

University of Michigan Journal of Law Reform

Volume 26

1993

The Bar in America: The Role of Elitism in a Liberal Democracy

Philip S. Stamatakos

McKenna & Cuneo, Washington, D.C.

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Law and Society Commons](#), [Legal Profession Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Philip S. Stamatakos, *The Bar in America: The Role of Elitism in a Liberal Democracy*, 26 U. MICH. J. L. REFORM 853 (1993).

Available at: <https://repository.law.umich.edu/mjlr/vol26/iss4/6>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE BAR IN AMERICA: THE ROLE OF ELITISM IN A LIBERAL DEMOCRACY

Philip S. Stamatakos*

Upon the Bar depends the continuity of constitutional government & the perpetuity of the republic itself.¹

Americans must conduct an intelligent debate about the place of equality, egalitarianism, and community values in western society. Three forces, liberal democracy, the free market, and science, have converged in the twentieth century and threaten to atomize society, changing the state from a community to a collection of individuals. All three forces emphasize the primacy of the individual and therefore threaten many traditional institutions founded on communitarian principles. In particular, traditional concepts of community are under pressure from the excesses of egalitarianism, economic specialization, and the concept that knowledge and truth reside in each individual. This phenomenon raises urgent questions for the Bar² because of lawyers' special access to and control over the law, the mechanism that governs relations between people. Given its relationship to the law, what should be the Bar's role, if any, in shaping American society? If, by virtue of its power over the instruments used to attain and protect individual rights, the Bar is viewed as elite, what is the role of elitism in a liberal democracy?

Immanuel Kant said that "[w]e must not expect a good constitution because those who make it are moral men. Rather, it is because of a good constitution that we may expect a society composed of moral men."³ Kant's statement evokes an image of the good state as a perpetual motion machine which, once set in motion, will run eternally, like clockwork. Kant's vision of society, however, cannot be entirely accurate.

* B.A. 1985, University of Michigan; M.A. 1987, University of Toronto; J.D. 1993, University of Michigan. Associate, McKenna & Cuneo, Washington, D.C.

1. Engraving on the walls of the University of Michigan Law School.
2. Throughout this essay, I use the word "Bar" to refer to the practicing members of the legal profession.
3. LON L. FULLER, *THE MORALITY OF LAW* 152 (1961) (quoting Immanuel Kant).

The foundations of society and the state must be buttressed continuously, generation after generation, to serve the commonwealth and to avoid societal decay.⁴

If the excesses of liberal democracy, the free market, and science are weakening societal institutions, who then must stymie the dissolution of society? A recent response from the legal community has been "certainly not lawyers!" According to Grant Gilmore,

[a]s lawyers, we will do well to be on guard against any suggestion that, through law, our society can be reformed, purified or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us.⁵

Gilmore's assertion is subject to attack on two grounds. First, we cannot assume, as Gilmore seems to, that a general and unchanging consensus exists among citizens. Consensus on issues, like the values upon which consensus is founded, must be nurtured. This is, in part, the role of the law. Because laws apply equally to all citizens in democracies, even citizens who disagree with a statute's purposes and effects must abide by its restrictions. Laws therefore can condition both behavior and thought and thereby may be instrumental in molding community values, building consensus, and promoting societal reform.⁶ Second, although Gilmore minimizes its import, the law's function as a mechanism for dispute resolution is vital. The peaceful settlement of disputes—the principled and judicious allocation of resources to individuals with conflicting claims—is in great measure the cornerstone of

4. Freud recognized the delicate nature of society and attributed its fragile character primarily to individual aggression. In *Civilization and Its Discontents*, he wrote that civilization was perpetually threatened with disintegration as a result of "primary mutual hostility [between] human beings." SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 69 (James Strachey ed., W.W. Norton & Co. 1989) (1930). Given the threat that civilization may dissolve, statecraft should be viewed as the struggle to maintain and improve upon societal bonds.

5. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977).

6. See GEORGE F. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 19–20 (1983).

civilization. It constitutes a recognition that people will have conflicting claims to limited resources and that those claims will be resolved, not by brute force or an arbitrary system of justice, but by law, a body of precepts which are the expression of general accord.⁷

The continuity of constitutional government and the perpetuity of the Republic itself rests to a considerable extent upon the Bar. Lawyers, as the standard-bearers of the Constitution, carry the sacred trust of the nation.⁸ "The legal profession is a public profession. Lawyers are public servants. They are stewards of all the legal rights and obligations of all the citizens."⁹ Lawyers inescapably hold an elite position in American society because of the nature of their work.¹⁰ In *Democracy in America*, Alexis de Tocqueville recognized the special place of lawyers when he stated that "[i]f I were asked where I place the American aristocracy, I should reply without hesitation . . . that it . . . occupies the judicial bench and the bar."¹¹ The history of the Bar in the United States has been the struggle of an intellectual and power elite defining its role in a society whose first axiom is that all people are created equal. The history of the Bar also parallels society's struggle to define its values and to determine who, if anyone, should create and protect those values.

7. Sigmund Freud notes the grand importance of the law in society: "The first requisite of civilization, therefore, is that of justice—that is, the assurance that a law once made will not be broken in favor of an individual." FREUD, *supra* note 4, at 49.

8. See generally Joint Conference on Professional Responsibility, *Professional Responsibility Report of the Joint Conference*, 44 A.B.A. J. 1159-62 (1958) ("The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."); Marc Galanter & J. T. Knight, *When Bush Sang Praises of Lawyers*, NAT'L L.J., Oct. 12, 1992, at 13-14 (quoting from a speech given by then-Vice President Bush on Aug. 10, 1981, addressing the perception that lawyers have a special role in American society vis-à-vis the Constitution).

9. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* at vii (1953).

10. The literature and rules of the American Bar Association (ABA) frequently refer to lawyers' special role in supporting a democratic form of governance. For example, the Preamble to the Model Code of Professional Responsibility states that "[l]awyers, as guardians of the law, play a vital role in the preservation of society." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1981); see also MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (1992) ("A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.")

11. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 125 (Richard D. Heffner ed., Penguin Books 1984) (1840).

A dynamic exists between the law and the milieu from which it comes. The law and the Bar are a reflection of society.¹² Oliver Wendell Holmes posited that "the life of the law has not been logic: it has been experience."¹³ Holmes probably would agree with the modern notion that the law does not espouse principles by which people ought to live, but "refers to how most men behave most of the time."¹⁴ Workable standards of judgment depend upon the morality of those being judged; the excellence toward which the law is able to propel the citizenry is limited by the citizenry's moral fabric. "Legal history is a chapter of social history, not a self-contained entity."¹⁵

Likewise, a society is, in part, a reflection of its law. Valueless laws can drag a society toward nihilism. Enlightened laws can teach excellence in action and thought, building and maintaining a sense of community and nurturing civic-minded citizens. The Bar has a responsibility to transcend the soil from which it sprouts and raise the aim and actions of citizens through its justice system. The extent to which law increases enlightenment or deterioration, however, is dependent upon the nature of the civic body with which law interacts.

The Bar has a special responsibility, or duty, as the caretaker of the law and the protector of rights. Its charge is to lead the people by example. As a result of its unique role, the Bar is elite, and the elements of elitism necessary for the proper fulfillment of its mission should be preserved.

Part I of this Note argues that liberal democracy, the free market, and science have contributed to the increasing

12. Cf. EDWARD C. LINDEMAN, *SOCIAL DISCOVERY* 223 (1925) ("The leader is a stimulus, but he is also a response."). American presidents' relationships with the Washington, D.C. power structure exemplifies this phenomena in a liberal democracy. On the one hand, presidents are "of the people": they come from the same place as their constituents, they hold many of the same views as their constituents, and they are elected by those constituents. When leading, the president is constrained by his constituents and their representatives. On the other hand, presidents also guide their constituents. One senator has explained that "[e]very new president comes with a promise to change things as we know it. The actual results are that they change Washington and they are changed by Washington." Dan Balz, *Changing the Capital, but More So the Man*, WASH. POST, Jan. 18, 1994, at A1, A6 (quoting Senator John Breaux).

13. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Little, Brown & Co. 1949) (1881).

14. WILL, *supra* note 6, at 41.

15. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 8 (1976).

atomization of American society. When each person and her views are glorified, universal standards of good become undermined, values become relative, and a sense of community becomes evanescent. Part II argues that individualism is incapable of accounting for the commonweal and therefore is inherently amoral, because morality is concerned largely with determining when an individual's will should be subservient to the will of others. Part III considers the nature of elitism and equality, and attributes the demise of elitist institutions in America to the rise of individualism and egalitarianism. When liberal democracy, bolstered by the free market and science, overturned discriminatory institutions of the past, it rightfully eliminated the immoral excesses of institutional elitism. Unfortunately, liberal democracy did so without discretion, discrediting not only the immoral aspects of elitism but its desirable aspects as well. The ethic of service to others that is the most sacred quality of the legal profession therefore is threatened. Moreover, the destruction of elitist institutions has left a vacuum that has not been filled. The country therefore needs a force that promotes a sense of community and embodies an ethos of service to others.

Finally, Part IV argues that the Bar is a distinctive public calling which engenders special access to, and control over, the instruments of government and a unique ability to affect private rights. By virtue of this elite position, the Bar has a moral responsibility to serve the public. The Bar should fulfill its duties by countering the atomizing influences of liberal democracy, the free market, and science through the example of service to others.

I. THE LIBERAL DEMOCRAT AS THE SPOILED CHILD:
THE ADVENT OF INDIVIDUALISM AND THE
NIHILISM OF VALUE RELATIVITY

To the gods, all things are possible.

— Greek proverb.

Deities, like emboldened revolutionaries and liberal democrats, have little need for the past. A deity is sufficient

unto itself, self-contained, omnipotent. Alexis de Tocqueville observed that "people reign in the American political world as the Deity does in the Universe."¹⁶ In this regard, the habits of American youth are revealing. Consider a young person wearing a portable headset. He strolls, hermetically sealed off from the world outside, pumping into his head only those noises that he chooses. His primary concern is himself; others may concern him, but only if they disturb his pleasure or offer to increase it. His individualism is critical in shaping his view toward history. History has little to offer him because it is largely the history of human interaction and group consensus about values—two interrelated phenomena that are irrelevant to him. History, however, is a treasure. Today's challenge is to make democratic society more aware of its moral genealogy.¹⁷

The person with the headset and the millions of others like him know of only one standard of beauty: their own.¹⁸ They are the product of three historical forces: liberal democracy, the free market, and science. The primary fault of liberal democracy, the free market, and science is that they tend to produce a society that takes insufficient cognizance of the need to nurture a collectivist democracy where each person is aware of their duty to one other. All three forces undermine a society in which service to others is honored and community values are prized. Each force therefore warrants closer examination.

A. *Liberal Democracy and the Excesses of Tolerance*

Liberal democratic theory teaches that before people lived in society, they lived in the state of nature. In this state of nature, people were in constant conflict with each other, "that condition which is called War[]." ¹⁹ Each person, however, possessed unfettered enjoyment of his "natural

16. TOCQUEVILLE, *supra* note 11, at 58.

17. "The aim should be to nurture a sense of continuity with the rich tradition of political philosophy, from Aristotle to Burke." WILL, *supra* note 6, at 163.

