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The Idealist Discourse of Legal Professionalism in Maryland: Delineating the Omissions and Eloquent Silences as a Progressive Critique

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ARTICLE

THE IDEALIST DISCOURSE OF LEGAL PROFESSIONALISM IN MARYLAND: DELINEATING THE OMISSIONS AND ELOQUENT SILENCES AS A PROGRESSIVE CRITIQUE

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I. INTRODUCTION: LIKE ROSE-COLORED GLASSES

Several years ago, I co-wrote a book on the sociology of education[1] with Reverend Dr. Michael S. Onwueme.[2] Included in the book was a chapter titled "Teaching as a Profession." We intended for the book to be used by undergraduate students in their study of education and social sciences. Many of my academic peers who previously handled such a topic tended to grapple with it by asking and trying to answer one major question: Is teaching a profession? After first indulging the standard trait approach[3] to the question, I reasoned that it probably mattered little how one came out in answering this basic descriptive or "What" question in any event. Thus, I decided to do something slightly different by posing

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[1] MICHAEL S. ONWUEME & KEZ GABRIEL-UGBOR, EDUCATION AND SOCIETY: THE SOCIOLOGY OF EDUCATION (Nigerian Educational Research Association 1994).

[2] Reverend Dr. Michael S. Onwueme is a professor emeritus of education and religious studies at the University of Benin in Nigeria.

[3] The standard strategy was to outline upwards of ten characteristics of a profession, including: (1) skill based on theoretical knowledge; (2) long period of education and training; (3) entry regulation or license; (4) life-long commitment or career; (5) occupational association; (6) code of ethics; (7) independence or autonomy; (8) altruism or public service ideal; (9) occupational journal or magazine; and sense of community. *Id.* at 116, 122. Then, methodically and systematically process teaching, teacher preparation, and teachers through each itemized trait or characteristic, and using the resulting grade balance sheet to finally make an overall determination as to the adjudged status of teaching as a profession. Employing basically the same "trait methodology," some of the appraisers and assessors of the professional claims of teachers and teaching ended up answering yes, others ended up answering no, while a third group would conclude that it depended on how one looked at it or what set or combination of the characteristics of a profession one chose to emphasize. *Id.* at 122.

higher–order "Why" and "Whose Interests" analytic questions to reach my conclusions.[4] I also proceeded to restate the chapter as "Teaching and the Question of Professionalization." With the purposes of the exercise fundamentally recast, the material immediately became more analytic, enterprising, and even provocative.[5]

In this article, I attempt to bring the same ethic of progressive and transformative critique to bear on the "Ideals of Professionalism," the recently released document by the Commission on Professionalism (hereinafter the "Commission") of the Court of Appeals of Maryland.[6] I specifically do so by delineating and analyzing some of the important omissions and eloquent silences in the thoughtful and well-intentioned document. This document represents a culmination of efforts that began in 2003 to strengthen and promote the standing of the legal profession under the direction of a Judicial Task Force on Professionalism.[7] Eight subcommittees of the Commission studied and reported upon several areas of concern identified by the Judicial Task Force on Professionalism.[8] The task force's goal was to identify concerns that appeared to threaten the historic glory and high professional ideals of the Maryland legal community, while also protecting and promoting the professional ideals.[9]

The Commission studied several facets of lawyers' professional conduct and formulated methods and recommendations intended to raise professionalism standards in the Maryland legal community. The Commission developed a value system of professional conduct, featuring a set of standards that lawyers should aspire to, together with associated characteristics of accountability and trustworthiness; education,

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[4] For example: Why would teaching and teachers want to join the ranks of a profession and professionals? Why would they not want to professionalize? Whose interests would society serve best by transforming the lower middle class occupation of elementary and secondary school teaching into a rock-solid middle class profession of powerful, prestigious, and privileged instructional experts?

[5] I actually found it a little easier to cut to the chase after prefacing the undertaking with the standard trait approach by going to the unstated heart of the professionalism matter, namely, the pursuit of social, cultural, and expert (i.e., skill and knowledge based) power, authority, wealth, privilege, and prestige. *See generally* P.J. CORFIELD, POWER AND THE PROFESSIONS IN BRITAIN, 1700–1850 (Routledge 1999); ELIOT FRIEDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (Univ. of Chicago Press 1986); and TERENCE J. JOHNSON, PROFESSIONS AND POWER (Macmillan 1972). Most of my academic peers who reviewed the material afterwards considered it refreshing, interesting, transforming, and even progressive.

[6] MD. CODE ANN., CTS., JUDGES & ATTORNEYS § 16-800 app. (Ideals of Professionalism) (LexisNexis 2011), *available at* http://www.courts.state.md.us/professionalism/pdfs/ideals.pdf (hereinafter "Ideals of Professionalism").

[7] *Id.*

[8] *Id.*

[9] *Id.*

mentoring, and excellence; a calling to public service; as well as fairness, civility, and courtesy.[10] The stated goal was "to maintain and enhance the role of [Maryland] legal professionals as protectors of the rule of law."[11]

While the principles set forth by the Commission are facially well-intentioned, the document is overly idealistic as it views the world of law, lawyers, law practice, and legal professionalism through insular and antiseptic rose-colored glasses. As Millie Jackson's lyrics entitled "Rose Colored Glasses"[12] would suggest, such rose-colored glasses would show mostly the good part of conventional legal professionalism and understate the complex truth that many progressive lawyers would like to bring back into the professionalism equation.

The Ideals of Professionalism do a good job of covering standard fare, in their present form, but they are incomplete, rose-colored, and antiseptic for our history. For one, the core values identified in the prefatory definition of professionalism not only omit equally important values of professional law practice such as justice, fairness, and fidelity to resolving disputes, but also read like rose-colored glasses that show mostly the good side but silence the problematic power-relations aspects. Second, there is not a consensus conception of law, legality, profession, and professionalism. Additionally, legal practice is not one size fits all as legal professionals are not a homogeneous group who see their work and the world the same way. Third, there is our historical and contemporary experience of the ready amenability of law, the legal system, and the legal profession to oppressive abuses and misuses. They range from the legalized machinations of Nazi Germany, apartheid South Africa, and American legalized historical racial and gender abuses, to the contemporary realities of Bush-era enablement of torture, human rights violations, privacy invasions, and negations of civil liberties. Practically, the Ideals of Professionalism largely omit nonstandard but important, timely, and progressive legal professionalism issues that it ought to have named and addressed directly. For that matter, the document promoting integrity and trustworthiness failed to formulate a clear protocol for attenuating the major concern in our legal community and the larger society that many lawyers are scandalous enablers of the rich and powerful. This article submits that these legitimate but silenced professionalism issues must be addressed.

Moreover, it likely makes no practical difference whether such legalized violations are effected "pursuant to law" or "under color of law" once they become institutionalized through the legitimizing prerogatives

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[10] *Id.*

[11] *Id.* at 2.

[12] MILLIE JACKSON, *Rose Colored Glasses*, on JUST A LI'L BIT COUNTRY (SouthBound UK 1981).

and practices of the American Constitution and laws; the Congress and legislators; the Presidency and executive administrators; as well as the Supreme Court and the justices, judges, lawyers, and conventional legal professionalism. Like any good thing, there can be excessive conventional representations of the ideals of professionalism to the point of erasing any sense of the complex realities of professional law practice.

Accordingly, this article will attempt to highlight some of the omissions and eloquent silences that act as a countervailing moral and ethical imperative in the progressive practice of law and the higher ethical conduct or portrayal of legal professionalism. Part II provides an overview of the document of interest, namely, the Ideals of Professionalism. Part III briefly examines the concepts of law, profession, and professionalism to set forth the framework for the progressive critique. Part IV integrates the preceding sections to delineate and analyze some of the important omissions and eloquent silences of the Ideals of Professionalism.

II. OVERVIEW OF THE "IDEALS OF PROFESSIONALISM"

The "Ideals of Professionalism" (hereinafter "the Ideals") as promulgated by the Commission on Professionalism and approved by the Court of Appeals of Maryland on March 8, 2010, is an eight-page document divided into eight sections.[13] These sections are the prefatory definition of professionalism's core values; a preamble; itemized ideals of professionalism; accountability and trustworthiness; education, mentoring, and excellence; a calling to service; fairness, civility, and courtesy; and a concluding section that integrates the material in a summary.[14] According to the opening prefatory definition, "*Professionalism* is the combination of the core values of personal integrity, competency, civility, independence, and public service that distinguish lawyers as the caretakers of the rule of law."[15] Thereafter, the preface invokes the enabling or grandfathering statute for the Ideals, stating that "[t]hese Ideals of Professionalism emanate from and complement the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), the overall thrust of which is well-summarized in . . . the Preamble to those Rules . . . ," which understandably echoes or evokes the Ideals.[16]

The Preamble to the Ideals begins with the weighty reminder that Maryland

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[13] Ideals of Professionalism, *supra* note 6.

