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ESSAY

ETHICS, PROFESSIONALISM, AND MEANINGFUL WORK

William H. Simon*

Much of the anxiety and dissatisfaction associated with legal ethics arises from the categorical quality of the bar’s dominant norms. These norms take the form of relatively inflexible rules insensitive to all but a few of the circumstances of the cases they govern. Hence they often require the lawyer to take actions that contribute to injustice or to refrain from actions that would avert injustice.

For example, many lawyers believe that a criminal defender is obliged to impeach a truthful complaining witness even though the only immediate purpose of this tactic is to encourage the trier to draw a mistaken inference. And it seems fairly clear that the bar’s current confidentiality rules prevent a lawyer from disclosing client secrets even in situations where disclosure would be necessary to save an innocent person wrongly convicted of a crime.

Of course, to the bar, these injustices are redeemed by some broader or more long-run justice that the rules ultimately serve. I and others have argued against this currently dominant view ("Dominant View") in favor of a more contextual regime of ethics norms that give lawyers more immediate and direct responsibility to seek justice in the

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1. See MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 43-58 (1975).

2. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997); Symposium, Executing the Wrong Person: The Professionals’ Ethical Dilemmas, 29 LOY. L.A. L. REV. 1543 (1996) (based on a hypothetical situation where a client discloses to his lawyer that he earlier killed a person and an innocent person was scheduled to be executed for that crime).
particular case. Most of our critique of the Dominant View has focused on matters of fairness as between clients and third parties and the public.

Here I want to pursue a different aspect of the critique of the Dominant View—one that is in some respects more peripheral yet nevertheless important. This is the effect of the dominant categorical ethics regime on the lawyer’s sense of pride and satisfaction in her work. An often overlooked cost of the Dominant View is that it promotes a dispiriting alienation of the lawyer from her work. The current regime betrays an ideal of “meaningful work” that has long underpinned the morally ambitious images of the profession. This ideal has been a major source of the attractions of the profession to morally ambitious people, and its betrayal is a major source of the moral anxiety and disappointment that is so widely expressed now.

The argument is necessarily speculative and impressionistic. Some of its most important sources are in literature and social theory, but I hope to show that the vision of professionalism as meaningful work most vividly expressed outside the profession mirrored and influenced critical developments within the profession.

I begin in Part I by invoking a notion of alienation that literature and social theory portray as a core problem of modernity. I then recall in Part II how certain central features of professionalism, especially American legal professionalism, have been embraced and defended as remedies to this problem of alienation and as supports of meaningful work. Next, I show in Part III how American jurisprudence has been devoted to developing one of these features—a style of legal judgment that unites generality and particularity—along precisely the lines that the “meaningful work” tradition suggested. In Part IV, I note some of the ways in which the leaders of the profession have rationalized the emasculation of this style of judgment in the field of legal ethics. Finally, Part V acknowledges that there is a frightening, as well as exhilarating, side to the ideal of meaningful work that may account for the profession’s inconstant embrace of it.

This Essay is a more indirect critique of the Dominant View than most. It does not set out so much to refute the Dominant regime of cate-

gorical norms as to make it appear both an anomaly and an obstacle to the deepest ambitions that animate legal professionalism.

I. THE PROBLEM OF ALIENATION

Alienation is a diagnosis in most critical portrayals of modernity. The symptoms are a sense of one’s own weightlessness and ineffectuality and of the strangeness and impermeability of the social world.

In modern social theory, alienation emerges as a problem of the transition from organically integrated societies to looser, more individualistic ones. For some, the history of the West over the past five centuries or so is simply one long transition of this kind. Others see more partial and intense versions of the transition occurring in various discrete periods. For example, Robert Wiebe portrayed America at the time of the emergence of the institutions of modern professionalism in the late nineteenth century as such a transition:

Yet to almost all of the people who created them, these themes meant only dislocation and bewilderment. America in the late nineteenth century was a society without a core. It lacked those national centers of authority and information which might have given order to such swift changes. American institutions were still oriented toward a community life where family and church, education and press, professions and government, all largely found their meaning by the way they fit one with another inside a town or a detached portion of a city. As men ranged farther and farther from their communities, they tried desperately to understand the larger world in terms of their small, familiar environment. They tried, in other words, to impose the known upon the unknown, to master an impersonal world through the customs of a personal society.

This picture stands in opposition to the classical liberal portrayal of modernity as the happy triumph of individualism. In that portrayal, the erosion of relatively fixed roles and institutions and relatively self-contained communities is a boon that makes possible both prosperity and individual self-realization. The theorists of alienation find this view naive in two general respects. From the point of view of social welfare, the decline of traditional social institutions creates a host of problems that cannot be solved through independent individual action, but require the collective creation of a new set of stable institutions. From the point of view of the individual, the new society leaves the social dimension of

self unsatisfied; it fails to provide the senses of place and connection that are essential aspects of self-realization.

It is the latter point of view that most concerns us. Its premise is that people need a sense of both relation to the larger society and solidarity with concrete others, not just family and friends, but a wider circle of potential collaborators in material and political projects. At the same time, this view often concedes that people have a need to express their individuality and impress their wills on their surroundings.

For many, the satisfaction of these potentially conflicting needs for connection and self-assertion lay in the idea of meaningful work. Work is “meaningful” when the worker experiences it as both a form of a self-assertion and a point of connection and solidarity with the larger society. The most common reference point for the theorists of alienation has been the artisan, especially under the regime of the early modern guild.

The artisan has a sense of place in society as the producer of an important product. His skills and a variety of cooperative practices in the production process provide the basis for a shared occupational community among members of the craft. At the same time, craft production involves individual self-expression in two senses. First, the artisan, individually or with a small number of collaborators, controls the work process, deciding when, what, how much, and how to produce. Second, the artisan’s products are not standardized, but involve myriad variations and are often customized for the particular purchaser. The artisan’s techniques take the form of general principles and general-purpose tools that can be adapted to an infinite variety of specialized uses. Thus, the artisan’s work leaves room for, and often demands, creativity.

Although nostalgia for the guild regime is common among alienation theorists, many acknowledge that even at its best the opportunities for self-expression the regime provided were highly limited and that they were often accompanied by heavy social costs in terms of monopolistic practices and technological stagnation. For most of them, traditional craft production is not an institutional ideal, so much as a set of clues about the possibilities of meaningful work. They do not prescribe a return to the guilds, but the adoption of some of their animating principles.5

In their paradigmatic, unreformed states, the core institutions of modernity—the market and the bureaucracy—appear as threats to meaningful work. The alienation theorists emphasize the similarities of

these two institutions: both are premised on specialization of function, involve potentially large scale coordination, and above all, typically regulate through impersonal rule. In both the two most influential alienation theories—the Marxist/Romantic critique of the market and the Weberian/Romantic critique of bureaucracy—each institution appears in part as a variation on the principle of governance through impersonal rule.

The Marxist perspective portrays the worker in the capitalist labor market as a mechanical part incorporated into a mechanical system. He finds it already pre-existing and self-sufficient, it functions independently of him and he has to conform to its laws whether he likes it or not. . . .

[Under these laws] all issues are subjected to an increasingly formal and standardised treatment and in which there is an ever-increasing remoteness from the qualitative and material essence of the "things" [that are the subjects of decision].

