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]

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Finally, I would like to thank the members of the Florida Bar Commission on Lawyer Professionalism, with whom I served from 1987 to 1989, and the current members of its successor, the Florida Bar Committee on Professionalism, to whom I act as law school liaison. Though we have frequently found ourselves in disagreement, my appreciation for their work informs every page of this Article.

1. ROBERT BURNS, *The Solemn League and Covenant*, *in* POEMS AND SONGS OF ROBERT BURNS 361 (James Barke ed., 1955).

I. Introduction

In 1986 the American Bar Association (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 had been smoldering since the late 1960s.

2. ABA COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, *reprinted in* 112 F.R.D. 243 (1986) [hereinafter ABA BLUEPRINT].

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 crusade has spawned[4]—even sponsored[5]—serious academic conclaves devoted to the discussion of professionalism and has welcomed scholars into its own ranks,[6] though sometimes without fully appreciating their prior work.[7] From the academic cloister, the word 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

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3. *See, e.g.*, COMMISSION ON LAWYER PROFESSIONALISM, FLORIDA BAR, PROFESSIONALISM: A RECOMMITMENT OF THE BENCH, THE BAR, AND THE LAW SCHOOLS OF FLORIDA (1989) [hereinafter FLORIDA COMMISSION]; COMMITTEE ON CIVILITY, SEVENTH FEDERAL JUDICIAL CIRCUIT, FINAL REPORT, *reprinted in* 143 F.R.D. 441 (1992) [hereinafter CIVILITY COMMITTEE FINAL REPORT]; Special Comm. 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 COMMITTEE ON CIVILITY, INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 61-63 (1991) [hereinafter INTERIM REPORT]; Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 949 n.10 (1991); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 681 n.98 (1993); and *Growing Attention to Professionalism: Professionalism Reports*, PROF. LAW., Fall/Winter, 1989-90, at 12-13. For compilations of professionalism reports, see INTERIM REPORT, *supra*, at 63-64, and Clarke, *supra*, at 1012 n.320. The ABA's Center for Professional Responsibility maintains a running list of codes and reports. *See* Memorandum from the American Bar Association Center for Professional Responsibility to the *Texas Law Review* (Nov. 1995) (on file with the *Texas Law Review*) [hereinafter ABA Memo].

4. The Association of American Law Schools Section on Professional Responsibility made professionalism the theme of its 1988 annual meeting, which included a paper on professionslism by Eliot Freidson, an academic sociologist who served on the ABA's Commission on Professionalism. For a version of this paper, see Eliot Freidson, *Professionalism as Model and Ideology*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 215 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS]. For other examples of academic conclaves devoted to the discussion of professionalism, see *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1994); Essays, 41 EMORY L.J. 403 (1992); Symposium, *The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 333 (1994); and *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990's*, 28 VAL. U. L. REV. 513 (1989).

5. *See* Robert L. Nelson et al., *Preface* to LAWYERS' IDEALS, *supra* note 4, at ix-xi [hereinafter LAWYERS' IDEALS *Preface*] (describing the American Bar Foundation's sponsorship of a Conference on Professionalism in September 1988 to discuss the ABA Commission's *Blueprint* and the Foundation's support of the publication of the papers presented there in book form).

6. Thus, for example, Eliot Freidson, a professor of sociology and authority on professionalism, participated in the ABA Commission on Professionalism. *See* LAWYERS' IDEALS *Preface*, *supra* note 4, at xiii (listing Freidson as a contributor to the collection of articles taken from the Conference on Professionalism); ABA BLUEPRINT, *supra* note 2, at 307 (listing Freidson as "a lay member of the Commission").

7. *See* Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 775-77 (criticizing the ABA Commission's inattention to scholarly studies of professionalism).

ideals.[8] The academic conclaves have been widely ecumenical,[9] and even some former skeptics have become, if not apologists, at least respectful commentators.[10] There is widespread sympathy for the revival of interest in professional values, but not wholesale support for the particular forms the revival has taken. Perhaps most significantly, both sweeping endorsements[11] and thundering condemnations[12] of professionalism have begun to give way to detailed analyses and conciliatory efforts to come and reason together, if not always to enter full communion.[13]

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8. *See, e.g.*, Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 916 (1990) (proposing a revival of the "gatekeeping" function of private lawyers as part of a needed professional revival, but faulting the ABA Report for its "supply side" focus); Moore, *supra* note 7, at 773, 775-77 (criticizing the ABA Commission's inattention to scholarly studies of professionalism, but hailing its effort to call lawyers back to their moral obligations); 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"); Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 365, 365-66 (1993) (concluding that "the ABA should not debate the merits of ethics rules . . . in the rhetoric or 'idiom' of professionalism," but recognizing the value of that discourse in other contexts); Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 395-405, 409-10 (1990/91) (generally praising the ABA Report for its emphasis on virtue ethics, but faulting it severely for its suggestions on how virtue is to be taught); *see also* LAWYERS' IDEALS *Preface*, *supra* note 4, at x (noting that the Commission's Report "raised fundamental questions" about the relationships between professional ideals and practice); Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 432 (1992) (stating that the movement toward rethinking professionalism is a "healthy exercise").

9. Thus, for example, the American Bar Foundation's September 1988 Conference on Professionalism included speakers and other participants deeply skeptical of traditional professionalism rhetoric. *See* LAWYERS' IDEALS *Preface*, *supra* note 4, at x (listing speakers, panelists, and discussants); *id.* at xiii-xiv (listing biographical sketches of those presenting papers).

10. Prominent examples are Eliot Freidson and William Simon. As to the former, compare ELIOT FREIDSON, PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE (1970) and ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1986) (both criticizing professions for being self-serving) with Freidson, *supra* note 4, at 215 (outlining a defensible model of professionalism). As to the latter, compare William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 130-40 (preferring lawyerly advocacy based on nonprofessional, personal ethics to "adversary advocacy," which mistakenly relies on professional, institutionalized ethics in providing legal services) with Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS, *supra* note 4, at 230, 230-31 (reconsidering their earlier "debunking" of the professionalism idcal and instcad providing "some reasons for taking the professionalism ideal seriously on its own terms," such as the fact that professionalism supplies valuable institutional and moral ideals).

11. *E.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953) (praising the role of bar associations in the development of the legal profession).

12. *E.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) (lambasting the bar as an elitist, racist, self-interested lot); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981) (charging that the ABA does not promulgate ethical rules in order to promote ethical behavior, but rather to control the market for lawyers' services and to convince itself of its own morality).

13. This is not to say, however, that criticism of the crusade is not at times severe, particularly from long-standing skeptics like Richard Abel. *See* RICHARD L. ABEL, AMERICAN LAWYERS 245, 239-

This Article is very much a part of that latter process, the sympathetic re-assessment of lawyer professionalism.[14] It does not suggest that we burn the ABA's professionalism bull, which contains some insightful, even inspired, ideas.[15] But with respect (and not entirely without reverence), it does pose several theses for discussion. Focusing on two related concerns of the crusade, litigation abuse and incivility, it challenges the crusade's implicit assumption of one true professional faith and its tendency to condemn categorically certain modes of conduct as cardinal sins.

These religious metaphors come 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 that are enshrined in documents described as "Creeds," "Oaths," and "Pledges" of professionalism. Even when these documents are called "codes," they read more like the Decalogue than the Uniform Commercial Code or, for that matter, the Model Code of Professional Responsibility.[16] The former titles imply, with perhaps a more profound accuracy than their authors intended, that the documents they describe are articles of faith.

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45 (1989) (criticizing the ABA's *Blueprint* as "wholly irrelevant to the fundamental problem[s]" of the profession); Stephen Gillers, *Words into Deeds: Counselor, Can You Spare a Buck?*, A.B.A. J., Nov. 1990, at 80 (expressing deep skepticism about the professionalism movement); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 663 (1994) (asserting that a "power elite in the organized . . . bars functions like a privileged class" that promulgates civility codes to promote its own interests).

14. There is, for those inclined to turn theoreticians' weapons upon their wielders, a remarkable symmetry here. The first wave of theorists of the professions, Emile Durkheim and Talcott Parsons, offered positive, optimistic accounts, attempting to show the social contributions of professional ethics and organizations. *See* EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 6-8 (1958) (noting that professional organizations provide a beneficial moral structure for their own members and in turn benefit society as a whole by providing a positive moral example for others); TALCOTT PARSONS, *The Professions and Social Structure*, *in* ESSAYS IN SOCIOLOGICAL THEORY 35, 34-35 (1954) (stating that society depends on the smooth functioning of professions and that "[t]he professional man is not thought of as engaged in the pursuit of his personal profit, but in performing services to his patients or clients, or to impersonal values like the advancement of science"). The second wave brought mainly negative, pessimistic accounts, insisting for the most part that professions operate for their own benefit and to society's detriment. *See infra* note 23 and accompanying text (discussing the views of dominance theorists). The third, contemporary phase is predominantly synthetic, condemning certain aspects of professionalism, commending others, and generally offering correctives to both sets of earlier accounts. *See, e.g.*, Gordon & Simon, *supra* note 10, at 235, 231-35 (recognizing the truth of some accusations that professionalism is self-serving and only furthers the interests of wealthy clients, but suggesting that the professionalism project be taken seriously because it aspires to provide "autonomy, solidarity, and responsibility in the workplace"). As others have doubtlessly noted, what Hegelianism lacks as a theory of history it may more than make up for as a history of theory.

15. *Cf.* Rotunda, *supra* note 8, at 1151 n.8 (noting the mixed metsphor in the *Blueprint*'s title and pointing out that "[a] blueprint might be used for rebuilding, but not for rekindling—unless one is going to burn the blueprint"); Shaffer, *supra* note 8, at 395 (stating that the *Blueprint*'s subtitle "leaves you wondering whether you are supposed to start the fire with the blueprint").

16. The telling exception is the Code's "Ethical Considerations," which has no analogue in the Model Code's successor, the ABA's 1983 Model Rules of Professional Conduct.

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 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 the dangers and to suggest a way to avoid them without ignoring the positive aspects of the crusaders' message.[17]

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.[18] Like patriotism and religion, the rhetoric of professionalism, too, may be a popular refuge for scoundrels, a point not fully appreciated either by conscientious crusaders of the past or by professionalism's earlier students. Even professionalism's current defenders admit that at least some of what once passed for professionalism was excessively self-defensive.[19] At worst, some of it has been not just patently self-serving,[20] but also invidiously discriminatory.[21] Against this background, some of the classic pronouncements of lawyerly selflessness transcend hyperbole and approach inadvertent irony.[22]

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17. For the general use of theological parallels to illuminate legal principles, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-53 (1988) (comparing "Catholic" and "Protestant" approaches to Constitutional interpretation). For the particular applications of such analogies in the area of professional responsibility, see ABA, *Report of the Committee on Code of Professional Ethics*, 1906 ABA REPORTS 600 [hereinafter ABA, *1906 Report*] ("[T]he lawyer is and must ever be the high priest at the shrine of justice."); Terrell & Wildman, *supra* note 8, at 423 ("Our heritage as lawyers—the 'living faith' that links us with our predecessors, and that we must in turn teach to our successors—is the responsibility to recognize, honor, and enhance the rule of law in our society."); and Joseph P. Tomain, *The Legal Heresiarchs: Luban's* The Good Lawyer, 1984 AM. B. FOUND. RES. J. 693, 694-97 (comparing the critique of neutral partisanship to theological heresy).

18. *See, e.g.*, *Amos* 5:21-24 (rejecting religious exercises in favor of justice and righteousness); *Matthew* 23 (condemning members of the religious establishment for not practicing what they preach).

19. *See, e.g.*, FLORIDA COMMISSION, *supra* note 3, at 10 (calling on the bar to "admit failures and shortcomings in professionalism . . . [and] abandon self-defensive postures").

20. Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 209-10 (1990) (implying that lawyers' groups have often fought against nonlawyer participation in the legal services market under the guise of "public protection" in order to corner the market for themselves).

21. *See* AUERBACH, *supra* note 12, at 95-101; Robert Stevens, *Democracy and the Legal Profession: Cautionary Notes*, LEARNING & L., Fall 1976, at 12, 16 (both outlining the exclusionary motives for mandatory education requirements).

22. *See, e.g.*, POUND, *supra* note 11, at 5 (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

The hypocrisy and hubris of some past crusaders invites overreaction by revisionists. This second danger, reductionism, is the besetting sin of the dominance theorists. This prominent school of students of professionalism maintains what might be called an "opiate of the masses" theory. According to them, professional ideology is nothing but an addictive dispensed by professional elites. Its purpose is to dupe both the public and the lower orders of the profession itself into a scheme of market dominance and social subordination—the hidden agenda of the entire professionalism enterprise.[23]

A somewhat milder version of this theory dismisses the current crusade as an anodyne for a general professional malaise that affects even the professional elite itself.

> The concerns of both the losers and at least some of the winners in the recent growth and restructuring of the [legal services] industry made it important for bar leaders to say something comforting about professionalism and its value as an integrating element for the profession. . . . The result is a vague and general invocation of "shared" values that really aren't shared and a symbolic and nostalgic crusade in the name of an ideology almost no one really believes in fully and which has little to do with the everyday working visions of most American lawyers.[24]

According to this account, the bar's elite, faced with a constituency depressed by losing control of "market, workplaces, and careers,"[25] has prescribed the Prozac of professionalism on a grand scale. In the crusading tradition, pointing to the Holy Land offers dual relief from

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service because it may incidentally be a means of livelihood." *Id.* at 5. It is hard not to read this as heavily implying something disreputable about having to work for a living, and harder still to see what the current professionalism crusade hopes to gain by its frequent allusions to this kind of rhetorical overreaching. *See* ABA BLUEPRINT, *supra* note 2, at 261 (contending that Pound's rhetoric may be dated, but that "the spirit of Dean Pound's definition stands the test of time"); Illinois Committee, *supra* note 3, at 445 (quoting Dean Pound).

23. *See* Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS, *supra* note 4, at 16-18 (summarizing the dominance theorists' view of professional ideology). Dominance accounts include AUERBACH, *supra* note 12; JAMES C. FOSTER, THE IDEOLOGY OF APOLITICAL POLITICS: THE ELITE LAWYERS' RESPONSE TO THE LEGITIMATION CRISIS IN AMERICAN CAPITALISM: 1870-1920 (1986); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); and 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 Association's recent reform efforts, see Abel, *supra* note 12; Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) and Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989). For a balanced response to the dominance theorists, see Gerald L. Geison, *Introduction* to PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 3-8 (Gerald L. Geison ed., 1983) and Gordon & Simon, *supra* note 10, at 230-35.

24. Nelson & Trubek, *supra* note 23, at 14.

25. *Id.*

problems closer to home. The despairing can be comforted with pilgrimages; the uncomfortably energetic diverted, if not quieted, with Quixotic quests.

Those dubious of previous professionalism movements have doubtlessly gained important insights by inspecting the crusaders' eyes for motes and their hearts for ulterior motives. But only the most cynical 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.[26] Market failures, in particular information asymmetries and positive and negative externalities, surely justify corrective regulatory measures,[27] and altruistic motivations on the part of lawyers, individually and collectively, cannot be discounted altogether without the risk of circular reasoning.[28]

Even in its milder form, the dominance critique is overly dismissive. On the one hand, in condemning the crusade's focus on voluntary individual virtue, it tends to overlook problems in using coercive public measures to address some of the central concerns of the present crusade. On the other hand, in contrasting an emphasis on individual virtue with a resort to increased public enforcement, it tends to underestimate, or overlook entirely, a middle way that is very much evident in the present crusade: mutual collegial correction and encouragement.

A third danger is that those who object to the present professionalism crusade will be denounced as heretics, enemies of a shared professional faith.[29] Mindful of this, I have chosen to describe the position from

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26. *See* Marvin E. Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 TEX. L. REV. 723, 726-28 (1981) (countering Professor Abel's portrayal of attorneys as self-centered by presenting evidence of such activities as the ABA's campaign to save the Legal Services Corporation); Gilson, *supra* note 8, at 888 ("[H]istory discloses a pattern of lawyer behavior consistent with a utility function more complicated than simply income maximization."); Gordon & Simon, *supra* note 10, at 234-35 (describing the socially desirable aspects of professionslism).

27. *See infra* text accompanying notes 46-55 (setting out the economic rationale for organizing some occupations as professions); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 710-11 (1977) (hypothesizing that trained lawyers may be able to dispose of cases more quickly, and therefore more efficiently in economic terms, than lay advocates).

28. Deborah Rhode and David Luban nicely illustrate the "heads I win, tails you lose" quality of some such critiques: "For example, if lawyers do not provide pro bono legal assistance, they are acting out of narrow economic self-interest. Conversely, if they do engage in such work, they are attempting to legitimate the profession's claim to special status, which also serves economic interests." DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 60 (1st ed. 1992).

29. *Compare* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4 (1990) (applying the term "heresy" to describe opponents of his view of the judicial function) *with* Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 638 (1990) (describing Bork as "a dissenter from within the legal establishment, almost . . . an apostate") *and* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 658 (1990) ("[I]t is simply intolerable that in [Bork's] quest for redemption he should accuse a significant portion of the academic legal profession of being tricksters and cynics . . . .").

which I comment on the crusade as that of a dissenter. To adopt the dissenter's position is to accept the sincerity, even virtue, of the crusade while pointing rather insistently to its dangers and false assumptions. The dissenter's position vis-à-vis orthodoxy, like mine vis-à-vis the crusade, has an essential duality. Most obviously, it bespeaks 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."[30] For present purposes, its basic assumptions can be reduced to these: our society and its legal system are basically just,[31] their imperfections are to be corrected by institutionally authorized mechanisms of reform (including civil disobedience), and the 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.[32] 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. With the professionalism crusaders, my dissent shares the belief that the professionalism movement can help redirect the lawyer's role toward that end.

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30. *See* Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 440, 439-40 (1989) (describing "what is truly fundamental in our legal system" as consisting of core values "such as due process and the right to be heard"). Identifying legal liberalism 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. *See* Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 872-89 (1992) (outlining a fideist response to meta-ethical skepticism). Nevertheless, this discussion has an implicitly extramural, as well as intramural, aspect. As I shall argue below, part of the task of legal liberalism is to decide how to deal with outsiders, and part of the commitment of legal liberalism is to reach that decision in dialogue with them.

31. I am borrowing the notion of an acceptable approximation to justice from Rawls, who uses the shorthand expressions "near justice" and "reasonably just." JOHN RAWLS, A THEORY OF JUSTICE 350-55 (1971). This is not to say, however, that all adherents to legal liberalism agree that it is Rawls's particular notion of justice that our society does or should approximate.

32. *See* Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1329 (1992) ("Fidelity to law envisages the legal professional as a citizen, living and working within the bounds of the law, with the opportunity to change those bounds through the democratic process."). For a different, and narrower, definition designed to distinguish legal liberalism from the Critical Legal Studies movement, see Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8, 5 & n.14 (1984) (contrasting legal liberalism's commitment to a legal system grounded "on a foundation that is rational, objective, and apolitical" with the Critical Legal Studies movement's belief that "there are no rational, objective criteria that can govern . . . how we make legal decisions"). As defined here, liberal legalism would embrace some—perhaps many—adherents of the Critical Legal Studies movement.

The crusade, however, assumes that conscientious lawyers agree on their proper role in legal liberalism to a much greater extent than is actually the case.[33] 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 legal liberalism than the crusade implies. The model of lawyering that the crusade holds up as its standard is certainly not the only one available; I will argue that it is not even the best.[34]

Talk of the common ground underlying orthodoxy and dissent implies that there are some who do not share that ground, those who are outside the fold, if not beyond the pale. Here lies the final danger: crusades are not noted for their generosity in dealing with those they identify as infidels.[35] 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.

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33. Here I am in agreement with some of the legal profession's persistent critics. *See* THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 173-228 (1987) (identifying a "dissenters' tradition" running counter to the orthodox view of lawyering espoused by the ABA and most elite lawyers); Nelson & Trubek, *supra* note 23, at 14 ("The result [of attempts to decry certain trends in the bar] is a vague and general invocation of 'shared' values that really aren't shared and a symbolic and nostalgic crusade in the name of an ideology almost no one really believes in fully . . . .").

34. Timothy Terrell and James Wildman emphasize the rising moral diversity of the bar as a critical factor in the decline of professionalism. Terrell & Wildman, *supra* note 8, at 413-14. They urge a re-emphasis on lawyers' common commitment to the rule of law as the needed corrective. *Id.* at 422-23. 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.

35. The treatment of radical lawyers and bar applicants during the McCarthy era amply attests to this danger. *See, e.g.*, *The Point Where Toleration Ends*, 34 A.B.A. J. 696, 696 (1948) (urging members of the bar to adopt "an uncompromising attitude toward the Marxist faith," which is "an alien conspiracy" (quoting Cornelius W. de Kiewet, Commencement Address at Cornell University (June 14, 1948))). On the organized bar's role in promoting McCarthyism, see AUERBACH, *supra* note 12, at 231-58. *But see* Terence C. Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era*, 1982 AM. B. FOUND. RES. J. 911, 979-80 (describing the organized bar's role in implementing procedural protections that helped end McCarthyism); Rayman L. Solomon, *Five Crises or One: The Concept of Professionalism, 1925-1960*, *in* LAWYERS' IDEALS, *supra* note 4, at 144, 162-66 (agreeing with Auerbach on the organized bar's early role in promoting McCarthyism, but concluding with Solomon that the bar ultimately shifted against McCarthyism). *See generally* David N. Rockwell, Comment, *Bar Associations and Radical Lawyers*, 5 HARV. C.R.-C.L. L. REV. 301, 309-12 (1970) (tracing the history of official disfavor of radical lawyers). The Supreme Court eventually decided to protect the admission of bar candidates with communist and other "subversive" affiliations as long as they answered questions about their affiliation and abjured force and violence. *See, e.g.*, Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165-66 (1971) (describing permissible inquiries into subversive political affiliations by Bar examiners); Keyishian v. Board of Regents, 385 U.S. 589, 606-07 (1967) (stating that to justify disbarment, a Communist Party member must share and not merely know of the Party's unlawful goals). Rather ironically, the present crusade seems more concerned with heretics, "the enemy within" who would supplant professionalism with commercialism, than with infidels, foreign or domestic, who would subvert the market system. Nelson & Trubek, *supra* note 23, at 12, 26; *see also* ABA BLUEPRINT, *supra* note 2, at 248 ("[T]he Commission shall examine such matters as . . . so-called commercialization . . . ." (quoting John C. Shepherd, then-President of the ABA)).

Here the religious metaphors of the professionalism crusade enter the realm of reality. At least since the late Enlightment, one serious strand of theological thought has come to see religion as having to do less with our orientation toward the divinity and the hereafter, and more with our orientation toward what ultimately concerns us, what we are fundamentally committed to.[36] 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 the Florida Commission on Lawyer Professionalism concluded in its report, "[P]rofessionalism ultimately is an individual decision and a way of life for every lawyer."[37]

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.[38] 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.[39] 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.[40]

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36. The phrase "ultimate concern" is from Paul Tillich, one of the leading exponents of this perspective. *See* 1 PAUL TILLICH, SYSTEMATIC THEOLOGY 14 (1967) ("Our ultimate concern is what determines our being or not-being."). 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, at 17 (1971); *see also* United States v. Seeger, 380 U.S. 163, 180 (1965) (stating that the theological views of Tillich fall within the definition of "religious" for the purpose of determining a person's conscientious objector status).

37. FLORIDA COMMISSION, *supra* note 3, at 33.

38. *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 4, 5, 4-8 (1981) (eschewing the "coercive philosophy" of "knockdown arguments" because "[t]he valuable person cannot be fasbioned by committing philosophy upon him"); *cf.* LON F. FULLER, THE MORALITY OF LAW 21 (1969) (advocating that those who are trying to "get men to accept an unwelcome compulsion" should "seek to give it the appearance of being voluntarily assumed").

39. Similar developments led to similar positions in France. *See* JUDITH N. SHKLAR, ORDINARY VICES 5, 8 (1984) (tracing the origins of Montaigne and Montesquieu's "liberalism of fear" to France's religious civil wars). *See generally* JOHN RAWLS, POLITICAL LIBERALISM at xxiv (1993) ("[T]he historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries." (citation omitted)).

40. One of the distinctive features of legal liberalism, in fact, is its commitment to the Holmesian possibility that it may preside over its own demise, under the open debate fostered by its own ground rules. *See* Abrama v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."). In theology, that position had been staked out in the first century of the common era by the rabbi Gamaliel of Jerusalem. In response to calls for the execution of Peter and the other apostles on charges of blasphemy, he successfully interposed this defense:

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, should 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 be discussed freely among students and teachers in law schools and to some extent among clients, counsel, and judges in the courts.

Part II identifies what "professionalism" has come to mean in the context of the present crusade, 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. Part III shows how 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. In particular, inherent limits in the use of coercive measures to control frivolous litigation and incivility have refocused attention on voluntary compliance with aspirational norms. But, as Part IV shows, the form this latter approach has taken in the current crusade fails to take account of a multiplicity of modes of lawyering, some conscientiously practiced, some not. Part V sketches how the crusade might be reformed, how the trinity of institutions generally invoked by the crusade—bar associations, the courts, and law schools—could cooperate better to advance those aspects of lawyer professionalism that are consistent with, if not constituent of, most lawyers' faith in liberal legalism.