18. Tocqueville wrote that "I think that in no country in the civilized world is less attention paid to philosophy than in the United States. . . . [E]ach American appeals only to the individual effort of his own understanding." *Id.* at 143.

19. THOMAS HOBBS, *THE LEVIATHAN* 185 (C.B. Macpherson ed., Penguin Books 1984) (1651). Hobbes posits that in the state of nature, the life of humanity is "solitary, poor[], nasty, brutish, and short." *Id.* at 186.

liberties"—freedom, equality, and independence—each of which focus on the individual.²⁰ In order to achieve peace,²¹ people transcended the state of nature through a "social contract" with each other.²² The social contract, or commonwealth, provides the safety that is lacking in the state of nature.²³ Such safety, however, comes at a price. People trade their natural liberties for civil liberties,²⁴ which are natural liberties subject to the limitations of the general will of the commonwealth.²⁵ Although people allow their natural liberties to be tempered when in society, the ultimate object of liberal democracy is to preserve people's natural liberties to the greatest extent possible. Jean-Jacques Rousseau stated that the objective of the social contract is "to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and remains as free as before."²⁶

Three aspects of liberal democratic thought are troublesome. First, liberal democratic theory suggests that individuals existed in the state of nature and that a commonwealth is but a congregation of individuals, an unnatural form of organization.²⁷ This suggestion is in tension with the fact that all individuals inevitably are the product of a communal union between men and women.²⁸ Regardless of whether one accepts

20. Locke refers to people's lives, liberties, and estates "by the general Name Property." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 395 (Peter Laslett ed., Mentor Books 1963) (3d ed. 1698).

21. See HOBBS, *supra* note 19, at 190.

22. *Id.* at 227.

23. In the state of nature, an individual's enjoyment of his property, that is, his natural rights, was "very unsafe, very unsecure," and this uncertainty provided the impetus for forming a social contract. LOCKE, *supra* note 20, at 395.

24. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 65 (E. V. Reiu ed. & Maurice Cranston trans., Penguin Books 1968) (1743).

25. *Id.*

26. *Id.* at 60.

27. See generally Herbert W. Schneider, *Moral Obligation*, 50 *ETHICS* 45, 47 (1939-40) (describing the concept of a state of nature giving way to a state of contract as a myth which was created to demonstrate the origin of duties and rights).

28. Aristotle theorizes that the polis, that is, society, or literally, the "city," exists by nature and preceded the existence of the individual. ARISTOTLE, *THE POLITICS* 6 (Ernest Barker ed., Clarendon Press 1982). Ernest Barker, commenting on Aristotle, says that

[t]he polis exists by nature in the sense that it is the whole to which man naturally moves in order to develop his innate capacity, and in which he is thus included as a part. Because it is the whole, of which the individual is

the premise that people are by nature communal, it takes a leap of faith to assume that people are inherently individualistic, or that rights are by nature individual. Liberal democratic thought nevertheless makes exactly this assumption. One could just as easily assume that all rights are by nature communal and that individual rights are but an afterthought, a gesture of benevolence or utility by the commonwealth toward its members.

Second, because liberal democracy assumes that people are inherently individualistic, it creates a tension between people's "naturally" selfish desires and the constraints of society. Liberal democracy views people as inherently selfish and pits them against their fellow citizens and against society.²⁹ This view has important consequences for humanity's self-image and for citizens' behavior in a communal environment.

Third, liberal democracy permits individual existence to determine essence and provide meaning. Liberal democrats believe that each person is a sovereign³⁰ and that people are born "with a Title to perfect Freedom."³¹ This presumption is but one step from Sartre's existentialist assertion that "man is freedom."³² The tremendous scope of individual freedom provided by liberal democracy requires a recognition of the primacy of the individual because, in liberal democracy, virtue resides in the individual.³³ By its nature, liberal democracy

necessarily a part, it is prior to the individuals who are its parts, as wholes generally are prior to their parts.

Id. at 6 n.2.

29. Freud also viewed humans as inherently selfish:

[T]heir neighbour is for them not only a potential helper or sexual object, but also someone who tempts them to satisfy their aggressiveness on him, to exploit his capacity for work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and to kill him. *Homo homini lupus* [man is a wolf to man].

FREUD, *supra* note 4, at 68-69.

30. Locke stated that naturally every man is a king, yet an equal with others. "For all being Kings as much as he, every Man [is] his Equal." LOCKE, *supra* note 20, at 395.

31. *Id.* at 366.

32. JEAN-PAUL SARTRE, *EXISTENTIALISM* 27 (Bernard Frechtman trans., Philosophical Library 1947) (1945).

33. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1981), which states:

suggests that values stem from the individual and therefore are relative.³⁴

America's own embracement of liberal democratic thought has contributed to an inability to differentiate between good and bad; cultural relativism destroys both one's own good and the good of others.³⁵ Granted, one who espouses tolerance could be a moral absolutist personally. But in practice, excessive tolerance tends to create a citizenry devoid of prejudices.³⁶ Allan Bloom writes that "[t]here is one thing a professor can be absolutely certain of: almost every student entering the university believes, or says he believes, that truth is relative They are unified only in their relativism and in their allegiance to equality."³⁷ Bloom's observation is applicable beyond the classroom. When complete tolerance prevails, the result is greater decentralization of authority, because tolerance teaches not that there are core values to which all should ascribe, but rather that individual preferences must guide each action.

The immoderateness of liberalism gives one pause. When each person is a god, whose law is to prevail? When each person is a god, is there any need for leadership, guidance or service by a legal elite that is cognizant of society's collective

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

34. Moral relativism pervades the legal profession. Thomas Shaffer has bemoaned the fact that "[e]xcept as provided in the *Code of Professional Responsibility*, there is no more accounting for morals than there is for one's taste in beer." Thomas L. Shaffer, *Moral Moments in Law School*, 4 SOC. RESP.: JOURNALISM, L., MED. 32, 38 (1978).

35. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 36-38 (1987). The opposite of prejudice is an existence devoid of values, a life lacking an ethos. Bloom writes that "[h]istory and the study of cultures do not teach or prove that values or cultures are relative. . . . To say that it does so prove is as absurd as to say that the diversity of points of view expressed in a college bull session proves there is no truth." *Id.* at 39. True openness is suppressed when one denies that it is possible to know good and bad. *Id.* at 40. Cf. FULLER, *supra* note 3, at 10 (asserting that the ability to judge bad behavior requires that we embrace an ideal of what is good behavior; society cannot impose duties or permit people to act in a certain way unless it has before it a picture of the ideal human existence).

36. See *id.* at 36.

37. *Id.* at 25.

needs and communal nature? When each person is a god, who then should be surprised by Nietzsche's proclamation that "God is dead"?³⁸ Perhaps Nietzsche merely was observing that God had been replaced by gods on Earth, humanity.³⁹

B. *The Free Market and the Curse of Specialization*

Liberal democracy and the free market frequently occur in tandem.⁴⁰ The two systems are complimentary because both are tied largely to the satisfaction of individual preferences. Whereas liberal democratic theory upholds the individual as the center of virtue, capitalism panders to individual tastes, as represented by purchasing power. Western-style capitalist doctrine states that individual preferences drive the free market: prices and quantity correspond to supply and demand,

38. FRIEDRICH NIETZSCHE, *The Gay Science*, in THE PORTABLE NIETZSCHE 95 (Walter Kaufmann ed. & trans., Penguin Books 1987) (1882).

39. Consider the following passages from Walt Whitman:

I celebrate myself,
And what I assume you shall assume;
For every atom belonging to me, as good belongs to you . . .

Have you thought there could be but a single Supreme?
There can be any number of Supremes—one does not
countervail another any more than one eye-sight countervails another, or one
life countervails another.

Walt Whitman, *Leaves of Grass*, quoted in HENRY ALONZO MYERS, ARE MEN EQUAL? AN INQUIRY INTO THE MEANING OF AMERICAN DEMOCRACY 56–58 (1945) Ralph Waldo Emerson wrote that "[i]n all my lectures, I have taught one doctrine, namely, the infinitude of the private man." MEYERS, *supra* at 38 (quoting an 1840 diary entry by Emerson).

A belief in the boundlessness of people's individual capacity and their perfectibility has appeared frequently in the United States. Late eighteenth- and early nineteenth-century evangelical Protestantism is one such example of liberal democracy's excesses. In his work on the history of American social reform movements, Ronald Walters examined the doctrine of perfectionism, or the notion that individuals could become sanctified while on Earth. See RONALD G. WALTERS, AMERICAN REFORMERS: 1815–1860, at 28 (1978). The most dangerous implication of that ideal was that sanctified people could do no wrong. *Id.*

40. Free market economies typically accompany liberal democratic political systems. See CHARLES E. LINDBLOM, POLITICS & MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 116 (1977). The converse is not necessarily true. See, e.g., James Fallows, *How the World Works*, THE ATLANTIC MONTHLY, Dec. 1993, at 61, 76 (discussing the free-market economies of Hong Kong, Singapore, Thailand, and Taiwan, none of which are liberal democracies in the Western sense).

and demand is the expression of each purchaser's desires.⁴¹ Capitalism, with its rejection of an active government role in the economy, promotes an individualist mentality in two ways. First, laissez-faire capitalism relies on specialization, a method of production that emphasizes individual processes and tends to isolate the individual from the toil and concerns of others. Second, laissez-faire capitalism tends to encourage consumption without regard for the effect of that consumption on society as a whole.

The engines of capitalism, specialization and market systems, atomize society through their broad reliance on specialists. Adam Smith's now legendary pin makers demonstrate how specialization generally increases productivity. In *The Wealth of Nations*,⁴² Smith describes how nail makers who perform all of the tasks associated with making a nail are only a fraction as productive as an equal number of nail makers who divide nail making into distinct operations and specialize in a particular aspect of production, combining their efforts to form a final product.⁴³ Specialization

41. Americans' acceptance of laissez-faire principles is so axiomatic that criticism of its "truths" borders on heresy. James Fallows suggests that

[i]f you don't believe in the laws of physics—actions create reactions, the universe tends toward entropy—you are by definition irrational. And so with economics. If you don't accept the views derived from Adam Smith—that free competition is ultimately best for all participants, that protection and interference are inherently wrong—then you are a flat-earthier.

Fallows, *supra* note 40, at 62. The United States embraced laissez-faire principles only recently. *See id.* at 79. For 150 years after the Revolutionary War, the country embraced protectionism in its industrial policy; the federal government frequently provided the capital needed for major industrial initiatives. *Id.* at 82–84. "The great industrial successes of the past two centuries—America after its Revolution, Germany under Bismark, Japan after the Second World War—all violated the rules of laissez-faire." *Id.* at 84 (quoting Professor Thomas McCraw of the Harvard Business School). As with nineteenth-century Britain, the relatively recent espousal of "out-and-out mercantilist policy" by the United States occurred only when it believed it could withstand open competition from foreigners. *Id.* at 79–84 (quoting Professor McCraw).