[14] *Id.*

[15] *Id.* at 1 (emphasis added).

[16] *Id.*

> [l]awyers are entrusted with the privilege of practicing law. They take a firm vow or oath to uphold the Constitution and laws of the United States and the State of Maryland. Lawyers enjoy a distinct position of trust and confidence that carries the significant responsibility and obligation to be caretakers for the system of justice that is essential to the continuing existence of a civilized society.[17]

The Preamble follows with the observation that as a custodian of the system of justice, each lawyer "must be conscious of this responsibility and exhibit traits that reflect a personal responsibility to recognize, honor, and enhance the rule of law in this society."[18] The Preamble ends by emphasizing that the "Ideals and the characteristics set forth below are representative of a value system that lawyers must demand of themselves as professionals in order to maintain and enhance the role of legal professionals as the protectors of the rule of law."[19]

Following the Preamble is a subheading itemizing specific standards or Ideals of Professionalism.[20] They urge lawyers to aspire to put fidelity to clients above their self-interests; to be a model of respect and regard for clients and other disputants; and to seek equality and fairness by avoiding all forms of wrongful discrimination in all activities.[21] They ask lawyers to preserve, improve, and make available to all and for the common good the law, the legal system, and other dispute resolution processes.[22] They urge each lawyer to aspire to practice law with a personal and mutually collegial commitment to the rules governing the profession.[23] They ask each lawyer to preserve the generationally inherited dignity and integrity of the profession by his or her conduct and to strive for excellence in legal practice to promote the interests of clients, the rule of law, and the welfare of society.[24] Finally, they ask lawyers to recognize that law practice is a calling in the spirit of public service rather than merely a business pursuit.[25]

The next section of the Ideals, titled "Accountability and Trustworthiness," urges each lawyer to understand certain principles.[26] First, punctuality promotes a lawyer's credibility while tardiness and

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17 *Id.* at 1-2.
18 *Id.* at 2.
19 Ideals of Professionalism, *supra* note 6, at 2.
20 *Id.*
21 *Id.*
22 *Id.* at 2-3.
23 *Id.* at 3.
24 *Id.*
25 Ideals of Professionalism, *supra* note 6, at 3.
26 *Id.*

neglect denigrate the individual lawyer and the legal profession.[27] Second, personal integrity, by way of keeping one's commitments to clients, opposing counsel, and the courts, is essential to the honorable practice of law.[28] Third, honesty and candid communication, subject to the legitimate limitation of confidentiality, promote credibility with clients, opposing counsel, and the courts.[29] Fourth, the lawyer must scrupulously resist monetary pressures that cloud professional judgment and thereby tax credibility and integrity.[30]

The Ideals then move onto "Education, Mentoring, and Excellence."[31] This section instructs each lawyer to use continuing legal education programs to remain current in legal knowledge and familiar with changes in the law affecting a client's interests.[32] It asks lawyers to take on the responsibility of promoting the image of the legal profession by appropriately educating non-lawyers and showing the importance of professionalism.[33] It also implores senior lawyers to willingly mentor and teach less experienced lawyers both by setting a good example and by ensuring that each mentee learns and adheres to the principles enunciated in the Ideals.[34]

In "A Calling to Service," the Ideals state that each lawyer should serve the public interest by communicating clearly, promptly, openly, and respectfully with clients, opposing counsel, and the courts.[35] The Ideals state that lawyers should be mindful of the impact of their actions on others when scheduling events.[36] Further, lawyers should keep clients informed of the status of important matters affecting them and the nature and frequency of expected communication or information.[37] They also state that each lawyer should always explain the client's options with sufficient detail for the client to make an informed decision, be respectful in all interactions with clients, opposing counsel, staff, and the courts, as well as "accept responsibility for ensuring that justice is available to everyone and not just those with financial means."[38]

Next, "Fairness, Civility, and Courtesy" states that a lawyer should act fairly, civilly, and courteously in all dealings as a way to promote the system of justice and zealously promote the client's interests without

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27 *Id.*
28 *Id.*
29 *Id.* at 3-4.
30 *Id.* at 4.
31 Ideals of Professionalism, *supra* note 6, at 4.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.* at 4-5.
36 *Id.* at 5
37 Ideals of Professionalism, *supra* note 6, at 5.
38 *Id.* at 5.

recourse to underhanded yelling, intimidation, and other bullying tactics.[39] This section also asks each lawyer to remain objective in advising each client on the strengths and weaknesses of his or her case and not to allow the lawyer's actions or advice to become a tool for a client's improper motives, unethical directions, animosity toward an opposing party, or ill-advised wishes.[40] Moreover, this section asks lawyers to use negotiation and alternative dispute resolution to achieve a client's objectives as appropriate, to use litigation tools to strengthen a client's case but not to harass, burden, or intimidate an opposing party, and as a matter of fairness, to note explicitly any changes to documents submitted for review by opposing counsel.[41]

Lastly, a concluding section rounds out the Ideals in a summary fashion by stating that a lawyer should understand that professionalism requires civility in all dealings, respect and empathy for different points of view, and showing courtesy and maintaining decorum in the court.[42] Lawyers enhance professionalism by "preparing scrupulously for meetings and court appearances and by showing respect for the court, opposing counsel, and the parties through courteous behavior and respectful attire."[43] Lawyers should demonstrate courtesy and respect in all contexts, including with clients and colleagues, in the courtroom, with support staff, and with court personnel.[44] "Hostility between clients should not become grounds for a lawyer to show hostility or disrespect to a party, opposing counsel, or the court."[45] Patience enables the lawyer to exercise restraint, defuse anger, and reduce tension and animosity between parties or lawyers in volatile situations.[46] "[T]he Ideals of Professionalism are to be observed in all manner of communication, and a lawyer should resist the impulse to respond uncivilly to electronic communications in the same manner as he or she would resist such impulses in other forms of communication."[47]

We turn now to the part of this article that broaches multidimensional conceptions of law, profession, and professionalism to set forth the analytic framework that helps lay bare some of the important omissions and eloquent silences. The hope is that the Maryland Bar and Bench would appreciate that the thoughtful and well-intentioned document in place today is nonetheless incomplete. In candor, the document is still a

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39 *Id.* at 5-6.
40 *Id.* at 6.
41 *Id.* at 6-7.
42 *Id.* at 7.
43 Ideals of Professionalism, *supra* note 6, at 7.
44 *Id.*
45 *Id.*
46 *Id.* at 8.
47 *Id.*

work in progress because in its present form, it has, as it were, left for another day (as many courts would!) some of the issues and concerns that either were never properly before the Commission or could be better handled at a different time or occasion. It is anybody's guess when that other time or occasion may arrive and whose criteria will be used to decide what is "properly before the Commission." It will suffice to say that being mindful of unfinished business sometimes makes one more circumspect about overstating even a working masterpiece.

III. OPERATING CONCEPTIONS OF LAW, PROFESSION, AND PROFESSIONALISM

A. Multidimensional Conception of Law

We start delineating our analytic framework by first considering the relevant conceptions of law because the purpose of the Ideals is ultimately to convey how best to practice law as a noble profession. For present purposes, we propose a five-fold conception of law that we hope broadly reflects the myriad approaches in jurisprudential literature. This is no elective work because unless we ask the necessary questions or raise the relevant issues, we would never broach the appropriate answers or the reasonable resolutions to the omissions and silences of interest here. *Functional analytically* speaking, law is the ordered process or institutional framework for effecting governmental social control,[48] resolving particular disputes, and modulating general social conflicts.[49] *Analytic-jurisprudentially* speaking, law is that command, order, or normative stipulation backed by an express or implied threat of punishment for failure to obey or comply.[50] Under a *critical or legal realist analytical* approach, law not only refers to context-driven value-based decisions made by judges and other authorized officials to resolve disputes,[51] but also represents politics (i.e., the imperatives of power and resource allocation) by other means in a similar fashion as war is politics and diplomacy by alternate means.[52] Under the *post-modernist analytical* approach, law is knowledge-power or expert-skill-power encoded as discourse, discursive practice, rhetoric, and symbolic representation in

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[48] DONALD BLACK, THE BEHAVIOR OF LAW (Academic Press 1976). *See also* Jack P. Gibbs, *Law as a Means of Social Control*, SOCIAL CONTROL: VIEWS FROM THE SOCIAL SCIENCES 83 (Jack P. Gibbs ed., 1982).

[49] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (Carolina Academic Press 5th ed. 1997).

[50] Gibbs, *supra* note 48, at 89 (referencing exponents of analytic jurisprudence like John Austin, Max Weber, E. Adamson Hoebel and Hans Kelsen).

[51] *Id.* at 91 (referencing exponents of legal realism like Oliver Wendel Holmes, Kurt N. Llewellyn, and Jerome Frank).

