 7; RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1987); *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988); *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988); *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (Richard L. Abel & Philip S.C. Lewis eds., 1989).

⁷⁸ ABEL, *supra* note 7, at 20.

⁷⁹ MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

⁸⁰ ABEL, *supra* note 7, at 27.

subversive: an astoundingly comprehensive portrait of how lawyers' private quest for economic and social status undermined their public commitment to service in the public good.

Abel's body of work from this period constituted an emphatic repudiation of the prevailing prosocial functionalist account of legal professionalism. Rather than viewing lawyers as motivated by public-regarding values adopted through training and professional assimilation, Abel argued that lawyers were engaged in a collective project to assert control over the market for their services and thereby enhance their wealth and status. In this account, the quest for economic gain was not opposed to, but rather formed the essence of, the professional project. This project – advanced by the organized bar – focused on efforts to extract monopoly rents by reducing the supply of lawyers and limiting competition, while simultaneously promoting a benevolent public image that abjured profit and embraced public service.⁸¹ Abel's account of the professional project in the United States concluded that the organized bar achieved partial success at a substantial cost: The achievement of imperfect market control carried with it profound inequalities in the distribution of legal services and deep stratification within the bar.⁸² He reached similar conclusions about the professional project across the span of other countries he and his collaborators studied.⁸³

There have been a number of important responses to Abel's theory, all of which question the weight he gives to the economic motivations of lawyers in explaining the trajectory of professional developments.⁸⁴ Here, I focus on three responses that dispute the priority Abel gives to market control in order to recapture some theoretical space for professionalism as a public good.

The first directly challenges the theoretical power of social closure by positing that the professional project be understood in political rather than market terms: Instead of viewing lawyers as collectively oriented toward market control, we should instead

⁸¹ Richard L. Abel, *Lawyers in the Civil Law World*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD*, *supra* note 77, at 1, 9.

⁸² ABEL, *supra* note 7.

⁸³ See, e.g., *LAWYERS IN SOCIETY: THE COMMON LAW WORLD*, *supra* note 77.

⁸⁴ One type of response, exemplified by Kritzer's review of Abel's work, questions the "fit" between Abel's theoretical framework and his empirical evidence. See Herbert M. Kritzer, *Abel and the Professional Project: The Institutional Analysis of the Legal Profession*, 16 *LAW & SOCIAL INQUIRY* 529 (1991). Specifically, Kritzer suggested that the evidence – particularly that which showed the breakdown of market control in the United States and England after the 1960s – better supported an alternative theory of professionalism: what he termed "institutionalization," characterized by the development of "standard, universalistic procedures to govern recruitment and entry." *Id.* at 547. Kritzer notes the overlap between market control and institutionalization in the definition of boundaries between practitioners and nonpractitioners (the production of producers); yet he disagrees with Abel's assessment of why market control broke down (Kritzer sees an institutional logic where Abel sees external factors at play in trends like increased law school enrollment).

understand them as political actors engaged in the pursuit of fundamental values associated with the liberal state.⁸⁵ This perspective rehabilitates the public-regarding conception of professionalism, though on different grounds from the structural-functionalists: Lawyers do not embody democratic values, but they frequently fight for them. And, indeed, there is strong evidence, assembled by Halliday, Karpik, and Feeley, that lawyers have in fact often been in the vanguard of movements to both establish and expand basic legal freedoms and other features of political liberalism.⁸⁶ Abel does not disagree with this proposition and, indeed, has offered a powerful portrait of lawyers' quest for political liberalism in his comprehensive account of the role of South African human rights lawyers in the struggle against apartheid.⁸⁷

