1999

Asking the Right Questions

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72 Temp. L. Rev. 839

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ASKING THE RIGHT QUESTIONS

David Luban*

At this Symposium, we have heard about forms of law practice that raise large questions about the lawyer's role. My sole theme in the present essay is that we often ask the wrong large questions. Too often, the questions about multidisciplinary practice ("MDP"), mediation and arbitration, and in-house lawyering are whether they are good for lawyers and good for clients. These are questions, I will suggest, that the market itself will decide. The right question is not whether new roles with no rules are good for lawyers and clients, but rather whether they are good for the rest of us—"us" being the citizenry who count on lawyers to be guardians of the law, and who market forces will not necessarily protect.¹

All three of the new roles raise the interesting prospect of the lawyer's traditional role dissolving into a different one as role boundaries blur and thin. In MDP, the prospect is that lawyers become indistinguishable from accountants, investment bankers, financial advisors, or business consultants. For in-house lawyers, the prospect is that lawyers become indistinguishable from corporate executives, or, more broadly, from clients. And for third-party neutrals, the prospect is that lawyers become very much like judges.

I will not be discussing all three roles in this paper. My principal focus is on multidisciplinary practice. The role of in-house counsel is a secondary focus, and I shall not address the role of third-party neutral at all.

I.

Last year, I sat in an audience of law professors, listening to a debate on the future of law practice. On one side was a partner in a venerable and famous Manhattan law firm, extolling the virtues of traditional large-firm practice in familiar terms. On the other was a lawyer from one of the Big Five accounting firms. He was low-key and well-spoken, but what he delivered was a variant of Nikita Krushchev's famous "We will bury you!" speech at the United Nations. He made it clear that his firm intends to offer one-stop shopping to business clients, to provide the proverbial seamless web of services, including legal

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1. This paper has a secret co-author. Several weeks before I wrote it, I heard Robert Gordon complain that the debate over multidisciplinary law practice ("MDP") was completely ignoring the question of what effect MDP would have on the lawyer's role as a guardian of public norms. He expressed considerable bemusement about the neglect of this question in published discussions of MDP. That sounded right to me, and the present paper is my effort to raise in public the question that Gordon raised in conversation. Of course Gordon bears no responsibility for the way I have elaborated his question.
services. To this end, he said, his firm will outbid any law firm for the services of
talented lawyers and new law graduates. Not only will it outbid the law firms, it
will hire lawyers by the hundreds and even the thousands—in fact, it will hire
lawyers in quantities that law firms can only gape at.² “Quantities,” I might add,
was very much the master-concept of his presentation, as he displayed one nifty
graph after another showing the irresistible lure the Big Five accounting firms
would soon be exerting to suck all the business in the world into themselves, like
black holes. Significantly—and no doubt as a deliberate provocation—he never
once used the word “client,” invariably preferring the words “consumer” and
“customer.”

The law professors in the audience walked away looking slightly green,
feeling rather old, shaking their heads and no doubt murmuring to themselves,
“O brave new world!” But what exactly is the problem? The market will decide
whether the brave new world is good for lawyers and clients. Lawyers and other
financial professionals apparently wish to merge, and business clients apparently
want them to do so as well. If business clients subsequently find that their needs
are better met by traditional law firms, they will vote with their feet; and if their
feet lead them away from multidisciplinary financial firms’ legal departments
back toward traditional law firms, lawyers’ feet will follow and the MDP
experiment will fail. A June 1998 article in The American Lawyer about Arthur
Andersen’s efforts to conquer the legal markets of Europe by buying up law
firms suggested that many lawyers were bailing out, because they did not like the
corporate mentality of the accounting firm; this is another issue on which the
market will have the last word.³

The American Bar Association’s worry has been that MDP will lead to an
erosion of the “core professional values” of independent judgment,
confidentiality, and loyalty. But we are talking primarily about very
sophisticated business clients who will know better than the ABA does whether
they are being well-served by their lawyers. In this context, paternalism seems
singularly out of place.

One might object to the claim that all clients of MDPs are sophisticated
business clients: in its report to the ABA House of Delegates, the committee that
studied MDP used the example of a lawyer partnering with a financial planner
and social worker to help plan the affairs of senior
citizens.⁴ The choice of
example is disingenuous, however. If MDPs were all like the one in the example,
rest assure that there would never have been an ABA commission on the issue.
The debate has never been about how best to help Mom and Dad plan their
retirement. It is about high-end lawyers who want to merge with other high-end
financial professionals to compete more effectively for the business of the
Masters of the Universe. The Masters of the Universe did not acquire their

². It is already the case that two of the four biggest “law firms” in the world are accounting firms.
⁴. ABA REPORT, supra note 2, ¶ 2.
riches by being dumb negotiators in their own self-interest, and they scarcely need the solicitude of the organized bar, which cannot claim to understand their interests better than they do. The rich really aren't like you and me, and they transact their business with lawyers and bankers out of sight of our speculations. We don't really know how they view their lawyers or what they say to them; why second-guess them, then? We find similar phenomena in nature. Two miles beneath the placid surface of the Pacific Ocean, far removed from the eyes of observers, the sperm whale and the giant squid grapple in silent combat. Moby Dick has no need of ABA commissions worrying that the squid may use an illegal hold. Moby Dick knows what to do.

