Assessing the Foundations of Neo-Classical Professionalism in Law and Business

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ROB ATKINSON

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

Walter Scott

Business should be, and to some extent already is, one of the professions. … [T]he term “Big business” will lose its sinister meaning, and will take on a new significance. “Big business” will then mean business big not in bulk or power, but great in service and grand in manner. “Big business” will mean professionalized business, as distinguished from the occupation of petty trafficking or mere money-making. And as the profession of business develops, the great industrial and social problems expressed in the present social unrest will one by one find solution.

Louis D. Brandeis

The professional ideology of service goes beyond serving others’ choices. Rather, it claims devotion to a transcendent value which infuses its specialization with a larger and putatively higher goal which may reach beyond that of those they are supposed to serve…. [I]t is because they claim to be a secular priesthood that serves such transcendent and self-evidently desirable values that professionals can claim independence of judgment and freedom of action rather than mere faithful service.

Eliot Freidson

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1 Ruden McCloskey Smith Schuster & Russell Professor of Law, Florida State University.
2 SIR WALTER SCOTT, GUY MANNERING 298 (Ginn & Co. 1888).
3 LOUIS D. BRANDEIS, Business – A Profession, in Business – A Profession 1,12 (Small, Maynard & Co. 1914).
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The change we need needs to include this: Remodeling the private practice of corporate law and the management of for-profit business to make both occupations better serve, together, their proper public functions. This paper assesses the existing foundations for that remodeling and sketches its basic outlines. This introduction takes the first step, explaining why the remodeling of business management and corporate law is timely and why it needs to integrate both occupations. The rest of the paper then surveys the foundation of that remodeling, the grounding of both law and management in the classic social scientific theory of professionalism, which itself ultimately rests on classical philosophy’s fundamental claim to unite individual knowledge and virtue in service to the public good.

Corporate lawyers and business managers have come in for increasingly intense censure of late. This is both entirely understandable and deeply disturbing. It is understandable, because lawyers and business executives have been at the epicenter of all the major economic and political scandals of recent memory, both the scandals of the 1960s and 1970s that launched the modern era of business ethics and legal ethics and the scandals of yesterday’s headlines – the massive malfeasance at Enron and WorldCom, Bernard Madoff’s monumental Ponzi scheme. Nor are these the worst of it.

Something more basic is the matter. Managers and lawyers masterminded the subprime mortgage bonanza, even as they presided over the proliferation of credit-default swaps and other arcane derivative investments the collapse of which have together dragged the global economy down to depths not plumbed since the Great Depression. And they have added political insult to economic injury. Corporate managers, with the approval of their lawyers, have paid significant parts of public rescue packages as bonuses to retain the very managers who precipitated the meltdown. The groundswell of outrage is as understandable as the political backlash is predictable.

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5 See, e.g., Jerry W. Markham, A Financial History of Modern U.S. Corporate Scandals: From Enron to Reform (M.E. Sharpe 2006); http://www.fundalarm.com/busted.htm (describing various SEC censures of mutual fund managers for malfeasance); http://www.accountancyage.com/accountancyage/news/2222862/sec-fines-enron-subsidiary-exec (detailing the charges brought by the SEC against an Enron subsidiary executive). This paper focuses on corporate lawyers and business managers; it does, however, have implications for the more general fields of law and management, and, as we shall see, it is also the foundation for a larger study of professionalism as a whole.


But this censure of lawyers and managers is also deeply disturbing, because these two occupations are absolutely essential to our economic and political life. If they are sometimes geese, among the fouler and more foolish of fowl, lawyers and managers also guard the forum, even as they bring much that is golden to market. We have to live with them, because we cannot live without them. Nowhere is this more evident than in the paradoxes of the bailout packages: Our political leaders, lawyers and managers themselves, tell us we cannot let the market chasten the private banks, investment houses, and insurance companies, lest we ourselves suffer too much in their fall; indeed, we must even keep on the old managers of the worst offender’s most dubious division, because no one else has the expertise to clean up the colossal mess they themselves have admittedly made. The public is to be forgiven for feeling that these managers deserve, not merely pink slips, but malpractice liability, even jail sentences. Backsliding into their dirty hands hardly seems the right direction for change.

So, beyond the predictable scapegoating and political grandstanding, now as before, we have had calls for ethical reflection and legal reform, even some significant new legislation, and we will surely see more. All this is certainly appropriate, even necessary. But, in the longer view, this all has a distinctively “déjà-vu all over again” look about it. Surely one lesson from the present crisis is that we do not know the full dangers of new developments until after they are upon us.

But, if that is so, how can we ever prepare ourselves for the next crisis? One prospect is to face – or face again – an obvious but often overlooked fact: We have met the enemy, and they are us. After all, special-purpose entities and off-book budget items were not specters summoned with dark arts from some nether region by

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9 See Atkinson, Come, Let Us Reason Together, supra note 6, at 474.

necromancers in alliance with either the Devil or the Evil Empire. We ourselves, and our students, are the sorcerer’s apprentices who conjured them up. The creatures devouring both Wall Street and Main Street are our own creations.

In this darkest and deepest phase of our economic downturn, it has become increasingly clear that criminality, even at the deepest levels, has probably not been the root of the problem. Nor, for that matter, was civil fraud, even actionable mismanagement. The evil besetting us now is both more banal and more basic, something very like an original sin: Our private professionals, for all their proficiency, have been, for want of a trendier if not better word, unprofessional. Operating fully within the limits of the law, business managers and their legal advisors have created financial arrangements and production models which, even as they enriched their creators and their principals in the short run, jeopardized the financial security of the entire world later in the day. Our regulatory Nerons may have fiddled while Rome caught fire, but it was corporate lawyers and managers, flaunting the letter of the law even as they flouted its spirit, who both lit the bonfire and fanned the conflagration.

We are accustomed, of course, to the insight of Adam Smith: It is not to the generosity of the baker or the butcher that we owe our sustenance, but to their self-interest. But the private bar never tires of telling us that law is a profession, not a mere trade; no less pragmatic a reformer than Justice Brandeis urged business managers themselves to rise above petty trade and join the ranks of public-spirited professionals like lawyers. What is more, “Adam Smith himself defended the privileged position of professions on the ground that the nature of their work requires trust.” But that trust – not to mention that privileged position! – must rest on trustworthiness.

If we listen carefully, we can hear, even in the current cacophony, sentiments that are not crudely populist or crassly redistributive, but classically republican, concerned with the common good. Resentment at automobile executives who fly corporate jets to ask Congress for federal bailouts may bespeak not class-envy but nostalgia for more Spartan management modes, an echo of the cheer that greeted Alexander’s refusal to drink in the desert while his troops went without water. Of course beaux gestes and rhetorical flourishes, classical or otherwise, cannot clean up the current mess; it would hardly help to question Depression Era remedies, even

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13 FREIDSON, supra note 4, at 214.
Randian reactions\textsuperscript{14}, only to offer in their stead vague inspiration from Plutarch’s Lives of the Noble Greeks and Romans.

What we need is not antiquarian but genuinely radical: A re-examination of the roots of modern professionalism, of what Brandeis meant when he called upon both lawyers and managers to practice their crafts in Mathew Arnold’s “Grand Manner.” We must of course try, yet again, to constrain the more egregious behavior of another generation of Holmes’s “bad men”\textsuperscript{15} in both law and business. But we must also try to inspire Brandeis’s conscientious, public-serving progeny. In particular, we must show them how to become Walter Scott’s architects\textsuperscript{16}; how to realize the opportunities Brandeis himself offered in both business and law for the fullest imaginable flourishing, personal and professional; how to focus their individual efforts on the social goals that, as Freidson reminds us, professionals have always said they are committed to serving.\textsuperscript{17}

What, in concrete terms, would remodeling professionalism mean in law and business today? Consider a simple thought experiment. Suppose that the Wall Street and K Street wonks behind today’s crises had asked themselves questions like these: If the financial instrument I am engineering works as planned, will it make markets operate better, more transparently and efficiently and fairly? If this instrument goes badly, will it have costs beyond those borne by me, my fellow professional agents, and our corporate principals? If the practice I am about to propose gains the approval of Congress or the Financial Accounting Standards Board or the SEC, will it benefit not only me in my next billing- or bonus-cycle and my firm in its next financial report, but also the world economy in the foreseeable future? And – critically -- if the answer to any of these questions is negative, if the private gain will be offset, even swamped, by public losses, what should I do?

These are questions that professionals once thought they had to ask themselves; if their answer was negative, they believed they


\textsuperscript{15} See \textit{Geoffrey C. Hazard, Jr., Susan P. Koniar, & Roger C. Crampton, The Law and Ethics of Lawyering} 295-323 (2d ed. 1994) (quoting Holmes: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanction of conscience.”).

\textsuperscript{16} See also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 \textit{Mich. L. Rev.} 34, 66 (1992) (“A person who deploys his or her doctrinal skill without concern for the public interest is merely a good legal technician – not a good lawyer.”)

\textsuperscript{17} Brandeis, The Opportunity in the Law, supra note 8, at 313 ("every legitimate occupation, be it profession or business or trade, furnishes abundant opportunities for usefulness, if pursued in what Mathew Arnold called 'the grand manner'").
had to try to restrain their private clients in the public interest. In fact, knowing the public interest in such matters, and acting to advance that interest, was the original core of the modern definition of professionalism. That definition, we shall see, dates back precisely to the era of bipartisan Progressivism, the Republicanism of the first Roosevelt as much as his cousin’s Democratic mentor, Woodrow Wilson. Indeed, even more deeply, that definition’s twin essentials – knowing the public good and serving it – are classical philosophy’s dual foundation for a truly virtuous, fully flourishing human life.

As we shall see in Part I, the classic functionalist theory of the professions required, at its core, just what the current crisis seems to call for: Personal commitment to serving the public good though a combination of technical expertise and general knowledge that professionals deploy primarily as agents of private principals. But this model, we shall see in Part II, has been criticized on both points, the epistemological and the moral, the need to know the public good and to consciously serve it, sometimes against the wishes of private clients. In responding to these criticisms, classic theory has run into a profound paradox on each point. Although classic theory has plausibly suggested why some occupations require a unique combination of technical expertise and general knowledge, it cannot show how occupational self-regulation is needed for either the acquisition or the competent employment of that knowledge.

What is worse, though classic theory can show how the application of proper professional knowledge requires a special virtue, commitment to the public good, it cannot show how the traditional institutions of professionalism, backed as they are by the force of law, can even attempt to guarantee that virtue without running afoul of basic liberal values, if not constitutional prohibitions. Liberal theory and constitutional law both renounce state compulsion of precisely what classic professionalism requires: belief in a particular vision of the good life, both personal and social. These, we will see, are the twin paradoxes of the classic theory of professionalism: Professions require a special kind of knowledge for which traditional professional institutions are not necessary and a corresponding virtue for which those institutions are not sufficient.

Part III traces the contours of neo-classical professionalism in law and business. Those contours become clear as soon as we have identified the fundamental flaws of classic professionalism. These flaws are basically two. In the first place, classic theory failed to see what the first generation of professional reformers themselves insisted upon: Business management, every bit as much as law, requires not only expert technical knowledge, but also both an

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18 A fuller treatment must be the job of the second phase of this project, An Elevation of Neo-Classical Professionalism in Law and Business. The recent trend toward shorter law reviews requires that that project, though already written, be published separately.
understanding of the broader public good and a commitment to its advancement.

Correcting this oversight points to the second flaw of classic theory. Classic theorists seem to have missed the need for properly professional knowledge and virtue in business management precisely because they were distracted by the absence in that occupation of an adventitious, even antagonistic, element that they found in law and mistook as essential to all professions: occupational self-regulation. The classic theorists seem to have thought that business management could never have the requisite knowledge and virtue of true professions, because business management had never been able to develop the institutions that were supposed, in classic professions, to guarantee precisely that knowledge and virtue: occupational control of members’ education, admission, and practice. Thus, by focusing on the institutions of professional autonomy, which our study will show to be unnecessary for the traditional profession of law, classical theorists failed to see that the very functional features that make law a proper profession, knowledge of the public good and commitment to it, are also essential to modern business management.

If we, by contrast, accept the charge of classic theory’s critics - - the traditional self-regulatory apparatus of the bar is at best self-aggrandizing, at worst parasitic, and in any case adventitious to proper professionalism – then we will be ready to re-build both law and management on their proper foundation: Knowing and serving the public good, even in the employ of private clients.

This study looks beyond the present crisis to an astoundingly ambitious optimum: Restoring classic professionalism may not only avert future disasters of the present kind, but also promote the common good, build a better world. That level of optimism, of course, will almost certainly prove too ambitious, at least in our lifetimes. For reasons we shall examine, nothing can guarantee, now or ever, that all lawyers and managers become proper professionals. Nonetheless, as we will also see, we are all almost certainly better off with every single one who is.

And, most basically, each of us is better off being a proper professional oneself. This is the study’s minimalist position, one that is surely attainable, if not self-authenticating. Even if we professionals cannot make ourselves the principal solution to the world’s problems, at very least we can decline to be a part of those problems. For this, too, is the claim of the Classics: To make life worth living for those who would work together to make the world better. At bottom, to paraphrase the Gospels, even if you cannot gain the whole world, it would not be nothing not to lose your own soul.