[52] *See generally* MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (Thompson Educ. Publishers, Inc. rev. ed., 1994).

historically specific sites and modalities of enunciation.[53] From this vantage point, lawyers are traders, who cater mostly to the powerful, occasionally promoting the rule of law or maintaining law and order in the contexts of tangible social, economic, political, and cultural inequalities and conflicts.[54]

For its part, *natural law jurisprudence* views law as the right-oriented, morally just, or justifiable enterprise of governing human behavior in accordance with clear and consistent rules, procedures, and principles of legality.[55] Law refers to those morally grounded propositional principles that govern the application of rules, based on past legal practice, to discern the morally justifiable unique correct answer to particular disputes or questions.[56] Or else, legal claims are principle driven and constructive interpretive judgments combine retrospective and prospective elements of past official action and judicial practice in an unfolding narrative seeking to discern the best possible moral answer to particular disputes or questions.[57] In the process of such a constructive interpretation, which necessarily involves assigning value or purpose to the interpretation, the presumed purpose of law is to "constrain or justify the exercise of governmental power."[58] Integrity in law, and thus in legal practice and legal professionalism, results best from interpretations that give the law a coherent moral vision, that is, interpretations that "express a coherent conception of justice and fairness."[59]

The aim has been to emphasize that there is no unitary conception of law or legality, the very subject matter of legal practice and legal professionalism. Rather, there are equally legitimate and competing conceptions of law and legality that have far-reaching implications for lawyers, law practice, and legal professionalism. Arguably, appreciating and providing for the nuances and ramifications of the differing conceptions of law and legality, even if by way of annotations and multiple tracking, ultimately would be more complete and realistic for the everyday world of the legal profession. We turn now to consider the competing conceptions of a profession to appreciate and provide for the

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[53] *See generally* LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION (Maureen Cain & Christine B. Harrington eds., N.Y. Univ. Press 1994).

[54] *Id.*

[55] BIX, *supra* note 49, at 82-86 (referencing a major historical exponent of Natural Law Theory, Lon Fuller).

[56] *Id.* at 87-89 (referencing 'the Right Answer thesis' as contained in the early writings of a major contemporary exponent of natural law theory. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Univ. Press 1999) (1977).

[57] BIX, *supra* note 49, at 89-91 (referencing "the principle of Best Fit Answer" as contained in the later work of a major contemporary exponent of natural law theory. *See* RONALD DWORKIN, LAW'S EMPIRE (Belknap Press of Harvard Univ. Press 1986).

[58] BIX, *supra* note 49, at 91.

[59] *Id.*

complexities of the real world of law, lawyers, and professional law practice.

B. Multidimensional Conception of Profession

Generally, when we speak in terms of a job, an employment, a career, an occupation, or a profession, we seek to characterize the work people do part-time or full-time for income, advancement in rank, personal growth and fulfillment, service to others, and the pursuit of socially valued resources of power, wealth, and prestige.[60] While for present purposes we shall consider an occupation as simply the work or employment in which an individual is engaged to earn a living, the more profound notion of a profession is quite a preeminent sociological phenomenon.[61] What, then, is a profession? Disregard for now the satirical but suggestive medical service inspired quip made by 1925 literary Nobel Laureate, George Bernard Shaw, to the effect that professions "are all conspiracies against the laity."[62] Roughly half a century ago, respected authority Professor A. M. Carr-Saunders, who was fondly known as "the fine British student of the professions," opined that

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[60] ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 112-13.

[61] *Id.* at 113. Further, all three major classical sociologists representing conservative, liberal, and radical orientations grappled with the professions and occupational groups as key aspects of the then emerging industrial social organization between the eighteenth and nineteenth centuries. For the more conservative Emile Durkheim, it was in terms of the social stability and social change effects of the division of labor (i.e., occupational differentiation and specialization), including the professional associations that he believed were like a middle entity between the individual and the more distant national government. For the liberal-conservative pragmatic Max Weber, it was in terms of the rise of skilled and credentialed experts and professionals as propertied middle classes, as well as the rise of formal organizations and the increasing specialization, bureaucratization, and rationalization of social life. For the radical Karl Marx, it was in terms of the headache posed to his program of class consciousness, class conflict, class struggle, and socialist transformation by the ambiguous petty-bourgeois class of skilled professionals and intellectuals. *See generally* SHAUN BEST, A BEGINNER'S GUIDE TO SOCIAL THEORY (Sage Publications Ltd. 2003) (2004); GEORGE RITZER, SOCIOLOGICAL THEORY (McGraw-Hill 2008) (1983).

[62] GEORGE BERNARD SHAW, THE DOCTOR'S DILEMMA: WITH A PREFACE ON DOCTORS (Penguin Books 1957) (1946). Apparently, George Bernard Shaw had a bad experience having a toe nail problem fixed by doctors whom he believed covered each other's malpractice and had an antisocial vested interest in peoples' ill health! Shaw also was reflecting on a situation in which an investigative journalist posed as an influenza patient for a major London newspaper and got different advice and prescriptions from the eminent physicians in the city at the end of the nineteenth century. "But the effect of this state of things is to make the medical profession a conspiracy to hide its own shortcomings. No doubt the same may be said of *all professions. They are all conspiracies against the laity*; and I do not suggest that the medical conspiracy is either better or worse than the military conspiracy, the legal conspiracy, the sacerdotal conspiracy, the pedagogic conspiracy, the royal and aristocratic conspiracy, the literary and artistic conspiracy, and the innumerable industrial, commercial, and financial conspiracies, from the trade unions to the great exchanges, which make up the huge conflict which we call society. But it is less suspected." *Id.* at 17-18 (emphasis added.).

a profession is "an occupation based upon specialized intellectual study and training, the purpose of which is to supply skilled service or advice to others for a definite fee or salary."[63] An even more glorious and contemporary rendition posits that a "profession is a vocation founded upon specialized educational training the purpose of which is to supply disinterested counsel and service to others, for a direct and definite compensation, wholly apart from expectation of other business gain."[64]

Notwithstanding that society pejoratively refers to prostitution as the oldest profession, the historical fact is that classically there were only three professions: divinity, law, and medicine.[65] Generally speaking, and leaving aside the broader functionalist (conservative), interactional (liberal), and conflict (radical) perspectives,[66] there are four conceptual approaches to understanding professions in the relevant literature. First, there is the typical trait approach, which would list upwards of ten characteristics of a profession for examining a particular occupation or profession of interest.[67] Second, there is the related historical-descriptive

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[63] ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 113.

[64] COMPETITION COMMISSION, ARCHITECTS' SERVICES, ch. 7, para. 123 (1977), *available at* http://www.competition-commission.org.uk/rep_pub/reports/1976_1979/fulltext/108c07.pdf.

[65] R.W. PERKS, ACCOUNTING AND SOCIETY 2 (Chapman & Hall 1993) as cited in the Wikipedia entry for "Profession", http://en.wikipedia.org/wiki/Profession (last visited Mar. 17, 2011).

[66] A *theoretical perspective* is a broad assumption about society, social organization, and social or human behavior that forms a point of view for studying, examining, explaining, or analyzing particular social phenomena, issues, or problems. The "Functionalist Perspective" assumes that society or the social system, much like biological organisms, is made of a structure of interdependent parts, each of which has a consequence or function for the orderly survival, maintenance, and incremental progress of the whole system. It is a conservative-reactionary or big-picture orientation. The "Interactional Perspective" holds that society or social experience comes down to those small-scale social structures and processes, transactions, or interactions by which people act toward, respond to, and influence one another in everyday life. It is a liberal-pragmatic or small-is-beautiful orientation. For its part, the "Conflict Perspective" views society or social formation as an arena of struggle, conflict, and change, fostered through and by various social classes and social conflict groups, over socially valued but scarce resources such as power, wealth, and prestige. This is a critical-progressive macro-level or big picture orientation. *See generally* BEST, *supra* note 61; RITZER, *supra* note 61.

[67] While the so-called Characteristics of a Profession can range between seven and ten, a rather extensive and almost exhaustive list appears under the entry for "Profession" in the online encyclopedia, Wikipedia, as highlighted below:

1. Skill based on theoretical knowledge;
2. Professional association;
3. Extensive period of education;
4. Testing of competence;
5. Institutional training;
6. Licensed practitioners;
7. Work autonomy;
8. Code of professional conduct or ethics;
9. Self-regulation;

approach, which seeks to establish the historical sequence or stages through which an occupation acquires the characteristics of a profession.[68] Third, there is the ideal-type analytic approach, which uses two major analytic criteria, namely, control of entry and service by the organized profession and practitioner autonomy in rendering the service, in locating occupational groups on an occupation-profession continuum, with law and medicine as the ideal-type, classic professions.[69]

Fourth, there is the power-structural analytic approach, one version of which fundamentally sees the professions as pressure groups that seek to maximize their power and privilege in society.[70] Based on this approach, the service ideals and codes of ethics exist as much for the public interest as for the personal and professional interests in securely maximizing socially valued resources of power, wealth, and prestige. Similarly, entry regulations such as credentials, professional exams, licensure, and accreditation exist not simply to provide clients with high caliber service, but to also serve as a gate-keeping strategy to minimize competition and enable practitioners to maximize the return on their investment through a

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10. Public service and altruism;
11. Exclusion, monopoly and legal recognition;
12. Control of remuneration and advertising;
13. High status and rewards;
14. Individual clients;
15. Middle-class occupations;
16. Male-dominated;
17. Ritual;
18. Legitimacy;
19. Inaccessible body of knowledge;
20. Indeterminacy of knowledge.

