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HOW I LEARNED TO STOP WORRYING AND LOVE LAWYER-BASHING: SOME POST-CONFERENCE REFLECTIONS

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I.

This Essay is a necessarily brief survey of some of the proposals that were discussed at the conference on enhancing the accountability of lawyers for unprofessional conduct. Many of the projects to improve lawyer professionalism are well designed, modest in scope, and aimed at addressing real problems. This represents a positive trend away from some of the vaporous and woolly discourse that has given the professionalism movement a bad name, but the sheer number and diversity of individuals and groups interested in lawyer professionalism ensures that it will continue to be exceedingly difficult to pin down a definition of professionalism with sufficient specificity to measure the effect of various proposals for increasing the accountability of lawyers for unprofessional conduct. As a sometime observer of the professionalism movement, I am struck by the seemingly limitless variety of sins that are encompassed by the rubric of unprofessional conduct. Professionalism is a capacious concept—an “umbrella” as one organization calls it¹—encompassing practically the whole range of lawyering traits, from individual characteristics such as competence and civility, to large-scale systemic issues such as distributional justice and diversity. Looking at the concept positively, professionalism can be defined as including one or more of the following attributes²:

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1. GA. CHIEF JUSTICE’S COMM’N ON PROFESSIONALISM, HOW CAN PROFESSIONALISM BE INSTITUTIONALIZED?: THE GEORGIA EXPERIENCE 24 (2002) [hereinafter GA. COMM’N REPORT].

2. For some lists of the characteristics of professionalism, see, for example, N. C. Chief Justice’s Comm’n on Professionalism, at <http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Default.asp> (last updated April 17, 2002); PROFESSIONALISM PRIMER AND PROBLEM-SOLVING GUIDE 5 (Roy Stuckey et. al. eds., 2002); THOMAS M. COOLEY PROFESSIONALISM COMM., PROFESSIONALISM PLAN: PROFESSIONALISM TAUGHT, LEARNED, AND LIVED IN LAW SCHOOL (2002) [hereinafter COOLEY COMM. REPORT]; GA. COMM’N REPORT, *supra* note 1, at 24-27 *passim*.

- Performing pro bono service or working to improve access to justice for underserved (poor and middle-class) populations.
- Civility, etiquette, and respect for other lawyers, clients, and other participants in the justice system.
- Refraining from abusive practices, such as evasive discovery responses, deliberately causing inconvenience through scheduling, and name-calling at depositions.
- Honesty, candor, and trustworthiness, including keeping one's word when dealing with opposing counsel, not misrepresenting the law or facts to the court, and dealing forthrightly with clients.
- Competence, in the sense of having received a good initial legal education including emphasis on practical skills, and maintenance of a high level of practical skills and knowledge, often with the assistance of continuing legal education programs.
- Making an effort to reform the law or judicial administration, as well as to strengthen the rule of law and individual rights.
- Seeing one's role as a problem-solver, rather than someone who exploits dissension for personal gain.
- Independence, either from the state or from powerful clients.
- Less emphasis on profit-making and commercialism, in comparison with craft virtues or "internal" rewards of the practice of law.
- Good client service, such as returning phone calls promptly and working diligently on client matters.
- Attention to diversity issues, both with respect to clients and the profession, including refraining from bias in one's professional conduct.
- A balance among one's occupational and private lives, leading to greater job satisfaction and a lower rate of some of the pathologies observed in populations of lawyers, such as mental health problems and substance abuse.
- A matter of having good moral character, a praiseworthy set of dispositions, or a well developed faculty of judgment, rather than merely acting in compliance with enforceable disciplinary rules, often referred to as a "floor" of minimally acceptable conduct.

Parenthetically, I would like to make a plea for a little more rigor in the use of concepts like professionalism and ethics. Many commentators identify "ethics" with a minimum standard of obligatory conduct and "professionalism" with what the lawyer should do, but

which is not made mandatory by enforceable disciplinary rules.³ In this vein, one frequently encounters the metaphor of floors (minimal, enforceable rules) and ceilings (aspirations) in discussions of professionalism.⁴ This is a common enough distinction, but it is useful to point out that the academic discipline of ethics (traditionally the concern of philosophers and theologians, but recently also of interest to cognitive psychologists, feminist critics, and others) is oriented toward standards of right and wrong that do not depend on enforceable rules.⁵ Many standards of professionalism may actually be *obligatory* for lawyers as a matter of philosophical ethics. In the lingo of philosophical ethics, standards that are not obligatory, but are nevertheless morally praiseworthy, are *supererogatory*. This category corresponds to Judge Veasey's discussion of ideals that are a "higher calling" for professionals.⁶ There is a substantial volume of thoughtful scholarship from professional ethicists on questions germane to the subject of this conference, but lawyers often misinterpret these arguments by equating ethics with legally enforceable rules. Moreover, as I suggested, some aspects of professionalism may be ethically

3. GA. COMM'N REPORT, *supra* note 1, at 55; E. Norman Veasey, Remarks at the Professionalism Conference in Charleston, South Carolina, Enhancing the Accountability of Lawyers for Unprofessional Conduct (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 897 (2003) [hereinafter Veasey Remarks].