The second main challenge to Abel's theory does not propose a unified alternative to market control, but rather suggests that the very notion of a coherent professional project is a chimera. Instead of professional unity, Nelson and Trubek argue that the profession itself is differentiated, "professionalism" is fractured and contested, and therefore to understand its meaning and practice, it is necessary to attend to lawyers' ideology in addition to the exogenous political and economic structures within which they work.⁸⁸ This emphasis on the relationship between external structure and lawyer agency, understood through the lens of ideology, represents another effort to redeem professionalism as a meaningful instrument of social justice. Whereas this perspective acknowledges that the rhetoric of professionalism – expertise, autonomy, and service – can be used to legitimate the inequities produced by market control, it argues that professionalism is not *just* legitimation. Rather, it is a set of competing ideas and norms, which may justify commercialism but may also point out ways to transcend it. This interpretive framework has led to a proliferation of "bottom-up" studies that focus on the construction of professional ideology across various professional arenas and practice sites, the factors that shape it, and the ways in which it may be mobilized to promote ethical and public-spirited lawyering.⁸⁹

⁸⁵ TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* (1987).

⁸⁶ See *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley eds., 2007); see also *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES* (Terence C. Halliday & Lucien Karpik eds., 1997).

⁸⁷ RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW AND THE STRUGGLE AGAINST APARTHEID, 1980–1994* (1995).

⁸⁸ Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 18 (Robert L. Nelson, David M. Trubek & Raymond Solomon eds., 1992). For the classic account of the differentiated nature of the profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1994).

⁸⁹ Abel examines the contest over the meaning of professionalism by various sectors of the English bar in RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* (2003).

A third response to Abel's professional project builds on the interpretive approach, but focuses on one slice of legal practice: cause lawyering. In his analysis of market control, Abel had asked whether U.S. legal aid and public interest law programs could be understood as strategies of "demand creation" – generating new business, promoting the profession's pledge of altruism, and reaffirming "a fundamental premise of liberal legalism – 'equal justice under law'?"⁹⁰ Although he concluded that such strategies were ultimately insufficient generators of new demand,⁹¹ by locating legal aid and public interest law within the professional project, Abel suggested that they might serve a market control function. Sarat and Scheingold's cause lawyering framework, in contrast, reasserts the connection between lawyers in those fields to the profession's public role.⁹² In doing so, they define cause lawyering not against profit-seeking practice, but rather against conventional professionalism – the so-called "ideology of advocacy" in which lawyers serve as amoral "hired guns" for their clients.⁹³ "At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service – be those ideals social, cultural, political, economic or, indeed, legal."⁹⁴ However, in challenging conventional ideology, Sarat and Scheingold argue that cause lawyers simultaneously help promote its public service aspirations by "asserting the political claims of professional authority."⁹⁵

Each of these responses to Abel's emphasis on social closure has its own limits and lacunae, and none ultimately supplants it as an explanatory framework, but rather only reveals it as a partial lens. For instance, the pursuit of political liberalism is not incompatible with the quest for market control, and indeed, there are features of both projects that may be complementary. Specifically, to the extent that political liberalism embraces an individual-rights enforcement regime coextensive with free-market capitalism,⁹⁶ we might expect the legal complex to mobilize to expand basic legal freedoms in the political arena (including freedom of contract and property rights) while simultaneously seeking to limit competition by asserting restrictions on their services in the marketplace. It is therefore possible (and in some countries even likely) that the legal profession would be at once profoundly supportive of political liberalism while fiercely protective of their own economic prerogatives.

⁹⁰ ABEL, *supra* note 7, at 127.

⁹¹ *Id.* at 132–35.

⁹² STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 28 (2004); *see also* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 3 (Austin Sarat & Stuart Scheingold eds., 1998).

⁹³ SCHEINGOLD & SARAT, *supra* note 92, at 3–7.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 47.

⁹⁶ *See* David M. Trubek, *The 'Rule of Law' in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 74 (David M. Trubek & Alvaro Santos eds., 2006).

The question then becomes how one assesses the consequences of each project in terms of different metrics of justice, such as rights enforcement and access to the legal process.

