THE LEGAL PROFESSION AS A BLUE STATE: REFLECTIONS ON PUBLIC PHILOSOPHY, JURISPRUDENCE, AND LEGAL ETHICS

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INTRODUCTION

Many conservative commentators view the legal profession as a Blue State—as a captive of the Democratic Party and political liberalism.1 They assert that most lawyers vote for Democratic presidential candidates.2 They attack the American Bar Association for supporting abortion rights and equal rights for lesbians and gays and argue that it gives preferred treatment to Democratic nominees to the federal courts.3 Many opposed the nomination of Harriet Miers to the Supreme Court on the ground that she lacks “the spine and steel necessary to resist the pressures that constantly bend the American legal system toward the left.”4 They create law schools

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4. Kenneth R. Bazinet, Bush On Defensive: See Nominee ‘Best Person I Could Find,’ N.Y. Daily News, Oct. 5, 2005, at 23 (quoting David Frum). For similar observations regarding the leftist drift of the legal system, see, for example, Bader, supra note 1 (“Judges typically drift to the left after being appointed to a high-profile post.”); Nagel, supra note 1 (discussing the contention that conservative judges “are subjected to intense
affiliated with religious conservatives to create lawyers free of the politically liberal taint.5

I would like to suggest that this affinity between the legal profession and a Blue State, which often manifests itself in differences on substantive issues of policy and law, has its roots in conceptions of public philosophy,6 jurisprudence, and legal ethics. In particular, I would like to focus on the way that people who express a priority for moral values are far more likely to be part of Red State America.7 Although this distinction undoubtedly glosses over some nuances, such as the Republican allegiance of economic libertarians8 and the strong values commitments of religious liberals9 and secular humanists,10 it does offer a reasonably accurate description of what Michael Barone has described as “two Americas . . . of different faiths.”11 Indeed, as a general matter, Blue State voters are less friendly to the

pressure to undergo radical ideological changes,” much of it from “read[ing] the Washington Post [and] socializ[ing] with liberal law professors”).


6. I use this term in the same way Michael Sandel employs it to indicate philosophical approaches that “blur the line between political commentary and political philosophy.” Michael J. Sandel, Public Philosophy: Essays on Morality in Politics 5 (2005). The goal of this essay is to identify the outlines of the dominant political philosophies that have provided the foundation, at least in broad strokes, of prevailing political perspectives.


promotion of moral values through the public sphere. In contrast to Red State voters, they are more likely to embrace a liberal public philosophy that emphasizes a conception of individual freedom grounded in the “basic principle of human dignity, [that] no person or group has the right deliberately to impose personal ethical values . . . on anyone else.”

The dominant—although not exclusive—modern conception of the lawyer as a hired gun tracks this commitment to removing personal ethical values from politics. It asserts that the proper functioning of the legal system requires lawyers to remove personal ethical values from their work. Their role is to function as extreme partisans without moral accountability for their own conduct or even that of their clients so long as both have not definitively crossed the bounds of the law. In this role, they are to be morally neutral. As Sanford Levinson has observed, the dominant conception requires “‘bleaching’ out of [the] merely contingent aspects of the self, including the residue of particularistic socialization that we refer to as our ‘conscience.’”

A powerful illustration of the confluence between the conception of the lawyer’s role and the Blue State approach to values is a recent decision of
the Tennessee Supreme Court’s Board of Professional Responsibility.17 A Catholic lawyer who believed that abortion was murder sought to avoid a court appointment to represent a teenage girl seeking court permission to obtain an abortion without her parents’ consent or, in the alternative, to recommend to his client that it would be better for her to seek parental consent and explore alternatives to abortion.18 Even though a literal reading of the applicable rules would appear to have permitted, though not endorsed, either course of action, the Board found that if the lawyer were to make a recommendation to his client based upon his personal beliefs, or even if he were to withdraw representation, his conduct would improperly create the risk of imposing his values upon the client or upon the legal system.19 Even in the Red State of Tennessee, the legal profession felt bound to follow a Blue State approach to values.

This approach to values was not always the dominant approach of the legal profession. Indeed, until the 1960s, the leading American conception of the lawyer’s role required lawyers to bring their conception of the public good into their work as lawyers.20 In 1984, Chief Justice Warren Burger complained that lawyers had forsaken their obligation to place the public good above their self interest and declared a “crisis of professionalism.”21 Since that time, leaders of the bench, bar, and academy have sought unsuccessfully to revive that duty.22

One source of this failure has been a mistaken understanding of the development and decline of lawyers’ commitment to the public good. Many bar leaders and academics persist in repeating a version of the account that bar leaders first presented in the late nineteenth century as part of the justification for the creation and empowerment of bar associations.23

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18. Id. at 2-3.
23. See, e.g., Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 93 (1983) (noting that bar leaders “accepted as axiomatic that bar standards had declined between 1840 and 1870”); Charles Warren, A History of the American Bar (1911).
With some variations in the chronological periods covered and explanations emphasized, the story they tell is as follows. The pre-Revolutionary American bar continued the English traditions of a self-regulating guild and the noblesse oblige responsibility of the gentleman. Sometime during the early nineteenth century, the bar began to decline as it became easy to become a lawyer and the sense of public responsibility collapsed. The creation of bar organizations after the Civil War revived standards for admission and ethics, including renewal of the public responsibility, and this success continued through the start of the crisis of professionalism. All that needs to be done to end the crisis is to teach professionalism to lawyers.

As this essay describes, the dominant story begins with assumptions that leading historians have rejected for at least 40 years. Beginning with Perry Miller and continuing through the tremendously influential work of Gordon Wood, these historians have identified the period following the Revolution as the moment of creation of a uniquely American understanding of lawyers as a necessary governing class in a democracy.

24. The classic statement of the history is Roscoe Pound’s observation that “[t]he high point [of the American bar] at the beginning is on the eve of the Revolution. The lowest point is immediately after the Civil War.” Roscoe Pound, The Lawyer From Antiquity to Modern Times 223 (1953). Elements of this story are found in the mythology of the bar. See, e.g., Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum 103-20 (1992) [hereinafter MacCrate Report]. Elements are also found in the work of distinguished scholars. See, e.g., Richard L. Abel, American Lawyers 40-48 (1989); Lawrence M. Friedman, A History of American Law 226-49, 463-500 (3d ed. 2005). Instead of examining the dominant understandings of lawyers and judges, these commentators use the rigor of standards for admission as the determinant of how well the bar was fulfilling its public role.