4. See, e.g., Blan Teagle, Remarks at the Professionalism Conference in Charleston, South Carolina, Enhancing the Accountability of Lawyers for Unprofessional Conduct (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 920 (2003) [hereinafter Teagle Remarks] (discussing professionalism and ethics); Veasey Remarks, *supra* note 3, at 897 (discussing professionalism and ethics standards); and Sally Winkler, Remarks at the Professionalism Conference in Charleston, South Carolina, Enhancing the Accountability of Lawyers for Unprofessional Conduct (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 912 (2003) (discussing the role of a professionalism commission).

5. To make matters even more complicated, "professionalism" is also a term employed in sociology, in which it is defined positively or descriptively, not normatively, and used to identify occupations as professions. On this kind of definition, characteristics of professions include a requirement of substantial intellectual training and the making of complex judgments; control by members of the occupation over licensure and entry; the necessity of trust in the professional-client relationship because professional expertise is inaccessible to the client; self-regulation; and a sense that professional prerogatives will be exercised in the public interest, not for the self-serving ends of the professional. See, e.g., A. B. A. Comm'n on Professionalism, ". . . In the Spirit of Public Service:" *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261 (1986) [hereinafter STANLEY COMM'N REPORT] (adopting definition of Eliot Friedson, a prominent sociologist of professions). For a survey of other sociological definitions of professionalism, see RICHARD L. ABEL, *AMERICAN LAWYERS* 14-39 (1989); Robert L. Nelson & David M. Trubek, *Introduction*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION I* (Robert L. Nelson et al. eds., 1992).

6. Veasey Remarks, *supra* note 3, at 897.

required if ethics is understood to proceed from a critical standpoint independent of the legal rules that in fact exist. The last section of this Essay focuses on arguments of this nature.

Given this diverse set of characteristics of professionalism, it should not be surprising that reform proposals have been equally varied.⁷ Professionalism reform groups advocate an array of solutions including better law school orientation programs, ongoing training, and programming designed specifically for teaching ethical reflection and judgment; continuing legal education focused on the aspirational dimension of legal ethics, the more mundane skills such as law practice management, and the deficiencies that tend to cause malpractice actions and disciplinary grievances against lawyers;⁸ “bridging the gap” programs to introduce new lawyers to practice skills they may not have acquired in law school; promulgation of voluntary creeds and oaths that may be displayed prominently to which lawyers can subscribe;⁹ development of more specific guidelines for particular practice areas such as litigation;¹⁰ mentoring programs to acculturate new lawyers into an authentically professional style of practice; informal meetings among local lawyers and judges to discuss professionalism issues; assistance for lawyers with substance abuse or mental health difficulties;¹¹ increased pro bono service by lawyers; enhanced use of alternative dispute resolution procedures; better enforcement of existing disciplinary rules; and public recognition of lawyers who exhibit the virtue of professionalism.

7. For lists of these proposals, see CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999) [hereinafter CHIEF JUSTICES’ ACTION PLAN], *available at* <http://ccj.ncsc.dni.us/natplan/natlactionplan.html> (last visited January 9, 2003); PROFESSIONALISM COMM., A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 27-34 (1996) [hereinafter “PROFESSIONALISM COMM. REPORT”]; STANLEY COMM’N REPORT, *supra* note 5.

8. CHIEF JUSTICES’ ACTION PLAN, *supra* note 7, at 26.

9. GA. COMM’N REPORT, *supra* note 1, at 25. For example, the Atlanta Bar Pledge is displayed at counsel table in courtrooms in Atlanta and repeated at all Atlanta Bar functions. *Id.* at 45.

10. For instance, the Trial Lawyers Section of the Florida Bar has a set of guidelines respecting issues such as scheduling and continuances, service of papers, and conduct in depositions. See CTR. FOR PROFESSIONALISM, FLA. BAR, GUIDELINES FOR PROFESSIONAL CONDUCT, <http://www.flabar.org/> (last visited January 3, 2003). Many of the guidelines simply restate existing rules of law governing lawyers, such as the prohibition on communicating *ex parte* with the court or making misrepresentations to the court or opposing counsel. *Id.* Others are considerably more aspirational, such as the guideline providing that “[a] lawyer should advise clients against the strategy of [refusing to grant] time extensions for the sake of appearing ‘tough.’” *Id.*

11. CHIEF JUSTICES’ ACTION PLAN, *supra* note 7, at 28.

Naturally, some organizations are more focused on particular attributes of professionalism than others. For example, the Professional Reform Initiative has adopted “restoration of lawyers’ reputation for truthfulness and honesty [as] its signature issue.”¹² And the Best Practices Project of the Clinical Legal Educators Association is aimed, as one might expect, at improving education and preparation of lawyers for practice. However, if there is one issue that seems to dominate many discussions of professionalism, it is civility.¹³ The story of Joe Jamail’s cursing at the Delaware deposition (“Don’t ‘Joe’ me, asshole”) has by now become a standard trope in the professionalism literature.¹⁴ I tend to agree with those who believe the emphasis on civility is at best a distraction and at worst antithetical to some of the core values of lawyering. It is a distraction because incivility is generally a symptom of some underlying cause, which should be the focus of reform initiatives. For example, if lawyers are obnoxious to one another in depositions, the problem may be that discovery in a case has become out of control, or that party-controlled discovery is in general a natural arena for misconduct by lawyers. However, the civility movement is positively harmful if norms of civility are understood as precluding challenges to injustices within the legal system. As one of my former colleagues, a committed advocate for capital defendants, was constantly reminding us, many civility codes would prohibit a defense lawyer from alleging in open court that a prosecution was racially biased, even if that claim was factually supported. This same colleague was fond of paraphrasing a maxim about journalists and applying it to lawyers; in his view, the job of the

12. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professionalism Reform Initiative*, 53 S.C. L. REV. 527, 538 (2002).