For Weber, the "specific nature" of bureaucracy develops more perfectly the more the bureaucracy is "dehumanized," the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. The paradigmatic way in which bureaucracy accomplishes this is by mandating "'rational' interpretation of law on the basis of strictly formal conceptions."

The psychological consequence is that the worker (or official) does not experience work as personal expression or as meaningful social participation. The Weberian perspective emphasizes the first loss; the web of rules becomes an "iron cage" that restrains the exercise of will. The Marxist perspective emphasizes the second; the rules obscure the social meaning of the worker's activity. They blind her to the ways in which the particular acts she and her fellows engage in contribute to the larger social ordering. The functions of social ordering take place behind the backs of the workers, so that they seem to operate independently of hu-

8. Id. at 216.
9. See id. at 196-244.
man action. Such a process of coordination resembles the "invisible hand" that earlier political economists had described in benign terms. The later theorists saw overwhelming psychological costs.

One is isolation. By subordinating individuals directly to the norms and rigidly specifying their conduct, the regime of impersonal rule eliminates needs and opportunities for collaboration. Another cost is ineffectuality. The new system induces a stultifyingly passive, or "contemplative," posture toward the larger patterns of social life. It denies the worker the Promethean satisfaction of leaving some lasting impression of himself on the world; the new worker has no opportunity for creativity. The craftsman had the experience of directly producing some useful product. The new worker has only the most limited sense of how her regimented, specialized activity contributes to some final product, or perhaps, even of the usefulness of the final product.

Finally and most importantly for our purposes, there is the loss of moral agency. The new worker lacks the autonomy or the understanding, or both, required for ethical responsibility. Whatever moral understanding the worker has must be subordinated to the unbending commands of the rules. And perhaps most distressingly, the worker may not develop moral understanding because she lacks motivation or ability to understand how her conduct relates to larger goods and evils.

This loss of moral agency is the most salient quality in modern literary portrayals of lawyers. One memorable symbol of this is the habit of Jaggers in *Great Expectations* of constantly washing his hands, so that one of the first things we notice about him is the smell of scented soap. It's easy to see why the lawyer is such a fascinating figure in considerations of the moral dimension of alienation. On the one hand, the lawyer seems distinctively powerful in a system of impersonal rules; rule mastery is her specialty. On the other hand, she is at the same time distinctively vehement in disclaiming responsibility for the consequences of her actions. This disparity between power and responsibility drives Mr. Gridley in *Bleak House* into a frenzied harangue that concludes:

"I mustn't go to Mr. Tulkinghorn, the solicitor in Lincoln's Inn Fields, and say to him when he makes me furious, by being so cool and satisfied—as they all do; for I know they gain by it while I lose, don't I—"
mustn't say to him, I will have something out of some one for my ruin, by fair means or foul! He is not responsible. It's the system. But, if I do no violence to any of them, here—I may! I don't know what may happen if I am carried beyond myself at last!—I will accuse the individual workers of that system against me, face to face, before the great eternal bar!"\textsuperscript{13}

Another dimension of the loss of agency is the lawyer's insensitivity to the underlying moral stakes of his work. Dostoevsky's lawyers, who are usually government officials, exercise considerably more agency than Dickens's, but they are blind to the values implicit in the rules they enforce. Dimitri Karamazov and Raskolnikov each has exactly the same complaint about the magistrate who interrogates him: he will not go to the heart of the matter. Both magistrates are preoccupied with procedural formalities or circumstantial evidentiary matters and seem indifferent to protagonist's first-person testimony about the core issues.\textsuperscript{14} Dickens portrayed this tendency comically in his portrait of the bureaucrats of the Circumlocution Office in \textit{Little Dorrit}.\textsuperscript{15}

Perhaps the most powerful portrayal of moral alienation under regime of categorical rule is Kafka's \textit{The Trial}, especially in the Parable of the doorkeeper, which Joseph K. hears in the Cathedral. This occurs toward the conclusion of his nightmarish experiences while trying to clear his name of the unspecified charges that triggered an official proceeding against him. Although we sometimes think of the novel as a portrayal of totalitarianism or bureaucracy, it is quite explicitly an account of life under a certain type of law. Kafka tells us at the beginning that, "K. lived in a country with a legal constitution, there was universal

\textsuperscript{13} CHARLES DICKENS, BLEAK HOUSE 164 (Morton Dauwen Zabel ed., The Riverside Press 1956) (1853).


In addition to the horrors of subordination to impersonal rules, Dickens, Dostoevsky, Stendhal, and Kafka (whom we discuss momentarily), in strikingly similar ways, portray the horrors of subordination to personal whim and unprincipled manipulation as well. All suggest that the two kinds of experience go together. It is tempting to suggest that the idea of contextual or purposive judgment—judgment that is principled but informal—is the remedy to the pathologies they portray. It is hard to say whether the authors would be sympathetic to this response. Jurisprudence is a very small part of the complex of sentiments, ideas, and institutions with which they were concerned.

peace, all laws were in force . . . .”

When the warders come to arrest K., they tell him they do not know why they are required to do this, but suggest that their boss, the inspector, whom they portray as a formidable person, will explain things. But the inspector turns out to be equally ignorant. This sequence, in which people we expect to be powerful and intimidating turn out to be confused and silly, recurs. The sense of menace that we start to associate with individual characters recedes repeatedly into a social background that no one seems to have any control over.

In Kafka’s work, people constantly refer to the governing rules either as “Law,” “duty,” or “authority,” the latter typically defining the boundaries of official roles. We are repeatedly told that people exceed their authority, or that they try to circumvent the rules by using personal influence to get favors. But the author and the characters also often explain behavior as complying with the rules, and this behavior is invariably meaningless to both K. and the actors themselves, except as a requirement of a rule. The recurring discovery that the behavior is as meaningless to the actors as to K. intensifies the sense of shallowness and silliness of the characters and the sense of menace of the social background.

These themes are crystallized in the “doorkeeper” chapter. K. hears the Parable from a priest whom he encounters in the cathedral. He has gone to the cathedral for the purpose of showing it to a client of the bank, but the client never arrives. He notices the priest mounting the pulpit and, deeming it “absurd” for the priest to preach a sermon to an all but empty church, wonders “if it were this priest’s duty to preach a sermon at a certain hour regardless of circumstances.” It turns out, however, that the priest’s appearance has a point; he has come to talk to K., to offer him a parable that will illuminate his experience with the Law.

In crude summary, the Parable of the doorkeeper tells the story of a man seeking “the Law” who arrives at an open door apparently leading to “the Law” and finds it guarded by the doorkeeper, who tells him that he cannot admit the man “at this moment.” We soon learn that the doorkeeper is the lowliest of a series of many guards before the many doors that must be opened before reaching the Law. The man waits before the initial door for years, cajoling, importuning, and trying to bribe

17. Id. at 261.
18. Id. at 267.
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the doorkeeper, to no avail. Eventually the man grows sick and weak, and on the verge of death he puts a final question to the doorkeeper, Why during all these years has no one else come here seeking admittance to the Law? The doorkeeper replies, “No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it.”  

There follows a parody of legal and religious textual exegesis in which K. and the priest discuss the meaning of the Parable. The discussion focuses on the character of the doorkeeper. K. begins by condemning him for contributing to an injustice. But the priest replies that it is possible that the doorkeeper was simply following the rules, or as he puts it, “fulfill[ing] his duty.” Perhaps, he implies, the man could only be admitted at a particular time. Perhaps when the time came, he failed to take the required actions to perfect his rights to enter. This may have been because the man was unaware of the requirements, but it may not have been the doorkeeper’s duty to inform him.

