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ARTICLE

THE ELUSIVE “HIGH ROAD” FOR LAWYERS: TEACHING PROFESSIONAL RESPONSIBILITY IN A SHIFTING CONTEXT

BRYANT G. GARTH

Many professional responsibility teachers believe our mandate is to teach professionalism rather than how to comply with the rules of professional responsibility or pass the professional responsibility exam. Yet, it is not particularly easy to define just what content goes into that vague concept of professionalism. Lawyers and professors repeat the mantra that your professional reputation is central to your long-term professional success. We insist on the values of taking the “high road” in a student’s professional career, and we try correspondingly to discourage ethical shortcuts characteristic of the “low road.” But the difference between these two paths—once one gets past extreme examples like lying or cheating—is not so easy to ascertain or to teach.

This contribution to the symposium is an attempt to look critically at this effort to find and teach a high road. It explores both professional contributions and the contributions of academics. It will proceed in four parts. Part I will look at some of the organized bar’s responses to teaching and modeling “professional values.” It will focus on the report of the Task Force on Law Schools and the Profession: Narrowing the Gap, termed generally the “MacCrate Report.”¹ This part will mainly document the relative lack of emphasis on the values in the “skills and values” that the MacCrate Report promoted as essential qualities of lawyers. That lack of emphasis contributed to a lack of influence.

Part II will note the improvement that was made with the “Carnegie Foundation’s Educating Lawyers: Preparation for the Profession of Law, known generally as the Carnegie Report on Legal Education.”² One key am-

1. TASK FORCE ON LAW SCH. & LEGAL PROFESSION: NARROWING THE GAP, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 207–222 (1992) [hereinafter MACCRATE REPORT].

2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter EDUCATING LAWYERS].

bition of the Carnegie Report was to get law schools to go beyond exhortations to respect general values and to focus on “the apprenticeship of professionalism”—to teach and socialize students into the high road of professionalism values. The Carnegie Report authors criticized teachers of professional responsibility for dwelling on the rules of professional responsibility and teaching in the same way that they taught doctrinal courses, with little attention to professional values beyond the rules. Teachers focused too much on how to manipulate the rules in order to defend or criticize certain behaviors such as solicitation of clients or advertising.

I teach a first-year year-long legal profession course at the University of California-Irvine School of Law that is a direct response to the findings of the Carnegie Report. As with respect to the other professors in the course, I use an innovative textbook by two UCI professors, Ann Southworth and Catherine Fisk.³ Part III of this article is based on my experience teaching this course in response to the challenges raised by the Carnegie Report. The book contains readings both on the theories available to guide students in understanding the high road and on the professional contexts in which lawyers practice. I will suggest that the available academic theories—brought together in this and other legal profession texts—are not all that helpful. However interesting the continuing debates are, they fail to deal with a shifting context, which creates a disconnect between the students in the class and the available theories. The leading theories appear anachronistic.

The difficulties in finding a theory to guide those seeking the high road are then addressed from a more sociological perspective in Parts IV and V. The conclusion then, in Part VI, rather than offering some new theory, seeks to provide some insights on what the high road is, who it benefits, and what role it plays in the legal profession despite the difficulty of teaching it and making it more precise. It suggests that the high road is both a moving target and an entrepreneurial opportunity (for practitioners and professors alike).

I. VALUES IN THE MACCRATE REPORT

The distinguishing feature of the MacCrate Report is its enumeration and discussion of the “skills and values” of the legal profession.⁴ The list represents an idealized statement that pays little attention to such practicalities as getting clients, obtaining a job, and succeeding in a particular position. The approach of the MacCrate Report is consistent with most of the organized professional writing about the legal profession, which concen-

3. ANN SOUTHWORTH & CATHERINE FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* (2014).

4. MACCRATE REPORT, *supra* note 1, at 207–221.

trates more on exhortation than practicality—the high road existing above actual practice.

The values enumerated by the MacCrate Report are: (1) competence; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession, with a particular emphasis on the importance of combatting discrimination and promoting equality; and (4) professional development “in an employment setting where he or she can effectively pursue his or her personal and professional goals.”⁵ There are also some related skills, such as one on “moral counseling,” but such counseling was not mandated.⁶

These are all perfectly fine as far as they go, but they do not provide much guidance for practitioners. Competence can be assessed, although the answer to the question of how much time to spend on a particular case is not obvious.⁷ Large firms make the calculation very differently than small firms, and client resources determine to a great extent how one defends, for example, a class action lawsuit. Similarly, the abstract terms of justice, fairness, and morality offer little guidance in representation of particular clients. Improving the profession is seemingly general and not related to professional practice.