II. The Professionalism Crusade

The meaning of "professionalism" in the current crusade is woefully—one is tempted to say "unprofessionally"—confusing. Even the ABA *Blueprint*, one of the canonical sources of the crusade, Delphically declares that "'[p]rofessionalism' is an elastic concept the meaning and application of which are hard to pin down."[41] Similarly, the Report of the Florida Bar Commission on Professionalism admits that "[t]here is no universally

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> [K]eep away from these men and let them alone; for if this plan or this undertaking is of men, it will fail; but if it is of God, you will not be able to overthrow them. You might even be found opposing God!

Acts 5:38-39.

41. ABA BLUEPRINT, *supra* note 2, at 261.

accepted definition of 'professionalism.'"[42] More pointedly, a recent article observed that "lawyers have sought a cure for a disease before agreeing on its nature, symptoms, and causes."[43] To understand and assess the crusade, we must first sort out its overlapping uses of the term "profession" and its derivatives.

A. The Elusive Meaning of "Professionalism"

The present crusade uses the terms "profession" and "professionalism" in four overlapping but distinct senses.

1. "Professionalism" as Description.—At the most general level, the crusade speaks of a profession as a distinct kind of occupation characterized by such features as special educational and licensing requirements; elements of nonmarket regulation, often in the hands of an occupational body rather than the state itself; and an announced ethos of public service. The ABA *Blueprint*, for example, begins with a working definition very much along these lines.[44]

This first, essentially descriptive sense of the word "profession" is indeed a useful start. In particular, it focuses attention on two fundamental and related issues: first, why do some occupations warrant a relatively high degree of nonmarket regulation, and, second, what form will that nonmarket regulation take? The answers to those questions give rise to three other senses of the terms "profession" and "professional."

2. "Professionalism" as Explanation.—The second meaning that the crusade attempts to evoke when it speaks of professionalism focuses on the market failures that create the need for professions as nonmarket means of organizing certain occupations.[45] These failures have essentially two aspects: those having to do with the consumers of the services and those

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42. FLORIDA COMMISSION, *supra* note 3, at 11; *see also* Illinois Committee, *supra* note 3, at 451 ("[The Special Committee on Professionalism] feels that the need for promoting professional conduct, however defined, is important to the bar and public, relevant to every area in which Illinois lawyers are active and likely to be needed indefinitely.").

43. Terrell & Wildman, *supra* note 8, at 403; *see also* Moore, *supra* note 7, at 777-88; Nelson & Trubek, *supra* note 23, at 2; Rotunda, *supra* note 8, at 1157-59 (all criticizing the ABA Report's amorphous conception of professionalism).

44. *See* ABA BLUEPRINT, *supra* note 2, at 261-62.

45. Economists are not the only social scientists to examine the need for professions along the lines that I sketch below. In particular, sociologists have given a parallel, and essentially consistent, "functionalist" account. *See, e.g.*, Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS, *supra* note 4, at 177, 180-82 (summarizing the functionalist account of professions developed by Talcott Parsons and others). I follow the economists' account here principally because their terminology enjoys wider currency in contemporary legal academia.

having to do with third parties, strangers to the transaction between the provider of the service and its consumer.[46]

With respect to consumers, the problem is what economic analysis calls information asymmetry. The services in question are sufficiently unusual that ordinary consumers cannot, at reasonable cost to themselves, independently evaluate whether the service delivered is actually of the quality promised.[47] Those in the market for estate planning advice, for example, cannot know whether a particular instrument will have the desired effect without studying law themselves or taking other self-protective measures that are generally prohibitively expensive. Conversely, the providers of such esoteric services have an incentive to trade on their superior knowledge—and their consumers' relative ignorance—to the consumers' disadvantage, either by claiming to have special expertise they lack or by cutting corners in provision. One can claim special knowledge of wills and trusts without a firm grasp of the Rule Against Perpetuities;[48] one can churn out form instruments without carefully tailoring them to the client's particular situation.[49] In such cases, the buyer may not know to beware.

Preventing such abuses requires nonmarket regulatory measures. At the broadest level of generality, these measures must ensure that the unqualified do not deliver services and that the qualified deliver them as promised and at an appropriate level of quality.[50] These measures generally include special educational requirements, to ensure that the professionals are capable of providing the service in question; special fiduciary duties, to ensure that the services of the requisite quality are

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46. *See, e.g.*, Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting) (warning that lawyers have the power to abuse their client for their own benefit and the legal system for their client's benefit); RICHARD A. POSNER, OVERCOMING LAW 92 (1995); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1922 (1993) (both arguing that competitive pressures force lawyers to focus on serving the customer, their client, at the expense of the courts and the community).

47. RHODE & LUBAN, *supra* note 28, at 646 (describing "information barriers" as the inability of consumers to accurately assess the legal services they receive and concluding that this is an appropriate reason to regulate lawyers); *see also Shapero*, 486 U.S. at 490 (O'Connor, J., dissenting) (noting that ordinary fraud provisions cannot protect clients from lawyers' abuse of specialized knowledge).

48. *See, e.g.*, Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962) (holding that an attorney who drafted a will that violated California's Rule Against Perpetuities did not breach his contract with his clients or commit malpractice); BODY HEAT (Warner Bros. 1981) (depicting Florida State University College of Law alumnus Ned Racine—presumably fictitious and provably before my time—who is badly tripped up by the Rule Against Perpetuities).

49. *See* Bates v. State Bar, 433 U.S. 350, 394 (1977) (Powell, J., concurring in part and dissenting in part) ("The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product.").

50. *See* Freidson, *supra* note 4, at 220 (explaining that consumer proteetion is especially important when "the profession's skills are so complex and esoteric that lay people are not well enough informed to be able . . . to choose the competent over the incompetent").

provided; and third-party monitoring of both training in the skill and delivery of the service.

With respect to outsiders to the transaction, the problem is one of what economic analysis calls external costs. Because such costs are not taken into account by the parties to a transaction—are external to them—the parties tend to consume more of the service than is socially optimal; the costs of this overconsumption fall on others.[51] In the paradigmatic context of legal services—litigation—two examples, undercompetence and overzealousness, illustrate the problem.

As to undercompetence, a client might be willing to hire a relatively poorly educated lawyer, on the assumption that such a lawyer will be relatively cheap, even though the client knows the quality of service will be correspondingly low. Assuming the client can assess the quality of the service delivered (that is, assuming away information asymmetry), and looking only at the transaction in terms of the lawyer and client, this is not particularly troubling: Some choose Cadillacs; others choose, or can only afford, Fords. But if the ill-preparedness of the lawyer causes delays in court, or requires the judge to spend time and energy prompting or correcting, then some of the costs of relative incompetence are borne, not by the consumer, but by the rest of us, in the form of delays, docket crowding, or additional judges. Society, so the argument runs, has a legitimate interest in preventing consumers of legal services from externalizing these costs.[52]

The second example of an external cost in litigation, excessive zeal, is closer to the heart of the professionalism crusade.[53] Suppose litigational delay on the lawyer's part is not a by-product of marginal competence, but a carefully calculated strategy to achieve client advantage at the expense of another party. The client will, to be sure, have to pay the lawyer to undertake these tactics. But if the client does not also have to pay the opposing party's legal fees in responding to such measures or society's costs in wasted judicial time, the client has a perverse economic incentive to engage in tactics that no neutral observer would believe conducive to a resolution of the case on its merits. Here again, economists tell us, market-corrective measures are warranted.[54]

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51. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 23 (1982) (presenting the elimination of "spillover" costs as the classical rationale for governmental regulation).

52. *See* Morgan, *supra* note 27, at 705, 710-11 ("[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties—the social costs involved are borne by society as a whole.").

53. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting) (citing "abuse of the discovery process" as an example of "overly zealous representation of the client's interests").

54. *See* RHODE & LUBAN, *supra* note 28, at 647 (referring to the public's interest in the efficient resolution of disputes "in circumstances where individual clients would be willing to pay lawyers to

3. "Professionalism" as Locus of Regulation.—But what form will such corrective measures take? Now we are in a position to understand a third sense in which the crusade uses the terms "professional" and "professionalism." In addition to describing the fact that some occupations are organized differently and accounting for the need for a nonmarket mode of organization, the term "professionalism" is also used to distinguish one of three possible models of occupational organization.[55] The first of these, the market, is, on the above analysis, not entirely adequate for the delivery of professional services to the extent they are characterized by information asymmetries and external costs. There are essentially two alternative regulatory regimes to laissez-faire, market-governed organization: one operated by the profession, the other by the government.[56]

The present legal regime applicable to the practice of law is a hybrid of the professional and the governmental organizational options. The regime's constituent rules are embodied not only in the official lawyer codes of the fifty states and the District of Columbia, enforced primarily by the profession itself, but also in other state and federal law governing the practice of law, enforced by ordinary civil, criminal, and administrative mechanisms. This corpus as a whole has come to be known as "the law of lawyering."[57] It requires lawyers to give competent representation,[58] forbids their being actively dishonest,[59] and, more generally, insists that they obey other laws.[60]

Understanding the present crusade and its proponents' central attachment to the notion of professionalism requires an examination of the trichotomy of occupational organization—market, professional, and governmental. In particular, note that professionalism as professional self-regulation differs from governmental regulation essentially in the identity of the regulator, not in the form of the regulation. It is a difference in who does the regulating, not in how the regulating is done. In that intermediate system of occupational organization, between the private regulatory regime of the market and the public regime of governmental regulation, the government in effect delegates its regulatory authority to a private body,

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delay or impede truth-finding processes"); Gilson, *supra* note 8, at 873-77 (outlining an economic justification for "the Rawlsian . . . prohibition of strategic litigation" contained in Model Rule 3.1).

55. *See* Freidson, *supra* note 4, at 218-19 (setting forth three models of occupational organization—professionalism, free market, and bureaucracy).

56. I am borrowing this tripartite scheme from Eliot Freidson. *Id.* at 215.

57. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 5, 1992); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1990).

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994) [hereinafter MODEL RULES].

59. *Id.* Rule 8.4(c).

60. *Id.* Rules 1.2(d), 8.4(b).

the profession itself, and backs that body's rules and regulation of its members with the force of law. In both cases, the regulations are law-like and mandatory.[61]

One of the oft-cited desiderata of the crusade is maintaining professionalism in this third sense of the term, regulation of the practice of law by the legal profession itself, rather than the state, through professionally mandated rules ultimately enforced by the state. To that end, the crusade's literature often includes calls for increased enforcement of, and voluntary compliance with, the mandatory rules of both the profession itself and the state.[62] This is not, however, the principal stated concern of the crusade, nor its primary use of the term "professionalism."

4. "Professionalism" as Focus of Aspiration.—Proponents of the crusade quite explicitly distinguish the professionalism they advocate from conformity with mandatory norms enforced by the state either directly or through delegation to the profession.[63] In the words of Justice O'Connor, "One distinguishing feature of any profession . . . is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."[64] Earlier crusades focused on tightening the rules themselves or beefing up their enforcement;[65] this one focuses on conduct that lies beyond the present scope of such rules, evincing a frustration with efforts to induce the desired conduct through traditional coercive measures. In the place of such measures, this crusade holds out the hope of voluntary, nonbinding self-regulation—the hope of transcending, or at least supplementing, law with gospel. This is particularly true with respect to incivility and litigational abuses, two problems to which the crusade has directed much of its attention.

It is, accordingly, the cultivation of professionalism in this fourth sense—voluntary conformity with legally unenforceable standards—that will

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61. *See* Freidson, *supra* note 4, at 220 ("[A]n occupation can fend off control of its work by individual or corporate consumers only by having power delegated to it by the state.").

62. *Id.* at 303 ("[W]e cannot be content with merely exhorting lawyers to be virtuous as individuals[;] the Bar collectively must use all available means both to prevent and to remedy incompetence or misconduct.").

63. ABA BLUEPRINT, *supra* note 2, at 262 (disagreeing with the view that legal professionals should "construe the rules of professional conduct as narrowly as possible"); FLORIDA COMMISSION, *supra* note 3, at 11 (noting that professionalism encompasses more than "being governed by a code of ethics or rules of professional conduct and abiding by them").

64. Sbapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting).

65. *See, e.g.*, ABA, *1906 Report*, *supra* note 17 (discussing the advisability and practicality of adopting cannons of professional ethics); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) (recommending solutions to disciplinary enforcement problems, including inadequate funding, complex procedures, lack of interagency communication, and the code of silence among lawyers).

be our primary focus in what follows.[66] This effort is all too easily dismissed as mere cant. Without denying the possibility of hypocrisy, I want to show how one can understand this focus on aspirational goals as a principled response to the limitations of law as a regulatory mechanism. The rest of this Part sketches the historical development of this focus on nonmandatory standards; the next Part explores in more detail why traditional legalistic means prove to be inadequate remedies for two key concerns of the contemporary crusade, incivility and litigational abuse.

B. Origins and Outlook of the Professionalism Crusade

The current professionalism crusade focuses on professionalism in the fourth sense—voluntary compliance with aspirational standards. 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. These lawyers were contemptuous of the system, and they often were held in contempt, in both the legal and the lay sense of the term.[67] That this friction sparked the crusading zeal of many is quite evident, for example, in Justice Burger's 1971 speech on civility to the American Law Institute.[68]

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66. The distinction I am drawing here between legally mandatory standards, whatever their source, and legally nonbinding standards parallels the debate among legal scholars as to whether teaching of professional responsibility should focus on laws or ethics. *Compare* L. RAY PATTERSON & THOMAS B. METZLOFF, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 3 (3d ed. 1989) ("Using the legal approach, we treat the rules of ethics as merely a subset of legal rules.") *with* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS at xxv-xxvii (1985) (claiming that principles such as those contained in the Model Code cannot explain or solve moral problems) *and* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963 (1987) ("Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience, but to sanction.").

67. *See, e.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS 2 (1970) ("[D]isruptive tactics . . . now threaten to become systematized . . . among small but militant segments of the profession and the general public."); AUERBACH, *supra* note 12, at 289, 288-92 ("By 1970 . . . [c]ontempt citations and disciplinary proceedings expressed the hostility of bench and bar toward professional dissidence . . . ."); NORMAN DORSEN & LEGN 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 about courtroom disruption 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); *see also* Alexander M. Bickel, *Watergate and the Legal Order*, COMMENTARY, Jan. 1974, at 19, 24 (discussing the destructive effects that civil disobedience has on the moral authority of the legal system); Clarke, *supra* note 3, at 952, 951-52 (stating that in the late 1960s and early 1970s, "tumultuous trials on politically sensitive issues suggested a decline in public respect for the judicial system"); William A. Stanmeyer, *The New Left and the Old Law*, 55 A.B.A. J. 319, 319 (1969) ("The New Left . . . has developed a new type of person—the ideological criminal—who poses a threat to law and the values law protects.").

68. *See* Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971) [hereinafter Burger, *Necessity*] ("At the drop of a hat—or less—we find adrenalin-fueled lawyers cry[ing] out that

Economic and sociological changes in the practice of law, particularly since mid-century, have had an even broader and more significant impact on the profession. These changes 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[69] and have led to calls for redoubling efforts to uphold professional standards.[70]

In the wake of the ABA's Commission, state and local bar associations have eagerly followed suit.[71] Typically, a 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 much the same features.

Consider, first, the role of the organized bar. The professionalism commission becomes, generally at its own recommendation, a permanent committee of the sponsoring bar association.[72] The committee's mandate is to further the goals of the crusade on an ongoing basis, in particular, to

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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 codea of professional conduct—the necessity for civility—all become irrelevant."); *see also id.* at 217-18 ("Some few of them [uncivil lawyers] seem bent on destroying the system and some are simply ill-mannered and undisciplined noisemakers."). In Justice Burger's view, things have not improved much. *See* Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993) ("[T]he standing of the legal profession is at its lowest ebb in the history of our country due to the misconduct of a few judges and all too many lawyers in and out of the courtroom.").

69. *See* ABA BLUEPRINT, *supra* note 2, at 251-61 (declaring that changes in society and the economics of the practice of law are the likely causes of the decline in lawyer professionalism); Gordon & Simon, *supra* note 10, at 230-31 (noting that economic competition among law firms is a primary factor contributing to the erosion of the traditional ideal of professionalism, which promotes "occupational self-regulation"); Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 953-54, 953-59 (documenting "the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach").

70. *See* Nelson & Trubek, *supra* note 23, at 1 (noting the bar's swift embrace of the professionalism campaign). Here again, Chief Justice Burger's voice has been prominent. *See, e.g.*, Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62 (1984) (urging that the ABA examine problems of professionalism and propose solutions).

71. Nelson & Trubek, *supra* note 23, at 1. As of November 1995, seventeen state and six local bar associations and the United States Seventh Circuit Court of Appeals had produced professionalism reports. *See* ABA Memo, *supra* note 3 (listing existing professionalism reports).

72. *See, e.g.*, FLORIDA COMMISSION, *supra* note 3, at 30 ("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." (emphasis omitted)); Illinois Committee, *supra* note 3, at 451 (proposing the appointment of a two-year task force on professionalism to "recommend an appropriate structure for an ongoing ISBA [Illinois State Bar Association] promotion of professionalism").

oversee the implementation of its proposals. Though these proposals often refer to the need to tighten existing standards or increase enforcement efforts, the recognition of the limits of these approaches is often explicit.[73] The crusade more typically relies on exhortation and instruction; the committee functions 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*.

In conjunction with these 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.[74] The ostensible function of these supplementary standards varies somewhat. Sometimes adherence is to be a condition of entrance or continued membership,[75] something of a forced baptism. But more typically the standards are to serve as "guidelines" or "bases for discussion," a catechizing function.[76] Finally, the sponsoring bar association solemnly pledges to cooperate with the other relevant

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73. *See, e.g.*, COMMITTEE ON PROFESSIONALISM, BOSTON BAR ASS'N, PROFESSIONALISM AND THE LEGAL PROFESSION 10-11 (1992) (noting that judges should make full use of "[j]udicial powers of instruction and enforcement" to address uncivil behavior); Committee on Federal Courts, Association of the Bar of the City of New York, *A Proposed Code of Litigation Conduct*, 43 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 738, 739 (1988) [hereinafter New York Bar, *Proposed Code*] (focusing on "conduct that is legal, ethical, and usually beyond the reach of sanctions, but is nevertheless, in our view, improper"); *see also* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting) (noting that membership in a profession entails an ethical obligation to adhere to "standards of conduct that could not be enforced either by legal fiat or through the discipline of the market").

74. As of November 1995, twenty-six state bar associations, sixty-two local bar associations, two ABA subdivisions, two state supreme courts, a handful of lower state and federal courts, and the United States Seventh Circuit Court of Appeals have promulgated codes, creeds, goals, standards, statements, guidelines, principles, ideals, tenets, hallmarks, pledges, declarations, or rules of professionalism, civility, courtesy, or etiquette. *See* ABA Memo, *supra* note 3 (listing official statements on professionalism).

75. *See* CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 447 (recommending a rule requiring adherence to standards of professional conduct as a condition of bar admission).

76. 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." ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 01:401 (1994). 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 these actions were not intended to alter a lawyer's enforceable professional obligations in any way. *See id.* (noting that adoption of the creeds was not intended to alter the Model Rules, other disciplinary codes, or existing negligence standards); *see also* New York Bar, *Proposed Code*, *supra* note 73, at 739-40 (expressing "hope" that "suggesting rules of conduct" will "provide some guidance to the bar and initiate a debate about where proper lines should be drawn").

institutions, the judiciary and the law schools, to promote the principles of professionalism.[77]

The judiciary, for its part, is supposed to support the canons of professional conduct, either at the behest of the bar[78] or, occasionally, on its own initiative.[79] This support is to take the form of fatherly and informal warnings to the offenders against civility[80] or of sterner measures up to and including use of the contempt power, somewhat inconsistently enforcing "soft" rules with "hard" sanctions[81]—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.[82]

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.[83] This inculcation should take place not just in mandatory courses on legal ethics and professional responsibility, but throughout the curriculum.[84] Visits by judges and practitioners, who will bear testimony to the virtues of professionalism and the evils of its opposites, should supplement the curriculum.[85] Typical of this

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77. *See, e.g.*, ABA BLUEPRINT, *supra* note 2, at 262, 261-304 (suggesting ways in which judges and law schools "can inspire a rebirth of respect and confidence in themselves, in the services they provide and in the legal system itself"); FLORIDA COMMISSION, *supra* note 3, at 33 ("The law schools, the Bar Examiners, The Florida Bar Board of Governors, the courts, and EACH MEMBER of the bar must work together . . . to 'improve the administration of justice'. . . ." (emphasis in original)).

78. *See, e.g.*, ABA BLUEPRINT, *supra* note 2, at 290-96; FLORIDA COMMISSION, *supra* note 3, at 23-25 (both urging judges to take an active role in revitalizing the ideal of professionalism).

79. *See* CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 446 (suggesting that the judiciary should voluntarily assume a more active role in promoting professional conduct).

80. FLORIDA COMMISSION, *supra* note 3, at 23 (recommending "on-the-spot court admonitions"); CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 452 (stating that judges have a duty to "bring to lawyers' attention uncivil conduct" that they observe).

81. *See* Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (calling for sanctions for incivility equivalent to those imposed for Rule 11 violations).

82. *See, e.g.*, Clarke, *supra* note 3, at 950 (reporting that the Maryland Court of Appeals has adopted a requirement that all new members of the bar must take a course on professionalism); Nancy A. Bowser, *The Pros of Being a Pro*, B. LEADER, May-June 1989, at 12, 14 (reporting that the Georgia Supreme Court requires an annual one-hour professionalism course).

83. *See* ABA BLUEPRINT, *supra* note 2, at 266-71; FLORIDA COMMISSION, *supra* note 3, at 18-19 (both claiming that an important part of legal education is instruction in professionalism and exposure to proper legal role models); *cf.* T.H. WHITE, THE SWORD IN THE STONE 4 (1939) (listing as integral to the squire's education, "the theory of chivalry, with the proper measures to be blown [*sic*] on all occasions, terminology of the chase and hunting etiquette").

84. ABA BLUEPRINT, *supra* note 2, at 267; FLORIDA COMMISSION, *supra* note 3, at 19. The call for teaching ethics by the "pervasive method" has support well outside the professionalism movement, even among some of its more vocal critics. *Compare* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD at xxx (1994) (advocating the pervasive method of teaching ethics) *with* Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274 (1986) (criticizing the rhetoric and tactics of the professional reform movement).

85. FLORIDA COMMISSION, *supra* note 3, at 19.

trilateral effort to create the appropriate professional atmosphere is the new passion for Inns of Court programs.[86]

III. From Coercing Compliance to Encouraging Commitment

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. This Part takes up two such approaches, reliance on hard-and-fast legal rules and recourse to vaguer principles in the tradition of equity.[87] Neither approach works very well as applied to the problems of litigational abuse and incivility, on which the current crusade focuses. These inadequacies press professionalism's proponents to alternative measures—efforts to promote professionalism in the nonmandatory sense earlier identified.

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 method is particularly appealing: If things are not going as they should, then fire off a law requiring that they shall or forbidding that they shall not. This was the principal method of earlier professionalism crusades,[88] which gave us the

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86. The stated goals of the American Inns of Court are to foster professional excellence and to restore the practice of law to the highest standards of civility and ethics. Donald W. Banner et al., *Foreword by the Giles S. Rich American Inn of Court*, 76 J. PAT. [& TRADEMARK] OFF. SOC'Y 303, 303 (1994). The Inns pursue these objectives through a traditional British model of legal apprenticeship. Donna M. Bloemer, *The Salmon P. Chase American Inn of Court*, 21 N. KY. L. REV. 255, 255 (1994). For endorsements of the Inns of Court movement, see FLORIDA COMMISSION, *supra* note 3, at 19 (citing participation in Inns of Court programs as a useful way of supplementing academic study of law with "close and frequent interchanges with the bar and the bench"); *American Inns of Court*, ETHICS: EASIER SAID THAN DONE, Dec. 1993, at 78 (describing the composition and activities of the Inns of Court); Geoffrey Hazard, *Change Rules to 'Civilize' the Profession*, NAT'L L.J., Apr. 17, 1989, at 13, 14 (suggesting the Inns of Court movement as a possible solution to problems of lawyer professionalism); and James W. Walker & Laura Cerniglin, *American Inns of Court: A Return to Civility in Practicing Law*, 52 TEX. B.J. 1306, 1306 (1989) (describing the history of the movement, particularly its progress in Texas, and praising its benefits, such as encouraging greater discipline for misconduct and providing a formal setting for continuing legal education). *But cf.* CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 447 (recommending participation in Inns of Court but noting commentators' concerns about their exclusivism); *infra* note 342 (expressing hope for the Inns movement but cautioning against exclusivism and excessive Anglophilia).

87. For an introduction to the more general concerns raised by the law-equity distinction, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992), and the works cited therein at 559 n.1.

