

**“PUBLIC SERVICE MUST BEGIN AT HOME”: THE LAWYER  
AS CIVICS TEACHER IN EVERYDAY PRACTICE**

**BRUCE A. GREEN\* & RUSSELL G. PEARCE\*\***

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\* Louis Stein Professor, Fordham University School of Law.

\*\* Edward & Marilyn Bellet Chair in Legal Ethics, Morality, and Religion, Fordham University School of Law.

## INTRODUCTION

Fifty years ago, the leading national representatives of the American legal profession, the American Bar Association (ABA), and the Association of American Law Schools (AALS), issued a joint report (the Report) on the nature of lawyers' professional responsibility in the context of the adversary system.<sup>1</sup> Principally authored by legal philosopher Lon Fuller,<sup>2</sup> who co-chaired the joint conference that issued it, the Report's premise was that the legal profession's inherited traditions provided only indirect guidance to lawyers in light of their changing roles, and that a "true sense of professional responsibility" must derive from an understanding of the "special services" that the legal profession "renders to society and the services it might render if its full capacities were realized."<sup>3</sup> A decade later, the Report was quoted throughout the footnotes to the Preamble and Ethical Considerations of the ABA Code of Professional Responsibility,<sup>4</sup> suggesting that the Report captured or influenced understandings that continued at least through the early 1970s.

The Report was short on examples and long on abstraction. It included only one story of an exemplary lawyer.<sup>5</sup> That story came not from domestic law practice but from abroad—from "the life of Thomas Talfourd," an early nineteenth-century English barrister, jurge, author, and member of Parliament:<sup>6</sup>

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1. AM. BAR ASS'N & ASS'N OF AM. LAW SCH., PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, 44 A.B.A. J. 1159 (1958) (hereinafter REPORT).

2. David Luban, *Rediscovering Fuller's Legal Ethics*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 193, 199 (Willem J. Witteveen & Wibren van der Burg eds., 1999).

3. REPORT, *supra* note 1, at 1159-60.

4. See MODEL CODE OF PROF'L RESPONSIBILITY pmb. preliminary statement, nn.3-5 & 7 (1980); *id.* at EC 2-1 n.4, 2-15 n.25, 2-25 n.40, 2-27 n.45, 2-30 n.51, 7-1 n.5, 7-3 n.9, 7-8 nn.18 & 19, 7-13 n.24, 7-17 n.29, 7-19 nn.32 & 33, 7-20 n.36, 8-1 nn.2 & 3, 8-2 n.4. Work on the ABA Model Code commenced in 1964 with the appointment of a committee to propose amendments to the 1908 ABA Canons of Professional Ethics, and culminated in 1969 with the adoption of the ABA Model Code by the ABA House of Delegates. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 56 (1986).

5. The story was included in the beginning of the Report's discussion of "Private Practice as a Form of Public Service." REPORT, *supra* note 1, at 1162.

6. *Id.*

As a barrister Talfourd had successfully represented a father in a suit over the custody of a child. Judgment for Talfourd's client was based on his superior legal right, though the court recognized in the case at bar that the mother had a stronger moral claim to custody than the father. Having thus encountered in the course of his practice an injustice in the law as then applied by the courts, Talfourd later as a member of parliament secured the enactment of a statute that would make impossible a repetition of the result his own advocacy had helped bring about.<sup>7</sup>

The Report used Talfourd's story to illustrate the "sense in which the lawyer must keep his obligations of public service distinct from the involvements of his private practice."<sup>8</sup>

The Report's account of *Greenhill v. Greenhill*,<sup>9</sup> the 1836 case that Talfourd argued, is too abbreviated to capture the extent of the injustice he helped achieve.<sup>10</sup> In 1835, six years after her marriage, and while caring for three infant daughters, Mrs. Greenhill learned that her husband, whom she believed to be off yachting, had in fact been living for more than a year with another woman whom he passed off as his wife.<sup>11</sup> When Mrs. Greenhill brought divorce proceedings, Mr. Greenhill retaliated by demanding that she relinquish the children.<sup>12</sup> Custody proceedings followed.<sup>13</sup> Despite Mr. Greenhill's refusal to end his adulterous relationship and despite Mrs. Greenhill's undeniable fitness as a parent, Mr. Greenhill had the superior legal right under precedents that regarded children as the husband's chattel.<sup>14</sup> Mr. Greenhill demanded that the children

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7. *Id.*

8. *Id.* ("This line of separation is aptly illustrated by an incident in the life of Thomas Talfourd.")

9. (1836) 111 Eng. Rep. 922 (K.B.).

10. Caroline Norton, an early nineteenth-century poet, novelist, and political activist, gave a fuller account of the *Greenhill* case in a political tract written under the pseudonym Pearce Stevenson in support of what was to become the Custody of Infants Act of 1839. CAROLINE NORTON, A PLAIN LETTER TO THE LORD CHANCELLOR ON THE INFANT CUSTODY BILL 34-35 (1839). Norton was motivated by a similar personal experience. See generally JAMES O. HOGE & JANE MARCUS, INTRODUCTION TO CAROLINE NORTON, SELECTED WRITINGS OF CAROLINE NORTON, at vii-xvii (James O. Hoge & Jane Marcus eds., 1978); Martha J. Bailey, *England's First Custody of Infants Act*, 20 QUEEN'S L.J. 391 (1994-95).

11. NORTON, *supra* note 10, at 60.

12. *Id.* at 61.

13. *Id.*

14. *Id.* at 62-63, 68.

be delivered to his mother, with whom he had formerly been estranged and who had until then refused to see her grandchildren.<sup>15</sup> Further, he sought to prevent his wife from seeing the children, as was his legal right.<sup>16</sup> When Mrs. Greenhill refused to comply with a court order to deliver up the children, her husband sought her imprisonment for contempt of court.<sup>17</sup> Mrs. Greenhill offered to live anywhere and to make any arrangement for Mr. Greenhill to visit the children, but Mr. Greenhill, spurred on by his mother, refused even at the judge's urging to reach an accommodation.<sup>18</sup> This was the matter in which Talfourd successfully advocated the husband's custody claim.<sup>19</sup> As a contemporary put it: Talfourd "had been compelled to support that as an advocate, which as a man, possessed of the same generous sympathies as his fellow men, he must have felt to be iniquitous and absurd."<sup>20</sup>

From our own perspective, the Report's choice of this particular story among all the possibilities was unfortunate in five respects.<sup>21</sup> First, Talfourd's story seems to portray the lawyer's self-conscious civic engagement as work performed entirely outside the ordinary, everyday private practice of law.<sup>22</sup> In this account, only outside private practice did Talfourd dedicate his knowledge and skills explicitly to public ends. Elsewhere, the Report expresses the presumption that zealous advocacy properly provided on behalf of private clients promotes the public good.<sup>23</sup> But, Talfourd's example seems to test that presumption, given the iniquitous result.

Second, the story implicitly portrays civic engagement—in Talfourd's case, endeavoring to improve the law as a member of

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15. *Id.* at 63.

16. *Id.* at 64-66.

17. *Id.* at 65.

18. *Id.* at 66.

19. *Id.* at 61-69, 71-72.

20. *Id.* at 71-72.

21. The Report's use of this story was previously criticized in James F. Smurl, *In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility*, 11 *IND. L. REV.* 797, 811-18 (1978); see also Comment, *The Lawyer's Moral Paradox*, 1979 *DUKE L.J.* 1335, 1353 n.64.

22. For an analysis of the reverse situation—in which public officials are faced with the dilemma of advocacy undermining their past and future clients' interests—see generally James E. Moliterno, *A Golden Age of Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 *WM. & MARY L. REV.* 1261 (2009).

23. REPORT, *supra* note 1, at 1160-61.

Parliament—as a pastime for the professional elite. Third, and again implicitly, the story portrays civic engagement as a concept from a distant place and time that presumably needs to be planted or resurrected on American soil. Fourth, the story of Talfourd's success as an advocate in achieving an immoral result for a private client is entirely silent about a lawyer's role in counseling the client, including regarding moral and other nonlegal considerations such as, in this case, the children's best interests and the husband's moral obligations to his wife.<sup>24</sup> Finally, the story is equally silent about the possibility of refusing to engage in a representation that is morally repugnant.<sup>25</sup>

Talfourd's work to reform the child custody law exemplifies a conception of the "citizen-lawyer" that has prevailed since our country's founding.<sup>26</sup> This is the idea of the lawyer as patriotic leader outside the everyday professional work of representing clients.<sup>27</sup> Our Essay explores an alternative conception of the citizen-lawyer, also rooted in earlier American law practice but less explicitly identified, and also given expression in the 1958

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24. Presumably, as a barrister Talfourd could not perform the counseling function. But, as Norton recounted the story, Mr. Greenhill also had a solicitor who abetted the client's efforts to remove three infant children from their innocent mother, and who presumably could have performed a counseling function. NORTON, *supra* note 10, at 61.