I will not discuss the legal skills enumerated in the MacCrate Report here, but they are more precise. There is considerable supporting explanation to go with the list, which includes problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute-resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.

The relative unhelpfulness of the values in contrast to the skills listed in the MacCrate Report is understandable given that the focus of the Report was on making the case for more skills instruction. The case for more skills instruction was also an argument for professors specialized in that work, in particular clinical professors. Indeed, the MacCrate Report made the case for skills instruction by insisting that it was necessary to have professors well-versed in the theories behind the skills, such as negotiation theory and a kind of litigation theory.⁸ The insistence that these areas are “theoretical” is a way to say they merit equality of treatment in the legal academy with the other “theoretical” subjects, such as torts, contracts, or constitutional law.

5. *Id.*

6. *Id.* at 176–184.

7. Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639 (1983).

8. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469–510 (1993).

The MacCrate Report makes no attempt to argue for legal theories that could be behind specific values. It did not, for example, engage the critical professional responsibility literature on professional values that will be discussed in Part III of this article. Furthermore, both the skills and values sections, as noted above, suffer from a neglect of the markets in which lawyers operate. This weakness is especially evident in the values section, with the practical context completely missing from the discussion.

The MacCrate Report succeeded in its major aim. It had a tremendous influence on the spread of clinics and skills instruction. Nevertheless, as Russell Pearce noted in 2003 in one of the few articles addressing values in the MacCrate Report,⁹ the work on values represented mainly a “missed opportunity.”¹⁰ He further noted “major flaws” in the values and that they were clearly a “second priority.”¹¹ Pearce’s main point is that the MacCrate Report “failed to confront obstacles in the dominant culture of the Bar and Academy”¹² and “to devise successful strategies for overcoming those obstacles.”¹³ The obstacles Pearce highlighted were twofold: the Bar’s comfort with the “hired gun” model of representation, and the Academy’s marginalization of the subject of legal ethics. The result was that the ABA offered only its usual unsuccessful recipes to improve, professionalism—exhortations, conferences, CLEs, and Task Forces.¹⁴

It is instructive that Robert MacCrate himself next took up the question of professional values in another MacCrate Report, this time on the subject of multidisciplinary practice (MDP).¹⁵ Prepared for the New York State Bar, this report emphasized that the “core values” of the legal profession were inconsistent with MDPs, in particular the alliances that the Big Five accounting firms had made with lawyers and law firms in the late 1990s.¹⁶ Core values were a shield and a weapon to be used to stop MDPs. The higher values of the legal profession were taken for granted as compared to the accountants. The report is consistent with the Bar’s defense of its important “values” coupled with a lack of guidance about how they are applied in practice.

9. Russell Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2002–2003).

10. *Id.*

11. *Id.* at 585.

12. *Id.*

13. *Id.*

14. *Id.* at 595.

15. N.Y.S.B.A. Special Comm. on the Law Governing Firm Structure Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers* (2000).

16. Yves Dezalay & Bryant Garth, *The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility*, 29 L. & SOC. INQUIRY 615, 615–638 (2004).

II. THE CARNEGIE REPORT AND THE RESPONSE OF THE ACADEMY

The Carnegie Report's three apprenticeships are well-known.¹⁷ For the purpose of this article, the important finding of the Carnegie Report was that—after learning legal reasoning and learning skills—the “third apprenticeship” is socialization into the profession and its values. Consistent with the criticism Pearce made of the MacCrate Report, the Carnegie authors wanted to change the place of professional responsibility and legal ethics within the Academy.¹⁸ They believed that law schools were failing in this crucial aspect of educating lawyers. A number of schools have taken up this challenge. The two pioneers with innovative first-year courses were Indiana University-Bloomington School of Law and the University of California-Irvine School of Law (UCI).