42. ADAM SMITH, *THE WEALTH OF NATIONS* (R.H. Campbell et al. eds., Clarendon Press 1976) (1795).

43. Smith related that

[a] smith who has been accustomed to make nails . . . can seldom with his utmost diligence make more than eight hundred or a thousand nails a day. I have seen several boys under twenty years of age who had never exercised any other trade but that of making nails, and who, when they exerted themselves, could make, each of them, upwards of two thousand three hundred nails in a day.

Id. at 18.

undoubtedly increases productivity and, more importantly, profitability. Moreover, specialization is likely to increase accountability of employees to employers because a given task is easily associated with the particular employee who performed it. Specialization's curse, however, is that it frequently removes the individual from the whole and renders her unable to understand the relation of the steps in the process. Even Adam Smith noted that narrow-mindedness is one side effect of specialization: "[b]ut in consequence of the division of labour, the whole of every man's attention comes naturally to be directed towards some one very simple object."⁴⁴

Karl Marx recognized that specialization overlooks or rejects communal interests. "[T]he division of labour implies the contradiction between the interest of the separate individual or the individual family and the communal interest of all individuals who have intercourse with one another."⁴⁵ For example, the division of labor can make it difficult to identify the moral aspects of a problem.⁴⁶ A partner in a large New York law firm offers this insight:

Big law firms with narrow specializations . . . offer less opportunity for individual counseling of clients. When you have a real client, you continually interact, whereas in a big firm you're just one of 30 associates working on a problem. And if jobs get separated into enough pieces . . . the moral dimensions tend to disappear.⁴⁷

The lack of breadth that accompanies specialization creates a strange person, one who regards himself as one "who

44. *Id.* at 20. The phenomenon of specialization may provide an excuse to evade the responsibility which usually accompanies privilege. Once, in a legal ethics class, I heard a future securities lawyer explain that he felt that he would owe no special duty of public service as an attorney. He reasoned that it would be impossible for him to perform pro bono work because a specialist in securities law could rarely be of help to the poor.

45. Karl Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER 160 (Robert C. Tucker ed., 1978).

46. President Wilson once grieved that "[the] truth is, we are all caught in a great economic system which is heartless." RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION & THE MEN WHO MADE IT 234 (1973).

47. Robert Kanigel, *Uncertain of Our Gods*, NOTRE DAME MAG., Summer 1988, at 34, 44. The law is so specialized that "[t]here is no such thing as a corporate lawyer." *Id.* For a humorous collection of essays taking large firms to task, see generally MORDECAI ROSENFELD, THE LAMENT OF THE SINGLE PRACTITIONER (1988).

knows," but who actually knows only his "tiny corner of the universe."⁴⁸ He is "radically ignorant of all the rest."⁴⁹ If the average citizen's experience is so narrow, democratic government may not function properly because meaningful participation in representative government requires the ability to look beyond immediate self-interest. Good citizenship and leadership demand an understanding of what course of action is best, which in turn requires the ability to compare theories, systems, and ways of doing things. Good citizens and leaders have the ability to combine "the powers of the most distant and dissimilar objects" when searching for solutions to problems.⁵⁰ Specialization hinders this ability.

The eradication of western-style capitalism would be neither propitious nor possible.⁵¹ Capitalism nevertheless is limited as a system of social organization and control⁵² because it pays insufficient heed to society's need to make qualitative, collective choices.⁵³ Western market-economists tend to believe that each person acting on her own behalf will produce the "best" results for all. The concept of the "tragedy of the commons" reveals the limits of this belief. Consider a communally-owned resource, such as land, which may be used and exploited by all citizens of the community. The citizen who uses the land, for example to hunt, till, or mine, will have an incentive to grossly

48. JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 111 (W.W. Norton & Co., College ed. 1957) (1930).

49. *Id.* The specialist is a novelty:

[P]reviously, men could be divided simply into the learned and the ignorant, those more or less the one, and those more or less the other. But your specialist cannot be brought in under either of these two categories. He is not learned, for he is formally ignorant of all that does not enter into his specialty; but neither is he ignorant, because he is "a scientist," and "knows" very well his own tiny portion of the universe. We shall have to say that he is a learned ignoramus, which is a very serious matter, as it implies that he is a person who is ignorant, not in the fashion of the ignorant man, but with all the petulance of one who is learned in his own special line.

Id. at 112.

50. SMITH, *supra* note 42, at 21.

51. As long as specialization is profitable, the tendency toward it will continue. Unlike Marx, however, I believe that specialization's fruits justify the preservation of much of the western-style capitalist system.

52. Professor Lindblom compares the market to a tool, "designed to do certain jobs but unsuited for others." LINDBLOM, *supra* note 40, at 76.

53. "Before the principle of marginal utility nothing is sacred; all existing arrangements are subject to being reordered in the interest of increased economic return." FULLER, *supra* note 3, at 28.

overuse it because although she alone reaps the benefits, the costs of her overuse are distributed throughout the community. The tragedy is that when each citizen acts in her own best interests, for example by maximizing the present value of her property rights, the long-term value of the communal resource will diminish.⁵⁴

A similar result occurs in the market economy any time a person or entity fails to internalize externalities⁵⁵ when exercising private property rights. This problem underlies any market transaction in which total costs, including costs to third parties or society, are not reflected in price. Market imperfections, including uninternalized externalities, are why the person who steadfastly pursues his own good usually is not producing simultaneously what is best for society.⁵⁶

The fruit of western economics is more fruit—increased quantity.⁵⁷ The productive advantages of capitalism are admittedly self-evident.⁵⁸ Nonetheless, a system that produces “more” can have its drawbacks. For society’s well-being, free market systems need a counter-balancing force which emphasizes the relationship between the producer, consumer

54. This example is borrowed from Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (Papers & Proceedings 1967).

55. “Externalities” are those costs and benefits which result from a person’s act but which are borne or reaped by a third party. A person who acts but considers only the costs and benefits to himself is not “internalizing,” or including in his cost-benefit calculation, the external effects of his actions on others. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 38–43 (2d ed., 1988).

56. Professors Rhode and Luban assert that market imperfections justify external oversight of the Bar. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 646–47 (1992). These imperfections include: (1) information barriers (the clients’ inability to accurately assess the services they receive because of their lack of past experience); (2) adverse selection (because of information barriers, clients cannot choose accurately the most capable lawyers, which creates a lack of incentive for lawyers to provide quality services); (3) free riders (individual lawyers who benefit from the Bar’s general reputation without adhering to or maintaining that standard); and (4) externalities (discussed *supra*, note 55). See *id.*

57. The free-market economic approach assumes that the ultimate measure of a society is its level of consumption. Fallows, *supra* note 40, at 66; see also SMITH, *supra* note 42, at 21 (observing that the “subdivision of employment” means that “more work is done upon the whole, and the quantity of science is considerably increased by it”).

58. The inefficiencies of most communist economies render them inferior, in terms of output and consumption, to most capitalist economies. See, e.g., THE SOVIET ECONOMY: CONTINUITY AND CHANGE (Morris Bornstein ed., 1981) (offering insightful examinations and critiques of the Soviet economic system before the Soviet Union’s dissolution). Nevertheless, western-style capitalism is but one of many successful economic systems in existence. See, e.g., Fallows, *supra* note 40, at 76 (discussing the successes of Asian economies).

and society. This is doubly true when, as in the United States, a free market economy is paired with a liberal democracy, a political system that merely reinforces the primacy of the individualist perspective.

C. *Science and the Myth of Progress*

In science, the authority embodied in the opinion of thousands is not worth a spark of reason in one man.

— Galileo⁵⁹

Aristocratic nations are naturally too apt to narrow the scope of human perfectibility; democratic nations, to expand it beyond reason.

— Alexis de Tocqueville⁶⁰

Liberal democratic thought and modern science are united in their glorification of the individual. Whereas liberal democracy upholds the individual as a vessel of rights, science views the individual as the seat of knowledge. In January 1610,⁶¹ Galileo turned his telescope to the heavens and shattered millennia-old beliefs about the Moon, the planets, the stars, and, more importantly, humanity's ability to know its place in the universe.⁶² First, Galileo's discoveries seemed to

59. PIETRO REDONDI, GALILEO: HERETIC 37 (1987) (quoting Galileo Galilei).

60. TOCQUEVILLE, *supra* note 11, at 158.

61. Experts offer conflicting dates. Daniel Boorstin gives the date as January 1610. DANIEL J. BOORSTIN, *THE DISCOVERERS* 318 (1983). Brian Appleyard simply offers the year 1609. BRYAN APPELYARD, *UNDERSTANDING THE PRESENT: SCIENCE AND THE SOUL OF MODERN MAN* 17 (1992). More significantly, however, Appleyard chooses this moment as the birth of modern science. *Id.* at 17–18.

62. Galileo wrote:

What was observed by us in the third place is the nature or matter of the Milky Way itself, which, with the aid of the spyglass, may be observed so well that all the disputes that for so many generations have vexed philosophers are destroyed by visible certainty, and we are liberated from wordy arguments. For the Galaxy is nothing else than a congeries of innumerable stars distributed in clusters.

GALILEO GALILEI, *THE SIDEREAL MESSENGER* 62 (Albert V. Helden trans., University of Chicago Press 1989) (1610).

demonstrate that there is a scientific solution for every problem.⁶³ Humanity therefore must hold the key to all of life's secrets; the potential for knowledge is boundless. Second, Galileo's discoveries threatened and ultimately destroyed the monopoly on knowledge and truth claimed by the Roman Catholic Church.⁶⁴ The Church, realizing the revolutionary significance of Galileo's discoveries, condemned him for heresy, but condemnation was futile. Over time, science retained its appeal because, in a practical sense, "it worked!"⁶⁵

The influence of the early modern European scientists on the development of the western mind should not be underestimated. Science challenged established concepts of order, and in doing so fundamentally altered common beliefs about epistemology, the individual's ability to discover truth, and hence, humanity's place in the world.⁶⁶ David Bohm argues that "our notions of order are pervasive, for not only do they involve our thinking but also our senses, our feelings, our intuitions, our physical movement, our relationships with other people and with society as a whole and, indeed, every phase of our lives."⁶⁷ Scientific discoveries challenged previous

63. See APPLEYARD, *supra* note 61, at 4-6 ("nothing can be ultimately unknown"). Appleyard explains that "from 1700 onwards the human imagination was convinced that nature could be fully understood as a series of differential equations, as an algorithmic compression." *Id.* at 46.

64. Appleyard's view is that science played an important role in the growing dissident movement of the sixteenth and seventeenth centuries, a movement which embodied the spirit of the Renaissance, the Reformation, the Counter-Reformation, and the discovery of the New World. *Id.* at 28-37. Allan Bloom argues that Galileo and his fellow scientists were the natural enemies of the established powers because scientific investigations undermined those powers' divine legitimacy. BLOOM, *supra* note 35, at 296. This spirit eventually toppled the old order. "Science became enthroned as the final arbiter of truth and value, occupying a position similar to that of the church in the Middle Ages." John H. Hallowell, *The Decline of Liberalism*, 52 ETHICS 323, 337 (1941-42).