25. Under the traditional "cab rank" rule, English barristers do not have discretion to decide who to represent. See William C. McMahon III, *Declining Professionalism in Court: A Comparative Look at the English Barrister*, 19 GEO. J. LEGAL ETHICS 845, 851-52 (2006).

26. See, e.g., Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 187-88, 193-95, 211 (2001); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. ROUNDTABLE 381, 381-83 (2001). See generally Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153 (2009) (exploring the many meanings of a "citizen lawyer"); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009) (analyzing competing views among lawyers as to the proper scope of their public or civic obligations as lawyers).

27. For example, in 1915, Indiana Supreme Court Judge Orrin N. Carter included in his legal ethics book a section on "The Lawyer as a Citizen" in which he wrote: "Possibly the greatest service that has ever been performed for the public in this country has been rendered by lawyers as citizens, and not in their professional capacity or as public officials." ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* 36-37 (1915). He pointed to the writings of Hamilton, Madison, and Jay in the Federalist Papers leading to the adoption of the U.S. Constitution, and gave as an example in his own day the work of "lawyers who outside of their professional duties have served as leaders in helping to settle the great social, industrial and political problems of the day." *Id.*

ABA/AALS Report.<sup>28</sup> That is the idea that a lawyer's civic obligation is expressed in the manner in which the lawyer conducts everyday private practice and includes an obligation to convey to clients the lawyer's understanding of proper civic conduct. We call this the idea of the lawyer as "civics teacher." In recent years, this conception has largely dropped out of the legal profession's conversation about lawyers' obligations to serve the public.<sup>29</sup> Rather, the organized bar emphasizes the American lawyer's civic role as expressed in law reform, pro bono work, and other efforts outside daily private practice.<sup>30</sup> Our aim is not to take issue with this effort, the importance of which we do not dispute, but rather to suggest that the lawyer's civic role has an additional dimension.<sup>31</sup>

The conception of the lawyer as civics teacher directly addresses the lawyer's role as client counselor in the daily private practice of law, regardless of whether the matter relates to a transaction or to litigation. It emphasizes that when lawyers counsel clients about their legal rights and obligations, and about how to act within the framework of the law, lawyers invariably teach clients not only about the law and legal institutions, but also, for better or worse, about rights and obligations in a civil society that may not be established by enforceable law—including ideas about fair dealing, respect for others, and, generally, concern for the public good. This

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28. REPORT, *supra* note 1.

29. Many commentators have argued for a more robust role for the lawyer in counseling clients. *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 157-61 (2007); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 50-52 (1998); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 26-29 (1988); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1317-20 (2006). The organized bar's efforts to promote lawyers' professional commitment to the public good, however, have largely focused on law reform and pro bono work. *See, e.g.*, Martha W. Barnett, *Angels of Justice*, 86 A.B.A. J. 10 (2000); Robert E. Hirshon, *To the Heroes Among Us*, 87 A.B.A. J. 10 (2001); Robert A. Katzmann, *Themes in Context*, in THE LAW FIRM AND THE PUBLIC GOOD 1, 6 (1995); Howard Lesnick, *Why Pro Bono in Law Schools*, 13 LAW & INEQ. 25, 25-29 (1994); *see also* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6-20 (2004); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2108-11, 2115-16 (2004); Pearce, *supra* note 26, at 417-20.

30. *See* Barnett, *supra* note 29, at 10; Hirshon, *supra* note 29, at 10; *see also* Cummings, *supra* note 29, at 18; Pearce, *supra* note 26, at 419-20.

31. *See generally* W. Taylor Reveley III, *The Citizen Lawyer*, 50 WM. & MARY L. REV. 1309 (2009) (arguing that lawyers have an unusually strong need to be civic minded and to work for the public interest); Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (examining the "special responsibilities" of lawyers as "public citizens").

conception also addresses aspects of lawyers' work aside from client counseling, because lawyers teach clients by example, especially when lawyers address their own legal obligations in the course of a representation. Adopting and elaborating upon the idea of the lawyer's role as civics teacher, we suggest, would lead lawyers to perform this function more self-consciously and, therefore, more often for the better.

This Essay begins in Part I by sketching the concept of the lawyer as civics teacher. Part II offers two reasons why lawyers should make a self-conscious effort to teach civics well and shows how this conception is rooted in Fuller's Report as well as in writings that both predate and postdate it. Finally, Part III places the conception in the context of contemporary professional and academic discussion of four subjects: the lawyer's duty to serve the public, the lawyer's role in a democracy, the lawyer's counseling function, and the lawyer's dealings with professional colleagues.

## I. THE IDEA OF THE LAWYER AS CIVICS TEACHER

In his dissenting opinion in *Olmstead v. United States*,<sup>32</sup> Justice Brandeis wrote that: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."<sup>33</sup> Justice Brandeis was responding to the Court's decision to authorize the government's use of evidence secured through wiretapping.<sup>34</sup> His point was that the government teaches by example whether or not it means to do so, and that in this case, its example of indifference to the law would encourage public lawlessness.<sup>35</sup> Almost seventy years later, the Court described this statement, in which "Justice Brandeis recognized the importance of teaching by example," as "pathmarking."<sup>36</sup>

Borrowing Justice Brandeis's phrase, we would describe lawyers also as potent and omnipresent teachers, particularly on the subject of civic norms and values.<sup>37</sup> In part, our claim is descriptive. In

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32. 277 U.S. 438 (1928).

33. *Id.* at 485 (Brandeis, J., dissenting).

34. *Id.* at 466 (majority opinion).

35. *Id.* at 485 (Brandeis, J., dissenting).

36. *Chandler v. Miller*, 520 U.S. 305, 322 (1997).

37. In general, we would adopt Charles N. Quigley's idea of a civics education as including

society, lawyers in fact teach their fellow citizens how to understand their rights and responsibilities as members of a community—their obligations to obey the law, aspirations to fulfill the spirit of the law, and responsibilities to the good of their neighbors and the general public.<sup>38</sup> Lawyers teach civics both directly in the course of counseling clients and indirectly by example.<sup>39</sup> They do so through what they say and do, and through their silence and inaction, whether or not they are self-conscious about the role, and, if they are self-conscious, whether they consider this function to be central or

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the knowledge and skills and inculcation of the values necessary for “informed, responsible participation in political life by citizens committed to the fundamental values and principles of American constitutional democracy.” Charles N. Quigley, *Education for Democracy*, BLUEPRINT, Apr. 1, 1999, [http://www.ndol.org/ndol\\_ci.cfm?kaid=115&subid=145&contentid=1450](http://www.ndol.org/ndol_ci.cfm?kaid=115&subid=145&contentid=1450) (last visited Feb. 11, 2009); see also Sanford Levinson, *What Should Citizens (as Participants in a Republican Form of Government) Know About the Constitution?*, 50 WM. & MARY L. REV. 1239, 1247-48 (2009) (discussing Justice Sandra Day O’Connor’s advocacy for civics learning in grade school education). See generally Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379 (2009) (comparing how ordinary citizens interpret the Constitution with how lawyers do). Quigley identifies basic democratic “values and principles” to include basic “individual rights and responsibilities, concern for the public good, the rule of law, justice, equality, diversity, truth, patriotism, federalism, and the separation of powers.” Quigley, *supra*. Further, he identifies “civic dispositions”—including “responsible self-governance by each individual, moral responsibility, self-discipline, and respect for individual worth and human dignity”—“that contribute to the healthy functioning of the political system and the improvement of society.” *Id.* He also identifies “traits of public and private character”—including “public spiritedness, civility, respect for law, critical mindedness, and a willingness to negotiate and compromise”—that are indispensable for our democracy’s vitality. *Id.* Needless to say, we do not claim that lawyers can, do, or should address all possible elements of a good civics education in every representation. The extent and nature of the dialogue with the client will depend upon the context.

38. When we use the term citizen, we do not mean only those in a community who are citizens as defined in immigration and naturalization laws. Rather, we are employing the term more broadly to include all people who live in a particular community, a nation being only one way to define the bounds of a (usually) large community. A nation, in turn, is itself made up of smaller communities of various sizes and locations. Accordingly, the role and responsibilities of membership in these communities is rather complex, as is the role of lawyer as civics teacher.