I. THE FUNCTIONALIST THESIS: CLASSIC PROFESSIONALISM THEORY.
Beginning early in the last century, modern theorists of the professions have sought to explain a persistent phenomenon left largely aside in the sweeping nineteenth century social theories of Marx, Weber, and others. This phenomenon, paradoxically, was one of which the theorists themselves were exemplary. These were the traditional professions, occupations insulated from both the market and the regulatory state in a regime of relative autonomy. These occupations, represented traditionally by the law, medicine, the clergy, and university faculty, posed two related questions. The first, more basic question, goes to function: What special, socially essential role, if any, do these distinctive occupations play? The second, subsidiary question goes to form: How should such occupations be organized to guarantee that they do, in fact, fulfill their special function and thus warrant their relative autonomy from both the market and the state? Theorists have thus asked themselves what about professional services was special and why the providers of those special services needed to regulate themselves.

Admitting at the outset some minor distortion of intellectual history and individual positions, we can identify three logical, if not quite chronological, answers, or sets of answers, to the two basic questions about professionalism. The first answer is affirmative—something of a Hegelian thesis. On this view, professions perform vital functions in societies with advanced market economies and liberal polities, functions that such societies cannot meet by other means than the traditional institutions of professionalism. This functionalist answer points logically, and has led historically, to its antithesis, the second school, which answers the basic questions of professionalism in the negative. Professions exist, not for the benefit of society in general, but for the benefit of their members in particular. Professions are, in the vernacular of George Bernard

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19 Or, as stated by a contemporary sociologist of the professions,

The crucial characteristic of the knowledge systems of professionals, as they have been perceived in the discussions of professionalism of recent years, is to what extent they really serve a problem-solving purpose which in turn gives power and prestige to the owners of this capacity, or to what extent the knowledge is a symbolic value that serves the purpose of being something that can be brought forward in other people's eyes as important but which has no clear relation to the problem-solving capacity of professionals.

Rolf Torstendahl, Introduction: Promotion and Strategies of Knowledge-Based Groups to THE FORMATION OF THE PROFESSIONS: KNOWLEDGE, STATE AND STRATEGY 1, 3 (Rolf Torstendahl & Michael Burrage, eds., (1990)).

20 For a brief but useful historical survey of this three-phased development, see Randall Collins, Changing Conceptions in the Sociology of the Professions, in THE FORMATION OF PROFESSIONS: KNOWLEDGE, STATE AND STRATEGY 13 (Rolf Torstendahl & Michael Burrage, eds., Sage Publications 1990) [hereinafter Changing Conceptions], at 11-15.

21 The leading general work in this vein is Magali Sarkatti Larson, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (Univ. of California Press 1977); as to the legal profession in particular, see the pioneering work of Richard Abel, United States: The
Shaw, “conspiracies against the laity.” Thus, in its academic form, this position has come to be called the “dominance” theory, when the focus is on that position itself, and “revisionist” when the emphasis is on its relationship to classic, functionalist theory.

My own position belongs to a less tidy third group of theories, sometimes referred to as “post-revisionist.”

These theories maintain, with more nuance if less grandness than either functionalist or dominance theory, that the truth lies between their extremes. With the functionalists, these synthetic theories hold that modern societies cannot exist in anything like their present form without occupations that fairly closely resemble ideal-type professions. On the other hand, with the dominance theorists, this third school accepts that the traditional professions, as an empirical matter, have quite often served members of the professionalized occupation at the expense of the broader public. What this third group of theories suggests, therefore, is that we need a professionalism remodeled in light of dominance critiques to bring it more in line with its appropriate, public functions.

The remainder of this Part outlines the case for functionalism; Part II then examines the dominance theorists’ critique at each essential point. We will see that, on plausible assumptions, functionalism can show how certain occupations provide an essential combination of knowledge and virtue not available in conventionally state-regulated markets. On the other hand, we will see that dominance theorists raise plausible questions about the need for, and appropriateness of, traditional professional institutions as the guarantee of precisely that knowledge and associated virtue. Against that background, Part III first sets out the critical assumptions that make classical functionalist claims about professional knowledge and virtue plausible and shows how classical functionalism can be re-modeled to both account for and remedy the inadequacies of traditional professional institutions.

Let us begin with classic functionalist theory. As we have seen, that theory rests on two closely related theses, the first about professions’ essential function, the second about their necessary form. According to the first thesis, professions provide a special, socially

22 G.B. Shaw, A Doctor’s Dilemma 16 (Penguin Books 1913).
24 Id. at 14-15.
25 And, to their credit, proponents of both functionalism and dominance theory have acknowledged some strengths of their opponents’ position and weaknesses of their own. See, e.g., Friedson, supra note 4, at 105 (acknowledging the importance of Larson’s critique) and Margali Sarfatti Larson, In the Matter of Experts and Professionals, or How Impossible It Is to Leave Nothing Unsaid, in The Formation of the Professions: Knowledge, State and Strategy 24, 24 (Rolf Torstendahl & Michael Burrag, eds., (1990) (acknowledging she had initially “exaggerate[d] the importance of protected markets”).
essential kind of knowledge and virtue. According to the second thesis, maintenance of both professional knowledge and professional virtue require essentially autonomous professional institutions. We now examine these basic functionalist theses in turn, with particular reference, in each case, to law, where functionalists found both essential elements, and business, where they found neither.

A. The Function of Professions: Providing Special Knowledge.

It is their answer to the first question of professionalism, the question of function, that gives the functionalist school its name: Different modes of occupational organization, professions included, serve identifiably different social functions. Professions, in particular, provide a kind of specialized knowledge and an associated virtue that society cannot secure from either the market on the one hand or the state on the other. This answer was first theoretically articulated by sociologists, and theirs is still the most detailed account. For purposes of our analysis, however, functionalism’s primary thesis is most cogently outlined in terms of two forms of market failure identified by neo-classical economists. These failures have essentially two aspects: those having to do with the consumers of the services in question and those having to do with third parties.

26 In their separation of virtue and knowledge, functionalist theory is more neo-classical than classical, in two related ways. For one thing, classical philosophers tended to see knowledge itself as a kind of virtue. As we saw at the outset, Plato and Aristotle understood virtue, at the highest level of abstraction, to be the ideal condition of a person or thing for performing its proper function. In the case of humans, one of those conditions could be said to be knowledge; on that view, knowledge becomes a species of virtue. This difference is mostly definitional and does not affect our analysis. The classical philosophers’ other conflation of knowledge and virtue is more of a problem. Plato in particular tended to assume that, if one had the knowledge of what to do, one would do it more or less automatically. See Plato, Gorgias 39 (W. Hamilton trans., Penguin Books ed., 1960) (Stephanus 460) (“In fact, a man who has learnt any subject possesses the character which knowledge of the subject confers… Then by the same reckoning a man who has learnt about right must be righteous.”). This, of course, minimizes the problem of intemperance, or evil: knowing the good but being unable or unwilling to do it. That distinction definitely affects our analysis, but we can safely postpone it until Phase II, where we focus more closely on the knowledge and virtue relevant to our analysis.

27 See e.g., Talcott Parsons, The Professions and Social Structure, in ESSAYS IN SOCIOLOGICAL THEORY (rev. ed. 1954); Talcott Parsons, A Sociologist Looks at the Legal Profession, in ESSAYS IN SOCIOLOGICAL THEORY (rev. ed. 1954), at 458 (“The professions appear as not only empirically somewhat different from business, but the two fields would seem to exemplify the most radical cleavage conceivable in the field of human behavior.”).

28 See Freidson, supra note 4, at 78 (“In professionalism, sheltered labor markets for particular jurisdictions in a division of labor are created on the basis of a claim to be able to perform a defined set of discretionary tasks satisfactorily.”).

29 Functionalism had earlier proponents among social reformers who were also theorists, particularly Brandeis in the U.S., and R.H. Tawney in the UK. See William H. Simon, Babbit v. Brandeis: The Decline of the Professional Ideal, 37 Stan. L. Rev. 565 (1985), at 123 (noting close parallels between Progressives like Brandeis and functionalist sociologists like Parsons).

30 See Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 Texas L. Rev. 259, 317-18 (1996) [hereinafter Dissenter’s Commentary], The following analysis comes more or less directly from Atkinson, Dissenter’s Commentary, supra, at 271-73 and the sources cited there.
strangers to the transaction between the provider of the service and its consumer.  

With respect to consumers of professional services, the problem is what economists call information asymmetry. The services in question are so unusual or complex that ordinary consumers cannot, at reasonable cost to themselves, independently evaluate whether the service actually delivered is of the quality promised. Those in the market for estate planning advice, for example, cannot know whether a particular document will have the desired effect without studying law themselves or taking other self-protective measures that are prohibitively expensive. Conversely, the providers of esoteric services like estate planning have an incentive to trade on their superior knowledge—and their consumers' relative ignorance—to the consumers' disadvantage, either by claiming to have special expertise they lack or by cutting corners in providing the knowledge they do have. One can claim special knowledge of wills and trusts without a firm grasp of the Rule Against Perpetuities; one can also churn out form instruments without carefully tailoring them to the client's particular situation. The usual rule of the market, caveat emptor, would work badly in such cases; here the buyer may not know what to beware of, or even to beware at all.

Consider, as a further example, the paradigmatic lawyerly activity, litigation. The proper lawyer must be able to assess the

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31 See, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting) (warning that lawyers have the power to abuse their client for their own benefit and the legal system for their client's benefit); Richard A. Posner, Overcoming Law 92 (1995); Richard A. Posner, The Deprofessionalization of Legal Teaching and Scholarship, 91 Mich. L. Rev. 1921, 1922 (1993) (both arguing that competitive pressures force lawyers to focus on serving the customer, their client, at the expense of the courts and the community).

32 Richard A. Posner, Economic Analysis of Law (Wolters Kluwer for Aspen Publish. 2007); Mark Seidenfeld, Microeconomic Predicates to Law and Economics 66-67 (1996). See Freidson, supra note 4, at 79 (“The requirement of discretionary specializations…and most particularly those based on esoteric, abstract theory, poses a serious problem to prospective labor consumers. How are they to judge whether a particular worker is able to perform tasks adequately?”).

33 Deborah L. Rhode & David Luban, Legal Ethics 646 (1st ed. 1992) (describing "information barriers" as the inability of consumers to accurately assess the legal services they receive and concluding that this is an appropriate reason to regulate lawyers); see also Shapero, supra note 31, at 490 (O'Connor, J., dissenting) (noting that ordinary fraud provisions cannot protect clients from lawyers' abuse of specialized knowledge).

34 See, e.g., Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961), cert. denied, 368 U.S. 987 (1962) (holding that an attorney who drafted a will that violated California's Rule Against Perpetuities did not breach his contract with his clients or commit malpractice); Body Heat (Warner Bros. 1981) (depicting Florida State University College of Law alumnus Ned Racine--presumably fictitious and provably before my time--who is badly tripped up by the Rule Against Perpetuities).

35 See Bates v. State Bar, 433 U.S. 350, 394 (1977) (Powell, J., concurring in part and dissenting in part) (“The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product.”).
relative merits of the client’s case under the law, the likely gains from prevailing over against the costs of prosecuting the case, the relative advantages of other modes of dispute resolution. And this is only the beginning. Once the case is underway, the lawyer must make a host of similarly complex decisions: whether to call a particular witness, whether to make a particularly novel argument or to invoke a relatively obscure line of precedent. The appropriateness of all these calls is difficult for lay-folk to assess. (So, too, we shall see, are managers’ decisions about whether to engage in a particular line of production, marketing, or investment). To assess whether their lawyer gets these decisions right, clients would need to have precisely the kind of knowledge that they lack, the kind of knowledge that leads them to need, and to hire, a lawyer in the first place.36

With respect to outsiders to the transaction, the problem is what economists call external costs. Because such costs are not taken into account by the parties to a transaction—external to them—the parties tend to produce and consume the service in socially non-optimal amounts or kinds; the costs of their less than ideal decisions fall on others.37 In the paradigmatic context of legal services—litigation—two examples, undercompetence and overzealousness, nicely illustrate both sides of the problem: services of the wrong quality and the wrong quantity.

Take undercompetence first. A client might well be willing to hire a lawyer relatively lacking in basic professional knowledge, on the assumption that such a lawyer will be comparatively cheap, even though the client knows the quality of service delivered will be correspondingly low. Assuming the client can assess the quality of the service delivered (that is, assuming away information asymmetry), and looking only at the transaction in terms of the lawyer and client, this is not particularly troubling: Some choose to drive BMWs; others choose, or can afford, only Fords. But if the ill-preparedness of the lawyer causes delays in court, or requires the judge to spend time and energy prompting or correcting, then some of the costs of relative incompetence are borne, not by the consumer, the lawyer’s client, but by the rest of us, in the form of delays, docket crowding, or additional judges. If my Yugo stalls out on the freeway, I’m not the only one who’s late for work. Much worse, if the gas tank of my Pinto explodes on impact: then you, too, may be incinerated. Thus society, on purely efficiency grounds, has a legitimate interest in preventing consumers from externalizing such costs, whether they

be associated with products like cars or services like legal assistance.\textsuperscript{38}

The second example of an external cost in litigation is excessive zeal; here the problem is more a matter of degree than kind.\textsuperscript{39} Suppose litigational delay on the lawyer's part is not a by-product of marginal competence, but a carefully calculated strategy to achieve client advantage at the expense of another party. The client will, to be sure, have to pay the lawyer to undertake these "hard-ball," "pit-bull," "scorched-earth" tactics. But if the client does not also have to pay either the opposing party's legal fees in responding to such measures or society's costs in wasted judicial time, the client has a perverse economic incentive to engage in tactics that no neutral observer would believe conducive to a resolution of the case on its merits. Several years ago a colleague and friend of mine related, with relief if not relish, that he'd just read how his Suburban could plow right through a Camry without sustaining any appreciable damage; as Camry driver myself, I found this news less than comforting. Here again, economists tell us, market-corrective measures may be warranted.\textsuperscript{40}

Externalities, of course, can be benefits as well as costs; just as the consumers of a product can inflict costs external to themselves upon others, so they can also confer external benefits. My friend's Suburban can crush my Camry like an aluminum can; your hybrid – more fuel efficient, less effluent emitting – may make everyone's world, not just your budget, better. Such external benefits have long been identified with professionalism in general and with the practice of law in particular, though typically with more rhetorical enthusiasm than empirical evidence or analytic rigor. Thus, for example, de Tocqueville famously spoke of American lawyers as a kind of "buffer" and stabilizer between the people and the propertied.\textsuperscript{41} Not surprisingly, encomia to the professionalized practice of law as essential to the rule of law and liberal democracy continue, if mostly in the organized bar's self-description.\textsuperscript{42} More

\textsuperscript{38} See Thomas D. Morgan, \textit{The Evolving Concept of Professional Responsibility}, 90 HARV. L. REV. 702, 705, 710-11 (1977) ("[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties--the social costs involved are borne by society as a whole.").