65. See generally APPLEYARD, *supra* note 61, at 3-6 (asserting that science's greatest appeal and promise is that "it works" in a very practical sense).

66. The work of the early modern scientists marked a shift from metaphysics or ontology to epistemology. See, e.g., APPLEYARD, *supra* note 61, at 58 (discussing science and its epistemological supremacy). Whereas the ancient Greek might exclaim, "God exists!", the Renaissance man would ask, "How do you know?"

67. DAVID BOHM, *WHOLENESS AND THE IMPLICATE ORDER* 176 (1980). Scholars have argued that scientific discoveries can have implications far beyond their direct application and can alter beliefs previously held as immutable. "When Copernicus ousted Earth and its travelers from their illusion of a central place in the universe, his assertion went beyond physics: it called into question our privileged relationship to God." SHERRY TURKLE, *THE SECOND SELF: COMPUTERS AND THE HUMAN SPIRIT* 308 (1984).

concepts of order and thereby diminished the authority of nonsecular institutions.⁶⁸ The authority of the individual filled the void.

In this sense, Descartes foreshadowed the liberal democratic movement:

I thus concluded that the foundation of our opinions is far more custom and example than any certain knowledge. And finally, although this is the foundation of our opinions, I noticed that the approval by the majority is no guarantee of that truth that is difficult to discover, and in such cases it is much more likely that truth will be found by one person than by many. I could, however, select from the crowd no one whose opinions seemed worthy of preference and thus I found myself compelled to use my own reason in the conduct of my life.⁶⁹

Descartes's conclusion is based on a premise provided by science—that each person can discover the truth. This conclusion is reminiscent of Martin Luther's attack on the "spiritual estate" of Rome and his proclamation that "we are all priests alike,"⁷⁰ each equally capable of interpreting or espousing "The Word."⁷¹ The definition of The Word, however, becomes uncertain when individuals, each acknowledged to have the ability to determine truth, debate its meaning and arrive at conflicting conclusions. Each individual becomes more inclined to believe that The Word is his or her word.⁷²

68. See APPLEYARD, *supra* note 61, at 55–60.

69. RENÉ DESCARTES, DISCOURSE ON METHOD 14 (John Veitch trans., J.M. Dent & Sons 1949) (1637).

70. Martin Luther, *Address to the Christian Nobility of the German Nation*, in 2 CLASSICS OF WESTERN THOUGHT: MIDDLE AGES, RENAISSANCE, & REFORMATION 522 (Karl F. Thompson ed., 1988); see also C. Dyke, *Collective Decision Making in Rousseau, Kant, Hegel, & Mill*, 80 ETHICS 21 (1969). Dyke states that the major issue of the Reformation was "[w]hat is the relationship of an individual to his God; and in particular, what is the relationship of an individual to God's Law?" *Id.* The Reformation's answer is that "each man is an autonomous individual who needs no intermediary in his approach to God." *Id.*

71. Martin Luther, *The German Reformation*, in THE PROTESTANT REFORMATION 71 (Hans J. Hillerbrand ed., 1968) (stating that "no ruler ought to prevent anyone from teaching or believing what he pleases, whether gospel or lies").

72. Sigmund Freud has called humanity a "prosthetic God," one who imitates God in action and attitude, and yet is not in reality a deity. FREUD, *supra* note 4, at 44. Freud also notes, however, that "present day man does not feel happy in his Godlike character." *Id.* at 45.

In this way, science suggests that truth, and therefore values, are relative.⁷³

Not only has science promoted the individual as a source of societal authority, but it has attempted to show that humanity is evolving toward a superior form of existence. Darwin's evolutionary theory purports to explain the chain of progress, in which the weak succumb to the strong and the dumb to the clever.⁷⁴ In this context, time assumes a moral character. The past is bad, the present is better, and the future will be better still.⁷⁵ The verity of this proposition is exemplified by posing the question: "At what period of history would you like to have lived?"⁷⁶ The answer is obvious—we prefer to live today, because it is "better" than the past.⁷⁷

The myth of science as progress is attributable perhaps to the ease of living that science has provided.⁷⁸ Modernity's *zeitgeist* is satisfaction of one's appetites. The American dream manifests the very essence of this spirit. Each succeeding generation is to have more opportunities, achieve greater success, enjoy greater comforts, and secure greater liberties than did preceding generations.⁷⁹ Sadly, because

73. This proposition's influence is nowhere more apparent than in universities, which, to varying degrees, have embraced the "mythical need for a sterilized, 'value neutral' education." Richard A. Salomon, *"Shades of Gray" and Other Myths*, 1 GEORGETOWN J. OF LEGAL ETHICS 463, 465 (1987).

74. See generally CHARLES DARWIN, *THE ORIGIN OF SPECIES* (Random House 1936) (1892); CHARLES DARWIN, *THE DESCENT OF MAN* (Random House 1936) (1898).

75. See APPELYARD, *supra* note 61, at 222; see also MYERS, *supra* note 39, at 110–14 (1955) (attacking the conclusion of Darwin's admirers that because later life forms are more advanced than earlier ones, living beings will reach their goal of perfection).

76. ORTEGA Y GASSET, *supra* note 48, at 35.

77. *Id.* at 34–35.

78. Technology removes hurdles and seems to be a panacea for many problems. For example, modern engineering has made considerable steps toward eliminating flooding, a phenomenon once so catastrophic that the ancient Egyptian calendar was based upon the weeping rhythm of nature. BOORSTIN, *supra* note 61, at 6–7. Boorstin states that "[t]he rhythm of the Nile was the rhythm of Egyptian life." The rise and fall of the Nile was such a regular and important force in ancient Egyptian life that it marked the phases of the "Nile year," a calendar used by Egyptians as early as 4241 B.C. *Id.* at 7. The Aswan Dam now controls the flow of the Nile into lower Egypt and nearly has eliminated the threat of flooding downriver. *Id.*

79. Alluding in his first State of the Union address to the need to revive the American dream, President Bill Clinton stated: "Once, Americans looked forward to doubling their living standards every 25 years. At present productivity rates it will take a hundred years to double living standards, until our grandchildren's grandchildren are born. I say that is too long to wait." *Text of the President's Address to a Joint Session of Congress*, N.Y. TIMES, Feb. 18, 1993 (Late ed.) at A20, A21.

science seems capable of continually overthrowing the old order and reinventing "truth," our belief in scientific progress creates the illusion that the past is dispensable.⁸⁰ Ortega y Gasset writes:

Hence for the first time [in history] we meet with a period which makes *tabula rasa* of all classicism, which recognises in nothing that is past any possible model or standard, and appearing as it does after so many centuries without any break in evolution, yet gives the impression of a commencement, a dawn, an initiation, an infancy. We look backwards and the famous Renaissance reveals itself as a period of narrow provincialism, of futile gestures—why not say the word?—*ordinary*?⁸¹

The disassociation of the past and present, which science encourages, intimates that old standards of what is good are useless today.⁸²

This is an unfortunate deception because history may provide fodder for the resolution of modern moral problems. In contrast, science is incapable of solving the moral dilemmas that have puzzled man throughout time. In our great "progress," Einstein, Plank, Hawking, Galbraith, and Jung have not resolved the issues posed by Plato, Mill, and Nietzsche: "what is justice?"⁸³ "what is the proper sphere of state action?"⁸⁴ or "what is the criterion for goodness?"⁸⁵ While science solves many problems, it creates just as many: science is no catholicon. Its freedom is hollow.⁸⁶ George Will writes:

80. One such critic has alleged that "the truths of science do not require the wisdom of the past." APPLEYARD, *supra* note 61, at 237. Appleyard contends that "the past comes to be understood as an undeveloped realm, an impoverished Africa of memory and imagination, useful only as a staging post for the future." *Id.* at 236.

81. ORTEGA Y GASSET, *supra* note 48, at 36.

82. *Id.*

83. See, e.g., PLATO, *THE REPUBLIC* (G.M.A. Grube trans., Hackett Publishing Co. 1974).

84. See, e.g., JOHN STUART MILL, *ON LIBERTY*, (David Spitz ed., W.W. Norton & Co. 1975) (1859).

85. See FRIEDRICH NIETZSCHE, *The Genealogy of Morals, in THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 158–88 (Francis Golffing trans., Doubleday Anchor Books 1956) (1887).

86. Freud also felt that technology was no panacea for an unfulfilled life:

Men are proud of [their] achievements, and have a right to be. But they seem to have observed that this newly-won power over space and time, this subjugation of the forces of nature . . . has not increased the amount of pleasurable

Freedom is not only the absence of external restraints. It also is the absence of irresistible internal compulsions, unmanageable passions and uncensorable appetites. From the need to resist, manage and censor the passions there flows the need to do so in the interest of some ends rather than others. Hence freedom requires reflective choice about the ends of life.⁸⁷

Reflective choice loses much of its meaning if the choice excludes previous standards of what is good. Notions of progress should not persuade us that the answers to our problems lie only in the present.⁸⁸

D. *The Emptiness of the Individual*

As liberal democracy weakened the institutions of the past, and free market and science stressed the essence of individual existence, people increasingly looked within themselves to fill the spiritual void. Today such self-reflection often involves psychoanalysis. Unlike political philosophy, which deals with the relationship between people as a group, traditional psychology is concerned predominantly with a dissection of the individual psyche.⁸⁹ Freud, in *Civilization and Its*

satisfaction which they may expect from life and has not made them feel happier.

FREUD, *supra* note 4, at 39.

87. WILL, *supra* note 6, at 66.

88. Ortega y Gasset tells a story about the waning of time-tested ideals:

The gypsy in the story went to confession, but the cautious priest asked him if he knew the commandments of the law of God. To which the gypsy replied: "Well, Father, it's this way: I was going to learn them, but I heard talk that they were going to do away with them."

ORTEGA Y GASSET, *supra* note 48, at 134.

89. Psychology is "concerned with the individual mind and its processes," and therefore it is doubtful "if a psychological approach can suffice to explain interconnections between . . . individuals." Kurt Wilk, *Law and the State as Pure Ideas: Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy*, 51 ETHICS 158, 179 (1940-41). Wilk argues that the psychological approach to political thought reduces the state to a bundle of psychological relationships between individuals. *Id.* at 180.