39. See Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403 (2000).

The best way to teach ... is through example. Every time we represent a client, argue in court, participate in a public or professional meeting, or take on pro bono work, we set an example. With every action—and inaction—we send a message to our peers and, more importantly, to the next generation. That message can say that standards matter, that law matters, that civic life matters, that participation matters. The lawyer’s role as teacher is his most important role in public service, for it encompasses all the others.

*Id.* at 416. See generally Pearce, *supra* note 26.



incidental to their work.<sup>40</sup> Like the government, lawyers teach for good or for ill and whether or not they intend to do so.

A few examples will help illustrate this idea.

When lawyers counsel clients about how to act within the law, especially when the meaning of the law is unclear, they explicitly or implicitly teach their clients about civic obligations both under the law and beyond the law. Advising the client to stay comfortably within the law<sup>41</sup> (or to comply with the imperfectly expressed spirit or purpose of the law) teaches one conception of civic obligation.<sup>42</sup> Encouraging the client to exploit legal loopholes or to test legal limits teaches a different conception.<sup>43</sup> Similar lessons are taught by example. When litigators decide how to comply with uncertain discovery and procedural obligations<sup>44</sup>—whether to implement the spirit of the law or to exploit the law's inexactitude—they teach by example, conveying to clients how the lawyer regards her own civic responsibility in addressing legal boundaries.

When transactional lawyers advise clients about what to disclose to those with whom their clients are doing business, independently of legal disclosure obligations, lawyers convey their understandings about mutual obligation among those who engage in commerce

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40. See Breyer, *supra* note 39, at 416.

41. Particular questions of interest are raised when the client regards the law to be morally unjust. Counseling compliance with the law reflects one view of citizens' obligations. See, e.g., GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* 17 (1920) (arguing that "law ... is practically nothing more than the embodied conscience of the political community" to its "paramount assertion of control and direction each individual of the community is bound to submit" as "a moral duty" (emphasis omitted)). Advising about the legitimacy (or illegitimacy) of civil disobedience reflects another view of citizens' obligations. See generally Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralistic Society*, 63 *GEO. WASH. L. REV.* 984, 1028 (1995) (defending the provision of legal advice about civil disobedience when the client has a "compelling and well-grounded" moral claim).

42. See, e.g., CARTER, *supra* note 27, at 51 ("Consistently with his oath of office and duty to his profession, the lawyer cannot do anything else than advise his client to obey the law in letter and in spirit.")

43. See, e.g., William H. Simon, *The Confidentiality Fetish*, *ATLANTIC MONTHLY*, Dec. 2004, at 113, 115, available at <http://www.theatlantic.com/doc/200412/simon> ("Many lawyers insist that they have a duty to exploit loopholes in the interests of their clients whenever possible.... [Enron's law firm] has responded to criticism by saying that as long as what the client wanted could be accomplished within the law, the law firm was not responsible for any bad consequences.")

44. For one of many discussions of lawyers' approaches to discovery and of discovery abuse, see Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *VAND. L. REV.* 1295 (1978).

within the civic community. Lawyers teach similar lessons by example when clients observe the lawyer's own negotiations and the extent to which the lawyer is candid or unforthcoming.

When a lawyer concludes that the client has only a weak legal claim or defense in litigation, the lawyer's advice (or lack of advice) about whether to proceed in litigation teaches a lesson. The client has a legal right to exploit the proceedings if the claim or defense is not frivolous, and doing so may enable the client to pressure the opposing party to settle on favorable terms.<sup>45</sup> Whether the lawyer encourages this, admonishes that this is not a proper use of the courts or not a proper attitude toward legal rights and obligations, or, indeed, refuses to represent the client in court, teaches the client not only about legal rights but also about the role of the courts and attitudes toward the law and legal institutions. Of course, additional counseling considerations apply where a case raises issues of systemic or distributive justice, such as when a party seeks law reform to promote a broader view of justice, where significant imbalances in power exist between the power of the parties, or where a party's fundamental needs (such as food or shelter) are at stake.<sup>46</sup>

Similar lessons are taught when a lawyer counsels a client whose claim or defense, although legally sound, is inequitable. Two examples are traditionally given. In the first, a debtor client with the financial ability to pay a just debt must decide whether to repay the debt or invoke the statute of limitations to bar the creditor from recovering.<sup>47</sup> In the second, a client who agreed orally to convey property and received money for it, but then received a better offer, might decide whether to convey the property or attempt to defeat a claim for transfer of the property by arguing that a writing was necessary to establish a binding agreement.<sup>48</sup> Whether the lawyer advises the first client to pay the debt or advises the second client

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45. See, e.g., *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy J., concurring) ("For [patent licensing] firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.").

46. Cf. William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on The Practice of Justice*, 51 STAN. L. REV. 991, 996-1000 (1999).

47. See GLEASON L. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* 187 (1910).

48. See *id.* at 187-88.

to convey the property, as a matter of civic obligation,<sup>49</sup> or instead accepts the representation and invokes the legal defense, teaches the client, for better or worse, about how to regard legally unenforceable agreements made to others in the community. Here, too, questions of systemic or distributive justice may also complicate the counseling challenge.<sup>50</sup>

Although our focus is on everyday private practice, we note also that lawyers unavoidably teach civics by example outside their professional work.<sup>51</sup> When lawyers serve on juries, they make an implicit public statement about the significance of this civic obligation. When they seek to avoid jury service, claiming that they lack the time or suggesting that they know too much to be fair, they teach the opposite lesson, whether or not intentionally.<sup>52</sup>

As these examples suggest, we offer an image of the citizen-lawyer that is just the opposite of Thomas Talfourd—a member of the nineteenth-century British professional elite who advocated for immoral results in private practice and sought to improve the law in his later years in public life.<sup>53</sup> The lawyer as civics teacher is an ordinary, contemporary American lawyer whose sense of civic obligation influences his or her daily private practice, and most especially his or her approach to counseling clients.

This means that the lawyer does not rest on the claim that ordinary legal practice plays a significant role in civic life for reasons that are intrinsic to law practice—for example, as may be true, that lawyers promote a just society whenever they advocate for clients within the bounds of the law and that they promote the rule of law whenever they advise clients about the law’s limits. The civic

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49. This is one early traditional view of how the lawyer should advise clients in these examples. *See id.* at 185-88; CARTER, *supra* note 27, at 51-52 (recounting Lincoln’s refusal to take a legally sound but unjust case against a widowed mother with six children). Archer regards the duty to give this advice as a duty that lawyers owe to the state. ARCHER, *supra* note 47, at 185-87.

50. *See supra* note 29 and accompanying text.

51. *See generally* Friedman, *supra* note 26.

52. Likewise, lawyers teach by example when they bring or defend legal proceedings on their own behalf, such as when they engage in what appear to be misuses of the judicial system. *See, e.g., Nice Try: Cleaner Wins \$54 Million Pants Lawsuit*, ALASKA BAR RAG, Oct.-Dec. 2007, at 23 (describing administrative law judge’s unsuccessful two-year lawsuit seeking \$67 million, later reduced to \$54 million, in damages from a dry cleaner that allegedly lost his pants).

53. REPORT, *supra* note 1, at 1162; *see supra* text accompanying notes 6-8.

teaching role we envision involves a more robust idea of “civics” and a more self-conscious idea of teaching. At a minimum, this includes educating clients about civic obligations that are not legally enforceable and that may be found in the “spirit” of the law.<sup>54</sup> Further, and perhaps even less precisely, our concept includes counseling clients about general concepts (equality, respect for others, fairness, civility) that are not captured by either the law’s letter or spirit, but that reflect ideas of civic obligation that influence people’s voluntary conduct as an ordinary matter and that may therefore bear on the client’s or lawyer’s conduct in a legal representation.

Three additional observations: First, we would not limit the lawyer-client conversation about the public good to situations where the clients’ proposed conduct is patently antisocial. Lawyers assist clients in making fully informed decisions. This requires consideration of all relevant considerations, not just legal considerations.<sup>55</sup> Considerations of civic obligation are relevant even when it is far from clear which way they point or when they point in conflicting directions.