From this vantage, the post-Civil War period, rather than serving as the high point of lawyers’ commitment to the public good, actually began a period of narrowing conceptions of the capacity of lawyers and the nature of the public good that continued through the 1960s.29 When the final collapse of lawyers’ commitment to the public good occurred in the 1960s, it represented the victory of a view that rejects the idea that any conception of the public good is necessarily superior to another, much like the understandings that are dominant among Blue State voters.30 Not surprisingly, lawyers with these views are largely immune to efforts to preach professionalism.31

In this essay, I extend my previous work on the origins of the “governing class” perspective and its demise in the 1960s.32 The essay incorporates jurisprudence and public political philosophy into the analysis and offers a more nuanced account that explains the gradual erosion of the commitment to the public good that preceded its collapse. In addition to offering a more complex historical account, the essay also concludes by suggesting the framework for a normative obligation of lawyers to the public good grounded not in the mythology of an idealized past33 but in the reality of contemporary moral challenges.

A few caveats are also in order. First, the essay is written from the perspective that ideas matter and that they shape how we understand our place in the world. It rejects the view that our actions are determined exclusively by material self-interest. Second, the essay does not provide a complete account of the history of public political philosophy, jurisprudence, or legal ethics. It follows dominant trends and changes in “emphasis and proportion.”34 It does not explore the many gradual and fluctuating changes that comprise these trends and does not offer a full account of the variety of nuances within either dominant or minority perspectives. Third, the essay examines how lawyers understand their work, not how they actually perform it.35 To construct lawyers’ understanding of the place of the public good in their representation of clients, the essay looks to ethics rules and treatises, as well as the published

29. See infra Part II.
30. See infra Part III.
31. See supra notes 14-16 and accompanying text.
33. As Brian Tamanaha observes, these romantic jurisprudential perspectives “invoked abstractions and offered accounts of law and judging that, in hindsight, appear patently implausible. Nonetheless, they were widely espoused and sincerely believed, especially by the legal elite.” Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law 4 (2006). Tamanaha’s work parallels this essay. In describing the shift to an “instrumental view of the law,” he focuses on a different aspect within the same general trends. Id.
34. Id. at 2.
35. Id. at 4.
pronouncements of lawyers. Beyond that, it is impossible as a historical matter to compare the actual conversations between lawyer and client over time. With its main focus on how lawyers understand their relationship to the public good, the essay also does not determine whether lawyers actually fulfilled their aspirations to the public good or whether their views of the public good are the same as ours today. Certainly, they are not. While lawyers throughout American history may share general commitments to the rule of law and individual rights, today’s understandings of the public good—disputed as they are—would converge in rejecting notions of the superiority of whites, of Protestants, and of men that were widespread among bar leaders from the late nineteenth through the twentieth centuries. Nonetheless, as with the aspirations in our Declaration of Independence and Constitution, the fact that the public good was historically associated with tarnished ideas does not mean we should abandon it altogether. To do so would mean losing a valuable and necessary resource for understanding the role and responsibilities of the modern lawyer.

I. FROM GUILD TO GOVERNING CLASS

The conception that lawyers were the American governing class with the primary responsibility for the public good emerged in the constitutional period. It borrowed from the English guild notion that lawyers were above self-interest, but claimed a far more ambitious societal role for lawyers than the English guild conception recognized. The American construct reflected the demands of an elite political philosophy that embraced majority rule but


37. Martin Luther King, Jr., for example, relied on the general commitment of the Declaration of Independence and the Constitution to human dignity and equality to argue that their spirit supported equal rights for African Americans even though the documents themselves were written, in part, by slaveholders and did not abrogate—but actually permitted—slavery. Martin Luther King, Jr., “I Have A Dream,” Address Delivered at the March on Washington for Jobs and Freedom 1 (Aug. 28, 1963), available at http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf (transcript) (“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.”); see also Gordon S. Wood, Revolutionary Characters: What Made the Founders Different 8-11 (2006) (defending the “greatness” of the founders even though they “do not share our modern views about important matters, about race, the role of woman, and equality”).

38. For a similar argument regarding a noninstrumental approach to the law, see Tamanaha, supra note 33, at 250.
found it incompatible with the public good and rule of law absent a governing class to manage it.

A. The English Guild

In colonial America, the legal profession largely borrowed from the English guild model. Society trusted guilds to rise above self-interest and to police themselves. In turn, the government permitted the guilds autonomy in membership, production, and marketing. Although English craft guilds had largely lost their authority by the eighteenth century, the guild continued to provide the organizational basis for the professions. In the legal profession, this meant that lawyers would perform their obligations to the legal system with excellence and integrity. But English lawyers were not the governing class. Their commitment was to what H.L.A. Hart termed an “internal point of view,” faithfulness to the secondary rules that society maintained for resolving disputes, not to maintaining the public good. Although lawyers came from the social class of “gentlemen,” possessed of “good behavior, well bred, amiable, [and] high-minded,” the task of governing fell to aristocrats and their oldest sons who assumed their place, not their younger sons who might become lawyers. Accordingly, although Blackstone’s natural law jurisprudence included an expansive commitment to the public good that lawyers would have to understand, the primary responsibility for identifying and pursuing the good for society fell to the gentry and not to the community of lawyers. As Perry Miller observed, “Blackstone tailored his masterpiece to the needs on an eighteenth-century England, wherein the gentry still ruled as justices of the peace, with the House of Commons as their club.”

B. The Original American Understanding

The development of a uniquely American ethic for lawyers began around the time of the Constitution’s ratification. The republican ideology of the American Revolution viewed society as organic. Although “commerce and the attendant pursuit of self interest [posed] a threat to proper

40. Id. at 7.
44. Wood, supra note 37, at 14.
46. Miller, supra note 26, at 144; see also Tocqueville, supra note 42, at 267-68.
47. Miller, supra note 26, at 144.
The deliberative process would enable “the people . . . to perceive the common good and to define the limits of individual rights.” Majority rule would provide the “voice of the people” that would establish a government responsible for “fostering virtue, of making the individual unselfishly devote himself to the common good.”

The experience of republican government after the American Revolution shattered the elite’s faith in the ability of individuals and majorities to overcome their selfish interests. “[P]rivate interest,” they concluded, “ruled most social relationships,” and the expectation that “most people [would] sacrifice their private interests for the sake of the public good was utopian.” Observing that legislatures disregarded property and individual rights in expropriating land and in making biased or corrupt decisions, the elite no longer believed that deliberative democracy would result in virtuous government for the benefit of the public good. Instead, they came to fear that unchecked majority rule would result in tyranny of the majority.

They turned instead to a public political philosophy that combined both liberal and republican impulses. Retaining the republican goal of government as promoting the public good, they tended to define that good in liberal terms, such as “security, justice, prosperity and liberty.” At the same time, they maintained the republican distrust of commerce and of self-interested factions. They embraced checks and balances as a roadblock to tyranny of the majority and concluded that majority rule would only coincide with the public good, including rule of law and protection of minority rights, so long as an elite governing class provided leadership to the majority. In the view of the framers, professionals, as the sector of society that pursued the public good and not self-interest, were best suited to this role.

Antebellum jurisprudence assigned this vital governing class role to lawyers on account of their virtue and their central role in governance.