Wikipedia, Profession, http://en.wikipedia.org/wiki/Profession (last visited March 15, 2011).

[68] Terrence J. Johnson has ably criticized this approach for being only marginally analytic and for canvassing a misleading idea of the "natural history of professionalism" that has produced contradictory results for the United States as compared to the United Kingdom. For the United States, the historical sequence was: (1) a full-time occupation emerges; (2) a training institution is established; (3) a professional association is founded; (4) state regulation or legal protection is secured through political agitation; and (5) a formal code of ethics is adopted. For the United Kingdom, the historical sequence was: (1) a professional association; (2) change in the name of the occupation; (3) code of ethics; (4) agitation to obtain state recognition or mandate; and (5) the concurrent development of training facilities. *See* ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 116 (following JOHNSON, *supra* at note 5, at ch. 2). Another source on the American experience also identifies the historical milestones through which an occupation became a profession as follows: (1) it became a full-time occupation; (2) the first training school was established; (3) the first university school was established; (4) the first local association was established; (5) the first national association was established; (6) the codes of ethics were introduced; and (7) state licensing laws were established. PERKS, *supra* at note 65, at 2.

[69] Eric Hoyle, *Professionality, Professionalism and Control in Teaching, in* 1 MANAGEMENT IN EDUCATION, 314-15 (V. Houghton, et al. eds., 1975).

[70] JOHNSON, *supra* note 5, at ch. 2.

type of monopoly.[71] The other version of the approach is Donald Treiman's structural theory of occupational prestige, according to which occupational prestige is ultimately rooted in power resources and relations.[72] Validated with international comparative data, the key propositions are that: (1) specialization through the division of labor in society creates occupational differentials in power resources (expert and technical knowledge, skills, authority, and wealth); (2) which in turn produce differentials in occupational privilege (autonomy, trust, independent judgment, working conditions, etc.); and (3) the two together result in differentials in occupational prestige.[73]

Once again, the point has been to appreciate that there is no unitary conception of a profession, the very phenomenon that is supposed to be the horse and carriage of legal professionalism. As in the case of law and legality, there exist equally legitimate and competing conceptions of a profession that have far-reaching ramifications for lawyers, professional law practice, and legal professionalism. Stripped to its fundamentals, the notion of a profession is a multidimensional concept having prestigious power resources and even monopolistic power relations, practitioner autonomy, and self-governing control of entry and services at its heart and soul. Arguably, there is nothing particularly angelic about such attributes. Accepting this characterization would entail openness to the numerous ramifications in the everyday world of lawyers, law practice, and the legal profession. By extension, annotating, parallel tracking, or otherwise customizing the discourse of legal professionalism to reflect such ramifications would ultimately foster a more complete and realistic discourse of legal professionalism for myriad practitioners. We turn now to consider the all-important matter of professionalism itself.

C. Multidimensional Conception of Professionalism

Merriam-Webster's online dictionary defines professionalism rather flippantly as "the conduct, aims, or qualities that characterize or mark a profession or a professional."[74] An online source oriented to the commercial world, BusinessDictionary.com, is much more forthcoming in defining professionalism as the "[m]eticulous adherence to undeviating courtesy, honesty, and responsibility in one's dealings with customers and associates, plus a level of excellence that goes over and above the

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[71] JOHNSON, *supra* note 5, at ch. 2; *see* MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); *see also* YVES DEZALAY & DAVID SUGARMAN, PROFESSIONAL COMPETITION AND PROFESSIONAL POWER (1995).

[72] ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 120-21. *Accord* DONALD J. TREIMAN, OCCUPATIONAL PRESTIGE IN COMPARATIVE PERSPECTIVE 1-19 (1977).

[73] ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 120-22.

[74] Merriam-Webster, http://www.merriam-webster.com/dictionary/professionalism (last visited March 25, 2011).

commercial considerations and legal requirements."[75] For its part, the Ideals open with a working prefatory definition of professionalism as "the combination of the core values of personal integrity, competency, civility, independence, and public service that distinguish lawyers as the caretakers of the rule of law."[76] Accordingly, regardless of the specific definition, professionalism has to do with a passionate belief in, and commitment to, one's professional roles and responsibilities as a lawyer, together with the associated ideals, standards, values, principles, laws, ethics, colleagues, organizations, and service to the public.

However, there still is a crucial aspect of the concept of professionalism that must be acknowledged. At this point in our discussion, I would like to introduce an analogy. Whenever I have occasion to discuss the topic or idea of "postmodern social theory"[77] with my upper-class undergraduate students, I usually begin by giving them a conceptual anchor, frame of reference, or advance organizer as follows: There is a debatable *condition* of post-modernity, an ongoing *process* of post-modernization, and a dogged *ideology or belief system* of postmodernism. I would invite them to try to do the same thing with the related and flavorful topic of the global condition, globalization, and globalism in contemporary social theory.[78] I would then close by stating: Even if we cannot conclude that the world is in a condition of post-modernity, reasonable people would at least agree that the process of post-modernization is underway, and that regardless, the ideology or belief system of postmodernism appears to be here to stay. Their smiling faces and nodding heads would be all the feedback I needed before inviting an open discussion on those topical flavors of contemporary social theory.

Extrapolating and translating, there is the historically settled condition of law practice being a profession and lawyers being professionals. Furthermore, the historical and contemporary process of professionalization may ebb and flow with changes in knowledge,

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[75] BusinessDictionary.com, Professionalism, http://www.businessdictionary.com/definition/professionalism.html (last visited March 25, 2011).

[76] Ideals of Professionalism, *supra* note 6, at 1.

[77] According to which we are living in a new era in which issues of culture and identity predominate, economic activities and operations are globalized, and information and communication technologies are constricting time and space and forging new forms of communities, identities, and associations. However, the term "post-modernism" or "post-modernity" has come to mean many different things. "Some associate it with postindustrial society, others with the post-Marxist world; still others view it as a movement in literary criticism, and some view it as a legitimation of new voices in a diverse and multicultural society." JAMES FARGANIS, READINGS IN SOCIAL THEORY 357 (McGraw-Hill 6th ed. 2011).

[78] For a dizzying but rewarding digest of contemporary social theory, including the topics of globalization and post-modern social theory, *see generally* BEST, *supra* note 61; RITZER, *supra* note 61.

technology, and the economy, but the ideology or belief system of legal professionalism has a staying power regardless of other changes. Thus, professionalism is an ideological practice or belief system in the same manner as any other "isms" out there in the institutions, organizations, and everyday realities of our social, cultural, political, and economic life. Ideologies (e.g., the American Dream, the service ideal, and the rule of law) are complex socio-political, socio-economic, and socio-cultural phenomena that attempt to explain, justify, or rationalize prevailing meanings, values, and practices.[79] Their complex socio-legal functions include to mystify or demystify, to energize or de-energize, to enable or disable, to mobilize or demoralize, to challenge or defend, and to promote or undermine the affected groups, interests, priorities, or objectives. Practically, it is like a sword and a shield, a fort or firewall from which to play both offense and defense in the professional project of asserting and guarding a monopolistic claim over some specified domain of social life.[80] Little wonder that Terence J. Johnson firmly instructs that professionalism is the entrenchment by practitioners and their self-governing organizations of institutionalized forms of occupational control, autonomy, authority, ideology, and mystique.[81] Therein lie some of the important unstated features of the professionalism ideals under examination and critique herein.

Again, we see that professionalism is not a unitary or disinterested idea. Rather, it is a multidimensional concept that is rife with important questions of professional and practitioner self-interest, monopoly, power, autonomy, ideology, mystique, and cultivated civility. Appreciating and making provisions or allowances for how different lawyers, practice groups, or practice niches might prefer or have to go about those aspects of legal professionalism would likely make the Ideals more complete and realistic for the myriad practitioners in today's society. The thought to take and extend just the very crucial concomitant of professional autonomy or independence is a feature that seems to be common to most definitions of professionalism and the four various approaches to a

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[79] While the material conveyed here has been influenced during a course of two decades of extended readings of the rather dense ideas or/and writings of the likes of Ray Williams, Antonio Gramsci, Louis Althusser, and Michael Apple, the interested reader would find an accessible exposition of the concept of ideology in the works of TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION (Verso Publishers 1991); DAVID HAWKES, IDEOLOGY (Routledge 2d ed. 2003). Even an online source, BusinessDictionary.com, defines ideology practically as a "system of ideas that explains and lends legitimacy to actions and beliefs of a social, religious, political, or corporate entity." BusinessDictionary.com, Ideology, http://www.businessdictionary.com/definition/ideology.html (last visited March 25, 2011).