II.

But the rest of us may not know what to do about Moby Dick. Richard Posner rightly points out that the incursion of competitive markets into the cartelized legal profession is likely to enhance legal ethics if the term is understood as heightened regard for the interests of consumers (pardon me: "clients"), even as it makes life less pleasant for the producers, the lawyers toiling away in gilded sweatshops.\(^5\) Competitive markets are good for consumers. Almost as an afterthought, Posner observes that the commercialization of the legal profession is likely to erode whatever protections now exist of third-party interests: competitive pressure will make lawyers more inclined to do the client's bidding without raising questions or objections.\(^6\) Posner immediately drops the subject, but for those of us who believe that the protection of third-party interests is one of the watershed issues in legal ethics, dropping the subject is on a par with "apart from that, Mrs. Lincoln, how was the play?"

The problem is this: The advent of MDP thins the distinction between lawyers and other financial professionals, in the same way that the role of in-house counsel thins the distinction between lawyers and their clients. It is hardly a secret that financial deal-makers, like many business clients, regard the law with suspicion and even hostility—as a universe of red tape, bureaucratic meddling, regulatory hindrance, and deadweight loss. As lawyers come to occupy roles structurally similar to those of deal-makers and clients, it should not surprise us if lawyers' approach to the law swings increasingly into alignment with this jaundiced view.

Contrast this with one of the prominent alternative views of the lawyer's role, occupying an honorable position among the bar's traditions. On this alternative, the lawyer serves a unique and indispensable social function by acting as a kind of mediator between private interests—those of the client—and the public interest, represented by the law.\(^7\) This way of describing the

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\(^6\) Id. at 93.

\(^7\) This view was elaborated by the sociologist Talcott Parsons, but it may already be found in Tocqueville, and has been defended by such notable jurists as Louis Brandeis. See generally Talcott Parsons, A Sociologist Looks at the Legal Profession, in Essays in Sociological Theory 370.
alternative comes from Talcott Parsons and Louis D. Brandeis, but it also has a familiar counterpart in the contemporary bar's official self-understanding. As the Preamble to the ABA's Model Rules of Professional Conduct puts it, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." 8

The root idea is that lawyers owe fealty not just to the client but to the law (at least insofar as the law is just). The most prominent expression of this idea is the familiar bromide that a lawyer is an "officer of the court." The meaning of this formula is far from obvious, but it receives some tangible expression in the rules of professional conduct. The clearest example is the lawyer's duty of candor to the courts, which requires lawyers to reveal, if necessary, that a client has committed a fraud on the court. By contrast, lawyers are forbidden from revealing client frauds committed on anyone else. 9

The idea that lawyers have duties to the law as well as to their clients is wider than the officer of the court concept, however. For one thing, it applies outside of litigation settings, for example, in the requirement that lawyers decline to assist clients in criminal or fraudulent schemes. 10 More importantly, it represents an ideal of lawyering that transcends the formal rules of professional conduct, an ideal that is sometimes described by the phrase "the independence of lawyers." 11

The ABA report on multidisciplinary practice focuses exclusively on one meaning of this ideal, namely lawyers' independence from nonlawyers who may be paying their fees and who may have interests of their own, not necessarily helpful to the client. 12 Historically, the ideal had a second meaning as well: it refers to the lawyer's independence from the state. For nineteenth-century European liberals struggling to loosen the grip of the monarchical state, this was

9. See id. at Rule 3.3(a)(4) (requiring lawyer to disclose to tribunal material facts to avoid assisting in crime or fraud); id. at Rule 1.6 (forbidding lawyer from revealing certain information related to client representation).
10. Id. at Rule 1.2(d). See also id. at Rule 1.16(a)(1) (requiring lawyer to withdraw if representation will result in violation of law); id. at Rule 1.16(b)(1) (permitting lawyer to withdraw if client persists in course of action that lawyer believes to be criminal or fraudulent). My interpretation of the rule as an expression of the Parsons-Brandeis ideal may not be valid if we consider only criminal schemes, in which the requirement not to counsel or assist is nothing more than the demand not to be an accomplice or enter into a criminal conspiracy—hardly a requirement that applies only to lawyers! The interpretation is more plausible when we turn from criminal schemes to non-criminal frauds.
12. The relevant Model Rules are 1.8(f) and 5.4, both of which forbid lawyers from allowing third parties paying their fees to interfere with their judgment on behalf of clients. ABA MODEL RULES, supra note 8, at Rules 1.8(f), 5.4.
the notion of independence worth going to the barricades for. But a third
meaning is equally important: the lawyer is independent from the client. For
understandable reasons, this aspect of independence is not one that the bar
adVERTISES, but like the others it too is implicit in the rules. Representing a client
does not entail endorsement of the client’s objectives; advocating for a client
doesn’t mean believing that the client’s cause is just, and, above all, advising a
client sometimes means telling the client that what he wants to do is against the
law and he shouldn’t do it.