13. See CHIEF JUSTICES’ ACTION PLAN, *supra* note 7, at 39, 53 (surveying state bar definitions of professionalism and concluding that “[b]y far, the most common definition of professionalism related to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors and the public”); see also George Chapman, Remarks at the Professionalism Conference in Charleston, South Carolina, Enhancing the Accountability of Lawyers for Unprofessional Conduct (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 907 (2003).

14. See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); see also Veasey Remarks, *supra* note 3, at 897 (discussing professionalism and ethics standards). *But see* Teagle Remarks, *supra* note 4, at 920 (commenting that the Florida Bar Center for Professionalism was careful not to equate professionalism exclusively with manners or civility).

lawyer is to “comfort the afflicted and afflict the comfortable.”¹⁵ Afflicting the comfortable is not always pleasant and may result in accusations of incivility by the comfortable. To turn the point around, effective lawyering may require nastiness, not civility.¹⁶ For this reason, the question we should be addressing is the deeper ethical issue of the possible justification of adversarial conduct, not simply eliding that difficulty by exhorting lawyers to follow a creed of professionalism centered on courtesy, civility, respect, and dignity.

One theme of the professionalism literature has been that the public’s image of the legal profession is at an all-time low or in a state of crisis, which is caused by the unprofessional behavior of some lawyers. Indeed, it is hard to find an article on professionalism that does not begin with a lament about lawyer jokes, survey data revealing popular distrust of lawyers, or the decline in professional values as compared with some past golden age.¹⁷ Improve professionalism, runs the argument, and lawyers will regain the public’s trust and approbation, as well as enjoy more satisfying careers in the law. In my view, that aspect of the professionalism movement is misguided, and chasing after the public’s trust and confidence is the wrong way to go about addressing issues of professional conduct. Rather, the better approach would be to reason critically from the nature and function of the legal profession to a set of duties or dispositions that characterize the ethical practice of law. Some public criticism may remain; indeed, it may be the case that the involvement by lawyers in highly contested normative debates makes it impossible to escape the wrath of at least

15. The original quote is attributed to Finley Peter Dunne in BARTLETT’S FAMILIAR QUOTATIONS 602 (Justin Kaplan ed., 16th ed. 1992). Dunne wrote in the name of his character, the voluble, Irish-American barkeeper, Mr. Dooley, in Chicago newspapers and made his name in a series of columns opposing the Spanish-American War.

16. Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L.J. 403, 420 (1992).

17. Citations could be multiplied *ad infinitum*, but for a representative sample, see James Coleman, Jr., *Professionalism Within the Profession*, 65 TEX. B.J. 926, 926 (2002); Karen M. Raby, *Professionalism in the Classroom and Beyond*, GA. B.J., Aug. 2000, at 77. One sociologist’s study of the rhetoric of bar leaders throughout most of the first half of the twentieth century reveals that this theme was sounded consistently during that period. See Rayman Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES, *supra* note 5, at 144. For a comprehensive critique of the behavior of lawyers and the organized bar that is refreshingly sensitive to both history and contemporary social scientific evidence, see DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

some of the public, some of the time.¹⁸ Therefore, in the next section of this Essay, I will first examine reasons why we should not be overly concerned about public opinion polls, lawyer jokes, negative stereotyping of lawyers (like Jim Carrey's character in *Liar, Liar*),¹⁹ and other popular attacks on the profession. I am not taking the position that everything is rosy with the legal profession, and all that is needed is some kind of public relations campaign to get ordinary folks to see how wonderful lawyers are, how much pro bono service they provide, and how essential lawyers are to our constitutional democracy. In fact, it may be the case that the legal profession is failing to measure up to standards of professionalism. However, the point I wish to underscore is that these standards cannot be supplied by public praise or criticism, but should be the product of critical reflection on the ethical responsibilities of lawyers. Accordingly, in the concluding section, I will briefly set out a model of professionalism that can serve as the starting point for measuring professionalism and increasing accountability for unprofessional conduct.

II.

There are a number of reasons why lawyers should stop worrying about lawyer-bashing. (Loving it is a different matter—one would have to share my understanding of the role of the lawyer in society.) In a nutshell, it is just not the case that the public's affection for lawyers is at an all-time low, or that lawyer professionalism is in a historic nadir. Measured against a critical ethical baseline, most lawyers, most of the time, do just fine. Why, then, is there such a persistent sense of crisis in the commentary on lawyer professionalism? One problem is that lawyers writing about professionalism tend to read survey data superficially. It is true that when people are asked about lawyers in the aggregate, they frequently characterize lawyers as dishonest, unethical, or untrustworthy. For example, a recent survey conducted by Columbia Law School revealed that thirty-nine percent of respondents believed lawyers are “especially or somewhat dishonest” and forty-one percent believe lawyers “do

18. In seventeenth-century Massachusetts, the Puritan government banned lawyers, reasoning that because only one side in a dispute could have the truth on its side, lawyers must represent the Devil as often as they represented God. ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT*, at 49 (1996).