\textsuperscript{39} See Shapero, \textit{supra} note 31, at 489 (citing "abuse of the discovery process" as an example of "overly zealous representation of the client's interests").

\textsuperscript{40} See \textit{Rhode & Luban}, \textit{supra} note 33, at 647 (referring to the public's interest in the efficient resolution of disputes "in circumstances where individual clients would be willing to pay lawyers to delay or impede truth-finding processes"); Ronald J. Gilson, \textit{The Devolution of the Legal Profession: A Demand Side Perspective}, 49 MD. L. REV. 869, 873-77 (1990) (outlining an economic justification for "the Rawlsian ... prohibition of strategic litigation" contained in Model Rule 3.1).

\textsuperscript{41} \textit{Brandeis, The Opportunity in the Law, supra} note 8, at 330 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, Book I Chapter XVI).

\textsuperscript{42} See, e.g., \textit{Model Rules of Prof'L Conduct}, Preambles (1983).
significantly, arguments for this “public citizen” role of lawyers also appear in serious academic analyses of the legal profession.\textsuperscript{43}

Both these kinds of market failures, information asymmetries and externalities, involve two elements critical for functionalist analysis: specialized knowledge and the particular virtue associated with that knowledge. To avoid harming clients on the one hand and the public on the other, lawyers must, in the first place, know what they are doing. Beyond that, though, lawyers must also deploy their knowledge in a way that properly orders the benefits it confers: lawyers’ own remuneration must be subordinate to benefiting the client, and benefitting the client must be subordinate to, or coordinated with, benefiting, or at least not excessively harming, the public.\textsuperscript{44}

This dual prerequisite of knowledge and virtue, while only implicit in the economic analysis of professions, is quite explicit in the profession’s self-description. Brandeis, here as elsewhere, is the paradigm:

First. A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.

Second. It is an occupation which is pursued largely for others and not merely for one’s self.

Third. It is an occupation in which the amount of financial gain is not the accepted measure of success.\textsuperscript{45}

Roscoe Pound’s oft-quoted definition of profession captures the dual knowledge and virtue components more succinctly:

The term [profession] refers to a group ... pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood.\textsuperscript{46}

This distinctive service component, or virtue, is also quite explicit in sociological analyses of professionalism. Thus Freidson is careful to point out that professionals claim not only specialized knowledge, but also the virtue of commitment to the values that that knowledge advances: in his words, “devotion to a transcendent value which infuses its specialization with a larger and putatively higher goal which may reach beyond that of those they are supposed to


\textsuperscript{44} See Atkinson, Come, Let Us Reason Together, supra note 6, at 473.

\textsuperscript{45} BRANDEIS, Business – A Profession, supra note 3, at 2.

\textsuperscript{46} ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953), quoted in “...In the Spirit of Public Service”: A Blueprint for the Rekindling of Lawyer Professionalism, 1986 ABA COMM’N ON PROF’L.
serve.”⁴⁷ As illustrations of such values, Freidson lists “Justice, Salvation, Beauty, Truth, Health, and Prosperity.”⁴⁸ Justice, obviously, is the cynosure of the traditionally recognized profession of law; prosperity has been the focus of those seeking recognition for management as a profession.⁴⁹

Furthermore, in functionalist theory, just as the values that professions serve set them apart from other occupations, so the ranking of these values establishes a hierarchy among the professions themselves. Even as professions differ in kind from other occupations, depending on the nature of the knowledge and virtue they provide, so they differ in degree among themselves, depending on the importance of the value they serve. In the words of Freidson:

“The basis for legitimizing hierarchy among occupations will be putatively functional and based on specialized knowledge and skill, with superordinate occupations thought to have specialized knowledge and skill that is of central importance to a productive goal shared by all.”⁵⁰

Thus, according to Freidson:

“There are a few disciplines whose tasks bear on issues of widespread interest and deep concern on the part of the general population. These might be called core disciplines, bodies of knowledge and skill which address perennial problems that are of great importance to most of humanity.”⁵¹

Law, on this analysis, is traditionally recognized not only as a profession, but also as a “core discipline,” because its practitioners have the specialized knowledge needed to advance the fundamental social value of justice. We are left to wonder, though, whether a parallel case can be for management as the profession serving the coordinate value of prosperity. Both to see why this recognition has not come to management in particular and to understand more fully the functionalist notion of professionalism in general, we must turn to the second functionalist thesis: Form follows function.

B. The Institutions of Professionalism: Form Follows Function.

Affirmatively answering the question of professions’ function raises the second fundamental question of professionalism, that of

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⁴⁷ FREIDSON, supra note 4, at 122.
⁴⁸ Id.
⁴⁹ BRANDEIS, Business – A Profession, supra note 3, at 4; R.H. TAWNEY, THE ACQUISITIVE SOCIETY 91-122 (1920); see also SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 123 (citing Brandeis and Talcott Parson’s argument for “the transformation of business management into a professional activity”).
⁵⁰ FREIDSON, supra note 4, at 59.
⁵¹ Id. at 161-62.
form. If professions are indeed necessary for fundamental social functions, what institutional arrangements are needed to ensure that professions actually perform those functions, and perform them well? If the economic analysis of the prior section is correct, then mere market mechanisms will not answer the need; on account of information asymmetries and externalities, both positive and negative, the market will tend to produce the wrong kind of professional services, in the wrong amounts.

The classic response to such market failures is governmental intervention, in any one of several forms, from a minimum of government’s subsidizing favored suppliers or penalizing others, though government imposition of mandatory standards, to a maximum of outright provision of the service in question. In the specific context of services, these regulatory measures typically include special educational requirements, to ensure that the professionals are capable of providing the service in question; special fiduciary duties, to ensure that the services of the requisite quality are provided; and third-party monitoring of both training in the skill and delivery of the service. At the broadest level of generality, these market-correcting regulatory measures must ensure that the unqualified do not deliver services and that the qualified deliver them as promised, at an appropriate level of quality, and without excessive costs to either clients or third parties. In principle, these correctives should be applied so long as the costs of such regulation are lower than the benefits gained, so long, that is, as the prescribed regimen of governmental regulation isn’t worse than the market malfunction it is intended to correct.

But traditional professions like law stand more ambiguously between government and the market than the foregoing analysis suggests. As we have seen, they claim as essential to their proper functioning a significant measure of autonomy from state regulation as well as protection from market competition. In particular, professions claim three related elements of self-governance: education of prospective members, screening of members upon entry for the requisite knowledge and virtues, and regulation, to the extent of expulsion, of those admitted. The reason for these putatively

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52 Atkinson, Dissenter’s Commentary, supra note 30, at 272-73.
53 See FREIDSON, supra note 4, at 220 (explaining that consumer protection is especially important when “the profession’s skills are so complex and esoteric that lay people are not well enough informed to be able ... to choose the competent over the incompetent”).
54 There are, we should note, more dubious, defenses of professional autonomy, particularly in the case of the law. See MODEL RULES OF PROF’L CONDUCT, supra note 42, at Preamble [11] (arguing that “self-regulation also helps maintain the legal profession’s independence from government domination,” which is important to the rule of law because “abuse of legal authority is most readily challenged by a profession whose members are not dependent on government for the right to practice.”).
55 FREIDSON, supra note 4, at 12. See also WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 1 (2d ed. 2005) (identifying the
essential elements of autonomy is critical to functionalist theory; it traces back to the nature of professional work. As we have seen, the actual possession of professional knowledge is difficult for lay folk to assess.\(^{56}\) More fundamentally, there is a problem with the deployment, not just the possession, of professional knowledge. Not only is it difficult for lay people to know whether professionals have the relevant knowledge; it is also difficult for them to assess whether professionals are using their knowledge well in practice.

This problem of information asymmetry between client and professional, which makes ordinary market provision of professional services problematic, has a correlate, according to functionalist theory, on the government side. The proper use of professional knowledge requires a large and essential element of discretion, what the ancients called “phronesis,” or practical wisdom,\(^ {57}\) which is, by its very nature, difficult to reduce to bright-line, categorical rules.\(^ {58}\) As we have seen, the litigating lawyer must know, not only the substantive laws in which clients’ claims are grounded and the procedural laws by which those claims are asserted, but also subtle, difficult to calibrate matters like what witnesses to call, how to question them, when to press on and when to leave off. These latter matters, according to functionalist theory, make it impossible for fungible functionaries to measure professional performance by standardized, bureaucratic protocols. Professional practice must, instead, be evaluated by the professional cognoscenti themselves with inevitable hazily-stated, “know it when I see it” standards rather than “hard and fast,” bright-line rules. To overcome this aspect of the information asymmetry problem, professions claim the need to control not only the educational requirements for those allowed to deliver the relevant services, but also the need to monitor the delivery of those service by their own internal regulatory regime.\(^ {59}\)

What of the other problems with provision of professional services? We saw that professionals may not merely lack professional knowledge, formal and practical; they may also abuse that knowledge, in two distinct ways. On the one hand, information asymmetries raise the prospect that professionals will exploit their client’s relative ignorance to their own advantage – cutting corners,\

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\(^{56}\) As we shall see, however, it need not be difficult for professionals in the employ of the law to assess.\(^ {57}\) FREIDSON, supra note 4, at 31. See also LUBAN, LAWYERS AND JUSTICE, supra note 43, at 170; SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 21-25 (identifying “practical reason” with his fundamental lawyerly attribute, “contextual judgment”).\(^ {58}\) FREIDSON, supra note 4, at 31; SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 123 (“Because such services depend on technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization.”).\(^ {59}\) FREIDSON, supra note 4, at 31-32.
padding bills, overcharging. On the other hand, externalities pose the problem of experts’ deploying their specialized knowledge at the expense, not of the client, but of the public – bending or breaking the law to give their clients improper, systemically unjustified, advantages.

In the face of these two problems, according to functionalist theory, the professions provide two distinct virtues. The first involves placing the client’s interests about the professional’s own; the second, placing the public interest above the interests of both the client and the professional. Although functionalist theorists tend to conflate these two identifiably distinct kinds of professional virtue, this is essentially their claim: Professional virtue is necessary and sufficient to meet both problems. In the words of Justice O’Connor, "One distinguishing feature of any profession ... is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."

We have already examined why the market does not correct these problems; they are, at bottom, classic market failures, information asymmetries and externalities. Clients lack the knowledge to recognize abuse of professional knowledge at their own expense; they lack the incentive to discourage abuse of professional knowledge at the expense of the public. Functionalists insist that state regulation of the market cannot solve these problems either. With respect to client-protective virtue, the problem is essentially the same we saw with respect to incompetence. Just as it is impossible to set hard-and-fast, bright-line rules to define incompetent use of professional knowledge, so it is with self-serving abuse of that knowledge. Lawyers may omit critical measures because they do not know those measures are critical; they may also omit them, essential though they know them to be, as a means of cutting costs without corresponding fee reductions, thus improperly increasing their private gains. In either case, capturing the proper measure of effort in a mathematically precise rule is equally problematic.

60 The professional might purposely charge excessive rates for otherwise appropriate services. For this reason, professional regulation has traditionally monitored not only quality, but also price, of professional services, a practice now largely circumscribed by federal antitrust law. See Goldfarb v. Virginia State Bar, 355 F.Supp. 491 (1973) (minimum fee schedules held to violate Sherman Act); see also SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 125 ("The effort at market control has been largely abandoned.").

61 Atkinson, Dissenter’s Commentary, supra note 30, at 272-73.

62 See Edwards, Growing Disjunction, supra note 16, at 66 ("Good lawyers ... must sometimes ignore their own self-interest, or the self-interest of their clients"); SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 125 (noting that the self-regulatory regime of the "Progressive-Functionalist project" enforced two basic norms, which "are primarily concerned with the adequacy of service to clients, and secondarily concerned with fairness to third parties").

63 Shapero, supra note 31, at 488-89 (O’Connor, J., dissenting).
With respect to public-protective virtue, there is a parallel problem: Just as it takes an expert to know when professional knowledge is being applied poorly on the client’s behalf, so it takes one to know whether that knowledge is being applied over-zealously, even maliciously, at the expense of the client’s opponent or the general public. The point, for example, at which a line of appropriately pointed cross-examination crosses into the area of inappropriate harassment of a witness is impossible to specify with Euclidian clarity, even though an expert may be able to mark it, in practice, to a single moment.