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50. Id.; see also Wood, Creation, supra note 27, at 134.
51. Treanor, supra note 49, at 699; see also Wood, Creation, supra note 27, at 60-68, 162-65; Wood, Radicalism, supra note 27, at 104-06, 188-89; Treanor, supra note 27.
52. Wood, Radicalism, supra note 27, at 252-53.
54. Wood, Creation, supra note 27, at 403-09; Treanor, supra note 53, at 1033.
56. Wood, Radicalism, supra note 27, at 253-54.
57. Id. at 253-58; see also Nedelsky, supra note 55, at 170-83; Pearce, supra note 20, at 386.
58. The Federalist No. 35, at 257 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); see also Wood, Radicalism, supra note 27, at 253-58; Pearce, supra note 20, at 386.
Virtue inhered in lawyers both in their status as professionals and in the nature of legal practice. Americans transformed the English notion of lawyers as gentlemen by class into a conception of lawyers as gentlemen as a moral badge of their ability to rise above self-interest, whatever their class origin. Ensuring lawyers’ virtue was the practical wisdom necessary to succeed in their work of representing clients. This required an ability to master both natural law and empirical knowledge. As Joseph Story wrote, “‘The Law of Nature[] ... lies at the foundation of all other laws, and constitutes the first step in the science of jurisprudence.’” Nonetheless, the appropriate methodology for applying this science to a particular case was “instrumental and pragmatic,” grounded ultimately in “experience” that reflected “social context,” and not “jurisprudential theory” alone. Story viewed the common law as “constantly expanding ... with the exigencies of society,” such as its “commercial needs.”

59. See infra notes 60-61 and accompanying text.

60. Wood, supra note 37, at 14-16. This transformation helps explain the contrast between the English preference for the landed gentry to assume political leadership, see supra notes 45-46 and accompanying text, with the American preference for professionals, see The Federalist No. 35, supra note 58 (identifying professionals as preferred political leadership though finding the landed gentry superior to merchants).

61. 1 David Hoffman, A Course of Legal Study, Addressed to Students and the Profession Generally 26-27 (2d ed. Baltimore, Joseph Neal 1836) (observing that “[t]o be great in the law ... it is essential that we should be great in every virtue; skilled in many, and somewhat improved in most of the departments of knowledge, for ‘it applies the greatest powers of the understanding to the greatest number of facts,’ and embraces nearly the entire extent of human actions and concerns”).


63. Id. at 1411.
64. Id. at 1401.
65. Id. at 1398.
66. Id. at 1404.
67. Id. at 1415 (quoting Justice Story in part). Morton Horwitz uses Story’s concern with “commercial needs” as evidence that the antebellum jurisprudence “reshaped [‘the legal system’] to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society.” Morton U. Horwitz, The Transformation of American Law, 1780-1860, at 253-54 (1977); see also Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value (1973). Even assuming that Horwitz is correct both with regard to the instrumental approach and the negative impact of that approach on society, the subject of this essay is how Story and other jurisprudential thinkers of the time understood the nexus between lawyers and the public good, not whether they in fact were promoting the public good. As Brian Tamanaha points out, Story and his peers uniformly described themselves as applying natural law in a noninstrumental way. Tamanaha, supra note 33, at 24-28, 33-35. This essay also follows Stephen Feldman’s approach in identifying antebellum jurisprudence as containing both natural law and empirical elements. See Feldman, supra note 62, at 1404-05 (seeking to “reconcile” commentators, such as William LaPiana and G. Edward White, who emphasize the primacy of natural law analysis with commentators, such as Robert Gordon, Morton Horwitz, Karl Llewellyn, and Grant Gilmore, who emphasize the primacy of pragmatic considerations).
As the custodians of the formal and informal institutions of governance, lawyers applied their ability to identify and promote the public good to providing the leadership necessary to ensure that laws would be consistent with the public good and that the majority would respect the rule of law.68 Within the formal government, lawyers “controlled the judicial branch and dominated the legislature and the executive.”69 Equally important, as representatives of clients and as members of the community, they also served as intermediaries between the formal institutions of government and the people. In “counsel[ing] clients, making arguments in court to judge[s] and jur[ies],” and participating in civic life, they “sought to gain the confidence of and ‘to diffuse sound principles among the people.’”70

The governing class conception embraced a necessary connection between lawyers’ ethics and the public good. Commentators agreed that legal ethics required moral counseling, moral considerations in deciding who to represent, respect for court and colleagues, and personal integrity.71 Beyond these axioms, the two leading American ethicists disagreed on how to reconcile republican and adversarial obligations. David Hoffman urged lawyers not to pursue a defense or claim that they believed “cannot, or rather ought not, to be sustained,”72 including the Statute of Limitations when based on the “mere efflux of time.”73 In a criminal case “of the deepest dye,” where the lawyer believed the client guilty, Hoffman argued that it would be unprofessional to apply “ingenuity . . . beyond securing to them a fair and dispassionate investigation of the facts of their cause.”74 In contrast, George Sharswood urged lawyers to zealously put the prosecution to its proof in order to protect the defendant’s liberty interests, even where the crime was heinous.75 In civil matters too, Sharswood, in contrast to Hoffman, believed that liberty and property rights of defendants required lawyers to defend an “unrighteous claim.”76 Nonetheless, Sharswood limited advocacy of that claim “to assuring the defendant ‘a fair trial’” and advised lawyers to refrain from assisting a client in “frustrat[ing] legitimate property rights, such as . . . the ‘just demands of creditors.’”77

68. Pearce, supra note 20, at 387-92.
70. Pearce, Republican Origins, supra note 32, at 256; see also Sharswood, supra note 69, at 30-31, 53-54.
71. Pearce, supra note 20, at 388-91; Pearce, Republican Origins, supra note 32, at 258-66.
72. David Hoffman, Resolutions in Regard to Professional Deportment, in 2 Hoffman, supra note 61, at 752, 754 (Resolution XI).
73. Id. (Resolution XII) (emphasis omitted).
74. Id. at 755-56 (Resolution XV) (emphasis omitted).
75. Pearce, Republican Origins, supra note 32, at 265-66, 265 n.193 (citing Sharswood, supra note 69).
76. Sharswood, supra note 69, at 98; see also id. at 95-99; Pearce, Republican Origins, supra note 32, at 265-66 (explaining the civil context).
77. Pearce, Republican Origins, supra note 32, at 266 (quoting Sharswood, supra note 69, at 98-99, 112).
The commitment to the public good in legal ethics, grounded in jurisprudence and public political philosophy, withstood pressures from both inside and outside the legal profession. Throughout the antebellum period, some argued that lawyers were business people. Still others argued for a hired gun perspective. They endorsed Lord Brougham’s well-known maxim that “an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.” Hoffman and Sharswood expressly rejected these approaches.

During the Jacksonian era, prevailing public sentiment rejected the notion that lawyers, or any other elite group, had a superior ability to identify and pursue the public good. As a result of this egalitarian impulse, many states abolished or minimized the qualifications for becoming a lawyer. Rather than accept these critiques, the dominant thinkers in the bar continued to rely on the teaching of natural law jurisprudence and elite political philosophy. Indeed, the Jacksonian era was the time when Hoffman and Sharswood published their legal ethics treatises articulating the governing class approach to the lawyer’s role.