Although the Model Rule concerning lawyers as advisors does not put this
last proposition as indelicately as I just have, the proposition is central to the
ABA Model Rules’ justification of confidentiality. Many people suspect that
confidentiality permits clients to conceal wrongdoing. To counter this common-
sense fear, the ABA insists that confidentiality actually enhances client
compliance with the law. Confidentiality encourages clients to seek their
lawyers’ advice, and, the commentators assure us, “[b]ased upon experience,
lawyers know that almost all clients follow the advice given, and the law is
upheld.” Regardless of whether you believe this assurance, the important
point to note is that it presumes that lawyers are in there pitching for their clients
to uphold the law. If so, then no doubt clients often don’t like to hear it—but,
the Comment implies, lawyers are supposed to dish it out anyway. That is what
independence is about.

Independence of this sort may already be a scarce commodity in traditional
law practice, where lawyers competing for clients may be understandably
reluctant to tell their clients that they can’t do what they want to do. But it’s
vital to ask whether the ideal of independence can thrive in the context of MDP
or, for that matter, in-house counsel, where the lawyer’s role has to a large
degree blended with those of people whose attitude to the law is often that of

13. See, e.g., DiETRICH RUESCHEMeyer, LAWYERS AND THEIR SOCIETY: A COMPARATIVE
STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES 174-75 (1973)
(discussing legal profession in Germany in the nineteenth century).

14. Interestingly, this meaning is explicitly acknowledged and centrally important in Germany.
The Federal Lawyers’ Act (Bundesrechtsanwaltsordnung) and the code of legal ethics (the so-called
“Richtlinien” or Grundsätze des anwaltlichen Standesrechts) both begin with the fundamental
principle, “a lawyer is an independent organ of the administration of justice” (Rechtspflege). BRAO §
1; RICHTLRA, Vorspruch § 1. The leading commentaries all agree that this means independence from
the client as well as the state. For discussion and references, see David Luban, The Sources of Legal
Ethics: A German-American Comparison of Lawyers’ Professional Duties, 48 RABELS ZEITSCHRIFT

15. See ABA MODEL RULES, supra note 8, at Rule 1.2(b) (stating that client representation does
not amount to endorsement of client’s views).

16. Id. at Rule 3.4(e) (prohibiting attorneys from stating their own views during trial).

17. “In representing a client, a lawyer shall exercise independent professional judgment and
render candid advice. In rendering advice, a lawyer may refer not only to law but to other
considerations such as moral, economic, social and political factors, that may be relevant to the client’s
situation.” Id. at Rule 2.1.

18. Id. at Rule 1.6 cmt. 3.
Holmes's "bad man." The bad man cares nothing about the law beyond whatever effect its enforcement may have on his own interests. Holmes provokes his readers by insisting that the bad man's jurisprudence is largely right. However, many readers fail to notice that on the very same page where Holmes sings the praises of the bad man, he insists that lawyers are by and large good men and good citizens. On this issue, even Holmes was a traditionalist. The question we are entitled to have answered is: what happens to the enforcement of legal norms when lawyers, too, occupy the structural role of Holmes's bad man?

Let me pose my complaint about asking the wrong question in somewhat different terms. For decades, the bar has been embroiled in a profound collective introspection about commercial values supplanting professional values. Viewed from the standpoint of this distinction, the debate about MDP, like the debate between the law firm and the accounting firm lawyers I described above, is another manifestation of the battle between professionalism and commercialism, symbolized by the decision over whether to refer to legal employers as clients or consumers, that is, customers.

There is, however, another distinction more familiar to political philosophers than to analysts of legal ethics. This is the distinction between consumers and citizens. As a consumer, I am a participant in markets. My aim is to enhance my own well-being, by satisfying my preferences, which I express through market behavior. As a citizen, my concern is different. It is a concern not with what is best for me but with what is right for us. My aim is to participate in deliberation with my fellows, and I consider not only my preferences but my (and our) values as well. Frequently, my consumer preferences coincide with the values I support as a citizen; sometimes, however, they do not. I may, for example, support higher taxes on people like me, because I believe it would be better for my community; I may vote against a new dam on environmentalist grounds even though if it is not built my own electric bill will go up. Because our aims as consumers and citizens are somewhat schizophrenic, public and private life both require a never-ending negotiation between consumer values and citizen values. In Emile, Rousseau painted a one-sided picture of the ideal citizen as someone who cares only for his city, never for himself. But we are

20. Id.
21. The distinction between citizen and consumer has been explored by Mark Sagoff in a series of elegant articles in the 1980s. Many of these were eventually incorporated into his book, The Economy of the Earth. See generally MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988).
22. JEAN-JACQUES ROUSSEAU, EMILE, OR ON EDUCATION 40 (Allan Bloom trans., Basic Books ed. 1979). Rousseau wrote:
The Lacedaemonian Pedaretus runs for the council of three hundred. He is defeated. He goes home delighted that there were three hundred men worthier than he to be found in Sparta. I take this display to be sincere, and there is reason to believe that it was. This is the citizen.
not like that, nor should we be; in both inner and outer life, consumer and citizen roles constantly threaten to undermine each other. We must give both their due, and that is not an easy task.