88. *See* Solomon, *supra* note 35, at 153 (explaining that critics of the profession frequently "urged structural reform" during the period between 1925 and 1960).

present system of mandatory legal education,[89] virtually universal bar admissions exams,[90] and three ABA-promulgated lawyer codes in this century.[91] With respect to the last of these developments, dissatisfaction with the open texture and hortatory tone of each code was specifically cited as part 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.[92]

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,[93] and both the bench and the bar still try to forbid frivolous litigation.[94] Federal Rule of Civil Procedure 11, which deals with this latter problem, has been overhauled twice in a decade.[95] This approach rolls back the domain of "professionalism," in the sense of voluntary self-

89. *See* AUERBACH, *supra* note 12, at 94-101; ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 205 (1983) (both recounting the development of legal education requirements for admission to the bar); *see also* Stevens, *supra* note 21, at 16 (arguing that the evolution of compulsory legal education was a result of the ABA's desire to improve the quality and restrict the number of lawyers). For a general discussion of the need for professions to maintain exclusive control over their educational institutions, see LARSON, *supra* note 23, at 175 ("The monopolistic and standardized production of professional producers is a necessary step in the mareh toward market control . . . .").

90. *See* Abel, *supra* note 23, at 194-95 (discussing legal licensing examinations, which serve as both a "fundamental guarantee of quality and the principal mechanism for controlling numbers").

91. ABEL, *supra* note 13, at 142. The ABA's Codes are the Canons of Professional Ethics (1908), the Model Code of Professional Responsibility (1969), and the Model Rules of Professional Conduct (1983).

92. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface at iv (1969) (noting that "[the Canons] are not cast in language designed for disciplinary enforcement and many abound with quaint expressions of the past"; thus, although "many canons . . . are sound in substance [, they] are in need of editorial revision"); *see also* RHODE & LUBAN, *supra* note 28, at 120 ("[T]he trend in professional standards over the last century has been toward substituting legal rules for ethical aspirations."); Abel, *supra* note 12, at 642 n.21 (criticizing the Canons for not providing enough guidance to young lawyers and noting that one state supreme court refused to adopt a canon because it was too vague and unworkable); Walter P. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978) (citing ABA President Powell's call for the standards to be "capable of enforcement"); Geoffrey C. Hazard, Jr., *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 571-72 (1982) (urging replacement of the Model Code with the Model Rules because the Code's structure "turned out to be disastrous").

93. *See, e.g.*, MODEL RULES, *supra* note 58, Rules 7.1-7.5; ABA ASPIRATIONAL GOALS ON LAWYER ADVERTISING (1988), *reprinted in* SELECTED STATUTES, RULES, AND STANDARDS OF THE LEGAL PROFESSION 418-20 (John Dzienkowski ed., West 1994) (suggesting items lawyers should consider when advertising for fees and services); Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 IOWA L. REV. 179, 219 (1991) (stating that the ABA's Aspirational Goals for Lawyer Advertising are to "guide lawyers in achieving the benefits of advertising while minimizing or eliminating its negative effects").

94. *See infra* section III(A)(1).

95. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 419-24 (1993) (substituting a "nonfrivolous" standard for "good faith" as the test to determine whether a filing has been made appropriately); Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 167-68 (1983) (increasing the application of Rule 11 to other papers besides pleadings and requiring an affirmative duty of prefiling inquiry to replace the less stringent good faith formula of the original rule).

regulation, by increasing the range of professional conduct that is subject to binding legal regulation by either the profession or the state.[96]

There are, however, problems with this legal irredentism, problems implicitly recognized in the crusade's shift to other emphases. As the ABA itself ruefully notes, some conduct long denounced as unprofessional by the bar is now protected under the Constitution or other federal law.[97] Thus, for example, a broad range of lawyer advertising is now protected as commercial speech under *Bates v. State Bar*[98] and its progeny,[99] and price competition for legal services enjoys the protection of the Sherman Antitrust Act after *Goldfarb v. Virginia State Bar.*[100] In these and other areas,[101] the bar's strategy of forbidding all that federal law has not protected has at best guided a hard-fought, and not entirely heroic, campaigu of retreats, reverses, and rear-guard actions.[102]

More significantly, the conduct with which we are principally concerned—incivility and litigational abuse—is particularly difficult to regulate by legalistic means. With respect to both, the problematic conduct is difficult to define under clear and enforceable legal rules, the "I-know-it-when-I-see-it" problem.[103] In dealing with this problem, legalism

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96. *See, e.g.*, Reed E. Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 311-12 (1987) (arguing that clarification of rules will simply lead to manipulation and that stricter enforcement is likely to lead to biased enforcement); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 499-505 (1990) (identifying and criticizing calls for greater clarity in rules and stricter enforcement).

97. *See* ABA BLUEPRINT, *supra* note 2, at 254-57 (discussing cases that limit state regulation of lawyers' solicitation of business and the bar's setting of fees).

98. 433 U.S. 350, 382 (1977) (upholding a lawyer's right to advertise routine fees and services).

99. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110-11 (1990) (upholding an attorney's right to note his certification by the National Board of Trial Advocacy on his letterhead); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 477-78 (1988) (upholding an attorney's right to engage in direct mail advertising); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 644-47 (1985) (upholding an attorney's right to include accurate statements of law in newspaper advertising); *In re* R.M.J., 455 U.S. 191, 204-07 (1982) (upholding an attorney's right to list areas of practice in print advertisements).

100. 421 U.S. 773, 792-93 (1975).

101. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1980) [hereinafter MODEL CODE] (addressing group legal service plans and explicitly forbidding what is not constitutionally protected).

102. Remnants of this strategy are still evident in the crusade itself. *See, e.g.*, ABA BLUEPRINT, *supra* note 2, at 255 (citing with approval the dissenting opinions in Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964), which expanded constitutional protection of legal service organizations).

103. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to further define the kinds of materials included within the definition of pornography but suggesting "I know it when I see it"); *see also* 1 HAZARD & HODES, *supra* note 57, § 3.1:301 (alluding to Justice Stewart's pornography standard in the frivolous litigation context); Sanford Levinson, *Frivolous Cases: Do Lawyers Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 370 (1987) (suggesting that it is "no coincidence that writers on frivolousness have tended to adopt versions of Justice Stewart's famous . . . test of pornography"); *cf.* Kenney Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1512 (1989) ("We [lawyers] know quibbles when we see them.").

encounters a paradox—the need to draft and implement black letter rules that enjoin obedience to the spirit, as well as the letter, of the law.[104] 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 of a law that directs our attention above and beyond itself, upon pain of punishment here and now.[105]

With respect to incivility, there is a second problem. Incivility is, in the normal course of things, sanctioned not by the imposition of state-enforced measures, but by informal, unofficial—in a word, civil—means.[106] Legalistic regulation here poses another paradox: the effort to supplement formerly informal, extra-legal sanctions with the force of law runs the risk of killing—or at best supplanting—civility in order to save it. The effort to preserve civil conduct by legally enforcing it, in other words, may tend to undermine or displace civility as a system of informal social control.

1. Litigational Abuse.—The first challenge of legalistic regulation, litigational abuse, is nicely illustrated by the parallel efforts of the bar and the courts to curtail frivolous litigation,[107] efforts roughly contemporaneous with the present professionalism crusade and frequently cited in its literature. Three principal sources of the law of lawyers—private civil suits, judicially promulgated rules of procedure, and the bar's own rules

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104. The official commentary on the law of lawyering is replete with admonitions to obey the spirit of the law. *See, e.g.*, MODEL RULES, *supra* note 58, Preamble ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."); *id.* Scope ("[The Rules of Professional Conduct] should be interpreted with reference to the purposes of legal representation and of the law itself."); Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 584 (1993) ("The rule retains the principle that attorneys . . . have an obligation to the court to refrain from conduct that frustrates the aims of [Rule 11]."); *id.* at 590 (pointing out that Rule 11 motions should not be used for improper purposes like "exact[ing] an unjust settlement," "intimidat[ing] an adversary," or "increas[ing] the costs of litigation"). More surprisingly, ostensibly mandatory rules also frequently adopt this approach. *See, e.g.*, MODEL RULES, *supra* note 58, Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); *id.* Rule 3.5(c) ("A lawyer shall not . . . engage in conduct intended to disrupt a tribunal."); *id.* Rule 4.4 ("[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .").

105. *See* Hazard, *supra* note 86, at 14 ("How is it possible for rules to mandate higher standards than the rules require?"); John F. Sutton, Jr., *Outlawing Unjust Rules of Law: A Response to* Quibbles, 67 TEX. L. REV. 1517, 1517 (1989) (parodying as a solution to legal but unjust results obtained by litigation a proposal to "Enact yet another law—but this time, an awesomely overriding law that outlaws lawyers' 'quibbling.'").

106. *See* Hazard, *supra* note 86, at 14 ("[T]he problem is that true courtesy, and so also true civility and true professionalism, involves an element that eludes legislative prescription.").

107. For illustrative purposes, I want to focus on one aspect of that problem, the filing of improper claims, leaving aside for the most part allied problems like discovery abuse and obstructionist tactics in court. Most of the problems of the legal regulation of improper claims recur in these allied areas; I leave them aside now solely for the sake of shortening and simplifying discussion.

of professional responsibility[108]—all have highly evolved systems for curbing abusive litigation. Their convergent evolution toward vagueness or vacuity illustrates inherent limits in legalism as a means of redressing the central concern of the professionalism crusade.[109]

The genus of frivolous claims has two related species.[110] The first comprises vexatious claims, legally colorable claims pressed not to vindicate or advance the claimant's legal rights, but to harass, injure, or wear down an opponent. The classic is Shylock's suit for Antonio's pound of flesh.[111] The second species comprises legally unwarranted claims, claims that although not wrongly motivated, are inadequately grounded in law. Frivolous claims include vexatious suits, whatever their legal merit, and legally unwarranted suits, whatever their motivation. The disfavor of both kinds of suits derives from the same sources as the law's general distaste for spite, waste, and extortion.[112]

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108. *See* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (critically assessing disciplinary, liability, institutional, and legislative controls on lawyer misconduct). *But see* Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH. L. REV. 31, 61-73 (1993) (calling for a shift in policing of professionalism from judicial sanctions and civil suits to lawyer disciplinary proceedings).

109. This is also evident in less highly evolved legislative approaches as well, in particular 28 U.S.C. § 1927 (1988) and the new legislation aimed at strategic lawsuits against public participation, or "SLAPPS." *See* Laura J. Ericson-Siegel, *Silencing SLAPPS: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 FLA. ST. U. L. REV. 487, 498 (1992) (arguing that a Florida statute aimed at punishing parties for filing SLAPPS creates a standard that is "close-to-impossible" for plaintiffs to meet).

110. My bifurcation of frivolity is reflected in each of the three bodies of law I analyze. With respect to the official lawyer codes, the definition of that term in the official comment to Model Rule 3.1 declares:

> The action is frivolous . . . [1] if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, [2] if the lawyer is unable either to make a good faith argument on the merits or the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

MODEL RULES, *supra* note 58, Rule 3.1 cmt. The same distinction appears in the Model Code's DR 7-102(A)(1) and 2-109(A)(1), which forbid harassment and malicious injury, and DR 7-102(A)(2) and 2-109(A)(2), which forbid legally unwarranted claims and defenses. MODEL CODE, *supra* note 101, DR 2-109(A)(1) & (2), 7-102(A)(1) & (2). Rule 11, similarly, distinguishes between filings "warranted by existing law or a good faith argument for the extension, modification, and reversal of existing law" and "not interposed for any improper purpose." FED. R. CIV. P. 11. Finally, the torts of wrongful use of civil process and abuse of process parallel this division, as courts applying Rule 11 have noted. *See, e.g.*, Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) (noting that Rule 11 "effectively picks up the torts of abuse of process (filing an objectively frivolous suit) and malicious prosecution (filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning)").

111. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

112. Thus, for example, the law of property forbids "spite fences"—fences erected to injure one's neighbor rather than enhance one's own property—and spiteful extraction of resources like water, oil, and gas from common pools even when extraction for any other purpose is unlimited. *See, e.g.*, 5 RICHARD R. POWELL & PATRICK ROHAN, POWELL ON REAL PROPERTY ¶ 696 (Ellen M. Fischer ed.,

Ideally, the law would regulate frivolous litigation by complementary subjective and objective tests.[113] The subjective test would forbid vexatious suits on account of their tainted motive, irrespective of their legal merit. The objective test would forbid legally unwarranted suits on account of their groundlessness, regardless of the purity of their purpose. But, for all its conceptual elegance, this framework has proved an elusive ideal. Problems of overinclusiveness and underinclusiveness[114] bedevil the regulation of both vexatious and groundless suits: how to curb disfavored conduct without overdeterring desirable conduct, and, conversely, how to provide safe harbors for desirable conduct without creating havens for pirates.

With respect to vexatious suits, the twin problems of overinclusiveness and underinclusiveness have both a practical and a theoretical aspect. The practical aspect is the difficulty of proving subjective intent, of knowing which suits are really improperly motivated.[115] Even if this problem could be surmounted—or accepted—a deep theoretical divide would remain: disagreement over whether any legally warranted claim should ever be barred on account of bad motivation.[116] Shylock's right to bring his

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1993) (spite fence); 1A GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 239 (John S. Grimes repl. 1980) (spite fence); 3 HERBERT T. TIFFANY, TIFFANY ON REAL PROPERTY § 716 (1939) (spiteful extraction). Similarly, DR 7-105(A) forbids "threaten[ing] to present criminal charges solely to obtain an advantage in a civil matter." MODEL CODE, *supra* note 101, DR 7-105(A); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(b), (c) cmt. d (1979) (noting that the threat of initiating a civil action makes a contract voidable if the purpose of the suit is illegitimate); Arthur A. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 19 n.58 (1970) (discussing commercial torts arising from naked spite, and citing 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS §§ 6.11-6.13 (1956)).

113. For an elegant economic analysis of the problema of legalism as an inadequate remedy for litigational abuse, which the following discussion parallels, see Gilson, *supra* note 8, at 877-82.

114. Gilson, *supra* note 8, at 877 (discussing the "difficulty [of] defining strategic litigation in a fashion that minimizes the costs associated with the definition being either under or overinclusive").

115. As I have argued elsewhere, parodying Lord Justice Bowen's dictum, the state of mind may be as provable in principle as the state of digestion, but it is a good deal more difficult to prove in fact. Rob Atkinson, *Altruism in Nonprofit Corporations*, 31 B.C. L. REV. 501, 529 (1990); *see also In re* Primus, 436 U.S. 412, 443 (1978) (Rehnquist, J., dissenting) (lamenting a "jurisprudence of epithets and slogans" based on the subjective motives of the lawyers whose contacting of clients is in question); Wilkins, *supra* note 96, at 511, 511-12 (noting that in any system of professional regulation "it will often be difficult to determine whether a particular lawyer has acted in 'good faith'").

116. When money is clearly the object of the suit, such a proxy might well work. The problem, of course, is that money is not always the object and that when money *is* the object is not always clear. Compare the view of Leslie Green, that "a case is frivolous only if the value of its being heard is not worth the costs (in a large rather than narrow or economic sense)," with that of Sanford Levinson, that "we are willing to tolerate a litigant's bringing a case that most of us would find radically 'uneconomic,' so long as the formal legal arguments are not preposterous," because, for example, "some individuals might have an exaggerated sense of honour that requires them to sue for defamation or invasion of privacy when the rest of us would shrug our shoulders." Levinson, *supra* note 103, at 358 n.19 (quoting letter from Leslie Green to Sanford Levinson (Apr. 10, 1986)). *See also* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 569 (1985) ("For two millennia, philosophers have viewed steadfast adherence to principle as one of the cardinal virtues.").

case, if not his motives for bringing it, has always had its defenders.[117] The body of current law on vexatious litigation reveals these tensions with predictable compromises. In none of the three principal divisions of the law of vexatious litigation—the common-law tort of abuse of process,[118] Rule 11, and the parallel provisions of the lawyer codes[119]—is vexatious

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117. No less a jurisprude than von Jhering defended Shylock's claim as a paradigmatic defense of the rule of law itself. RUDOLF VON JHERING, THE STRUGGLE FOR LAW 86-88 (John J. Lalor trans., 2 ed. Callaghan & Co. 1915) (1877). As we shall see in the next section, the fact that this view has contemporary defenders among American lawyers poses another set of problems for the professionalism crusade. *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976) (defending the hypothetical legal representation of Shylock based on the moral theory that it is justifiable to put a client's interest above the greater good). *See generally* JOHN GROSS, SHYLOCK: A LEGEND AND ITS LEGACY (1992).

118. The common-law tort of abuse of process makes actionable the filing of a legally valid claim for improper purposes. RESTATEMENT (SECOND) OF TORTS § 682 cmt. a (1976) [hereinafter RESTATEMENT]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 897 (5th ed. 1984); 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 4.9 (2d ed. 1986). Lawyers filing such claims are subject to suit themselves. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78 cmt. d (Tentative Draft No. 7, 1994) (tracking RESTATEMENT, *supra*, § 682). Significantly, however, even purely spiteful motivation does not alone make the suit actionable as abuse of process. *See* RESTATEMENT, *supra*, § 682 cmt. b; KEETON ET AL., *supra*, § 121, at 897; HARPER ET AL., *supra*, § 4.9, at 481-95. Only when legal process is used to accomplish some further harm to the defendant, other than that which will result from the bringing of the case itself, is it actionable.

In the typical case of abuse of process, this additional harm involves some form of extortion: The threat of bringing an otherwise legitimate claim is used to extract from the defendant something other than concession of the claim that is the basis for the suit. RESTATEMENT, *supra*, § 682; KEETON ET AL., *supra*, § 121, at 898; HARPER ET AL., *supra*, § 4.9, at 479-81. Shylock's foreclosure would not seem to be actionable under the general rule, as reflected in the *Restatement*, unless Portia could show that Shylock meant to achieve something other than the direct harm attributable to the asserted forfeiture of collateral. *See* RESTATEMENT, *supra*, § 682 cmt. b ("The usual case of abuse of process is one of some form of extortion, using the process to put pressure on the other to compel him to pay a different debt or to take some other action or refrain from it."). When evidence of spiteful motive is especially clear, courts sometimes require very little, if anything, more. HARPER ET AL., *supra*, § 4.9, at 483-85, 490-95.

119. The Model Code did have explicit prohibitions of vexatious suits, but the prohibitions were restricted to suits brought "merely to harass or maliciously injure." MODEL CODE, *supra* note 101, DR 7-102 (A)(1) (forbidding the acceptance of employment to bring a malicious action); *id.* DR 2-109 (A)(1) (forbidding the filing of malicious actions). The Model Code's predecessor, the ABA's 1908 Canons of Ethics, had a similar prohibition in Canon 30 of "conduct[ing] a civil cause . . . intended merely to harass or injure the opposite party or to work oppression or wrong." ABA CANONS OF PROFESSIONAL ETHICS Canon 30 (1908). This seems to require an exclusively improper purpose, which would be difficult to prove in principle, 1 HAZARD & HODES, *supra* note 57, § 3.1:102 (Supp. 1994), and which in fact enforcement authorities were loath to find in legally warranted cases. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.5.5, at 717 n.66, 718 (1986) (noting the reluctance of some courts to apply to well-founded charges the prohibition of DR 7-105 against threatening criminal charges solely to obtain advantage in civil matters and discussing the absence of a parallel prohibition in the Model Rules).

The ABA's 1983 Model Rules purport to broaden the prohibition of vexatious litigation. According to Rule 3.1's official comment, the standard is now whether the claim is asserted "primarily for the purpose of harassing or maliciously injuring," which the Rule's Model Code Comparison explicitly contrasts with the "merely to harass or maliciously injure" language of the Model Code. MODEL RULES, *supra* note 58, Rule 3.1 code comparison. This suggests that a suit is sanctionable if

motive alone clearly sanctionable.[120]

Matters stand no better with respect to the other main branch of frivolous litigation, legally unwarranted claims. Here high theory and ordinary practice produce convergent pressures. The relative indeterminacy of legal rules injects an element of uncertainty into every case; the private market in legal services inclines lawyers to exploit that uncertainty to their clients' advantage in every new application of law to facts.[121] The principal problem here is articulating a standard of "legally warranted" with enough play in the joints for law to move forward in critical areas without crippling the doctrines of stare decisis and res judicata on which the very rule of law itself stands.

In virtually identical language, Rule 11, the lawyer codes, and the common law of wrongful civil proceedings all accede to this need to balance stability and dynamism: to avoid sanction, a claim need not be

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its main purpose is vexation, even if that is not its sole purpose. But all language about harassment and malicious injury is gone from the text of Rule 3.1, the official commentary is not supposed to add anything to the text, and the Model Code Comparison is explicitly relegated to unofficial status. *See* MODEL RULES, *supra* note 58, Scope, ¶ 21 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."); *id.* ("The [research] notes have not been adopted as part of the Model Rules, and are not intended to affect the application or interpretation of the Rules and Comments."). Furthermore, no disciplinary action appears ever to have been taken under either the Model Rules or the Model Code for bringing a wrongfully motivated but technically warranted claim. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. REV. 959, 974 (reporting that few courts have even construed state code provisions aimed at technically warranted, yet harassing, claims).

120. Rule 11 comes closest. It retains a prohibition of improperly motivated filings; lawyers must certify that papers are not filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). The circuits are split, however, on whether a wrongly motivated but legally warranted suit is sanctionable under the rule. *Compare* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1083-85 (7th Cir. 1987) (finding sanctions proper in such cases), *cert. dismissed*, 485 U.S. 901 (1988) *with* Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986) (finding sanctions not proper in such cases). *Cf.* Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1475-77 (1988) (holding that sanctions are proper as to filings other than complaints that pass the "warranted by law" prong of Rule 11 but fail the "improper purpose" prong).

For fuller discussion of the conflict among circuits, see GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTATIVE MEASURES 4-38 to -40 (2d ed. 1990 & Supp. 1994) and ABA LITIGATION SECTION, STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in* 121 F.R.D. 101, 121-22 (1988). Commentators are similarly divided. *Compare id.* at 121-22 *and* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 184-86 (1989) (both favoring improper motivation as an independent basis for sanctions) *with* VAIRO, *supra*, at 4-44 (arguing that papers meeting the "warranted by law" prong of Rule 11 should not be independently sanctionable as filed for an "improper purpose").

121. Wilkins, *supra* note 96, at 497 ("Lawyers have both the power and the incentive to manipulate the very boundaries that are supposed to provide an independent source of constraint."); *see* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 637 (1987) (noting that the lack of a standard of plausibility "mak[es] it difficult for a lawyer to predict the likelihood of sanctions when filing a novel or undeveloped claim").

"warranted by existing law"; it may alternatively be warranted by "argument for the extension, modification, or reversal of existing law."[122] Yet it is extremely difficult in practice, if not impossible in principle, to devise an "extension, modification, or reversal" exception that does not devour the "unwarranted by existing law" rule. In allowing the limiting case of legal dynamism—argument for the reversal of existing law—the exception threatens on its face to undermine the competing value of stability embodied in the doctrine of stare decisis, which is the basis of the rule. Without qualification, permitting argument for the reversal of existing law would mean that one could file today for reversal of yesterday's unanimous decision by the Supreme Court on admittedly indistinguishable facts. Yet arguments for reversal must be allowed at some point, or *Plessy*[123] could not give way to *Brown*.[124]

These problems in objectively qualifying the permissible scope of arguments for change in existing law led to the understandable but infelicitous inclusion of subjective qualifiers in the lawyer codes, Rule 11, and tort law. This is most striking in the common-law tort of wrongful use of civil proceedings.[125] An essential element of that tort is a showing of the defendant's bad faith in bringing the legally unwarranted claim.[126]

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122. This has been the language of Rule 11 since its amendment in 1983; the 1993 amendment added the phrase "or the establishment of new law." FED. R. CIV. P. 11 advisory committee's note. The language quoted in the text is also found in virtually identical words in MODEL CODE, *supra* note 101, DR 7-102(A)(2), 2-109(A)(1), and MODEL RULES, *supra* note 58, Rule 3.1. The *Restatement (Second) of Torts*, in defining wrongful use of civil process, uses the term "without probable cause" to capture the concept of "unwarranted by law." RESTATEMENT, *supra* note 118, § 674. Section 675, comment f, "Existence of Probable Cause," makes clear that arguments for the reversal of existing law meet the standard if based on a "reasonable" opinion that "there was a sound chance that the claim might be sustained." *Id.* § 675 cmt. f.

123. Plessy v. Ferguson, 163 U.S. 537 (1896).

124. Brown v. Board of Educ., 347 U.S. 483 (1954). *Plessy*, predictably, is a favorite citation for this point. *See, e.g.*, RHODE & LUBAN, *supra* note 28, at 213 (suggesting that the passage of time alone may have prevented the plaintiff's argument in *Brown* from being frivolous); Robin J. Collins, Note, *Applying Rule 11 to Rid Courts of Frivolous Litigation Without Chilling the Bar's Creativity*, 76 KY. L.J. 891, 921 (1988) (noting that the arguably frivolous early challenges to *Plessy* "paved the way for the holding in *Brown v. Board of Education*").

125. This is the term used in Chapter 30 of the *Restatement (Second) of Torts* to refer to legally groundless civil actions. RESTATEMENT, *supra* note 118, § 624. The term "malicious prosecution," which the *Restatement* restricts to wrongful initiation of criminal proceedings, *id.* ch. 29 (Introductory note), is also widely used by courts and commentators to refer to legally groundless civil cases as well. *E.g.*, WOLFRAM, *supra* note 119, at 53 n.14; Wayne Thode, *The Groundless Case—The Lawyer's Tort Duty to his Client and to the Adverse Party*, 11 ST. MARY'S L.J. 59, 68 n.40 (1979); *see also* HARPER ET AL., *supra* note 118, §§ 4.8-4.9 (using the term "malicious prosecution" to refer to civil as well as criminal cases).