In response to these problems of securing professional virtue by state regulation of the market, proponents of professionalism within the profession insist, and functionalist analysts of the professions tend to affirm, that the professions themselves must be the guarantors of that virtue. The organized, autonomous profession is to achieve proper deployment of professional knowledge, the essence of professional virtue, through three basic means. First, the profession inculcates into its initiates a commitment to the core professional virtues, particularly in the course of their professional education. Second, the profession denies admission into its ranks to those lacking in the relevant virtues, under its “character and fitness” requirements. Third, the profession maintains a system of sanctions, positive and negative, that encourage its members to practice the requisite virtues and eschew the corresponding vices.

Just as members of the profession, in regulating one another, bring to bear a more subtle assessment of misconduct than either the law or the market can provide, so the profession has at its disposal a wider range of remedial measures. On the negative side, it can invoke, not merely monetary penalties or expulsions from practice, but also reprimands and admonitions; on the positive side, it can reward self-abnegating, other-regarding conduct with comradely commendations and mutual respect.

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64 Note that these problems apply both to regulations applied by the state and to laws invoked by private parties in litigation.
65 See, e.g., Model Rules of Prof’l Conduct, supra note 42, at R. 4.4(a): Respect for Rights of Third Persons (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person….”).
66 Friedson, supra note 4, at 95.
67 See Deborah Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985).
68 See also Model Rules of Prof’l Conduct, supra note 42, at Preamble [7] (In addition to the rules of professional conduct, “a lawyer is also guided by personal conscience ant the approbation of professional peers”); Model Code of Prof’l Responsibility Preamble (1980) (although the lawyer is to be guided by both the Code and personal conscience, “in the final analysis it is the desire for the respect and confidence of members of his profession and of the society with he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct” and “the possible loss of that respect and confidence is the ultimate sanction.”).
69 Talcott Parsons, The Professions and Social Structure, supra note 27, at 43-46; Friedson, supra note 4, at 108. See also Model Rules of Prof’l Conduct, supra note 40, at Preamble [7] (In addition to the rules of professional conduct, “a lawyer is also guided by
extensive arsenal and able to take more precise aim at the problems of professional misconduct, professions are actually able both to set their standards higher\textsuperscript{70} and to apply them with greater precision than either the law or the market.\textsuperscript{71} Or so the functionalist thesis maintains.

For functionalists, then, all the institutions of professional autonomy should operate to ensure proper function. In the words of the ABA, “the profession has a responsibility to assure that its regulations are conceived in the public interest and not in the furtherance of parochial or self-interested concerns of the bar.”\textsuperscript{72} Society confers upon the professions a significant measure of market control, backed by the force of law, not as a means of increasing the wealth of professionals, but as a means of preventing unqualified providers from entering the market and either selling inferior skills or improperly using superior skills. So, too, the elevated social status of professionals must be related to their performance of their essential function, not to satisfying adventitious “social climbing.” And so the educational requirements should truly prepare entrants for professional service, not impose an artificial barrier to entry or add a mere social ornament.

From the beginning, functionalists realized that existing professions might fail to match their “ideal type,”\textsuperscript{73} in whole or in part. That ideal type thus gave them a template for normatively assessing, as well as positively describing and explaining, the professions.\textsuperscript{74} If any element of a proper profession’s organizational structure did not serve to enhance the profession’s public function, that element was not appropriate. Even more precisely, any particular element of professional self-regulation should be less costly than both (1) the market problems it was supposed to remedy and (2) the alternative state regulatory measures available to address that same problem.

\textsuperscript{70} See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 21 (West 1986) (noting that lawyers may be subject to civil remedies, criminal sanctions, and other formal regulation in addition to professional discipline); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) (same).

\textsuperscript{71} See SIMON, THE PRACTICE OF JUSTICE, supra note 34, at 123 (“The system can function in the absence of the material incentives of the market and the bureaucracy because professional work organized in this manner provides its practitioners with satisfactions that motivate responsibility.”).

\textsuperscript{72} MODEL RULES OF PROF’L CONDUCT, supra note 42, at Preamble [12].

\textsuperscript{73} FREIDSON, supra note 4, at 2.

\textsuperscript{74} See id. ("The ideal type is a method of conceptualizing that can both organize the abstract theoretical issues which concern scholars and highlight the practical issues confronting social policy.").
What’s more, the whole of the objections that might be lodged against any given profession might, logically, amount to more than the sum of their parts. If a putative profession did not meet the twin functionalist test, professional autonomy ensuing public service, that occupation would be no profession at all. Worse than an emperor with no clothes, it would be a whole pack of wolves in sheep’s clothing.  

II. THE DOMINANCE ANTITHESIS: THE PARADOXES OF CLASSIC PROFESSIONALISM

This last prospect suggests an even more radical possibility: The objections that can be lodged against any particular profession can, by logical extension, be lodged against all professions, against the whole of professionalism itself as a legitimate mode of occupational organization. It may be, that is, not only that some or many or most putative professions fail to pass muster under the functionalists’ two-part test but that they all do. The set of occupations that require self-regulation as the guarantee of delivering special knowledge and its associated virtues may be null. As in the classic Kuhnian paradigm shift, the entire functionalist model could thus be called into question. That, in essence, is the position of dominance theory, the antithesis of functionalism. Functionalism gives us a touchstone for detecting the clay feet of graven professional images; in the hands of dominance theorists, that touchstone threatens to produce a surprising result: Not that there are many false gods of professionalism but that there is no true one.

Dominance theorists are a less tidy school than functionalists, more an identifiable tendency than a self-conscious movement. For our purposes, we can focus on the objections they raise to each of functionalism’s two basic claims: first, the claim that our society needs, and professions provide, specialized knowledge, then the claim that our society needs, and the professions maintain, specialized virtues necessary to curb professionals’ abuse of that knowledge.

75 As we shall see, functionalist theory and practice allowed for the roll of proper professions to expand as well as contract over time as reflected, for example, in their case for business management. See BRANDEIS, Business – A Profession, supra note 3, at 1 (“The once meagre list of learned professions is being constantly expanded.”); see also SIMON, supra note 34, at 123 (noting Progressives’ and Functionalists’ expanding view of professions).


77 All the dominance theories discussed here thus attack one aspect or another of functionalism’s claim that the professions are necessary means to sustaining a polity and economy essential like the one we have. A more theoretically radical strain of critics attack do not attack the professions as a necessary means to that kind of society, but rather that kind of society itself. Some of these more radical critiques are nostalgic, looking back to simpler, pre-industrial times. Others are Utopian, looking forward to a way of organizing complex industrial societies without the need for professional expertise. See RANDALL
With respect to these claims, dominance theorists press functionalism into two related paradoxes: Our society may well need professional knowledge and virtue, but traditional professional institutions are not necessary to guarantee the former or sufficient to guarantee the latter. This part examines first the paradox of professional knowledge then the paradox of professional virtue.

A. The Paradox of Professional Knowledge

Functionalism makes two related claims about professional knowledge: the substantive claim that a distinctive form of professional knowledge is socially essential, and the formal claim that only professional institutions can ensure the proper acquisition and deployment of that knowledge. As we shall see, dominance theorists’ critique of the substantive claim puts unbearable pressure on the institutional claim: Although our society may well depend upon distinctive professional knowledge, it may well be able to secure that knowledge without professional institutions, through the more routine mechanisms of regulated markets.

1. Questioning the Need for Professions as Providers of Special Knowledge

Functionalists claim that professions provide distinct and essential kinds of knowledge; dominance theorists challenge both halves of this dual claim. Some dominance theorists object that professional knowledge is not socially essential; others, that it is not significantly different from other kinds of occupational knowledge. According to the first, more radical criticism, putative professional knowledge is not an essential component of advanced market capitalism or modern liberal democracy, but rather an artificial need created by professionals themselves to justify their existence and maintain their elevated status. On this view, professionals create an unnecessary market for their services and then exploit consumers of those services by dominating that market. The second, less radical

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78 Collins, The Credential Society: An Historical Sociology of Education and Stratification (1979); see also Freidson, supra note 4, at 52 (“In his early work, Marx was hostile to the idea that people would devote a lifetime to practicing a single specialty, however complex and discretionary it might be.... This prejudice against specialization and the division of labor on the part of analysts influenced by Marx continues to this day, a fact which Sayer and Walker (1992) properly deplore.”). Answering these more radical critiques would take us well beyond the scope of this inquiry. All we can do here is simply to acknowledge these critiques and make explicit the conditional nature of our inquiry: Assuming that a society with a capitalist market economy and liberal democratic polity is what we want, how can the professions be seen to advance that end?

78 See Margall Larson, The Rise of Professionalism, supra note 21, at 14-16; Randall Collins, The Credential Society, supra note 77, at 1-21; Richard L. Abel, United States: The Contradictions of Professionalism, supra note 21. See also Collins, Changing Conceptions, supra note 20, at 20 (citing law as an instance where “the skills of ‘professionals’ ... are answers to self-created problems; the skill is intrinsic to the professional structure itself, and does not exist without it”).
criticism concedes the need for some forms of special knowledge, but
denies that it is analytically distinguishable from other, equally
essential, kinds of knowledge provided by non-professionalized
occupations. We take up these two challenges to professional
knowledge, the more radical and the more plausible, in turn. As we
shall see, the less radical proves the more problematic, but even it
can be easily accommodated within the basic framework of
functionalist theory.

a. Denial of a Legitimate Need for Specialized Knowledge

All but the most radical critics of functionalism, including the
principal exponents of the dominance school, embrace functionalism’s
chief end, a modern industrial economy and a rule-of-law polity. But some dominance theorists deny that specialized knowledge is a
necessary means to that end. The main problem with that objection
is evidentiary: No such society has ever existed without something
readily recognizable as the kind of expert legal knowledge that
professionalism purports to provide. Conceding that legal experts
cultivate an esoteric vocabulary that is, beyond some identifiable
point, self-serving and unnecessarily exclusionary, as opposed to
public-serving and essential, it remains to be seen how some such
highly specialize knowledge is not socially essential.

The critics of functionalism on this point, it is fair to say, have
been long on identifying professions’ mystifying and obfuscating
vocabulary and short on explaining away their apparent
indispensability. This is particularly evident with the traditional
profession on which we are focusing, the law. These critics have
given neither historical examples nor fully-fledged models of “lawyer-
free” societies. The historical evidence tends to run strongly in the
opposite direction: Complex societies seem to require
correspondingly complex law. When complex societies have tried to
replace law with simpler regulatory systems, they have not met with
signal success. And when simple economies have become complex,
they have tended to develop complex law, even in the face of stern

79 Not, it bears noting, as any sort of ultimate end-in-itself, but as a kind proximate end
that is itself a means toward other, higher ends like justice and prosperity.
80 See, e.g., Collins, Changing Conceptions, supra note 20, at 20-21:
[A] lay person needs a lawyer to make a way through the maze of legal procedures, codes
and precedents; but that is because the legal problems have been created by the previous
activities of the profession of lawyers. Without lawyers, there would be no legal problems;
that is, there would be problems, but they would not be legal ones; they would be matters
of politics, tradition, personal negotiation, conflict and so on.
81 See FREIDSON, supra note 4, at 162 n. 7 (“Revolutions represent the installation of new
(though often temporary) legal institutions.”); id. at 167 n.11 (“In the case of law, popular
justice has a short life,” citing Huskey 1986 at 81-82 for e.g. of Lenin’s abolition of Russian
bar in 1921, only to reinstate it later that same year, with particular reference to the need
for defense counsel.).
official opposition. What is more, liberal democratic societies, in particular, seem to require legal protection of personal rights; those protections are very near the foundation of Madisonian "governments of laws, not of men." Much the same point about complexity can be made, we will see, about business management. Adam Smith's insights about the economic advantages of increasing specialization have become well-entrenched realities, even as Marx's vision of undifferentiated labor has receded further over the horizon.

Accordingly, I will take as provisionally given that some measure of specialized legal knowledge is essential to the functioning of a society basically like ours, economically and politically. If we can find a way to provide that kind of expertise that meets the dominance theorists' other objections to professionalism, then we will have answered them in a way that is likely to be more practicable, if certain to be less elegant, than any lawyer-free Utopia (or post-capitalist, fully-automated or fungible-labor economy). We will apply, in other words, something like Occam's razor: We will look for an answer to the rest of the dominance theorists' critique that does not require us to imagine a state of the world that has not yet existed and may never exist.

b. Denial of a Distinct Category of Professional Knowledge

Even conceding that societies like ours require a large measure of legal complexity, and hence specialized legal knowledge, critics of functionalism raise a significant point: What is so distinctive about the knowledge of the traditionally recognized professions that it cannot be provided by ordinary mechanisms of a state-regulated market? Even if the services professionals provide are truly essential to our society, and genuinely esoteric, how are they fundamentally different from those provided by non-professionals? As we have seen, functionalists claim that it is the necessarily discretionary application of professional knowledge that removes it from both ordinary market provision and routine state regulation. But a complex economy, after all, involves many forms of special knowledge, from computer programming to auto repair, that most of us can neither acquire for ourselves at reasonable cost nor adequately assess in others. Remember Seinfeld and Costanza's despair over dealing with auto mechanics: We are ever that their mercy because they can always blame unnecessary or over-priced

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82 See Richard B. Morris, The Legal Profession in America on the Eve of the Revolution, in Harry W. Jones, ed., Political Separation and Legal Continuity (1976) (noting the rise of an accepted legal profession in each American colony, despite early official opposition in most, as their economies entered the Atlantic market in the latter half of the seventeenth century).