The output of citizen activity is, typically, the output of government: law—the formal expression of public values. When Talcott Parsons described lawyers as mediators between the private interests of clients and the public interests expressed in law, he was suggesting that lawyers play an indispensable role in carrying out the negotiation between public values and private preferences. There are few settings that more purely reflect the schizophrenia of public and private values than transacting commerce in a regulatory state. It is the lawyer's role in negotiating this delicate dialectic, hence the very meaning of public values to the legal profession, that the ideal of independence aims to preserve, and that the capture of lawyers by third parties or by customers threatens.

And my complaint is that we are not asking about the threat to this role.

III.

The question assumes that the Brandeis-Parsons ideal of the lawyer's role as public citizen is correct, and that assumption may lead some to roll their eyes. As Robert Gordon observes, "when lawyers start talking this way about their public duties, . . . most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real."23 I want to defend the ideal of independence by working through five objections to taking it seriously. The first is that these ideas rest on an impossibly romantic conception of law as the expression of public values. The second is that they rest on a knee-jerk conservative equation of law, public values, and goodness. The third is that lawyers need be no more committed to the law than anyone else. The fourth is that these concerns rest on a mistaken conception of lawyers' role, one that wholly neglects the fact that it is a client-centered, adversarial one. And the fifth is that even if the Parsonian analysis of the lawyer's role is correct, legally-trained people in MDPs or in-house positions can simply define new roles for themselves.24 Only the last, I believe, has merit—and once we see the merit

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A Spartan woman had five sons in the army and was awaiting news of the battle. A Helot arrives; trembling, she asks him for news. "Your five sons were killed." "Base slave, did I ask you that?" "We won the victory." The mother runs to the temple and gives thanks to the gods. This is the female citizen. Id. (footnotes omitted).


24. There is a sixth rejoinder as well, perhaps the least familiar but in some ways the most interesting. That is the point, developed in numerous essays and books by Lon Fuller, that the sharp distinction between citizen and consumer—state and civil society, in the terminology of nineteenth-century political economy—is excessively statist and, in the final analysis, misunderstands the pluralist nature of law. In Fuller's eyes, law arises whenever human beings subject their own conduct to the governance of rules, whether or not these rules are made by the state; thus, the law in a contract is just as much "contract law" as the law governing its formation.

I believe that it is possible to recast the distinction between public norms and private interests
IV.

Consider first, then, what I will call the public choice response to concerns that lawyers in MDP, and in-house counsel, may not fulfill the role of guarding public values. Who says that law expresses public values? Law gets made by public officials who are no less self-interested rational actors than the rest of us. Law is, essentially, bought, through the familiar processes of interest group politics. As Richard Posner expounds the economic theory of legislation, the political “process creates a market for legislation in which legislators ‘sell’ legislative protection to those who can help their electoral prospects with money or votes.”\(^{25}\) The entire framework of economic regulations represents, as a consequence, nothing more than the triumph of some private interests over others. Morally speaking, then, there is no reason at all why business clients should genuflect before the law. Regulations are simply one more obstacle thrown up by market competitors against each other, and there is no reason for lawyers or clients to treat them as anything other than obstacles. There is no reason not to push the envelope, or play the enforcement lottery, or invent ingenious methods of contracting around the law. The Brandeis-Parsons ideal of the lawyer as guardian of the boundary between public and private interests is, from the standpoint of political and economic reality, basically absurd.

This is not a preposterous point of view; it is, on the contrary, an important and cogent one, widely believed by knowledgeable people. It is also, however, an exaggerated point of view, and once we recognize its exaggerations, the conclusion it draws, that the ideal of the lawyer as public citizen is absurd, no longer follows.

In its academic form, the public choice argument simply postulates that all politicians are self-interested rational actors and that all law is the result of market activity: the rational-actor model is an assumption, not a conclusion, of the theory. In its own way, this assumption is just as abstract and one-sided as Rousseau’s, in effect denying that legislators have even a single non-self-interested thought. The model would have to be taken seriously if it was backed by a wealth of empirical confirmation; but the theory has proven notoriously disappointing on the empirical front.\(^{26}\) In its non-academic form—the form you

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\(^{26}\) On this issue, the by-now-standard work is that of Donald P. Green and Ian Shapiro. They carefully review hundreds of political science studies in the public-choice tradition and find them by and large either unfalsifiable or falsified. See generally DONALD P. GREEN \\& IAN SHAPIRO, \textit{PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL
hear talking with lobbyists, journalists, lawyers, and politicians—the conclusion is not nearly so drastic. True, a first peek into the legislative sausage factory is indescribably revolting. A second glance shows, among the horse-traders, men and women of principle making decisions of principle on a daily basis. There is no reason to assume that all law is bought law, or that law should be read as nothing more than the terms of a horse-trade. Some law will fit this description, some will not.