I have now taught the four-unit Legal Profession course at UCI three times. My colleagues Ann Southworth and Catherine Fisk developed the materials that evolved into a casebook, and the professors who teach the course all use that book and move at essentially the same pace.¹⁹ The uniformity allows the entire first-year class to meet together when there are panels of lawyers exemplifying practice settings—small firms, plaintiffs' practice, legal aid, public interest law, criminal defense, criminal prosecution, government law, corporate law, in-house counsel, and alternative dispute resolution. The ethical and professional challenges of each practice area are linked to discussion with actual practitioners who discuss both their career trajectories and the professional challenges of each position.

The course is generally successful, even though it is certainly against the grain of first-year law school, and LSSSE scores also suggest that the course contributes to making professional identity more salient among UCI students than at peer schools or law schools generally.²⁰ We published a chapter on this course recently, and there is no need to repeat those insights here.²¹ The course squarely addresses the Carnegie challenge to teach the “third apprenticeship.” Yet, as noted at the outset of this essay, the formula for teaching the high road that lies behind this challenge is still not easy to grasp. The problem is not with the book, which assembles the leading scholarship as well as the best discussions of the different professional contexts. There are more fundamental challenges to teaching the high road of professionalism.

17. See EDUCATING LAWYERS, *supra* note 2.

18. *Id.* at 128–161.

19. SOUTHWORTH & FISK, *supra* note 3.

20. Ann Southworth, Bryant Garth & Catherine Fisk, *Some Realism About Realism in Teaching About the Legal Profession*, in THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE, VOL. I, PUTTING LAW IN ITS PLACE: THE NEW LEGAL REALIST PROJECT 74–95 (S. Macaulay, E. Mertz & T. Mitchell eds., 2016).

21. *Id.*

III. CHALLENGES OF TEACHING THE HIGH ROAD AND DISTINGUISHING THE LOW ROAD: LEGAL THEORY AND THE SHIFTING SOCIAL CONTEXT

The Southworth and Fisk text for the course begins with a contrast between the so-called amoral lawyer role and a variety of different professional stances.²² The first reading is Richard Wasserstrom's critique of the amoral role, which was written in response to the Watergate scandal and the disappointing behavior of a number of lawyers as part of the scandal.²³ The amoral role disavows lawyer responsibility for the professional work they do in support of a client as long as the lawyer does not violate professional norms such as falsifying evidence.²⁴ Other readings critical of the amoral role are by such luminaries as Robert Gordon,²⁵ William Simon,²⁶ David Luban,²⁷ Deborah Rhode,²⁸ and Bradley Wendell.²⁹ They combat the amoral approach with some version of an ethical lawyer—guidance for navigating what ought to be respected as a high road.

A recent review essay by David Luban and Bradley Wendell discusses two waves of legal profession literature confronting these basic issues about the legal profession.³⁰ The first wave is especially present in the book, and it uses moral philosophy among other bases to guide the behavior of lawyers. William Simon, whose critique of the "ideology of advocacy"³¹ helped to dramatize these issues, argues that a properly ethical lawyer has a duty to ensure that the process is fair, and to take into account not only the rules, but also the "purposes" behind those rules and regulations. Robert Gordon similarly argued that the lawyer's role is "guiding the client to comply with the underlying spirit or purpose as well as the letter of laws" and to "protect the rules of the game."³² David Luban, as part of a symposium on Stephen Pepper's defense of amoral advocacy,³³ insisted that lawyers should not assist clients in behavior that a lawyer finds to be immoral.³⁴

22. SOUTHWORTH & FISK, *supra* note 3.

23. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 A.B.A. HUM. RTS. 1 (1975).

24. See Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 AM. B. FOUND. RES. J. 613 (1986).

25. See generally Robert Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009).

26. See generally WILLIAM SIMON, *THE PRACTICE OF JUSTICE* (1998).

27. See generally David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 11 AM. B. FOUND. RES. J. 637 (1987).

28. See generally DEBORAH RHODE, *IN THE INTEREST OF JUSTICE* (2000).

29. See generally BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

30. David Luban & W. Bradley Wendell, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337 (2017).

31. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

32. Gordon, *supra* note 25, at 1173–1174.

33. Pepper, *supra* note 24.

34. Luban, *supra* note 27; see also DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

One of the basic tenets of this literature is that lawyers are responsible for the clients that they choose to represent. The main exception to this maxim is deemed to be criminal defense on the grounds that someone must ensure that even very bad individuals deserve a criminal defense.