The priest then suggests different ways of appraising the doorkeeper’s performance. One, which might be called Romantic/Weberian, suggests that the doorkeeper sympathized with the man and his quest for the Law but was constrained by the rules from doing more than he did to help him. Another, which might be called Romantic/Marxist, suggests that the doorkeeper had no understanding of his circumstances, that he is in fact “more deluded” than the man. He is, after all, the lowliest of the many doorkeepers. It is unlikely he himself has seen the Law. While the man can at least see the light shining out the door, the doorkeeper has his back to it. Moreover, the priest reminds Joseph K. that, whatever we may think of his service to the man after his arrival, “for many years, for as long as it takes a man to grow up to the prime of life, his service was in a sense an empty formality, since he had to wait for a man to come.”

Toward the end of the discussion, the priest advances a new interpretation that sees the doorkeeper as not at all “deluded,” but indeed exalted by virtue of his attachment to the Law: “It is the Law that has placed him at his post; to doubt his dignity is to doubt the Law itself.” The discussion then concludes:

19. Id. at 269.
20. Id. at 270.
21. See id. at 270-78.
22. Id. at 274.
23. Id. at 276.
“I don’t agree with that point of view,” said K., shaking his head, “for if one accepts it, one must accept as true everything the doorkeeper says. But you yourself have sufficiently proved how impossible it is to do that.” “No,” said the priest, “it is not necessary to accept everything as true, one must only accept it as necessary.” “A melancholy conclusion,” said K. “It turns lying into a universal principle.”

This seems to satirize Positivism, but perhaps also more generally, all arguments that assert that conduct, which in the here-and-now is alienating (or unjust), is necessary to some more remote, abstract end (order, efficiency, justice in the long run). We might generalize the priest’s remark that it is not necessary to accept everything as true to suggest that the immediate values of truth and justice must yield to the more abstract imperatives of order. And we might interpret K.’s response that the priest’s appeal to necessity requires an embrace of dishonesty (which on a literalistic interpretation is a non-sequitur, since the priest has just disclaimed an effort to induce belief in truth) as a claim that the necessitarian justifications for the doorkeeper’s conduct are either unconvincing or insufficient to alleviate the sense of strangeness and terror the novel associates with governance by categorical rule.

We often think of *The Trial* from the point of view of the oppressed citizen represented by Joseph K. However, most of the characters in the novel are identified and described in terms of their work as insiders of various kinds in the system (and part of the novel portrays K. himself as a worker in a bank). More often than not, we see them as grotesque and pathetic. This impression is in part due to the opacity of their practices, their disconnection from larger social purposes, which the novel links in turn to the categorical nature of the norms that govern them.

This indictment of role is different from complaints about the specialization and conformity roles require. Some currents of the alienation critique object that roles narrow the range of capacities an individual can express and develop, and that they presuppose a large measure of acceptance of the surrounding society. But the version of the alienation critique that invokes the artisanal ideal does not press such objections; it accepts both the finitude of human potential and the claims of social acquiescence, both saliently embodied in the artisanal role. Its complaint focuses instead on the experience of the individual of alienation from the very values that undergird her own role. And this experience arises

24. *Id.*
25. *See id.* at 103-12.
from the denial to the worker of the discretion to shape her work in accordance with these values.

_The Trial_ evokes this alienation when, for example, it imagines the priest obliged to preach a sermon even if the cathedral is empty or the doorkeeper obliged to guard the door even if no one is likely to come. It evokes it most stunningly in the doorkeeper’s next-to-last words—"this door was intended for you." The effect of this declaration is to make the doorkeeper’s practices, which already seem grotesque, seem even more so by suggesting that they are inconsistent with their very purposes.

It is worth contrasting the alienation critique to the more familiar critique of role morality in works such as Herman Melville’s _Billy Budd_ and Jean Anouilh’s _Antigone_. Each of these works involves a character—Captain Vere, Creon—who occupies a political role that commits him to the defense of order. Each revolves around a situation in which order appears to require the sacrifice of a morally admirable person—Billy Budd, Antigone—for actions that are justifiable or at least excusable but that, if left unpunished, will incite disorder.

Each work begins with a sympathetic portrayal of the subversive hero and his or her crime. Each then shifts perspective to that of the political officeholder. The authors proceed to surprise and discomfort us by inducing at least provisional sympathy with Captain Vere and Creon. Each man does an apparently necessary job, and the authors spend great artistry to make us sense how, from within the perspective of their roles, the sacrifice of Billy Budd and Antigone seems necessary.

Then, a second shift of perspective occurs. We pull back from the identification with the political role and begin to doubt its necessity and moral attractiveness. The doubt goes less to the assumption that the sacrifice of the innocent hero is necessary to the preservation of the political order than to the assumption that the preservation of the political order is worthwhile. Neither work resolves these doubts explicitly. Anouilh’s play, which was written and first performed during the Nazi occupation of Paris, is usually interpreted to suggest that preoccupation with the internal morality of role can blind us to the evil of the larger structure that the role serves. Creon thus exemplifies Hannah Arendt’s "banality of evil."

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26. _Id._ at 269.
Melville’s work is more ambiguous. It flirts with—and never rejects—an interpretation that would accept both Vere’s understanding of the demands of his role and the necessity of the larger order it serves. In this view, there is a tragic dignity to Vere’s (and Creon’s) position. All political decisions involve moral costs; thus, one who assumes political responsibility must be willing to sacrifice some of the innocent for the sake of order. The job is psychologically difficult, but we should be sympathetic with and grateful to those who can do it effectively.

Notice that both interpretations—the “banality of evil” interpretation and the “tragic choice” interpretation—are quite different from the alienation critique exemplified by the Parable of the doorkeeper. Both interpretations of Billy Budd and Antigone assume a decision-maker acting in harmony with the logic of his role and a decision that directly incarnates the role’s fundamental purpose. To put it somewhat differently, in both cases, if the legislator who enacted the rules under which the official operates were himself making the decision, he would have made exactly the same decision Captain Vere or Creon made. In both cases, the reservations about the decision arise from values outside the role, and the question we are pressed to consider is whether the role and the system it helps constitute are legitimate.

But the doorkeeper story and the Marxian and Weberian critiques of alienation present a different image. While Vere and Creon have intuitive access to the norms that govern their roles, the doorkeeper cannot see the Law. His stunning final line emphasizes that he has not acted in harmony with any role logic. Either the purposes of the role escape his understanding or he is not trusted to implement them directly. The surprise and irony of the last line arises from the suggestion that, if the legislator were there to make the decision directly, he would decide differently. There is no hint of dignity, nor even of banality in the doorkeeper. The doorkeeper is, on any of the interpretations Kafka evokes, simply grotesque. Thus, Kafka has given an image of the distinctive degradation associated, not with role in general, but with role defined by categorical norms, and he suggests that this degradation is an exceptionally corrosive one.

Of course, I don’t suggest that, even if my interpretation of The Trial is right, the Dominant View is refuted simply because Kafka rejected it. (There may be novels that portray conformity to categorically defined role as fulfilling, though I can’t think of any great ones.) But if

30. For example, there is Herman Wouk’s The Caine Mutiny, which is sometimes interpreted to assert that, even though Captain Queeg was an incompetent and abusive commander, his sub-
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right, the interpretation usefully links one of the most resonant and compelling portrayals of contemporary alienation with an important premise of the Dominant View. Thus, it offers a clue to what might lie behind the vaguer expressions of alienation in the recent anguished literature of lawyering, and it makes available a vivid image to support the intuition that there is something stultifying about the role prescribed by the Dominant View.