Consider, then, a lawyer in the important role of compliance counselor to a regulated business, or a due diligence opinion letter writer in a large-scale deal. Because some legislation is bought legislation, the lawyer cannot assume a priori that the law she is dealing with is a genuine reflection of public values; nor, however, can she assume that it is simply sausage from the sausage factory, reflecting nothing more than a process of venality and vote-buying. Instead, she must range it on a scale of which these are merely the extremes, and consider to what extent it deserves good faith compliance and to what extent it should be treated as a mere obstacle. In his path-breaking treatment of compliance counseling, Robert Gordon has identified over a dozen distinct stances a lawyer may advise a client to take, depending on where she locates the law on the public values/private sausage continuum.27 The lawyer can recommend complying with the letter of regulation but not the spirit; or the letter and the spirit; or arguing to regulators that a business plan complies with the spirit, even though it does not comply with the letter; or resisting the regulators; or recasting a prohibited business plan in a cosmetically different but substantively identical form; or playing the enforcement lottery; or avoiding a technically lawful course of action because outsiders might perceive it as harsh or unfair.

In effect, then, recognizing that the public choice theory is intermittently true vests more discretion in lawyers to be Brandeis-Parsons public citizens, not less. Now the lawyer is not merely to mediate between public and private interests, but also to determine whether the law confronting her actually represents public interests. But, one might ask, why is this the lawyer's responsibility? Because she is schooled in the law, and, more importantly, because compliance counseling or due diligence is her job.

Public choice theorists will not yet be convinced that lawyers owe any responsibilities to mediate between private interests and public norms. For, in addition to the argument that all legislation is bought legislation, academic theorists sometimes offer another argument, aiming to show that the very concept of a public value or public interest is incoherent, at least if the concept refers to the outcome of rational and democratic deliberation (like Rousseau's "general will"). The discoveries of social choice theory, including Arrow's theorem and its more sophisticated progeny such as the theorems of McKelvey and Schofield, demonstrate that there is no such thing as a decision that is simultaneously rational and democratic: strangely enough, even quite minimal assumptions about rationality and democracy turn out to be demonstrably
inconsistent. If so, then the very idea of law as the expression of public values rests on a mistake, and it would be equally mistaken to define lawyers' ethical obligations as the ABA does, as "public citizens."

I shall say very little to respond to this argument, because I believe that it turns out to be more of a mathematical curiosity than a genuine paradox. Each of the principal theorems of social choice theory depends on mathematical assumptions that turn out to be remarkably strong—strong enough that they do not really model the democratic process as we ordinarily conceive of it. Thus, the McKelvey and Schofield theorems assume that there are infinitely many available choices, while Arrow's theorem assumes that choices are always voted on two at a time, without the vote being influenced by the availability of other alternatives; Arrow's theorem also assumes that voters are allowed to cast ballots for choices that other voters have already excluded as a matter of legal right. Without these assumptions, the troubling theorems cannot be proven; and, of course, there is no need to accept the assumptions. Whatever its other infirmities, the notion of lawyers as public citizens need not be abandoned on the ground of intellectual incoherence.

V.

Skepticism about the moral authority of public norms can come from other directions besides the generally conservative outlook of public choice theorists. Consider, for example, the perspective of a Christian radical such as Thomas Shaffer. In a recent essay, Shaffer offers the example of his own representation of immigrants who the Immigration and Naturalization Service is attempting to trick into making admissions that will render them deportable. Shaffer is bemused at the idea "that the INS deserves cooperation or even candor from an honest person—or from her lawyer.” He explains:

The INS is, after all, an arbitrary, unreviewable, disgusting bureaucracy.... And the immigration laws of the United States are, from the perspective of biblical justice, as immoral as Pharaoh demanding more bricks.... I might come to suggest an analogy between INS rules and the demand of the Roman state that Christians


29. See David Luban, Social Choice Theory as Jurisprudence, 69 S. CAL. L. REV. 521, 522 (1996) (discussing Arrow, McKelvey, and Schofield theorems); see also id. at 567-71 (discussing McKelvey and Schofield theorems); id. at 574 (discussing Arrow's assumption of pairwise voting); id. at 522, 556-58, 580-86 (discussing Arrow's assumption that voters may cast ballots for choices that other voters have excluded by right and demonstrating that without this assumption Arrow's theorem fails).


31. Id. at 912.
in the early church worship the emperor. That would be a way for a modern American lawyer to think about her radical Christian heritage.\textsuperscript{32}

Genuflecting before public norms is a form of idolatry. Writing in a similar vein, Robin West asks, "Is our law really \textit{that} good? What happens if it falls from grace? What happens if our deepest, most fundamental, most basic law, when best read in its most moral light, takes a disastrously bad, immoral, evil turn and becomes utterly, inarguably unjust? What if it already has?"\textsuperscript{33}

What distinguishes Shaffer and West from the public choice objectors is that the former worry that legal norms may oppress the weak, whereas the latter typically dislike the possibility that they may hamper the strong, the overdogs. The difference in emphasis is enormous, but the response is the same. The ideal of the lawyer as public citizen requires lawyers to mediate between public norms and private interests. As we have seen, that doesn't mean siding invariably with the bad man, but neither does it mean invariably siding with the state. When the law has become as oppressive as Shaffer and West suggest it may, then the Brandeis-Parsons lawyer must be a resolute defender of the interests of the oppressed. She should give the law exactly the respect it deserves—none at all. Brandeis's point was that lawyers are perfectly situated to comprehend both aspects of the relationship between norms and persons. Public citizens will regard it as part of their obligation to fight public injustices.

VI.