126. To establish such a claim, the aggrieved party must prove not only that the challenged action was legally groundless under an objective, reasonable person standard, RESTATEMENT, *supra* note 118, §§ 674, 675 ("without probable cause"), but also that it was advanced "primarily for a purpose other than that of securing the proper adjudication of the claim," such as "to harass the person proceeded against." *Id.* § 674 (setting out basic requirements of the tort); § 676 (elaborating the requirement of

A less radical, but equally problematic, recourse to a subjective qualification of the "warranted by law" standard has infected both the lawyer codes and Rule 11. In neither is bad faith an element of the offense, but in both "good faith" historically has been an effective defense. Under both the Model Code[127] and the Model Rules,[128] and under Rule 11 until its amendment in 1993,[129] arguments for the extension, modification, and reversal of existing law have been permissible if they are made in "good faith." Reading "good faith" to protect arguments made in innocent ignorance of existing law gave rise to a hopelessly open-ended "pure heart, empty head" defense that was explicitly rejected by both the 1983 amendments to Rule 11 and ABA's 1983 Model Rules.[130]

Conceptually, a subjective standard of good faith could be limited to protecting those who conscientiously and knowledgeably press positions not recognized by existing law. Unfortunately, no such standard would be workable, for both practical and theoretical reasons. As a practical matter, the unscrupulous would simply assert that they, too, were in the protected class, that their positions were asserted in subjective good faith. And, even

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improper purpose); *see id.* § 674 cmt. d (discussing the requirement of an improper purpose with respect to lawyer's filing claims on behalf of clients); *cf.* Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 113 S. Ct. 1920, 1928 (1993) (finding that the filing of a lawsuit is subject to antitrust penalties only if the suit is objectively baseless and also is motivated by an intent to interfere with business relationships). Thus, the *Restatement*'s definition of the tort explicitly exonerates those who bring legally unsound claims unless, in addition, their purpose is improper. On account of this and other restrictions, such suits, like those for abuse of process, seldom succeed except in the most egregious cases. *See* 1 HAZARD & HODES, *supra* note 57, § 3.1:303; WOLFRAM, *supra* note 119, § 5.6.5 (both noting that physicians have usually not been successful countersuing an attorney for bringing a frivolous medical malpractice suit, but have had some recent success in egregious cases). The courts, in developing both torts, have tended to strike the balance between over- and under-deterrence of frivolous litigation fairly explicitly in favor of the latter, and generally they justify the choice in terms of giving everyone a day in court or not chilling zealous advocacy. *See* 1 HAZARD & HODES, *supra* note 57, § 3.1:303; WOLFRAM, *supra* note 119, § 5.6.5; *see, e.g.*, Thode, *supra* note 125, at 69-71, 77-82; Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 311-14 (1979) (all arguing that the courts have been too stingy in allowing countersuits against frivolous suits).

127. MODEL CODE, *supra* note 101, DR 2-109(A)(2), 7-102(A)(2).

128. MODEL RULES, *supra* note 58, Rule 3.1.

129. 2A MOORE'S FEDERAL PRACTICE ¶ 11.02 (Aug. 1994). The 1993 amendments substituted "nonfrivolous" for "good faith," thus rejecting an unsatisfactory answer in favor of begging the question. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 586-87 (1993).

130. *See* 1 HAZARD & HODES, *supra* note 57, § 3.1:102 (Supp. 1994) ("The [1983] revisions of FRCP Rules 11 and 26(g) were plainly meant to impose a higher standard on lawyers . . . . The focus was no longer on the lawyer's actual belief in the soundness of what was being asserted, but on whether a reasonable lawyer would know that what was being asserted had no substantial basis or was frivolous."). The Advisory Committee's report states that the amended rule is "intended to eliminate any 'empty-head pure-heart' justification for a patently frivolous argument." FED. R. CIV. P. 11 advisory committee's note. The commentary accompanying the Model Rules also stresses the shift from a subjective to an objective standard. MODEL RULES, *supra* note 58, Rule 3.1 code comparison (distinguishing between the Model Code's subjective—"good faith"—standard and the Model Rules' objective—"nonfrivolous"—standard).

if this loophole could be plugged, it is not clear that we would want all sincere arguments for the change of existing law to be assertable without penalty.[131] At some point, we would grow impatient with claims, however conscientiously asserted, that the federal income tax effects a taking of property[132] or interferes with the free exercise of religion[133] or, on the other hand, that socialism is implied in the Constitution.[134]

The theoretical problem is thornier still. Conscientious lawyers differ not only on the fundamental question of when the law should change; we differ, too, on the role of lawyers in effecting that change. As we shall see in more detail later,[135] a widely held view of the lawyer's role, particularly in matters of litigation, is to press every advantage of the client to the farthest extent legally permissible, leaving it to judges or, ultimately, legislatures to determine whether the position is just, legally meritorious, or in accord with prevailing public norms. This model of lawyering implies something close to professional if not personal agnosticism about whether a particular legal position should prevail. To ask lawyers of this mind to bring only cases in which they personally believe would thus be to ask them to abandon their understanding of their lawyerly role. Even if those who think otherwise deemed it appropriate to demand this of them and could prevail against them in getting such a rule in place, it would be practically impossible to prove violations without resort to the very kind of objective standard the absence of which is the source of the problem. If there were a clear standard for when it is objectively appropriate to press a claim that lies beyond existing law, there would be no need to inquire into whether the lawyer pressing such a claim believes it should prevail.[136]

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131. *See* Wilkins, *supra* note 96, at 512-13 (proposing numerous arguments against a "good faith" safe harbor).

132. For instances of present judicial and legislative impatience in that regard, see Granzow v. Commissioner, 739 F.2d 265, 268 (7th Cir. 1984) (noting that "even good faith reliance on misguided constitutional beliefs does not relieve a taxpayer from liability" under 26 U.S.C. § 6673(a) (1988 & Supp. V 1993), which provides for monetary penalties when it appears to the court that the taxpayer's position is frivolous or groundless).

133. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound income tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

134. For the outline of such an argument, presented to contrast its logical coherence with its likelihood of legal success, see Singer, *supra* note 32, at 22-23.

135. *See infra* text accompanying notes 188-211.

136. A final alternative to the dilemma of objective and subjective standards in the evaluation of legal claims is the agnosticism of automatic fee shifting. This alternative abandons altogether the effort to define "vexatiously motivated" and collapses the criterion of "warranted by law" into the merits of the case. Rather than try to decide when a winning case is wickedly motivated or a losing case too lame to allow without penalty, this approach simply requires all losers to pay the fees of their opponents. Perhaps as evidence of frustration with other efforts in this field, fee shifting appeared in the Republican party's package of panaceas, the *Contract with America*. NEWT GRINGRICH ET AL.,

All this leaves us, in logic and existing law, with an unstable mix of objective and subjective standards for assessing the legal plausibility of claims under both Rule 11 and Model Rule 3.1. The more prominent objective component refers to an impersonal, reasonable lawyer or judge standard,[137] but even in articulating the objective component itself, the

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CONTRACT WITH AMERICA 145 (1994) (advocating a "loser-pays" rule for diversity cases filed in federal court); *see also* Neil A. Lewis, *House Passes New Standards Limiting Awards in Civil Suits*, N.Y. TIMES, Mar. 11, 1995, at 1, 7 (noting that House Republicans intended for fee shifting to discourage baseless litigation). Frivolity as a separate category simply disappears.

But mere fee shifting, despite its elegant agnosticism as to motive of litigant and colorability of claim, is hardly an ideal solution to the frivolity problem. To its credit, the ABA *Blueprint* concedes as much. ABA BLUEPRINT, *supra* note 2, at 292. Automatic fee shifting may merely shift the familiar problema of over- and under-deterrence into a new format. On the one hand, those with highly colorable but nevertheless uncertain claims will be deterred from filing suit by the prospect of having to pay their opponents' fees if they lose. This deterrence will predictably be greatest for those who already have problems paying their own fees under the present regime. And this outcome will be particularly true when their claims rest not on existing law, but (if you will pardon the expression) on good faith arguments for the modification, extension, or reversal of existing law. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-68 (1975) (discussing the inherent and statutory power of the federal courts to shift fees). On the other hand, mere fee shifting may be an inadequate deterrent in some cases. A rational strategy of well-heeled litigants is to wear down their opponents, and this may work even when they must pay their opponents' legal fees. Judith L. Maute, *Sporting Theory of Justice: Taming Adversarial Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 28, 32 (1987) (stating that the lack of consistent, rational enforcement of Rule 11 and professional codes creates a payoff incentive for the use of vexatious and dilatory tactics); Gilson, *supra* note 8, at 909 (suggesting that the amount of awards in reported Rule 11 cases is unlikely to be a sufficient deterrent, especially to corporate clients). This result would be possible, for example, when the delay of protracted litigation imposes significant costs other than legal fees, or when the gains of delay with a losing case exceed the shifted fees. The perpetrators of war crimes might as well be required to reimburse their victims for bullets fired in self-defense, without regard to bombed-out cities. For a comprehensive discussion of fee shifting see Symposium, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984) (examining historical, political, economic, and ethical aspects of fee shifting) and Bradley L. Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154 (1992) (setting forth a formal economic analysis of the effect on settlement of the English and American rules).

137. The vestigial subjective element, reflected in the perennial requirement that arguments beyond existing law be made in "good faith," refers to the lawyer's own belief that his or her position meets the external, objective standard. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (stating that a lawyer must have a "substantiated belief" in the propriety of the papers filed). The risk of this subjective component's widening into an empty-head, pure-heart defense is scotched two ways. First, courts tend to infer good faith only in cases in which departure from the objective standard is not too egregious. *See* JOSEPH, *supra* note 120, at 172, 171-72 (noting that courts use "a standard of objective reasonableness" in determining good faith); William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988) ("The facts in reported cases are egregious."); *see also* Business Guides, Inc. v. Chromatic Communications Enter., Inc., 892 F.2d 802, 808 (9th Cir. 1989); FSLIC v. Molinaro, 923 F.2d 736 (9th Cir. 1991); Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 70, 69-70 (3d Cir. 1988) (refusing to impose Rule 11 sanctions when "[t]he complaint in this case relied upon an expanded theory . . . which, while novel and unsuccessful, was not plainly unreasonable"). Second, the 1993 Rule 11 amendments dropped the term "good faith" from the text of the rule. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 578 (1993). Yet, when judges or bar disciplinary authorities see subjective good faith violations of the objective standard, they can, and apparently do, decline to impose severe penalties, under both Rule 11 and the parallel

tendency is toward extreme laxity. An oft-cited interpretation is that of Judge Easterbrook:

> [S]omething is frivolous only when we've decided the very point, and recently, against the person reasserting it, or 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable.[138]

The wide latitude Rule 11 allows, both in its standard of frivolity and its flexible penalty structure, implicitly concedes failure to find a legalistic solution to the problem.[139] As we have seen, the parallel provisions of the lawyer codes fare no better, and the common law of wrongful use of civil process is even more porous. Indeed, despite over a decade of intense effort, no clearly articulated and readily enforceable standard of either vexatiousness or legally unwarranted actions has emerged. We have, instead, a failure of legalistic regulation, an inability to spell out in clear terms the kind of conduct that we want forbidden in a way that gives warning to the conscientious and unscrupulous alike, deterring the latter enough without deterring the former too much.

It is important to note also that frivolous legal claims, which I have focused on here for the sake of simplicity, are but the tip of the iceberg. Beneath the surface of every legal claim, frivolous or otherwise, is its factual predicate, which itself may be without foundation.[140] Moreover, vexation and legally unwarranted issues arise not just at the level of cases

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provisions of Model Rule 3.1. 1 HAZARD & HODES, *supra* note 57, § 3.1:204 (Supp. 1994). The 1993 amendments to Rule 11 actually increased this flexibility by removing the requirement that any sanction at all be imposed. FED. R. CIV. P. 11(c); *see Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. at 508 (Scalia, J., dissenting) (objecting that making sanctions discretionary will decrease Rule 11's deterrent effect).

138. Levinson, *supra* note 103, at 375 (quoting Letter from Judge Easterbrook to Sanford Levinson (Jan. 29, 1986)); *see also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 76 (1985) ("Unthinkability has shrank dramatically over the years."); JOSEPH, *supra* note 120, at 92 ("[C]ourts resolve all doubts in favor of the signer [of the paper subject to Rule 11 certification] and impose sanctions only where it is 'patently clear' that they are appropriate."); Gilson, *supra* note 8, at 880 (asserting that the search for an objective standard tends to a "straight face" standard, under which "if the plaintiff's lawyer can stand before the court and recite the argument without smiling, the litigation is not strategic").

139. *See* SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 26 (1985) (finding "substantial disagreement among federal district judges concerning the propriety of and doctrinal standards for imposing sanctions on attorneys who violate Rule 11"); Levinson, *supra* note 103, at 378 ("[T]here seems to be no way of stating a recognition rule that can genuinely avoid charges of arbitrariness and, dare I say it, radical indeterminacy.").

140. Accordingly, the lawyer codes, Rule 11, and the analogous torts involving frivolous claims all address the problem of inadequate factual predicates. *See, e.g.*, MODEL RULES, *supra* note 58, Rule 3.1 cmt. 2; MODEL CODE, *supra* note 101, DR 7-102(A) (both stating that a claim is not frivolous merely because it has not heen fully substantiated, but it cannot be made to harass or maliciously injure another); RESTATEMENT, *supra* note 118, § 675 (defining "probable cause" to include "reasonabl[e] belie[f] in the existence of the facts upon which the claim is based").

or causes of action, but at the level of substantive and procedural matters within cases.[141] Pointless evidentiary objections and dilatory discovery practices are widely perceived problems in the professionalism crusade,[142] and their redress encounters the same problems we have identified with frivolous litigation generally. They are simply the retail end of a phenomenon we discussed at the wholesale level, and retail by its very nature involves vastly more individual transactions.

I must be careful here not to be mistaken for claiming too much.[143] It does not follow that, having identified problems in regulating frivolous litigation by legalistic means, I am asserting that all law is uselessly indeterminate.[144] With respect to law as a general regulatory system, that would prove too much for my legal liberal position. For my purposes, a much less sweeping claim is adequate: Legalistic regulation works less satisfactorily in some areas than in others,[145] and abusive litigation is an especially difficult area. Even in regard to abusive litigation, legalism has made headway. The rules have been improved—particularly by the elimination of the empty-head, pure-heart defense—and additional resources devoted to enforcement might produce a higher yield in the tightened net. But at some point the effort will begin to pay diminishing returns. Moreover, the costs come not just in the currency of increased expense of enforcement, but also in the more precious coin of competing values, in particular, the deterrence of conscientious but imaginative or impecunious litigants.[146] To show why the professionalism crusade looks beyond

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141. In implicit recognition of this, Rule 11 applies not only to "pleadings," but also to "every . . . written motion, and other paper" filed in the course of litigation, FED. R. CIV. P. 11(a), with the exception of matters of discovery, FED. R. CIV. P. 11(d), which are the subject of Rules 26 through 37. FED. R. CIV. P. 26-37; *see also* MODEL RULES, *supra* note 58, Rule 3.4(d) (forbidding frivolous discovery requests and failure to respond with reasonable diligence to an opponent's legally proper discovery request).

142. *See, e.g.*, FLORIDA COMMISSION, *supra* note 3, at 23; CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 445.

143. I am indebted to Mark Seidenfeld for pointing out this danger.

144. That position, emphatically not my own, is often vaguely associated with the mainstream of the Critical Legal Studies movement, see, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-28 (1984), and sometimes vaguely advanced by that movement's more aggressive currents. *See* Singer, *supra* note 32, at 10 ("Everyone is confused about what Critical Legal Scholars mean when we say that law or rights or legal theory is indeterminate."). For the debate generated by Carrington's charge that the Critical Legal Studies movement is tantamount to "legal nihilism," see Colloquy, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

145. *See* Kaplow, *supra* note 87, at 599-601 (describing general circumstances under which "legal commands cannot plausibly be formulated as rules").

146. *See* Gilson, *supra* note 8, at 908, 905-09 (arguing that the "public gatekeeping system" under the 1983 amendments to Rule 11 leads to "the fear that too rigorous a requirement of legal support will chill the development of the law"); Wilkins, *supra* note 96, at 499-500, 503-05 (concluding that "tighter" rules would exact systemic costs, because they would likely be either overinclusive or underinclusive and would lead to disparate or inconsistent enforcement).

legalism as a means of redressing abusive litigation, it is not necessary to show that legalism is useless even in the abusive litigation context. It is enough to show that legalism fails to work as well as many who worry about frivolous litigation would like, and that this failure has prompted them to look to other remedies.

Finally, legalism proper is only half the arsenal of legal liberalism, and arguably not the half best directed at the abusive litigation problem. There is, of course, an obvious alternative. Rather than relying on sharp-edged, legalistic prohibitions of vexatious and legally unwarranted suits, regulators could rely on fuzzy, "know-it-when-I-see-it" principles that nevertheless carry the full force of state-backed penalties. We could, in traditional terms, subordinate law to equity, allowing recourse to extremely open-textured standards whose interpretation and enforcement is entrusted to the wide, but not wholly untrammelled, discretion of judges. To some extent, we do this already in the abusive litigation context, and some elements of the professionalism crusade call for more. Before we examine this alternative and its problems, however, we need to see why legalism is an inadequate remedy with respect to the other major concern of the professionalism crusade, incivility.

2. Incivility.—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. The more authoritative arbiters of etiquette thus emphasize underlying dispositions and attitudes, not laundry lists of "dos" and "don'ts."[147]

Etiquette, moreover, is only one aspect of the civility that is relevant to the professionalism movement, and both etiquette and the larger dimensions of civility present problems for legalistic regulation even more fundamental than difficulties of precise definition. In the broader sense, civility incorporates two related elements. The first element is the notion that those to whom civility is extended are all members of a shared community, and worthy as such. From the international level down to the interpersonal, this means recognizing the common obligations of civility as

147. *See, e.g.*, LETITIA BALDRIDGE, LETITIA BALDRIDGE'S COMPLETE GUIDE TO EXECUTIVE MANNERS 6, 6-7 (Sandi Gelles-Cole ed., 1985) (asserting that "consideration of others is the key to good social behavior"); JUDITH MARTIN, MISS MANNERS' GUIDE FOR THE TURN-OF-THE-MILLENNIUM 12 (1990) (expressing a belief in "the unfairness of rigidly assigned duties"); ELIZABETH L. POST, EMILY POST'S ETIQUETTE at xiii, xiii-xiv (14th ed. 1984) [hereinafter POST, ETIQUETTE] ("Beneath its myriad rules, the fundamental purpose of etiquette is to make the world a pleasanter place to live in, and you a more pleasant person to live with." (quoting EMILY POST, ETIQUETTE IN SOCIETY, IN BUSINESS, IN POLITICS, AND AT HOME (1922))).

distinct from, and sometimes superior to, those of class or culture, party or religion, people or nation.[148]

The second element of civility is the way in which its obligations are superior to those of other affiliations. That supremacy lies in a commitment to resolving disputes—even disputes arising from other affiliations or commitments—by using the least coercive means against other members of the community.[149] At the international level, this means preference for nonviolent resolution of disputes, through legal means rather than by force, and, if force is necessary, by only the contextually appropriate force with minimum destruction of human life and culture, as the law of war paradoxically requires.[150] At the interpersonal level, this means observing cultural prescriptions for mannerly conduct, at least to the extent such prescriptions are designed to minimize social friction and give all persons their due as members of the community, even down to fairly small matters of detail.[151]

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148. *See* DURKHEIM, *supra* note 14, at 72-75 (attempting to reconcile national and universal ends in a national ethos that places the good of humanity at its apex); MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 248 (1994) (describing the threat that revived ethnic nationalism poses to "liberal civilization—the rule of laws, not men, of argument in the place of force, of compromise in place of violence").

149. It is important to note here the difference between civility, which is fundamental to liberal legalism, and civic virtue, which in its more aggressive forms manifests totalitarian tendencies. Civility is a more passive, procedural virtue; it entails minimally coercive resolution of disputes. In this sense, civility is virtually synonymous with tolerance. By contrast, civic virtue in its more virulent strains strives to eliminate disagreement in favor of universally accepted substantive outcomes. Regimes of civic virtue are not known for their civility toward those who persist in disagreement; intolerance, if not terror, tends to become the order of the day. *See* SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 678-846 (1989) (describing the ends and means of the Jacobin "Republic of Virtue"); Stephen G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 882, 883, 881-83 (1993) (labelling the civil republican movement as undemocratic for rejecting "skepticism, the impermanence of power, and individual autonomy" in order to perpetuate its own theories and "enforc[e] its chosen values"); *cf.* ABA, *1906 Report*, *supra* note 17, at 600 (denouncing those who depart from the ABA's professional vision as "enemies of the republic").

150. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 66-80 (1963) (describing the move in international law to ban the use of war as foreign policy, justifying it only in self-defense).

151. *See* Judith Martin & Gunther S. Stent, *I Think; Therefore I Thank: A Philosophy of Etiquette*, 59 AM. SCHOLAR 237, 245 (1990) ("[T]he first purpose of etiquette is to soften personal antagonisms and thus to avert conflicts, just as the first purpose of diplomacy is to avert war."); *see also* POST, ETIQUETTE, *supra* note 147, at xii, xiii-xiv ("[M]anners help to smooth the path between people, to establish a pleasant relationship.").

Sadly, etiquette sometimes functions to ensure that a particular class of people's due is small or systematically inferior. *See* JOHN F. KASSON, RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 3 (1990) ("[E]stablished codes of behavior have often served in unacknowledged ways as checks against a fully democratic order and in support of special interests, institutions of privilege, and structures of domination."); *see also* HAROLD NICOLSON, GOOD BEHAVIOUR, BEING A STUDY OF CERTAIN TYPES OF CIVILITY (1956) (examining twelve historically significant forms of civility, several of which were distinctly aristocratic). *But see* Martin & Stent, *supra*, at 253 (defending etiquette against charges of elitism). This was clearly true of those aspects

It is critical to notice that, in this conception of civility, law occupies an ambiguous position. On the one hand, it ensures minimum order. Rather than literally fight our neighbors, personal or national, we are to resort to legal means; we sue them, in forums that range from small claims court to the International Court of Justice. Significantly, however, the very law to which we have resort to avoid coercive self-help measures itself has coercive measures as its own ultimate sanction.[152] For that very reason, the order of law is the minimal, not the optimal, order in a regime of civility.[153] In that regime, as we have delineated it, recourse to coercive, nonpersuasive means is fundamentally disfavored. The preferred methods of interaction, from the global to the personal, are informal and non-coercive—in a word, civil.

It is that distinction between minimal order (the order of law) and optimal order (the order of civility) that Grant Gilmore illustrates in the parable with which he concludes *The Ages of American Law*:

> The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[154]

The radicalization of that distinction in the apostolic church[155] and its emulators among modern Anabaptists[156] underlies their dictum that it is better to suffer injustice at the hands of fellow believers than to seek justice against them in the courts of law. Rejecting their utopian anarchism,

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of Southern etiquette that required deference to whites on the part of blacks, see, e.g., WILLIAM H. CHAFE, CIVILITY AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA AND THE BLACK STRUGGLE FOR FREEDOM 8-10 (1980) (stating that blacks were victimized by Southern notions of civility), and also true of those aspects of "chivalrous" etiquette that tend to subordinate women. MARILYN FRYE, THE POLITICS OF REALITY 5-7 (1983). I want to hold those aspects of etiquette to the side for now; they will become important later, when we see that the current professionalism crusade does not do very well with them. For now, let us assume that etiquette in our society at least aspires to meritocracy and egalitarianism. We will deal with more realistic qualifications of that assumption later.

152. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

153. The terms minimal and optimal public order are from the New Haven school of jurisprudence, the principal exponents of which are Myres S. McDougal, Harrold Lasswell, and Micheal Reisman. *See, e.g.*, MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 95-96, 964-87 (1981).

154. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977); *see also* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 442 (1990) ("Far from establishing a society of trusting individuals, widespread enforcement of informal commitments based on trust alone would create a dystopia of regulatory oppression.").

155. *See Matthew* 5:40 ("[I]f any one would sue you and take your coat, let him have your cloak as well . . . ."); I *Corinthians* 6:2-7 (urging that believers settle disputes among themselves or allow themselves to be wronged without remedy, rather than seek justice in the courts).

156. *See* ROLAND H. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY 100 (1952) ("Under no circumstances would . . . [the Anabaptists] go to law.").

however, need not involve embracing its opposite. Indeed, overlooking Gilmore's distinction undermines efforts to ground this aspect of the professionalism crusade in a preference for the rule of law.[157] To seek codification and enforcement of civility as a matter of law is to risk losing ourselves in Gilmore's punctilious regulatory perdition. In a realm of optimal public order, lawyers are officers of the court only in the last resort; otherwise, they are officers of civility.