Second, and relatedly, civic obligations can mean different things to different lawyers and at different moments in history. The nineteenth-century legal elite had a notion of civic obligation that was typically aligned with that of their clients, that gave primacy to property interests, and that was inconsistent in many ways with contemporary notions.<sup>56</sup> Lawyers today may have ideas of civic obligation that are far less closely aligned with their clients’ civic intuitions. Thus, we do not suggest that lawyers’ civic teachings must have any prescribed content, other than that the “hired gun”

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54. The idea of the law’s “spirit” is itself ambiguous. One might understand its relevance to be simply as an aid to understanding the meaning of the law, as might be true of the law’s “purpose.” But our understanding of the concept is as a source of potential self-restraint beyond that which the law would be interpreted to impose. See generally W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473 (2006); Symposium, *The Internal Point of View in Law and Ethics*, 75 *FORDHAM L. REV.* 1143 (2006).

55. See, e.g., *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (“The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable.... His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations.”); see also *Pritchard v. County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) (quoting Judge Wyzanski and observing that “[w]hat Judge Wyzanski observed long ago applies with equal force today”).

56. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 254 (1992) (describing George Sharswood’s view).

approach, focusing exclusively on compliance with the "letter of the law," reflects too narrow a view. Generally speaking, as Deborah Rhode has previously observed, the lawyer's role requires counseling about and consideration for "the letter of the law, and ... core principles of honesty, fairness, and social responsibility."<sup>57</sup>

Finally, it follows from this that our emphasis is on opening up a lawyer-client conversation about civic obligation and the public good. We are not proposing that lawyers demand that the client act in any particular way or that lawyers generally decline or terminate a representation when the client's lawful conduct strikes the lawyer as antisocial, although there may be situations that warrant doing so.<sup>58</sup> Some nineteenth-century writers took that stronger view of lawyers' obligation to integrate civic considerations into their practice, insisting that certain objectives, although lawful, should not be furthered, and certain means, although lawful, should not be employed.<sup>59</sup> Some commentators today take a similar view.<sup>60</sup> We do not do so, in part because we think that discerning obligations of citizenship, beyond maintaining a commitment to compliance with the law, is complicated, and in part because we believe that good "teaching" means having a mutually respectful conversation in which the teacher does not compel adherence to her views.

## II. WHY LAWYERS SHOULD TEACH CIVICS WELL

Besides making a descriptive claim, we make a prescriptive claim: that lawyers should consider their role as civics teachers to be central to their work and should strive to teach it well. We offer two arguments.<sup>61</sup> The first, which echoes Brandeis's observation in

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57. Rhode, *supra* note 29, at 1319. Rhode's article argues "that lawyers have a moral responsibility to provide moral counseling, whether or not it can be packaged in pragmatic terms." *Id.* We conceive of the relevant principles as aspects of *political* morality and that they can be cast in terms of civic obligation, rather than exclusively in terms of personal morality, on the one hand, or client self-interest, on the other.

58. *Cf.* Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1769-70 (1993) (stressing the importance of such deliberation to "constitutional democracy").

59. *E.g.*, DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752, 754 (Arno Press 1972) (vols. 1 & 2 1836).

60. *E.g.*, LUBAN, *supra* note 29, at 62-64.

61. Neither of these arguments requires a belief that lawyers have a superior ability to perceive the public good, although they are certainly consistent with such a belief. For a historical examination of lawyer perspectives grounded in the superior connection of lawyers

*Olmstead*, might be summed up as follows: "As long as lawyers are unavoidably teaching ethics, they ought to try to do a good job of it, if only out of a sense of public obligation."<sup>62</sup> The second, which derives from the ABA/AALS Report and from other writings before and since, reflects an affirmative understanding of the lawyer's responsibilities.<sup>63</sup>

### A. *Teaching Civics Well as a Public Service*

Lawyers should teach civics self-consciously and for the better because lawyers are potent and invariable teachers of the subject, the subject is important, and teaching it well is a public service that lawyers can provide with no special effort.

To begin with, the need for civics education is plain.<sup>64</sup> In a collection of writings on the "citizen lawyer," it is most appropriate to cite no less a source than Thomas Jefferson, who wrote: "I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion."<sup>65</sup> To put it more prosaically, people need to understand their rights, responsibilities, and roles in a civil society. The effective functioning of our society presupposes that they do. Each new generation must be taught.<sup>66</sup>

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to the public good, see Pearce, *supra* note 26. In the sociological literature, "structural functional" theorists, such as Durkheim and Parsons, made a similar claim. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 14-16, 34-35 (1989).

62. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see *supra* text accompanying notes 32-35.

63. REPORT, *supra* note 1, at 1160-62.

64. Indeed, as was pointed out in this symposium, Justice Sandra Day O'Connor has argued that civics teaching, if anything, is on a rapid decline in primary education. See Levinson, *supra* note 37, at 1242-43.

65. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820). See generally Douglas, *supra* note 26, at 192-95; cf. THE FEDERALIST NO. 35 (Alexander Hamilton).

66. As Justice Breyer has observed:

[The Supreme Court is] there to keep the system on the rails.... The democratic rails, the boundaries, the creation of the democratic space within which people are to make their own decisions. That is what Tocqueville said in 1830. How is it possible, he asks, that in this society where the basic idea is everyone has something to offer and (unlike Europe) there is not some social class that is "us and not them"—why does this country not go off the rails?... And he answered the question by saying, "because people practice democracy." They learn how.

It is also well-acknowledged that schools do not always do the job successfully and thoroughly,<sup>67</sup> and people have too few other effective opportunities to learn. People can learn indirectly through observation of others,<sup>68</sup> but those whom they observe may not be adequate role models or, in observing, people may infer the wrong lessons.

A legal representation, on the other hand, is an obvious context in which to teach civics to clients and to the community. Understandings about how to regard the law and how to interact with legal institutions and fellow citizens are implicitly or explicitly implicated in virtually all representations.<sup>69</sup> We have noted that clients can learn indirectly by observing their lawyers,<sup>70</sup> or they can learn directly in the civics tutorial that we ordinarily call client counseling.<sup>71</sup> But beyond that, clients can "learn by doing," which is one of the most effective ways to learn.<sup>72</sup> That is the case when the legal representation calls on the client to give effect to, or to ignore, his understanding of his own civic obligations.<sup>73</sup> Neither form of education is limited to clients alone. Friends, family, coworkers, employees, employers, adversaries, community members—all who

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They learn how in town meetings, or they learn how in school, to work with others. They learn that you have to cooperate. They learn that you better listen to what somebody else says if you want your way. They learn that we are part of something bigger than us and that when we make decisions we are deciding as a group.

Justice Stephen G. Breyer, *Reflections of a Junior Justice*, 54 *DRAKE L. REV.* 7, 13 (2005). Tocqueville, of course, emphasized the importance of lawyers as instrumental to how the people learned to practice democracy. See *ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA* 264-70 (J.P. Mayer ed., George Lawrence trans., Harper & Row, Perennial Library ed. 1986) (1966); cf. Pearce, *supra* note 26, at 392.

67. See Levinson, *supra* note 37, at 1242-43; Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 *ALB. L. REV.* 1425, 1425 (1999).

68. Cf. Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 *FORDHAM L. REV.* 1429 (2006).

69. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950); REPORT, *supra* note 1, at 1159-60 (describing the varied roles of a lawyer and accompanying responsibilities to society); Gutmann, *supra* note 58, at 1768.

70. See *supra* note 31 and accompanying text; see also Breyer, *supra* note 39, at 416; Green, *supra* note 68, at 1431-32.

71. See *supra* notes 47-49 and accompanying text; see also *United Shoe*, 89 F. Supp. at 359; ARCHER, *supra* note 47, at 185-87.

72. See Breyer, *supra* note 39, at 13 (describing how people learn civic responsibility in daily life); Quigley, *supra* note 67, at 1426, 1430 (listing effective means of civics instruction).

73. See, e.g., ARCHER, *supra* note 47, at 185-87; HOFFMAN, *supra* note 59, at 764.

learn of the matter through word of mouth or the press and all whose lives are affected directly and indirectly—will receive a lesson in civic responsibility.<sup>74</sup>

One can argue that the government, in licensing lawyers, might fairly demand that lawyers shoulder this responsibility.<sup>75</sup> Or one might argue, as we do below in Section B, that promoting clients' *sound* understandings of civic responsibility is intrinsic to the lawyer's role, properly understood. But those are separate claims. Our point here is simply that, if teaching civics by word and deed is unavoidable, lawyers' commitment to the public good compels the conclusion that lawyers should take this function seriously and strive to teach well.<sup>76</sup> Lawyers who teach civics well serve an important public function, while those who teach poorly undermine the public interest in having civically disposed and informed citizens.<sup>77</sup>

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74. See REPORT, *supra* note 1, at 1160; Green, *supra* note 68, at 1431-32.