One problem with the recipes for ethical lawyering is that they appear today, and indeed since the 1980s, to be anachronistic, tied to an era controlled by the “liberal establishment.”³⁵ The anachronistic feeling is apparent in a number of respects. First, the lawyer is deemed to be an extension of the regulatory state, advising clients that they ought to comply with both the letter and the spirit of the regulations. Many take the position now that the regulation is harmful and that any lawyering that prevents regulation is just good lawyering. We may lament that demise of faith in the state, but it is pervasive among businesses and political conservatives.

Furthermore, in the spirit of equality, these authors argue lawyers should not take advantage of superior resources to overpower the other side. They should ensure that the rules of the game work and that the process works.³⁶ Again, we are in an era now where those with superior bargaining power and leverage are expected and encouraged to use it. The rise of adhesion contracts mandating arbitration of consumer, securities, employment, and other disputes is one example. Corporate counsel will, as a general rule, impose an arbitral process that we all know will favor the company and offer little to the consumer.

According to the Luban and Wendell review of the literature, a new generation of professional responsibility scholarship seeks to remedy at least the most anachronistic elements of the theories from the liberal establishment. Wendell’s own work, in particular, argues for a perspective grounded in political pluralism, which frees lawyers from some of the moral responsibility for the conduct of their clients.³⁷ Indeed, Luban criticizes Wendell’s approach for giving up too easily.³⁸ Responding to Wendell’s criticism that Luban’s prescriptions are “unrealistic,” Luban says:

They are unrealistic in a different sense, namely that they may create awkward moments of saying no to clients and partners on a more frequent (but not super frequent) basis than lawyers have to do now. Awkward moments, though, are hardly an objection to a view of lawyers’ ethics, and they do not support the suspicion that an ethical view that generates awkward moments is unrealistic.³⁹

35. GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* (2006).

36. SIMON, *supra* note 26; Gordon, *supra* note 25.

37. See, e.g., Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 *GEO. J. LEGAL ETHICS* 1065 (2010).

38. David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 *GEO. J. LEGAL ETHICS* 1101 (2010).

39. *Id.* at 1108.

Luban criticizes the more “realistic” approach advocated by Wendell, which pushes for fidelity to law as the leading professional value, but even Wendell’s approach seems difficult to sustain in today’s social context.⁴⁰

These debates continue, and I do not wish to enter into the contest over specific theories.⁴¹ On one side are those who hold on to and seek to reinvent a position where lawyers are actively promoting progressive positions. On the other side are those seeking to be more realistic and avoid making waves with their clients. The most important problem with these debates is that the social and economic context is very different than it was in the 1970s and 1980s. Already noted is the greater faith in the state and in regulation in the 1970s, but neoliberal reforms reshaped the professions as well. Businesses and their lawyers are much more competitive than they were in the 1970s and 1980s.

As a result, lawyers are not in a position to be picky about their clients, and lawyers need to build notoriety to gain clients. Indeed, certain types of legal practices were already quite competitive at the time of the earlier set of articles promoting strong moral accountability for clients and their positions. Corporate law firms were not very competitive in the 1970s, but those hustling for clients to build a solo or small firm practice without family resources and credentials had a very difficult time already avoiding “getting dirty” to make it in that world.⁴² The genteel theories of the 1970s do not capture the different practice settings nor the changes that have occurred within corporate law firms. Legal theory in general moves with practice and the changing social context.⁴³ But it is very difficult for that theory to keep up with the changing world of the legal profession.

As a longtime teacher of the legal profession, I want to relate these debates to my earlier experience as well. When I taught professionalism in the 1980s, these theories of legal professionalism made sense to me. I fully believed also that the most respected lawyers would be those who embodied what the theories posited. They would be lawyers careful about whom they would choose to represent. I even thought corporate lawyers might favor a regime of transparency about which clients they served, which then could enhance the reputation of those who would not lend their services to unsavory clients. The admired “lawyer statesperson” would protect that reputation through the selection of clients.

40. WENDEL, *supra* note 29.

41. Compare Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011), with Geoffrey C. Hazard, Jr., *The Morality of Law Practice*, 66 HASTINGS L.J. 359 (2015).