But why must lawyers be so tiresomely civic-minded? Two decades ago, Charles Fried voiced the following well-taken complaint:

Some of the more ecstatic critics have put forward the lawyer as some kind of anointed priest of justice. \ldots But this is wrong. In a democratic society, justice has no anointed priests. Every citizen has the same duty to work for the establishment of just institutions, and the lawyer has no special moral responsibilities in that regard.\textsuperscript{34}

I think that Fried is largely right, and indeed his comment may be right even in non-democratic societies. What is not right, however, is Fried's insinuation that anyone who believes Brandeis's and Parson's notion of law practice regards lawyers as anointed priests of justice. Fried's imagery is overblown and tendentious. If lawyers have special responsibilities to legal justice, that is not because they are divinely elected, or better and holier that the rest of us. It is because of how their role fits into an entire division of social labor. Lawyers represent private parties before public institutions, or advise private parties about the requirements of public norms, or reduce private transactions to a publicly-prescribed form, or ratify that transactions are in compliance with public norms. Public citizens will regard it as part of their obligation to fight public injustices.

\textsuperscript{32} \textit{Id.} at 912-13.


norms. To say that they have special duties of fidelity to those norms is no more ecstatic and supernatural than saying that food-preparers have heightened duties to ensure their hands are clean. It is their social role, not the brush of angels' wings on their foreheads, that requires them to wash their hands every time they go to the bathroom. Indeed, even Fried acknowledges that "the lawyer like any citizen must use all his knowledge and talent to fulfill that general duty of citizenship, and this may mean that there are special perspectives and opportunities for him."35 "The Opportunity in the Law," let's not forget, is the title of Brandeis's speech expounding the vision of the lawyer as mediator between public and private interests.

Someone might respond that I have still not explained why nonlawyers are entitled to adopt the bad man's point of view—treating the law in an entirely instrumental fashion, calling it "sir" only because that's what you call a six-hundred-pound gorilla—whereas lawyers owe the law moral respect, and are supposed to mean it when they say "sir."

If the objection means to deny that nonlawyers owe what Fried calls the general duty of citizenship, my reply is that this is a mistake.36 When law is unjust or pernicious, we owe it no allegiance, but so long as law is reasonable, I believe that all citizens have a prima facie obligation to respect the law. There is no moral permission to be a bad man; that, I take it, is why Holmes picked the word "bad."

If, on the other hand, the objection means that the duties of citizenship require no more than bare-minimum compliance with the law, I will concede that in many contexts this might be true of nonlawyers, but not of the legal profession, which has been granted an exclusive and valuable monopoly on legal services, for which the quid pro quo is a stance rather different from bare-bones compliance—a stance that I have elsewhere described as trusteeship.37

Let me explain the metaphor. Ideally, law is a product of the community, acting through its government; but law is "vended" or distributed by a private party—the legal profession. This places lawyers in a relationship akin to trusteeship—a relationship in which one party creates a good for the benefit of someone else, and the two parties jointly compensate a third person, the trustee, to administer the good and ensure that the second party enjoys its benefits. In this case, the community creates the good of law for the benefit of its members, and entrusts it to the legal profession to administer. The legal profession is compensated by clients in the form of legal fees and by the community in the form of a lucrative monopoly, which boosts the income and prestige of the profession's members. Obviously, the purpose of permitting the monopoly is not

35. Id. (emphasis added).

36. See David Luban, Lawyers and Justice: An Ethical Study ch. 3 (1988) (elaborating on the circumstances in which we do or do not have an obligation to acknowledge the law's moral authority); see generally David Luban, Conscientious Lawyers for Conscientious Lawbreakers, 52 U. Pitt. L. Rev. 793 (1991).

37. See David Luban, Faculty Pro Bono and the Question of Identity, 49 J. Legal Educ. 58, 63-66 (1999) (defending this view).
to do lawyers a favor, just as the creator of a trust is not aiming to do the trustee a favor. The purpose is to ensure that the aims of the community, understood collectively, are carried out for the benefit of the community's members, taken individually. The purpose is, in other words, to mediate between the roles of citizens and consumers, the public aims embodied in the law and the private interests of clients. The argument vindicating the trusteeship metaphor is, in a sense, the justification of the Brandeis-Parsons ideal of lawyerly independence.

VII.

It might be said that all this overlooks the fact that law is an adversarial profession. The ABA's Code of Professional Responsibility—the Model Rules' predecessor—includes a section entitled "Duty of the Lawyer to the Adversary System of Justice," and states flat-out: "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law." On this analysis, the principal public norm governing lawyers is the norm instructing them to advocate private interests with zeal, rather than mediating between those interests and a public interest that is often inimical to clients.

I will not spill any ink here discussing the pros and cons of the adversary system; I have done so in other places. In the present context, it suffices to notice that when we discuss the non-traditional roles of lawyers in MDP, or in-house counsel, we are typically talking about lawyers outside the courtroom—outside, that is, of the network of formal rules and the impartial referee that help restrain the excesses of adversarial zeal in adjudication. Even the strongest defenders—perhaps I should say especially the strongest defenders—of the adversary system believe that the lawyer's role in the courtroom is morally unique. Defending an armed robber doesn't make you an accomplice, and thus lawyers in the adversary courtroom claim that they are not accountable for the ends their clients pursue or the lawful means they employ. The criminal defender's ethos of maximum zeal and minimum moral accountability is what we often think of as an adversarial ethic.