The limit of the interpretive approach to professionalism is that it exposes the multiple practices of professionalism from the bottom up but does not reach back to the general level to offer an overarching appraisal of their aggregate consequences. Indeed, the fragmentary and contested meanings of professionalism across smaller arenas of practice may nonetheless still sum to a larger picture of market control. To the degree that lawyers operate in a private market, in which outcomes are determined through competition, we can expect that wealth and status will be important factors within most arenas. Competition will invariably pit some groups of lawyers against others and it will generate conflict between lawyers and non-lawyers over the boundaries of legal services. Within market-based systems, there will be winners and losers; not all lawyers will benefit from any collective mobility project. Indeed, some will suffer – at times deliberately so (as we have seen in the United States with the restrictions on barratry and champerty designed to disadvantage nonelite, often immigrant, practitioners).⁹⁷ And there will be lawyers who actively resist a market-oriented vision. In the end, however, we may still find that these various projects settle into an overall pattern of professional organization and distribution of services that are at odds with the very public values that lawyers purport to embrace.

Focusing on cause lawyers' challenge to conventional professional ideology – whether they have “something to believe in” – is also a limited way of reframing the professional project. Defining a cause lawyer by her “political or moral commitment” raises questions about who *is not* a cause lawyer. What about the corporate lawyer who believes that her work defending against employee lawsuits reduces corporate costs and benefits consumers? Or the takeover specialist who believes his work promotes economic efficiency? Can one be a cause lawyer irrespective of whether the cause is in service of the economically powerful or the politically fringe? If so, cause lawyering would seem to be the exception that threatens to swallow the rule. Far from reconnecting legal practice to public values, cause lawyering in the service of corporate capitalism might actually subvert them.

Our approach in this volume seeks to bridge the competing conceptions of the professional project – commercial versus political; top-down versus bottom-up – by recognizing the multiplicity of projects while nonetheless trying to sort out which matter the most in appraising whether justice has been served at different times and

⁹⁷ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). Also, the exclusion of women and racial and ethnoreligious minorities was a deliberate part of the status enhancement component of the professional project. See ABEL, *supra* note 7, at 85–108.

in different locations. Toward this end, it rejects the standard binary formulation of the professional project – are lawyers a force for good or ill writ large? – and instead asks: Under *what conditions* do *which lawyers* advance *which projects*? And what are the consequences for social justice?

OVERVIEW OF THE BOOK

To understand the construction and contest of professional projects, this book is organized around the relationship of lawyers to three different types of justice claims, which correspond to the theoretical responses to Abel's theory of social closure presented above. The first is a claim to the *public good* understood in terms of the basic system of rules (on the books and in action) governing political and economic life. Within this domain, the key questions are, in the political arena, the degree to which lawyers act collectively and individually as guardians of the rule of law and, in the market, the extent to which they stand for and make possible equal access to justice. The second justice claim relates to the notion of *ethical practice*. Here, we ask how the quality of legal representation provided affects the quality of justice served. The questions revolve around the appropriate nature and extent of professional regulation in the production of zealous, competent, and ethical lawyers who are guided by fealty to client welfare but also a commitment to a broader set of professional values. The final claim is one of *transformative justice*. Which lawyers challenge the status quo in the service of a transformative vision of political change? What causes them to embrace radical possibilities and move beyond procedural fairness to envision the fair distribution of other types of social goods, often expressed in the concept of economic and social rights?⁹⁸

Lawyers and the Public Good

The chapters in Part I, *Lawyers and the Public Good: The Fundamental Dilemma*, examine the basic contest between the public and market-oriented versions of the professional project. Robert Gordon begins with a sweeping historical assessment of the role of American lawyers in the development of democratic institutions. He concludes that the performance of American lawyers has varied across different epochs. "In their roles as Revolutionary spokesmen and Constitution-makers they have been among the world's most eloquent and effective architects of the institutions of rights-based democratic government. . . . As zealous servants of wealthy and

⁹⁸ See Lucie E. White, *African Youth Mobilize against Garbage: Economic and Social Rights Advocacy and the Practice of Democracy* (in this volume).

powerful clienteles, however, they have also effectively staffed the causes of conservative resistance to, or rollback of, access to equal justice and political power for workers, minorities, and other marginalized groups.”