42. JEROME CARLIN, *LAWYERS ON THEIR OWN* (1962).

43. See Yves Dezalay & Bryant G. Garth, “*Legal Theory*,” *Strategies of Learned Production, and the Relatively Weak Autonomy of the Subfield of Learned Law*, in *SEARCHING FOR CONTEMPORARY LEGAL THOUGHT* 137 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

I helped to organize a conference on the legal profession with Case Western Reserve Law School in the early 1990s (published in 1994).⁴⁴ It brought together some of the leaders in research on the legal profession and respected leaders of the corporate bar. What became clear immediately was that the respected corporate lawyers, including Robert MacCrate, would have nothing to do with the idea that they were responsible for the clients they represented. I noted then, and confirmed over time that, in fact, the reputation for professional virtue that these leaders of the corporate bar shared made them attractive to unsavory clients. They were not willing to give up the opportunity to represent some of those individuals and companies that needed a lawyer with independent credibility. It may be that these lawyer statespersons helped tame bad clients when they did represent them, but by the 1990s, at least, the notion of responsibility for clients as a general principle was a non-starter.

This subject could sustain a different paper, but here are some examples from the literature of the relationship between professional stature and unsavory clients. Alexander Forger provides a first example. He is one of the giants among the supporters of legal services for the poor as well as a top trusts and estates lawyer. He became a partner with Milbank, Tweed, Hadley & McCloy in 1958 and was chairman of the law firm from 1984 to 1992. For the American Bar Association, for example, he participated in the Comprehensive Legal Needs Study, was on the Advisory Committee to the Immigration Pro Bono Development Project and on the Commission on Legal Problems of the Elderly. He was a director of the Legal Aid Society in New York City from 1976 to 1993, President from 1977 to 1979 and Chairman of the Board from 1984 to 1993. He served as President of the U.S. Legal Services Corporation from 1994 to 1997. He has been honored with:

the Whitney N. Seymour, Sr. Award, presented by the Federal Bar Council in recognition of public service by a member of the private bar; the Treat Award for Excellence, presented by the National College of Probate Judges in recognition of contributions to the improvement of the law in the probate field; the Servant of Justice Award for the Legal Aid Society, and honorary degrees from Widener University School of Law and the New York Law School.⁴⁵

The portrait of Forger as a lawyer on one side of the contest for the Johnson and Johnson fortune, however, is quite unflattering in terms of the ethical high road of the professional responsibility professors.⁴⁶ It looks

44. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 *CAS. W. RES. L. REV.* 665 (1994).

45. Alexander D. Forger, *BLOOMBERG* (Dec. 20, 2017, 1:23 PM), <http://www.bloomberg.com/research/stocks/private/person.asp?personId=4004169&privcapId=5325215>.

46. DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1994).

more like a hired gun, scorched earth approach in support of a very weak case.

Another example is Keith Highet, former President of the American Society for International Law. He reportedly handled more cases than any other lawyer before the International Court of Justice at The Hague.⁴⁷ At the time of his death in 2000, according to the Washington Post:

he was chairman of the Organization of American States' Inter-American Judicial Committee and a director of the Law of the Sea Institute. Over the years, he had taught courses in international law at such institutions as George Washington University's law school and the Johns Hopkins University School of Advanced International Service in Washington. He was a member of the board of editors of the American Journal of International Law. He was the author of 13 book chapters and 30 technical articles on international law.⁴⁸

An article in the American Lawyer in 1982, however, noted that the main client for Highet and his firm at the time was Muammar Gaddafi.⁴⁹

Another potential example is William D. Rogers of Arnold and Porter, who died in 2007.⁵⁰ Among other service, he was special counsel, then deputy United States coordinator of the Alliance for Progress. He was also president of the American Society of International Law, the first president of the Center for Inter-American Relations, and a board member of the Council on Foreign Relations.⁵¹ As a lawyer for Argentina and Carlos Menem, who famously packed the Argentine Supreme Court, Rogers co-authored a book published in Argentina arguing as a matter of scholarship that the Supreme Court under Menem was independent.⁵² He lent his name to a seemingly neutral piece of scholarship that went completely against what Argentine experts concluded.⁵³

The examples could be enumerated, but one last and particularly obvious one is the saga of the distinguished Washington, D.C. lawyer, Clark

47. William H. Honan, *Keith Highet, 67, Specialist in International Legal Cases*, N.Y. TIMES (July 15, 2000) <http://www.nytimes.com/2000/07/15/us/keith-highet-67-specialist-in-international-legal-cases.html>.