79. See, e.g., Miller, supra note 26, at 100-04, 187, 203-06. Norman Spaulding has argued that the “civic republican” conception of lawyering and a “client-centered” approach were dominant in the antebellum period. See Spaulding, Myth of Civic Republicanism, supra note 28, at 1399-1400. By creating a straw man of “civic republicanism” grounded in modern arguments for moral activism, he mistakenly classifies perspectives, such as Sharswood’s, that integrate advocacy with a strong commitment to the public good as exclusively client centered and he fails to recognize that commentators he describes as client centered expressly reject the amoral perspective of the hired gun. Id. at 1442-43. Spaulding describes as a defender of “client-centered, ethically neutral lawyering,” id. at 1440, a commentator who asserted, “[Clients] have purchased your services, but not your consciences. You are not responsible for the goodness of their cause; but you are responsible for the means you use to gain it.” Id. at 1442 (quoting T. Walker, Advice to Law Students: Being the Substance of a Valedictory Address to the Graduates of the Law Class in the Cincinnati College, Delivered March 3, 1838, 1 W. L.J. 481, 483 (1844)). Perhaps one of the grounds for these erroneous readings is his attempt to place the antebellum conception of republican lawyering in the context of the “civic republicanism” of the Revolution and of contemporary discourse, rather than the more complex liberal republicanism that was dominant among the elites in the antebellum period. See supra notes 54-57 and accompanying text. Interestingly, Spaulding’s later work acknowledges the power of obligations to the public good in the antebellum period, though he does so by reading the late nineteenth century conception of professionalism into the earlier period. Spaulding, Discourse of Law, supra note 28, at 2029-39.
81. See Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture, 38 Md. L. Rev. 673, 684 (1979); see also Sharswood, supra note 69, at 84-97; Pearce, Republican Origins, supra note 32, at 257-58.
82. See Bloomfield, supra note 78, at 84; see, e.g., Friedman, supra note 24, at 236-37.
83. See supra notes 71-77 and accompanying text; see also Spaulding, Discourse of Law, supra note 28, at 2029-39 (discussing professionalism in the Jacksonian era).
II. REDEFINING AND LIMITING THE DUTY TO THE PUBLIC GOOD

In the period from the Civil War through the 1960s, the duty of lawyers to the public good narrowed both in terms of defining the public good and in terms of lawyers’ capacity for pursuing the good. Promoting this redefinition was the shift in the dominant jurisprudence from natural law to empiricism, a shift that reflected the increasing influence of liberalism in the larger society.

A. The Decline of the Public Good in Elite Public Political Philosophy

After the Civil War, the increasing influence of liberalism undermined the republican faith in an organic community that promoted the public good.84 While liberalism encompassed a variety of particular political prescriptions, its fundamental emphasis was promoting freedom of the individual.85 At its core, liberalism conceived of the individual as fundamentally self-interested and viewed the role of government as permitting individuals the greatest freedom possible.86 When individuals maximized freedom, they would also maximize what was best for society through the invisible hand of the market87 or through the democratic electoral process.88 As a political philosophy, liberalism did not, at its core, include a conception of the public good independent of individual freedom.89

This absence permitted the development of hybrid public political philosophies that combined liberalism with conceptions of the public good that were not apparently inconsistent with the logic of liberalism. Prior to liberalism, dominant philosophies tended to view society as having an organic component that was more than the compilation of individual self-interest and as having a goal of promoting the public good.90 As liberalism advanced, some public political philosophies sought to accommodate the reality of individual self-interest that liberalism identified with the goal of

84. For republicanism, see supra text accompanying notes 47-51.
85. See, e.g., John Gray, Liberalism, at ix-xi, 26-36, 82 (1986); Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism 9 (1990); Michael J. Sandel, Democracy’s Discontent: America in Search of a Public Philosophy 4-7 (1996); Raymond Williams, Keywords: A Vocabulary of Culture and Society 181 (rev. ed. 1983).
87. See, e.g., Gray, supra note 85, at 62-72; Posner, supra note 86, at 24-25.
88. See, e.g., Sandel, supra note 85, at 5. Majority rule offers a method for aggregating individual preferences. Id. Although many liberal theorists emphasize that democracy may in fact undermine individual freedom, Posner, supra note 86, at 25-29; Gray, supra note 85, at 73-78, the emerging preference for deference to majority rule reflected that it was—at least implicitly—becoming a higher good than limited government. See infra notes 97-99 and accompanying text.
90. See, e.g., Gray, supra note 85, at 7-25, 45-56. For a discussion of civic republicanism, see supra note 79.
promoting the public good.\footnote{Sandel, supra note 85, at 4-7; see also supra notes 84-89 and accompanying text.} For example, as discussed above, liberal republicanism in the antebellum period derived a conception of the good from natural law that included the liberal commitment to individual freedom, a conception of justice that transcended individual self-interest, and an elite governing class that placed the public good above self-interest.\footnote{See supra text accompanying notes 55-58.}

Nonetheless, the logic of liberalism made individual freedom primary. As liberalism extended its influence, hybrid approaches like liberal republicanism were less persuasive. First, they were inconsistent with the core of liberalism. The insistence on a public good independent of the pursuit of individual self-interest prevented the maximization of individual freedom. Second, they were unnecessary. Although liberalism may have needed justifications grounded in natural law when it was a less powerful force,\footnote{See supra notes 91-92 and accompanying text.} as it became dominant it no longer needed external sources of support.

The two most significant changes in public political philosophy that would influence the understanding of the function of lawyers related to knowledge of truth and faith in majority rule. In the antebellum period, access to truth required both virtue and empirical knowledge.\footnote{Tamanaha, supra note 33, at 63; Feldman, supra note 62, at 1400-14. For example, in the antebellum period, a scientific approach consisted of knowledge acquired through both virtue and empiricism. See, e.g., Miller, supra note 26, at 158-59; Feldman, supra note 62, at 1400-14.} Following the Civil War and continuing through the 1960s, empirical knowledge became by far the more dominant way of establishing the truth, at least in elite culture, and the influence of ethics grounded in virtue diminished considerably.\footnote{See, e.g., Michal Alberstein, Pragmatism and Law: From Philosophy to Dispute Resolution 21 (2002) (noting that, from the late nineteenth century, “anything not scientifically constructed, logical, argumentative, or structured will be considered outside the discourse”); Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 380 (1988) (noting that as a result of this shift “[b]y the 1920s, nearly every respectable scientist claimed to believe that no statement about any subject, including humanity and society, was meaningful unless it could be empirically proven or disproven”); See, e.g., George M. Marsden, The Soul of the American University: From Protestant Establishment to Established Nonbelief (1994); Purcell, supra note 67, at 7-8, 15.} Higher education, for example, shifted from a primary emphasis on moral development of the student to a primary—and later almost exclusive—emphasis on empirical knowledge.\footnote{See, e.g., Macedo, supra note 85, at 97-98 (describing liberalism’s rejection of elite political leadership); Feldman, supra note 62, at 1417-19.}