[80] *See, e.g.*, GERALD LARKIN, OCCUPATIONAL MONOPOLY AND MODERN MEDICINE (Tavistock Publications 1983).

[81] JOHNSON, *supra* note 5, at ch. 4 (cited in ONWUEME & GABRIEL-UGBOR, *supra* note 1, at 114.

profession indicated in a previous sub-section: the trait approach, the historical-descriptive approach, the ideal-type analytic approach, and the two-prong power-structural analytic approach. According to one source, professionals are autonomous in the sense that they can make independent judgments about their work.[82] A concurring source has noted that professional autonomy is an essential characteristic of professional ideology.[83] As such, professional autonomy is based on three claims:

> First, the work of professionals entails such a high degree of skill and knowledge that only fellow professionals can make accurate assessments of professional performance. Second, professionals are characterized by such a high degree of selflessness and responsibility that they can be trusted to work conscientiously. Third, in the rare instance in which individual professionals do not perform with sufficient skill or conscientiousness, their colleagues may be trusted to undertake the proper regulatory action.[84]

Continuing, the source quickly advises that autonomy "has other meanings."[85] Specifically, "*[p]rofessional autonomy is often described as a claim of professionals that has to serve primarily their own interests.*"[86] Moreover, "*this professional autonomy can only be maintained if members of the profession subject their activities and decisions to a critical evaluation by other members of the profession.*"[87] Thus, rather than simply serving the public interest, the concept of autonomy embraces not only independent judgment, but also self-interest and a continuous process of critical evaluation of ethics and procedures from within the profession itself.[88]

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[82] MICHAEL D. BAYLES, PROFESSIONAL ETHICS (Wadsworth Publishing Co. 1981).

[83] Sivakumar Velayutham & Hector Perera, *The Historical Context of Professional Ideology and Tension and Strain in the Accounting Profession*, 22(1) ACCT. HISTORIANS J. 81, 95 (June 1995).

[84] *Id.*

[85] Wikipedia, *supra* note 67 (citing J. Hoogland & H. Jochensen, *Professional Autonomy and the Normative Structure of Medical Practice*, 21.5 THEORETICAL MED. 457, 457-75 (September 2000)).

[86] *Id.*

[87] *Id.*

[88] *Id.*

IV. ANALYSIS AND DISCUSSION

A. General Analytic Thrusts and Premises

We can encapsulate our major analytic premises by distilling and summarizing the general thrusts of the previous sections. First, the subject matter predicate of law practice and the legal profession, law, or legality is a multidimensional concept requiring corresponding nuances and ramifications in any composite, realistic, and effective discourse of legal professionalism for all practitioners. Strictly speaking, there are dispute resolution, command-obeying, governmental social control-oriented, value-driven decisional, political discursive encoding, clear and consistent legality oriented, moral propositional, and justice-oriented dimensions to law and legality. Second, the idea of a profession is a multidimensional concept susceptible to various approaches from which one can distill fundamentals that are not particularly angelic or saintly, such as purported public service, prestigious and monopolistic power relations, practitioner autonomy and independence, and self-governing exclusionary control of entry and services. Consistent with the complex and contradictory notion of a profession, neither legal practice nor the legal profession that is the horse and carriage of legal professionalism itself is "one size fits all." Analogous to competing and equally legitimate conceptions of law and legality, there are competing and equally legitimate professional law practice dimensions, orientations, niches, values, interests, imperatives, and priorities. These dimensions require corresponding nuances and ramifications in any composite, realistic, and effective discourse of legal professionalism for all practitioners. Third, as the propeller shaft for legality, the rule of law, legal practice, and the legal profession, professionalism is not a unitary or disinterested idea. Instead, professionalism is a multidimensional concept entrenched by the profession and practitioners with many socially problematic questions of power, autonomy, ideology, mystique, and cultivated civility. Again, appreciating and providing for the nuances and implications of those complex and contradictory dynamics would certainly make for a more complete, realistic, and effective discourse of legal professionalism for all practitioners who understandably do not always look at their work the same way.

B. Particular Applications and Discussions

i. Incomplete Core Values

The core values of professionalism identified in the prefatory definition of the Ideals are incomplete in that they omit and silence equally legitimate and competing core values of law, legal practice, and legal professionalism. Specifically, there is no mention of equity, justice, and fairness as core values of law, legal practice, or legal professionalism.

This omission is rather surprising because these values should actually be both our moral and ethical imperative as lawyers and legal professionals. If nothing else, our inquiry into the hydra-headed concept of law evidences that there are value-driven, moral propositional, and justice and fairness dimensions to law and legality. As 1991 Burmese Human Rights Nobel Laureate, Aung San Suu Kyi, would say, the intrinsic virtue to law is really its capacity to foster a sense of justice understood as fundamental fairness.[89] The intrinsic virtue to law's concomitant order is the reflective discipline of a people satisfied that justice has been done, can be done, and will be done.[90] Thus, in formulating a more composite, realistic, and effective discourse of legal professionalism for all practitioners, the core values of equity, justice, and fairness must be constitutive of our operational definition of professionalism consistent with the legitimate professional law practice groups, dimensions, orientations, niches, values, interests, imperatives, and priorities that they reflect or represent. Neither law text and talk nor the discourse of professionalism would be complete without directly naming and claiming such values as fundamental constitutive features.

There is also no mention of fidelity or commitment to resolving disputes or conflicts as a core value. Again, this is surprising as many of us know or have reason to know that some lawyers actually persist in making disputes worse at the expense of our collective and individual reasonableness, sincerity, honesty, integrity, and trustworthiness as professionals. We certainly saw a problem-solving, dispute-resolving, or conflict-modulating dimension to law and legality, which law practice and legal professionalism should expressly mirror as a core value. For that matter, it taxes professionalism's stated core value of civility or courtesy when a practitioner fully intending on resolving particular disputes fairly, justly, and expeditiously is forced to endure the procedural abuses and tactical maneuvers of another practitioner whose only well-compensated interest is to stall the proceedings and frustrate the other side. Meanwhile, a non-interventionist court typically would indulge such ways and means of the adversarial Anglo-American system, which further drains the wellspring of patience and civility relative to opposing counsel, other litigants, witnesses, and the affected public. Regardless, as the law and some family and domestic relations disputants may rightly characterize such a scenario of abuse of power and internal contradictions as irreconcilable differences, the arising legal practice transactional conflicts may appear in forms the Ideals could mistakenly try to exhaust unsuccessfully with the language of civility and courtesy. With respect, while those are certainly important professional qualities to

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89 AUNG SAN SUU KYI, FREEDOM FROM FEAR (Michael Aris ed., 2d ed. 1995).

90 *See id.*

be "cultivated" and "exhibited" in all circumstances, the operational dynamics and power-discursive elements are arguably so complex that only a multidimensional discourse of professionalism could capture the myriad nuances and commitments justly, fairly, and equitably. In sum, the aforementioned discussion suggests that the Ideals neglected or failed to formulate a clear protocol for attenuating the major concern in our community that lawyers and the legal profession are scandalous enablers of the rich and powerful.

ii. Rose-Colored Omissions and Silences

Nevertheless, the core values of professionalism identified in the prefatory definition that opens the Ideals appear to view law, lawyers, law practice, and the legal profession through rose-colored glasses. The tendered core values and ideals mostly show good sides of legal professionalism as "independence, public service, caretakers, and rule of law," but the Ideals are otherwise mum about such underbellies as collective and practitioner self-interested exclusionary and monopolistic control of entry and services, let alone the prestigious and potentially abusive power and wealth associated with the same. As a reminder, the ultimate focus is ethics and professional responsibility. Ethics, properly understood, means much more than mere compliance with the Maryland Lawyers Rules of Professional Conduct, from which the Ideals both emanate and complement according to the prefatory section of the Ideals. Thus, and hold your breath if you may, it is at least debatable that lawyers are not simply "caretakers," "custodians," "guardians," "protectors of the rule of law," or "protectors of the system of justice" as the Ideals eloquently avers. The ideology and mystique of "caretakers," "guardians," and "public service" understates the individual and collective self-interest of the legal profession in serving mostly the paying or well-heeled public. Similarly, the mere exhortation to make law available to everyone does not equal a general professional mandate or a specific practitioner obligation to furnish legal representation to the economically underprivileged members of the same public whose interest the Ideals purportedly serve as stated in the Ideals of Professionalism and A Calling to Service sections.