48. *International Lawyer Keith Highet*, WASH. POST (July 17, 2005), https://www.washingtonpost.com/archive/local/2000/07/15/international-lawyer-keith-highet/6eec8730b7ce-4565-b829-802cb09c79b0/?utm_term=.B7a445e6583d.

49. Connie Bruck, *Libya's Low-Profile Lawyers*, AM. LAW. 30, 31 (Feb. 1982).

50. Douglas Martin & Sarah Abruzzese, *William D. Rogers Is Dead at 80*, N.Y. TIMES (Sept. 30, 2007), <http://www.nytimes.com/2007/09/30/us/30rogers.html> (last visited Oct. 4, 2017).

51. *Id.*

52. WILLIAM D. ROGERS & PAOLO WRIGHT-CAROZA, *LA CORTE SUPREMA DE JUSTICIA Y LA SEGURIDAD JURÍDICA* (1995).

53. Jonathan Miller, *Ignoring Political Influences*, LEGAL TIMES 51 (Aug.1995).

Clifford, and his representation of BCCI (Bank of Credit and Commerce International).⁵⁴ A *New York Times* story noted the process:

In an interview in the mid-1980s, Mr. Clifford said his concept of the practice of law “is that through the years you conduct yourself in such a manner that the staffs of the Government agencies have confidence in your integrity and your credibility.” . . . It was precisely his reputation for integrity and credibility that led the group of Arab investors to seek Mr. Clifford’s help in the late 1970s when they wanted to acquire an American bank.⁵⁵

These examples are not meant to suggest that these individuals are examples of failed lawyer statespersons. It is to suggest that one of the features of lawyer statespersons is that they are attractive to less than savory clients. This process complicates the analysis of the high road in legal professionalism.

IV. THE MOVING TARGET

Concepts such as duties to courts and to the legal system and the duty of zealous advocacy appear to be timeless. We routinely forget that what they mean changes in relation to an evolving social context. We tend also to forget that the social context outside the law and the legal system has much to do with the meaning infused into the categories of the law and the legal profession.

Biographies of lawyer statespersons of the first half of the twentieth century tend to suggest that lawyers at one time could not easily escape identification with their clients. Corporate lawyers were identified with and criticized for the “robber baron” clients that they represented. Large corporations still generated much populist hostility, and those who helped them become ever larger and try to avoid regulation generated considerable criticism. Elihu Root’s biographer wrote that,

The central problem of Root’s career before 1899 was his role as counsel for various powerful business interests in and around New York. This work . . . earned him the politically fatal title of “corporation lawyer.” . . . [T]he popular estimate of that work blocked any possibility of his nomination for the Presidency.⁵⁶

John W. Davis, of the next generation, ran unsuccessfully for president and during that time, according to his biographer, “Hardly a week

54. DOUGLAS FRANTZ & DAVID MCKEAN, *FRIENDS IN HIGH PLACES: THE RISE AND FALL OF CLARK CLIFFORD* (1995).

55. Marilyn Berger, *Clark Clifford, A Major Adviser to Four Presidents, Is Dead At 91*, N.Y. TIMES (Oct. 11, 1998), <http://www.nytimes.com/1998/10/11/us/clark-clifford-a-major-adviser-to-four-presidents-is-dead-at-91.html>.

56. RICHARD LEOPOLD, *ELIHU ROOT AND THE CONSERVATIVE TRADITION* 15 (1954).

passed . . . that Davis was not reminded that his connection with J.P. Morgan & Co. was his main liability.”⁵⁷

Today is very different. One notable example that shows the basic point is the career of Kirsten Gillebrand, formerly of Davis Polk and Wardwell and now Democratic senator from New York. A New York Times article notes that:

The Philip Morris Company did not like to talk about what went on inside its lab in Cologne, Germany, where researchers secretly conducted experiments exploring the effects of cigarette smoking. So when the Justice Department tried to get its hands on that research in 1996 to prove that tobacco industry executives had lied about the dangers of smoking, the company moved to fend off the effort with the help of a highly regarded young lawyer named Kirsten Rutnik.⁵⁸

She helped come up with a successful strategy and became a key lawyer for Philip Morris both in that firm and later when she moved to Boies Schiller. According to the New York Times, “those who recall Ms. Gillebrand’s days as a young lawyer say she was capable and eager as she plunged into the high-stakes and lucrative world of tobacco defense work.”⁵⁹ She had the option at Davis Polk to decline work for big tobacco, but she did not invoke it. Her prior legal practice got the attention of the New York Times, as noted, but it did not slow her political career as a Democrat. It could very well be, in fact, that excelling at Davis Polk in the ways that mattered at Davis Polk was important to her reputation and her political ambitions.