83 Phase II, Part I, explores in more detail why this complexity is necessary in both law and management.
repairs on the “Johnson rod” or some other faux-gizmo or fabricated malfunction.

Furthermore, many non-professional services entail not only information asymmetries but also externalities. If the providers of these non-professional services fail us, it is not just we consumers, but also third parties, who will suffer, and sometimes more than in the case of improperly performed professional work. A poorly drafted will may cost the client’s beneficiaries a fortune in the relatively distant future; a poor brake job on my pickup truck could easily cost both you and me our lives, later this very afternoon. Yet we leave the latter situation to an essentially unregulated market in auto repair, reinforced by the tort system if something goes radically wrong. If some combination of private market and government regulation works in other areas of esoteric knowledge, why not in law and other professions, too? How is putatively professional knowledge distinguishable from other esoteric knowledge that functionalist theory does not see as requiring professional organizations? If it isn’t, then professionals need no more special occupational organization than other occupations providing other, equally complex and essential, forms of knowledge.

The implication of this criticism is that functionalist theory proves too much; its definitional net sweeps in more occupations than functionalists are willing to include in their catalogue of professions. This overbreadth places functionalism in a dilemma: it must either “elevate” these other knowledge-based occupations into professional status, or re-consider the possibility that, like them, the classic “professional” mode of organization could be replaced by some combination of governmental and market mechanisms.

Functionalism has offered an answer, although it is not without severe problems of its own. The critical distinction functionalists draw is already traceable in Brandeis’s original outline: “A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.”84 Functionalists concede that occupations other than professions also involve specialized knowledge, and that that knowledge, in turn, requires a measure of discretion on the part of practitioners.85 But functionalists insist that professional knowledge is nonetheless distinct, in several related ways. Most fundamentally, professional education requires a university foundation.86 Unlike craft training, which takes place largely in the workplace, and technical training,
which “typically takes place in para-secondary and post-secondary institutions that are sometimes called technical institutions,”87 the ideal type professional “school is attached to institutions of higher learning.”88 What’s more, “in contrast to those involved in both craft and technical training, the faculty of the ideal-typical professional school is expected not only to teach, but also to be active in the codification, refinement, and expansion of the occupation’s body of knowledge and skill by both theorizing and doing research.”89

These conditions, however, will not distinguish between the two occupations we have taken as our focus, law and business management. The latter, like the former, now meets all of these distinctions from the merely technical. As Louis Brandeis pointed out, nearly a century ago, business management is the subject of highly esoteric bodies of knowledge, in several quite disparate disciplines in both the physical and social sciences,90 and it is taught at the university level.91 Freidson himself essentially concedes this point:

Today it is often the expectation that the managerial and political elite obtain specialized training in the form of business management, accounting, political science, law, or engineering rather than merely a general education. However, none of those specialized degree-granting programs, including those in business or management schools, has succeeded in obtaining a monopoly over executive positions in the labor market for their graduates. After almost a century of effort in the United States, business schools have not managed to make the MBA a binding prerequisite for management positions as an MD degree, for example, is for performing surgery. And even when they possess advanced degrees, I doubt that managers would invoke them as qualifications for their positions. Rather, they are more likely to invoke a capacity to rise above specialization….92

Yet this “capacity to rise above specialization” is a particularly odd basis for distinguishing elite managers from professionals proper. In fact, it is the very combination of special technical training with a university-based general education that Freidson points to as the essence of any profession’s claim to a unique form of knowledge. Professions do not merely involve a higher, university-based theoretical foundation of their teachers; they also

87 Id. at 91.
88 Id. at 92.
89 Id. at 92.
90 BRANDEIS, Business – A Profession, supra note 3, at 2-3.
91 See id. at 1 (“The establishment of business schools in our universities is a manifestation of the modern conception of business [as a profession].”).
92 FREIDSON, supra note 4, at 121.
require a more broad-based liberal education on the part of their students and practitioners. Thus, according to Freidson,

The ideology of professionalism asserts knowledge that is not merely the narrow depth of the technician, or the shallow breadth of a generalist, but rather a wedding of the two in a unique marriage. This wedding of liberal education to specialized training qualifies professionals to be more than mere technicians. It qualifies them to serve in managerial positions where they can establish policy as well as organize and control their own work and the work of their colleagues independently of both managers and consumers. By grounding a functionally specific specialization in the advanced, elite generalism that provides executives and politicians with a mandate to command consumers, subjects, and citizens, the professional ideology creates a basis for claiming legitimacy that goes beyond the technical. And this elite generalism, according to Freidson, “provides or requires prior exposure to high culture.”

Thus to outline the basis for professions’ claim to a kind of specialized knowledge above the merely technical, of course, is simply to raise another question: Is that foundation substantial enough to sustain the edifice that has been erected upon it? More precisely, in functionalism’s own terms: Is this university-based training functionally related to professionals’ performance of their socially necessary tasks? The dominance critique has a ready response: Liberal education of professionals is a pseudo-necessity, either another costly and unnecessary barrier to entry, or simply a high-status consumption item or ornament. The real function of the requirement is thus to dominate the market for certain services, either by restricting supply of qualified practitioners or by creating demand for what amounts to little more than mystifying pseudo-science.

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93 Id.
94 Id.
95 See, e.g., F. K. Ringer, Education and Society in Modern Europe 21 (1979) (“The ability to do without any special competence was clearly honorific... suggest[ing] the power to direct others, as against having to be useful and usable oneself.”); Collins, The Credential Society, supra note 77, at 189 (“It has been by the use of educational credentials that the lucrative professions have closed their ranks and upgraded their salaries, and it has been in imitation of their methods that other occupations have ‘professionalized.’”). See also Griggs v. Duke Power, 401 U.S. 424 (1971) (inappropriate to require higher education of employees when their job performance did not require that education and when that requirement tended to exclude Black applicants).
96 See Max Weber, quoted in Collins, The Credential Society, supra note 77, at vii (“The old requirements of a knightly style of life ... is nowadays in Germany replaced by the necessity of participating in its surviving remnants, the dueling fraternities of the universities that grant the patents of education; in the Anglo-Saxon countries by the athletic and social clubs that fulfill the same function.”).
97 See Larson, supra note 21; Abel, supra note 21.
The functionalists have not provided anything like a satisfactory response to this objection. And part of their answer is anything but reassuring: Maybe professions cloak themselves in the status-enhancing allure of university education because it associates them, in various ways, with powerful elites. Thus, for example, after noting that “The prestige that distinguishes the professions from the crafts stems from the connection of their training with higher education,”98 Freidson goes on to speculate:

And this in turn, I suspect, stems from the connection of higher education with service to the elite. Historically, institutions of higher learning long predated other formal modes of schooling, and were closely associated with service to the rulers of high civilizations.99

“Seen in this light,” Freidson concludes,

I suspect that the prestige attached to professions stems less from the social origins of their members than from the fact of their attending institutions of higher education that are respected by the elite, and from their service to elite interests.100

Thus, pretty much by their own admission, functionalists fail to make an adequate case for the distinctive role they assign to liberal education in the university-based schools of professionalism. On the one hand, they make it the vital distinction between professional and merely technical education; on the other, they fail to show how it functionally advances the supposedly special knowledge and virtue of professionals. Indeed, this explanation of the demand for special knowledge tends to undermine the claim for special virtue: If the special virtue of professionals is putting social values above client interests, one would think the knowledge required would be knowledge of those very values. If so, it is more than a little odd to claim that the real importance of university education is rubbing shoulders and currying favor with the very elite whose interests are to be subordinated.

But, as we shall see more fully in Part III, the functionalists’ emphasis on the link between professional knowledge and the university points us decidedly in the right direction. It takes us back to the essence of the functionalist theory of the professions in a way that functionalist theorists themselves have not adequately appreciated. The foundation of that theory, remember, is that professions provide a special knowledge and virtue vital to society’s welfare. What if professions are those occupations whose members

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98 FREIDSON, supra note 4, at 103.
99 Id.
100 Id. at 104.
need to know what society’s welfare, the commonweal, actually is? On this view, what proper professionals need is not only knowledge, however technical, about a particularly vital social function. Nor is it merely an understanding of how their individual practice fits into their particular occupation’s function. They need, in addition, both a comprehensive sense of what the public good is, or could be, and an understanding of how to use their technical knowledge to advance that public good.

This would be Freidson’s marriage of technical and general knowledge. We need not prove at this point that such a hybrid form of knowledge is either possible for professions to provide or necessary for society to have. Even assuming both conditions are met, we are still left with a major problem with functionalism’s claim about professional knowledge. As we will see in the next section, it is not at all clear that such knowledge would require professional institutions to sustain it.

2. Questioning the Nexus Between Professional Knowledge and Professional Institutions

Functionalist theory, remember, does not merely maintain that professionals need a certain distinctive and essential form of knowledge; it also maintains that professional control is essential to ensure the acquisition and competent delivery of that knowledge. The hybrid of specialized knowledge and general knowledge that functionalists have identified as uniquely professional could plausibly be said to require the special institutional forms of professionalism, on account of market failures on the one hand and government failures on the other. Consumers who need this knowledge cannot recognize its competent suppliers in the market; government cannot adequately mandate and police its provision. Or so the argument would run.

But here functionalist theory faces two problems, one perhaps surmountable, the other much more serious. On the one hand, professional institutions have, as a matter of fact, almost utterly failed to establish, much less sustain, any meaningful connection between liberal education in the university and technical education

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101 See, e.g., Model Rules of Prof’l Conduct, supra note 42, at Preamble [13]: Lawyers [as guardians of the law] play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to [with and function in] our legal system. The bracketed language is from the otherwise identical provision of the Model Code, Preamble.

102 To explore this possible way of delivering on the functionalists’ promise to identify a specifically professional knowledge, we will have to go back in the second phase of this study to the classical distinction that it all too vaguely reflects. This is the distinction Plato drew, and Aristotle elaborated, between “techne” and “sophia.”

103 The second phase of this project will make the case for precisely this kind of hybrid knowledge in management as well as in law.
in law schools. On the other hand, even if the need for lawyers and other professionals to combine liberal and technical education is genuine, it is still not clear why that need cannot be met by the market and the state. It appears, then, that the institutions of professionalism have not been sufficient and may not be necessary to sustain the kind of hybrid expert and general knowledge that functionalism takes to be an essential element of professionalism.

a. Professional Institutions as Insufficient

To take the former problem first, as the functionalists themselves admit, 104 a liberal education has not historically been required for entry into even the ideal type professions. In the Anglo-America world, in sharp contrast with Continental Europe, two of the oldest traditional professions, law and medicine, were not grounded in university education until the late nineteenth century. Nor, even now, does the American bar make much if any effort to ensure that the required undergraduate education is, in fact, liberal in any recognizable way. Historically, the failure of the Anglo-American bar has been even more basic. Although today virtually all American jurisdictions require lawyers to hold a three-year graduate degree in law, and although law schools are currently located, for the most part, in universities, this is hardly the whole story. University-based law schools are a relatively new phenomenon in the Anglo-American world, not all American law schools are affiliated with universities even now (and the trend is running rapidly in the other direction), and law students are neither required to take the more theoretical courses offered in law school nor be tested on them on the bar exam.

All of that said, none of it is a particularly great problem for functionalist theory. At worst, it simply suggests that, as a matter of fact, the institutions of professionalism have not been sufficient guarantors of the general knowledge component of professional education’s hybrid of special and general knowledge. In that light, the relatively loose (and historically short) link between legal education and liberal education could just indicate a gap between theory and practice, a point at which reform is appropriate along the very lines functionalism itself implies. The organized bar’s assertedly essential control of legal education might, that is to say, need to be shored up, not abandoned. But that question may be mooted by another, more fundamental, question: Whether this element of professional control is necessary at all, more specifically, whether either the market or the state might be an equally or more effective guarantor of appropriate professional knowledge.

104 Freidson, supra note 4, at 97.
b. Professional Institutions as Unnecessary

Consider, first, the market. Even if clients cannot monitor lawyers’ lack of adequate professional knowledge ex ante, they may be able to monitor it ex post, in the way contracts with experts are routinely monitored: civil law suits for failure to perform as promised. Post hoc remedies, of course, may be a distinctly second-best solution; it may take many kilos of cure to do the work of a milligram of prevention. Providing precisely that prevention could be the special province of professional self-regulation.

And information asymmetries, remember, are not the only market failures that beset lay people’s purchase of professional services. As we have seen, clients may intentionally employ under-qualified professionals, expecting, not to bear the cost of incompetence themselves, but to inflict it on others. Judges may have to catch and correct their lawyers’ errors; judges and opposing parties and even the general public may have to share in the delays and other dysfunctions attendant upon sub-standard practice. By allowing only properly-educated professionals to practice, professional institutions could conceivably avert the externalizations of such costs.

Perhaps most significantly, as we have seen, some of the more significant externalities associated with professional practice are positive, not negative. In particular, if a lawyer is to stop pressing certain claims, or employing certain methods, at a point beyond which their harm to others exceeds their benefit to the client, then the lawyer must know where that point is. Clients, on the other hand, have little incentive to pay for lawyers who have acquired this knowledge; it is, after all, knowledge that is to be deployed, not for their benefit, but for the benefit of third parties. Here again, by requiring that the relevant professionals know where these lines fall in theory, and how to avoid crossing them in practice, professional institutions might help ensure that legal services are more efficiently consumed.