Even more importantly, the Ideals omit and silence the reality that lawyers are excluders and gate-keepers of access to the citadels of power and state-legitimated authority euphemistically called the rule of law, but also known as the relations of ruling. Even assuming that the focus is on the rule of law, by now we can legitimately ask such rule *and* law a number of questions. Let us improvise some dramatized accompaniment with apologies to the bashful Bar and Bench. "This tribunal would like to get some direct and cross-examination on the record. May the witness called the 'Rule of Law' take the stand please? Bailiff, you may now

swear in the witness. Sir/Ma'am, do you understand that you are under oath? Under the penalty of perjury, this tribunal obligates you to tell the truth, the whole truth, and nothing but the truth. Do you understand that?" "Yes, your honor." "'The rule of what law?' is the fundamental question for you here. Is it the law of dispute resolution, the law of command backed by threat, or the law of moral-propositional right answer principle? Alternatively, is it the law of governmental social control, or the law of governing human conduct by clear and consistent principles of legality? Or is it the law of avenging norm violation, the law of discursive power and symbol trading for established interests, or the law of politics by other means with all the implications for domination, oppression, and even exploitation? Do, or should, all practitioners necessarily expect, want, or have to be caretakers, guardians, or custodians for all those types of rule of law too? For that matter, could the 'rule' just as well be 'of' the integrity-enhancing constructive-interpretive 'law' of equity, justice, and fairness, which we indicated should be a core ethical value or imperative of legal professionalism multidimensionally understood? Which one is it, Mr./Ms. Rule of Law? Is the witness taking the 5th or reserving testimony until the further advice of counsel? You may step down, Sir/Ma'am."

iii. Axiomatic Exhortation Without Needed Qualifications

There is a much more urgent and present danger on this all-important question of what rule and which law is unstated in the axiomatic Preamble to the Ideals. From our well-documented historical and contemporary experience of the legal system and the legal profession, there is an imperative moral and ethical qualification missing from the Preamble to the Ideals. The Preamble states as axiomatic or self-evident that:

> Lawyers are entrusted with the privilege of practicing law. They take a firm vow or oath to uphold the Constitution and laws of the United States and the State of Maryland. Lawyers enjoy a distinct position of trust and confidence that carries the significant responsibility and obligation to be caretakers for the system of justice that is essential to the continuing existence of a civilized society. Each lawyer, therefore, as a custodian of the system of justice, must be conscious of this responsibility and exhibit traits that reflect a personal responsibility to recognize, honor, and enhance the rule of law in this society.[91]

All this weighty exhortation is as well and good as it is axiomatic or self-evident. Even if by way of annotation or annex though, the one major

[91] Ideals of Professionalism, *supra* note 6, at 1-2.

qualification this author would strongly recommend is that upholding the Constitution and laws or enhancing the rule of law be subject to the countervailing value and principle of conscientious objection whenever and wherever such Constitution or laws command or accessorize morally or ethically repugnant, degrading, or oppressive conduct. The magic language is "providing that such Constitution, laws, rules, regulations, or associated policies do not command complicity in, or obedience to, racial oppression, gender subordination, social discrimination, economic exploitation, political repression, genocide, ethnic cleansing, pogroms, war crimes, crimes against humanity, grave human rights violations, or mass atrocities of any kind, shape, or form." A related qualification this author would strongly recommend would be to insert an express provision requiring lawyers, judges, and judicial and adjudicative tribunals to refrain from accessorizing or obliging any laws, rules, regulations, or executive actions that directly or indirectly facilitate governmental abuse of power, torture, or similar human rights violations.

The two major qualifications strongly recommended above are obviously borne out of the lived and experienced worlds of law, the legal system, and legal professionalism past and present. Some legal scholars have claimed that the German legal system under Nazi rule so compromised procedural practices that there was no rule of law to generate a moral obligation to comply.[92] However, that is an overly impetuous presumption. The reality is that the law or the legal system is a chameleon. Therefore, both oppressors and liberators would find something for them in it. For the same reasons that the devil can cite the scripture for his purposes (to echo the mischievous William Shakespeare), the despot or tyrant would decipher, author, or enact some law to further his or her aggression. The truth is that there was some enacted law, rule, regulation, or policy authorizing virtually everything, including the good, the bad, and the ugly, done by, for, or in the name of the Nazi regime.[93] At least in terms of an ordered or orderly process that

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[92] BIX, *supra* note 49, at 12 (stating that respected legal philosopher, Ronald Dworkin, transformed or muted the debate between disputing scholars by showing that the opposite claims are both reasonable and compatible perspectives on German Nazi law and legality).

[93] DAVID J. HOGAN ET AL., THE HOLOCAUST CHRONICLE: A HISTORY IN WORDS AND PICTURES (Publications International, Ltd., 1st ed. 2001); LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933- 1945 (Collier McMillan 10th ed. 1986). Together with the other myriad decrees, rules and regulations passed by the German Nazi government, the famous Nuremberg Laws of 1933 are legion, even excluding the thirteen later amendments. Noteworthy "laws" in the Nuremburg Laws of 1933 include the Law for the Protection of German Blood and German Honor, the Law for the Restoration of the Professional Civil Service, and the Law Against the Overcrowding of German Schools and Institutions of Higher Learning. To help ensure political repression, the National Press Law served to squelch the morally courageous, professionally ethical, and politically determined discursive resistance of some progressive-conservative yet anti-oppressive journalists of the Munich Post, including

the legal system, law enforcement, lawyers, and legitimated laws and regulations typically make possible, the Nazi regime was quite efficient at running a massive bureaucracy and following protocol. Reportedly, too, even while wearing the banner of organized and disciplined professionalism, the German legal system and the vast majority of German jurists and lawyers quickly accommodated or adapted themselves to the dictates and proclivities of the Nazi regime.[94] Additionally, even long after World War II, apartheid South Africa distinguished itself in entrenching and working the machinery of racial oppression, political repression, and economic exploitation with the active participation of its Constitution and laws, legal system, the judiciary, and the legal profession with a good dose of professionalism to boot.[95]

Moreover, even after the Bill of Rights had been ratified in 1791, the Constitution and the laws of the United States and the State of Maryland

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Erhard Auer, Fritz Gerlich, Martin Gruber, Edmund Goldschagg, and Julius Zerfass. Unreserved acknowledgment is due to Erhard Auer in particular. Before being "disappeared" by Hitler's henchmen, he tirelessly reconfigured conventional journalism training and professionalism to expose the schemes and machinations of the Nazi Party and leadership through a combination of savvy investigative and tabloid-style articles between 1923 and 1933. HOGAN, *supra*, at 23-25.

"Nazi" is a contraction for National Socialists, which full Western-style democratic and civilized political party name was National Socialist German Workers' Party. *Id.* The Nazi regime successfully passed The Enabling Act to the Nuremberg Laws on March 23, 1933 with more than the two-thirds majority Hitler needed in the German legislature, the Reichstag. *Id.* By so doing, a professional legislative body in a Western-style democracy and civilized society gave the executive branch the legal authority to enact any laws or decrees it considered necessary and proper to promote and safeguard the interests of the nation for the following four years. *Id.* Rather than responding to the immediacy of a September 11, 2001-style terrorist attack, the Nazi regime had a composite and longer-term goal of promoting Nordic or Aryan racial purity, galvanizing the distressed German economy, and restoring the historic glory of both the German military and German territorial polity. *Id.*

[94] *See* HOGAN, *supra* note 93, at 101.