*Discontents*⁹⁰ and *The Ego & the Id*,⁹¹ performed a taxonomy of the Self. Like a twentieth-century Darwin, Freud attempted to understand the mysteries of organized society by dissecting the mind. His conclusion was that "the purpose of life is simply the programme of the pleasure principle."⁹²

An analysis that begins by exalting each individual's needs has difficulty transcending itself; such an analysis runs the risk of portraying humanity as a spoiled child who has difficulty with life's spiritual or moral aspects. If the measurement of progress is morality, then the nihilism of modern value relativity suggests that society is in danger of devolving into a collectivity of individuals.⁹³

II. SELFISH INDIVIDUALISM AS THE ANTITHESIS OF MORALITY

This Note has argued that the individualism inherent in liberal democracy, although itself hardly antithetical to virtuous civilization,⁹⁴ carries seeds of atomism which threaten society's disintegration. Fortunately, liberal democracy is a broad and flexible concept. It is capable of embracing various roles for government and the individual. At its outer edges, liberal democracy is threatened by totalitarianism and nihilism. Totalitarianism, the tyranny of the majority, imposes absolute governmental control upon the citizenry;⁹⁵

90. FREUD, *supra* note 4.

91. SIGMUND FREUD, *THE EGO & THE ID* (J. Strachey ed., W.W. Norton & Co. 1962) (1923).

92. FREUD, *supra* note 4, at 25.

93. How odd then that a state of nature which never existed before civilization could threaten to exist now within it!

94. Liberal democracy is unique in its rejection of force and birthright as a source of authority. Liberal democracy may be viewed as somewhat moral because it eschews conflict by attempting to govern by some measure of consensus. One author and critic of liberal democratic thought has conceded that "[l]iberalism . . . is the supreme form of generosity; it is the right which the majority concedes to minorities and hence it is the noblest cry that has ever resounded in this planet. It announces the determination to share existence with the enemy; more than that, with an enemy which is weak." ORTEGA Y GASSET, *supra* note 48, at 76.

95. An ominous warning of the evils which are possible when twentieth-century science combines with unrelenting majoritarianism is Huxley's *Brave New World*. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932). The teachings of Mao Tse-tung provide another example of majoritarianism gone awry. In typical totalitarian fashion, he emphasizes the need for the individual to subject his will to the interests of the Communist state:

nihilism and gross individualism lead to the total rejection of community institutions and values. Both extremes are to be feared. The most immediate threat to the American society's well-being comes from excessive individualism and its lack of morality.

I will make an assertion that many Americans will find untrue on its face: individualism is not moral.⁹⁶ Individualism's objective is the pursuit of individual as opposed to group interests. Individualism's first principle is that no social goal can justify forcing an individual to be a resource for others;⁹⁷ it assumes that freedom from external constraints is morality. Such freedom is in reality the antithesis of morality.⁹⁸ One cannot properly "define the conditions of freedom for single individuals prior to considering the conditions of freedom for all individuals" because "one individual's free act is a limit on the freedom of another and thus every free act is potentially coercive in its effect on the freedom of others."⁹⁹ Accordingly, moral laws do not consider the individual as an individual. They instead focus on regulating relations between people to strive for the general good.¹⁰⁰ Morality cannot be understood outside of the context of the interaction between individuals in a society.¹⁰¹ Individualism ignores the idea that the law and the state aim not at the

At no time and in no circumstances should a Communist place his personal interests first; he should subordinate them to the interests of the nation and of the masses. Hence, selfishness, slacking, corruption, seeking the limelight, and so on, are most contemptible, while selflessness, working with all one's energy, whole-hearted devotion to public duty, and quiet hard work will command respect.

4 CLASSICS OF WESTERN THOUGHT: THE TWENTIETH CENTURY 49 (Donald S. Gochberg ed., 1980) (quoting Mao Tse-tung).

96. "Immorality is doing harm to others; doing good to self is not necessarily doing harm to others. . . . Up to a certain point a man may be an egoist without hurting anyone." Frank Thilly, *The Moral Law*, 10 ETHICS 223, 228 (1989-90).

97. Jeffrey H. Reiman, *The Fallacy of Libertarian Capitalism*, 92 ETHICS 85, 85 (1981) (citing ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33 (1974)).

98. Schneider, *supra* note 27, at 49.

99. Reiman, *supra* note 97, at 94.

100. Thilly, *supra* note 96, at 227.

101. Morality and surrounding issues of right and wrong emerge only when an individual's will conflicts with an obligation to others, or when obligations to others conflict. See Schneider, *supra* note 27, at 54. Such circumstances give rise to "a conflict of duties and rights." *Id.* Thus, "moral principles cannot function in a social vacuum or in a war of all against all." Peter P. Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 84 ETHICS 307, 318 (1972-74) (quoting FULLER, *supra* note 3, at 205-06). Moral principles quintessentially concern relations among people.

individual good, but at the common good. Excessive individualism reduces civic-mindedness.¹⁰² Edmund Burke wrote that “[t]he effect of liberty to individuals is that they may do what they please; we ought to see what it will please them to do before we risk congratulations”¹⁰³

III. THE DEMISE OF ELITISM

An examination of the Bar’s role in a liberal democracy must reconcile western egalitarian tendencies with the Bar’s elite role in controlling the instruments of individual and community rights. This Part argues that the forces of individualism, manifested by the rights revolution, became powerful enough in the twentieth century to reshape many elitist institutions in American society, including the Bar. The rights revolution, however, failed to preserve the noble qualities of those institutions, particularly the ability to make an individual feel like part of a community. Despite the reformed, more egalitarian nature of the Bar, this failure to preserve the desirable qualities of imperfect institutions is one reason why lawyers and public servants are held in low regard by the public. Society therefore needs to recast its understanding of individual rights in order to find a place for leadership and civic virtue.

A. *The Western Individualist Tradition and the Demise of Elitism in the Bar and Society*

One cornerstone of western individualism is the belief in individual rights and equality among citizens. This belief is largely incompatible with traditional, elitist institutions. It is perhaps inevitable that a society which regards individual rights and equality among individuals as paramount values will attack institutions which inhibit the full expression of

102. When citizens are no longer bound together by common concepts of virtue, “social consensus becomes dangerously attenuated and citizenship becomes a blurry notion.” WILL, *supra* note 6, at 142.

103. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 9 (Thomas H. D. Mahoney ed., 1955) (1790).

personal rights. The transformation of the Bar and American law in the twentieth century demonstrates that the glorification of the individual and her rights have contributed to the demise of elitism in American society.

Historically, the Bar reflected the character of American elitist institutions in general. From the late 1800s¹⁰⁴ until the middle of the 1900s, the Bar conspicuously exhibited the classic negative features of a closed club.¹⁰⁵ Considerable nonmerit barriers to entering the profession existed, admission of members was tightly controlled, and economic competition, including price competition, was regulated carefully.¹⁰⁶ These characteristics were an affront to liberal democratic notions of equality.

Jerold Auerbach has argued that for the better part of the last 150 years, privileged lawyers have manipulated the law and instruments of justice for their own gain.¹⁰⁷ This elitist Bar ignored the legal needs of the average citizen.¹⁰⁸ The racial, religious, ethnic, and gender stratification of the Bar enabled a small group of lawyers, "self-appointed guardians of professional interests," to legislate for the entire profession and to speak for the Bar on matters of professional and public consequence.¹⁰⁹ This elite's¹¹⁰ principle objective was to structure legal education, ethics, discipline, and services so as to meet its own political goals at a time when social change threatened the status and the values of the groups to which

104. Bar associations first became a force in American law in the late 1800s. See AUERBACH, *supra* note 15, at 62–63.

105. See Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 410–16 (1992).

106. *Id.*

107. See AUERBACH, *supra* note 15, at 50–51 (noting that professional rules of ethics "were applied by particular lawyers to enhance their own status and prestige").

108. Justice Blackmun lamented that "the middle 70% of our population is not being reached or served adequately by the legal profession." *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977) (quoting AMERICAN BAR ASS'N, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 2 (1972)). One study of legal services in Chicago showed that in metropolitan Chicago, about half the work of lawyers is devoted to representing corporate clients, and one quarter is devoted to representing small businesses. Mark J. Osiel, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009, 2015 n.19 (1990) (reviewing LAWYERS IN SOCIETY (Richard L. Abel et al. eds., 1988)).

109. AUERBACH, *supra* note 15, at 4. The Bar was born with elitist roots. The American Bar's birth continued a tradition of elitism created by the English Bar. See POUND, *supra* note 9, at 100.

110. I use the word "elite" to refer to racial, ethnic, gender, and socioeconomic distinctions employed by the Bar. This Note, however, advocates a drastically different vision of elitism in Part IV, *infra*.

elite lawyers belonged.¹¹¹ For decades, the nonelite were denied access to the nation's finer law schools¹¹² and denied membership in its most influential law firms.¹¹³ The ABA established Canons which prohibited legal advertising, which, in effect,

rewarded the lawyer whose law firm partners and social contacts made advertising unnecessary at the same time that it attributed inferior character and unethical behavior to attorneys who could not afford to sit passively in their offices awaiting clients; it thus penalized both them and their potential clients, who might not know whether they had a valid legal claim¹¹⁴

Many state Bar associations also established preceptorship-registration systems to weed out the "morally unfit" through unevenly applied standards that "placed a premium upon social standing, family connections"¹¹⁵ and certain personality traits. These barriers ostensibly were erected to prevent admission into the Bar of immigrants who, the legal elite claimed, did not have "the faintest comprehension of the nature of our institutions, or their history and development."¹¹⁶

111. AUERBACH, *supra* note 15, at 4. For example, James Beck, a former solicitor general, wrote that "if the old American stock can be organized, we can still avert the threatened decay of constitutionalism in this country." *Id.* at 125.

112. *Id.* at 29. For example, Harvard Law School's unique requirement in the early 1900s that entering students possess a college degree eliminated 96% of eligible candidates. *Id.*

113. *Id.* at 25. "Barriers to access became more formidable as the desirability of access increased." *Id.*; see also RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* 7 (1985) ("Traditionally, the profession has also been extremely hierarchical in nature, granting women and minorities only very limited access to its more prestigious and remunerative positions.").

114. AUERBACH, *supra* note 15, at 43. For an argument that access to legal services will improve if attorneys are allowed to advertise, see *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

115. AUERBACH, *supra* note 15, at 123-27. A preceptorship system, which required prospective law students to secure sponsors and to register those sponsors with the Bar before admission to law school, was used because, as one Pennsylvania Bar committee member explained, raising educational requirements in order to exclude ethnic minorities was risky: it might "keep our own" out. *Id.* at 125.

116. *Id.* at 121 (quoting Att. Gen. George Wickersham). One Pennsylvania attorney observed in the early 1900s that even intellectually gifted and persevering immigrants "come to the bar 'without the incalculable advantage of having been brought up in the American family life,' and, therefore, they 'can hardly be taught the ethics of the profession as adequately as we desire.'" *Id.* at 100 (footnote omitted).

This rationale, however, was merely an excuse for excluding from the practice of law those who might threaten the hegemony of the elite. Auerbach concludes that “[t]he structure, the values, even the most cherished principles and basic processes of professionalism were perceived as instruments of injustice.”¹¹⁷

The Bar is less of a closed club than it used to be.¹¹⁸ The Bar currently is characterized by at least some measure of racial, ethnic, gender, and religious diversity.¹¹⁹ Educational achievements are the only substantial barriers to entrance imposed by most law schools.¹²⁰ Although control over admission to the Bar is held still by a small number of persons, they must evaluate a huge pool of applicants, using relatively objective criteria which make intentional discrimination more difficult.¹²¹ Further, anticompetitive controls on fees and advertising have been eliminated and competition has been embraced.¹²²

Similarly, in the name of equality, Americans have embraced a long legacy of legal reform.¹²³ Many of these

117. *Id.* at 306.