Terence Halliday turns us away from the American case to provide a comparative perspective on the professional project. Building upon his work on the legal complex, Halliday echoes the positive part of Gordon’s story, arguing that around the world, lawyers can “often be found leading the charge toward a new kind of politics – the pursuit of political liberalism.” Yet lawyers do not work alone. Indeed, as Halliday demonstrates, they often draw support and work in collaboration with religious groups. His chapter maps the nature of this conjuncture. Drawing on evidence of legal mobilization by lawyers in Asia, Latin America, and Africa, Halliday identifies the conditions under which religious groups stand for political liberalism and, alternatively, when the legal complex stands for religion. He concludes by suggesting the ways in which “religious groups mobilize in tandem with the legal complex on behalf of political liberalism” by lending their facilities as “reserve infrastructures” and “protected spaces for victims” and lawyers, monitoring abuse, restraining police, shaping rights’ consciousness, leading civil society, and mobilizing the public.

Marc Galanter turns our attention to the increasing number of lawyers and its implications for justice by studying the “worldwide multiplication of legal professionals.” He is concerned with “legalization” – reflected in the rapid growth of lawyers in countries around the world at rates much faster than the growth of courts and litigation. He concludes that this trend is related to the rise of “big time lawyering” – nonlitigation work for nonindividual clients, particularly “Artificial Persons – corporations, associations, and governments – rather than Natural Persons.” One consequence of this (echoing the negative part of Gordon’s story) is that “[l]awyers, especially in the growing corporate sector, are more loyal and committed to their clients and less to their firms or the guild: more ‘hired guns’ and less ‘officers of the court.’” The impact of the growth of lawyers on justice is thus uncertain: More lawyers are available, but they may be appropriated by the powerful rather than the dispossessed.

John Nockleby’s contribution to the debate about the relationship of lawyers to the public good is to focus our attention on lawyers for individuals – the antithesis of Galanter’s big-time lawyering – and ask whether the conditions of their practice promote greater access to justice. His subject is tort lawyers who play a crucial role in defining and defending the compensatory and regulatory functions of our tort system—acting as gatekeepers of justice. In theory, tort lawyers allow an injured party to seek redress. In practice, this is often true, but Nockleby’s analysis of the structure of litigation arrives at a troubling conclusion. Specifically, he notes that “the lawyer-as-gatekeeper affects the types of cases that are brought into

the tort system, and the choices about cases to accept determine what cases are heard. Cases that cannot attract the contingency lawyer will not be brought, and this central fact means that many people's access to justice is limited by factors other than justice." Thus, even lawyers committed to challenging the power of Artificial Persons face economic tradeoffs that affect the scope of justice they can provide.

These contributions help map out some of the background factors influencing the contest of professional projects. First, they suggest that the relationship between lawyers and the form of government – its structure and its stage of development – is a crucial factor influencing the extent to which lawyers orient their projects toward the political rather than the commercial. Lawyers may have more at stake in building emerging democratic states than in maintaining basic liberties in highly developed ones. In addition, the type of political economy might influence how successful lawyers are in their different pursuits. Thus, lawyers in authoritarian states may be less likely to serve as checks on political power; in liberal capitalist ones, they may be less likely to check economic power.

Second, how lawyers orient their projects will depend on the organization and structure of the market for their services. To the extent that more lawyers serve more powerful interests, the less likely it is that they would be, as a collective, willing to stand against those interests in the name of some broader conception of the public good. In particular, where lawyers serve powerful corporate clients that are repeat players on which lawyers depend for wealth and status, those lawyers are unlikely to take political positions that fundamentally threaten corporate interests.

Lawyers and Their Clients

Part II, *Lawyers and Their Clients: Determinants of Ethical Practice*, explores the context-specific and structural factors influencing ethical lawyering. Lynn Mather starts by asking "how and why do lawyers misbehave?" She argues that we should focus not just on individual flaws but also on structural concerns. Mather looks at evidence of how lawyers view the extent of ethical practice across different substantive areas and finds that there is significant variation, with "[s]ubstantially more lawyers practicing in the areas of energy, banking, securities, real property, employee benefits, and estates agree[ing]... that their peers in the field were highly ethical than did lawyers practicing in the areas of labor relations, criminal law, insurance, immigration, and civil rights/discrimination..." To understand why this hierarchy exists, she proposes a perspective that focuses on "the structure, organization, and content of legal work itself." In particular, she considers how informal sanctions exerted through "collegial control" that emerge from different communities of legal

practice interact with formal structures of lawyer discipline (such as professional liability and legal malpractice) to police lawyer misconduct.