Against this background, we can see why legalism is an inadequate remedy for lapses in civility. On the one hand, with respect to minimum order, civility—with its essential preference for nonviolent means of dispute resolution—is the foundation of the legal order. As the emerging liberal democracies of the old Soviet bloc are painfully discovering, the construction of a liberal legal order is virtually impossible without the historically and logically prior foundation of a more general civil society.[158] The law prescribes respect for itself with the futility of Canute before the waves. Creating a civil society by legal fiat is an impossible bootstrap operation, both practically and conceptually. In both liberal political theory and the history of liberal polities, the rule of law is the product of a prior, prelegal commitment to civil society.[159]

With respect to optimum public order, there is a deep paradox in enforcing civility through legal means. To the extent that law succeeds, it necessarily entails the elimination of civility as an independent category of social regulation.[160] To let law encroach on the autonomous realm of civility as a means of preserving that realm is thus to advance, rather than

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157. *See* Terrell & Wildman, *supra* note 8, at 414 (noting that codes of professional conduct enforce only minimum standards of behavior and describing the function of "professionalism" as "to reach beyond the basic and uninspiring values enforced by the codes, and demonstrate that lawyers share, or ought to share, higher, more ambitious moral aspirations").

158. This theme has been especially prominent in the works of Vaclav Havel, the first post-Communist President of Czechoslovakia. *See, e.g.*, Vaclav Havel, On Home, Speech at Lehigh University (Oct. 26, 1991), *in* N.Y. REV. BOOKS, Dec. 5, 1991, at 49 (Paul Wilson trans.); Vaclav Havel, *The Culture of Everything*, N.Y. REV. BOOKS, May 28, 1992, at 30 (Paul Wilson trans.); Vaclav Havel, The Post-Communist Nightmare, Speech at George Washington University (Apr. 22, 1993), *in* N.Y. REV. BOOKS, May 27, 1993, at 8 (Paul Wilson trans.); *see also* NATIONAL HUMANITIES CENTER, THE IDEA OF A CIVIL SOCIETY (1992) (compiling papers on civil society presented at an international conference organized to explore efforts to redefine the relation between citizen and state in the former Soviet bloc); ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY 1-14 (1992) (describing a revival of interest in civil society, both in the academy and in practice).

159. *See* BURTON ZWIEBACK, CIVILITY AND DISOBEDIENCE 64-70 (1995) (grounding liberal theory of political obligation on the commitment to create a civil society as conceived by Hobbes and Locke); *see also* RAWLS, *supra* note 39, at 13, 13-15 (arguing that the content of a political theory of justice "is expressed in terms of certain fundamental ideas seen as implicit in the public political culture of a democratic society").

160. *See* Martin & Stent, *supra* note 151, at 245-47 (comparing law and etiquette as regulatory systems and noting that "law can be said to exist to compensate for the failure of etiquette," because law "bandles conflicts . . . that etiquette has failed to avert").

to reverse, its erosion. Law undermines the capacity of civility to enforce itself, to sustain and promote itself through its own set of informal rewards and punishments. And this erosion of civility as optimal public order may, perversely, undermine law as minimum public order. Some evidence of this undermining already exists in the particular area of frivolous litigation, as ready recourse to Rule 11 motions is reported to fray tempers and reduce the very civility that might otherwise operate as an independent constraint on frivolous litigation.[161] More generally, the displacement of civility with recourse to law may undermine the ultimate source of respect for the rule of law itself. Thus, in trying to prune back incivility—the withering of optimal public order—by the coercive means of law, legalism may be cutting off the only stock onto which the rule of law—the barest minimum of public order—can successfully be grafted.[162]

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 "legalistic," approach. Following an oscillation evident in other areas of law,[163] the professionalism crusade could, and sometimes

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161. *See* 1 HAZARD & HODES, *supra* note 57, § 3.1:205 (Supp. 1994) ("According to . . . critics, Rule 11 . . . has been a major contributing factor in the rise of so-called 'Rambo tactics' and the breakdown of civility and professionalism."); Marvin E. Aspen, *From the Bench: Doing Something About Civility in Litigation*, LITIG., Winter 1992, at 3, 4, 61 (1992) (citing Rule 11 as producing "incivility flash points" and concluding that "rules and regulations are perceived to be a major factor contributing to the decline in litigation civility").

162. In a perverse way, this result might well play directly into the hands of those subversively disruptive lawyers whose techniques most alarm some elements of the professionalism crusade. It is this delicate fabric of civility at which they characteristically strike, trying to destroy it not by abandoning it themselves with respect to civil society, but by forcing civil society to reject it in dealing with them. *See* WILLIAM KUNSTLER & SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 37 (1994) (discussing how the repressive judge in the trial of the "Chicago Seven" had "radicaliz[ed] enormous numbers of people" and eroded public respect for the American justice system); *cf.* Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 81-83 (Robert P. Wolff et al. eds., 1965) (faulting liberal society's practice of tolerance for creating complacency and co-opting critics). If those disruptive lawyers' methods are widely adopted, a liberal regime will collapse, not so much from outer attack, as from the compromise of its own values that are required to meet the outward attack. For similar reasons, terrorism may be more effective against liberal regimes than totalitarian ones; its perverse victory over the former may be to force them to become functionally indistinguishable from the latter. *See Human Rights v. New Initiatives in the Control of Terrorism*, 79 AM. SOC'Y INT'L L. PROC. 288, 294 (1985) (reporting the remarks of John F. Murphy that "[m]ost terrorism is directed against democratic societies in the hope that they will overreact to the threat and take actions that violate human rights principles").

163. *See* Hegland, *supra* note 103, at 1511, 1510-12, 1512 n.59 (summarizing a shift in contracts and juvenile justice from "deciding controversies pursuant to legal rules to deciding them pursuant to factual gestalt"); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580-90 (1988) (citing examples in property law in which "the straightforward common law crystalline rules have been muddied repeatedly by exceptions and equitable second-guessing"). *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685-86 (1976)

does, swing 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 decisionmaker.[164] Both the bar's professionalism studies and scholarly articles are replete with calls for this discretionary approach, sometimes joined with rather impatient suggestions that enforcing such standards is an inherent job of the judiciary on which judges have recently been slacking.[165] Moreover, the judiciary itself sometimes advocates judicial enforcement of professionalism,[166] and the United States Supreme Court, in the context of litigation abuse, has kept the option open.[167]

But even this approach has its problems. Judges have evinced, and occasionally expressed, reluctance to enter the lists against offending lawyers, sometimes because the judges fear retaliation in retention elections and bar polls,[168] sometimes because they regard such actions as institutionally inappropriate, wasteful of their time, beyond their expertise, or otherwise improper.[169] Behind this reluctance may lie a more funda-

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(analyzing the conflict between the use of clearly defined, easily administrable rules and equitable standards promoting ad hoc decisionmaking in the context of common-law thinking).

164. This effect sometimes happens in the interstices of supposedly sharp, "legal" rules, often with the blessing of sophisticated commentators. *See* HARPER ET AL., *supra* note 118, § 4.9, at 499 (praising some courts for following their "[c]ommon law instincts" in malicious prosecution and abuse of process cases in which abuses are clear and bemoaning the tendency toward "the proliferation of unnecessarily detailed 'rules' and 'elements'" that become "loopholes").

165. *See, e.g.*, ABA BLUEPRINT, *supra* note 2, at 291 (recommending more extensive use of sanctions under Rule 11 and its state analogues); CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 446 (noting the calls of "[s]everal commentators [on an interim draft] . . . urging the judiciary to assume a leadership role and serve as the principal example of courtesy, dignified courtroom conduct, restraint, and tolerance"); FLORIDA COMMISSION, *supra* note 3, at 29 ("Judges of the state and federal courts should be encouraged to enforce the Standards of Professionalism."); DORSEN & FRIEDMAN, *supra* note 67, at 192, 192-97 ("[U]ltimately the problem of courtroom disorder is one which the trial judge must solve."); Clarke, *supra* note 3, at 980, 977-84 ("Whether or not the judge finds that [certain] behavior [is] contemptuous, . . . the judge has broad discretion to implement measures that punish or control.").

166. *See* Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286-87 (N.D. Tex. 1988) (recognizing the court's power to "adopt standards for attorney conduct in civil actions"); CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 446 (urging the adoption of standards that articulate values that "should be voluntarily assumed and implemented by judges and lawyers alike as a commitment to improving the administration of justice").

167. Chambers v. NASCO, Inc., 501 U.S. 32, 42-51 (1991) (concluding that the statutory sanctioning scheme established for federal courts does not displace judges' inherent power to impose sanctions for bad-faith conduct); *see also* FED. R. CIV. P. 11 advisory committee's note (noting the availability of other remedial avenues under *Chambers*).

168. *See* ABA BLUEPRINT, *supra* note 2, at 293 ("[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 . . . .").

169. *See* Clarke, *supra* note 3, at 954 (noting that, with some notable exceptions like the *Dondi* case, "[c]ourts generally are reluctant to impose formal rules of courtroom conduct"); Robert E. Keeton, *Times are Changing for Trials in Court*, 21 FLA. ST. U. L. REV. 1, 15 (1993) (maintaining

mental problem: Who judges the judges, and in what terms, if the judges are by definition being asked to apply ineffable standards?[170] Abusive judges exist, even if they don't abound.[171] And variation would exist even among conscientious judges, as the history of Rule 11 amply demonstrates.[172] Equity, remember, is notorious for varying with the chancellor's foot.

With respect to both civility and frivolity, the prospect of judges imposing severe sanctions under vague, discretionary standards poses an oft-noted problem of chilling legitimately zealous advocacy.[173] There is much anxiety, and at least some evidence, that the chancellor's foot may be applied with skewed vigor to unpopular claimants, innovative claims, and nonelite lawyers.[174] This potential problem could in principle be

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that "judges in general have neither the time, the resources, nor the will" to undertake the responsibility of controlling and punishing hardball lawyers). This reluctance is also evidenced by the judiciary's failure to expand Rule 11's scope from "gatekeeping"—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, 1542, 1538-42 (9th Cir. 1986) ("Amended Rule 11 of the Federal Rules of Civil Procedure does not impose upon the district courts the burden of evaluating under ethical standards the accuracy of all lawyers' arguments."); RHODE & LUBAN, *supra* note 28, at 211 (noting a "fundamental" disagreement as to whether Rule 11 is best understood as a "gatekeeping" or an "ethical" rule).

170. *See* Illinois Committee, *supra* note 3, at 451 ("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.").

171. *See* DORSEN & FRIEDMAN, *supra* note 67, at 199-205, 233-34 (documenting various forms of judicial misbehavior); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972) (examining the dangers of courtroom misconduct by judges and prosecutors); Aspen, *supra* note 161, at 61 (quoting lawyer criticism of judges as "arbitrary" and "rude" in response to a survey by the Seventh Circuit's special Committee on Civility); Clarke, *supra* note 3, at 1004-11 (discussing breaches of etiquette by judges).

172. *See* KASSIN, *supra* note 139, at xi ("[T]here is a good deal of interjudge disagreement over what actions constitute a violation of the rule . . . ."); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 965-75, 985 (1992) (documenting the uneven application of Rule 11); Schwarzer, *supra* note 137, at 1016 ("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.").

173. *See, e.g.*, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 77-82 (1990) (asserting that zealous advocacy and innovative lawyering are put at risk when judges impose sanctions not only against lawyers who file frivolous claims but also against those who file pleadings or make arguments that the court finds unavailing); 1 HAZARD & HODES, *supra* note 57, § 3.1:205 (Supp. 1994) (noting that criticism of Rule 11's chilling effect persisted despite studies suggesting it had no such effect); Collins, *supra* note 124, at 911-21 (discussing approaches to Rule 11 designed to minimize its chilling effect); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 303, 301-10 (1989) ("Numerous courts' application of Rule 11 has jeopardized litigation seeking to vindicate new legal theories, less popular and test cases . . . ."). *But see* Schwarzer, *supra* note 137, at 1017 (arguing that concerns about chilling are unfounded given that reported sanctioned behavior has been egregious).

174. *See* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 69 (1989) (finding that civil rights

remedied by rigorous standards of review, but the same problems that beset the drafters of rules against frivolity and incivility also bedevil efforts to corral their application through appeals. Not surprisingly, the standard of review in Rule 11 cases is highly deferential.[175]

Here again, it is important not to be mistaken for proving too much. To assert that the vagueness inherent in flexible equitable standards is intolerable in the regulation of litigation abuse and incivility is not to say that similar degrees of vagueness are always intolerable. It is enough to note that the danger of overdeterrence here trenches against especially fundamental interests, a condition under which vagueness has long been recognized as especially troublesome.[176] The interests here are not only legally allied to constitutional protections like the right to petition government[177] and the right to effective assistance of counsel,[178] but also are logically anterior to the assertion of any other right in a court of law.[179]

Moreover, with respect to incivility, another problem would remain even if the problem of excessive discretion were solved—the problem of displacing an area of autonomous civic regulation by the coercive power of the state. Whether judges impose sanctions under clear, legalistic rules or under looser, equitable principles, they equally act as agents of the state, wielding the state's coercive power. As we have seen, invocation of these

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plaintiffs in the Third Circuit were sanctioned at a considerably higher rate than other plaintiffs); KASSIN, *supra* note 139, at 38 (comparing judges who had imposed sanctions frequently to those who had done so infrequently and noting that the former group was more likely than the latter to impose sanctions when confronted with a hypothetical civil rights case, but not when confronted with other hypothetical cases); Wilkins, *supra* note 96, at 504 (arguing that the uneven application of Rule 11 sanctions "highlights the extent to which a universal enforcement strategy disproportionately affects those at the lower end of the socioeconomic ladder"); *see also* Hegland, *supra* note 103, at 1512 (expressing fear that moving away from clear legal rules in this context may give play to judicial bias toward class, gender, or race). The similarly loose standards for assessing the moral character of bar applicants have certainly been used in this fashion. *See* Rhode, *supra* note 116, at 566, 566-70 (documenting the price that the "moral character requirement has placed . . . on nonconformist political commitments").

175. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (holding abuse of discretion to be the standard of review applicable to Rule 11 matters).

176. *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-85 (1960) ("[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.").

177. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

178. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.").

179. *See* Rhode, *supra* note 20, at 228 ("As the Supreme Court has long recognized in other contexts, the right to sue and defend 'is the right conservative of all rights,' and would often be of little value if it did not encompass access to legal assistance." (quoting Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907))).

means necessarily trenches against the alternative, informal methods of civility.[180]

There is, however, a possible accommodation: judges could intervene to address instances of incivility, despite their role as state agents, but with minimally coercive measures. In particular, judges might advise lawyers or clients that lawyers have overstepped the bounds of civility, though not the bounds of law, and urge them, without invoking coercive sanctions, to voluntarily comply with extralegal constraints on their conduct. The same strategy, moreover, could be applied to frivolity as well as to incivility.[181] With respect to both problems, judges might act as agents of civility as well as agents of law and thus expand the civic realm without significantly contracting the legal.

I will explore this particular role of judges in detail below.[182] The point to note here is that this new role of judges is part of a larger strategy, which is an alternative to both the legalistic and equitable approaches. To that third approach, and its relation to the professionalism crusade, we must now turn.

C. *Nonbinding Self-Regulation*

So where are we, when we conclude that neither hard legal rules nor squishy equitable standards adequately address the problems of frivolity and incivility? We are at the threshold of the professionalism crusade. This movement is the professional equivalent of a religious revival, for better and for worse. It relies on legally nonbinding "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.[183]

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 their place,

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180. *See supra* text accompanying notes 158-62.

181. *See* FED. R. CIV. P. 11 advisory committee's note (including "issuing an admonition" as a possible sanction for Rule 11 violations); MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.154 (1995).

182. *See infra* subpart V(B).

183. *See* Aspen, *supra* note 161, at 61 ("Interestingly, lawyers seek strong judicial leadership and lawyer commitment as a primary means of curbing incivility."); Croft, *supra* note 32, at 1351 (calling for supplementing the "rules-plus-discretion" approach of lawyer codes with promotion of "professional ethical sensitization"); Hazard, *supra* note 86, at 14 ("Up until now, the regulation of the profession has depended too much on rules attempting directly to regulate conduct and too little on establishment of professional institutions that can foster good conduct.").

evidence of an effort to rebuild the kind of professional community on which enforcement of informal sanctions depends.[184]

IV. Cracks in the Crusade

There are, however, two serious problems with the emerging approach. First, it tends to assume monolithic agreement about the substantive commitments that such a community would entail, what I call the fallacy of the one true way.[185] Second, it tends to assume that certain kinds of conduct are to be categorically condemned, what I call the fallacy of misplaced congeniality. This Part addresses these problems.

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

The major problem with the crusade's new approach 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 in the fourth, aspirational, sense that I have identified.[186] Before we can teach such professionalism, or reward it or punish it or make people promise to practice it, we have to get clear on what "it" is. To understand better why we are not clear on what it is, I will examine a tripartite taxonomy of lawyers. Each type fits quite comfortably within the law of lawyering, and each has both scholarly defenders and practicing exemplars. Yet each incorporates a very different vision of the lawyer's professional obligations beyond conformity to legally binding rules.[187]

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184. *See* PARSONS, *supra* note 14, at 44, 44-45 (hypothesizing that voluntary adherence to professional norms is greater in a "well-integrated situation" in which individual and group ends coincide).

185. *See* ABA BLUEPRINT, *supra* note 2, at 262 ("While one must always be conscious of the variety within the legal profession, more unites than separates us.").

186. *See supra* text accompanying notes 63-66.

187. There is, on the one hand, nothing inherently sacred about the number three. Robert Nozick 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 fully in mind, which is why there is no holy Quadrinity." NOZICK, *supra* note 38, at 557. For other tripartite divisions of lawyer types, see ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90-155 (1980) (the full advocacy model, the legal rights model, and the moral rights model); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 3-33 (1981) (the ethics of role, the ethics of isolation, and the ethics of care); Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS L.J. 761, 763 (1983) (the autonomy model, the socialist model, and the deontological model); John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1022 (1982) (the market model, the public utility model, and the personal responsibility model); and William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-90 (1988) (the libertarian model, the regulatory model, and the discretionary model).

1. The Neutral Partisan (or the Hired Gun).—The first type of lawyer is known in scholarly circles as the neutral partisan.[188] This type is also known, with more partisanship than neutrality, as the hired gun[189] or "Rambo."[190] The basic operating premise of this type 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 acceptable, 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,[191] has three basic modern justifications. Some commentators argue that it is an inevitable corollary of the adversarial system, which is itself defended as the best means of discovering truth and protecting individual rights.[192] More

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Heedless of Nozick's warning, other scholars have declined to schematize, insisting that normative models of lawyering vary too greatly among kinds of practice situations. *See* Nelson & Trubek, *supra* note 45, at 181-82 (arguing that developing normative models "without regard to everyday practice and professional history" is an "idle task"); Wilkins, *supra* note 96, at 516, 515-23 ("[L]egal ethics must develop a set of 'middle-level principles' that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in areas where they apply." (citations omitted)). In the discussion that follows, I implicitly take issue with the more fissiparous taxonomists; my scheme suggests that three broad categories of lawyer moralities cut across a wide range of practice areas, though of course their adherents may well encounter different issues and pressures in different contexts.

188. *E.g.*, RHODE & LUBAN, *supra* note 28, at 132-33; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985). This position has been described in many ways. *See, e.g.*, GOLDMAN, *supra* note 187, at 92-112 (referring to the position as the full advocacy model); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 7 (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE] (identifying the position as the standard conception); Fried, *supra* note 117, at 1061 (labeling the position as the "traditional conception"); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 613 (describing the position as the lawyer's amoral ethical role); Simon, *supra* note 187, at 1084-85 (characterizing the position as the libertarian approach). 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 28, at 132-33.

189. *See* WOLFRAM, *supra* note 119, § 10.3.1 (noting the ambivalence of lawyers to the term, some associating it with "servile acts of immorality and lawlessness" and others with "the macho heroics of the frontier").

190. *E.g.*, CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 445; 1 HAZARD & HODES, *supra* note 57, § 3.1:205 (Supp. 1994). *But see* Mashburn, *supra* note 13, at 699 (characterizing the denigration of Rambo in the professionalism movement as evidence of a bias against workingclass heroes).

191. It is traceable at least back to the position of Callicles in Plato's *Gorgias*. PLATO, GORGIAS 74-85 (Walter Hamilton trans., 1960); *see also* HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW 29-30 (1992) (arguing that Callicles's aggressive style is akin to that of the Rambo lawyer); James B. White, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 850 (1983) (identifying Callicles as "a mature practitioner of the rhetorician's art" and contrasting rhetoric with Socrates's dialectic as fundamentally opposed "ways of speaking, of being, and of establishing community with others").

192. *See* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) (defending the adversarial system as the best method for determining truth).

recently, this model 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, because lawyers are their clients' "special purpose friends" in such matters.[193] 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 be usurping the function of the law itself in setting the bounds of appropriate individual conduct.[194]

Scholars have criticized each of these defenses of neutral partisanship—as a corollary of the adversarial system,[195] as an analogue of friendship,[196] and as a necessary means to individual autonomy[197]—severely and, I think, compellingly. But—and this is a significant point—conscientious people could nonetheless think otherwise.[198] Indeed, one of the critical failings of the present crusade is to overlook those whom I will describe as conscientious Type 1 lawyers.

Both contemporary theoretical critiques of Type 1 lawyering and an awareness of its extensive social costs are fairly new,[199] and the elaboration of alternative models, newer still. As problems with 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

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193. *See* Fried, *supra* note 117, at 1071, 1071-76 (describing a lawyer's role as a "friend in regard to the legal system").

194. Pepper, *supra* note 188, at 617-18.

195. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 50-66; David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1984) [hereinafter GOOD LAWYER]; Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988) (all criticizing the adversarial system defense of the neutral partisanship model).

196. *See* RHODE & LUBAN, *supra* note 28, at 151-53; Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 639-40; Simon, *supra* note 10, at 108-09; Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, *in* GOOD LAWYER, *supra* note 195, at 38, 59 n.4 (all criticizing Fried's description of a lawyer as the client's "special purpose friend").

197. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 74-78; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 [hereinafter Luban, *Lysistratian Prerogative*]; Rhode, *supra* note 188, at 605-17 (all criticizing the individual autonomy defense of the neutral partisanship model).

198. When inequality of wealth and other sources of power are not factors, the neutral partisan model is much more appealing; by all accounts, neutral partisanship would be much more compelling in a world in which everyone had access to a neutral partisan. *See* Luban, *Lysistratian Prerogative*, *supra* note 197, at 643-48; Simon, *supra* note 10, at 50.

199. Here again, however, Plato laid the foundation, with Socrates's position in the *Gorgias*. *See* PLATO, *supra* note 191.

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.[200] 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 result, perhaps, gives Type 1s's 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."[201]

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 antisocial conduct; others are no doubt happy to operate up to the margins of legality without any excuse, conscientious or contrived. Among these latter, we can expect to find not just stretching of the borders of the law, but also self-serving transgressions of ordinary civility. Lawyers of this ilk do not justify their Type 1 behavior by even a self-serving reference to dubious theories; they do not try to justify it at all.[202] They are what I call unscrupulous Type 1 lawyers.

Consider a few illustrations of the Type 1 lawyer. In fiction, there is Dickens's marginally scrupulous Jaggers, portentously washing his hands of the consequences of his legal actions.[203] He not only defends the least

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200. *See* Rhode, *supra* note 188, at 618; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, *in* ETHICS AND THE LEGAL PROFESSION 114, 119 (Michael Davis & Frederick A. Elliston eds., 1986).

201. 2 GEORGE ELIOT, MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE 83 (Alfred E. Knopf 1930).

202. For an exception that oddly proves the rule, albeit in the idiom of the culture it represents (for which idiom I apologize in advance), see LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 241 (1993) ("Don't forget. I'm at Skadden Arps now. We *pride* ourselves on being assholes. It's part of the firm culture." (emphasis in original)). *See also* Benjamin Weiser, *Are Too! Am Not! Are Too! Am Not! Judges Try to Impose a Civil Tone as Depositions Get Increasingly Down and Dirty*, WASH. POST, Mar. 10, 1994, at B10 (reporting that attorney Joe Jamail unapologetically responded to the Delaware Supreme Court's rebuke of him for verbally insulting the opposing counsel during a deposition by stating, "They want to make lawyers dance to the tune of their mediocrity.").

203. CHARLES DICKENS, GREAT EXPECTATIONS 204 (Heritage Press 1971) (1861) (describing Jaggers's habit of literally washing his hands "whenever he came in from a police-court or dismissed a client from his room"). *But cf.* RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 54-56 (1992) (describing Jaggers as the paradigm of "successful literary lawyers").

savory of London's criminally accused, but also orchestrates the innocent Pip's frustrated expectations.[204] And there is Trollope's Sir Abraham Haphazard, to whom the justice of his client's or the opposition's case "were ideas that never presented themselves."[205] Finally, in more popular fiction, there is Polly Biegler, in Robert Traver's *Anatomy of a Murder*[206] (played by Jimmy Stewart in the movie version). As defense counsel, he presses the edge of subornation of perjury to suggest to his client a dubious but successful insanity defense to murder.[207]

In fact, the pantheon of Type 1 lawyers is equally crowded. The prophet, if not the patron saint, is Lord Brougham. Defending his defense of Queen Caroline against King George IV's charge of adultery, Brougham articulated an oft-quoted version of the Type 1 lawyer's creed:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[208]

A contemporary archetype is the late Bruce Bromley, a former litigation partner with Cravath, Swaine & Moore, who was noted for his dilatory tactics in major antitrust suits.[209] 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 [the Justice Department's Antitrust chief] could think of and protract it for the defense almost to infinity. . . . .

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204. DICKENS, *supra* note 203, at 164.