[95] Something approaching an exposé will be found in ANTHONY H. RICHMOND, GLOBAL APARTHEID: REFUGEES, RACISM AND THE NEW WORLD ORDER (Oxford Univ. Press, 1st ed. 1994). "When the Nationalist Party came to power in South Africa in 1948, building on existing forms of discrimination and segregation, it proceeded to create the system that came to be known as 'apartheid.' In defending the South African Group Areas Act in 1951, then President Dr. Malan argued that it was essential to keep the groups apart in order to maintain 'racial peace'. . . . This inequality has been maintained by systemic discrimination beginning with the Labor Regulations Act of 1913, which created the 'reserves,' later to be described as 'homelands,' confining the African population to 13 per cent of the total area of the country. Subsequent legislation, up to and including the Influx Control Act (1986), regulated the movement of people into urban areas. Other measures included the Blacks (Urban Areas) Consolidation Act (1945), the Population Registration Act (1950), which required everyone to carry racially classified identification, the Group Areas Acts (1950 and 1966), and the Prevention of Illegal Squatting Act (1951). Added to these were a series of [administrative, regulatory and policy] measures entrenching the dominant economic and political power of the 'White' population by denying full citizenship and franchise, suppressing political opposition, and restricting access to education and social rights . . . ." *Id.* at 208-09.

still disenfranchised and relegated women to the status of non-persons unable to vote or be voted for until the 19th Amendment in 1920.[96] The United States also promoted and protected racial slavery by expressly safeguarding the importation of such persons as chattel slaves until 1808 under Article 1, section 9 of the Constitution,[97] while slavery was not prohibited outright until 1865 by the 13th Amendment.[98] Even then, the Constitution and laws continued to endorse racial slavery by reducing African Americans to three-fifth of a person for electoral population base calculations under Article 1, section 2.[99] This was not changed until 1868 by section 2 of the 14th Amendment.[100]

For that matter, legal professionalism, an overly praised and generationally inherited masterpiece existed in 1857 when the respected Frederick, Maryland native lawyer and Chief Justice of the Supreme Court, Roger Taney, authored the racially abusive and oppressive Dred Scott Decision.[101] Acknowledging historical realities, it certainly took the professional competency, civility, and decorum of eminent Supreme Court justices in a civilized society to hold, while hiding behind the so-called state action doctrine, that corporations and businesses could continue racially abusive discrimination in 1883.[102] Furthermore, it certainly took the cultivated competency, civility, independence, and public service of many respected lawyers and eminent Supreme Court justices to formulate the racially abusive separate-but-equal doctrine under the *Plessy v. Ferguson* opinion of 1896.[103] This glorified and generational historic professionalism was in place when the University of Maryland School of Law and the legal profession would not admit women or African Americans, including Thurgood Marshall. The Constitution and laws of both the United States and the State of Maryland not only "exhibited" slave codes and, later, post-abolition Jim Crow laws

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[96] U.S. CONST. amend. XIX.

[97] U.S. CONST., art. 1, § 9 (repealed 1808).

[98] U.S. CONST. amend. XIII.

[99] U.S. CONST., art. 1, § 2 *repealed by* U.S. CONST. amend. XIV, § 2.

[100] U.S. CONST. amend. XIV, § 2.

[101] Dred Scott v. Sandford, 60 U.S. 393 (1857). This decision held that persons of African ancestry, whether slave or free, were not and could not be American citizens under the Declaration of Independence. *Id.* It also held that such persons could not sue to win their freedom in federal courts because they had no standing under the diversity of citizenship jurisdiction of the federal courts pursuant to law. *Id.* It declared that slaves were chattel whose owners Congress could not deprive of their property rights without due process of law as guaranteed by the Constitution. *Id.* It also held that Congress did not even have the Constitutional authority to prohibit slavery in federal territories. *Id.*

[102] The Civil Rights Cases, 109 U.S. 3 (1883).

[103] 163 U.S. 537 (1896). The case held that legalized racial apartheid in public transportation or rail way carts was Constitutional as long as facilities were equal, a ruling which any thinking person would know was patently dishonest. *Id.*

of legalized racial discrimination,[104] but they also aided racial oppression, subordination, and violence against socially marginalized Blacks, Asians, Hispanics, Native Americans, Jews, and so-called White ethnics from southern, central, and eastern European countries.[105] All this happened under the watchful eyes of the historically prevailing conventional or idealist legal professionalism that we insist is in need of overhaul and recalibration for our time and era.

Furthermore, there is the contemporary American experience of legalized torture, privacy invasions, and negations of civil rights and liberties that exists under the advice and guidance of prominent and respected professional lawyers, judges, lawyer-politicians, and legal policy advisers. However, out of every crisis in the history of a people comes a deepening of insight into the true nature of human beings and the human society. The same also holds true for law, legality, lawyers, the legal profession, the legal system, and conventional idealist professionalism. As the former totalitarian Soviet communist empire emerged after World War II, there also emerged a corresponding American historical example of legalized political repression, anti-communist witch-hunts, invasions of privacy, and violations of civil rights during the hearings conducted by Senator Joseph McCarthy. That was part of the unqualified rule of law in a civilized society under the watchful eyes of its appointed guardians, custodians, and caretakers. Nearly one half century later, when Americans were confronted with the September 11, 2001 terrorist attacks, a substantial part of the true rather than fair-weather nature of our society, culture, interpreted Constitution, enacted laws, and the justice system emerged again. Almost overnight, the idealist values and platitudes of our conventional rule of law and diplomacy quickly receded when the power-discursive politics of safety and security became front-page material. It soon became obvious that many legal professionals in senior justice and administrative positions would readily approve unprovoked or preemptive State aggression, war, invasions of privacy, deprivations of civil liberties, violations of human rights, and torture or cruel, inhumane, or degrading treatment against real or imagined enemies.[106]

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[104] *See, e.g.*, Vernellia R. Randall, Race, Racism and the Law; Examples of Jim Crow Laws, http://academic.udayton.edu/race/02rights/jcrow02.htm (last visited Apr. 20, 2009).

[105] *See generally* JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (Routledge 2006) *and* MARTIN N. MARGER, RACE AND ETHNIC RELATIONS: AMERICAN AND GLOBAL PERSPECTIVES (Wadsworth Publishing Co., 8th ed. 2008).

[106] The two definitive references on the subject are PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (Palgrave Macmillan 2008) and JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (W.W. Norton & Co., 2007). For some of the standard operating procedures, *see* the incisive work by so-called American terrorism czar, RICHARD A. CLARKE, AGAINST ALL ENEMIES (Free Press 2004).

In addition to the detainee and prisoner abuses and scandals at both Abu Ghraib and Guantanamo Bay, which were militarily unnecessary, horrendous activities including extra-judicial killings, extra-ordinary rendition, torture, simulated drowning or "water-boarding," "enhanced interrogation," preventive detention without charge or trial, and tainted military tribunals became the practiced nature of law, legality, and justice in America.[107] Collaborating with very senior lawyers in the Justice Department, then White House Chief Legal Counsel, and later U.S. Attorney General for the Bush administration, Alberto Gonzales, advised that the Geneva Conventions were quaint and obsolete and so-called "enemy combatants" were not entitled to prisoner-of-war status under the Geneva Conventions, which would necessarily grant them certain protections.[108] With the concurrence of U.S. Attorney General Alberto Gonzales, the Dick Cheney-Karl Rove masterminds of the Bush administration's tyrannical tendencies even went so far as to fire nine U.S. Attorneys whose fidelity to the new legal-policy dispensation was in doubt.[109] Cheney and Rover would go on to insist that the firings were professional rather than political,[110] despite critics assertions that it was all political.

Regardless, the point to emphasize is that these were not mere happenstance but institutionalized professional conduct within the legal and justice system whereby many well-respected lawyers, judges, congressional lawyer-politicians, legal policy advisers, law professors, and legal think-tanks legitimized and cheered-on many of the Draconian policies of the Bush administration.[111] Because those impugned policies and convictions run deep in the culture, economy, and polity of our civilized society of unquestioned and unqualified rule of law, the Obama administration has simply reformulated but not abandoned or eradicated many such legal abuses and misuses. Indeed, even in 2009 when segments of the American public confronted the Obama administration with vocal calls to formally investigate and censor the legalized excesses

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[107] *See* SANDS, *supra* note 106.

[108] *Id.*

[109] *Id.* Philippe Sands, himself Queen's Counsel and Professor of International Law at The University College, London, has been particularly outraged that the fingerprints of the most senior lawyers in the Bush administration—our storied guardians of the rule of law—were all over the design and implementation of the abusive interrogation policies and practices. His dishonor roll call using the last names of the torture team of lawyers that made the Bush administration believe it could circumvent international law, the Geneva Conventions, and the U.S. Army's own Field Manual are: Addington, Bybee, Gonzales, Haynes, and Yoo. *Id.*

[110] *Id.*

[111] *Id.*

of the Bush administration,[112] the Obama administration chose not to investigate, prosecute, or censor.[113] As usual, the ideological justification was a variation on letting sleeping dogs lie, public safety and national security interests,[114] which are the same interests that many courts have also continued to invoke while overseeing procedurally questionable trials. Even as a matter of degree rather than kind, it is thus a mistake to think that it was only under Nazi Germany that criminal and administrative prosecutions and proceedings were procedurally tainted or otherwise compromised for whatever rationalizations.

iv. Not One Size Fits All Please

Moreover, the formulated ideals of professionalism omit or gloss over the differing experiential and world-view realities of internal stratification within the legal profession and amongst lawyers themselves.[115] Some lawyers who are highly ranked by their peers inhabit questionable morals and conduct themselves unconscionably, often at the expense of, or while exploiting, the poor and powerless under the guise of vague contractual rights and obligations. Conversely, other lawyers, who are highly principled, serve in modest-paying jobs, yet they attempt to solidify the American legal system's eloquent promise of equality and fairness in the everyday lives of the poor and powerless.