75. Gleason Archer, almost a century ago, took the view that because the state (through the courts) grants lawyers "new standing in the community" and "new powers and privileges," it may properly "exact greater accountability from [the lawyer] than from the ordinary citizen." ARCHER, *supra* note 47, at 183; see also CARTER, *supra* note 27, at 37 ("The lawyer is entrusted with interests and powers of great magnitude. It is of vital importance that his sense of duty should be in proportion to the magnitude of these interests."); JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 127 (1907) ("In every employment which the lawyer receives, his primary duty is to the State ... [b]ecause he is a part of the judicial system of the Government."); HENRY WYNANS JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER 23 (1925) ("A lawyer is a citizen with enhanced responsibilities. The dignity of his office constrains him to serious observance of civic obligations ... [which includes] avoid[ing] even the appearance of disrespect to or disregard of constitutional or statutory regulations."). However, the contemporary understanding is that practicing law is not an exercise of state power, lawyers are not "officers of the court" in either a literal or political sense, and there are therefore limits on what burdens can be placed on lawyers as a condition of being licensed to practice law. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 282-83, 288 (1985).

76. Cf. ARCHER, *supra* note 47, at 183 (stating that lawyers have additional "duties and obligations" demanding "greater accountability" than from ordinary citizens).

77. See Breyer, *supra* note 39, at 416 (describing the importance of the lawyer's role as teacher); Quigley, *supra* note 67, at 1433-34 (noting the effects on the public of poor civics education); see also REPORT, *supra* note 1, at 1162 (explaining when lawyers serve or hinder the public interest).



*B. Teaching Civics Well as Intrinsic to the Lawyer's Social Function*

Fuller's Report does not refer to lawyers as “civics teachers.”<sup>78</sup> But it does describe the lawyer's role in a manner that, notwithstanding the Talfourd story, gives significant weight to the lawyer's duty to serve the public in ordinary private practice and that, in particular, takes note of the lawyer's pedagogic role in doing so.<sup>79</sup> The ABA/AALS Report's conception had antecedents in earlier writings on the legal profession and it was carried over into subsequent writings.<sup>80</sup>

*1. The ABA/AALS Report's Idea of Lawyers' Pedagogic Role as Derived from Their Social Function*

To begin with, Fuller's Report takes the view that a lawyer's “work must find its direction within a larger frame” than simply “the faithful discharge of duties assigned to him by others.”<sup>81</sup> That larger framework is provided by an understanding of the lawyer's societal role.<sup>82</sup> The Report recognizes that “[p]rivate practice is a form of public service when it is conducted with appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government ... voluntary forms of self-regulation.”<sup>83</sup>

That lawyers in private practice serve a quasi-governmental function is a pervasive concept in the Report, which refers to the lawyer's position as an “office,”<sup>84</sup> suggesting that the lawyer serves as more, or other, than simply an agent of private clients.<sup>85</sup> This conception is set forth explicitly by the Report's pronouncement that “[t]he lawyer's highest loyalty” is not to the client “but to procedures

78. See REPORT, *supra* note 1.

79. See *id.* at 1161-62.

80. See *infra* Section II.B.2.

81. REPORT, *supra* note 1, at 1159.

82. See *id.*

83. *Id.* at 1162 (further stating that “[p]rivate legal practice, *properly pursued*, is ... itself a public service”) (emphasis added).

84. *Id.* at 1159.

85. See *id.* at 1159, 1162, 1216.

and institutions”<sup>86</sup>—an implicit repudiation of the “hired gun” conception that is often attributed to Henry Lord Brougham.<sup>87</sup> The Report describes the lawyer as a trustee “for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends,”<sup>88</sup> and observes that “democratic and constitutional government is tragically dependent on voluntary ... co-operation in the maintenance of its fundamental processes and forms.”<sup>89</sup> The Report sketches out the significance of this conception of the private practitioner’s role in the context of three functions that lawyers perform: advocacy, negotiating and drafting, and counseling.<sup>90</sup>

Not surprisingly, the Report envisions adjudication as serving a crucial governmental function: the impartial resolution of disputes.<sup>91</sup> It describes adjudication within an adversary setting in particular as crucial to just resolutions.<sup>92</sup> Without adversary presentations, the judge would be required to serve not only as neutral arbiter but as both parties’ representatives, going back and forth between a sympathetic identification with the parties and a neutral role, with the likelihood of judging prematurely.<sup>93</sup> “Partisan advocacy,” which relieves the judge of these multiple roles, thus “plays a vital and essential role in one of the most fundamental procedures of a democratic society.... The institution of advocacy is ... an expression of human insight in the design of a social framework within which man’s capacity for impartial judgment can attain its fullest realization.”<sup>94</sup> Partisan advocacy, however, does not invariably serve the

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86. *Id.* at 1162.

87. See generally Pearce, *supra* note 56, at 394-95, 405, 409 (describing how Brougham’s American contemporaries expressly rejected his perspective and how his view became the “standard conception” following the 1960s) (quoting Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671-73 (1978)); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2-3 (2005) (observing that Brougham’s 1820 declaration “that ‘an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client’ ... remains emblematic of a conception that is arguably the ‘dominant’ one among United States lawyers” (quoting 2 TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., London, Albion Press 1821))).

88. REPORT, *supra* note 1, at 1162.

89. *Id.*

90. See *id.* at 1160-62.

91. See *id.* at 1160-61.

92. See *id.* at 1160.

93. See *id.* at 1160-61.

94. *Id.* at 1161.

prescribed social function.<sup>95</sup> Partisanship must be restricted in accordance with these general principles.<sup>96</sup> On one hand, "[t]he advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case.... Thus, partisan advocacy is a form of public service so long as it aids the process of adjudication."<sup>97</sup> On the other hand, partisan advocacy ceases to serve the public "when it hinders that process, when it misleads, distorts and obfuscates, when it renders the task of the deciding tribunal not easier, but more difficult."<sup>98</sup>

Although the lawyer's role in negotiating and drafting takes place outside the setting of government institutions and processes, the Report situates that role in the context of voluntary self-governance, which it regards as playing an equally important role in a democracy.<sup>99</sup> It notes that most "human relations are set" in our society "by the voluntary action of the affected parties," who "collaborate and ... arrange their relations" by, for example, "forming corporations [and] partnerships," contracting and leasing, and transacting in other large and small ways "by which their rights and duties toward one another are defined."<sup>100</sup> "[S]uccessful ... collaboration" requires "a framework for the parties' future dealings," comparable to a formal charter, and in our society, the lawyer is "the natural architect of this framework."<sup>101</sup> In this role, the lawyer "advances the public interest when he facilitates the processes of voluntary self-government" but "works against the public interest when he obstructs the channels of collaborative effort, when he seeks petty advantages to the detriment of the larger processes in which he participates."<sup>102</sup> As in advocacy, the lawyer's duty is not solely to the client: "[T]he good lawyer does not serve merely as a legal conduit for his client's desires, but as a wise counselor, experienced in the art of devising arrangements that will put in workable order the entangled affairs and interests of human beings."<sup>103</sup>

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95. *See id.*

96. *Id.*

97. *Id.* at 1161-62.

98. *Id.* at 1162.

99. *See id.* at 1161.

100. *Id.*

101. *Id.*

102. *Id.* at 1162.

103. *Id.*

Finally, as counselor, the lawyer “contributes to the administration of the law” and “effective realization of the law’s aims” by advising clients about the outcome of potential litigation and about compliance with the law.<sup>104</sup> The Report observes that by reminding clients of the “long-run costs” of proposed conduct, “the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.”<sup>105</sup> And it cautions that “[t]he reasons that justify and even require partisan advocacy ... do not grant any license to the lawyer to participate as legal advisor in a line of conduct that is immoral, unfair, or of doubtful legality.”<sup>106</sup>

The Report envisions the lawyer’s responsibility to promote governance and self-governance as including a pedagogic role.<sup>107</sup> For example, it observes that the lawyer has a duty to preserve voluntary cooperation “by imparting the understanding necessary to give it direction and effectiveness”—“a duty that attaches [both] to his private practice [and] to his relations with the public.”<sup>108</sup> Further, the lawyer “has an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process;” otherwise, “there is an inevitable tendency for practice to drift downward to the level of those ... whose experience of life has not taught them the vital importance of preserving just and proper forms of procedure.”<sup>109</sup>

How does Talfourd’s story fit into this vision of private practice as a form of public service where the lawyer practices consistently with a proper understanding of the lawyer’s role in society?<sup>110</sup> Not comfortably. The Report speculates that “Talfourd’s devotion to public service” as a member of Parliament “grew out of his own enlightened view of his role as advocate.”<sup>111</sup> Furthermore:

It is impossible to imagine a lawyer who was narrow, crafty, quibbling or ungenerous in his private practice having the

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104. *Id.* at 1161.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1162-63.