Philip Lewis directs our attention to the microworld of the lawyer-client relationship, probing the external and endogenous factors that shape how lawyers implement professional values in practice. Drawing on studies conducted in a variety of practice settings, he argues that key features of the lawyer's role – the nature of expertise, the degree of control, and the relevance of other disciplines – are profoundly shaped by client influence and context. In so doing, he highlights the significant variation in professional values and identities across practice sites, and – like Mather – underscores the importance of informal controls and communities of practice in regulating lawyer conduct.

Deborah Rhode's chapter shifts the lens back to the macrolevel of formal professional regulation and asks what can be done – both within and outside the bar – to move it “toward more socially conscious policies.” She focuses on two projects: pro bono and professional discipline. With respect to pro bono, she urges firms to adopt a more strategic approach to guide their pro bono contributions, rather than the “spray and pray” approach that has historically characterized their efforts. She chides firms for putting their own professional interests over the public interest and shrinking from “oversight and accountability.” To move forward, she suggests the need for “more systematic processes for selecting and overseeing matters that take into account both participants' and public interests” and argues that “[c]ourts, bar associations, clients, academics, and the media can...do more to encourage and evaluate public service.” With respect to professional discipline, she urges more transparency in bar proceedings, which rarely result in public sanctions and thus provide little guidance for consumers of legal services who want to evaluate possible lawyers.

Carrie Hempel and Carroll Seron conclude the section by considering the potential of legal education to reshape professional values toward public ends. They focus on the experiment by the newly formed University of California at Irvine School of Law to create a law school that operationalizes a commitment to experiential learning and interdisciplinarity toward the end of promoting public service. They describe the law school's goal of moving clinical education and professional responsibility from the margins to the mainstream of the curriculum, detail how it has been implemented, and evaluate the challenges that remain. “By making the concept of practice central to UCI's mission, there is the expectation that students' preparation for careers in the law will be more integrated and comprehensive.” To do this, UCI has incorporated a Legal Profession course into its first-year curriculum; created an innovative first-year Lawyering Skills course that emphasizes broad skills such as interviewing, counseling, and negotiation; and required each student to take a clinical course. The challenge, as Hempel and Seron see it, lies in pursuing this mission

within a highly developed professional field in which prestige and reputation are the name of the game, and in this game, “those who teach professional responsibility and clinical courses can rarely win.”

Lawyers and Social Change

Part III, *Lawyers and Social Change: Mobilizing Law for Justice*, concludes the volume by analyzing how lawyers deploy law to produce social change. Penelope Andrews focuses on the iconic case of South Africa and asks whether the political and legal struggle to overturn apartheid has translated into real equality. She focuses specifically on the constitutional imperatives of promoting judicial independence and transforming the race and gender composition of the bench. She concludes that judicial independence has been advanced, seen in the role of courts in restraining state power, although courts have not yet lived up to their promise to reduce poverty and inequality. She is less sanguine about the effort to increase the representation of blacks and women on the bench, which “remains a central challenge.”

Ann Southworth, Anthony Paik, and John Heinz look at how lawyers try to impact politics from a different perspective – namely, how they construct advocacy networks that attempt to influence national-level policymaking. Through a study of organizations and advocates that took positions on a set of controversial policy issues in the United States, the authors explore the characteristics of the lawyers, the strategies they deployed, and the lines of conflict and collaboration. They find relationships between professional status and causes served: “lawyers for liberal activist groups had the most prestigious academic credentials, while those serving conservative religious organizations were much less likely to have such credentials.” They also found different patterns of collaboration. Their research “suggests that socially conservative advocates and organizations stand apart, not only from other conservatives but from the interconnected communities of lawyers and organizations that speak for most major players in national policymaking.”