As belief in virtue as the source of knowledge declined, the trends in public political philosophy following the Civil War minimized or eliminated surviving republican notions. A more liberal and democratic sense of capacity for self-rule challenged the belief that a particular class in society was qualified to provide elite political leadership.\footnote{See, e.g., Macedo, supra note 85, at 97-98 (describing liberalism’s rejection of elite political leadership); Feldman, supra note 62, at 1417-19.} If an elite class
was not better able to identify the truth, majority rule shifted from a source of mistrust to grounds for celebration. Indeed, majority rule offered a way, roughly analogous to the market, for self-interested individuals to exercise their political freedom in a way that reconciled their preferences. 98 Where the elite’s liberal republicanism had required an elite governing class to make democracy function properly, in the period following the Civil War and continuing through today, the dominant understanding, even among the elite, was that majority rule was an unqualified good and that arguments for limiting majority rule faced a heavy burden. 99

Ironically, the increasing influence of liberalism in promoting empiricism and belief in majority rule coincided with a declining commitment to the vision of maximizing economic freedom through laissez-faire economics. By the late nineteenth century, the prevailing conception of natural law enshrined the “ideal that government should not interfere in the natural workings of the market.” 100 Proponents rejected government regulation of “property rights and the right to contract.” 101 Incorporating a strong conception of individual self-reliance and construing contract solely as an individual right, they condemned labor unions as interfering with natural law and urged courts to employ natural law conceptions to strike down legislation regulating business or empowering unions. 102 By undermining the existence of a public good independent of self-interest and embracing deference to majority rule, the emerging dominant liberal approach either permitted these types of government intervention in the name of limiting judicial discretion or encouraged them in order to pursue an empirically justified social good. 103

B. The Diminishing Role of Lawyers in Jurisprudence

Reflecting these shifts, jurisprudential commentators redefined the role of lawyers in a way so as to minimize—or in some cases eliminate—their role as the governing class. The natural law-based jurisprudence of James Kent and Joseph Story 104 gave way to empirically grounded approaches like the pragmatism of Oliver Wendell Holmes, the formalism of Christopher

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99. See, e.g., Feldman, supra note 62, at 1417-19, 1425; Treanor, supra note 27, at 464 (identifying leading commentators and judges of this period who developed arguments for limiting judicial review).
100. Tamanaha, supra note 33, at 38; see, e.g., Hovenkamp, supra note 95, at 402-04.
101. Tamanaha, supra note 33, at 38; see also Hovenkamp, supra note 95, at 411-20.
102. Tamanaha, supra note 33, at 40; see also Hovenkamp, supra note 95, at 387-89. Herbert Hovenkamp notes that the activism of the courts should not be exaggerated since they did refuse to overturn a number of regulatory statutes. Id.
104. Miller, supra note 26, at 166-67; Feldman, supra note 62, at 1396-1404.
Columbus Langdell, and the sociological jurisprudence of Roscoe Pound.\textsuperscript{105} As they rejected the natural law basis of antebellum jurisprudence, they also rejected its suspicion of majority rule. Indeed, the empirical schools strongly embraced majority rule.\textsuperscript{106}

The change from natural law to empiricism as the dominant basis for jurisprudence was not seamless. Judges who had been educated in the natural law approach persisted in employing substantive due process to strike down progressive legislation despite the increasing influence of empirical jurisprudence as the dominant jurisprudence of the twentieth century.\textsuperscript{107} Even Lon Fuller, the most influential of the twentieth century natural law scholars, adopted a largely procedural version of natural law that embraced majority rule in the same way as did the empirically grounded jurisprudential commentators.\textsuperscript{108}

In these approaches to jurisprudence, lawyers were no longer central actors. If the majority could be trusted, threats to the rule of law were the exception and not the rule. As virtue became marginal to jurisprudence, so did the need for lawyers as a virtuous leadership class to maintain the public good and rule of law. As the role of lawyers diminished, or disappeared altogether, jurisprudence no longer focused on how the lawyer should combine virtue with empirical knowledge to ascertain the law. Instead, the dominant subject became law as “what the judges say it is.”\textsuperscript{109}

Lawyers played a supporting role as technicians whose task was to study and anticipate the decisions of judges, a role that required no particular commitment to the public good in either Langdell’s formalism or Holmes’s pragmatism.\textsuperscript{110} Pound’s sociological jurisprudence nonetheless continued to afford lawyers some important public responsibilities. While judges played the lead role, lawyers who applied scientific methods to legal structures could provide them with beneficial support.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{105} See, e.g., Alschuler, \textit{supra} note 103, at 10 (discussing Oliver Wendell Holmes’s “revolt against natural law”); Tamanaha, \textit{supra} note 33, at 61-65; Feldman, \textit{supra} note 62, at 1417-46.
\item \textsuperscript{106} See, e.g., Alschuler, \textit{supra} note 103, at 58-59.
\item \textsuperscript{107} See, e.g., Tamanaha, \textit{supra} note 33, at 43-52; Hovenkamp, \textit{supra} note 95, at 393-94. Hovenkamp describes how the views of the Justices in \textit{Lochner v. New York}, 198 U.S. 45 (1905), as well as the state court judges who struck down state regulations, derived from their training in a natural law-based understanding of political economy and law “taught in American universities in the 1870s and 1880s.” Hovenkamp, \textit{supra} note 95, at 400-01. Hovenkamp also describes how, through the late nineteenth century, American legal and economic commentators relied on a natural law approach that the English had generally abandoned for more empirical approaches, such as utilitarianism, in the early nineteenth century. \textit{Id. at} 402-03, 415-16.
\item \textsuperscript{108} Lon L. Fuller, \textit{The Morality of the Law} (1964).
\item \textsuperscript{109} Anthony T. Kronman, \textit{The Lost Lawyer: Failing Ideals of the Legal Profession} 196 (1993).
\item \textsuperscript{110} Oliver Wendell Holmes, \textit{The Path of the Law}, 10 Harv. L. Rev. 457 (1897).
\item \textsuperscript{111} See generally Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 Colum. L. Rev. 605 (1908).
\end{itemize}
These trends continued through the early 1960s. Empirical approaches to jurisprudence, such as the legal realist, legal process, and positivist perspectives, continued to focus on judges and to minimize the significance of the lawyer’s role. Even legal process, which highlighted the contribution of lawyers as problem solvers, limited the scope of this function to the technical resolution of challenges facing individuals and not the engineering of societal structures.

Fuller’s natural law jurisprudence continued to place lawyers in a governing class role, but a far narrower one than that proposed by antebellum thinkers. Embracing majority rule and lacking a broad conception of lawyers’ virtue, Fuller largely found the public good in the “internal morality of the law” and lawyers’ roles in protecting process. This was far less ambitious than the antebellum understanding that lawyers identified and promoted the substantive, as well as the procedural, public good and guided majority rule.