109. *Id.* at 1216.

110. *See id.* at 1162.

111. *Id.*

conception of public responsibility displayed by Talfourd. A sure sense of the broader obligations of the legal profession must have its roots in the lawyer's own practice. His public service must begin at home.<sup>112</sup>

As to Talfourd, however, that is pure conjecture. One might imagine the story differently: that his law reform efforts were a self-imposed penance for working to help a vindictive, adulterous husband deny a fit mother visitation rights to three infant children who scarcely recognized him.<sup>113</sup>

Regardless of how one views the story of Thomas Talfourd, the Report expresses a conception of the citizen-lawyer that has been largely overwhelmed by two other ideas. One is the popular conception of the zealous advocate that has leached into virtually all aspects of law practice.<sup>114</sup> The other is the idea that public service takes place largely outside the private practice of law on behalf of ordinary clients: through public office, law reform activities, pro bono representation, and the "representation of unpopular causes."<sup>115</sup>

## *2. Antecedents to the ABA/AALS Report's Idea of Lawyers' Pedagogic Role*

The Report's conception that lawyers in ordinary law practice should serve the public good in part by teaching clients about cooperative relationships and fair dealings has its roots in earlier understandings.<sup>116</sup> Both David Hoffman and George Sharswood, two

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112. *Id.*

113. *See supra* Introduction.

114. *See* Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407, 418-33 (2001) (discussing how "the philosophical movement within the practicing bar has been for the adversary ethic to spill over from adjudicative proceedings into corporate representation that occurs outside the adjudicatory context"); Thomas L. Shaffer, *Business Lawyers, Baseball Players, and the Hebrew Prophets*, 42 VAL. U. L. REV. 1063, 1064 (2008) (observing that "[o]ur [contemporary] obsession [with the adversary ethic] has obscured the distinction between" litigators and business lawyers).

115. REPORT, *supra* note 1, at 1216-17; *see* Barnett, *supra* note 29, at 10; Hirshon, *supra* note 29, at 10; Katzmann, *supra* note 29, at 25.

116. *See* Pearce, *supra* note 56, at 241, 243 (describing historical influences on modern legal ethics).

of the first major American legal ethicists,<sup>117</sup> saw the everyday work of lawyers instructing clients as vital to the proper functioning of society.<sup>118</sup> They believed that without lawyers' guidance people would undermine "order, liberty, and property" as they sought to "promote their interests at the expense of the rights and interests of others."<sup>119</sup> The function of lawyers was to persuade clients to understand and respect the rule of law and the public good.<sup>120</sup> In contrast to their self-interested clients, lawyers possessed a greater virtue that enabled them to identify and pursue the public good.<sup>121</sup> This virtue enabled lawyers both to "gain the confidence of" clients and to persuade them of "sound principles" that went beyond the letter of the law.<sup>122</sup> As Sharswood noted, "[a] very important part of the advocate's duty is to moderate the passions of the party, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy."<sup>123</sup> Counsel to a client should consider not only what was legal but what was just.<sup>124</sup> Clients should not pursue the letter of the law at the expense of its spirit.<sup>125</sup> Sharswood advised, "confine not yourself in your transactions with your fellow-men to giving them simply the strict measure of their legal rights, give them all that is honestly theirs as far as you have ability, whether the law affords them a remedy or not."<sup>126</sup>

Both Hoffman and Sharswood took a strong view of lawyers' civic obligations. Although differing between themselves, both took the view that the lawyer's civic obligation in private representations went beyond the lawyer's counseling function.<sup>127</sup> Each called on the lawyer to refrain in some cases either from engaging in lawful but

117. *See id.* at 241, 249 (describing Sharswood's ethics essay as being the source of current ethics codes, and citing Hoffman as being part of the nineteenth-century legal ethics debates).

118. *See id.* at 256; *see also* HOFFMAN, *supra* note 59, at 754, 764.

119. Pearce, *supra* note 56, at 254.

120. *See id.* at 256.

121. *See id.* at 255-56.

122. *See id.* at 256 (quoting George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 1, 30 (1907)).

123. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 109 (T. & J.W. Johnson & Co., 5th ed. 1896).

124. *See id.* at 113-14; Pearce, *supra* note 56, at 258.

125. *See* SHARSWOOD, *supra* note 123, at 113-14; Pearce, *supra* note 56, at 258, 269.

126. SHARSWOOD, *supra* note 123, at 114; *see also* Pearce, *supra* note 56, at 266.

127. Compare HOFFMAN, *supra* note 59, at 750-51, with SHARSWOOD, *supra* note 123, at 109, 113-14.

antisocial conduct or from engaging in lawful conduct that would serve antisocial ends.<sup>128</sup> For example, each asserted that lawyers should refuse to pursue an unjust claim on behalf of plaintiffs.<sup>129</sup> Hoffman urged lawyers not to use defenses that "ought not[] to be sustained," such as "the Statute of Limitations, when based on the *mere efflux of time*."<sup>130</sup> Sharswood was less categorical, maintaining that lawyers should not assist debtors of "ample means" in harassing or taking advantage of a creditor.<sup>131</sup> In defense of a criminal defendant accused of an egregious crime such as a parricide, Hoffman said a lawyer should not provide "special exertions," only the efforts needed to "secur[e] to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law."<sup>132</sup>

As corporate legal practice developed in the late nineteenth century, Louis Brandeis extended this perspective to the corporate lawyer.<sup>133</sup> In an essay that is more famous today for its discussion of the lawyer's responsibility in the area of law reform, Brandeis observed that representing corporations implicated the wisdom and skill required for "diplomacy" and "statesmanship."<sup>134</sup> With "training ... [that] leads to the development of judgment,"<sup>135</sup> lawyers had achieved the societal "position of the adviser of men."<sup>136</sup> In the business arena, "lawyers are needed, not only because of the legal questions involved, but because [of] the particular mental attributes and attainments which the legal profession develops."<sup>137</sup> Applying good judgment to the representation of businesses was a form of public service.<sup>138</sup> Brandeis observed that:

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128. See, e.g., HOFFMAN, *supra* note 59, at 754; SHARSWOOD, *supra* note 123, at 109, 113-14.

129. HOFFMAN, *supra* note 59, at 754; SHARSWOOD, *supra* note 123, at 113-14.

130. HOFFMAN, *supra* note 59, at 754.

131. SHARSWOOD, *supra* note 123, at 113-14; Pearce, *supra* note 56, at 266 n.199 (quoting SHARSWOOD, *supra* note 123, at 113).

132. Pearce, *supra* note 56, at 265 n.193 (quoting HOFFMAN, *supra* note 59, at 755-56). In contrast, Sharswood asserted that all criminal defendants were entitled to a zealous defense. SHARSWOOD, *supra* note 123, at 90-92, 105.

133. LOUIS BRANDEIS, BUSINESS: A PROFESSION 320-21 (1914).

134. *Id.* at 319.

135. *Id.* at 315.

136. *Id.* at 317.

137. *Id.* at 319.

138. *Id.*

The relations between rival railroad systems are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to commoners or dependents. The relations of public-service corporations to the people raise questions not unlike those presented by the monopolies of old.<sup>139</sup>

A well-known incident from Brandeis's own practice offers an example of how the civics teacher role requires lawyers to think beyond the material self-interest of the client and to advise the client on the implications of its actions on others. Representing United Shoe against its employees' who complained that their employment should be annual rather than seasonal,<sup>140</sup> Brandeis "determined that these claims were legitimate and worked with his client to revamp the plants' manufacturing schedule in a manner Brandeis believed to be in the best interest of both his client and the employees."<sup>141</sup>

In 1908, when the ABA promulgated its first code of ethics, it wholeheartedly embraced the notion that the civic responsibility of lawyers was fundamental to their work. According to the Preamble to the Canons of Professional Ethics ("Canons"), "The future of the republic, to a great extent, depends upon [lawyers'] maintenance of justice pure and unsullied."<sup>142</sup> To fulfill this obligation, lawyers must

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139. *Id.* at 319-20.