205. ANTHONY TROLLOPE, THE WARDEN 72 (Robin Gilmour ed., Penguin Books 1984) (1855). *See* Hegland, *supra* note 103, at 1507-09 (discussing Sir Anthony as a paradigm of lawyerly quibbling).

206. ROBERT TRAVER, ANATOMY OF A MURDER (1958).

207. *Id.* at 35-36.

208. Speech of Mr. Brougham, *in* 2 TRIAL OF QUEEN CAROLINE 3 (Jersey City, Frederick D. Linn & Co. 1879) (1821). On this speech's place in the iconography of neutral partisanship, see LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 54-55, 63, 84 (citing Brougham as a model for both criminal defense and civil lawyers); DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973) (noting the radicalization and distortion of Brougham's position); WOLFRAM, *supra* note 119, § 10.3.1, at 580 (citing Brougham's speech as the best known statement of zealous advocacy); Rhode, *supra* note 188, at 605 (citing Brougham's formulation of the advocate's role as "classic").

209. Philip Stern perfectly captured Bromley's tactics:

> 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 . . . .

PHILIP M. STERN, LAWYERS ON TRIAL 151-52 (1980).

> . . . Promptly after the answer was filed [in United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942)] 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.[210]

Today, there is a chair honoring Bromley at the Harvard Law School,[211] a monument 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.[212] The central belief of the Type 2 lawyer is this: public 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.[213] 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 . . . ."[214] Ends are to be measured against justice, not the letter of the law; means against truth and honor, not mere legality.

Like the Type 1 model, the Type 2 model is not monolithic. For our purposes, differences in theory, rather than motivation, matter most here. For Type 2 lawyers, different theoretical underpinnings give rise to different ranges of permissible conduct. To understand these differences, we must distinguish two subclasses of Type 2 lawyers, proceduralists and substantivists.

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210. Bruce Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417, 417, 420 (1959).

211. ASSOCIATION OF AM. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS: 1993-94, at 60; Rotunda, *supra* note 8, at 1165 (expressing the hope that everyone now recognizes Bromleyan tactics as professionally improper).

212. *E.g.*, Simon, *supra* note 10, at 61-67 ("[T]he lawyer as para-bureaucrat. . . ."); *id.* at 91-94 ("[T]he lawyer as acolyte . . . ."). For some, of course, the lawyer's metaphorical vestments are anything but a cloak for maliciousness. ABA, *1906 Report*, *supra* note 17, at 600 ("[T]he lawyer is and must ever be the highpriest at the shrine of justice.").

213. William Simon urges that lawyers be guided by the spirit of the law. *See* Simon, *supra* note 10, at 136 (noting that the lawyer should not view procedural considerations "independently of the substantive legal and moral values involved"); *see also* Croft, *supra* note 32, at 1329 (calling on lawyers "to adhere to the law's purpose—as well as its letter"). David Luban points them to ordinary morality. *See generally* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at xxii (calling on lawyers to practice "moral activism").

214. FLORIDA BAR COMM. ON PROFESSIONALISM, THE RULES REGULATING THE FLORIDA BAR AND IDEALS AND GOALS OF PROFESSIONALISM 10 (1991) [hereinafter FLORIDA BAR].

Type 2 proceduralists find limits short of the letter of the law, but only as to procedure, not as to substance.[215] In general, they believe that lawyers should use procedural laws—rules of evidence and procedure, 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. Type 2 proceduralists would, in other words, press any nonfrivolous claim, irrespective of their private opiniou 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 public limits short of the letter of the law constrain the lawyer with respect to substance as well as procedure. Substantivists would, accordingly, decline to bring nonfrivolous 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[216] or in the dictates of ordinary morality.[217] Stated most generally, the lawyer pursues justice, not just legally permissible outcomes.[218] In more sophisticated versions of the substantivist Type 2 model, substance and procedure are subtly coordinated. Thus, if the procedural mechanisms will ensure a fair adversarial presentation of differing positions on the merits, and if the tribunal is an appropriate one for making such decisions, then the lawyer can take more dubious substantive positions and can press them more aggressively than would otherwise be proper.[219]

The paradigmatic Type 2 lawyer is Louis Brandeis, playing two roles he created for himself, "lawyer for the situation" and "the people's lawyer." As "lawyer for the situation," Brandeis tried to bring antagonistic private parties together on mutually beneficial accommodations.[220]

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215. The paradigm of this position is expressed by ABA Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161-62 (1958) [hereinafter *Report of the Joint Conference*] (embracing partisan advocacy for its contribution to a "wise and informed decision to the case," while cautioning the lawyer not to distort or obfuscate the case's true nature).

216. Simon, *supra* note 187, at 1090-91, 1093, 1096.

217. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 174 ("You must remember that some things legally right are not morally right." (quoting 2 WILLIAMS H. HERNDON & JESSE W. WEIK, HERNDON'S LINCOLN 345 (Chicago, Belford, Clarke & Co. 1889) (quoting Lincoln))); Luban, *Lysistratian Prerogative*, *supra* note 197, at 638 (noting that "exercising one's legal rights is not always morally acceptable").

218. LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 173-74 (arguing that a lawyer should counsel a client as to the morality of his proposed acts and should withdraw from a case the lawyer finds unworthy); Simon, *supra* note 187, at 1083 (arguing that lawyers' "basic consideration should be whether assisting the client would further justice"); *see also* Hegland, *supra* note 103, at 1495 ("I would ban quibbling because it produces injustice.").

219. Simon, *supra* note 187, at 1096-113.

220. *See* WOLFRAM, *supra* note 119, § 13.6, at 730.

As "the people's lawyer," Brandeis tried to temper his representation of the emerging corporate giants of his day with concern for the underrepresented interest of the public at large.[221] This conception is the vision the bar generally holds up to its members,[222] and it is a vision toward which many lawyers aspire, at least in their more beatific moods.

3. The Moral Individualist (or Lawyer Vigilante).—The third type of lawyer is the moral individualist[223] or, less charitably, the lawyer vigilante.[224] The basic operating premise of this type is that lawyers may exploit loopholes, violating the spirit of both substantive and procedural law, subject to two constraints. First, like the other lawyer types, they must not transgress the law's letter; second, and distinguishing them from the other types, they must be laboring in a good cause, by their own lights. Unlike the Type 1 lawyer, the Type 3 lawyer believes in pursuing justice directly. But, in contrast to Type 2s, it is justice by their own standards, not by any set of shared public norms like the spirit of the law or ordinary morality. Type 3 lawyers, then, pursue any legal ends that they believe to be morally right, by any means that meet the same criterion.[225]

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 legal liberalism, stretching the law's outer bounds for the advantage of particular

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221. *See* LOUIS D. BRANDEIS, BUSINESS: A PROFESSION 337 (Hale, Cushman & Flint 1933) (1914) ("We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.'"); *see also* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 171, 169-74 (noting that Brandeis advocated that the American bar should stand "ready to protect . . . the interests of the people").

222. *See* MODEL RULES, *supra* note 58, Preamble ¶ 1 ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.2(a), 4-7.1(a) (1992) (directing prosecutors and defense counsel to practice "strict adherence to the rules of professionalism," without specifying which codes); *Report of the Joint Conference*, *supra* note 215, at 1162 (describing "partisan advocacy [as] a form of public service so long as it aids the process of adjudication").

223. *See* STERN, *supra* note 209, at 158 (invoking "my own personal balance scale" in assessing whether to represent a potential client and acknowledging that "[o]thers may propose different guidelines"); Leubsdorf, *supra* note 187, at 1045 (identifying the "personal responsibility model" of professionalism, which "calls on lawyers to stop hiding behind rules, roles, and institutions, and to take responsibility for their actions").

224. *See* Spiro T. Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931 (1972) (describing poverty lawyers as "ideological vigilantes").

225. For a general defense of this model, see Atkinson, *supra* note 30, at 947-77. For an example in the particular context of criminal defense, see John B. Mitchell, *The Ethics of the Criminal Defense Attorney: New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980) (discussing Mitchell's professional and personal reasons for representing defendants known to be guilty or dangerous to society). On substantive matters, my Type 3 lawyer closely resembles David Luban's "lawyer for a principle," typified by the ACLU's defense of a Nazi group's First Amendment right to march in the predominantly Jewish suburb of Skokie. National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977); LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 161-62.

clients, without meaning to subvert the legal system as a whole.[226] These are loyalist Type 3s. Other Type 3 lawyers, in contrast, oppose legal liberalism itself. They seek to exploit the play in its joints to cripple or kill what they think is a beastly system. These are subversive Type 3s. With them we reach a paradox—for these latter Type 3 lawyers, the processes that constitute legal liberalism are to be used as the means of delegitimating and eventually overthrowing the system as a whole.[227]

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."[228] She is no more troubled than a Type 1 lawyer[229] to prevail by arguing for a judicial construction not contemplated by either contracting party, even if that means denying Shylock his legal due.[230] What is critical to her, and irrelevant to the Type 1 lawyer, is that her client is her lover's best friend. Think, too, of Stephen Vincent Benét's Daniel Webster, exploiting jurisdictional technicalities and jury sympathies to deliver a New Hampshire neighbor from the Devil's levy on a Faustian loan.[231] As David Luban points out, Webster's role in converting Stone from his former avarice is critical to the salvation of Webster's own soul:

> Benét's story would be colored very differently if, at the end, Jabez Stone [the client] merely swaggered out chortling over how with the help of his lawyer he'd been able to take the money and run, or if Webster had beaten the Devil on a technicality, winked, pocketed a

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226. 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 maxims which one can at the same time will to be universal law. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (Lewis W. Beck trans., 1978) (1785). 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 a client 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. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 60-66.

227. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 370 (1982-83) (envisioning a leftist movement by lawyers that borders on the avowedly subversive).

228. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

229. *Cf.* Fried, *supra* note 117, at 1088 ("[T]here is a vocation and a satisfaction even in helping Shylock obtain his pound of flesh.").

230. *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 91-99 (1988) (pointing out Portia's willingness to use legal technicalities to trick Shylock out of his contractual rights in order to save a life).

231. Stephen V. Benét, *The Devil and Daniel Webster*, *in* THE DEVIL AND DANIEL WEBSTER 13 (1937).

> fee, and left Jabez Stone as he found him, hard and mean and prosperous.[232]

For nonfiction exemplars, think of Clarence Darrow, in his withering Scopes trial cross-examination of William Jennings Bryan[233] as well as in his "lawyer for the damned" criminal defense work.[234] But also bear in mind more ambiguous role models like William Kunstler, repeatedly cited for contempt of court in the Chicago Seven trial.[235] Kunstler purported to "only defend those I love,"[236] the mark of the Type 3 lawyer, but he had no love lost for legal liberalism,[237] the badge of the Type 3 subversive. Finally, it is worth remembering that zeal, even for justice, can lapse beyond sanctimoniousness into narcissism.[238]

B. Illustration of the Lawyer Types

To recapitulate, the three lawyer types are Type 1, the full advocate or hired gun, who goes full bore for *any* client or cause; 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 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 clarify these three breeds of lawyering and their respective subspecies, this subpart puts them through their paces in an extended example drawn from contemporary legal practice.

The case involves wetlands development. A well-heeled developer wants to dredge and fill part of an ecologically sensitive wetland and put in highrise condominiums. 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. We will look first at how the lawyer types approach the ends and means of client representation, in particular, the use of aggressive litigation tactics, then at their attitudes toward civility.

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232. LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 166.

233. *See* ARTHUR WEINBERG & LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 324-26 (1980) (highlighting Darrow's questioning of Bryan).

234. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 162 (noting that this phrase was a badge of honor, not a criticism).

235. *See* Victor S. Navasky, *Right On!*, N.Y. TIMES, Apr. 19, 1970, Magazine, at 88 (noting that the judge in the Chicago Seven trial sentenced Kunstler to an unprecedented four years and thirteen days for contempt of court).

236. AUERBACH, *supra* note 12, at 290.

237. *Id.* at 290-91.

238. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 115 (denoting three categories of people who take morality to excess: "the moral bully, the Bohemian *poseur*, and the overgrown adolescent"). For a compelling although fictional account of the havoc wrought by a self-appointed moral reformer, through his lawyer, at the expense of himself, his putative beneficiaries, and his fiancee's family, see TROLLOPE, *supra* note 205, at 140.

1. The Lawyer Types and Litigation Techniques.—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 his or her private opinion of the merits of the project. The Type 1 lawyer may defend his or her representation by telling us that every legal viewpoint deserves a good lawyer and, if a conscientious Type 1, may cite scholarly articles on the point.[239] 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 represent the environmental group. The critical point 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 the Type 3 lawyer will claim to be motivated by belief in the cause. And we have 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, Type 2 may decline the representation altogether, on grounds of public policy or personal morality. In fact, 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 Type 3. Conversely, belief in the substantive justice of the client's case will not be everything, as it is for Type 3s, or nothing, as it is for 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.[240]

Thus, instead of turning down the developers in this case, the Type 2 lawyer will likely try to persuade them to do better, or less bad, dressing that recommendation up in terms that will be meaningful to such a client: public image, community outrage, costly legal battles, and the like.[241]

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239. *E.g.*, Fried, *supra* note 117; Pepper, *supra* note 188.

240. As Geoffrey Hazard puts it, if the standard for continued association with a client were "what would be done by a supremely moral person unconcerned with costs," "there would be few of either clients or lawyers." GEOFFREY C. HAZARD, JR., ETHICS AND THE PRACTICE OF LAW 136 (1978). On the moral appropriateness of taking personal finances into account, at least at the margin, see Rhode, *supra* note 188, at 627 and Simon, *supra* note 187, at 1093.

241. *See* MODEL CODE, *supra* note 101, EC 7-8 n.19 (noting that a lawyer might try to lead a client to a morally proper decision by "emphasiz[ing] the possibility of harsh consequences that might result from the assertion of legally permissible positions"); *Report of the Joint Conference*, *supra* note 215, at 1161 ("[B]y reminding him of [litigation's] long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its

This tack will be especially appealing in the early, advisory phases of the representation. The lawyer might propose, for example, that the developer set aside a certain segment of legally-developable estuary as open space, perhaps in return for permission to build taller than normally permitted highrises. This effort to accommodate the interests of all concerned is the role of the Brandeisian "lawyer for the situation."[242]

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 costs in terms of time, 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,[243] or take intimidating steps against the environmental group.[244] He or she would routinely file Rule 11 claims and disqualification motions against the other side.[245] 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.[246] If there is a snail darter, the

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underlying spirit and purpose."). Robert Gordon has stated:

> Obviously most lawyers, or at least lawyers for big, powerful companies, will avoid abrasive and unnecessary confrontations with their clients. They will phrase negative advice as prudential rather than moralistic, supporting their recommendations with reasons that sound much more like statements of technical rules or empirical predictions of risks and results than political or moral judgments.

Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 28 (1988).

242. *See supra* text accompanying notes 220-22.

243. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that temporary takings effected by invalidated land use regulations are compensable under the Takings Clause).

244. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 396 (1993); George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 938 (1992) (all describing lawsuits used by real estate developers to intimidate local neighborhood and activist groups); Jennifer E. Sills, Note, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547, 547 (1993).

245. *See* MODEL RULES, *supra* note 58, Scope ¶ 6 (warning that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons"); *id.* Rule 1.7 cmt. 15 (cautioning that the raising of conflicts issues against an opposing counsel "can be misused as a technique of harassment").

246. *See In re* Primus, 436 U.S. 412, 445-46 (1978) (Rehnquist, J., dissenting) (expressing fear that a lawyer who "proceeds from political conviction rather than pecuniary gain" "will be inclined to

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.[247] They will exercise their constitutional right to inform the public, through the press, about the impending environmental apocalypse about to be wrought by the opposing party.[248]

What about the Type 2s? 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. In litigation, Type 2 will tend to rely on the adversarial 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, which they will leave to the court.[249] Thus, for example, if an opponent's request for a stipulation or continuance is reasonable and will not seriously disadvantage the proceduralist's client, he or she will go along, or at least urge the client to go along.[250] 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.[251]

2. The Lawyer Types and Civility.—I want to focus now on a final aspect of the example—the general tone of the representation, through all its phases, as seen in the routine interaction with other counsel, other

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pursue both culpable and blameless defendants to the last ditch in order to achieve his ideological goals").

247. *See* Ronald D. Rotunda, *Law, Lawyers, and Managers, in* THE ETHICS OF CORPORATE CONDUCT 142-43 (Clarence C. Walton ed., 1977) (recounting charges of obstructionist tactics by environmental and other public interest lawyers); William Tucker, *Environmentalism and the Leisure Class*, HARPER'S, Dec. 1977, at 49 (portraying the litigation in Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), as an obstructionist tactic of wealthy environmentalists).

248. *See In re* Kunstler, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991) (reversing an imposition of sanctions against William Kunstler and others for publicizing baseless allegations in the news media).

249. *See Report of Joint Conference*, *supra* note 215, at 1161 ("The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.").

250. *See, e.g.*, MODEL CODE, *supra* note 101, DR 7-101(A)(1) (stating that 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").

251. *See* Simon, *supra* note 187, at 1097-102.

parties, and the court, with respect to such things as requests for extensions and stipulations, returning phone calls, and keeping appointments—conduct generally subsumed under the heading of civility. It is important to note that attitudes toward civility are less clearly correlated with the lawyer types than are attitudes toward aggressive litigation techniques. Conscientious Type 1 lawyers, for all their tactical ferocity, may well eschew incivility, at least in their more visible public dealings. The reason for this attitude 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 approach, cultivating a 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,[252] as it is, for example, among debt collection agencies.[253] Hassles and headaches are, on this view, just other ways of wearing down the opposition, more bullets in the hired gun's bandolier.

In contrast, Type 2 lawyers, committed as they are to orderly legal processes, will tend to be committed to an overall tone of civility. For them, civility is likely to trade as a value independent of its effect in particular clients' cases.[254] 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 sheeps' clothing in which they try to disguise wolverine or vulpine objectives.

Finally—and this is very significant—even lawyers generally committed to civility, whatever their type, may operate under only a rebuttable presumption of mutual cooperation, contingent on the other side's reciprocating.[255] Sometimes enough will be enough. If the environmental group, for example, files to have algae declared an endangered species, it

252. *See* CAPLAN, *supra* note 202, at 121-227 (describing the evolution of an aggressively uncivil culture, especially at Skadden, Arps).

253. *See* Leff, *supra* note 112, at 34-36 (explaining the value of a reputation for toughness, or "credibility," to debt collection agencies).

254. *See, e.g.*, MODEL CODE, *supra* note 101, EC 7-37, 7-38 (urging civility toward, and cooperation with, tribunals and opposing counsel).

255. *See* Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J. L. & PUB. POL'Y 647, 648 (1994) (setting out as the "principle of civility": "One ought to presume, until sufficient evidence is adduced to show otherwise, that any given person has acted in accordance with serious social obligations." (citations omitted)).

will be time to call them obstructionists (if not pond scum) and to use a tone of voice not commonly heard on Sesame Street.

C. *Failings of the Professionalism Crusade*

Part III suggested that, even if proscribing litigational aggressiveness and incivility were an accepted end, neither of the usual means of proscription—legalistic rules or equitable principles—offers much hope of success at tolerable costs. This inadequacy suggests a need to turn to other methods, in particular voluntary standards set higher than what the law can effectively require. The present crusade reflects just such a turn. But this approach is not without problems of its own. Most fundamentally, as we have seen in this Part, there are three readily identifiable models of ethical lawyering competing for adherents, each with a very different take on aggressive litigation tactics and none with a monolithic understanding of civility. Further complicating matters, civility itself is not a monolithic concept. The professionalism crusade, unfortunately, fails to acknowledge either the multiplicity of conscientious models of lawyering or the context-sensitive nature of civility. This section examines each of these failings; the final Part suggests how the crusade might be reformed to save it from these failings.

1. The Diversity of Conscientious Lawyer Types and the Fallacy of the One True Way.—The professionalism crusade disappoints—I would even say disturbs—in its failure to acknowledge the various competing visions of ethical lawyering. In its creeds and codes and pledges, the crusade presents the Type 2 lawyer, the officer of the court or acolyte of the law, as the one true way, at least implicitly condemning alternative visions as heretical.[256] On the one hand, this failure leads to nearly despairing assessments of the state of the profession, eulogies to *The Lost Lawyer*[257] and *The Betrayed Profession*,[258] which bemoan the passing of a paradise of lawyerly innocence and harmony lost in the present Babel of conflicting creeds.

On the other hand, the failure to acknowledge conscientious diversity can lead to a disturbingly optimistic tendency, the aspiration of the self-declared orthodox to become an established church. This tendency is especially likely when the crusade is taken up by integrated, nonvoluntary bar associations and by the courts. The latter, of course, are themselves

256. *See* Nelson & Trubek, *supra* note 45, at 195 (describing the desire of American lawyers to maintain an image of unity and high ideals, despite numerous divisions).

257. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

258. SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION (1994).

organs of the state; bar associations, as we have seen, promulgate their own professional standards, with the sanction of the state to back them up. If strictures against aggressive litigation and incivility are directly enforced, then the crusade re-enters the realm of legalism, with its attendant enforcement problems.

But there is another, more insidious turn. The crusade, with the state's power behind it, can make an anticipatory strike. Rather than try to punish departures from its creed post hoc, it can require adherence to its creed ex ante. This approach, of course, is the method of loyalty oaths and, before them, Test Acts.[259] As a condition of enjoying governmental largess,[260] in this case a license to practice law, applicants would be required literally to pledge allegiance.

In summary, most lawyers probably think of themselves as, or recognize important aspects of themselves 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, using litigation as a last resort, and then only in accord with the spirit of the law. 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."[261] Moreover, as the sorry histories of loyalty oaths and Test Acts attest, "pledges of allegiance" are no curbs on the truly subversive, and no way for adherents of liberal legalism to treat the conscientious dissident.

2. *The Fallacy of Misplaced Congeniality.*—There is a related point with respect to civility. Even though most of us 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.

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259. The Test Acts were laws of England, Scotland, and Ireland that conditioned eligibility for public office on profession of loyalty to the state and the established Protestant religion. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990); *cf.* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

260. The term is from Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964), the classic discussion of the dangers of making conformity to majoritarian norms the condition of enjoying government benefits.

261. JOHN BARTLETT, FAMILIAR QUOTATIONS 341 n.1 (Justin Kaplan ed., 16th ed. 1992).

This belief is why most of us accept, even applaud, Atticus Finch's aggressive trial tactics in *To Kill a Mockingbird*,[262] in which he defended a black man falsely accused of rape by the daughter of the town derelict. In the process, Atticus destroyed the young woman's credibility by showing how she had tried to seduce the defendant.[263] Though we are moved by her tears, we hardly fault Atticus for his remorselessness, as we would be inclined to had she been innocent and candid.[264]

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 "[t]ricky lawyers like Atticus Finch took advantage of him all the time with their tricking ways,"[265] he takes little of our sympathy with him. Instead, we are reminded of a classic (indeed, an English) formula for civility: never hnrt another person's feelings—without meaning to.[266] And, most of us would add, except for a good cause. Even the staunchest defenders of the professionalism crusade's emphasis on civility accede to this contextualized standard. Thus, for example, Justice Burger, in a speech entitled "The Necessity of Civility," quoted with approval this observation about the practices of late nineteenth-century English barristers:

> Of course if a witness is deliberately trying to conceal the truth, he must be severely cross-examined; but an honest and innocent witness is now always treated with courtesy by counsel on both sides.[267]

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262. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

263. *Id.* at 190-200.

264. *Compare* Monroe H. Freedman, *The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966) (defending criminal defense counsel's discrediting of truthful witnesses) *with* Harry I. Subin, *The Criminal Defense Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, I GEO. J. LEGAL ETHICS 125, 135 (1987) (questioning the appropriateness of discrediting truthful complaining witnesses in rape cases) *and* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1026-35 (1990) (questioning the brutal cross-examination of a complaining witness in any rape case, except when defense counsel knows or reasonably suspects she is lying).

265. LEE, *supra* note 262, at 148. Compare Atticus's trick, which involved exploiting the witness's marginal literacy to show that he was left-handed, with Simon, *supra* note 187, at 1101, 1100-02 (justifying the surreptitious switching of handwriting samples to trip an expert witness if "the tactic is likely to contribute to the adjudicator's ability to decide the case fairly").

266. M. SCOTT PECK, A WORLD WAITING TO BE BORN: CIVILITY REDISCOVERED 4-5 (1993).

267. Burger, *Necessity*, *supra* note 68, at 213 (quoting W. Blake Odgers, *Introductory Changes in the Common Law and the Law of Persons, in the Legal Profession, and in Legal Education*, *in* 14 CLASSICS IN LEGAL HISTORY: A CENTURY OF LAW 1, 41 (Roy M. Mersky & J.M. Jacobstein eds., 1972)). *Compare* ABA STANDARD RELATING TO THE ADMINISTRATION OF JUSTICE, DEFENSE FUNCTION 4-7.6(b) (1979) ("[A] lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination.") *with* ABA STANDARD RELATING TO THE ADMINISTRATION OF JUSTICE, DEFENSE FUNCTION 4-7.6(b) (1992) (deleting the recommendation that a witness's truthfulness be considered in the conduct of cross-examination).