II. THE PROFESSIONAL SOLUTION

One response to the alienation critique was to deny the need for meaningful work. Sinclair Lewis produced a memorable image of this approach in Dr. Roscoe Geake, a character in *Arrowsmith*, who finds his calling upon leaving a medical professorship for the presidency of the New Idea Medical Instrument and Furniture Company. His farewell advice to his students emphasizes the importance of attractive office furniture on the doctor’s ability to inspire the confidence necessary for “putting over and collecting an adequate fee.” He concludes:

For don’t forget, gentlemen, and this is my last message to you, the man worth while . . . instead of day-dreaming and spending all his time talking about “ethics,” splendid though they are, and “charity,” glorious virtue though that be, yet he never forgets that unfortunately the world judges a man by the amount of good hard cash he can lay away.

Another approach was to make a virtue of what the Marxists disparaged as the disengaged, “contemplative” aspect of alienated work. No parody could develop this position to a greater extreme than Holmes did on two occasions when he spoke to law students. He conceded the

32. *Id.* at 88.

ordinates should not have mutinied against him. *See Herman Wouk, The Caine Mutiny* 440-48 (1951). The message is delivered with drama and irony by the chief mutineer’s defense lawyer Barney Greenwald, who explains to his client that, even though he (Greenwald) believed that the mutineers had acted wrongly in refusing Queeg the deference his role demanded, Greenwald’s own role as defense lawyer required him to humiliate Queeg and exonerate the mutineer. *See id.; William H. Whyte, Jr., The Organization Man* 243-48 (1956). Note that Whyte, who popularized this interpretation of the novel as an endorsement of Greenwald’s view, condemned what he took to be its conformist message.

In general, novelists seem to have opposed the notion of categorically defined role with fairly consistent vigor. Even the three biggest law-and-order men of nineteenth-century fiction—Fyodor Dostoevsky, Joseph Conrad, and Henry James—show nothing but distaste for the idea. Consider Porfiry in *Crime and Punishment*, the Board of Inquiry in *Lord Jim*, and the heroine of James’s story *In the Cage.*
stultifying character of law practice, asking, "How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?" His recommendation was that they cultivate the "secret isolated joy of the thinker" by burying themselves (presumably in their spare time) in study of the "remoter and more general aspects of the law." "The law is the calling of thinkers," Holmes continued. Though practice mires them in particularity, leisure study permits them to express their disposition to "make plainer the way from some thing to the whole of things."

Others, however, produced a more ambitious response to the alienation critique. They conceded the horrors of alienated work engendered by the market and the bureaucracy. Yet they suggested that the conditions of modern society permitted, indeed required, a different form of productive organization more hospitable to meaningful work. This was the profession. The designers and theorists of the modern profession, often in self-conscious reaction to the alienation theorists, suggested that professionalism might produce a kind of work that would be experienced as both self-expression and compliance with social norms. They argued that professionalism could, and should, be institutionalized in ways that differed from paradigmatic markets and bureaucracies, especially in their repudiation of governance by categorical rule.

One of the earliest expressions of this view, and still one of the most powerful, is George Eliot's *Middlemarch*, published in 1871 and 1872, just after the establishment in America of the landmark institution of legal professionalism—the American Bar Association.

*Middlemarch* has been aptly called a "novel of vocation," as most of its many characters are portrayed in substantial part in relation to their work. The gallery includes a few characters like Lewis's Dr. Geake who seek nothing from work but material self-advancement, notably the grocer Mawmsey, who replies to a candidate's suggestion that he exercise his newly won vote in a "public spirit:" "When I give a vote... I must look to what will be the effects on my till and ledger . . . ."

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34. *Id.* at 32.


37. *Id.* at 30.

Lewis did with Dr. Geake, Eliot portrays Mawmsey as shallow and foolish.

However, she reserves her most intense scorn for those who follow Holmes’s advice and seek the isolated glory of contemplative abstraction. There is, for example, the preacher Mr. Tyke, who is preoccupied with doctrinal niceties and indifferent to the concrete problems of the parishioners; he is compared unfavorably to Mr. Farebrother, "‘a parson among parishioners whose lives he has to try and make better.'" And above all, there is the grotesque Casaubon who, at the expense of everyone around him, has devoted his life to researching a monumental study synthesizing all mythological thought—a work Eliot portrays as arid and vacuous, a project of vanity and self-delusion.

Eliot shows sympathy for two different vocational paths. One is that of Caleb Garth, the only happy male character in the book. Garth is a self-employed builder and part-time manager who has the skills and values of the artisan. “[B]y ‘business,’ Caleb never meant money transactions, but the skilful application of labour.” Work for him is a source of pride and fellowship. But the novel entertains diffidently the prediction made so vehemently by Marx that the opportunities for the artisanal career may be shrinking. Larger-scale and more impersonal forms of economic organization, represented in the novel by the coming railroad and the banker Bulstrode, appear as potential threats to the skills and autonomy of the craft worker.

The vocational aspirations that most fascinate Eliot are those of Dr. Lydgate, who wants to apply new scientific developments in medicine to the care of patients. From the point of view of the novel’s sociological themes, Lydgate is an exciting figure because he is simultaneously at the vanguard of modernizing social developments and yet, like Garth and Farebrother, committed to personal service to concrete individuals. Again and again, Eliot emphasizes the distinctive combination of the general and abstract on the one hand and the particular and personal on the other in Lydgate’s vocation.

[H]e carried to his studies . . . the conviction that the medical profession as it might be was the finest in the world; presenting the most perfect interchange between science and art; offering the most direct alliance between intellectual conquest and social good. Lydgate’s nature demanded this combination: he was an emotional creature, with a flesh-and-blood sense of fellowship which withstood all the abstrac-

39. Id. at 537.
40. Id. at 596.
tions of special study. He cared not only for "cases," but for John and Elizabeth . . . . 41

Lydgate's youthful efforts depicted in the novel are tragically un-successful, and the book is ambiguous about the moral quality of his success after he moves to London. Yet Lydgate seems to represent some of the author's deepest aspirations.

In the years since Middlemarch appeared, these aspirations have been expressed over and over by both prominent professionals and academics out to refute the alienation theorists. In America, they were at the core of the views of the Progressive movement in politics and the Functionalist movement in academic sociology. Perhaps their best known proponents were the Progressive lawyer Louis Brandeis and the Functionalist sociologist Talcott Parsons. In mutual ignorance but strikingly convergent terms, Brandeis and Parsons (and following them, myriad allies and disciples) elaborated a view of modernization that put professions at the center. 42

In crude summary, the theory was this: Marx and Weber had based their visions of inexorable marketization and bureaucratization on industrial production and military and welfare state organizations. The premise of governance under categorical rule may have been plausible in these instances because such organizations tend to produce standardized products and routinized services. (Later writers would severely question this concession.)