140. John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 755; David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 722-23 (1988); Pearce, *supra* note 26, at 401-02.

141. Pearce, *supra* note 26, at 402. In 1978, Geoffrey Hazard employed Brandeis's notion of "the lawyer for the situation" to incorporate these considerations into some representations. Hazard sought to do this by relaxing the conflict of interest rules to permit lawyers to represent clients with differing interests who were seeking to work together amicably. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 58-68 (1978). His efforts led to the short-lived Model Rule 2.2. See MODEL RULES OF PROF'L CONDUCT R. 2.2 (2003) (marking the end of the rule's short life); HAZARD, *supra*, at 58-68; Dzienkowski, *supra* note 140, at 744 n.11. The view of lawyer as civics teacher takes a different approach. Representing multiple clients is not necessary to permit the lawyer to incorporate consideration of the good of all parties into a negotiation. Cf. Luban, *supra* note 140, at 722-23 (recommending a similar approach). Rather, the lawyer can always advise the client to pursue an alternative that promotes harmony with its counterpart. After all, a good citizen considers how her actions will impact her neighbors and society. Whether or not the client takes this advice, the lawyer offers a model of good citizenship.

142. MODEL CANONS OF ETHICS pmb1. (1908), available at <http://www.abanet.org/cpr/1908->



reject the "false claim ... that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."<sup>143</sup> While providing "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights,"<sup>144</sup> civic responsibility required the lawyer to "advise" the client to avoid pursuing "questionable transactions, ... bringing questionable suits, [and undertaking] questionable defenses...."<sup>145</sup> According to the Canons, in the

"Last Analysis[,] ... despite the contrary urging of any 'client, corporate or individual, however powerful, nor any cause, civil or political, however important ...,' [t]he lawyer 'will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."<sup>146</sup>

### *3. The Perpetuation of the ABA/AALS Report's Idea of Lawyers' Pedagogic Role*

The Report's conception of civic responsibility continued in professional discourse through the 1970s. In the early 1960s, according to Erwin Smigel, Wall Street lawyers described their role as a "buffer between the illegitimate desires of ... clients and the social interest."<sup>147</sup> Lawyers representing corporations would "serve ... as the conscience of big business."<sup>148</sup> They urged their clients to consider not only the letter of the law but its spirit and the good of the community, based "upon not only what is permissible but also what is desirable."<sup>149</sup> Smigel found that big firm "[l]awyers often use their positions as advisors to guide their clients into what they believe to be proper and moral legal positions,"<sup>150</sup> applying this view both to litigation and to transactional work.<sup>151</sup>

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code.pdf [hereinafter ABA CANONS]; see Pearce, *supra* note 26, at 400.

143. ABA CANONS, Canon 15.

144. *Id.*

145. *Id.* Canon 31.

146. Pearce, *supra* note 56, at 268 (quoting ABA CANONS, Canon 32).

147. ERWIN O. SMIGEL, WALL STREET LAWYER 342 (Ind. Univ. Press 1969) (1964).

148. *Id.* at 5.

149. *Id.* at 5-6.

150. *Id.* at 6.

151. *Id.* at 6-8. Stewart Macauley painted a similar picture in his study of consumer

As previously noted, the 1970 ABA Model Code of Professional Responsibility cited repeatedly to Fuller's Report.<sup>152</sup> Among other things, it expressed the understanding that "[l]awyers, as guardians of the law, play a vital role in the preservation of society, [such as through the maintenance of] the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government."<sup>153</sup> Similarly, the 1983 Model Rules of Professional Conduct described the lawyer as a "public citizen having a special responsibility for the quality of justice"<sup>154</sup> and permitted the lawyer to counsel clients on civic responsibility under a rule authorizing the lawyer to refer to "moral, economic, social and political factors."<sup>155</sup> But in general, after the 1960s, professional discourse about lawyers' civic role, their contributions to governance even as private practitioners, and their obligation to temper their own advocacy and to counsel clients in light of a broader sense of social responsibility was filtered out of the professional discourse. By 1985, for example, most elite lawyers no longer claimed that the public good played a major role in their everyday practice.<sup>156</sup>

In the past year, a consortium of corporate law firms issued a statement of "shared values" that illustrates how far the corporate bar's ideology now departs from Fuller's conception.<sup>157</sup> The statement posits that as a matter of principle a lawyer must "vindicate the values of the client—up to the limits of the law," without regard for countervailing "values currently important to the general public" or to "the amorphous concept of 'common good.'"<sup>158</sup> Indeed, the

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protection litigation in Wisconsin in the 1970s. Stewart Macauley, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 117, 127-28 (1979) (suggesting that the "hired gun" model does not accurately characterize professional practice, as lawyers often "seek to educate, persuade and coerce both sides to adopt the best available compromise," and describing this role in consumer protection cases in particular).

152. See *supra* note 4 and accompanying text.

153. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1980).

154. MODEL RULES OF PROF'L CONDUCT pmbl. (1983).

155. *Id.* R. 2.1.

156. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Value and Client Relationships in the Large Firms*, 37 STAN. L. REV. 503, 533 (1985) (describing survey indicating that lawyers in large firms rarely give advice regarding the public interest); Pearce, *supra* note 26, at 407-10 (and articles cited therein).

157. LEX MUNDI, LEX MUNDI AND PROFESSIONALISM: A STATEMENT OF SHARED FUNDAMENTAL VALUES (2008), available at <http://www.lexmundi.com/images/lexmundi/PDF/Publications/SharedFundamentalValues.pdf>.

158. *Id.* at 5.

statement advises that lawyers must embrace their clients' values and perceived interests with what it calls "principled enthusiasm," as "[c]lients pay their lawyers not just for results, but for attitude as well."<sup>159</sup> Although noting that lawyers should be "publicly engaged and committed participants in the political and social processes," the statement conceives of this function of "engaged' citizenship," like that of pro bono services, as extrinsic from the representation of private clients.<sup>160</sup>

### III. THE SIGNIFICANCE OF THE CONCEPT IN PROFESSIONAL AND ACADEMIC DISCOURSE

The concept of lawyers as civics teachers in everyday law practice offers a different way of thinking about at least four important subjects: the lawyer's commitment to the public good; the lawyer's role in a contemporary democracy; the lawyer's counseling function; and lawyers' relationships with each other.

#### A. *Serving the Public Good*

First, the civics teacher concept offers a view of the lawyer's role that is somewhat different from that found in the conventional conversation regarding the lawyer's commitment to the public good. As a general matter, the contemporary conversation does not focus on lawyers' everyday practice.<sup>161</sup> The conversation ordinarily concerns the duties of lawyers to provide pro bono assistance,<sup>162</sup> to defend civil rights and civil liberties,<sup>163</sup> and, as in the story of Thomas Talfourd,<sup>164</sup> to promote law reform.<sup>165</sup> To the extent that the conversation about serving the public good touches on everyday

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159. *Id.* at 8. As Deborah Rhode has observed, however, the idea that out of respect for client autonomy, lawyers should not interpose values not expressed by clients themselves assumes that both the client and the lawyer accurately perceive the client's values. This may not be the case, especially before the lawyer counsels the client with regard to relevant nonlegal considerations, and it may never be true in the case of a corporate client. Rhode, *supra* note 29, at 1330.

160. LEX MUNDI, *supra* note 157, at 6, 8.

161. *Id.*

162. *See, e.g.*, Breyer, *supra* note 39, at 405-09.

163. *See id.* at 411-13.

164. *See supra* notes 6-19 and accompanying text.

165. *See, e.g.*, Breyer, *supra* note 39, at 409-11.

practice, it has sought to set boundaries that would prevent lawyers from assisting in client wrongdoing<sup>166</sup> or has identified lawyers as role models in exemplifying obedience to law.<sup>167</sup>

As civics teachers, lawyers have a far broader responsibility for incorporating an understanding of the public good into their practice. Doing so is quotidian, not exceptional. In almost every aspect of practice, whether providing advice, negotiating with an adversary, appearing in court, or in other capacities, lawyers affect how clients and, in many cases, third parties, conceive of their rights and responsibilities. In this work, lawyers have great discretion. They may choose to teach that the only guide to appropriate conduct is maximizing individual conduct within the bounds of the enforceable law—that one's civic responsibility is only to oneself and to respect the law only as a boundary on self-interest. On the other hand, lawyers may choose to teach that appropriate conduct requires taking into account not only one's self-interest but also one's obligations to one's fellows and one's community. Lawyers primarily teach these lessons through their conversations with clients, but they also teach them when they interact with others on a client's behalf.<sup>168</sup>

### *B. The Lawyer's Role in a Democracy*

Second, the concept adds to the broader discussion of the lawyer's role in a democracy. Although this discussion was historically prominent in the United States,<sup>169</sup> today it takes place largely with respect to transitional and developing democracies, where our own bar ascribes to lawyers an important role in promoting and sustaining democratic legal and institutional reform, largely through work outside the everyday representation of private clients. This ascribed democratic role may also include educating the public about its legal rights and how to assert them as well as educating the public about legal obligations and restrictions.<sup>170</sup> The idea of the

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166. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008).