The professionalism crusade, unfortunately, tends to overlook the importance of these qualifications for a proper understanding of civility. Instead, the crusade oversimplifies by categorically condemning all unpleasant conduct, all less-than-cordial social exchanges. It calls for us all to act like Mr. Rogers even though we clearly aren't 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."[268]

This unqualified endorsement of what seems to be a kind of senatorial courtesy is critically flawed. First, insistence on courtesy and decorum has occasionally worked against legitimate demands for structural reform as, for example, in the civil rights movement.[269] Dr. King's nonviolent but distinctly confrontational tactics landed him in the Birmingham jail, from which he felt compelled to respond to decorum's defenders.[270] 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. Thus, in reducing civility to a monolithic concept, as more generally in insisting on one proper way to be a conscientious lawyer, the crusade risks becoming a stultifying law instead of a liberating gospel.

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. We feel this way not because we are not quite sure what we want, individually or collectively, but because what we want is more complex than the paradise of lost innocence that the professionalism crusade promises to regain. This Part has tried to clarify, though I am afraid not simplify, what we want. Against that background, the final Part discusses why the present crusade cannot satisfy us and how we might reform it.

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268. The Florida Bar's Ideals and Goals of Professionalism make clear that one should turn the other cheek "when confronted with rude, disruptive, and disrespectful behavior." FLORIDA BAR, *supra* note 214, at 13; *see also* San Diego County Bar Ass'n, Civil Litigation Code of Conduct 2 (on file with the *Texas Law Review*) ("Lawyers should conduct themselves so that they may conclude each case with a handshake with the opposing lawyer.").

269. *See* CHAFE, *supra* note 151, at 8-10 (asserting that white progressives' insistence on civility stifled expression of racial justice issues).

270. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 76 (1963). As Dr. King put the matter in response to an open letter from white clergymen:

> You deplore the demonstrations taking place in Birmingham. . . . It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortunate that the city's white power structure left the Negro community with no alternative.

Id. at 77-78; *see* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989) (contrasting King's letter with the judicial opinion in Walker v. City of Birmingham, 388 U.S. 307 (1967), which affirmed King's criminal contempt conviction).

V. Redeeming the Crusade[271]

The professionalism crusade is not without redeeming social value. It is to be congratulated for underscoring problems, particularly excessive zeal and incivility, that threaten the core values of legal liberalism. And it rightly evinces a growing skepticism about the possibility and propriety of using coercive legal measures to redress those problems. Finally, the crusade admirably aims at infrastructural reforms and communal edification that are both more radical and more consistent with an appreciation of the ultimate foundations of the legal liberalism it is devoted to preserving. We can preserve these positive elements, however, while at the same time purging the movement 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 incivility, it could acknowledge that sometimes it is appropriate for lawyers to turn the other cheek, but that sometimes it is necessary (at least metaphorically) to braid a whip and drive the money-changers from the temple. 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 . . . ."[272] But in the very next clause, the other shoe falls: "*unless* required by the justice of the cause with which I am charged."[273]

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 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 change would have distinct effects on the role of bar organizations, the courts, and the law schools with respect to the crusade.

A. The Bar Associations

Under my proposal, the role of bar associations would depend on their type. Mandatory bar associations, the unified bars that now exist in many

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271. Here again, the religious imagery is not original with me. *See* Gordon & Simon, *supra* note 10, at 230 (referring to the "redemption" of professionalism).

272. FLORIDA BAR, *supra* note 214, at 10; *see also* MODEL CODE, *supra* note 101, EC 7-37 ("A lawyer should not make unfair or derogatory personal reference to opposing counsel.").

273. FLORIDA BAR, *supra* note 214, at 10 (emphasis added).

states,[274] would ideally disappear in favor of the more typical forms of profession regulation by state agencies.[275] 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 the 1983 Model Rules. These rules 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 on which conscientious lawyers will predictably have divergent views. There is some evidence of such discussion already, if only by default, in the Bar's sponsorship of professionalism and civility studies and task forces and its tendency to promulgate creeds as "guides" or "discussion drafts" rather than as bases for sanctions or requirements of membership.[276]

Voluntary bar associations, by contrast, could appropriately undertake a much more active role in promoting the shared values of their members, including the values of the professionalism crusade. This greater role is appropriate to voluntary organizations because they have no element of conscience-coercion; any lawyer who does not like the organization's vision of professionalism can leave or be expelled without loss of license to practice law. Voluntary bar 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 legal liberalism.[277] Other organizations might require adherence to much narrower or more rigorous understandings of professional obligation. These understandings could exist within more latitudinarian groups like the ABA, in the way that separate orders and fellowships exist in the Anglican and Roman Catholic communions, or as

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274. *See* Martha Middleton, *Bar Dues Scrutiny Continues: What's "Political" Action?*, NAT'L L.J., Jan. 17, 1994, at 3 (noting "the country's 34 unified bars").

275. *See* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 6 (calling for the elimination of unified bars in favor of private voluntary bars and public administrative agencies); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 73 (1994) ("[A] return to a voluntary bar is in the best interests of both lawyers and the public.").

276. *See, e.g.*, ABA, A LAWYER'S CREED OF PROFESSIONALISM Preamble (1988), *reprinted in* JOHN S. DZIENKOWSKI, SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 414 (1994); *see also* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 731 (1994) (calling on professional groups to expand their role in developing voluntary codes).

277. *See* Nelson & Trubek, *supra* note 23, at 13 ("The only kind of association that can now house the diverse elements of the profession is one that imposes a minimum of collective regulation.").

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 creeds for their members, not for the entire bar. This approach 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, elaboration, and promotion.[278] And it might give the public a clearer view of the range of lawyer types available.[279]

Here, however, we encounter a frequently raised objection. Clients, it is said, face a prisoner's dilemma.[280] If they and their opponents both choose lawyers who abjure uncivil and hyper-aggressive methods, both sides and the system as a whole will fare better. Without being able to ensure that the other side will so choose, however, the rational choice of even public-spirited clients is the Type 1 or Type 3 lawyer. Otherwise, they disarm unilaterally, placing themselves at the mercy of the merciless opposition. As a result of this choice, the argument runs, Type 2 lawyers and other lawyers committed to civility are at a competitive disadvantage, a disadvantage they would hardly want to increase by advertising that commitment.[281]

Matters may not, however, be as grim as this scenario suggests, for several reasons. First, the call of the Type 2 lawyer is not for unilateral disarmament, but renunciation of the first strike. Retaliation remains an option, once the crusade's categorical understanding of civility and frivolity is rejected. The result might be a balance of terror—mutually assured destruction—rather than Finlandization.

Furthermore, clients seem increasingly to realize that litigational Armageddon is mutually destructive of themselves, their opponents, and

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278. *See* Atkinson, *supra* note 30, at 964-79; Gordon & Simon, *supra* note 10, at 244; Rhode, *supra* note 276, at 731.

279. *See* Gordon & Simon, *supra* note 10, at 245-48 (citing the Association of the Bar of the City of New York and the National Lawyers Guild as bar organizations of intermediate size and relative ideological homogeneity that have sustained among their members and promoted among outsiders alternative and ambitious visions of professional obligation).

280. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 48-49, 312-13 (1994) (providing a game-theoretical account of the prisoner's dilemma). For a brief history of the dilemma, see PARADOXES OF RATIONALITY AND COOPERATION 3-4 (Richmond Campbell et al. eds., 1985).

281. *See, e.g.*, Aspen, *supra* note 161, at 61 (quoting an anonymous lawyer: "Bad taste, offensive conduct, and obstructive actions are viewed by many of the prospective clients as signs of a 'good' lawyer."); Gordon & Simon, *supra* note 10, at 244-45 (describing the "race to the bottom" argument and noting its wide circulation).

the system of justice, but not, critically, of either side's lawyers.[282] In wars of attrition, if not annihilation, the real winners are not the combattants, but the munitions traders. Lawyers who run up exorbitant bills with dilatory tactics are not just inflicting costs on their clients' opponents; they are inflicting costs on their clients, too. Type 2 lawyers can point this out to both sides[283] and take advantage of two critical distinctions from the classic prisoner's dilemma. First, the parties, unlike the prisoners, can confer with one another; neither need depend on the other's unilateral, uncoordinated adoption of a mutually beneficial position. Second, if either side reneges on its commitment to cooperative, or at least civil, conduct of a case, the other will usually have an opportunity to alter its own conduct accordingly.

Whether single-mindedly self-interested clients will find the benefits of cooperating with opponents to exceed the gains of unilaterally aggressive tactics is, of course, a difficult empirical question.[284] Whatever the answer, there is a final prospect that Type 2 lawyers should not ignore. Some clients may be willing to sacrifice their private advantage to promote public goods, in this case a cordial litigation atmosphere and the expeditious resolution of disputes.[285] Such clients might be part of a countermarket trend, a race to the ethical top, rather than bottom.[286] In

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282. *See, e.g.*, Letter from David T. Kearns, President, Xerox Corporation, to "All Lawyers Representing Xerox Corporation," *reprinted in* ABA BLUEPRINT, *supra* note 2, at 310 [hereinafter Kearns letter] (endorsing Chief Justice Burger's call for a more productive judicial system and directing them to "have as one of [their] primary objectives the support and maintenance of an efficient court system as required by the letter and spirit of the recently amended Federal Rules"); Letter from Robert S. Banks, Vice President & General Counsel, Xerox Corporation, to "Xerox Attorneys" (Mar. 22, 1985), *reprinted in* ABA BLUEPRINT, *supra* note 2, at 312 (noting that "Xerox attorneys cannot justify extreme advocacy positions on the ground that the client expects it of us" and attaching for their direction the American Corporate Counsel Association's *Guidelines for Practicing Under the Federal Rules*, which counsel against a range of aggressive litigation strategies).

283. *But see* MODEL RULES, *supra* note 58, Rule 4.2; MODEL CODE, *supra* note 101, DR 7-104(A)(1) (both forbidding lawyers from contacting parties represented by other lawyers about the subject matter of the representation, without either the other lawyers' consent or legal authorization).

284. For an altogether too facile assumption that client and systemic interests will converge in the long run, see *Report of Joint Conference*, *supra* note 215. For contemporary debate on the efficacy of aggressive litigation tactics, compare Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1987, at 48 (quoting attorneys who believe that hardball tactics are an appropriate and effective form of representation) with Robert N. Sayler, *Rambo Litigation—Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79 (arguing that hardball tactics are bad advocacy, bad for the attorney, and bad for the profession).

285. *See, e.g.*, Gordon & Simon, *supra* note 10, at 252, 251-53 (reviewing extensive empirical evidence suggesting that corporate responsiveness to arguments for compliance with the spirit as well as the letter of the law varies widely with "variations in corporate strategies, structures, and 'culture'"); Kearns letter, *supra* note 282 ("The [Xerox] Corporation expects its interests to be protected as appropriate but not with a disregard for the need of an efficient system of justice.").

286. Gordon & Simon, *supra* note 10, at 245. Gordon and Simon also suggest that even the self-serving may opt for lawyers who present themselves as maintaining higher ethical standards than required, either because they associate such standards with increased professional sophistication or

ensuring that clients understand this alternative, the courts can play an important role.

B. The Courts

For their part, the courts should continue, perhaps even redouble, their present efforts to maintain at least the minimum order required for the rule of law, particularly its judicial administration. 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. This approach leaves open to them important, and increasingly utilized, opportunities for encouraging civility and other values of liberal legalism that lie outside the scope of existing, and probably imaginable, legal rules. To exploit these opportunities, judges must focus more on educating clients and their lawyers and less on sanctioning offenders.[287] This subpart looks first at the general contours of such an approach, then at how it

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because they believe such lawyers' enhanced public image will reflect positively on them. *Id.*; *see also* Gilson, *supra* note 8, at 886 n.35 (positing a reputational model "in which particular lawyers openly specialize as gatekeepers because their retention allows a client to credibly signal that his claim is real"); Nelson & Trubek, *supra* note 23, at 23 (suggesting the possibility of competition among professional ideologies). Even if such a market does not develop, of course, see Gilson, *supra* note 8, at 915 (expressing pessimism), lawyers who favor the Type 2 approach can simply opt for the rewards of pursuing the social good as opposed to the maximization of their own income. *Id.* at 886-87. There is some evidence that this process is already underway. *See* John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 576, 576-82 (1994) (describing the International Society of Primerus Law Firms as an association of attorneys "with limited membership and very specific goals designed to identify high quality lawyers and communicate their whereabouts to the public"); David Gering, *Law Firms Adopt Credos*, A.B.A. J., Jan. 1989, at 56 (describing the inclusion of a law firms' public-spirited credo in a brochure sent to present and prospective clients).

287. *See* Clarke, *supra* note 3, at 1012-13 ("Judges have an ongoing responsibility for setting the standards of etiquette in courtrooms and for informing lawyers of what conduct is inappropriate."); Croft, *supra* note 32, at 1344 n.507 ("The judiciary should continue to articulate in strong terms its expectations and aspirations of legal professionalism, thereby playing a vital role in the deliberative moral community of legal practice.").

would apply to each of the three lawyer types we have identified. Finally, we will take up several problems and objections.

1. General Contours of the Judges' Educational Approach.—The most obvious target of these efforts would be litigating lawyers. Without resort to the more coercive measures available to them, the contempt power and the inherent authority to discipline lawyers practicing before them, judges can educate lawyers, especially the more inexperienced,[288] in fulfilling the elusive role of "officer of the court." In particular, they can inform lawyers when, in their judgment, lawyers present arguments bordering on the frivolous or engage in conduct at the edge of incivility.[289]

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 more inexperienced 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 quite another to hear them articulated in open court or in chambers by a sitting judge.

The judges' other constituents are litigants themselves. 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.[290] Clients are, after all, supposed to determine within the law not only the ends that their lawyers pursue, but also the means by which they pursue them.[291] 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,

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288. *See* Talbot D'Alemberte, *On Legal Education*, A.B.A. J., Sept. 1990, at 52 (setting forth the ABA president-elect's description of the educational role judges played early in his practice).

289. *See, e.g., In re* R.M.J., 455 U.S. 191, 205 (1982) (finding a lawyer's conspicuous advertising of his membership in the Supreme Court bar to be constitutionally protected, but in "at least bad taste").

290. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.2 (McKinney 1994) (requiring that New York courts provide matrimonial litigants with a "Statement of Client's Rights and Responsibilities").

291. *See* MODEL RULES, *supra* note 58, Rule 1.2 cmt. ("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.").

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.

In broad outline, my proposal would work like this. At the outset of a case, the judge would confer with the parties, preferably without their lawyers, to explain the values of liberal legalism in the particular context of litigation and the potential erosion of those values by uncivil conduct and abuse of the spirit of the law, procedural and substantive. This conference would also inform the client that, although judges and others frown upon these practices, they are difficult to define and police with command-and-control rules. The judge would then try to enlist the client in the eradication of such conduct, emphasizing not only the client's right to control the conduct of litigation by his or her lawyer,[292] but also—and more controversially—the client's duty as a citizen to assist in the fair and expeditious resolution of disputes, even disputes to which the client is a party. The judge would also invite the client to call to the judge's attention any departures from what the judge describes as acceptable conduct.[293] Should a lawyer's conduct become problematic during the course of trial, the judge would have another session with the client to point out the problem and encourage the client to take corrective action.

This course of action would open an ongoing dialogue among lawyer, client, and judge about the proper conduct of the case and introduce an additional element of adversariness into the process.[294] Each client's lawyer would speak for that client's narrow, individual interest; the judge would speak to both clients in the name of the systemic good of avoiding abusive litigation tactics and incivility. Thus, in addition to presiding over a trial on the merits between the two opposing sides as neutral arbiter, the judge would be a partisan in a contest with each lawyer for the client's commitment to systemic values.

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292. *See id.* Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . , and shall consult with the client as to the means by which they are to be pursued.").

293. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (reminding attorneys who are facing discovery abuses that the judge is "but a phone call away").

294. One judicial member of the New York court's "Matrimonial" study "was concerned that presenting a statement of rights and responsibilities to a prospective client sets an unnecessarily 'adversarial' tone to the attorney-client relationship, encouraging distrust and apprehension before the representation has even begun." COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, STATE OF NEW YORK, REPORT (May 4, 1993) [hereinafter MILONAS REPORT] (on file with the *Texas Law Review*). Other members, however, believed "the goal of informing the public is paramount" and would have positive effects on balance for lawyer-client relations. *Id.* at 10.

2. Judicial Dialogue with the Three Types of Lawyers.—Although this dialogue would obviously differ with the facts of each case and the personalities of each participant, we can usefully project how one factor, the type of lawyer involved, would affect the dialogue. Consider, first, how this dialogue would go with Type 1 lawyers, both conscientious and unscrupulous. To the clients of both, the judge's message would be that, contrary to their lawyers' assertions, our system of litigation does not work best, or even particularly well, when lawyers use all legal means at their clients' disposal, without respect for the underlying purpose of the law.

Confronted with this position, unscrupulous Type 1 lawyers would either have to defend their position along the lines of conscientious Type 1s or explicitly decline to enter into the debate—in effect giving what David Luban calls in another context "a raspberry in the direction of the law."[295] This reaction alone might be disturbing to clients who value thinking of themselves as good citizens, or, more generally, as people who act with regard to something other than their private advantage. This insistence on giving reasons, of course, has been the method of legal liberalism from its prototype in Socratic dialogue,[296] through mainstream liberalism,[297] to its present revisionism of the civic republicanism school.[298] To the extent that conscientious clients' self-image leads them to demand such dialogue of their lawyers, the unscrupulous Type 1 will be pressed toward a more reasoned, if not more reflective, practice.[299]

The dialogue with judges will affect conscientious Type 1 lawyers on two levels. At the most general level, they will have to meet the judge's

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295. *See* Luban, *Lysistratian Prerogative*, *supra* note 197, at 646-48 (describing a position he calls "Low Realism," which resembles the unscrupulous Type 1 position).

296. This is especially evident in the *Crito*, in which Socrates presents his commitment to obeying law as the product of a dialogue with the laws personified. PLATO, *Crito*, *in* THE LAST DAYS OF SOCRATES 79-96 (Hugh Tredennick trans., 1959).

297. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 4 (1980) (positing as a first principle of liberalism that "[w]henever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is").

298. *See* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 331 (1994) (focusing on "one of the core concerns of republican-oriented legal theory: creating a more deliberative or reflective political life"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1504-05 (1988) (describing "the dialogic tradition" of republicanism); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992) ("[C]ivic republicanism embraces an ongoing deliberative process."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (identifying four principles of "liberal republicanism," the first of which is "deliberation in politics").

299. Concealing the identities of offenders against civility out of a misplaced sense of politeness can only undermine this process. *E.g.*, Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 522 (1994) (quoting a Skadden, Arps lawyer's use of a vulgarism to describe the firm's cultivated image of offensiveness, but deleting the firm's name from the quote).

challenge to their entire conception of the lawyer's role of single-minded devotion to client interest. Even if, as is likely, the judge fails to persuade the client and the lawyer at this level, all is hardly lost. A promising paradox may develop at the level of particular application, when lawyer and client must consider the judge's invitation to forego arguably legal ends, or dubious means, for the greater social good.

Such renunciations are quite consistent with conscientious Type 1 theory, which maintains only that *lawyers* should not make these calls for clients unilaterally or force clients to make them on threat of resignation. The more sophisticated versions of Type 1 theory do not maintain that pressing immoral but legal ends is socially desirable; they maintain that it is socially desirable for the moral decision to be made by the client, not by the lawyer.[300] Thus, public-spirited clients might well ask their lawyer to conduct themselves as Type 2 lawyers; since this request would then be the will of their clients, Type 1 lawyers would, on their own principles, have to comply. Judges could agree with Type 1 lawyers on the point of client responsibility and could press that point on litigants, without conceding the point of lawyerly co-responsibility.[301]

In contrast to the fundamental challenge judges would pose to the premises of Type 1 lawyering, they would share and express broad agreement in principle with Type 2 lawyers, who emphasize the lawyer's role as "officer of the court." Judges, like Type 2 lawyers, would urge clients to follow a standard that is sometimes more restrictive than the letter of the law. Significantly, however, Type 2 lawyers may not reach the same result as a given judge in every particular case on how these extra-legal standards apply. So, for example, a Type 2 lawyer and a judge could disagree on whether the spirit of the law or ordinary morality permits a client to press more aggressively against the outer bounds of technical legality or ordinary courtesy. In such a case, the public-spirited client would decide between the perspectives on public policy presented by his or her lawyer and the judge. As a general matter, having judges in a position to press for systemic values would free Type 2 lawyers to take a

300. Fried, *supra* note 117, at 1088 (noting that a significant part of a lawyer's role as "friend" to a client is to enable the client to realize his status as a moral being); Pepper, *supra* note 188, at 630-32 (arguing that lawyers may properly supplement their legal advice with their moral opinions, as long as they permit the client to decide whether to waive legal rights on moral grounds).

301. Public-spirited clients may well choose aggressive, amoral lawyers—Type 1s—quite rationally and quite consistently with their moral principles. They may want from their lawyers nothing more than technical, legal advice, not because they themselves are amoral, but because they can consult their own consciences or their friends for moral advice. Though it may not flatter the Type 2 lawyers' sense of being a moral advisor or social engineer, such clients may well want to use their lawyers in the way that defenders of neutral partisanship suggest—as mere mechanics in the machinery of modern government, Pepper, *supra* note 190, at 623, or as private bureaucrats-for-hire, Dauer & Leff, *supra* note 196, at 581.

more client-oriented line, consistent with more sophisticated versions of Type 2 lawyering.[302]

The expanded judicial role I recommend would affect "loyal" and "subversive" Type 3 lawyers—those who accept legal liberalism and those who reject it—quite differently. The "loyal" Type 3 would agree with the judge on the general virtues of legal liberalism and perhaps even on the harm to those values by the way he or she wants to press the client's interests in a particular case or class of cases. But, against the judge, the Type 3 lawyer would insist that the worthiness of the client's cause generally, or the importance of its prevailing in a particular case, warrants a level of aggressiveness that, if adopted by all litigants, would severely undermine legal liberalism. In effect, the lawyer would argue to the client that the virtues of the client's claim in the case at hand outweigh the general vices of litigational aggression or incivility to which the judge points.

If the client sees his or her case as the Type 3 lawyer does, the judge will probably not prevail on the client to curb aggressive conduct. But some clients may well come to see their own claims as something less than moral crusades, and thus as inappropriate for Type 3 treatment. Even those who do not come around to this view may nevertheless be chastened at the margin, with respect to some of the more potentially disruptive and systemically harmful Type 3 conduct. Here again, the mechanism will be a dialogue between lawyer, client, and judge about the relative merits in a particular case of undermining a system in which they all believe.

This common belief, by contrast, is lacking among the subversive Type 3s. For them, harm to liberal legalism is not an unfortunate cost of aggressively pressing their clients' cases; it is either a serendipitous benefit or the very point of the underlying case. The judge's counseling in the name of legal liberalism against aggressive conduct would most likely be, if anything, counterproductive here.[303] This advice would tend more to alert an enemy to weakness than to rally an ally to common defense. Subversive Type 3 lawyers and their clients will be undeterred, and unpunished, so long as they do not transgress into the realm of legally sanctionable misconduct. Both the clients and their lawyers will be free to bear the cost of increased public and judicial obloquy, which is, arguably, what they expect, or what they want, or both.[304]

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302. *See supra* text accompanying notes 212-22.

303. *See* Grosser v. Trustees of Columbia Univ., 287 F. Supp. 535, 545 (1968) ("It is surely nonsense of the most literal kind to argue that a court of law should subordinate the 'rule of law' in favor of more 'fundamental principles' of revolutionary action designed forcibly to oust governments, courts and all.").

304. *See* Navasky, *supra* note 235, at 93 (describing William Kunstler's view that, in "political trials," "a lawyer's obligation may be to 'win by losing,' and thereby expose the repressive nature of the legal subsystem").

Perhaps, however, we should not too readily dismiss another possibility: that clients who are attracted to subversive Type 3 lawyers, and to their antipathy toward law, have never seen law and its agents as part of a humane process that respects them as individual human beings. The quality of the bait is, after all, widely believed to bear on the quantity of the catch. At the risk of sounding like Polyanna or Pangloss, we might hope that, at least in some cases, showing respect for these clients and their causes will have a salutary effect on their attitudes, or at least the attitudes of their likely sympathizers, toward liberal legalism.[305] Certainly the converse was true, for example, in the Chicago Seven trial, where Kuntsler's successful baiting of Judge Hoffman into anger generated sympathy for his clients even among those not otherwise inclined in their favor.[306]

3. Problems with the Judges' Educational Approach.—This new judicial function is not, of course, without problems. Logically, the first issue is the commitment of judges themselves to promoting legal liberalism in the way that I recommend. My proposal obviously rests on some such commitment; unless judges undertake the educational task I outline, my proposal will never get off the ground. It might be objected that, just as lawyers should be permitted other perspectives and practices, so, too, should judges. An insistence that judges promote a vision of professionalism parallel to that of Type 2 lawyers, in other words, is oddly out of symmetry with a plea for tolerance of lawyers who reject that vision.