I have argued that even in the courtroom the adversarial ethic is more problematic than its defenders often believe. Outside the courtroom, in the context of business transactions, it is outrageous to enter a blanket claim of moral non-accountability. In its pure form, the adversarial ethic discounts to

38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1982)

39. See David Luban, Twenty Theses on Adversarial Ethics, in BEYOND THE ADVERSARIAL SYSTEM 134 (Helen Stacy & Michael Lavarch eds., 1999); LUBAN, LAWYERS AND JUSTICE, supra note 36, at chs. 4-5 (considering ethical obligations of attorneys within adversarial system); see also David Luban, The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83-123 (David Luban ed., 1983) (discussing the conflict inherent in lawyer's ethical obligations in the adversarial system).

40. I should add that in my view the claim of moral non-accountability is often unjustified. See generally Luban, Twenty Theses on Adversarial Ethics, supra note 39; Luban, The Adversary System Excuse, supra note 39 (discussing lawyers' ethical obligations in adversary context); LUBAN, LAWYERS AND JUSTICE, supra note 36, at chs. 6-8 (discussing lawyers' role and moral obligations).
zero the interests of everyone but the client; why should financial advisors and business consultants be held morally non-accountable if they do that? No client would win our assent if he claimed that looking out for Number One is the sole valid moral rule; outside the Ayn Rand cult, we do not identify morality with egoism. What makes looking out for Number Two any better?

This point is very important. We countenance the adversarial ethic, when we do, for very specialized reasons deriving from the structure and goals of the adjudicatory system. It is very much an advocate's ethic, bound up tightly with the reasons that justify the traditional advocate's role. When we move to new roles, in which the boundary between lawyers and business consultants or business clients thins, those reasons no longer apply, and neither does the adversary system excuse. So, outside of the specialized setting of litigation, there is no reason to think that the duties of a lawyer's role deviate in any substantial way from the Brandeis-Parsons model of the lawyer as trustee.

VIII.

On the other hand, no one says that if you go to law school you have to become a lawyer. Suppose that a partner in a large accounting firm or a corporate manager decides that she will be able to do her job better if she becomes learned in the law. She goes to law school at night; having done well, she sees no reason not to take the bar exam, which she passes with flying colors. But her intention was never to stop working at her day job, and she has no intention of practicing law. She realizes that her new credential helps her out in multidisciplinary settings, or allows her to do the same kind of thing as her corporation's in-house counsel. That's why she suffered through four years of evening classes in law school. But she insists that she would do exactly the same work-related things even if she had elected not to take the bar exam; indeed, she simply doesn't see why her decision to read law magically transmogrifies her moral obligations and makes her a trustee of the law.

As Arthur Applbaum has observed, one could make the same argument about doctors. Is it acceptable for a doctor to deliver limited-purpose services, perhaps in a penny-pinching HMO, or perhaps doing physicals for employers and insurance companies, where the job description does not include telling the examinees about their conditions? An essentialist about the professions might argue that non-Hippocratic medicine of this sort is inconsistent with the nature of the doctor's role; to which the response might be, "Very well, then, let's agree not to call me a doctor. Call me a schmoclor, which denotes a medically-trained person who practices non-Hippocratic medicine." Doctor, schmoclor. Who says you can't be a schmoclor?

Clearly, the same point could be made by our brave new lawyer—sorry, schmawyer. If the lawyer's role really comes freighted with a Brandeis-Parsons albatross about its neck, law graduates recruited by Big Five accounting firms or

Fortune 500 corporations might well settle for the less exalted but more down-to-earth and lucrative role of schmawyer. The schmawyer is simply a legally-trained and knowledgeable person doing non-legal work with a legal component, as in MDP, or doing legal work for a client from whom she is in no sense independent, as in in-house counsel.

Lest this seem like a contrived philosopher’s example, we should recall that in many nations, only a miniscule proportion of law graduates become lawyers; the majority go to work for corporations. In Germany, there is a sharp distinction between lawyers—Rechtsanwälte—and in-house counsel—Syndikusanwälte. The German code of legal ethics incorporates a rule entitled “Protection of Professional Independence,” which forbids a lawyer from entering into relationships that threaten his independence, conspicuously including working in-house for a corporation. The Syndikusanwalt cannot join the bar to become a Rechtsanwalt, because he cannot comply with the requirement of professional independence from his employers. The Syndikus is a schmawyer.