19. *Liar, Liar* (Universal Pictures, 1997).

more harm than good.”²⁰ However, when people who have used lawyers are asked whether they are satisfied with their own lawyer’s performance, large majorities report that they are “very satisfied” or “somewhat satisfied” with their lawyer.²¹ A consistent theme in survey data is that people tend to think that “lawyers generally work very hard to protect the interests of their clients” but that they distrust the power of lawyers and believe they have a deleterious effect on the national economy.²²

An explanation for this finding is that if they were in any sort of trouble, people would want a single-minded, loyal representative who puts her client’s interests first, regardless of the effect of this partisanship on others; however, when considering the effect of these adversarial relationships on the community as a whole or the economic costs of partisanship, people are more circumspect and voice displeasure with lawyers.²³ The positions taken by lawyers are not necessarily in the public interest, but from the standpoint of an individual with a legal problem, that is exactly what is praiseworthy about lawyers. Thus, when a person is evaluating lawyers from the perspective of a client or potential client, her evaluation is likely to be positive based on the lawyer’s responsibility to be a loyal representative of the client, as against the rest of the world. However, when a person is judging from the perspective of an affected member of the public, it is precisely this quality of partiality and loyalty that is disturbing. This deep structural dichotomy is likely to inspire distrust, even revulsion,²⁴ in the public, but it does not follow from the mere existence of a pervasive negative response to lawyers that this sentiment is justified.

Similarly, many bar leaders claim to lament the win-at-all-costs mentality they perceive taking over the profession,²⁵ but I would be

20. Columbia Law Survey, *Lawyers and the Legal Profession* (April 2002), http://www.law.columbia.edu/news/surveys/survey_opinion_index.shtml (providing detailed survey results and descriptions of the methodology).

21. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808 (1998) (footnote omitted).

22. *Id.* at 809-10 (footnotes omitted).

23. See Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 60-63 (1999).

24. For a fascinating explanation of public revulsion, created by the necessity of a lawyer simultaneously playing a role and denying that she is acting, see Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 387-89 (1987).

25. See, e.g., Ernest Borunda, Remarks at the Professionalism Conference in Charleston, South Carolina, *Enhancing the Accountability of Lawyers for Unprofessional Conduct* (Sept. 28, 2002), in *Transcript*, 54 S.C. L. REV. 897, 903

surprised if any of these commentators would admit to going less than all out for a client. To the charge of neglecting the public interest, this hypothetical bar leader would probably respond that she is justified in vigorously protecting the client's interests, and that the public's interests will be better served by partisan, adversarial presentation of the opponents' cases than by each side's lawyer serving as a kind of freelance judge of the client's case. (I am assuming a litigated dispute, rather than a transactional, counseling, or planning matter. The adversarial ethic has always been less suited to instances in which no neutral referee exists to evaluate the parties' positions.) This defense of the adversarial ethic is so familiar that it hardly needs elaboration.²⁶ Despite rigorous academic criticism,²⁷ the conception of legal ethics as "zealous advocacy within the bounds of the law" remains dominant within the practicing bar. Thus, it is always ironic to hear successful lawyers complaining about the "gladiator" or "hired gun" mentality they observe among their fellows. That is exactly the mindset that is drilled into the consciences of newly minted lawyers, and all the mentoring and gap-bridging programs in the world will not make junior lawyers any more attentive to the public interest as long as the great majority of lawyers believes that the public interest is best served by partisanship and adversarial presentation of cases.

Interestingly, survey data seems to confirm that the public regards lawyers as *appropriately* adversarial; in one survey conducted for the ABA, a remarkable eighty percent of respondents characterized the justice system in the United States as "the best in the world."²⁸ It is hard to believe that large majorities could regard lawyers as unprofessional or unethical, yet maintain that the system, of which they are an essential part, is the best in the world. The most plausible explanation is that people have internalized a kind of bifurcated expectation of lawyers, in which they are simultaneously fascinated and disturbed by the same set of characteristics. The criticism of

(2003) (discussing his perspective as a judge).

26. See RHODE, *supra* note 17, at 53-58 (criticizing the adversarial ethic).

27. In addition to countless articles, there are several book-length arguments from a variety of philosophical and jurisprudential perspectives criticizing this conception. See, e.g., ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* (1999); MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS* (1989); ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); RHODE, *supra* note 17; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1999).

28. Public Understanding and Perceptions of the U.S. Justice System, A.B.A. sponsored survey and report prepared by M/A/R/C/ Research #58 (presented Feb. 1999). I am grateful to Andy Perlman for this reference.

lawyers is grounded in the perceived access of lawyers to political and economic power, their ability to manipulate language and evidence, the barriers to entry denying nonlawyers access to professional mysteries, and the seemingly uncanny ability of lawyers to advocate passionately for positions they personally oppose.²⁹ But these are exactly the qualities that lead people to seek out lawyers when their interests collide with those of other individuals or the state.