But a central and growing sector of modern economies is concerned with the provision of services that are at once technical and particularistic. These are the professions, as typified by law, medicine, and engineering; soon to be augmented by a host of newer service groups such as nursing and social work; and augmented further—so both Brandeis and Parsons argued—by the transformation of business management into a professional activity. Because such services depend upon technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization. In the market, the customer would have to shop for services tailored to her needs, but without specialized training, would be unable to evaluate effectively what she got. In the bureaucracy, performance could not be specified categorically.

41. Id. at 174.
42. See LOUIS D. BRANDEIS, BUSINESS—A PROFESSION (Hale, Cushman & Flint 1933) (1914); TALCOTT PARSONS, A SOCIOLOGIST LOOKS AT THE LEGAL PROFESSION, IN ESSAYS IN SOCIOLOGICAL THEORY 370 (rev. ed. 1954).
So this type of work has to be organized differently. At the level of practice, workers have to be given autonomy and responsibility. At the level of occupational regulation, collective self-governance is needed. The system might work in the absence of the material incentives of the market and the bureaucracy because professional work organized in this manner provides satisfactions to practitioners that motivate responsibility. These were precisely the psychological satisfactions that the alienation theorists despaired of achieving in the emerging social order.

Told in this manner, the story explained professionalism as a solution to a technical problem of organizing a certain kind of work. But while they didn’t put the moral point in the forefront, the Progressive-Functionalist view at least implicitly shared Eliot’s aspiration that professionalism would be the answer to the problem of meaningful work. Although they often spoke of this feature of professionalism as a by-product of a technological development, they exulted in it.

Here, for example, is the historian Robert Wiebe again on turn-of-the-century America:

As this society [of small towns and urban neighborhoods] crumbled, the specialized needs of an urban-industrial system came as a godsend to a middle stratum in the cities. Identification by way of their skills gave them the deference of their neighbors while opening natural avenues into the nation at large. Increasingly formal entry requirements into their occupations protected their prestige through exclusiveness. The shared mysteries of a specialty allowed intimate communion even at long range, as letters among the scattered champions of public health demonstrated. Finally, the ability to see how their talents meshed with others in a national scheme encouraged them to look outward confidently instead of furtively.43

Here are precisely the elements of meaningful work. “Identification by way of skills” and “shared mysteries” provide a basis for cooperative relationships that overcome isolation. “Specialized needs” requiring individualized service means that the practitioner will have a sense of control over her work and of creativity in adapting her general knowledge to the particular circumstances of the client. And the ability to place one’s skills in a transparent “national scheme” means that the practitioner will have a sense of how her acts relate to larger social purposes.

The professional’s moral agency is secured at two levels. On the level of the profession as a whole, the members participate in defining

43. WIEBE, supra note 4, at 113.
the broader social needs it serves and the occupational norms that implement these needs. On the level of individual practice, the essence of the professional's work is the adaptation of these general norms to the particular circumstances of the client.

Of course, these arrangements would vindicate the ideal of meaningful work only to the extent the professional's own values converged with the governing norms. The Progressive-Functionalist View was confident that they would. In part this was because its proponents found professional norms, as they were actually evolving, both appealing and well-adapted to the surrounding institutions of modern society, and they assumed that other reasonable people would appreciate these virtues. But they supplemented this aspiration with two further ideas.

One was the notion, amply illustrated in Middlemarch, that criticism and "reform" were integral elements of professional work. Professional work is a continuous process of self-reconstitution, and this creates legitimate and productive roles for dissidence, such as Lydgate's. The second was the notion of "secondary socialization," which suggested that the professions might design processes of initiation, such as prolonged schooling or apprenticeship, through which individuals would be induced unconsciously to accept the governing norms as if they were there own. This latter notion sits less comfortably with the ideal of meaningful work, but was occasionally useful in explaining how the professional project might be viable in a society with extensive normative disensus.

American lawyers developed the Progressive-Functionalist View in two broad respects. First, they developed an institutional model of self-governance. The model provides for collective control by incumbent practitioners over the admission of newcomers and over a disciplinary process that enforces norms of good practice. The norms are primarily concerned with the adequacy of service to clients, and secondarily with fairness to third parties. For many years, they also attempted to structure the market for legal services to give some insulation from competitive pressures by inhibiting price cutting, advertising, and solicitation. This latter effort would have been of interest to Elliot, who doubted that the professional project was compatible with the funding of services through the market. Indeed, Lydgate comes to grief in part because of such competitive pressures.

The project of self-regulation suffered substantial setbacks in recent years. The effort at economic control has been largely abandoned. The admissions process has been streamlined and loosened. Although disciplinary activity increased, its relative importance declined with the
growth of extra-professional lawyer regulation through the malpractice system, court and legislature-imposed litigation rules, and the activity of specialized agencies such as the Securities and Exchange Commission and the Office of Thrift Supervision. My own view is that the relative decline of these particular self-regulatory institutions is desirable and does not threaten the important aspects of the professional project.

The second, and more important, development was the elaboration of a conception of legal judgment that explained how legal work could be both abstract and particular, self-expression and social control, and creative yet grounded in established norms. This effort, which embraces the work of Roscoe Pound and Benjamin Cardozo early in the century, of Karl Llewellyn and Henry Hart later on, and Ronald Dworkin most recently, constitutes the major preoccupation and enduring achievement of American academic lawyers.

This is not the place to try to do justice to the richness and variety of this work. For present purposes, it is enough to say that a crude but accurate summary of all of it would be this: Abstraction and particularity, self-expression and social control, and creativity yet groundedness are all qualities of good contextual judgment, and contextual judgment is the defining activity of legal work in America. Contextual standards are general norms that depend upon, and are typically derived from, the circumstances of particular applications. Since new and unique cases constantly arise, the answers involve creativity; yet when plausible, they seem to have been implicit in the pre-existing norms. To the extent that lawyer shares the relevant public norms, she expresses her own values as she vindicates the public ones.

This jurisprudence is commonly understood to be concerned with legitimating the role of the activist judiciary in a democratic society. That is surely a prominent preoccupation. But it seems likely that another important concern is to demonstrate the possibility that law could manifest the virtues of meaningful work. Indeed, whatever the intentions of their authors, the classics of American jurisprudence represent the most extended illustration in all social theory of the ideal of meaningful work.

III. THE LOST LAWYER

We now have to deal with the question of the "lost lawyer," not in Anthony Kronman's sense of the disoriented lawyer,44 but in the sense

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of the missing lawyer, the lawyer who appears so little in American theorizing about law, including Kronman’s.

For it is a striking fact about this literature that the legal work it explicates so exultantly is for the most part identified with the judge. Most of the literature has been produced by academics with tenuous connections to practice and whose interests and ambitions focus on judging. When these theorists have left the academy, they have usually done so to become judges. Kronman’s preoccupation with the “lawyer statesman,” who occupies positions in the executive branch, reminds us that the theorists’ preoccupations occasionally ranged more broadly, but this ideal is equally indifferent to the world of private practice, where the vast majority of American lawyers always worked.45

I’ve been arguing that the ideas developed in the mainstream of American legal theory imply a powerful criticism of the Dominant View of legal ethics and an alternative vision based on contextual judgment and the ideal of meaningful work. Yet it is a striking fact that most of the theorists did not themselves draw these implications explicitly or indeed confront the ethical issues of lawyering more than marginally.