Some prosecutors, who as a rule serve without heed to political ambitions, spend their entire legal careers trying to deprive some members of the public of their civil liberties under the guise of pressing the public interest in safety or security. Often defense attorneys with little or no political capital go to great lengths to keep all citizens, including criminally charged outlaws, out of prison in hopes of achieving justice and fairness for the same public.

Other than a shared interest in the professional practice of law, which is certainly important, as a practical matter, do all these lawyers in various practice areas necessarily share the same ideals of professionalism, no matter what? With respect, we doubt it. That is at least debatable, especially as the ideals of professionalism necessarily draw on a value system that presupposes interests, principles, and choices

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[112] *See, e.g.*, text and attached files in Center for Constitutional Rights, *The Spanish Investigation into U.S. Torture,* http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture (last visited Apr. 25, 2011).

[113] *Id.*

[114] *Id.*

[115] *See, e.g.*, ANSELEM L. STRAUSS, PROFESSIONS, WORK AND CAREERS 10 (Transaction Books 1975) (stating that the professions are not homogenous communities but loose amalgamations of segments pursuing different objectives in different manners). Lawyers and law practice are segmented both vertically or hierarchically between practice areas (*e.g.*, corporate versus public interest/legal aid practice), and horizontally within particular niches of the same practice areas (*e.g.*, criminal prosecution versus criminal defense). *Id.*

in terms of high-order issues and dilemmas of socio-legal and moral-ethical philosophy.[116]

These substantive dilemmas and internal contradictions do not suddenly disappear simply because we formulated an elegant list of ideals, principles, and standards of professionalism. Without imputing any untoward intentions, one could argue that the Ideals may in fact have unwittingly privileged the interests of some legal practice groups, niches, and proclivities (*e.g.*, large firm corporate and insurance defense bar), while simultaneously omitting or silencing the interests of others (*e.g.*, solo and small firm plaintiff bar) in important respects. Based on similar concerns, it could be said that the majestically elegant law prohibits both the rich and the poor, upon penalty of imprisonment, to sleep under a bridge, to beg for alms, or to steal bread to feed their hungry children. Regardless, we will again note that the legal practice transactional conflicts inherent to such a scenario of structural and philosophical dilemmas and contradictions may arise in forms the Ideals could mistakenly try to exhaust unsuccessfully with the language of courtesy, civility, or decorum. With respect, while courtesy, civility, and decorum are important professional qualities to be cultivated, they are not the only considerations in our discourse of professionalism.

v. For Better And Not So Good

The remainder of the Ideals, which deal with itemized ideals of professionalism, including: accountability and trustworthiness; a calling to service; education, mentoring, and excellence; and fairness, civility, and courtesy, do a reasonable and commendable job of covering the standard expectations.[117] The Ideals address fidelity, credibility, and integrity to clients; the rules and the courts; punctuality, preparation, competency, and decorum when dealing with the court, opposing counsel, parties, and the public; honest and candid communication of non-confidential matter; and the need to resist financial pressures that may cloud one's professional judgment. The Ideals also exhort lawyers to go about their jobs with the goal of equality and fairness by avoiding wrongful discrimination based on "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."[118] The document expects all lawyers to ensure that they are current in legal knowledge and with changes in the law that may affect their clients' interests.[119] The

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[116] For example, when two equally valuable moral-ethical-legal principles collide, why and how should one yield? Who gets to make that decision? What criteria is used? Whose best interests should be served?

[117] Ideals of Professionalism, *supra* note 6.

[118] *Id.* at 2.

[119] *Id.* at 4.

document calls upon senior lawyers to mentor new lawyers willingly, both by their own examples and by ensuring that the new lawyers learn and apply the ideals of professionalism in their professional lives.[120] The Ideals not only invite lawyers to recognize that the practice of law is a calling to public service rather than only a business pursuit, but also presents an expectation that lawyers accept responsibility for ensuring that justice is available to all people regardless of financial means.[121] Perhaps as a reflection of the balance of current concerns, the Ideals include copious language on the question of civility in all communications, including electronic communications, which is certainly current and in keeping with the times.

Overall, the snapshots that come across from the remainder of the Ideals are all legitimate professionalism standards, principles, expectations, concerns, and issues. The problem with the Ideals is not its adherence to legitimate and long-standing professionalism standards and issues. Rather, it is the Ideals' glaring omissions, value priorities, and one-dimensional portraits that are of greatest concern. For example, those lawyers committed to the progressive and anti-oppressive practice of law certainly value and recognize fairness, civility, and courtesy. It is simply not enough to exhibit courtesy or display insincere politeness if the lawyer is presenting unreasonable claims, making unreasonable requests, or otherwise taking unconscionable procedural positions because of the extraordinary financial resources that allow him or her to pursue a protracted litigation.

Frankly, as this discussion has practical, not simply theoretical, implications, many lawyers are amazed that Maryland's professionalism rules indulge rather appalling and abusive uses of the legal system. For example, a lawyer defending a wealthy corporate client has a financial incentive to draw out litigation by excessively filing baseless preliminary motions. Such an attorney should resist the financial temptations and adhere to the professionalism rules promulgated under the Ideals. In the end, the Maryland legal community would benefit from a warts and all discourse of professionalism consistent with the finer, albeit messier, points of the reality of practicing law.

V. CONCLUSION

Ultimately, rather than proceeding as if there is a unitary conception of law and legality, a homogenizing professional law practice experience, or a disinterested set of core values animating professionalism itself, a more complete discourse of legal professionalism should track the various

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120 *Id.*

121 *Id.* at 4-5.

approaches to, and contradictions within, law and professional law practice groups. For the same reasons that our theory of human rights would have been impoverished if the United Nations had stopped at its storied first generation of rights, our understanding and action about legal professionalism would be malnourished if we failed to forage beyond the seminal ideals.

All lawyers want a profession that is glorious and effective, but there is a need for a compelling internal debate about the legal profession because we do not all necessarily always see or experience law the same way. Maybe recalibrating the discourse of legal professionalism in ways that openly and directly address the realities of the segmented working world of lawyers and legal practice would ultimately serve the profession and all practitioners better than a straightjacket, unitary, and essentialist approach to twenty-first century legal professionalism.[122] To be both realistic and comprehensive, lawyers could use having the standard or conventional portrait of the Ideals of Professionalism for everyone alongside annotated nuances, targeted provisions, and meaningful formulations for the differential tracking of law practice and lawyers or

[122] The twenty-first century is mentioned here because other than perhaps impending demographic and generational shifts within the legal profession, there are factors largely external to law, legality, legal practice, and the legal profession that are affecting all of that in ways that might cause some anxieties or concerns about the professional standing, image, or stability of lawyers and legal practice. We live in a post-industrial and postmodern information society, economy, and culture. In addition to the disciplinary and occupational practice boundary threats coming from immense trends toward transnational, interdisciplinary, and multidisciplinary occupational and professional practice arrangements, the contemporaneous changes in information and communication technology are not only redefining law itself but also changing law practice and the operations of the profession. Technology appears to be in the driver's seat some of the time in the courthouse, our offices, and our dealings with the courts and opposing counsel. One cannot in good conscience be into web surfing, e-mailing, e-trading, blogging, podcasting, YouTube, Craig's List, or Facebook and yet not realize that some of the alternative, snappy, brisk, and casual sub-cultural trappings of such technologies will rub off on you, legal practice, and the legal profession. The truth is that all of those things we fancy using also imperceptibly make some of our work seem routine, deskilled, and even commonplace. Little wonder that paralegals, legal agents, accountants, bookkeepers, real estate agents, and sundry two-year college graduates working as temps or consultants on anything under the sun are finding it easier to encroach on what is traditionally a lawyer's job. Some observers who probably wanted to make a name by getting ahead of the times have even forecast the end of lawyers! My point, then, is that we should probably be rethinking and reframing professionalism or fashioning a new professionalism for our age, rather than harping back to the mostly mythical glory days that some astute historians would call the way we never were when the whole truth emerges. As Alan Cross, music and technology columnist for METRO newspaper has noted on the topic of "The iPad Revolution," "[i]f there's one thing we've learned since the Regency TR-1—the very first transistor radio in 1954—it's not the device itself, but it's what the device allows us to do and the behaviors that result. Continue to expect many unintended and unforeseen consequences." Alan Cross, *Apple iPad is Poised to Change Music*, METRO CANADA, May 28, 2010, at 31.

the dissimilar experience of law and the legal profession by subsets of practitioners. This article submits that those are also legitimate but omitted or silenced professionalism issues within the ambit of accountability, public service, education, mentoring, excellence, fairness, fidelity, civility, integrity, and trustworthiness without which mere courtesy alone, for example, may seem quite insincere. Valuable and thoughtful though the Ideals of Professionalism may be, further discourse and more meaningful discussion on the limitations therein would be beneficial.