But it is important to recall that the institutions of professionalism are not the only means available for the redress of market failures; they are not, indeed, even the most commonly deployed. In the face of market failures we can, and traditionally do, turn first to government regulation. Functionalists, as we have seen, insist that the necessarily discretionary component of professional work makes it difficult to control by the regulatory apparatus of law. Whatever its general merits, that argument has considerably less purchase with respect to the acquisition of knowledge in the course of professional education. The state, quite as effectively as the profession, could easily mandate what courses of study should precede professional school, and, for that matter, what substantive
knowledge one must master in professional schools. And the state's agents, quite as effectively as those of the bar, could draft, administer, and grade the bar exam.

What, though, about the mastering of technical skills, as opposed to acquiring of information; beyond that, what about the application of both technique and more substantive knowledge in practice? Here is precisely where the functionalist argument about professional regulation is supposed to have its greatest purchase, for here is where regulation is supposed to require the flexible application of broad principles and “know-it-when-I-see-it” standards.

It is precisely here, though, that we find a severe flaw in functionalist theory, its impoverished understanding of law itself. Significantly, as we have seen, Freidson, following Weber, equates legal controls with bureaucratization, with formulaic rules algebraically applied by those outside the relevant occupation and thus uninitiated into its subtleties. Law, however, is a much more flexible regulatory regime than this recognizes. From its most dimly remembered and recorded origins, the Anglo-American legal systems, and almost surely all other systems of similar antiquity and sophistication, developed a profoundly significant functional, and eventually formal, distinction between “law” on the one hand and “equity” on the other. This distinction, now generally drawn between “rules” and “standards,” allows the system of law as a whole to relegate regulation of some matters – traffic flow, for example – to bright-line rules that require little discretion in the application, even as it reserves other matters – child custody, corporate management – to broad principles entrusted to the largely discretionary application of highly trained experts.

In the case of the legal profession, the application of state regulation to matters of subtle professional decision-making would be in the hands, not of those outside the profession, but those within it. The enforcers of law are now virtually always lawyers themselves. Prosecutors and judges are almost invariably lawyers; high level administrative officials, if not lawyers themselves, have lawyers on their staffs, at their direction. If the state directly regulated lawyers, it would still be other lawyers, in the employ of the state rather than the occupation, who determined close and complex questions of lawyerly conduct.

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105 See id. at 19.
106 William Simon notes that the tort system, in which lawyers and other traditional professionals may be civilly liable for malpractice, operates under very general standards of what is appropriate under the circumstances. SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 197-202.
107 See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L.J. 557 (1992); see also RICHARD POSNER, LAW AND LITERATURE 118 (Harvard University Press 1988) (discussing the tension between a “mechanical” jurisprudence and a discretionary one).
Even in the case of other occupations, those who apply the state-set standards of conduct, at least in the first instance, could be those trained in the regulated occupation. Thus doctors employed in state regulatory agencies could review the work of doctors in private practice. This is, of course, very nearly an exact description of how professions like medicine are regulated right now. Virtually all professionals except the law are under the licensing and regulatory authority of an executive-branch administrative agency. The central difference from classic professionalism would be, not that the regulators lack the relevant occupational expertise, but rather that they are in the employ of the state rather than the occupation itself.\textsuperscript{108}

It might be too much to claim that this difference would ensure that the regulators' loyalties run to the public, rather than to the profession. But surely it is also too much to say that professional self-regulation is less divided in its loyalty because it is independent of the state. Nor has professional self-regulation proven, in practice, to be any more rigorous than one would expect external regulators to be; in fact, dominance theorists strongly suggest that the reverse is more typically true.\textsuperscript{109} And the choice between self-regulation and state-regulation need not be absolute.\textsuperscript{110} The state could be limited to applying lesser penalties for violations of more demanding standards, leaving the harsher sanctions like decertification only for more obvious or repeated shortcomings. The organized profession could quite easily be left its own reputational rewards and punishments, accolades and comradely corrections, for more subtle and sophisticated successes and failures.


If this analysis is correct, then neither side of professional knowledge, the technical nor the liberal, seems to need autonomous professional institutions as its guarantor, in either acquisition or application. Some combination of markets and regulation may be every bit as effective in assuring that professionals know all that they need to. This is the paradox of professional knowledge: Even if, as functionalists maintain, professions require special knowledge, that special knowledge does not seem to require professional

\textsuperscript{108} And, as we shall see, this difference itself is, upon deeper analysis, much less significant than it seems on first face. See infra, Part II.B.1, Inefficacy of Professional Institutions.

\textsuperscript{109} See COLLINS, THE CREDENTIAL SOCIETY, supra note 77, at 180 (“Although much of this has not been investigated in detail, we can surmise from studies of professions that the rhetoric of ‘protecting the public interest’ that has justified this regulatory activity is mainly a dissimulative ideology, and that the activity serves the economic interest of the groups involved.”); Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEx. L. Rev. 639 (1981) (“The capacity of these precepts to legitimate is constantly being eroded as internal inconsistencies, the meaninglessness of the language, and the empirical falsity and impossibility of their claims and prescriptions become apparent or are exposed by criticism.”).

\textsuperscript{110} See SIMON, PRACTICE OF JUSTICE, supra note 36, at 195-215 (outlining a system of lawyer regulation that incorporates elements of both state and professional enforcement).
institutions. Here dominance theorists raise very substantial doubts, even if they do not quite carry the day. If we are to find a special need for professional organizational forms, we will have to look for them elsewhere, as guarantors, not of professional knowledge, but of professional virtue.

B. The Paradox of Professional Virtue

The knowledge paradox hardly sounds the death-knell of functionalism’s claim of the need for special professional institutions, relatively autonomous organizational forms independent of the market on the one hand and the state on the other. Functionalism maintains, as we have seen, that professions require not just special knowledge, but also special virtue essentially related to that knowledge. Professionals must not only acquire the required knowledge and know how to apply it appropriately in the circumstances; they must also use that knowledge and know-how to the right ends. In particular, they must use it to the advantage of their clients and the public, not just themselves. Here, then, we may find both another genuine distinction of professions from other occupations and a legitimate place for professional institutions: Professionals may need a special kind of virtue that corresponds to their special kind of knowledge; professional institutions may be the necessary guarantors of that virtue.

As we shall see in this section, however, a closer examination of functionalism’s claims about professional virtue produce a paradox of their own. The need for a special professional virtue is very much disputed; indeed, in both law and business a coherent alternative theory dismisses the need for special professional virtue altogether. Even if its proponents could prove their case, special professional virtue could not be guaranteed by what functionalists have identified as the essential professional institutions. We look first at problems with functionalist claims for a distinctive kind of professional virtue, then at the paradoxical impossibility of professional institutions’ guaranteeing that virtue.

1. Questioning the Need for Professional Virtue

The initial evidence for functionalists’ claim of particular professional virtues is more than encouraging; it is something of an embarrassment of riches. Proper professions appear to involve not just one special virtue, but two, corresponding to the two basic problems posed by professional knowledge. As we saw earlier, economic theory offers two basic rationales for regulating the

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111 See supra, Part I.A.
delivery of expert services. On the one hand, professionals may trade on their superior knowledge to their clients’ disadvantage, by, for example, “cutting corners”; on the other hand, professionals may use their superior knowledge to impose improper costs on third parties or the public, as with “excessive zeal.” We can identify, then, two kinds of professional virtue, one client-protective, the other public-protective.

Upon closer examination, however, we find that neither can do the work required of it in functionalist theory. Client protective virtue is no more than garden variety, “work ethic” virtue and is not, accordingly, an adequate distinction of professions from other occupations. By contrast, public protective virtue may indeed be unique to the professions. The problem here is that a significant body of scholarship in both legal ethics and business ethics denies that any such virtue is appropriate. If sustained, this challenge to functionalists’ claims about profession’s public-protecting virtue would be fatal to the entire functionalist enterprise; even if not sustained, this challenge poses an impossible task for professional institutions.

a. Client-Protective Virtue as Insufficiently Distinctive.

A fundamental feature of advanced capitalism is what theorists long ago identified as the separation of ownership and control.112 The owners of most modern corporations are essentially passive investors who rely on the corporation’s management and professional advisors to ensure a profitable return on their investment. This separation of ultimate owners from managers creates opportunities for two basic abuses, or agency costs: shirking and stealing.

For our purposes, it is important to note about these twin problems both involve lapses in what we might call garden variety, “work ethic” virtues. With respect to both shirking and stealing, the same principles apply essentially to all workers, whatever the level of their intellectual attainments or the color of their collar: A day’s work for a day’s pay; even more basically, thou shalt not steal. Blue collar shirking, to be sure, tends to be literally visible, even if behind the boss’s back, like leaning on your shovel while your supervisor is away from the worksite. White collar shirking -- cutting corners in research or drafting or some other intellectual function -- tends to be less readily recognizable, even under the boss’s nose. But it is hard to see why the presence of one vice is worse or the presence of one virtue better.

Stealing, the second risk professionals pose to their clients, involves the same parallel between professions and other corporate agents. A bank janitor’s pocketing a few bundles of hundred dollar bills while sweeping out the vault differs more in degree than kind from a manager’s switching funds electronically from the bank’s account to his or her own. This is, of course, the basic point of Bobby Jones’ rebuff to congratulations that he hadn’t fudged his golf score when teeing up out of sight: You might as well congratulate someone for not robbing a bank. Avoiding the temptation of basic dishonesty, whether in the mailroom or the boardroom, is no more a distinctive occupational virtue than diligently doing the work one is paid for, whatever it is.

These parallels raise an obvious question: If the client-protective virtues of professionals are not essentially different from those of other workers, then why can they not be addressed by essentially the same means, without recourse to special professional institutions? Are professional institutions really necessary to maintain the ordinary, work ethic virtues, of their members? Many of the remedial measures recommended and enacted in the wake of the current financial crisis are of just this routine sort, variations on familiar forms of government regulation to address special problems of shirking and stealing: ensuring arms’ length negotiations in the setting of executive salaries; ensuring independent, disinterested review of corporate financial records; requiring “reporting up” to higher levels of management and, beyond that, to government regulators.113

Here we come to a familiar impasse: unproved, probably unprovable, empirical questions of relatively greater efficacy. We cannot know whether traditional professional control ensures client-protective virtue better than the state itself could. But those imponderables need not impede our analysis. The critical point for our analysis is this: If the relative merits of the two regimes were ever actually weighed, even if professional institutions were to win, functionalist theorists will not have won very much; conversely, if they lose, they will not have lost very much. They have little to win, because the client-protective virtue they claim professional institutions are needed to protect is not, itself, a distinctly professional virtue; it is, as we have seen, nothing more than a subset of garden variety, “work ethic” virtue. A putative profession’s claim to systematically suppress garden-variety shirking and stealing is hardly an elevated basis on which to ground its claim for high occupational distinction. A “culture of trust” or “work ethic” is a

precondition of capitalism at all levels;\textsuperscript{114} as the legal profession itself
concedes, essentially the same virtues underlie the very rule of law
itself.\textsuperscript{115} If functionalism is to rely on virtue to distinguish
professions from other occupations, it would do well to do find a more
distinctly professional virtue than this.

But, even as the functionalists have little to win here, so they
also have little to lose. Most significantly, they can still make good
on their claim that professional institutions guarantee a truly
distinctive professional virtue, protecting the public from
professionals’ abuse of their special knowledge. As we shall see in
the next section, professional institutions fail to deliver on this
promise as well.

\textit{b. Public-Protective Virtue as Deeply Disputed}

If functionalism stands to gain or lose little with its claim that
professional institutions best ensure client-protective virtue, its
corresponding claims about professional institutions’ guarantee of
public-protective virtue are absolutely essential. Here our analysis
has finally reached the bases of the two central pillars of the entire
functionalist edifice: a distinctively professional, public-protective
virtue associated with professional knowledge, a virtue that can only
be guaranteed by autonomous professional institutions.

What we find at these twin bases is a fundamental weakness
in one and a fatal flaw in the other. The fundamental weakness lies
in functionalism’s definition of professional virtue: Although
functionalists do set out a distinct form of public-protective virtue,
they ignore a rift in occupational ethics over exactly that virtue.
Theorists of both legal ethics and business ethics, we shall see, divide
irreconcilably on the very existence of the public-protective virtue on
which functionalist professionalism must rest. This fundamental
weakness in the case for distinctive professional knowledge produces
the fatal flaw in functionalism’s demand on professionalism’s
distinctive institutions: Even assuming functionalists could mend
the split between occupational ethicists on public-regarding virtue,
they cannot show how professional institutions could sustain that
virtue. In this section, we will see that functionalists have laid the
foundations of their professional virtue on a major normative fault
line, shifting to the institutions of professionalism a load that those
institutions cannot be made to bear.