There is, of course, an outstanding exception. Louis Brandeis is the one great American legal theorist of the century to have made a major mark in practice.46 Although you would never know it from contemporary legal scholarship, which remains obsessed with the comparatively ineffectual Holmes, Brandeis is probably this century’s most influential legal thinker. His early piece with Samuel Warren on the then emerging “right to privacy” was a classic demonstration and defense of judicial creativity in the common law.47 His work on banking, utility regulation, and labor gave institutional concreteness to the ideas of the Progressive movement.48 His defense of social legislation against constitutional challenges in court, which produced the famous “Brandeis brief,” pioneered the use of statistics and data in legal argument.49 His decisions on the Supreme Court laid the intellectual foundations for the Legal Process school that produced the preeminent expression of liberal jurisprudence in the post-war era. And he was the foremost pre-war exponent of the idea of professionalism as meaningful work.

45. See id. at 14-23.
46. Some might also put Thurman Arnold in this category, but his importance to both theory and practice seems vastly less than Brandeis’s.
In 1905 Brandeis spoke to a group of Harvard undergraduates. "[Y]ou wish to know," he said, "whether the legal profession would afford you special opportunities for usefulness to your fellow-men . . ." Nineteen years earlier, Holmes, speaking to another group of Harvard undergraduates, had speculated that his audience was asking a slightly different question, "[W]hat have you said to show that I can reach my own spiritual possibilities through such a door as this [that is, the life of the lawyer]?" The beginning of Brandeis's answer was almost identical to Holmes's: The key feature of legal work, each man suggested, is the constant cross-referencing of the general and particular. But from this point, they took different directions. As we saw, Holmes viewed the mundane particularities of practice as raw material for solitary, contemplative theorizing. On the other hand, for Brandeis, redemption lay in the fact that the lawyer's efforts, however general, "have reference always to some practical end."

In the three decades before he became a judge, Brandeis was a practicing lawyer. He took many high profile government assignments. He largely crafted the modern idea of the public interest lawyer, who represents nongovernmental clients pursuing reforms in accordance with his conceptions of the public interest. And he was a highly successful private business lawyer. Brandeis wrote little about his private practice, and we lack detailed information about all but a few of his cases, but we do know that in word and deed Brandeis repudiated aspects of what he considered common features of the practice style of his day.

First, Brandeis insisted that the aggressive lawyering of the Dominant View could not promote justice in situations where all interests were not evenly represented, and he saw many such situations. His main response to this problem was government and public interest work designed to level the playing field by providing representation to underorganized interests and curb the power of big business. He supported and helped form various regulatory agencies and labor unions and consumer groups. He developed the public interest lawyer role, purporting to speak before legislatures, agencies, and courts on behalf of dispersed and more or less unorganized citizens. He also argued for the idea that counsel for powerful organizations had a duty to use their influence to

51. Holmes, supra note 33, at 29.
52. Brandeis, supra note 50, at 332.
discourage their clients from unjust or antisocial projects, and he practiced what he preached.\textsuperscript{54}

Second, in situations involving parties of roughly equal power, Brandeis urged lawyers to try to steer people away from wasteful squabbling and to craft new frameworks of mutually beneficial collaboration. This required lawyers to go beyond the law and understand the client's practical circumstances. It required a willingness to consider sympathetically the interests of third parties with whom the client is involved. In one famous instance, Brandeis responded to a request from the shoe manufacturer W.H. McElwain for assistance in negotiating a wage cut with workers by pointing out that while McElwain's wage rates were high, the average wages of his workers were low because their employment was irregular. He insisted that the client study the possibility of reorganizing his marketing and inventory practices with a view toward regularizing output and labor demand. The effort was successful and made possible an arrangement that left both employer and employees better off.\textsuperscript{55}

Since such third parties always have potentially conflicting (as well as potentially harmonious) interests, such efforts required a willingness to subject the client to risks of nonreciprocity and betrayal. It also required the lawyer occasionally to put himself in opposition to clients or former clients. Thus, Brandeis sometimes found himself accused of disloyalty. Having represented both the United Shoe Machinery Company and its customers, the shoe manufacturers, for years, Brandeis sided with the customers against the Machinery Company and (without taking a fee) attacked arrangements he had helped craft when he decided the Company was abusing them.\textsuperscript{56} In the "Lennox" case, Brandeis, consulted simultaneously by a troubled debtor and a major creditor, recommended an assignment of the debtor's property for the benefit of creditors, and when they assented, arranged one with his partner as trustee. When the partner found the debtor concealing assets, the firm

\textsuperscript{54} For example:
To one of his clients, faced at the time with labor trouble, Brandeis almost shouted:
"You say your factory cannot continue to pay the wages the employees now earn. But you don't tell me what those earnings are. How much do they lose through irregularities in their work? You don't know? Do you undertake to manage this business and to say what wages it can afford to pay while you are ignorant of facts such as these? Are not these the very things you should know, and should have seen that your men knew too, before you went into this fight?"

\textit{Id.} at 144.

\textsuperscript{55} See \textit{id.} at 145-46.

\textsuperscript{56} See \textit{id.} at 214-29.
felt obliged to press vigorously for their disgorgement, to the debtor’s outrage.57

This latter point was the most radical aspect of Brandeis’s approach to private practice. It led him to accept assignments involving vaguely defined responsibilities to people with potentially conflicting interests. Brandeis summarized his approach when he was asked whom he thought he was representing in the Lennox case when he recommended the assignment. “I should say that I was counsel for the situation,” he replied.58 This response was in radical tension with the spirit of the mainstream bar’s view of representation, which holds that the lawyer should normally assume responsibility only to a single set of unitary interests, and Brandeis was accused quite plausibly of violating the bar’s conflict of interest rules on several occasions. These charges became a major part of the case against him at the time of his nomination to the Supreme Court.59

The bar’s conflict of interest norms have never been as controversial as its client loyalty norms. The two sets of norms are strongly related, however, and Brandeis’s lawyering style seemed radical because it challenged both. The conflict of interest norms are premised on the loyalty norms. It is because the lawyer is expected to be aggressively loyal to a client that he cannot take on responsibilities to people with differing interests. As John Frank put it, “Lawyers are not retained by situations, and the adversary system assumes that they faithfully represent one interest at a time.”60

The conflict of interest prohibition reflects both the Positivism and the Libertarianism that underpins the loyalty norms of the Dominant View.61 Brandeis’s “counsel to the situation” idea assumes that there are tacit norms of fair dealing and collaboration to which the lawyer can resort to resolve competing interests among multiple clients. But the Positivist theme questions the substantiality of such norms, and the Libertarian theme suggests it would be illegitimate for the lawyer to impose them on clients. Together, these themes encourage the belief that the only convincing indication of the legitimacy of a cooperative arrange-

57. See id. at 232-37 (discussing Brandeis’s participation in the financial affairs of P. Lennox & Company and family).
58. Id. at 236.
59. See John P. Frank, The Legal Ethics of Louis D. Brandeis, 17 STAN L. REV. 683, 685 (1965). While Frank considers the specific charges without merit, he calls the “counsel for the situation” remark “one of the most unfortunate phrases [Brandeis] ever casually uttered.” Id. at 702.
60. Id.
61. For an explanation of these themes, see Simon, supra note 3.
ment is that it was produced by an arm's length negotiation in which every interest was independently represented.

The instrumental arguments for the Dominant View also underpin the conflict of interest norms. If, as those arguments assert, adequate preparation is precluded by duties to share information with adverse parties, then joint representation of parties with adverse interests must jeopardize adequate preparation. Joint representation also creates an impossible situation from the point of view of disclosure. The parties cannot tell whether their interests are sufficiently harmonious to permit joint representation until they all make full disclosure to each other. Yet once they have done so, they will have sacrificed an important advantage of separate representation.