There is no escape from public criticism because, in an adversarial system, someone's interests are always affected by the effective assertion of the opponent's legal entitlements by a competent lawyer. As Ronald Rotunda puts it:

People dislike us because we are guns for hire who manipulate the legal system, but they like us because we fight for our clients, protect their rights, and cut through bureaucratic red tape. When we fight zealously for our client, file lawsuits, and cut through red tape we do good, but when we fight zealously for our client, file lawsuits, and manipulate the legal system, we do bad. We receive accolades and denunciations for doing the same thing.³⁰

An alternative way to explain this simultaneous praise and criticism is that lawyers are the only profession called upon to serve people in a gray zone of moral ambiguity and conflict, where the nature of the relationship between the individual and society is contested.³¹ Because legal professionals must operate in a domain where evaluative criteria are being fought over, there is no baseline measure of the "health" of the legal profession. Criteria that could be used to judge whether the profession is functioning adequately—distributional considerations, the proper balance of competing rights and interests, and conceptions of justice—are precisely what the opposing parties in legal conflicts are contesting.³²

For example, to the extent lawyers are blamed for contributing to a "litigation explosion," we have to ask whether there is a problem

29. See WALTER BENNETT, *THE LAWYER'S MYTH* 65-67 (2001).

30. Rotunda, *supra* note 23, at 61.

31. "[L]awying as a profession exists largely *because of* moral ambiguity, not to resolve it." Terrell & Wildman, *supra* note 16, at 407.

32. *Id.* at 406-08.

with excessive litigation and, if so, what the causes are.³³ Perhaps the fear over groundless lawsuits, runaway juries, greedy ambulance-chasing lawyers, and a resulting chilling effect on innovation is being stoked by business and political elites who resist the shift in power toward consumers that has been accomplished by the tort system in the last several decades.³⁴ Naturally, the converse could also be true—that greedy personal-injury lawyers are stirring up frivolous litigation, blithely unconcerned about its effect on the availability of useful products or services. Without taking sides in this debate, let us assume that *some* accidents are the fault of someone other than the injured person, and in those cases, the victim would be legally entitled to recover compensation from the tortfeasor. To the extent the plaintiff's lawyer is doing her job well, the defendant will not be happy because an effective lawyer increases the likelihood that the plaintiff will obtain damages at trial. If we aggregate these cases, we can see how the interests of businesses that are frequently sued would be adversely affected by competent, ethical, professional lawyers, as long as legal entitlements generally favored accident victims. Similarly, if legal entitlements are slanted toward defendants, we would expect to hear criticism of lawyers from consumer groups that decry the protection of businesses from liability costs. Thus, whether or not the tort system is just, a great deal of lawyer-bashing might be explicable on the basis of lawyers behaving exactly as they are supposed to behave.

In any event, it is disappointing to see anecdotes and folk myths about the effect of unprofessional behavior by lawyers uncritically recounted in the professionalism literature. For example, the ABA's

33. See Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 276-88 (1986) (acknowledging reformists' claims of undue litigiousness, but questioning whether a problem truly exists, what the causes might actually be, and calling on these reformists to put forward substantive rhetoric and significant reform proposals).

34. The most useful scholarship on this question comes from legal sociologist Marc Galanter, who has extensively studied both the legal profession and the tort system and clearly has shown the connections between political discourse on liability and the public's perception of lawyers. In addition to work cited separately, see Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). Interestingly, one recent survey commissioned by the Minority Corporate Counsel Association found that eighty-five percent of respondents believed that companies hide dangers associated with their products until the government or a lawsuit forces them to tell the truth. John Gibeaut, *Fear and Loathing in Corporate America*, A.B.A. J., Jan. 2003, at 50, 52-53. This finding suggests that the general public is not hostile to the tort system, or at least is ambivalent, owing to the recognition that lawsuits can serve an important public-safety function.

Stanley Commission Report refers to a laundry-list of complaints against lawyers by the general public:

Many individuals blame lawyers for the huge increase in medical malpractice litigation, with a concomitant sharp increase in the costs of insurance protection Many blame lawyers when public playgrounds and sports programs are threatened with a loss of liability insurance and may be forced to discontinue use of facilities for recreational activities.³⁵

The report on professionalism does not stop to consider whether blaming these problems on lawyers is warranted. A great deal of systematic empirical scholarship exists that scrutinizes the support for many of these beliefs about lawyers and the civil justice system, and many of the horror stories supporting the public's disgust with lawyers turn out to be either without foundation in fact, or unrepresentative of the vast majority of civil cases.³⁶ The story about the psychic who recovered damages in a medical malpractice suit after a CAT scan allegedly destroyed her psychic powers conveniently ignores the fact that the trial judge granted the defendant's motion for a new trial and the plaintiff's case was dismissed on retrial.³⁷ Similarly, the infamous McDonald's coffee case turns out to be much more nuanced than the usual way it is retold as an example of lawyers run amok. The plaintiff was hospitalized for eight days after suffering third-degree burns from coffee that was served at temperatures far in excess of those necessary for good-tasting coffee; McDonald's had been warned by medical experts to lower the temperature of its coffee, but had refused despite having settled some 700 other burn cases; and it similarly refused to settle the New Mexico case for payment of medical expenses totaling \$11,000.³⁸ There very well may be a problem with greedy lawyers or frivolous litigation, but neither of these anecdotes, which are repeated often in the popular media, show any systematic relationship between unprofessional conduct by lawyers and increased costs for desirable goods or services.

Another reason to be skeptical about the claims of all-time low levels of public regard for the legal profession is that the public's

35. STANLEY COMM'N REPORT, *supra* note 5, at 253.

36. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726 (1998).

37. *Id.* at 726-28.