The same can be said about other areas of practice. There was a time when it was not considered the “high road” to represent organized crime and similarly deplorable clients who had many options for criminal defense. Edward Bennet Williams worked very hard to build the legitimacy for this kind of criminal defense, and indeed a defense of maximum tenacity, and he succeeded in becoming a lawyer statesperson of great prominence.⁶⁰ Joseph Rauh, Jr., a leading civil rights lawyer from the 1960s and 1970s, consistently spoke out against the legal ethics of Williams, but Williams’s approach won the day.⁶¹

57. WILLIAM HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* 197 (1973).

58. Raymond Hernandez & David Kocieniewski, *As New Lawyer, Senator Was Active In Tobacco’s Defense*, N.Y. TIMES (Mar. 26, 2009), <http://www.nytimes.com/2009/03/27/nyregion/27gillibrand.html>.

59. *Id.*

60. EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER: LEGENDARY TRIAL LAWYER* (1991); see also Alan Dershowitz, *Winning was Everything*, N.Y. TIMES (Dec. 15, 1991), <http://www.nytimes.com/1991/12/15/books/winning-was-everything.html?pagewanted=all> (reviewing EVAN THOMAS, *THE MAN TO SEE*).

61. Joseph L. Rauh, Jr., *A Public Interest Standard of Ethics for Lawyers*, Law Day Lecture, Univ. of Minn. Law School (May 1, 1979), <http://www.turnerhome.org/jct/lawday79.htm> (last visited Oct. 4, 2017).

As with respect to corporate law, criminal defense and criminal prosecution have both evolved considerably. Attorneys for criminal defendants fight to represent defendants charged with heinous crimes because the publicity is so important for the visibility and reputation that then leads to more clients.⁶² Prosecutors reportedly are judged less by their peers for their commitment to doing justice and more for their ability to gain convictions even of innocent people.⁶³

The point is that the standards are shifting. The profession is far more competitive than in the past. Notoriety and celebrity are key ingredients in building careers, and in a world of public relations, lawyers are much less likely to be judged for the clients that they obtain. Students, in my experience, already internalize these values of our time. Again, it is not easy to teach them that there is a high road that is essential to professional success—and how to recognize it—in the context of a very competitive professional environment.

V. THE CHALLENGE IN SOCIOLOGICAL TERMS

One response is to question the existence or utility of the so-called high road that the authors of the Carnegie and MacCrate Reports, and countless practitioners, advocate. Maybe it is just hypocrisy designed to distract people from the actual activities of successful lawyers.

Yet legal sociology also suggests that the high road in the legal profession brings rewards in the form of both peer respect and value to clients. The examples of the corporate lawyers suggests that there is a value that accrues to those with a reputation for public service and a distance from clients—that they are not merely “hired guns.” The sociological theory of fields identified with Pierre Bourdieu posits that, in fact, conduct that is beneficial to the field as a whole is rewarded within the field.⁶⁴ Bourdieu finds that motives may be entirely “disinterested,” but that motive is shaped by the incentives within the field.⁶⁵ Some form of *noblesse oblige* is built into the field, and it is in fact rewarded by peers who provide assessments of the worth of individuals competing within the field.⁶⁶ The lawyer statesperson remains at the top of the U.S. legal hierarchy because that kind of individual gains the respect of peers—in part because they enhance the reputation of the profession as a whole.

62. SOUTHWORTH & FISK, *supra* note 3, at 82–87.

63. *Id.* at 369–372.

64. PIERRE BOURDIEU, PRACTICAL REASON: IS A DISINTERESTED ACT POSSIBLE? 75–91 (1994).

65. *Id.*

66. Ronit Dinovitzer & Bryant Garth, *Pro Bono as an Elite Strategy in Early Legal Careers*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 115–134 (Robert Granfield & Lynn Mather eds., 2009).