167. On the latter point, see Breyer, *supra* note 39, at 416.

168. See *id.*

169. See, e.g., Pearce, *supra* note 26.

170. See, e.g., Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573, 611-14, 617-19 (2000); H.

American lawyer as civics teacher underscores that promoting and sustaining a democracy is not just a job for foreign lawyers and invites us to engage in exchanges with professional colleagues in developing democracies about our comparative roles and challenges.

### C. *The Lawyer's Counseling Function*

The concept also offers a different way of discussing the lawyer's counseling function. The ABA acknowledges the legitimacy of discussing nonlegal considerations with clients, including relevant "moral, economic, social and political factors,"<sup>171</sup> and many have argued for the importance of providing "wise counsel," rather than more narrow, technical, and exclusive focus on explaining the meaning and application of the law.<sup>172</sup> But many lawyers feel uncomfortable counseling clients with respect to moral, as distinct from business, considerations out of skepticism about the legitimacy of their own values or out of concern that their values are not shared by the client.<sup>173</sup> The idea of the lawyer as civics teacher suggests a particular class of nonlegal considerations to which the lawyer might refer—namely, those relating to the expectations and obligations of citizenry.<sup>174</sup> In their particulars, civic values may not be universally shared. Nonetheless, ideas of civic obligation and

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Kwasi Prempeh, *Lawyers and Liberal Democracy*, J. DEMOCRACY 71 (2000).

171. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008). Thus, if not ethically compelled, noncoercive discussions of civic considerations are certainly ethically permissible. See generally Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS, 19, 41-48 (1987) (discussing permissibility of moral counseling).

172. Thomas Shaffer recently gave two excellent examples from his early years in private practice. In the first, the partner (on Shaffer's advice) counseled an insurance company client that although it would be lawful to refuse to pay a young widower's claim on his wife's life insurance policy because it was filed outside the thirty days required by the policy, doing so would be morally wrong, and the company accepted the advice. Shaffer, *supra* note 114, at 1070-71. In the second, a partner advised a company in the early 1960s that, although a recent executive order did not require the company to integrate its mills, there was no doubt that it ought to do so. *Id.* at 1072-75.

173. See Green, *supra* note 171, at 41-48.

174. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1359-60 (1995). In an earlier volume of this law review, Fred Zacharias reached a similar conclusion about lawyers' counseling role, but one that he ascribed to lawyers' duty to maintain objectivity. Among other things, he suggested that lawyers' moral dialogue with clients should focus on client conduct injurious to third parties, client conduct meant to avoid legal obligations, the fairness of the disposition, and in general, "any obligations to third parties or societal interests that the lawyers believe should be honored." *Id.*

virtue should be regarded as legitimate subjects of discussion and, at the general level, as shared values, in a way that other beliefs and ideas may not be.<sup>175</sup>

Although some lawyers are reluctant to discuss these concerns, clients may welcome such guidance. Ben W. Heineman, Jr., General Electric's former senior vice president and general counsel, has explained how he sought in outside counsel both "an outstanding technical lawyer" and "a wise counselor," who could offer "thoughtful insights into all the nonlegal issues—ethical, reputational, and commercial."<sup>176</sup> Heineman similarly understood his own role as general counsel as including "establishing global values and standards beyond what financial and legal rules require; shaping the company's ... role as a corporate citizen[,] and ... addressing questions of how to balance the company's private interests with the public interests affected by the corporation's actions."<sup>177</sup>

Discussions about civics may ultimately point clients in the same direction as discussions of morality or other nonlegal considerations, but the discussion will sound different and may resonate with the client in a different way.<sup>178</sup> Both lawyer and client may find it easier to engage in conversation regarding civic responsibility, and both may perceive that lawyers have a stronger claim of expertise when

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175. Consider the following two examples. First, suppose that federal law prohibits U.S. companies from selling products to certain rogue countries, but for First Amendment reasons, the law excepts sales of publications. If a corporation asks for legal advice regarding whether the law allows it to sell publications that contain technical information and that are designed for commercial purposes, the lawyer may conclude that the publications are excepted from the embargo. But the lawyer might go on to advise that the material is within the spirit of the law's prohibition and encourage the client to consider whether, as a good U.S. corporate citizen, the company would want to promote the law's purpose even though the material is not technically covered.

Second, suppose that a publisher learns that someone has infringed its copyright, is confident that the problem can easily be resolved with a phone call, but sees this as an opportunity to file a lawsuit that will garner publicity and discourage other would-be infringers. The publisher's lawyer might ask the publisher to consider whether, although it has legal grounds to sue, it should refrain from doing so as a matter of good citizenship as this would involve a misuse of judicial resources and unfair and excessive use of legal force against the infringing party.

176. Ben W. Heineman, Jr., *Caught in the Middle*, CORP. COUNS., Apr. 2007, at 81, 84.

177. *Id.* at 82.

178. As coauthors, we have different views regarding the propriety of deliberating with clients on broader moral questions.

it comes to civic considerations, such as the value of concern for the "spirit" of the law.

*D. The Lawyer's Relationship with Professional Colleagues*

Finally, the idea that a lawyer should model good citizenship within the context of client representation offers a different way of thinking about relations among lawyers. Within the adversary process, for example, lawyers are in relationships with their counterparts, just as clients are in relationships with their own. Lawyers might think of each other as "opposing counsel" or "adversaries," but they might also think of each other as professional brethren. This is the conception suggested by the title of a recent centennial history of the New York County Lawyers' Association.<sup>179</sup> They might construct uncivil, even hostile relationships. Or they might strive, to the extent possible, to create relationships of civility and mutual trust within which they advocate for their clients zealously and perhaps even more effectively than if they were so-called "hardball litigators."<sup>180</sup>

Thinking about professional relationships as an expression of one's civic understandings provides a different way of thinking about recurring subjects of professional conduct in the adversary process. Among these are whether one comports with civility codes, whether one extends professional courtesy, how one deals with inadvertent disclosures, whether lawyers make and adhere to handshake deals, whether one makes true but intentionally misleading representations, whether one takes an aggressive approach to discovery obligations and other legal and ethical obligations, and the like. Further, the idea of the lawyer as civics teacher may provide

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179. EDWIN DAVID ROBERTSON, *BRETHREN AND SISTERS OF THE BAR* (2008).

180. For discussions of civility and incivility in litigation practice, see, for example, Stewart F. Hancock, Jr., *Days of Conviviality Preceded Specialization and Globalization*, 73 N.Y. ST. B.J. 35 (2001); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994); Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197 (2003); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998); Brenda Smith, *Civility Codes: The Newest Weapons in the "Civil" War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 DAYTON L. REV. 151 (1998); Adam Owen Glist, Note, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757 (2000).

a different kind of rationale for resolving these kinds of questions. The preference, where possible, for developing relationships of trust, for treating others fairly, for complying with the spirit of the law, and for negotiation and compromise may serve as a rationale for improving professional relationships when calls for “professionalism” are not sufficiently compelling.<sup>181</sup>

### CONCLUSION

At times, lawyers have been asked to serve as societal role models, and particularly as “citizen-lawyers.” One aspect of the lawyer’s role as citizen-lawyer might be characterized as that of a civics teacher. This conception draws on concepts and discourse going back to the American legal profession’s earliest days but finds especially full expression and justification in a Report authored by Lon Fuller a half-century ago. We part company with Fuller, however, in our rejection of Thomas Talfourd, a nineteenth-century barrister who served in the English Parliament, as a professional exemplar. In Talfourd’s stead, we offer a vision of everyday lawyers who incorporate public service by word and deed into their everyday private law practices, including the manner in which they counsel clients, interact with other lawyers, and regard their own legal obligations. Teaching civics, we suggest, is an unavoidable role for such lawyers. The only question is how well they fulfill it.

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181. See generally Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 730-32 (2001) (suggesting reasons why lawyers are uncomfortable discussing “professionalism”).