118. *See, e.g.,* Valarie A. Fontaine, *Cultivating a Diverse Work Force*, NAT'L. L.J., Jan. 10, 1994, at 1 (“One of the many dramatic changes that has swept the legal profession during the past 20 years is the growing number of women and minorities entering the profession.”). I do not suggest that the Bar has been cleansed of all indicia of a closed club. The dearth of women and minority law firm partners is just one manifestation of the Bar's continuing problems. *See, e.g., id.* at 1 (stating that 90% of all law firm partners are male and only 2.5% are minorities).

119. For example, “[b]etween 1960 and 1980, the proportion of women law students climbed from one in 25 to one in three.” Kanigel, *supra* note 47, at 41.

120. Terrell & Wildman, *supra* note 105, at 411.

121. *Id.* at 412.

122. *Id.*

123. Although it is impossible to fully trace the history of legal reform, a few obvious examples can be viewed as representative of the reform movement. *E.g.,* U.S. CONST. amend. XIV (abolishing tax restrictions on the right to vote and establishing equal protection under the law); U.S. CONST. amend. XV (abolishing race restrictions on the right to vote); National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988 & Supp. IV 1992)) (erasing the inequality of bargaining power between employees and management); Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397f (1988 & Supp. IV 1992)) (providing all working Americans with retirement benefits); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-17 (1988 & Supp. IV 1992)) (abolishing discrimination in the workplace); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. §§ 1989b-b9 (1988 & Supp. IV 1992)) (making reparations to Americans of Japanese descent interned during World War II); *Roe v. Wade*, 410 U.S. 113 (1973) (articulating a right of privacy as an individual right); *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation in public schools

reforms attempted to reconcile the conflict between the constitution's promise of equality and reality. To do so, the reforms expanded the list of individual liberties. Commentators have called the increase in rights-based claims a rights "revolution."¹²⁴ The animating force behind the rights revolution has been a desire for equality. Because racial, ethnic, and gender discrimination is incompatible with the principle that all are equal before the law, institutions that perpetrated such discrimination were dismantled. Similarly, because lawyers preserved a discriminatory rule of law incompatible with the principle of equal justice, the Bar was forced to change.¹²⁵

B. The Shortcomings of Revolution: Underemphasizing the Importance of Social Institutions for Civic Life

The rights revolution properly discredited the excesses of institutional elitism, but it has done so with temerity and without discretion. Often an ideology "can discredit an entire position containing many valid points of real social significance which could stand without the accompanying ideology."¹²⁶ Consider what has occurred to eastern European political and social structures over the last five years. One German citizen noted:

[T]here were good things in the former East Germany, and it was not necessary to destroy everything. . . . For example, there were excellent medical facilities in our polyclinics and these have been dismembered. Unfortunately, we did not follow the method of taking the good in the East and the West and putting them together.¹²⁷

is unconstitutional).

124. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4 (1991).

125. See AUERBACH, *supra* note 15, at 263-66.

126. Emilio Roma III, *The Moral Sanctity of Legal Functions*, 82 *ETHICS* 124, 124 (1971-72).

127. Roger Cohen, *An Empty Feeling is Infecting Eastern Europe*, *N.Y. TIMES*, Mar. 21, 1993, at E3. A socialist from Berlin stated that "[p]eople in East Germany cannot quite believe that for 40 years they did everything wrong. But the West German approach has been [to] sweep it all away, and get it functioning. It's been easier to destroy than to blend the old and the new." *Id.*

Similarly, when faith in twentieth-century legal authority disintegrated and revealed the role of lawyers in preserving discrimination, "[t]he elaborate structure of ethics and values which had defined professional responsibility for nearly a century collapsed in a shambles."¹²⁸

The destruction of historic institutions is permissible only on two conditions. First, old institutions must have nothing of value to offer future generations. Second, the new structure must have superior integrity and strength which is founded on a higher virtue. Both conditions require an appreciation for the beauty—and an understanding of the evil—of the past. Eyes which perceive only the past's excesses are myopic. In the process of scouring the Bar and society of elitist excesses, reformers have overreached and robbed society of many virtues.

The rights revolution correctly associated many American social institutions with elitist excesses of the past. The rights revolution, however, failed to join individual rights with civic responsibility. One author asserts that "American rights talk is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities."¹²⁹ The catalogue of individual liberties has expanded without regard to their effect on the individual's perception of her relation to others in society.¹³⁰ The beauty of social institutions is that their very existence reminds the citizenry that people are by nature social beings.

Social institutions are critical for emphasizing the importance of people's relationships to each other and for planting the seeds of civic duty in citizens. When social institutions are discredited and not rebuilt, citizens lose an important means through which to realize that others are like themselves. More importantly, citizens lose the sense that they are part of something larger than themselves, and therefore become less compassionate and caring. Recognizing this, Tocqueville wrote:

128. AUERBACH, *supra* note 15, at 263.

129. GLENDON, *supra* note 124, at 12.

130. *See id.* at 14.

For in a community in which the ties of family, of caste, of class, and craft fraternities no longer exist, people are far too much disposed to think exclusively of their own interests, to become self-seekers practicing a narrow individualism and caring nothing for the public good.¹³¹

Allegiance to social institutions is necessary to prevent society from becoming a mere collection of individuals.

Two phenomena suggest that traditional social institutions have been replaced not by superior structures, but by a concern for the self. One phenomenon is disaffection with public life. The other phenomenon is the current flood of litigation.

1. *The Bar and Social Institutions are Held in Low Esteem*—Despite the Bar's attempts at reform, evidence suggests that the Bar is held in low esteem by the public. Only twenty-two percent of all respondents to a recent ABA survey said that the phrase "honest and ethical" appropriately described the legal profession, and a mere eight percent had "great confidence" in law firms.¹³² A 1993 survey by the National Law Journal found that seventy-three percent of Americans think that lawyers are "less honest than most people," and only five percent said that they would encourage their children to become lawyers.¹³³ Public opinion polls consistently show that the public thinks about as highly of lawyers as it does of funeral directors and used-car salesmen.¹³⁴ Lawyer jokes are yet another indicia of how the sentiment against attorneys has spread to all segments of American society.¹³⁵

Disrespect for the Bar is further evidenced by the growing number of complaints about unethical attorney behavior.¹³⁶

131. *Id.* at 118 (quoting ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* at xiii (Stuart Gilbert trans., Doubleday Anchor Books 1955) (1856)).

132. Tim Poor, *Lawyers Still Inspire Fear and Loathing: ABA Study Highlights Image Problem*, ST. LOUIS POST-DISPATCH, Oct. 15, 1993, at 1C.

133. *Anti-Lawyer Attitude Up*, THE NAT'L L.J., Aug. 9, 1993, at 1.

134. Matthew Kauffman, *Spirit of Lawyer Gags Have Some Attorneys Feeling Glum*, THE HARTFORD COURANT, Jan. 3, 1994, at A1.

135. For a discussion about the prevalence of and reasons for lawyer jokes, see Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y. L.J., Nov. 19, 1993, at 2.

136. In recent years, many state bar associations have witnessed a great increase in the number of complaints against attorneys. For example, in 1992, the Michigan Attorney Grievance Commission received 3,980 requests for investigations of lawyers and 289 formal complaints. Jennifer Van Doren, *Lawyers' Credibility with Clients*

Lawyers readily admit that the profession has changed. One Chicago attorney states that in the late 1940s and early 1950s "there were very few lawyers whose word I wouldn't take. Now there's a loss of respect from lawyer to lawyer, a loss of collegiality."¹³⁷ The gentility, camaraderie, and mutual respect that for years was the mark of the legal profession has given way to sanctions against lawyers and legal malpractice suits.¹³⁸

The nation's highest political leaders have urged the Bar to reform itself.¹³⁹ The leaders of private enterprise also have clamored for legal reform; a columnist recently observed that "lawyers 'are replacing labor unions as the chief scourge of American business.'"¹⁴⁰

The contrast between this current state of affairs and the high esteem in which attorneys were held by the general public at the end of the last century demonstrates the depths to which the profession has sunk in the public's eyes. It was precisely the nobility of law which drew so many immigrants and first-generation Americans into the ranks of the Bar in the early part of the twentieth century: "the nexus between law and politics made a career as attorney personally attractive and politically important" to immigrants' sons.¹⁴¹

Diminishing, MICH. STATE U. NEWS, Feb. 23, 1993, at 5. Disciplinary orders against Michigan attorneys have risen by 25% since 1990. *Id.* A Michigan Grievance Commission administrator attributed the rise in complaints to a variety of causes, including: (1) the greater number of attorneys practicing law; (2) increased publicity for sanctions against lawyers; (3) increased incidences of unethical behavior; and (4) closer self-regulation. *Id.* Other state bars have reported similar trends. See, e.g., Daniel Wise, *Public Sanctions of Lawyers Increase 77% Over 3 Years in First Department*, N.Y. L.J., May 13, 1993, at 1 (The New York State Appellate Division's First Department Disciplinary Committee reported that the rising disciplinary caseload "stretched the committee's resources to the maximum.").

137. Kanigel, *supra* note 47, at 40.

138. Rule 11 of the Federal Rules of Civil Procedure permits judges to sanction lawyers for a number of reasons, including: filing complaints for improper purposes, filing complaints that are not well-grounded in fact, or filing complaints that are not warranted by existing law. FED. R. CIV. P. 11. For commentary on the impact of judicial sanctions against lawyers, see Joan M. Cheever, *Is Rule 11 Being Misused? Sanctioning Sanctions Against Attorneys*, 120 N.J. L.J. 229 (1987); Paul D. Freeman, *The Rule 11 Ruckus: Sanctions Have Changed Federal Practice & Bitterly Divided the Bar*, 11 CAL. LAW., May 1991, at 17; Edward W. Remsburg & Steven K. Gaer, *General Overview of Federal Rule of Civil Procedure 11*, 38 DRAKE L. REV. 261 (1988-89).

139. For example, President Bush's Council on Competitiveness "deplored the 'baleful effects' of having too many lawyers." Galanter & Knight, *supra* note 8, at 13.

140. *Id.* (quoting Wall Street Journal columnist Paul A. Gigot).

141. AUERBACH, *supra* note 15, at 88.

Given lawyers' stately task and the more democratic nature of today's Bar, why have lawyers been the target of so much scorn in recent decades? The surge in attacks on lawyers is related to the fact that institutions devoted to public service have come under attack.¹⁴² A 1991 poll found that forty-six percent of all Americans believed that many government officials are corrupt, up from less than thirty percent in the late 1950s.¹⁴³ The same poll showed that fifty-nine percent of those surveyed did not think that "public officials care much what people like me think," twice the percentage of those who held that view in the late 1950s.¹⁴⁴ It is no coincidence that the reputation of the Bar should be tarnished at the same time that the honor of public officials has come into increased disrepute. Both law and politics define the relationship of people to each other and to the community at large.