The same may be true of prosecutors who embody at some level the ideal of the “minister of justice.” We do not have good empirical research to see what this kind of high road looks like within particular practice settings. Certainly, the mantra that “professional reputation matters” suggests that integrity and stature affect one’s long-term professional success. But we do not know whether the most respected defenders or prosecutors are those who can win no matter what it takes or those who play by certain rules—even if not the pure rules of equal justice contemplated by Simon and Gordon.

From this sociological perspective, the high road is always about a position on the high side rather than the low side. It is a moving target and the direction to date has been more toward the market-oriented amoral advocate. It could change, however, and there are many gradations available to any given lawyer.

Legal sociology also teaches that the high roads and low roads are not equally accessible to all. The Watergate scandal, in many ways, made salient the question of how far lawyers should go in serving their clients, prompting Wasserstrom’s famous article.⁶⁷ The two lawyers who resisted Richard Nixon were Archibald Cox and Elliot Richardson, two pillars of the Eastern Establishment. They came from notable families with economic and social capital behind them. They came from a social background where they were willing to take on Nixon, and also did not need him in order to build their careers. In short, they had more resources to invest in the high road and resist the low road.

The differences can be taught in a professional responsibility class. In our class, for example, we have a role play exercise taken from Milton Regan’s *Eat What You Kill: The Fall of a Wall Street Lawyer*.⁶⁸ It is the saga of John Gellene, a young partner at Millbank Tweed, who is disciplined and criminally punished for lying in a bankruptcy proceeding. Regan goes into detail about the context in which Gellene depends on others, especially Lawrence (Larry) Lederman, for his clients, needs the work to succeed in the firm, and has few options outside the firm. The temptation to cut corners and rationalize such decisions is very hard to resist. In contrast, Lederman, the key person in the firm who Gellene at least may have thought condoned the actions, was in a different world. He was brought to Millbank from Wachtell as a proven rainmaker. Lederman’s career includes chairing the Practicing Law Institute, serving as a director of the American Chess Federation, teaching at both New York Law School and NYU, and even authoring two books—one on deals and one of his own photographs of the New York Botanical Garden. Lederman had a position where he could survive quite easily without cutting corners and where, if he did, he would

67. Wasserstrom, *supra* note 23.

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

be given the benefit of the doubt. The high ground that he occupied over the course of his career gave him palpable professional advantages. Gellene did not build a similar career, and it probably would have been difficult for him to do so, but such a stance would have strengthened his position considerably.

VI. CONCLUSION: THE MARKET IN HIGH AND LOW ROADS

I have suggested that, from a sociological perspective, the high and low road are shifting in relation to an evolving social context. What might have been poor and universally criticized at one time—leading to disdain among peers—can even be rewarded at another time. Yet the relative high road, which is less available to some than to others because of family and academic pedigrees, is the preferred way to build a career. That is both a teaching of legal sociology and the goal of the Carnegie Foundation's call for instruction in the "third apprenticeship" of socialization into the legal profession.

Yet, even the idea that the high and low roads evolve in relation to an evolving social context is a little misleading. It is not defined and is certainly not static. It responds according to the relationship between the evolving social context and human agency—professional entrepreneurialism. If Edward Bennet Williams could help to reinvent criminal defense in a way that legitimated the all-costs defense of Mafia leaders and gangsters, others can build their own particular high roads. Hypothetically, one might have a practice of only representing the most worthy clients with only the most upright tactics. It might or might not succeed.

In addition, circumstances outside the profession can change what works to build a high or low road career. There is evidence that corporate counsel who may have been unpopular for standing up to their bosses in the 1980s or 1990s gained market value when that high road became important for corporate credibility in the wake of Enron and other scandals.⁶⁹ The effort in teaching is to help students recognize the advantages as well as the difficulties of being an "entrepreneur for the high ground" in whatever practice setting one finds oneself. Consistent with this aspiration is the necessity of teaching students about different practice settings and putting them in contact with individuals within those practice settings.

Finally, the same is true of legal profession academics. They too will be rewarded for seeking and gaining adherents for a theoretical high ground to replace or augment those that no longer are credible.

69. See SOUTHWORTH & FISK, *supra* note 3, at 533–543.