C. Professionalism Both Preserves and Narrows Lawyers’ Obligation to the Public Good

With these changes in public political philosophy and jurisprudence, lawyers had to rethink their connection to the public good. Like all professionals, in the late nineteenth century they faced a challenge to their status grounded in the assertion that they were just as self-interested as business people and therefore deserving of no special authority. Resentment of the privileges of professionals in general and lawyers in particular became widespread. Robert Wiebe observed that “[w]ith the exception of bankers, no group late in the nineteenth century stood in lower public repute [than lawyers].”

In contrast to the Jacksonian era, lawyers could no longer mobilize jurisprudence and elite public political philosophy to justify their claim to serving as a virtuous governing class. As a result many lawyers joined the public in bemoaning lawyers’ failure to deserve the professional status they claimed. Robert Gordon has described “the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles

112. See, e.g., Kronman, supra note 109, at 187-226.
114. See Fuller, supra note 108, at 96.
116. See supra notes 59-70 and accompanying text.
118. Id. at 116.
and books—on the theme of the profession’s decline from a profession to a business.”

In the face of this challenge, lawyers turned to the Progressive Era’s ideological embrace of professionalism. Professionalism posited “a bargain between the profession and society.” Society would permit the profession autonomy in exchange for the promise to use its skills for the good of its clients and the public. Justifying this bargain were two factors. One, the esoteric knowledge of lawyers made it difficult, if not impossible, for lay people to evaluate their services and to regulate them. Two, the altruism of lawyers—the fact that they worked primarily for the public good in contrast to business people who worked for self interest—guaranteed that society could trust lawyers to regulate themselves.

While continuing to find importance in lawyers’ commitment to the public good, professionalism nonetheless offered a more circumscribed understanding both of lawyers’ capacity and their societal function. Where Hoffman and Sharswood had identified lawyers’ innate virtue as the source of their superior ability to identify and pursue the public good, professionalism made the empirically grounded claim that these characteristics derived from lawyers’ training and experience. Professionalism also had less confidence in the commitment of the individual lawyer. In contrast to the republican faith in the individual lawyer and the policing power of reputation, the rhetoric of commentators like Brandeis conceded that the standards of the profession had fallen and sought to restore them. Professionalism recognized that lawyers’ commitment to the public good could only be guaranteed through self-regulating bar associations that controlled admission to the bar, educated lawyers to their ethical duties, and enforced proper conduct through discipline.


120. Pearce, Professionalism Paradigm Shift, supra note 32, at 1238.

121. Id.


123. Pearce, Professionalism Paradigm Shift, supra note 32, at 1239-40.

124. See 1 Hoffman, supra note 61, at 26-27; Pearce, Republican Origins, supra note 32, at 259-60.

125. See Louis Brandeis, The Opportunity in the Law, in Business—A Profession 329, 331-335 (Hein 1996) (1914); see also Pearce, supra note 20, at 399-403.

126. Brandeis, supra note 125, at 329.

127. Pearce, Professionalism Paradigm Shift, supra note 32; Pearce, supra note 20, at 399.
Like the conception of lawyers’ capacity for the public good, the conceptions of lawyers’ function also narrowed. The antebellum notion that lawyers were a governing class responsible for maintaining the public good and the rule of law gave way to a perspective that defined a more limited scope for the governing class role. Pound’s view of lawyers as “social engineers” retained the aspiration that “lawyers [should] lead the people . . . instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.” But where the antebellum view understood leadership as defining the public good for the people, Pound viewed it as an “adjustment of the relations of men to each other and to society as conforms to the moral sense of the community.”

Brandeis articulated a similar notion that retained lawyers as a governing class charged with balancing the competing interests of rich and poor in order to maintain a fair and stable social order. At the same time that Brandeis and Pound articulated a narrower, but still robust, conception, Holmes appeared to abandon the governing class project altogether in describing the entire role of lawyers as predicting legal consequences for their clients.

While a view consistent with that of Holmes would ultimately prevail, the bar of his time preferred the governing class vision that Brandeis and Pound articulated. In 1908, the American Bar Association promulgated the Canons of Ethics, the first national code of ethics for lawyers. The preamble to the Canons stated expressly that “[t]he future of the republic, to a great extent, depend[ed] upon [lawyers’] maintenance of Justice pure and unsullied” through “conduct and the motives [that] merit the approval of all just men.” Although the promulgation of the Canons as a formal code of ethics reflected a lesser degree of confidence in the individual lawyer than that of Sharswood’s general guidance, the Canons themselves largely adopted Sharswood’s approach to balancing duties to clients and the public. The Canons stated that “The Lawyer’s Duty in Its Last Analysis” was “the countermajoritarian obligation of loyalty to the law and the judicial system despite the contrary urging of any ‘client, corporate or individual, however powerful, nor any cause, civil or political, however

130. Id.
131. See, e.g., Brandeis, supra note 125, at 337.
132. Holmes, supra note 110, at 458; see also Alschuler, supra note 103, at 139-40.
133. See, e.g., Haber, supra note 41, at 219 (describing Holmes’s general views as “anomalous” in his time).
134. Canons of Prof’l Ethics pmbl. (1908).
136. Canons of Prof’l Ethics Canon 32.
important . . . .”137 At the same time, they urged ““entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.””138 The Canons expressly stated that this zealousness did not require the “lawyer to do whatever may enable him to succeed in winning his client’s cause.”139 Indeed, the Canons provided that “[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer’s responsibility. He cannot escape it by urging as an excuse that he is only following his client’s instructions.”140 The lawyer “must obey his own conscience and not that of the client.”141

In the period from the early twentieth century through the 1960s, the rhetoric of aspiring to the public good remained consistent, while the understanding of lawyers’ function continued to narrow. Toward the end of this period, growing support for the hired gun role142 led the American Bar Association to restate the profession’s commitment to the public good. In 1958, the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, for which Fuller served as co-reporter, declared the “lawyer’s role” as a “trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.”143 Erwin Smigel’s study of Wall Street lawyers, published in 1964, confirmed that elite lawyers endorsed a similar understanding.144 The lawyers Smigel interviewed described themselves to be “guardians of the law,”145 urging their clients to adopt “proper and moral legal positions.”146 Although the Joint Conference did describe a narrower obligation to the public good than that of the early twentieth century, Smigel’s Wall Street lawyers kept alive the broader construction of Brandeis.