38. RHODE, *supra* note 17, at 122.

mistrust of lawyers is not a new phenomenon. We are all familiar with the “Woe to you lawyers . . . !” diatribe from the Gospel of Luke,³⁹ but perhaps less well acquainted with the history of the public’s perception of lawyers in the United States. In the Colonial, early Republican, and Jacksonian periods, revulsion of lawyers exceeded anything we are experiencing today.⁴⁰ Prior to the American Revolution, attorneys were regarded as an adjunct to an unpopular and corrupt government, in a conspiracy to suppress the rights of the colonists, and obstacles to peace or godly government.⁴¹ Public criticism of lawyers played up themes that would be familiar in a twenty-first-century professionalism symposium: greedy lawyers exploit technicalities, prey on the misfortunes of their fellow citizens, serve the rich at the expense of everyone else, and form an undemocratic elite.⁴² In fact, the only thing unique about the public perception of lawyers today is that it follows upon an extraordinary period of acclaim for lawyers—the civil rights movement—in which the law was by and large viewed positively as an instrument for beneficial social change.⁴³ The collapse of public trust in legal and political authority which followed Vietnam and Watergate certainly brought lawyers lower in the public’s regard, but it is incorrect to assume that the image of the legal profession is at an all-time low.

If we narrow the scope of the professionalism critique and concentrate on only one aspect of unprofessional conduct by lawyers, it is still the case that very little new can be said. For example, consider the complaint that the practice of law has degenerated from a noble profession to a “mere” business or trade.⁴⁴ Looking first at the “decline and fall” aspect of that claim, it is clear that complaints about money-grubbing and inappropriate, business-like behavior have

39. *Luke* 11:46-52.

40. Galanter, *supra* note 21, at 810-11.

41. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94-97 (1985).

42. *Id.* at 303-04.

43. Galanter, *supra* note 21, at 811. Even the civil rights movement was not a time of universally praiseworthy behavior by lawyers. State and local bar associations throughout the South defended “Nordic, White Protestant, Anglo-Saxon Christian values.” Most Southern lawyers refused to represent civil rights advocates, and bar associations fought vigorously against the efforts of out-of-state lawyers to provide representation to black clients. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 264-66 (1976).

44. *See, e.g.*, RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM* 23 (1989) (discussing the failure of lawyers to meet their professionalism responsibilities); MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT’S HAPPENED TO THE LEGAL PROFESSION* (1997) (describing the transformation of the legal profession); Norman Bowie, *The Law: From a Profession to a Business*, 41 *VAND. L. REV.* 741 (1988) (discussing the transformation of the practice of law).

always trailed lawyers. A great deal of internal professional disciplinary activity has always been directed either against non-lawyers seeking to encroach on professional turf, or against lower-status lawyers by elite members of the corporate bar, often to enforce rules, such as the prohibition on solicitation that served to protect the economic interests of the elite.⁴⁵ And there has always been criticism of lawyers either for their own wealth or for the wealth of their clients, presuming that the interests of the rich are inimical to those of the public at large.⁴⁶ The influential nineteenth-century legal ethics treatise written by George Sharswood laments the decline of the legal profession “from an honorable office to a money-making trade.”⁴⁷ In fact, Russell Pearce describes an “extraordinary outpouring of rhetoric” in the nineteenth century decrying the erosion of professional ideals—defined in part as indifference to financial self-interest—and their replacement by commercialism or profit-seeking by lawyers.⁴⁸ It may be the case that there are greedy lawyers or maybe even that a majority of lawyers are greedy, but to take public criticism seriously would require believing that the profession has been in a continuous state of decline since the first lawyer was created. Rather than taking our cues from this kind of implausible public perception, the professionalism movement should be oriented toward a critical analysis of the concept of professionalism and solid empirical research into performance of lawyers in the aggregate.

One of the achievements of the jointly sponsored South Carolina – Stanford conferences has been to require exactly this kind of reasoning from participants in the professionalism discussion. It also makes a great deal of sense to take a more finely grained approach to each of the component parts of professionalism—law school education, continuing legal education, transition to practice and “bridging the gap” programs, civility, access to justice, alternative

45. FRIEDMAN, *supra* note 41, at 634-35; KRAUSE, *supra* note 18, at 54; Solomon, *supra* note 17. As Richard Abel and others have pointed out, restrictions on solicitation are seldom enforced to prohibit practices by which large law firms establish ties with clients and obtain business, such as serving on corporation boards. See ABEL, *supra* note 5, at 119-20.

46. FRIEDMAN, *supra* note 41, at 639-40.

47. GEORGE SHARSWOOD, PROFESSIONAL ETHICS 73 (1854).

48. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1241 (1995) (quoting Robert W. Gordon, “*The Ideal and the Actual Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 61 (Gerald W. Gawalt ed., 1984).

dispute resolution, and so on.⁴⁹ The “big tent” approach to professionalism may reflect the diversity of concerns shared by observers of the legal profession, but it makes it difficult to move beyond foundational issues such as the definition of professionalism and the identification of problems. As a result of these efforts, we may be hopeful that the quality of the debate over professionalism will improve.

III.