My proposal, however, requires no such insistence. The commitment my proposal assumes has a strong and a weak form, and only the latter is a necessary condition. The strong form is that *all* judges *should* be required to adopt the activist role; the weak form is that *some* judges would be willing to adopt that role and should be allowed to do so.[307] For

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305. If this belief is overly optimistic, I am at least not alone in holding out the hope. *See, e.g.*, Mitchell, *supra* note 225, at 326, 326-27 ("The act of defense itself teaches that the indigent defendant is not alone and worthless without money."). Interestingly, some of legal liberalism's most trenchant opponents see its capacity for toleration as one of its most insidious and seductive aspects. *See, e.g.*, Marcuse, *supra* note 162, at 81 ("[W]hat is proclaimed and practiced as tolerance today, is in many of its most effective manifestations serving the cause of oppression.").

306. *See* KUNSTLER & ISENBERG, *supra* note 162, at 37 (noting that Judge Hoffman's behavior "awakened sympathetic responses in people of all ages and all persuasions"); *cf.* JOHN SCHULTZ, MOTION WILL BE DENIED: A NEW REPORT ON THE CHICAGO SEVEN CONSPIRACY TRIAL 277 (1972) (recounting one juror's statement that she did not like Judge Hoffman because he gave "the impression from the beginning that he thought they were guilty. The way he read the indictment, he read it as if they were already guilty.").

307. A case could perhaps be made for the strong, mandatory position, along the lines of the argument that judges can appropriately be required to decide cases according to law. *See* GOLDMAN, *supra* note 187, at 38-49 (arguing that judges have a moral duty to accept their institutional obligations even at the expense of seemingly more important moral rights of others).

present purposes, I only wish to argue the weaker position. As a descriptive matter, it is safe to say that at least some judges espouse the activist role, if only because it is in their individual interest. To the extent that activism succeeds in reducing frivolous litigation and incivility, it would tend to clear their dockets and pacify their courtrooms.

The critical issue, then, is normative: should judges be allowed to enter into a dialogue with litigants for these purposes? Note, first of all, that what I recommend would not be a very substantial departure from an expanding current practice. Both the bench and the bar have recognized that it is sometimes appropriate for regulatory authorities to communicate directly with clients to prevent their lawyers from taking advantage of them. Thus, for example, the Rules Governing the Florida Bar require lawyers to present to clients a prescribed statement in contingent fee cases; the statement sets out the nature of contingent fee arrangements, some of their potential problems, and the possibility of alternative modes of compensation.[308] Acting on the recommendation of a commission that cited the Florida example, the New York state courts have recently required lawyers to provide a "Statement of Client's Rights and Responsibilities" to clients in divorce and related cases.[309] As a general matter, such client-protective intervention would seem appropriate when the risk of harm to the client is great relative to the cost of the communication, when the client's capacity for understanding the risk is small, and when the likelihood of detecting and correcting the problem after its occurrence is also small.

In one respect, my proposal is quite similar to these client-protective interventions. The judge would inform the clients of the kind of lawyer they are paired with, and the consequences of the pairing. This communication ensures that clients know what they are getting and that they get what they want, not just at the general level of lawyer choice, but also at the particular level of conduct and tactics. This technique is just another instance of client-protective judicial intervention, closely parallel to judges' or the bar's providing of information about alternative fee arrangements in contingent fee cases.

This aspect of my proposal is also analogous to a much older and more recognized judicial function—instructing juries on matters of law. Jury instructions do not pertain merely to particularly arcane legal rules. They sometimes involve very general instruction about the nature of litigation and the appropriate roles of participants, not just jurors

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308. Rules Regulating the Florida Bar 4-1.5, *in* FLORIDA RULES OF COURT: STATE 802-807 (1995); *see also* MODEL RULES, *supra* note 58, Rule 1.8(a)(2) (requiring a lawyer to give a client "reasonable opportunity to seek the advice of independent counsel" before entering into a business transaction with the client).

309. *See supra* note 290; *see also* MILONAS REPORT, *supra* note 294, at 6.

themselves, but also lawyers, clients, and judges.[310] Jurors, of course, have no one else to instruct them in the law; unlike litigants, they are not represented by lawyers. This difference, however, does not distinguish jurors from clients for present purposes. With respect to the proper working of the judicial system, as opposed to the particulars of their own cases, lawyers may not inform their own clients, or at least not inform them in a way intended to advance systemic, rather than narrow, client-oriented interests.

The kind of court-to-client communications in current practice goes beyond the client-protective function of informing clients of their rights and opportunities. With an eye toward restraining clients, these communications also inform clients of their duties to the system, describe what they can legitimately expect from litigation, and urge them to take account of the interests of third parties subject to harm from their actions.[311] Similarly, under my proposal, the judge would not only inform clients of options in lawyerly conduct and their own obligations under existing law, but also would urge upon them choices of tone and tactic that advance legal liberalism. In both contexts, the courts are simply invoking, in hortatory rather than mandatory terms, the second general basis for regulating the delivery of legal services: protecting third parties and the public, rather than clients.[312] In effect, the courts would invite litigants to do through voluntary private action what the law cannot accomplish through coercive means, for the reasons we have identified above.

We should not, moreover, draw too sharp a distinction in the present context between measures desigued to ensure client autonomy and measures

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310. *See, e.g.*, 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 5.03 (4th ed. 1992) (describing and defending the use of preliminary instructions); AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-1, at 4, 5 (1982) (distinguishing "substantive" from "preliminary" instructions and noting that the purpose of the latter is "to inform the jurors what role they and the judge should play"); JODY GEORGE ET AL., HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 63-64 (1989) (noting that most courts provide jurors with an orientation in, among other things, the jury as an institution and proper jury conduct). For examples of preliminary instructions, see 1 DEVITT ET AL., *supra*, § 10.01 (criminal trials) and 3 *id.* § 70.01 (civil trials). *See also* Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 620-28 (suggesting the implementation of jury orientation programs to alleviate juror confusion regarding trial procedures and to make the jury a more effective instrument in administering justice).

311. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 1400.2 (1994) ("You are expected to be truthful in all discussiona with your attorney, and to provide all relevant information and documentation . . . ."); JUDGES OF THE FAMILY LAW DIV., 12TH JUDICIAL CIRCUIT OF FLORIDA, WHAT TO EXPECT . . . DIVORCE (1991) ("You must understand that the legal system is not a tool for punishment of your spouse"; "[p]lease do your best to keep emotions out of the case."); *see also* THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM II.1, II.5 (1989) (requiring lawyers to notify clients of "the contents of this Creed when undertaking representation" and to advise them of "proper and expeeted behavior").

312. *See supra* text accompanying notes 45-54.

designed to serve systemic goals, even when clients are in essence being asked to forego technical legal entitlements for a larger social good. As we have seen, some clients, given the opportunity, would actually want to forego these entitlements. Informed, for example, that some trial tactics, though technically legal, serve only to harm opponents and disrupt the administration of justice generally, some clients may well elect to have their lawyers forego them. The lawyer codes themselves encourage lawyers to put such choices to their clients,[313] and commentators tend to see this as enhancing, not undermining, client autonomy. Not to consult with clients on such matters is to assume that the client is a Holmesian "bad person" interested only in extracting the last measure of personal advantage from the inevitable porousness of legal rules.[314]

Moreover, the nature of the process further reduces the risk of judicial overreaching. For the most part, the system I recommend is minimally coercive. The judge would present a vision of professionalism and liberal legalism as positions that all conscientious people need not accept; there would be no penalty for choosing otherwise, except the judge's statement that the client and his or her lawyer have transgressed a nonmandatory standard. This reproach would be less severe than the lowest level of formal sanction under the official lawyer codes, the admonition, or private reprimand, which "declares the conduct of the lawyer improper" under mandatory standards.[315] This informal rebuke could be enhanced, in cases of persistent or flagrant incivility that approaches disruption citable as contempt, by resort to a formal, published reprimand.[316] Such a reprimand should be made only when it is clear that the transgression was intentional and should carefully specify that the offense was against standards of civility,[317] not a matter of professional competence. This distinction would serve to deter those committed to civility without punishing those who disagree; one lawyer's brand of infamy might be another's badge of honor.[318]

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313. MODEL RULES, *supra* note 58, Rule 1.2 (noting that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued"); MODEL CODE, *supra* note 101, EC 7-8 (requiring a lawyer to fully inform his client of all "relevant considerations" before allowing the client to choose a course of action).

314. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (explaining that a "bad man" is interested in the law only in order to take advantage of the law).

315. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 2.6 (1992).

316. *See* Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 53, 51-57 (Del. 1994) (addendum) (condemning a lawyer's "extraordinarily rude, uncivil, and vulgar" conduct during a deposition).

317. *See* Clarke, *supra* note 3, at 975-76 (calling for published standards of litigation etiquette as essential to even-handed enforcement).

318. The position of the Northern District of Texas is that

> [t]hose litigators who persist in viewing themselves solely as combatants . . . will find that

Finally, some might object that allowing judges to perform the function outlined here would involve an excessive diversion of judicial resources. As in all matters, however, costs cannot be counted in the abstract; they must be weighed against potential benefits. Judges' efforts along these lines should not be seen as naked expenditures of capital, but as an investment in civic virtue that should pay dividends not only in terms of educating lawyers and litigants, but also in an enhanced appreciation for the role of judges, collectively and individually.[319] Indeed, some of these benefits would directly redound to judges themselves; to the extent lawyers and clients accept judges' urgings, courtrooms would be not only more efficient, but also more pleasant.

C. *The Law Schools*

A recurrent theme in the professionalism crusade is the need for law schools to inculcate the virtues of professionalism.[320] In part, this recurrent theme is a call to the most widely shared professional value—competence. As we have seen, the narrowest possible understanding of a profession requires provision of certain services on something other than a strictly market basis to ensure appropriate quality for the protection of both consumers and the public.[321] The crusade, like its antecedents, quite rightly calls for shoring up this foundation.[322] There is, however, a dual danger here.[323]

> their conduct does not square with the practices we expect of them. Malfeasant counsel can expect instead that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances."

Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988) (quoting Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 878 (5th Cir. 1988)).

319. The civic virtue I have in mind here is voluntary citizen participation in normative dialogue outside the usual political fora of formal legislative assemblies. For the value of such participation in the civic republican theory, see Michelman, *supra* note 298, at 1531 ("[F]ormal channels [of electoral and legislative politics] cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement.") and Sunstein, *supra* note 298, at 1578 (emphasizing the importance of private organizations to republican constitutionalism). On the dangers of pressing civic virtue beyond such voluntary dialogue, see *supra* note 149.

320. *See* ABA BLUEPRINT, *supra* note 2, at 266-71; FLORIDA COMMISSION, *supra* note 3, at 17-19 (both discussing the role that law schools can play in fostering the development of professionalism).

321. *See supra* text accompanying notes 61-65.

322. *See* ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) [hereinafter CRAMTON REPORT]; ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 330-34 (1992) [hereinafter MACCRATE REPORT] (both making recommendations on how law schools can improve lawyer competency); *see also* ABA BLUEPRINT, *supra* note 2, at 273 (calling for the strengthening of mandatory continuing legal education).

323. A third danger, evident in earlier efforts to increase competence, should be noted: an inevitable concomitant of raising educational requirements for a profession is increasing the cost of

First, and most easily recognized, is the danger that emphasis will be directed toward mastery of black letter rules, a kind of bar-exam competence,[324] or toward technical proficiency in such matters as oral advocacy and document drafting, over what a growing number of law academics, following Aristotle, are coming to call "practical wisdom" or "judgment."[325] The relevance of this quality to professionalism should be clear from what we have seen already with respect to both frivolity and incivility. These qualities are not readily reducible either to hard and fast verbal rules or to pure vocational technique. Rather, they require subtle insights into both underlying values and surrounding circumstances. Without judgment, lawyers simply will not be able to make the kinds of calls in these matters that proponents of the professionalism crusade seek.

Even if lawyers are able, though, a critical question remains: whether they will be willing. Here we encounter the second danger. Having mastered the means of discerning the shifting frontiers of civility and frivolity, the lawyer is capable not only of respecting them, as the crusade wishes, but also of crossing them without detection and bending them for dubious ends. This poses an ancient problem: whether it is not wrong to place such tools into students' hands, without also teaching them to recognize proper ends. This issue is at the root of Socrates's debate in the *Gorgias* with the Sophists, those who taught rhetoric to the youth of Athens. According to the more radical of the Sophists, skills training was enough.[326] But according to Socrates, virtuous teaching required more: it required not only teaching the powers of persuasion, but also examining whether the ends sought were good and true.[327]

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entry into that profession. Whether intentionally or not, this development has the marginal effect of excluding the economically disadvantaged. *See* AUERBACH, *supra* note 12, at 96-101 (noting that higher educational standards exacerbate economic disadvantage and professional elitism). Calls in the present crusade for legal internships along the lines of medical residencies raise this concern again. *See* FLORIDA COMMISSION, *supra* note 3, at 18 (recommending "a minimal [*sic*] practice experience for lawyers be required prior to full admission to the Bar," but allowing such experience to be acquired in the context of the present three-year law school program).

324. The ABA expressly counsels against this. *See* ABA BLUEPRINT, *supra* note 2, at 258 (noting that law school instruction should include lessons in ethics and professionalism beyond simply teaching legal rules).

325. *See, e.g.*, KRONMAN, *supra* note 257, at 2 (lamenting the demise of the "belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom"); David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 654, 655 (1983) (discussing the Aristotelian notion of *phronesis*, or practical wisdom, "the capacity of judging particulars without general rules"); *see also* Gordon & Simon, *supra* note 10, at 240 ("[T]he law school, by encouraging critical reflection on the part of its students, would provide an example of the institutionalization of the kind of reflective judgment to which the professionalism project aspires.").

326. This was the position of Callicles, the prototypical Type I advocate. PLATO, *supra* note 191, at 74-85.

327. *Id.* at 40-41.

In a sense, the crusade is squarely on the side of Socrates, at least in its substantivist, Type 2 inclinations. It calls, if not for its adherents to insist on the justice of particular outcomes, then at least for them to occupy a version of the lawyerly role that has just outcomes as its general result.[328] And, with particular reference to law schools, the crusade tends to call for inculcation of such a role.[329]

The latter call, however, does not just overlook the variety of conscientious, though divergent, views of lawyering we have identified. More fundamentally, it ignores a basic commitment of liberal education—neutrality toward the widest possible range of viewpoints.[330] 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, the point of liberal education is to foster critical examination of the premises and articulations of *all* systems, including liberalism itself, secure in the faith that, in a free marketplace of ideas, liberalism's own ideals will thrive.[331] As liberalism's critics on the left[332] and the right[333] point out, and as many of its defenders have often conceded,[334] the ideals to which liberalism is fundamentally committed cannot be logically demonstrated, even by its own methods. At most, liberalism's fundamental ideals can be

328. *See* ABA BLUEPRINT, *supra* note 2, at 264, 278-80, 296 (suggesting that the Bar should place increasing emphasis on the role of lawyers as officers of the court who should develop and preserve professional integrity, fairness, and devotion to the public interest); FLORIDA COMMISSION, *supra* note 3, at 11 (defining professionalism to include "ensuring that concern for the result does not subvert candor, honesty, and respect for others involved in the process").

329. *See* ABA BLUEPRINT, *supra* note 2, at 269, 267-69 (urging law schools to examine more than minimal, legally enforceable standards and insisting that "an important mission of law schools must be the teaching of professionalism"); FLORIDA COMMISSION, *supra* note 3, at 18 ("Law schools . . . provide the essential environment in which the concepts of professionalism must be introduced and reinforced.").

330. *See* Shaffer, *supra* note 8, at 410 (declaring that "Socrates would be appalled" at the idea of instilling "principles of professionalism").

331. *Id.* ("[E]thics does not *instill* principles. Ethics *questions* principles." (emphasis in original) (citations omitted)); *cf.* ROBERTO M. UNGER, KNOWLEDGE & POLITICS 287 (1975) (describing the tension between "the ideal of critical education" and "the demands of group cohesion" because the former "instructs in the past and present beliefs and creations of mankind in their richest and fullest variety").

332. *See, e.g.*, UNGER, *supra* note 331, at 138 (Chart: The Antinomies of Liberal Thought) (charting the contradictions in liberal thought); *see also* Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 997 ("The one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue." (emphasis in original)).

333. *See, e.g.*, ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 326-48 (1988) ("[L]iberalism can provide no compelling arguments in favor of its conception of the human good except by appeal to premises which collectively already presuppose that theory.").

334. *See, e.g.*, EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 172-79 (1973) ("[Realism's] philosophical assumptions had undermined the concept of a rationally knowable moral standard.").

shown to be the basis for an acceptable way of life;[335] for that, the proof is only in the living.

My approach provides a way for legal educators, consistent with the liberal 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 importantly, 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. Conversely, they should insist that no conscientiously presented vision of lawyering, or, for that matter, of law itself, is beneath contempt. This is true of both the more aggressive versions of Type 1 lawyering and the more subversive versions of Type 3. The only heresy recognized within the liberal tradition is refusal to engage in full and fair debate.

In engaging in this kind of inquiry, legal scholars have already revealed fundamental flaws in the laissez-faire Type 1 model,[336] the glib acceptance of which by earlier generations of academics, and with them their students,[337] may have contributed considerably to the present problems of frivolity and incivility. Without pronouncing what right and good ultimately are, these scholars have raised fundamental questions about how well that system of lawyering serves 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 within the American legal tradition alternative visions of lawyering,[338] visions they have elaborated into alternative models of legal ethics.[339] Students could be presented with those alternative models

335. *See, e.g.*, RAWLS, *supra* note 31, at 136-42 (grounding his liberal political order on the choices prospective citizens would make behind a "veil of ignorance" about their particular status).

336. *See supra* text accompanying notes 195-201 (discussing criticisms of Type 1 theories).

337. *Cf.* Roger C. Cramton, *The Ordinary Religion of the Law School*, 29 J. LEGAL EDUC. 247, 259 (1978) ("The role of the 'hired gun' forces the [law student] to visualize himself as an intellectual prostitute."); Rhode, *supra* note 188, at 617, 617-18 ("Faced with a steady succession of hard cases and unstable distinctions, aspiring students quickly discover that there are no 'right' answers—there is 'always an argument the other way and the devil often has a very good case.'" (quoting Macaulay, Law School and the World Outside 25 (1982) (unpublished working paper))).

338. *See, e.g.*, LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 169-74 (describing the "people's lawyer" vision of Louis Brandeis); SHAFFER, *supra* note 33, at 173-228 (identifying traditions of dissent within Anglo-American legal and medical ethics); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 257-58 (1992) (identifying a republican, public-oriented strand of legal ethics in tension with the adversarial ethic).

339. *See, e.g.*, LUBAN, LAWYERS AND JUSTICE, *supra* note 188, at 160-74 (proposing a model of "moral activism" in which lawyers limit what they do for clients by the standards of ordinary

throughout the curriculum, not just in mandatory professional responsibility courses.[340]

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, does not in fact display value neutrality. Rather, it manifests a deep-seated, though generally only implicit, commitment to core substantive values prized also by the professionalism crusade. In particular, traditional legal scholarship 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[341] and, more generally, to act as role models for their students,[342] it quite rightly calls them back to their own proper role in a system of liberal education. Conversely, by fulfilling that role, academic lawyers indirectly inculcate 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 they can really live as a lawyer. An "ought"—even a noncategorical ought—implies a "can."

Here, however, academic lawyers 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 public-spirited 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.[343]

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morality); SHAFFER, *supra* note 187, at 21-22 (proposing "an ethic of care" that rejects lawyers' moral isolation and insists that attorney and client engage in a moral discourse in which each influences the other); Simon, *supra* note 187, at 1090-119 (proposing a "discretionary model," the central premise of which is that individual lawyers should directly "pursue justice").

340. On the pervasive method of teaching ethics, and the crusade's general sympathy with that approach, see *supra* text accompanying note 84.

341. *See* ABA BLUEPRINT, *supra* note 2, at 263 (admonishing law professors, through the example of their professional conduct, to instill in their students a respect for others and a commitment to pro bono services); FLORIDA COMMISSION, *supra* note 3, at 18, 18-19 ("Law schools can foster notions of professionalism by requiring both faculty and staff to conduct themselves in an ethical and professional manner.").

342. *See supra* note 83.

343. *See* Anthony T. Kronman, Foreword: *Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 955-56 (1981) ("[T]he law teacher has, for whatever reasons, chosen a life that is different in important respects from the professional lives that most of his students will lead after they graduate.");

Clinical education offers a possible resolution of this problem.[344] Why not show students, in a law school setting, under the supervision of clinical academics, that the kinds of lawyering favored by the crusade are viable in the real world? Two fundamental problems preclude this. First, it is not at all certain that, without an unseemly and probably improper inquiry into ideology, law schools could ensure that all types of lawyers are represented in the clinics. Clinical education has long been seen, by both critics and proponents, as the special province of the Type 3 lawyer, the lawyer devoted to causes.[345] Given the kinds of lawyering most often done in clinics—criminal defense work and legal aid to the indigent or other particularly needy classes—this may well be entirely appropriate. It does, however, undermine the prospect of using clinics to illustrate the viability of Type 2 lawyering, the kind of lawyering most consistent with the aims of the professionalism crusade. And, second, this prospect is further undermined by the obvious fact that most clinics are not sustained by fees from clients. To demonstrate that a form of lawyering is viable to

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see also ABA BLUEPRINT, *supra* note 2, at 264 ("If what they see in these law firms [those in which students work during and after law school] is inconsistent with the ideals taught in law school, the best academic effort may be for naught.").

344. The general merits of clinical legal education are obviously beyond the scope of this discussion. For the classic defense, see Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) and Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20 (1951). For a concise account of opposing views from a historical perspective, see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993). On the narrower issue of clinical legal education as a vehicle for moral education, compare the criticisms of Robert J. Condlin, *Clinical Education in the 70s: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 604-10 (1983) (arguing that clinical educators lack a critical perspective and so "teach students to manipulate and dominate others as a matter of habit"); Robert J. Condlin, *The Moral Failure of Clinical Legal Education*, *in* GOOD LAWYER, *supra* note 195, at 317, 326-32 [hereinafter Condlin, *Moral Failure*] (discussing the negative effects of persuasion-mode behaviors "as a set of disembodied means" rather than as "part of a larger moral system that includes constraints on the use of such means"); and Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 226 (1981) (suggesting that practice instruction encourages students to be "superficial, authoritarian, close-minded, and amoral") with the defenses of Norman Redlich, *The Moral Value of Clinical Legal Education: A Reply to Professor Condlin*, *in* GOOD LAWYER, *supra* note 195, at 356 ("The single most important contribution that clinical education makes to the teaching of professional responsibility is to force the individual student to assume some responsibility for his or her actions."); Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 620-22 (1983) (explaining that law students will not be as harmed by exposure to a less-than-ideal clinical practice as they will benefit from insights gained into the interpersonal character of legal institutions); and Luban, *supra* note 325, at 660-61 (arguing that amorality is not a problem created by clinical legal education but by the practice of law in general and society as whole). *See also* Clarke, *supra* note 3, at 1023-24 (arguing that "[c]linical legal education is the most appropriate way to sensitize students to etiquette skills and raise future lawyers' awareness of these codes of courtroom conduct").

345. *See* Condlin, *Moral Failure*, *supra* note 344, at 335 (noting that "a high percentage of new clinical teachers came from the ranks of the Neighborhood Legal Services Program for the poor"); Luban, *supra* note 325, at 660 (noting that many clinical professors had previous careers as poverty law practitioners).

the broad range of students who will become practitioners dependent on private clients, we must show them that that form of lawyering can be economically self-sustaining.

Literature can help here, particularly the well-wrought stories of the great masters—Dickens, Tolstoy, Faulkner, and George Eliot.[346] 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 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 careers. 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.[347]

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 virtually everyone.

Mentoring programs, of the kind occasionally mentioned in the literature of the crusade,[348] are an effort to bridge this gap with local attorneys and alumni, and some such relationships probably approximate the ideal: direct, personal friendships 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 students experience the ideal. 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

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346. *See* Robert Coles, *The Keen Eye of Charles Dickens*, HARV. L. SCH. BULL., Summer/Fall 1984, at 30, 31 ("[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."). Thomas Shaffer has long emphasized the importance of stories, true and fictitious, to training in legal ethics. SHAFFER, *supra* note 187, at 1-35. *See generally* ROBERT COLES, THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION (1989); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990) (including an extensive bibliography on narrativism).

347. *See* Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1065 n.67 (1985) (noting that students often assume they must be aggressive in order to be successful); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 595 (1982) (arguing that legal education inculcates "a set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession").

348. *See* CIVILITY COMMITTEE FINAL REPORT, *supra* note 3, at 447 (recommending establishment of and participation in mentoring programs).

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 our 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 touch 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 nonliberal 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 legal liberalism 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 upperclass.[349] If you will indulge a measure of understatement, a rather different view prevailed among the founders of the American Republic,

349. It is particularly to be hoped that the Inns of Court movement, which nicely 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 the Anglophilia implicit in its choice of the English model of legal education, these are not idle fears. *See generally* Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of* The Remains of the Day, 105 YALE L.J. 177 (1995) (describing parallels between an English butler's perverted professionalism and tendencies within the contemporary American legal professionalism movement).

those who sought to vindicate the traditional rights of Englishfolk as well as those who sought to advance the universal rights of humanity.

VI. 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 person 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 its central message, the faith of legal liberalism, by renouncing its categorical condemnations and its 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 cooperating with conscientious judges and legal educators. This, I have argued, is a conversion earnestly to be sought. But until it is attained, beware an ancient and dangerous movement with a long and ugly name: antidisestablishmentarianism.