In the United States, of course, no rules prevent corporate counsel from joining the bar; our profession, unlike that of Germany, is not formally segmented. One way of defending the traditional lawyer’s role against the schmawyer is to argue that if our would-be schmawyer takes the oath and joins the bar, she is now a lawyer whether she likes it or not; and if she doesn’t join the bar, she is guilty of unauthorized practice of law. Although this conclusion is comforting to traditionalists, the argument is weak. In the kind of law practice for which multidisciplinary firms are designed, the concept of unauthorized practice does not mean much: it means only that the organized bar has negotiated treaties with other powerful professions (accountants, bankers) over what does and does not count as the practice of law. It would be a mistake, I think, to regard the outcome of those treaties as a distinction of abiding moral significance. Because drawing a sharp distinction between authorized and unauthorized practice has so little to recommend it, the formalistic question of whether a schmawyer has joined the bar cannot bear the weight that this argument places on it. There’s more to being a lawyer than that. What distinguishes a lawyer from a schmawyer, Parsons would insist, is the functional role each plays within social structure. And our would-be schmawyer is on strong ground when she insists that her functional role is much closer to her pre-law-school career than it is to the traditional lawyer’s role. If the bar tries to enforce unauthorized practice statutes against her, she would be right to complain that what is speaking is nothing more than the anti-competitive voice of self-interest.

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42. Richtlra § 40.

43. In German criminal trials, the defendant does not testify under oath, to avoid creating a perjury trap for him. Here, too, German rules seem much more realistic in their sense of how much self-immolation it is reasonable to expect of ordinary human beings.

44. Too often, this is true at the low end of legal services as well. State bars usually invoke the prohibition to drive cut-rate competitors out of business. A typical case is Florida Bar v. Brumbaugh, where a proprietor of a typing service was found guilty of unauthorized practice, after she instructed
Yet the argument that joining the bar makes you a lawyer, not a schmawyer, has a point. Along with the duties incumbent on licensed lawyers, there are also privileges, notably the attorney-client privilege, which makes the services of lawyers substantially more valuable to clients than they would be without the privilege. Similarly, lawyers are bound by a state-enforced ethics code. Although it may be startling and counter-intuitive to describe this as a valuable privilege, the reassurance or "halo" value it offers clients is considerable—it is, in effect, the non-waivable contractual minimum package that comes with retaining a lawyer. It includes, among other things, a duty of confidentiality that is far broader than the attorney-client privilege.

Now, it seems to me that the schmawyer shouldn't receive any of these perks of lawyers. The reason is illustrated in the simplest way by considering the arguments justifying the attorney-client privilege and the duty of confidentiality. In both cases, the argument is not simply that it is good for lawyers and clients to be able to consult confidentially—the argument is that lawyers and clients being able to consult confidentially is good for the legal system. Within the context of adversary adjudication, the argument takes the form of claims that confidentiality is necessary so that clients will tell their lawyers all the information that the lawyers need to represent them with the informed zeal that the system demands. In the context of office practice, the argument is the one we examined briefly earlier in this paper: that confidentiality is necessary so that clients will tell their lawyers all the information that the lawyers need to know when the clients are about to break the law so they can talk their clients out of it. These are public purposes, part of the deal that the community offers lawyers when it makes them trustees of the law. That presumes that good lawyers are Brandeis-Parsons lawyers.

But there is no such presumption about schmawyers. If it's schmawyers we're talking about, who will not try to talk the client out of violating the law because the schmawyer is functionally identical to the client, then the evidentiary privilege and the court-enforced duty of confidentiality do little more than facilitate cover-ups.

My suggestion, then, is the following: We must ask realistically whether the new forms of practice are variations on the traditional lawyer's role as public citizen. If the answer is "yes," then we can proceed to address the bar's question about how best to protect core lawyer values in new settings. But if the answer is "no," so that what we confront is not a lawyer but a schmawyer, then there is no reason to grant any of the unique privileges of lawyers to them. In effect, this is precisely the way that Germany treats the Syndikus. It's a way of recognizing that knowledge of the law is for anyone who wishes to acquire it, for any purpose whatever; that knowledge of the law need not carry any special Brandeis-Parsons obligations with it; but that, by the same token, without any obligations there is

no reason to grant any privileges. A business person can lead an honorable and satisfying life without being a lawyer, and this is no less true if she has a law degree. There’s no shame in being a Syndikus. It’s simply a different honorable and satisfying life than that of a lawyer.

IX.

By this time, any reader who practices law in an accounting firm, or in-house with a business corporation, may feel like challenging me to a duel. I have been insulting their professional independence and lawyerly integrity, in effect suggesting that they be disbarred merely because they don’t work for a law firm.

Of course I have been doing nothing of the sort. I mean to draw no conclusions about the actual nature of MDP or in-house counsel. At best they would be premature. It is quite possible that lawyers in these settings fulfill the Brandeis-Parsons idea of a lawyer just as well, or better, than their counterparts in traditional legal settings. Nothing in this paper should be taken to suppose otherwise.

I am arguing that the incentives in MDP and in-house lawyering will make it harder to maintain independence, so that the concern about lawyers becoming schmawyers has a firm basis in common-sense psychology and economics. Some years ago, Robert Eli Rosen completed an important study of in-house counsel, many of whom believe that, the incentives notwithstanding, house counsel play a vital role in upholding the values of public justice. If so, that should come as welcome news; Rosen reserves judgment. My point is only that until we ask the kind of question that Rosen tried to answer, our speculations about the nature of new lawyer roles will be, in an important sense, irrelevant to the main issue that matters in legal ethics.


46. Id. at 553 (arguing that whatever virtue inside counsel possess lies in their political power, not their independence).