III. THE RISE OF THE HIRED GUN

As the influence of liberalism continued inexorably to expand, even this less ambitious commitment of lawyers to the public good would fade. Following the 1960s, while bar leaders retained a rhetoric of professionalism that was necessary to maintain self-regulation, most

137. Pearce, Republican Origins, supra note 32, at 268 (quoting Canons of Prof’l Ethics Canon 32).
138. Canons of Prof’l Ethics Canon 15. (quoting Sharswood, supra note 69, at 78-79); Pearce, Republican Origins, supra note 32, at 243-47.
139. Canons of Prof’l Ethics Canon 15.
140. Id. Canon 31.
141. Id. Canon 15.
142. See e.g., Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (1951).
143. Fuller & Randall, supra note 115, at 1162.
145. Pearce, supra note 20, at 381.
146. Smigel, supra note 144, at 5-6.
lawyers abandoned the notion that they had any special obligation to the public good, and, if they acknowledged it at all, they limited it to the margins of practice.

The 1960s represented a watershed in American culture. While proponents of philosophical liberalism, whether identified politically as liberal or conservative, had been dominant in elite culture since the late nineteenth century, certain pre-liberal conceptions, such as the public good, had continued to coexist in a less ambitious form. The 1960s marked the ascendance of purer forms of liberalism that questioned even a rhetorical commitment to the public good.

On the right, Milton Friedman’s libertarianism eventually eclipsed traditional conservatism as the engine for elite conservative political philosophy. While traditional conservatism had valued both economic freedom and the public good, Friedman rejected the public good as subversive of individual freedom. People were fundamentally self-interested. Claims of a public good were false and only interfered with individuals’ freedom to maximize their self-interest. Conservative commitment to the public good did not disappear entirely. Traditional conservatism survived, especially among religious conservatives whose views would eventually become very influential among the public. But at the level of elite culture, those views were hard to find. Conservative perspectives that emulated Friedman’s gained ascendance in the academy and the larger intellectual community, such as through the rise of the law and economics movement.

On the left, the dominant strains of liberalism also found every individual to be self-interested and applied skepticism to claims of values derived from the public good. The protest movements of the 1960s cast doubt on the legitimacy of established authority, while making the broader claim that no person or group was better able to ascertain and pursue the public good. The liberal goal was a public square that maximized individual freedom by

149. See, e.g., Alschuler, supra note 103, at 3-7; Kronman, supra note 109, at 231 (discussing dominant approach to law and economics); Posner, supra note 86, at 1-4. One prominent exception is religious conservative Robert George. See, e.g., Robert P. George, Public Reason and Political Conflict: Abortion and Homosexuality, 106 Yale L.J. 2475 (1997).
remaining neutral with regard to “competing visions of the good life.”
Persons should have the freedom to live their life without others, especially
the government, imposing values upon them. Conceptions of the public
good should remain in the private realm. Critics of liberalism from the left
often went even further. Not content to restrict the pursuit of the public
good to the home, they labeled it a subterfuge for the naked exercise of
power and sought to banish it entirely.

The dominant trends in jurisprudence reflected those in elite political
philosophy. Whether law and economics on the right, liberal jurisprudence
in the middle, or critical theory on the left, they either rejected outright
the legitimacy of a public good independent of individual freedom or sought to
make the concept as thin and private as possible. The rejection of virtue
and the acceptance of majoritarianism became so complete that the
diminished role lawyers played in earlier jurisprudences, like those of Fuller
and of the legal process school, gave way to the dominance of the
Holmesian perception that lawyers were mere technicians. Lawyers largely
disappeared from jurisprudence altogether as the focus on judges became
even more pronounced. For example, in contrast to the significant attention
Fuller gave lawyers, even natural law scholars such as Robert George, no
longer found it necessary to maintain a virtuous legal elite. The only
exceptions to this approach were individual scholars of both jurisprudence
and the legal profession, such as David Luban and Anthony Kronman, whose
works had little impact on prevailing jurisprudential perspectives.

Not surprisingly, consistent with these developments in jurisprudence
and public political philosophy, survey data and anecdotal impressions
revealed that the hired gun perspective had become dominant among
lawyers. If the concept of the public good did not exist, then lawyers
could claim no special relationship to it. If all people were self-interested,
lawyers could not claim to be above self-interest. If majority rule could be
trusted, society did not require lawyers to serve as an elite leadership class.

151. Kathryn Abrams, The Progress of Passion, 100 Mich. L. Rev. 1602, 1614 (2002);
Deborah L. Rhode, Feminism and the State, 107 Harv. L. Rev. 1181, 1187 (1994); Michael
J. Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 Cal. L.
Rev. 521, 521 (1989); see, e.g., Suzanna Sherry, Responsible Republicanism: Educating for

152. See supra note 13 and accompanying text.

153. See, e.g., Alberstein, supra note 95, at 178; Alschuler, supra note 103, at 7-8; Kronman, supra note 109, at 240-41; Tamanaha, supra note 33, at 120-23; David Kairys,
Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical

154. See generally Fuller & Randall, supra note 115.

mentioned in index).

156. See, e.g., Luban, supra note 15.

157. See, e.g., Kronman, supra note 109.

158. Pearce, supra note 20, at 407-09.
The hired gun conception rejected an obligation to the public good and privileged individual autonomy. It required lawyers to advocate zealously for their client’s self-interest and to disregard their own values in order to avoid interfering with their client’s autonomy. Lawyers’ role prescribed extreme partisanship on behalf of clients within the bounds of the law and without moral accountability for their actions or those of their clients.

The bar faced a dilemma. According to professionalism, lawyers’ commitment to the public good was a precondition to self-regulation. The bar responded in two ways. First, it continued to employ the rhetoric of allegiance to the public good. When it became undeniable that most lawyers were devoting themselves to their own self-interest and that of their clients, bar leaders declared a crisis of professionalism. They implemented commissions and mandatory classes to remind lawyers of their public obligation. Second, the bar redefined legal ethics and the public good to legitimize the hired gun view.

In its ethical codes, the bar minimized the centrality of the public good and expanded the commitment to promote the client’s interests. While the 1970 Code of Professional Responsibility echoed the 1908 Canons in proudly declaring that “[l]awyers, as the guardians of the law, play a vital role in the preservation of society,” the 1983 Model Rules of Professional Conduct identified the lawyer’s first role as “a representative of clients” and only after that “a public citizen having special responsibility for the quality of justice,” a less ambitious role than that of a leadership class upon which the very “preservation of society” depended.

Moreover, both the Code and the Rules accommodated the hired gun by elevating the lawyer’s duty to the client. The Code directed lawyers to “represent a client zealously” within the bounds of the law and required a lawyer “to seek the lawful objectives of his clients through reasonably available means permitted by law and the disciplinary rules.” While this

159. Id. at 417.
161. See Pearce, Professional Paradigm Shift, supra note 32, at 1239-40.
162. Pearce, supra note 20, at 410-15; Pearce, Professionalism Paradigm Shift, supra note 32, at 1254-57.
164. See infra notes 165-76 and accompanying text.
language could have been read to permit lawyers broad discretion, lawyers understood it as a command to serve the client as a hired gun. The Model Rules continued to privilege this vision. Indeed, for the first time in an ethical code, the ABA identified client representation, and not commitment to the public good, as lawyers’ primary obligation.