2. *The Rights Revolution has Spurred a Flood of Litigation*—Society's growing concern with the self is manifested in the growing number of lawsuits. One commentator has attributed the current flood of litigation to the erosion of the concept of fault.¹⁴⁵ Citing strict liability and no-fault insurance as indicia of the erosion of the fault concept, Joseph Spivey blasts attorneys, stating that "many strike suits originate in the minds of lawyers who through various strategies are able to solicit clients to their side."¹⁴⁶ According to Spivey, such modern legal practices are inconsistent with traditional notions of fault in which a victim was aware that he would not invariably be compensated for his injury or damage. Spivey ties the changing concept of "fault" to the rise of the "insurance" concept, which holds that no one may be injured without being made whole.¹⁴⁷

142. A Harris poll reveals that from 1966 to 1983, the

number of Americans saying that they have "a great deal of confidence" in professional institutions declined precipitously: from 61 percent to 36 percent in higher education, from 73 percent to 30 percent in medicine, from 41 percent to 23 percent in organized religion, and from 62 percent to 35 percent in the military.

Kanigel, *supra* note 47, at 45 (quotations and citations omitted).

143. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 28 (1993)(citing *Trust in Government*, WASH. POST, Nov. 3, 1991, at A17).

144. *Id.*

145. Joseph M. Spivey III, *Society Deserves the Lawyers it Produces*, 4 SOC. RESP.: JOURNALISM, L., MED. 53, 55 (1978).

146. *Id.* at 56.

147. *Id.* at 55-57.

Americans' obsession with individual rights and their demands for compensation when they believe that those rights have been compromised ignore the reality that individuals do not live in a vacuum, but in a polity, or society, the largest of social institutions. In a polity, rights are often in conflict. Given limited resources, citizens often cannot exercise their rights without trampling upon the rights of others. Because rights often are incapable of being fully exercised, it is improper to "fully" compensate an individual for the trampling of those rights. As such, "[r]ights are neither natural nor equal, they are not even equivalent or 'like.' They are reciprocal."¹⁴⁸

C. *The Ultimate Requisite for Social Health: Wedding Rights with Responsibility*

The hallmark of a civilization should be its morality. America needs a vision of equality which can embrace the best of the rights revolution—the scouring of discrimination—and the best of the institutions of the past—a devotion to something larger than self. Rights must be wedded with responsibility if society is to become a more inclusive and healthier community.

148. Schneider, *supra* note 27, at 51. The ancient Greeks held a similar communal view of rights. In ancient Greece, all freemen in Athens voted, but the individual understood that he was part of a community. The Greeks therefore might have spoken of the individual as part of a group: "Lycurgus of Sparta" or "Kleonike of Athens." The Greeks were known by their place of citizenship and took great pride in that identification.

Active involvement nourished a psychological state in the political animal, breeding patriotism—fierce pride in and love for his *polis*. Every *polis* was then a pressure chamber compelling men to discover and exercise their talents in the interest of something larger, more enduring, and more splendid than themselves. As such, the *polis* nourished an intensity of life seldom witnessed in history and brought forth achievements which sometimes seems almost superhuman.

JOHN B. HARRISON & RICHARD E. SULLIVAN, A SHORT HISTORY OF WESTERN CIVILIZATION 65 (1980). When the focus is on the community, the individual is much less likely to demand restitution for each transgression.

The state is in need of a force that will help reintroduce this collectivist goal. By virtue of the role it plays in our political and legal systems, the Bar is equipped to be one such force. The proposition that all people are inherently equal animated the anti-elitist sentiment largely responsible for cleansing the Bar.¹⁴⁹ Inherent equality of all people is not incompatible, however, with the concept that law is a distinctive calling which bestows a public duty upon those who practice it. Liberal democracy requires a measure of leadership, which is a form of elitism, in order to flourish.

IV. THE PROPER PLACE OF THE BAR: ELITISM REDEFINED

A. *The Distinguishing Characteristic of Professionalism: Service to the Community*

Martin Luther King, Jr. stated that we should "never succumb to the temptation of believing that legislation and judicial decrees play only minor roles. . . . The habits, if not the hearts, of people have been and are being altered every day by legislative acts, judicial decisions, and executive orders."¹⁵⁰

The work of lawyers is quintessentially public even when conducted purely for monetary gain. Lawyers therefore have a special responsibility for the morality of the nation and must ensure that the creation and practice of law contribute to the commonweal. In this sense, the law inescapably is an elite calling and the Bar cannot spurn its unique obligation.¹⁵¹

149. See generally AUERBACH, *supra* note 15, at 160-90 (stating that much of the sentiment to change the Bar also found a medium to effect a change on the profession through the New Deal programs).

150. GLENDON, *supra* note 124, at 105 (quoting MARTIN LUTHER KING, JR., STRENGTH TO LOVE 33-34 (1981)).

151. In the early nineteenth-century, the "feeling was strong that all callings should be on the same footing, the footing of business, a money-making calling. To dignify any one by styling it as a profession seemed undemocratic and un-American." POUND, *supra* note 9, at 182. Professionalism, however, by definition separates one group from another. Professionalism assumes inequality between groups, an inequality which should manifest itself in the practice and in the ideals that the profession pursues. The existence of equal rights, however, is not inconsistent with meritocracy; in every democracy, society strives to punish criminals and reward its most productive members.

Elitism therefore should be redefined with regard to the Bar in a way commensurate with the concept of *noblesse oblige*.¹⁵²

Attorneys' special duties spring from their special privilege and power. No other profession is so involved in the control and exercise of public power¹⁵³ and private rights.¹⁵⁴ Lawyers control the levers of the Constitution and of our laws. As the legal representatives of corporate America,¹⁵⁵ attorneys have daunting power to influence the shape of society.¹⁵⁶ Moreover, as the force that vindicates people's "rights,"¹⁵⁷ lawyers are entrusted with the most intimate facts about clients' personal lives, financial history, and criminal conduct.¹⁵⁸ Finally, lawyers have a distinctive occupation because individualist

152. The concept of *noblesse oblige* holds that noble birth imposes the obligation of high-minded principles and noble actions. In a democracy, one may replace the words "noble birth" with "pecuniary privilege" or "access to power." José Ortega y Gasset claims that "[n]obility is defined by the demands it makes on us—by obligations, not by rights. *Noblesse oblige*. 'To live as one likes is plebeian; the noble man aspires to order and law.' (Goethe)." ORTEGA Y GASSET, *supra* note 48, at 63.

153. Auerbach asserts that the legal profession is a public profession because lawyers monopolize access to the courts, which are public institutions. AUERBACH, *supra* note 15, at 281.

154. See generally *id.* at 262–306 (describing the positive effect of lawyers in furthering civil rights legislation in the South).

155. American lawyers are closely tied to U.S. commerce. A high percentage of attorneys deal with the problems of corporations and wealthy individuals. RHODE & LUBAN, *supra* note 56, at 167; see also Jennifer Gerarda Brown, *Rethinking "The Practice of Law"*, 41 EMORY L.J. 451, 458 (1992) ("[S]tatistics suggest that a very small percentage of clients absorb a very large proportion of legal services, and that some segment of society . . . is proportionately under-served by the legal profession.").

156. Mark Osiel argues that the Bar's power derives largely from its close relationship to American commerce. OSIEL, *supra* note 108, at 2066. Lawyers are powerful because they serve and are needed by corporate interests. *Id.*

Lawyers' role in the development of corporate law further demonstrates their power to shape society. Charles E. Lindblom explains that mid-nineteenth-century legal developments were instrumental in producing the modern corporation by limiting stockholders' liability and conferring new authority upon organizers of large enterprises. LINDBLOM, *supra* note 40, at 174. Lawyers also have played an instrumental role in allowing corporations to perform functions that government officials regard as indispensable to a healthy state. *Id.* at 175. As a result, "[c]orporate executives in all private enterprise systems, polyarchic or not, decide a nation's industrial technology, the pattern of work organization, location of industry, market structure, resource allocation, and, of course, executive compensation and status." *Id.* at 171.

157. See Terrell & Wildman, *supra* note 105, at 415 (stating that much of the debate about the law's proper social role is in terms of "rights-talk").

158. The attorney-client privilege and the ethical duty of confidentiality exist because clients entrust attorneys with information that affects their most valued liberties. See, e.g., Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978) (stating that the attorney-client privilege is regarded by many as the "pivotal" element allowing an attorney to effectively represent a client).

excesses have rendered law one of the last remaining vestiges of community—shared values and expectations—in American life.¹⁵⁹

In corporate law, fiduciaries owe the finest duty of loyalty, “[n]ot honesty alone, but the punctilio of an honor the most sensitive.”¹⁶⁰ Lawyers are likewise the “fiduciaries” of the people, guardians of their liberties and servants of the state.¹⁶¹ Because lawyers exercise “quasi-governmental” powers,¹⁶² they occupy a unique position which obligates them to raise the level of civic consciousness.¹⁶³

Although definitions of “profession” have varied,¹⁶⁴ the best definitions include an element of public service.¹⁶⁵ At the

159. As Terrell and Wildman put it:

All the other dimensions of our lives—race, religion, education, the arts, regional loyalty, and so on—divide us as much as they join us together because they are based on matters of “substance” on which we so often disagree. No single social theme or set of themes could identify, for example, the “community” of New York City or Los Angeles or even Des Moines. The traditions, heritage, and perspectives of Americans are now so disparate and isolated within ever smaller subcommunities that no common purpose, direction or moral values connect us fundamentally.

Except our system of law.

Terrell & Wildman, *supra* note 105, at 422.

160. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

161. *Cf. Roma*, *supra* note 126, at 134. *Roma* argues that because public education was not always a reality, and because the moral duty to educate has been delegated by law, he, as a university professor, has a special duty to instruct students to the best of his ability. *Id.* Similarly, because the privilege of being a lawyer is one delegated by law, because each state licenses its attorneys to practice law, the right to practice law carries a special responsibility.

162. Geoffrey C. Hazard, Jr., *The Legal & Ethical Position of the Code of Professional Ethics*, 4 SOC. RESP.: JOURNALISM, L., MED. 5, 7 (1979).

163. “[T]he public who grants a small segment of the populace the exclusive privilege of making a living practicing law has the right to demand that those so favored accept public service as one of their prime responsibilities.” Chesterfield Smith, *Lawyers Who Take Must Put—At Least a Bit*, 1 J. LEGAL PROF. 27, 30 (1976).

164. *See, e.g.,* Byrne J. Horton, *Ten Criteria of a Profession*, 56 SCIENTIFIC MONTHLY 164 (1944) (suggesting ten characteristics defining the professions of law, medicine, theology, and advanced teaching); Kanigel, *supra* note 47, at 37 (suggesting three characteristics that determine whether a worker is a “professional”). *See generally* Douglas Klegon, *The Sociology of Professions: An Emerging Prospective*, 5 SOC. WORK & OCCUPATIONS 259, 260–62 (1978) (discussing “variations” among definitions).