Brandeis would not have denied that there were costs and risks in the type of cooperation he urged. But there were also costs and risks to separate representation, for example, the costs of duplication of effort, of more circuitous communication, and of the failure to perceive opportunities for joint gains because of fragmentation of information and bias of perspective. Functionally analyzed, the conflict of interest rules rested on a dogmatic insistence that the risks and costs of collaboration always outweigh the risks and costs of separate representation.

Brandeis's lawyering style thus, at least implicitly, posed a basic challenge to the Dominant View. The radicalism of the challenge seems to have been perceived by the bar's leaders at the time of his Supreme Court nomination. Six former American Bar Association presidents asserted that Brandeis's departures from client loyalty and conflict of interest norms indicated him unfit for judicial office.62 Ironically, in losing the nomination fight, the bar gained their antagonist's retirement from the field of lawyering.

Brandeis never made his challenge explicit. In the post-World War II period, however, there were only two major American legal theorists to take an interest in practice that made some effort to draw out the implications of Brandeis's vision. These were Henry Hart and James Willard Hurst. It is surely no accident that both began their careers as law clerks to Brandeis on the Supreme Court. The works of each are full of references to Brandeis, and their understanding of practice was precisely the Brandeisian vision of meaningful work. They saw the potential of the insight that legal theory had developed in the judicial context—that law application could be both creative and grounded in established norms—to ennoble the lawyering role. They argued and

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62. See Frank, supra note 59, at 685.
demonstrated that lawyers had creative power, and that this power entailed a responsibility to see that it was used consistently with the social good.\footnote{63. See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1-9 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958); James Willard Hurst, The Growth of American Law: The Law Makers 249-375 (1950).}

In situations of unequal power, the Brandeisians castigated lawyers who allowed their clients to abuse their powers. They also advocated judicial and regulatory solutions to remedy the imbalance of power or impose socially desirable outcomes.

In situations of relatively equal power, they championed the "counsel to the situation" approach in which the lawyer's job was to craft frameworks of fair and mutually beneficial cooperation. For example, the third problem in the famous Legal Process materials Hart wrote with Albert Sacks involves the drafting of a small-time commercial lease. The central problem is the appropriate allocation of the risks and benefits of the lessee's business in a situation where the lessee wants flexibility in the event his business has to struggle to get off the ground and security of tenure in the event he is successful. The lessor wants a minimum return, protection against inflation, and additional return if the business is successful. The solution is a long-term arrangement with the rent based on a percentage of the lessee's sales, subject to a periodically increasing fixed minimum. The authors introduce us to the now-standard features of the percentage lease, emphasizing that the device was not legislated by a Positivist sovereign but was in fact created by lawyers. And they urge that the lease should be negotiated and interpreted in the light of the same interpretive premise they portray as standard in the interpretation of statutes—that the norms were "designed to operate rationally and evenhandedly."\footnote{64. Hart & Sacks, supra note 63, at 207.}

The Brandeisian vision of lawyering thus incarnates the virtues of the nostalgic conception of the artisan's role in nineteenth-century alienation theory. Like the artisan, the lawyer applies general socially defined knowledge creatively to produce an individualized product. And like him, the lawyer expresses a commitment to social norms and purposes by adhering to standards of quality in everyday practice. The fact that the lawyer's role is freighted with a more explicit and complex normative element makes it all the more promising as a vehicle for linking concrete practical activity with encompassing values—the hallmark of "meaningful work" in the tradition we discussed above.
The Brandeisian perspective has been an enduring voice in discussions of lawyering. It is reflected in parts of the modern ethics codes. For example, the codes acknowledge the propriety of lawyer advice that takes account of "moral" and "social" as well as strictly "legal" considerations. The conflict of interest restrictions have been substantially loosened, and the Model Rules explicitly legitimate the role of the lawyer as intermediary.

IV. THE BRANDEISIAN EVASIONS

The Brandeisians never developed their perspective into a full-blown challenge to the Dominant View, and they never pressed their criticisms with the activist vigor their mentor brought to so many other causes. The more radical implications of the Brandeisian critique have been largely neutralized, and this has occurred along two avenues that Brandeis and his disciples themselves first marked.

The first is the idea that the Brandeisian perspective may be relevant to only certain realms of practice. The basic distinction inaugurated by Brandeis was between litigation and counseling. Based on his own experience, Brandeis, as well as Hurst and Hart, argued that counseling, by which they meant providing nonlitigation advice and devising cooperative frameworks, was the exciting and important realm of practice. They tended to ignore litigation, and by implication to concede that the Dominant View might still be appropriate there.

The Brandeisians did not themselves put a lot of emphasis on this distinction. It seems likely that they wrote off litigation for the same reason other legal theorists wrote off private practice altogether—they found it distasteful. More recently, many have proposed to adopt the Brandeisian view but limit it to counseling, and indeed the codes pay lip service to this idea, though for the most part they add only exhortation, rather than enforceable duties, in the counseling sphere. Typically the distinction between the spheres is rationalized on the ground that, in litigation, the parties are likely to be more or less equally represented and supervised by the judge, whereas it is less likely that either safeguard will obtain in the counseling sphere.

This approach cannot survive reflection, and its vogue seems to be

66. See id. Rule 2.2.
coming to end. First, in the midst of the current sense of crisis over the court system, it seems obvious that all the dysfunctions of litigation do not arise from imbalances of power. Indeed some—the “arm’s race” features that compel one party to engage in expensive maneuvers solely because the other has or will—are aggravated when both parties are well-financed.

Second, the sectoral approach betrays the most basic tenet of modern jurisprudence—the repudiation, not of imbalances of power, but of categorical judgment. It makes room for contextual judgment only at the cost of introducing a new categorical distinction between litigation and counseling. Even if it were generally true that the ethics of the Dominant View are well-suited to litigation, the sectoral approach would be objectionable for failing to give the lawyer responsibility to modify those ethics in the exceptional litigation situations where they are not well-suited. The lawyer’s responsibilities are critically determined by a classic binary all-or-nothing decision that guarantees that the lawyer’s conduct will sometimes be inappropriate.

The depths of pettifogging mindlessness to which the approach can lead were illustrated by the efforts of Geoffrey Hazard, a drafter of the Model Rules, to defend the Kaye, Scholer lawyers in the aftermath of the Lincoln Savings & Loan collapse. Hazard argued that the lawyers were subject to a lower standard of responsibility to the public because they were acting as litigators (“litigation counsel”) than they would have been if they were acting as counselors (“regulatory counsel”). Recalling that the lawyers were advising and assisting Lincoln in complying with Bank Board requests for auditing information, one might ask what this has to do with litigation. Hazard’s response was that, since the government had begun to suspect Lincoln of illegal conduct, it was likely to initiate litigation in the future! Indeed, one might add, since the government’s suspicions were correct, litigation was more or less certain. Under Hazard’s argument, the more clearly lawless the client’s conduct is, the stronger the case for a lower standard of attorney-client responsibility. Fortunately for the

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69. Even as an interpretation of the Model Rules, the argument was absurd. In addition to mischaracterizing the lawyers as “litigation counsel,” it mistakenly asserted that the standard applicable under that characterization would be that of Model Rule 3.1 which authorizes lawyers to assert any claim on behalf of a client in litigation that is not frivolous. The argument was, apparently, that as long as Kaye, Scholer had a nonfrivolous argument that the information it held was not called for and the assertions it made were not misleading, it was on safe ground. But the Rule
dignity of the bar, the argument was not widely accepted. Its absurd implications are merely symptoms of a fundamental defect: it allows an important ethical decision to turn on a consideration distant from the real normative stakes of the situation.