The bar further accommodated the hired gun ideal by shifting responsibility for the public good from the average lawyer to the public interest practitioner. In the 1960s, public interest law emerged as a separate field of practice. It expanded from a few, small groups, such as the NAACP and the ACLU, to include significant numbers of lawyers engaged in a variety of causes. The bar came to embrace public interest work and to identify public interest lawyers as role models. In doing so, the bar located responsibility for the public good in the aptly named public interest bar and discarded it from its historical place in ordinary practice.

The bar also encouraged lawyers to remove any remaining personal obligation they felt to the public good from their everyday work and place it in the limited confines of the new ethical duty of pro bono. Although free legal services for those who could not afford them had long been one part of the larger governing class ideal, the idea of the pro bono duty as a separate ethical obligation arose in the 1970s. In 1970, the Code of Professional Responsibility became the first legal ethics code to articulate a separate, though aspirational, ethical duty to provide pro bono legal services. While the duty remained aspirational, it received greater attention and more detailed consideration in the Model Rules.

Commitment to provide a minimum number of pro bono hours, often in conjunction with public interest firms, became a major preoccupation of the bar’s professionalism campaign, thereby compartmentalizing the public good into the few hours a lawyer devoted to pro bono and further legitimizing the hired gun approach to representing clients.

But the bar’s strategy of combining the rhetoric of the public good with the hired gun perspective took a toll on lawyers and society. Professionalism’s promise that lawyers’ work contributed to the public good had provided earlier generations of lawyers with a coherent

170. Id. at 276-78; see also text accompanying supra note 159.
172. Pearce, supra note 20, at 417-19.
176. Pearce, supra note 20, at 419-20.
understanding of why their work was important. As lawyers came to view themselves as largely self-interested, the rhetoric of professionalism rang false.\textsuperscript{177} Absent an alternative approach to finding fulfillment in their stressful practices, lawyers had difficulty finding reward in their work. Their rates of job dissatisfaction, substance abuse, and anxiety-related mental illness exceeded those for other occupations.\textsuperscript{178}

Lawyers also failed their obligation to society. Even though the hired gun ideal denied it, lawyers continued to serve as the governing class. Aside from their continued overrepresentation in the formal institutions of government,\textsuperscript{179} they remained the primary intermediaries between the people and the law through their representation of clients and their community leadership. In that role, lawyers brought disrespect to the law and the legal system when they pursued self-interest at the same time as they claimed to serve the public good. To the public and to themselves, lawyers appeared to be “hypocrites, cynics, or fools.”\textsuperscript{180}

Moreover, as hired guns who denied moral accountability, lawyers taught clients to view the law instrumentally and to devalue obligations to conscience and community. This approach only benefited society under a rather pure libertarian view, like that of Milton Friedman,\textsuperscript{181} which defined a just society as one where individuals pursue their own self-interest within the bounds of the letter of the law and reject the existence of moral obligations derived from a public good. Most Americans, even those who employed Blue State rhetoric, did not actually accept individual freedom as the complete measure of a just society.\textsuperscript{182} To them, the hired gun’s amorality undermined the responsibilities a community rightfully demanded from its members.

Even within the legal system itself, the hired gun approach failed to satisfy lawyers’ responsibilities. The adversarial legal system delivers justice and truth when each party has an equal opportunity to promote its interests to the court. This can only occur if each party has equal access to

\textsuperscript{177} Pearce, Professionalism Paradigm Shift, supra note 32, at 1250-52.
\textsuperscript{178} Russell G. Pearce, Brian Danitz & Romelia S. Leach, Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll, 14 Widener L.J. 907, 914 & n.37.
\textsuperscript{179} For example, although lawyers comprise only .7% of the employed population, see U.S. Census Bureau, Statistical Abstract of the United States, 2006, at tbl.604 (2006), available at http://www.census.gov/compendia/statab/labor_force_employment_earnings/employed_persons/ (showing that lawyers represented 954,000 out of 139,252,000 employed civilians in 2004), lawyers represented approximately 40% of the members of the House of Representatives and 64% of the Senate for the 109th Congress. See Harold W. Stanley & Richard G. Niemi, Vital Statistics on American Politics 2005-2006 Online Edition, at tbl. 5-3 (2006), http://library.cqpress.com/vsap/document.php?id=vsap05tab5-3&type=toc&num=5.
\textsuperscript{180} Pearce, Professionalism Paradigm Shift, supra note 32, at 1274.
\textsuperscript{181} See supra note 147 and accompanying text.
\textsuperscript{182} See, e.g., Thomas Frank, What’s the Matter with Kansas?: How Conservatives Won the Heart of America (2004); Jim Wallis, God’s Politics: Why the Right Gets it Wrong and the Left Doesn’t Get it (2005); Sheryl Gay Stolberg, Democrats Getting Lessons in Speaking Their Values, N.Y. Times, Feb. 11, 2005, at A20.
the same quality of legal services. Otherwise, unequal justice will result. In our current system, where access to legal services is pervasively unequal, the hired gun exacerbates injustices that a commitment to the public good could possibly mitigate.

CONCLUSION

In a society where deep divisions exist regarding fundamental value questions, lawyers have failed to provide leadership in healing those divisions. A legal profession identified with the Blue State vision of excluding values from the public square has little to contribute if the public square is inevitably full of value conflict and debate. Indeed, even those in the Blue State camp have begun to recognize this dilemma. An increasing number of politically liberal commentators are acknowledging what conservative and progressive critics of liberalism have long argued: that the asserted effort to prevent the “impos[ition of] personal ethical values” actually conceals value judgments grounded in specific visions of the public good. The legal profession, too, must abandon the Blue State rhetoric if it is to play a leading role in helping transform value conflicts from culture wars to civil and respectful disagreement.

All people, lawyers or not, are morally accountable for their work at the same time as they balance their duty to the public good with their self-interest. What makes lawyers different is not their superior moral capacity, as lawyers have historically claimed. Rather, it is their work. As the intermediaries between the law and the people, lawyers have both an individual and collective responsibility for the health of the legal system and society. Unless lawyers believe, like Milton Friedman, that the public good consists of nothing more than maximizing individual freedom, they must find a way to translate their public responsibility into their everyday work. That would not require dictating to clients or overriding their choices. It would require counseling clients on the moral implications of their choices.

To effectively perform that role, lawyers would have to revive their capacity to serve as a political leadership class. Engaging clients in moral counseling would require lawyers to develop the ability to promote dialogue among and between people of differing values. If lawyers incorporated this ethic into their role as intermediaries between the people

184. See, e.g., Sandel, supra note 6, at 122-55, 211-47.
185. Dworkin, supra note 13, at 21.
186. See supra notes 183-84 and accompanying text; see also Romer v. Evans, 517 U.S. 620, 652-63 (1996) (Scalia, J., dissenting); Macedo, supra note 85, at 260-65.
and the law, they would better serve their governing class function and make a valuable contribution to healing the Blue State-Red State divide.