\textsuperscript{114} \textsc{Max Weber}, \textit{The Protestant Ethic and the Spirit of Capitalism} (Allen & Unwin
1930); Seymour Martin Lipset, \textit{The Work Ethic, Then and Now}, 13 J. of Labor Research

\textsuperscript{115} See \textsc{Model Rules of Prof’l Conduct}, supra note 42, at Scope (“Compliance with the
Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”).
Public service, particularly the exercise of public-protective virtue, is the cornerstone of classic professionalism’s functional claim: In deploying their special knowledge, professionals must sometimes put the public good above even their clients’ private interests. We have already quoted the legal profession’s apologists on this point. Freidson’s more general, and more nuanced, analysis nicely isolates the distinction between private- and public-regarding virtue:

The professional ideology of service goes beyond serving others’ choices. Rather, it claims devotion to a transcendent value which infuses its specialization with a larger and putatively higher goal which may reach beyond that of those they are supposed to serve.... [I]t is because they claim to be a secular priesthood that serves such transcendent and self-evidently desirable values that professionals can claim independence of judgment and freedom of action rather than mere faithful service.\(^\text{116}\)

Although functionalist sociologists have thus been emphatic about the importance of public-regarding virtue, they have been unfortunately vague about what this virtue involves, about how this conflict between client ends and the public good is to be reconciled. Freidson, for example, admits that the extent to which lawyers should advance justice directly, in opposition to their clients’ private interests, is unclear.\(^\text{117}\) What is worse, he and his fellows fail to deal adequately with a question even more basic than the proper balance lawyers should strike between client and public interest: Whether individual lawyers should engage in that balancing at all. What if individual lawyers need, not to calibrate the balance of client and public interest more carefully, but to cast that scale aside entirely? Freidson acknowledges that some call for exactly that rejection of public-regarding virtue,\(^\text{118}\) and he rightly insists that that call strikes at the very soul of classic professionalism.\(^\text{119}\) He fails to see, however, that that threat cannot be met within the framework of traditional professional institutions.

Whether private practitioners should ever place the public good above client interests is the basic question of occupational ethics in both law and business; its answer lies well beyond the scope of our present analysis. What we must do, rather, is outline the diametrically opposed answers that theorists in both occupations have offered to that question, then sketch out the consequences of those answers to the very possibility of classic professionalism itself. This is an absolutely critical turn. Not only how neo-classical professional must be structured, but whether it need exist at all,

\(^{116}\) Freidson, supra note 4, at 122 (embedded citation omitted).
\(^{117}\) Id.
\(^{118}\) Id. at 179-96 (“The Assault on Professionalism”).
\(^{119}\) Id. at 197-222 (“The Soul of Professionalism”).
depends on the course taken here, where client and public interests conflict and theorists explain how to reconcile them.

In the case of both law and business, the functionalist claim about the distinctiveness of the professions from other occupations maps quite precisely onto a significant body of scholarship about the ethical obligations of those within the respective occupations. On this view, optimal functioning of both the market and the law requires active, public-oriented virtue on the part of lawyers and managers. They must directly pursue the public good or, at very least, try personally to reconcile private ends with public ends when the two conflict. At least sometimes, on this view, serving the public good must take precedence over serving the client’s interest.

To appreciate the full import of that obligation, we first need to focus more finely on exactly what it means for professionals to put the public good ahead of both self-interest and client interest. Consider, in this connection, the advice Abraham Lincoln gave one of his private clients:

Yes, we can doubtlessly gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightly belongs, it appears to me, as much to the woman and children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.

Several aspects of this anecdote bear notice. First, although it is set in a cozily quaint, Currier and Ives frame, we can easily project its public-protecting principles into something very near the center of the current financial crisis: What if the lawyers and managers working for major commercial banks, not to mention federal regulatory bodies, had insisted that their principals be clearer to their borrowers about the terms of their credit, on both home mortgages and credit cards? Beyond that, what if lawyers and managers for major investment banks had insisted that the real riskiness of their “bundles” of securitized debts be revealed to investors across the globe? And what if lawyers and managers for Enron and other major corporations had balked at designing special purpose entities and off-balance sheet accounts essentially to misstate their principals’ actual financial situations, to the predictable detriment of investors?

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121 Luban, Lawyers and Justice, supra note 43, at 174 (quoting William H. Herndon & Jesse W. Weik, 2 Herndon’s Lincoln 345 (1889)).
That lawyers and managers should have had such an eye out for the welfare of both particular third parties and the public in general is a well-established position in the literature of both legal ethics and business ethics. Indeed, as I have shown elsewhere, scholars have articulated very sophisticated arguments, along closely parallel lines, in the two fields. For all its wide currency, unfortunately, this position has no generally accepted name in either legal ethics or business ethics. To underscore its emphasis on professionals’ active service of the public values, we can call it normative activism, or simply, activism.

Here we need to see how the central premise of activism in business and legal ethics -- the need for both managers and lawyers to serve the public good directly, sometimes placing it above the good of their private clients -- maps onto the functionalists’ quest for a uniquely professional knowledge and a correspondingly distinctive professional virtue. The relationship between these two bodies of scholarship is significantly reciprocal: Unless law and business need this kind of virtue, they cannot fit the functionalist definition of profession; conversely, unless law and business fit the functionalist definition of profession, they do not need this activist kind of occupational virtue. The importance of this reciprocal relationship becomes clear when we consider a powerful attack on precisely the public-protective virtue that underlies both functionalism and activism.

Some critics lodge essentially the same complaint against claims about public-protective virtue that they do about client-protective virtue: It is at best window-dressing or hypocrisy, at worst a second-rate and self-serving mode of occupational regulation. Other critics take professionals and their apologists at their word, happily conceding the descriptive point that professionals do indeed attempt to subordinate their clients’ interests. But on normative grounds they lay a much deeper and more dangerous charge: This is just another, and much more nefarious, way in which professionals dominate the laity, serving their own interests at the expense of both clients and the public. In this view, when professionals constrain their efforts on behalf of clients within limits narrower than profitability in the market and legality in the law, those professionals impose their own private, idiosyncratic preferences for public orderings, orderings that are properly set, in a capitalist democracy, by the market and the electorate.

A comparison with client-protective virtue is instructive here. When professionals practice incompetently or cut corners, they

122 Atkinson, Come, Let Us Reason Together, supra note 6, at 474-510.
123 See LUBAN, LAWYERS AND JUSTICE, supra note 43, at xxii, 160-61 (using the term moral activism for this position in legal ethics); see also Atkinson, Come, Let Us Reason Together, supra note 6, at 485-87 (discussing various other terms for this position).
advance their private financial interests against the private interests of their clients; when they purport to place the public good over their client interests, they advance their own ideological interests. This parallel is important: In both cases professionals are advancing personal interests of their own against private interests of their clients. To call it vice when professionals’ serve their own financial interests and yet to call it virtue when they serve their own ideological interests is to miss the fundamental similarity: Both involve serving the professional agent’s own interests at the expense of their principal’s legal and moral entitlements.

Nor, from this perspective, is that the end of the problem with activism, or even the worst of it. What passes for professional virtue is not only bad for professionals’ clients in the short run; it is also bad for the public at large in the long run. On this view, lawyers’ and managers’ efforts to impose public norms on their clients breach those agents’ duty to both the public and the client. These efforts breach the agents’ duty to the client, because lawyers or managers are imposing their own values, explicitly or implicitly, on what public institutions, the law and the market, would allow the client to do: maximize profits by any legal means. And these efforts breach the agents’ duty to the public, because the market and the law systemically advanced public ends without the lawyer or manager’s individual moral activism. Professional activism, then, is “dominance” of both the particular client and the general public, with a peculiar perversity: Lawyers and managers as agents impose their will on their principals, in the name of the public good, in ways that subvert the function of the very public institutions, law and the market, that professionals are supposed to serve.

Furthermore, from this perspective, activist professionalism is unnecessary as well as improper, and for closely related reasons. In this view, the fundamental institutions of our economy and polity work, both independently and together, to produce socially optimal outcomes without direct moral activism on the part of managers and lawyers. Indeed, those institutions work best if these agents do not try to limit their principals to pursuing anything other than what the law will allow and the market will bear. Single-mindedly seeking client ends redounds to public benefit, owing to systemic function of the market in the economy and the adversarial and political systems in the law.

This position is the perfect antithesis of activism in business and legal ethics, the absolute negation of functionalism’s claim that the professions’ distinctive virtue is to protect the public good against client interests.\textsuperscript{124} Where activism urges lawyers and managers

\textsuperscript{124} And so, not surprisingly, the proto-type of activism, Brandeis, was taken to task by proto-typical neutralists in the organized bar, particularly during his confirmation hearings as a Supreme Court Justice. See \textit{Simon, The Practice of Justice}, supra note 36, at 129-31.
themselves to inject values beyond mere legality and profitability into their routine representation of clients, this position urges lawyers and managers to remain essentially neutral to any such additional values. As a shorthand, we can call this position normative neutralism, or simply neutralism. On this view, lawyers and managers should always help clients do whatever is legal and profitable, without attempting to constrain clients with reference to any other public norms, including the classical trinity of truth, goodness, or beauty. The corporate lawyer’s proper professional role, on this view, is to assist the client in operating to the very outer margin of legality, even to move that margin outward in the client’s interest, without concern for the interests of either third parties or the public. As stated by one of its earliest and most aggressive advocates, “the job of the lawyer is to give good service.” Similarly, the corporate manager’s proper occupational role is to maximize profits; as stated by one of its earliest and most aggressive advocates, “the social responsibility of a corporation is to make a profit.”

Thus, for example, if earning greater long-term profits entails making cars that meet only the barest legal standard of emission control and safety equipment, so be it. Indeed, if greater long-term profits could be made under less exacting standards, then, irrespective of harm to the environment or even their own customers, lawyers and managers should work to have those standards lowered or relaxed. Similarly, if ways of keeping certain corporate obligations off its publicly inspected financial statements would increase share prices, lawyers and managers should devise and implement those methods; if occupational regulatory bodies like the Financial Accounting Standard Board, even Congress, balk at such measures, lawyers and managers should oppose amendments of standards or enactment of laws that would suppress these methods. For the professionals to do otherwise is both to place their idiosyncratic views of the public good over the interests of their client and to usurp the systemic decision-making processes of the law and the market. It is, thus, a deep and troubling professional vice, not a high and defining professional virtue.

The neutralist critique of functionalism is thus not merely negative; it also offers an alternative, positive vision of the proper rendering of legal and managerial services. Lawyers and managers serve the public, not by constraining their clients from pursuing certain goals that are both legal and profitable, but by the reverse, helping clients advance all ends that meet these two minimal

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125 See Atkinson, Come, Let Us Reason Together, supra note 6, at 487.
criteria. What coordinates private client goals with the public good is not the professionally informed constraints of lawyers and managers, but the social institutions in which these agents serve their principals: the law and the market. Activism, on this view, is at once both anti-democratic, because it imposes constraints beyond the people’s will expressed in law, and anti-consumerist, because it restricts production of goods and services that purchasers themselves are both willing and able to buy.

This implies, of course, a most heroic belief in both democracy and the market. If neutralists could deliver these horses, their theory would ride very high indeed. But neutralism is not, it is important to note, the view of cranks or crackpots, the likes of single-taxers and gold-standardists. Neutralism, quite the contrary, has prominent advocates in both legal ethics and business ethics. The legal position quoted above is that of Charles Fried, solicitor general of the United States and Dean of the Harvard Law School; the management position, that of Milton Friedman, professor economics at the University of Chicago and, of course, winner of the Nobel Prize in Economics. Nor are Fried and Friedman the only advocates of neutralism. Neutralism was long the standard, orthodox position of both legal ethics and business ethics, and it is probably still the most widely adopted position of practitioners in both occupations. What is more, the most recent comprehensive theory of lawyers’ ethics, written by a Yale Law School professor and published by Princeton University Press, espouses an aggressively neutralist position.

Neutralism has been subjected, it must be said, to sustained and, for my money, compelling criticism. That criticism was the ground-clearing work of the activism we just examined. Again, we cannot enter fully into that debate here, much less resolve it. Nor, significantly, do we need to. Rather, we simply need to see what the consequences for functionalism would be if the neutralists’ position were correct. What we must notice here are two closely related points. First, this critique, if sustained, essentially eviscerates a long-standing and essential claim of classical professionalism, its claim to a uniquely elevated form of virtue. Second, this critique, by its very existence, means that the traditional institutions of professionalism cannot ensure professional virtue. We take up the first of these points in the remainder of this section and the second in the next section.

Just as we have mapped the moral activist normative position onto the functionalists’ descriptive definition of professional, so we need now to see the converse: the moral neutralist position maps

128 Simon, The Practice of Justice, supra note 36, at 7-8 (on “Dominant View.”)
equally well onto the dominance theory’s descriptive account of professionalism. Stated more starkly: If neutralism is right over against activism, and professionals’ claims about client-protective virtue are a snare or delusion, then dominance theory is right over against functionalism. As we have seen, functionalism’s foundation is the need for a special, public-protective virtue to complement its special hybrid of technical expertise and knowledge of the public good; remove that foundation, as neutralism threatens to do, and the entire functionalist edifice must fall, even as dominance theory insists.

Here again, we come to a question we cannot answer. Without a social experiment difficult to design, much less impossible to implement, we cannot really determine whether the activist, pro-professional thesis or its neutralist, anti-professional antithesis would better serve our liberal democratic polity and capitalist market economy. Fortunately, reaching that impasse need not stymie our inquiry. Here, we need only to see that the very existence of neutralism, whether or not it can be normatively justified, is itself fatal to functionalism’s critical second claim, the claim that special professional institutions are superior to other alternatives, the market and the law, as means of sustaining the putatively necessary client-protective virtue.

2. Questioning the Nexus Between Public-Protective Virtue and Professional Institutions

The very existence of neutralism as an articulable (even if not particularly plausible or attractive) alternative to activism undermines functionalism’s claim that professionalism’s special institutions are necessary and sufficient guarantors of its essential, public-regarding virtue. To see why this is so, we must address dominance theory’s two familiar questions about professional institutions: Why can’t the market or the government provide the needed virtue; if they can’t, how can special professional institutions themselves fill the gap? We must look, first, at why neither the market nor routine legal regulation could produce the requisite professional virtue of functionalism, then at why professional institutions themselves fare no better. The market, we shall see, runs up against garden-variety market failures; public-protective virtue provides, not surprisingly, just the sort of spillover benefits likely to leave it both under-supplied and under-demanded by private.