165. *See POUND*, *supra* note 9, at 9. The Bar is threatened with deprofessionalization because of its actual or perceived indifference to its community service responsibility. Jerold S. Auerbach, *What Has Legal Education to do with Justice?*, 3 SOC. RESP.: JOURNALISM, L., MED. 36, 42 (1977); *see also* POUND, *supra* note 9, at 354 (asserting that inattention to service is a result of the “increasing bigness of things in which individual responsibility” is diminished or lost, and “economic pressure upon

heart of the concept of professionalism is the recognition that service to others must accompany special position, privilege, and knowledge. Power must not be divorced from moral responsibility. Redefining elitism means equating privilege with obligation.

Failure to fulfill the duty of public service means that attorneys can fail morally in a way in which an ordinary citizen cannot.¹⁶⁶ The specter of such failure is especially troublesome because so few societal forces now emphasize the importance of community. Lawyers are in a unique position to lead the fight against the excesses of individualism. To do so, they must assume their duty of public service.

B. The Bar Must Provide a Greater Service to the Community

I accordingly recommend two proposals for reform: (1) legal education should take greater cognizance of interdisciplinary studies and their moral lessons, and (2) each attorney should be required to devote a percentage of her time to public service.

1. *Reforms to Legal Education*—Law schools must produce students who have the mental tools that will enable them to assume the moral challenges which law presents.¹⁶⁷ Law presents a moral challenge because law affects human interaction and the way that people perceive their place in society.

Professors in every class should set aside time to discuss the law's moral dimensions so that students will understand better the implications of what they do as lawyers. Discussion

the lawyer may make the money-making aspect of the calling the primary or even the sole interest").

166. See Roma, *supra* note 126, at 135. Roma uses the example of the policeman to demonstrate how moral responsibility derives from special privilege:

The policeman can be held morally responsible for not using force to prevent disorder in a way that I cannot. The fact that he can be held morally remiss only serves to indicate that he does have a prima facie right to the use of such force. The ordinary citizen under ordinary conditions is not morally obligated, except with reference to his own behavior, to prevent disorder.

Id.

167. See Bryant G. Garth, *Legal Education and Large Firms: Delivering Legality or Solving Problems*, 64 INDIANA L.J. 433, 444-45 (1989).

of ethical issues simply should not be relegated to a required class on legal ethics. Improperly pigeonholing ethical discourse suggests that ethics are only peripherally relevant to substantive legal issues. The unfortunate reality, however, is that law school classrooms seldom discuss values and morality.¹⁶⁸ One law student pointed out that “[i]n the first year of law school I had no class in which a solitary word was ever said about right or wrong, should or ought, or the ethical responsibility of lawyers.”¹⁶⁹ This is unfortunate because studies demonstrate that professional schools do affect values and students’ moral judgments.¹⁷⁰ Students must understand that their actions as lawyers affect not only themselves and their clients, but society as well.

Law students also should be required to take courses from other university departments, especially the humanities.¹⁷¹ If lawyers are to properly serve others by molding the law in a meaningful way, they must have training, for example, in world history and comparative and political philosophy. A rudimentary understanding of the past is necessary if a lawyer is to fathom the social repercussions of promulgating a law, arguing a point, and representing a client. Such breadth also is necessary for the lawyer to avoid becoming a specialist unable to transcend his narrow world.¹⁷² History and the history of thought contain important messages about social institutions and their founding values. The study of history and cultures does not reveal that values or cultures are relative.¹⁷³ To the contrary, such study demonstrates that there are good and bad values. Lawyers must embrace worthy ideas

168. See, e.g., *id.* at 440 (suggesting that “[l]aw professors have some difficulty teaching core values” because brilliant teaching is irreverent of such values).

169. James R. Elkins, *The Pedagogy of Ethics*, 10 J. LEGAL PROF. 37, 49 (1985). In one of my own law school classes on corporations, an inquisitive student asked an ethical question about the proper scope of regulation during a discussion about government regulation of business. The teacher replied that such issues were beyond the scope of his class.

Some may reel at the thought of “teaching” morality. Professor W.I. Matson, however, argues that “effective mind control is essential to a sound society.” W. I. Matson, *Morality Pills*, 77 ETHICS 132, 132 (1962). Students must be allowed to engage in reasoned debate about ethical ends. *Id.* Matson notes that Plato also thought that virtue must be taught. *Id.* at 134–35.

170. Salomon, *supra* note 73, at 465.

171. See, e.g., *id.* at 467 (suggesting an interdisciplinary approach to the teaching of law).

172. See *supra* notes 42–50 and accompanying text.

173. See *supra* note 34.

because lawyers' ideas frequently are transformed into laws that profoundly affect human interaction.

2. *Mandatory Public Service*—Attorneys must be required to devote a certain portion of time to the public interest.¹⁷⁴ Currently, lawyers find it easy to shun their public duties because, as they see it, they have no public duties. Only one of the fifty rules of the ABA's Model Rules of Professional Conduct discusses the basic responsibility of the lawyer to provide legal services to those unable to pay.¹⁷⁵ If lawyers are not fulfilling their professional responsibilities, it is because nothing is expected of them.¹⁷⁶ Lip service to the ideal of service is not sufficient.¹⁷⁷ Attorneys must be required to perform public service.¹⁷⁸

The extent of service should vary according to each attorney's capacity. Less should be required of the attorney who is barely able to support her family; by contrast, more should be required of the attorney who is financially successful.¹⁷⁹ Additionally, an attorney should be able to discharge her obligation through a broad array of activities which match the attorney's interests and expertise when possible.¹⁸⁰ Pro bono work today consists primarily of assistance to the indigent and

174. See generally David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 MICH. BAR J. 280 (1985) (arguing that lawyers are morally obligated to perform pro bono work, and proposing a plan to implement this obligation). But see Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78 (1990) (arguing that mandatory pro bono misses the point, and that the Bar should instead focus its energies on providing legal assistance to those unable to find it).

175. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1992).

176. But see Lisa G. Lerman, *Symposium on Mandatory Pro Bono: Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1142-43 (1991) (examining the nature and scope of statutory barriers which hinder the ability of federal government lawyers to provide pro bono representation to the poor when that representation might conflict with government interests).

177. "It is, therefore not enough to set forth a code of ethics as a lamp for straying feet." Edward A. Ross, *The Making of the Professions*, 27 ETHICS 67, 75 (1916-17). Professor Auerbach has argued that the Bar should lose its exemption from government regulation if practitioners do not obligate themselves to provide public service. Auerbach, *supra* note 165, at 42.

178. The proper form of regulation—government regulation, self-regulation, or regulation by the market—goes beyond the scope of this Note. The actual form of regulation is arguably of little consequence, as long as public service is actually performed and attorneys and the public support the form.

179. But see Smith, *supra* note 163, at 31 (arguing that attorneys should be required to tithe, that is, to devote at least one-tenth of their time to public service).

180. *Id.* at 28-29.

others similarly situated.¹⁸¹ Such a conception of public service is problematic. First, attorneys may refuse to engage in pro bono work because they find such work too closely tied to causes that they do not support.¹⁸² Second, such a definition of service is too narrow. An attorney should be allowed, for example, to choose whether to aid the indigent, draft proposals for a more efficient judicial system, assist law schools in revising curricula, or perform government service.¹⁸³ A trial attorney may wish to assist a local prosecutor's office by assuming cases that the prosecutor otherwise would have insufficient resources to pursue.¹⁸⁴ A corporate lawyer might assist an organization to secure nonprofit status and draft its articles of incorporation. A tax lawyer might help a municipality revise its property tax regulations to better reflect actual property value. The nature of the work actually performed is perhaps less important than the motivation behind that work. Lawyers must demonstrate their commitment to the community.

Today's Bar, like today's society, reflects society's individualist bent. By virtue of the public nature of their work, however, lawyers have an obligation to transcend self-interest and to serve the community. The fulfillment of public duty should begin with instruction demonstrating that the public

181. Course titles for pro bono training offered by the Washington, D.C. Bar Public Services Corporation for 1993-94 include: Guardianship and Nursing Home Issues, Public Benefits, Administrative Law Advocacy, Consumer Law Training, Landlord and Tenant Training, Domestic Violence Training, AIDS Advocacy, Legal Needs of the Homeless, Rights of D.C. Prisoners, Providing Pro Bono Representation to Veterans in the U.S. Court of Veterans Appeals, and Family Law: Child Custody, Social Security Disability.

182. Some mandatory pro bono programs adopted by law schools have been criticized for forcing students to support political agendas that students do not endorse. Christopher Sterbenz, *Mandatory Pro Bono: Oxymoron and Outrage*, N.J. L.J., May 2, 1991, at 9 (noting that critics of law school public service requirements argue that students subjected to such requirements often are permitted to work only for carefully screened organizations with a very liberal or progressive agenda); see also Terrell & Wildman, *supra* note 105, at 420-22 (criticizing the approach to public service that equates professionalism to assisting the poor as the politicalization of professionalism).

183. See generally Smith, *supra* note 163, at 28-29 (stating that underrepresentation is evident in fields such as the environment, consumer protection, civil liberties, privacy, and the poor, and that these types of work should qualify as public service).

184. Marion County, Oregon pursued such a strategy in 1982. UPI, May 29, 1982, available in LEXIS, News Library, Wires File. Because Marion County had an insufficient number of prosecutors to handle cases, private attorneys assumed responsibility for prosecuting first-offense drunk driving cases and theft, forgery, bad check, and criminal mischief cases involving less than \$2000. *Id.*

realm is inextricably tied to a lawyer's work. Out of deference to those binding ties, lawyers must serve the community from which they derive privileges. If society is to change, it must be led,¹⁸⁵ and it must be reminded that we are inescapably interdependent on each other.¹⁸⁶

CONCLUSION

In an attempt to strengthen our society by glorifying the individual, we actually have weakened it. Civilization's indicant is the acceptance of common values. Democratic systems are impossible to maintain without some degree of consensus on values, because values are the foundation of the law and therefore determine our place as individuals relative to society. Charles Lindblom's warning is appropriate: "[E]ither there will be a less liberal, more collectivist polyarchy, or there will be no polyarchy at all."¹⁸⁷ In our eagerness to destroy the barriers to individual liberty, we have enervated the glue of community which holds together a polity. Americans today seem to consider themselves free from moral demands by the grace of value relativity.

The universal appeal of "freedom," "efficiency," and "progress" has helped to create a society of individuals. Our liberal democracy consequently is at risk of losing its moral bearings. The Bar can help to give direction. Stripped of many of its intemperances, the Bar can lead by example and manifest the ethos of service to the community that should distinguish it as a profession. Society needs a force that emphasizes the virtue of selflessness. The Bar's task is to perform that exigent service.

185. One author has claimed that lawyers are natural community leaders because of their education and training. Max Rosen, *The Social Conscience of a Lawyer*, 69 IOWA L. REV. 319, 324, (1984).

186. American political tradition did not begin in Philadelphia or in Florence, but in Athens. See WILL, *supra* note 6, at 164. Athenians recognized our interdependence.

187. LINDBLOM, *supra* note 40, at 166. Lindblom uses "polyarchy" interchangeably with "democracy," but prefers "polyarchy" because it is more suggestive of the distribution of decision-making power in liberal democracies. See *id.* at 132.