The previous section argued that we ought to stop worrying about lawyer-bashing. It has always been with us, has often been worse, and is inevitable given the lawyer’s role as the means by which normative conflicts are settled in a complex, pluralistic society. As legal historian Lawrence Friedman observes, lawyers are natural lightning rods, drawing public ire during contentious public debate.⁵⁰ Continuing the *Dr. Strangelove* theme, then, is it possible to love this role, in the sense of committing to it as a professional ideal? The answer depends on a critical ethical analysis of what duties lawyers owe to their own clients, to tribunals and the system of justice, to affected third parties, and to the public at large. If those obligations are worthy of moral respect, then we have an ideal of lawyer professionalism to which we can commit ourselves. Once this ideal is in place, we can identify deviations from it and devise means to enhance the accountability of lawyers for unprofessional behavior.

One ideal of professionalism, drawing from both sociology and professional ethics, is the Brandeisian vision described by William Simon in an influential article and in his book, *The Practice of Justice*.⁵¹ On this account, the lawyer’s role is not simply to represent a client, the consequences to all others be damned. Of course, the lawyer is a representative of clients and is partisan to some extent, but the Brandeisian ideal imagines that a lawyer worthy of the title of *professional* will not completely disregard the public interest.⁵² In this sense, a client is a “special interest” (pejoratively used to refer to “special interest legislation”), not necessarily someone acting in accordance with the norms of the society.⁵³ Society does not recognize

49. See Deborah Rhode, *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003).

50. FRIEDMAN, *supra* note 41, at 96.

51. SIMON, *supra* note 27, at 120-37; William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985).

52. See SIMON, *supra* note 27, at 568.

53. Solomon, *supra* note 17, at 152.

the role of lawyers to permit individuals to pursue their own self-interest without regard to the deleterious effects on social ordering; rather, lawyers exist to interpret and apply the esoteric, specialized body of law, which is inaccessible to lay people, with a view toward fitting the client's ends together with broader social ends. When Justice Louis Brandeis was in private practice, he understood himself as "counsel for the situation," whose job it was to use his influence with powerful clients to ensure that they did not pursue "unjust or antisocial projects" and that they sought mutually beneficial solutions to disputes with adversaries.⁵⁴ This ideal is also expressed in the often-quoted maxim of Elihu Root, finding that half of the job of a decent lawyer is telling his clients they are damned fools and should stop.⁵⁵

Significantly, this mechanism of social ordering is an improvement over the principal alternative—the classical liberal vision of self-interested actors pursuing material advantage constrained only by coercively enforced, impersonal legal rules:

The job of the lawyer, who knows the law and is spontaneously disposed toward compliance, is to teach the client and to encourage him to comply. The lawyer is in a better position to do so than is the government bureaucrat because the lawyer can establish a relation of relative trust and intimacy with the client that enables the lawyer to relate abstract legal principles to the client's concrete circumstances, to detect incipient deviance, and to persuade the client.⁵⁶

Therefore, professionalism is opposed to the pursuit of one's narrow self-interest, both for the professional, who is expected to be motivated by considerations other than acquiring material wealth, and for the client, who employs the professional with the understanding that the agent's role is constrained by the necessity of respecting the public interest.

I trust that it is not too much of an exaggeration to observe that this conception of professionalism is a complete non-starter with most lawyers. Lawyers resist nothing more fiercely than the notion that they are responsible for constructing a conception of the public good and attempting to conform their clients' ends to that standard. To illustrate,

54. SIMON, *supra* note 27, at 128-29.

55. GLENDON, *supra* note 27, at 37 (quoting the maxim of Elihu Root).

56. SIMON, *supra* note 27, at 572-73.

consider the debate over the “noisy withdrawal” requirement in the SEC’s proposed regulations implementing Section 307 of the Sarbanes-Oxley corporate responsibility legislation.⁵⁷ Briefly, the proposed regulations require a lawyer for an issuer of publicly traded securities to report evidence of a material violation of the securities laws “up the ladder” within the corporation—first to the chief legal officer of the client, then to the audit committee of the board of directors or to the full board.⁵⁸ If the lawyer is unsuccessful in persuading higher authorities within the corporation to correct the violation, she may be required to withdraw from representing the client and, in doing so, notify the SEC of the fact of withdraw and disaffirm any statements she may have participated in preparing.⁵⁹ This is the so-called noisy withdrawal requirement. The regulations also expand a lawyer’s authority to reveal confidential information in some circumstances, bringing the law governing the duty of confidentiality into line with the majority of jurisdictions.⁶⁰

In my view, the regulations are largely consistent with the existing law governing lawyers, particularly in the up the ladder and noisy withdrawal requirements, and in the authority to disclose confidential information in some cases.⁶¹ The law in these cases recognizes a circumscribed domain in which the lawyer acts ever-so-slightly in a Brandeisian role. By disclosing client confidences in these few cases, the lawyer can prevent harm to investors more effectively than by preserving the client’s confidences and trying to persuade the client to rectify the fraud. The permission to noisily withdraw is limited to cases

57. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

58. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,681.

59. *Id.* at 71,688.

60. *Id.* at 71,692. Both the 1983 and the 2002 versions of Rule 1.6 of the Model Rules of Professional Conduct would prohibit disclosure under some circumstances in which disclosure is permitted by the proposed regulations, but this rule has not been adopted in its “model” form in most states. For details, see the extremely helpful chart on ethics rules on client confidences, prepared by Attorneys’ Liability Assurance Society, reprinted in *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 161 (Thomas D. Morgan & Ronald D. Rotunda eds., 2003).