The section concludes with two stories of cause lawyering. Frank Munger turns to social movements in Thailand and elegantly maps the careers and work of lawyers who confront the state. He contrasts the experiences of lawyers working in the women’s rights, environmental, and antipoverty movements, and asks how cause lawyering may promote “progress” outside the common law world – measured by increased “government accountability, respect for rights, and freedom to advocate change, consistent with a liberal interpretation of the ‘rule of law.’” Munger’s conclusions are clear-eyed yet optimistic. Although he acknowledges that “Thai cause lawyers continue to struggle to sustain their work,” he finds “signs of progress” in the “administrative courts . . . and the still-strong network of NGOs and lawyers created by the October generation.”

Lucie White offers an analysis of innovative lawyering for economic and social rights in Ghana. She focuses on a collaboration between community residents and lawyers (with the crucial help of law students) to reform health and sanitation systems in a very-low-income community called Nima. White describes in compelling terms the ravages of inadequate sewage treatment and the grassroots effort to challenge the “root causes” of community deprivation. She carefully reflects on the origins and execution of Nima’s “Right to Health Campaign,” which moved beyond traditional top-down strategies toward a “pragmatic multitactic program of human rights activism” that sought to transform sanitation practices while providing “a foundation for citizen participation in state-of-the-art welfare delivery institutions and systems over the long term.” White concludes with observations about the degree to which the campaign was successful in achieving its aims, while also reflecting on the challenges of promoting equitable participation opportunities across differently situated members of Nima’s community.

These contributions underscore important cause lawyering themes. In particular, they suggest that the most significant challenges to the status quo may come from those segments of the legal profession that are most marginalized from centers of power – and hence have the least to lose. This is of course not bound to always be the case because there will inevitably be lawyers who sacrifice their own standing in the name of advancing a cause. However, we would assume that a common pattern of challenge would be attacks on the center by those at the periphery. And we would also assume that those challenges are (precisely for this reason) frequently thwarted – or at least muted – and that the most successful challenges would be those that involve alliances between lawyers and other groups that, in the aggregate, are able to mount serious threats to the status quo.

This leads us to Richard Abel’s powerful and synthetic epilogue, in which he asks whether and under what conditions law can, in fact, promote justice. In answering this question, Abel seamlessly weaves together the volume’s three fundamental concerns: “the adequacy of the ‘professional project’ as a theory of the legal profession, the commitment of lawyers to the core notion of legality, and the possibility of equal justice in unequal societies.” With respect to the professional project, Abel remains a committed Weberian and offers support for why he continues “to find Larson’s theory of market control and status competition the most insightful and economical explanation for the continuing saga of common law legal professions.” Although Abel is critical of the organized bar’s pursuit of private self-interest and the barriers to justice that it creates, he is not ultimately dismissive of the possibility that justice may be achieved – at least sometimes. He therefore chooses to illuminate moments of possibility and honor the lawyers who seize them. While some lawyers thwart the rule of law, others rally to its defense. While some serve power, others dedicate themselves to challenging it. In the end, Abel eschews cynicism for

inspiration, proclaiming that while law may offer only partial justice, it is a justice worth fighting for: “Any defense of the rule of law is better than capitulation to executive autarchy. Lawyers deserve praise for devoting effort to promoting justice – not criticism for failing to do more. . . . Victories, even small ones, inspire further resistance, not resignation to the status quo. The struggle for justice never ends; but each chapter inspires future generations to persevere.”

Conclusion: An Unfinished Project

This volume is inspired by Abel’s insistence that lawyers can – and should – do better. It therefore asks not just what the professional project has wrought, but what new visions it might create. Can lawyers lead us to a more just and equal world? What are the pathways and mechanisms by which lawyers may promote justice in the contemporary political and economic context? In the end, this volume does not answer these questions, but rather probes the openings for a revitalized approach to fusing law and justice while attending to the ongoing economic constraints embedded in the structure of the profession. In so doing, the contributors chart the new terrain of the professional project, asking whether the current moment is part of the inexorable march of commercialization – or may illuminate a meaningful way out.