The second avenue by which the subversive implications of the Brandeisian view were contained was the idea that public regulation might eventually moot issues of professional responsibility. Hurst and Hart both argued that, when business lawyers failed to curb their clients' abuses, government typically responded with regulatory constraints. Of course, the more likely this response, the more the argument for responsibility shaded into the argument for long-run self-interest. The ultimate implication of this line of thought was made clear by Adolph Berle's prediction that the regulatory state would ultimately liberate "the bulk of the corporation bar from the profitable but usually undistinguished bondage in which most of it lives" because "[t]he moment . . . [principles of social responsibility] are seriously infringed, the state predictably intervenes. In that case an explicit rule of law presently results. Great and powerful interests cannot afford to risk being caught in a major infringement even though the rule has not become explicit . . . ."  

If there was one thing the Brandeisians believed in more than professional responsibility, it was the benign capacities of the regulatory state. This latter commitment tended to dull the edge of the former. If the regulatory state did its job that well, then legal ethics was more a

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3.1 standard applies to litigation circumstances in which counsel is volunteering a position, not to circumstances where counsel is obliged to produce information. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1997).

To the extent that the charges against Kaye, Scholer involve withholding information, the litigation analogy is not to a closing argument, where counsel can argue any nonfrivolous characterization of the evidence, but to a response to a discovery request, where the most plausible standard would be that counsel must comply with a reasonable interpretation (a much narrower category than that of nonfrivolous interpretations) of the request. See Washington State Physicians Ins. Exch. v. Fisons Corp., 858 P.2d 1054, 1078 (Wash. 1993) (en banc).

To the extent that the charges involve misrepresentation, the situation is again quite different from a closing argument at trial, where counsel's statements are supposed to be understood to refer to evidence of record only, and the trier can make its own judgment on the plausibility of the characterizations. In the regulatory context, Kaye, Scholer's statements would naturally be understood to refer not just to the information they had produced but to any relevant information they were aware of. See William H. Simon, The Kaye, Scholer Affair: The Lawyer's Duties of Candor and the Bar's Temptations of Evasion and Apology, 23 L. & SOC. INQUIRY (forthcoming 1998).

See HART & SACKS, supra note 63, at 857-63; HURST, supra note 63, at 385-95.


71. Id. at 432.
matter of prudence than of responsibility.

But hardly anyone today shares this degree of faith in the state. In retrospect, we can clearly see two defects in the premise—both spectacularly illustrated by the Savings & Loan debacle. First, the chastening power of anticipated intervention works only if the client has a sufficiently long-term perspective. For someone inclined to "go for broke" and pursue small chances of short-term wealth or who faces near certain failure if she plays by the rules in the short term, it is ineffectual. These were precisely the circumstances of the Savings & Loan miscreants.

Second, regulation is no less dependent on the responsible conduct of officials than private ordering is on the responsible conduct of lawyers. If lawyers resist or betray responsibility, why should public officials do better? The carnival of official ineptitude, cowardice, and corruption in the Savings & Loan scandal is a monument to the proposition that effective state intervention need not follow "the moment" corporate irresponsibility threatens the public interest.

I speculate that the practical developments that have made the two Brandeisian evasions untenable accounts for the bar's current malaise far more than the theoretical challenges to legal reasoning that Anthony Kronman blames. The sense of crisis around the litigation system and the bar's profitable association with mammoth financial scandals exacerbated by inadequacies of various regulatory systems make clear that issues of responsibility are not moot in any area of practice. There is still a role for professional responsibility for any lawyer who would accept it. And while that role is responsive to the deepest aspirations of many lawyers, it is also a frightening one for which the bar's institutions provide little support. 73

V. SELF-BETRAYAL

This frightening aspect of the meaningful work ideal is as important as the hopeful one. For the striking fact about the history of legal professionalism is that lawyers' betrayal of the ideal has been has con-

73. Kronman and others also suggest that recent developments in the organization of private practice have narrowed the scope for Brandeis-style lawyering. See KRONMAN, supra note 44, at 23. Competition has eroded the leverage that lawyers once had over some clients. Moreover, lawyers are increasingly given narrow, short-term tasks that give them little opportunity to gain the background understanding of the client or the respect from the client needed for the Brandeis role. This suggestion seems plausible with respect to a broad range of firm practice. But there is a trend in the opposite direction with inside corporate counsel, whose numbers and power have been growing. In any event, these developments are too recent to explain why the Brandeisian project made so little progress to begin with.
sistent as their espousal of it. The notion of professional redemption thus belongs to that class of values that includes Christian love, Freudian mature sexuality, and Marxist self-actualization that people are portrayed as naturally both striving for and turning away from.

Although this dialectic of affirmation and denial seems puzzling, there are familiar explanations for it in all these doctrines. Sometimes it seems that people, through weakness or short-sightedness, overvalue the immediate short-term satisfactions such as material wealth or social harmony over more important but less readily accessible goals. Sometimes it seems that habituation to their fallen states has made people cynical about the possibility of something better or has induced a kind of addiction to the trivial but familiar comforts of the status quo. Sometimes it seems that people lack the courage to accept the dangers of failure that attend efforts to achieve the most exalted goals.

Of course, one might describe the same phenomenon as a rejection of the ideal on the basis of a calculation that the costs of striving for it are likely to exceed the benefits. However, such a view has rarely been asserted, at least publicly, within the legal profession. The more common response has been to defend the profession’s detours with the arguments of the Dominant View that we have been examining. In the Christian, Freudian, and Marxist traditions, it is common to see the evasions, misrepresentations, and non-sequiturs of such arguments as a kind of support for the ideals they deny or qualify. The more implausible the arguments, the more strongly they signal bad faith, and the greater the homage they seem to pay to the ideal.

For our purposes, it is sufficient to insist that one cannot take lawyers’ consistent subversion of the professional ideal as a considered rejection of it. The record shows ambivalence, not rejection.

VI. CONCLUSION

The ideal of meaningful work articulated in Progressive-Functionalist social theory and implicit in many literary treatments of professionalism lends support to the critique of the Dominant View and offers a clue to the underpinnings of the pervasive but vague expressions of moral anxiety within the profession.

The aspirations of many lawyers resonated with the “meaningful work” ideal that suggests personal fulfillment depends upon the experience of work as the vindication of general norms in particular contexts, of simultaneous social commitment and self-expression, and of groundedness conjoined with creativity. At times legal professionalism promises to provide this experience. The key professional institutions asso-
associated with ideal have been participatory self-regulation and contextual judgment. Brandeis and his disciples articulated the promise of professional work organized around contextual judgment more ambitiously than anyone else.

But the proponents of the “meaningful work” ideal tended to shy away from direct engagement with the Dominant View. The Brandeisians apparently hoped that social trends outside the profession would obviate the need to do so by pushing the profession in directions that would vindicate the ideal. They were wrong, however. The ideal of “meaningful work” is not a historical inevitability. It is at best a political possibility.