61. Fifty-one law professors, myself included, signed a comment letter to the SEC, prepared by Susan Koniak, Roger Cramton, and George Cohen, essentially supporting the SEC’s approach, but suggesting some improvements in the language of the regulations. The electronic record of the comments is available from the SEC’s website. See Letter from Susan P. Koniak, Professor of Law, Boston University School of Law, et al., to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 17, 2002), <http://www.sec.gov/rules/proposedcd/s74502/spkoniak1.htm>.

in which the fraud is ongoing and the client has used the lawyer's services to commit the fraud.⁶²

However, even this highly unusual case is too much direct action in the public interest for the corporate and securities bar. This group maintains the traditional view that a strong rule of confidentiality, prohibiting disclosure in these cases, is necessary to maintain the relationship of trust between clients and their lawyers, which in turn is necessary to enable the lawyer to counsel the client to comply with the law. These lawyers reacted strongly against the proposed regulations, perceiving a threat to the essentially private (or liberal-positivist, in Simon's terms) nature of the attorney-client relationship. The comments of seventy-seven prominent corporate law firms expressed concern that the new regulations would "drive a wedge between client and the counsel who advised it on a matter" and could "chill a lawyer's energetic representation of his or her client."⁶³ Debevoise & Plimpton worried that "the Commission would be using the attorney as the Commission's eyes and ears to build a case against the client."⁶⁴ Sullivan and Cromwell resists the requirement that lawyers "police and pass judgment on their clients."⁶⁵ Clifford Chance makes the standard argument about the importance of candor in the attorney-client relationship:

[The regulations] would impair the very relationship between attorneys and issuers that enables them to exert the influence that Section 307 seeks to promote. Faced with the possibility that attorneys who discover possible problems may have to disclose the existence of problems to the Commission or others, companies would do everything they could to be sure attorneys do not

62. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 366 (1992) (discussing the prerequisites for a noisy withdrawal); see also MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 (2002) (approving of withdrawals in the 2002 version); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (1983) (approving of withdrawals in the 1983 version).

63. Letter from seventy-seven law firms to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 18, 2002), <http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm> (last visited Jan. 9, 2003).

64. Letter from Debevoise & Plimpton to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 18, 2002), <http://www.sec.gov/rules/proposed/s74502/debevoise1.htm> (last visited Jan. 9, 2003).

65. Letter from Sullivan & Cromwell to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 18, 2002), <http://www.sec.gov/rules/proposed/s74502/sullivan1.htm> (last visited Jan. 9, 2003).

discover anything they might view as evidence of problems. The frankness by company personnel that lets attorneys make judgements on matters such as disclosure requirements and corporate responsibilities would inevitably be substantially reduced.⁶⁶

The tenor of the comments from affected lawyers could not be further from the vision of professionals as mediators between public and private interests. The securities lawyers strongly resist any interference with strong norms of confidentiality and loyalty, which conceive of the lawyer as responsible solely to protect the client's interests, subject only to the obligation not to counsel or assist violations of law. The bar readily accepts the classical liberal conception of self-interested actors pursuing material advantage constrained only by enforceable legal rules. The alternative to the Brandeisian conception of professionalism, and the sort of watchdog role that critics of the SEC regulations wrongly assume is being imposed on them is a vision of lawyering in which the lawyer's only ethical obligations are to serve as an effective, diligent representative of the client's interests, constrained only by enforceable legal norms and the lawyer's own aspirations to practice law in a particularly competent, courteous, respectful manner. Ironically, it seems to be exactly that model of partisan lawyering that attracts the public's ire. Given this tension, lawyers thinking about professionalism have a choice—either agree that public criticism is legitimate and move toward a more public-spirited conception of representation, or persist in doing what they take to be the right thing and accept that some negative opinion polls and lawyer jokes are just the price that must be paid for serving as a loyal representative of one party where normative issues may be contested.

Even if lawyers collectively dedicate themselves to either a private, adversarial conception of representation or a more public-spirited, Brandeisian vision, many problems under the umbrella concept of professionalism remain. Perhaps law schools should spend more time teaching practical skills such as law office management. Additionally, continuing legal education should be improved, mentoring programs should be developed, and lawyers should be encouraged to perform pro bono service. However, from what I know

66. Letter from Clifford Chance to Jonathan G. Katz, Secretary, Securities and Exchange Commission (Dec. 18, 2002), <http://www.sec.gov/rules/proposed/s74502/clifford1.htm> (last visited Jan. 9, 2003).

of the survey data, these are not the deficiencies complained of by the public. Most lawyer jokes and negative responses to polls do not focus on lawyers failing to return phone calls or being sloppy drafters. Rather, criticism is directed at lawyers as fomenters of strife, economic parasites who profit from the troubles of others, untrustworthy characters who can espouse positions they do not personally believe in, and people with power by virtue of having access to the arcane mysteries of law.⁶⁷ One can criticize the excessive loyalty to clients and the indifference to harms to others inherent in the dominant conception of legal ethics, but unless one is prepared to make a wholesale change in the moral foundations of the lawyer's role, it is only natural that the public will be both fascinated and repulsed by a profession dedicated to taking sides in disputes that touch on profound normative questions. The professionalism movement can benefit by moving beyond its excessive concern with lawyer bashing and refocusing on either reforming, or learning to love, the role of lawyer.

67. See Galanter, *supra* note 21, at 810.