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130 To work our way fully around it, we must step well back from our present perspective and understand the place of both law and business in our social system at the highest level; that is the task of the second phase of this inquiry. Simon, supra note 36, at 135. There we will see that neutralism rather ironically implies something very like activism on the part of all lawyers and managers in public positions and many in private practice. See id. at 135 (“regulation is no less dependent on the responsible conduct of officials than is private ordering on the responsible conduct of lawyers.”).
parties in the market. The distinctive problem here lies on the other side, with state efforts to correct these typical market failures. Government regulation cannot work here on account of the special nature of public-regarding virtue: Its absence is extremely difficult to detect by legal means and, even if it could be detected, it could not legitimately be proscribed by liberal law.

That, of course, simply points us, as functionalists would predict, to the self-regulatory institutions of professionalism as the only available alternative. But here, as we shall see, those institutions must also fail, and for the very same reasons. To attack neutralism, the nemesis of activist virtue, professional institutions must themselves resort to the coercive power of law (and face the compounding problem of occupational self-interest). Let us turn, then, to the details of this argument, first why the market and the state cannot guarantee activist, client-protective virtue, then why professional institutions cannot fill this regulatory gap.

a. Inefficacy of Non-Professional Institutions

The first step in our analysis tends strongly to sustain a basic functionalist premise: If professionals must act with a particular public-protective virtue, neither the market nor the state will be able to ensure that they do. Market failures on the one hand and inherent limitations of liberal law on the other mean that public-protective professional virtue must be guaranteed by other means.

(i) Market Failures

The reason the market cannot be expected to guarantee public-regarding professional virtue is a familiar one. It is simply the flip-side of the externalities problem that calls for professional public-regarding virtue in the first place. As we have seen, certain forms of hyper-aggressive professional tactics confer benefits on the professional's clients, and corresponding costs on the clients' opponents or the public, costs that cannot be justified systemically as either efficient or fair.

This problem can also be seen from the other side, as too little of a public good, the benefit of having professionals who police against just such opportunistic, cost-externalizing behavior by their own clients. Here, precisely as neo-classical economics predicts, the market under-produces the relevant social good, even as it over-produces the corresponding social harm. With respect to public-regarding professional virtue, this has both a supply side and a demand side. On the demand side, private clients, in both law and business, have strong economic incentives to hire professionals who
will advance their private interests at the expense of the public interest. But the converse is equally true. To the extent that a client’s lawyer or manager serves the public interest, that client is paying to provide a service the benefit of which redounds to others. They are buying, if not the rope with which they are to be hanged, at least the leash with which they are to be reined in.

Corresponding factors predictably operate on the supply side. Professionals can charge private clients directly for the benefits those clients themselves receive, including advancing clients’ interests against the public interest. On the other hand, professionals cannot expect their clients willingly to pay them for advancing the public interest at the clients’ own expense. Profit-maximizing professionals, accordingly, will tend to advance client interests, not the public interest, in case of conflict. That, quite literally, is what they are paid to do.

Thus clients will tend to purchase, and lawyers and managers tend to provide, services that favor the interests of private clients over the public. And there is good reason to think that these market forces have led, over the course of the last century and more, to a defection of critical elements of the law and management from the activist, public-service ethos of classic functionalist professionalism to an unabashedly client-first, neutralist perspective. Straightforward economic analysis, then, suggests that the market will not produce appropriate levels of public-regarding professional virtue; abundant historical research tends to confirm what almost daily headlines from the current financial crisis strongly suggest: that something very like this undersupply of public-regarding virtue has in fact occurred.

(ii) Government Failures

As we have seen, a standard response to market failure is some form of government intervention, up to the point at which the cost of implementing and operating the regulatory regime equals the benefits it provides, the point where the marginal returns of regulation reach zero. With respect to the particular problem we face here -- requiring lawyers and managers to pursue the public interest, when appropriate, over the private interests of their clients -- this regime runs immediately into increasingly severe, and ultimately insurmountable, problems. And these problems fatally undermine regulatory efforts at each possible phase: sanctioning those who violate professional norms, screening out applicants likely to violate those norms, and inculcating those norms during professional education.

132 See FREIDSON, supra note 4, at 179-96.
(a) The Impossibility of Mandating Public-Protective Virtue

In one respect, these problems are precisely the kind functionalists would predict: in this context it is extraordinarily difficult to specify in precise, rule-like protocols, the kind of behavior we need to encourage or discourage. This is because the relevant conduct involves the subtle application of complex technical knowledge – when to press a witness, by what means – in connection with the most profound understanding of fundamentally important public matters – the very nature of the public good – in constantly shifting real-life situations. To pursue the proper course, lawyers and managers must not only know the public good; they must also know the point at which to urge their principals to yield to that good over against their own private interests. What’s more, lawyers and managers would need the subtle diplomatic and rhetorical skills to bring their principals around to that position. All of this is easy to state in the abstract, but virtually impossible to specify in the black-letter, bright-line, readily applicable rules of ideal-type bureaucracy. This seems then, on its face, precisely the sort of discretion that functionalists say can only be regulated by professional, as opposed to state, standards and institutions.

But, again, this problem with bright-line rules is much more common in law than functionalists would have us believe. As we saw in our analyses of both professional knowledge and client-protecting virtue, law as a functioning system has long included relatively flexible standards as well as relatively fixed rules. What’s more, judges have developed in practice and scholars have elaborated in theory the sorts of situations in which one approach, rules or standards, works better than the other. But here, in trying to impose public-regarding virtue, liberal law as a means of social control quite literally reaches its limits. Policing of public-regarding professional virtue is not amenable to any imaginable regime anywhere on the long spectrum between perfectly fixed rules or ideally flexible standards.

The reasons for this have long been identified: Basically, we would need a kind of meta-law that required lawyers to use all laws as they should be used according to the activist theory of legal ethics. The basic mandate of that theory is this: Do justice; honor the

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spirit, not merely the letter, of the law. This, however, produces an immediate paradox: The letter of this meta-law would essentially require lawyers to honor the “spirit” of all other laws. And the seriousness of this theoretical problem is richly documented in perennial problems with two related regulatory efforts: curbing frivolous litigation and restraining improperly motivated, or “malicious,” litigation. Efforts along both these lines have been made in the law of torts, in the law of professional discipline, and in the law of civil procedure; nowhere have they met with more than limited success.

And the problems with implementing the “do justice” mandate of normative activism’s meta-law would be even greater. Unlike the effort to suppress frivolous litigation, that effort would seek not merely to prevent lawyers from asserting claims not grounded in a plausible theory of law, but also to mandate that lawyers only assert claims that would produce justice. Unlike the effort to curb malicious litigation, the effort would not seek merely to exclude the worst of motives, harm for the sake of harm, but to require the best of motives, coordinating private client rights with broader public goods.

What is more, the “pursue justice” mandate would have to be broader still: It would have to cover not only litigation, a relatively small part of the work of lawyers in general and corporate lawyers in particular, but also all the other aspects of their work, including office counseling. And even that would not be enough. In some ways, as Brandeis long ago pointed out, it is especially in their lobbying activities that corporate lawyers most need to supplement their assertion of client interests with countervailing concern for the public good.\(^\text{136}\) He called, accordingly, for lawyerly self-constraint to protect the public interest,\(^\text{137}\) and that call is still at the foundation of activist public-protective virtue.\(^\text{138}\) Thus the “pursue justice” meta-law would have to include not only advising clients and litigating on their behalf, but also legislative and administrative lobbying.

But here that meta-law reaches a problem of constitutional, not merely practical, dimensions. To appreciate that problem, we must first see how far the “pursue-justice” meta-law exceeds

\(^\text{136}\) He thought the case for lawyer neutralism in lobbying was worse, not better, than in litigation. In litigation, he believed, the neutrality of the judge and the constraints of procedural law combined to help ensure outcomes in the public interest. \textit{Brandeis, The Opportunity in the Law, supra} note 8, at 340. \textit{See Simon, The Practice of Justice, supra} note 36, at 133 (“Brandeisians tended to ignore litigation, and by implication to concede that the Dominant View [neutralism] might still be appropriate there.”); In legislation, he observed, these critical protections were absent, and the risk of publicly harmful outcomes correspondingly great. \textit{Brandeis, The Opportunity in the Law, supra} note 8, at 340-41.

\(^\text{137}\) \textit{Id.} at 343.

\(^\text{138}\) \textit{Luban, Lawyers and Justice, supra} note 43, at 169-71 (citing Brandeis as prototype of activist lawyering); \textit{Simon, The Practice of Justice, supra} note 36, at 127-32 (same).
Brandeis’s version of activist public-protective virtue. Brandeis called for lawyers as lobbyists to voluntarily limit themselves to promoting laws not violative of the public interest; he never called for a law to make those limits on lobbying mandatory. Nor could he have called for such a law, consistent with his own principles and those of liberalism more generally. The point to see is this: Any meta-law embodying Brandeis’s principle is not only unworkable, for the reasons we have seen; it is also unthinkable, liberal law’s self-contradictory equivalent of the round square. Such a law would be easy enough to state, either as a requirement of activism or as a prohibition of neutralism: In its positive, pro-activism form, Lobby or otherwise petition government only for laws you believe to be in the public interest; conversely, in its negative, anti-neutralism form, Do not lobby or otherwise petition government for any law you believe to be against the public interest. This law would quite unmistakably mandate activism, and ban neutralism, in legislation and legislative rule-making. But this law would, of course, run instantly and fatally afoul of the First Amendment’s protections for petitioning the government and freedom of speech in general. Beyond that, this law would, at a deeper level, utterly undermine the supposed value neutrality of the liberal state.

Lobbying, of course, is hardly the mainstay of most corporate lawyers’ work. But the problem with forbidding lobbying that is against the public interest recurs, in only slightly different guises, in the more common lawyerly tasks of litigating and advising. Litigation is simply another form of petitioning government; a ban on improper motivation would hardly withstand constitutional challenge there either.

Notice, too, that this position takes us beyond litigation to an even more common lawyerly function, advising clients. Clients will of course want to know how far they can press their rights, even when litigation is not looming on the horizon. And advising clients, also comes at the core of free speech. The first amendment allows only the narrowest restrictions on inciting clear and present danger in the breaking of laws; a ban on advocating unjust applications of existing laws would be hopelessly overbroad and vague under that test.139 State-mandated public-protective virtue is thus impossible, both in practice and in principle.

But we must remember, at this point, that the law has two other potential means of rooting out neutralism and, conversely, cultivating activism: screening applicants for occupational licenses and, even further “upstream,” prescribing their course of occupational training. But neither of these will work here, for reasons closely parallel to those we have already seen undermine any

139 See Renee Newman Knake, Attorney Advice and the First Amendment, WASH. & LEE L. REV. (forthcoming 2011) (analyzing two 2010 United States Supreme Court cases on restricting lawyers’ advice).
possible legal regime of post-admission sanctions. Neither could work in practice; neither would be allowed in principle.

(b) The Impossibility of Screening for Public-Protective Virtue

Consider, first, the possibility of screening applicants at the point of admission. Rather than try, hopelessly, to catch those who fail to pursue justice after admission, why not simply screen out those who would not even try, those who lack the necessary virtue, willingness to subordinate clients’ interests, when appropriate, to the public good? Laws screening out the occupationally unfit would be no novelty. The law clearly operates on similar premises with respect to other occupations: No convicted pedophiles shall be kindergarten teachers;\(^\text{140}\) no one with contagious TB shall work in food services;\(^\text{141}\) few felons of any kind may serve as military officers or public school teachers.\(^\text{142}\) Even in the present system of lawyerly regulation, the state supreme courts screen out for special scrutiny those who have committed serious felonies or otherwise indicated a lack of what the law of lawyering calls “character and fitness.”\(^\text{143}\) As with regulation of lawyers once admitted, however, this screening already shows signs of strain,\(^\text{144}\) and expanding it to include a search for public-protective virtue would stress it beyond both practical and principled limits.

On the practical side, the relevant virtue would be devilishly difficult to test for and exceptionally easy to fake. Character and fitness screening, as we have seen, is a weak and dubious method of identifying even garden variety virtue like honesty.\(^\text{145}\) It would doubtlessly be even more difficult to screen for some general predisposition to favor the public interest over private client interests under appropriate conditions.

There is, at least in theory, a clever way around these problems with identifying up front those who lack public-protective virtue: Make them identify themselves. If the law as our shepherd cannot separate the sheep from the goats, maybe it can make them sort themselves. Odd as this may sound, this is, in effect, precisely what the law has long tried to do with pledges of allegiance, test acts,\(^\text{146}\)

\(^{140}\) See, e.g. FLA. STAT. § 1012.315(1)(r) (2008) (list of requirements for certification as a public school teacher precludes unlawful sexual activity with a minor).
\(^{141}\) See, e.g. FLA. STAT. § 392.67 (2008) (Tuberculosis Control Act).
\(^{142}\) See, e.g. FLA. STAT. § 1012.315(1) (2008) (list of requirements for certification as a public school teacher precludes certain felons); 10 U.S.C. § 504 (2004) (list of persons not qualified to enlist in the armed forces includes felons, though exceptions may be authorized).
\(^{143}\) See, e.g. RULES OF THE FLORIDA SUPREME COURT RELATING TO ADMISSION TO THE BAR R. 12-2.
\(^{144}\) See Deborah Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491 (1985).
\(^{145}\) Id. pp. 41-42.
loyalty oaths, and oaths of admission to particular occupations. In fact, the Oath of Admission to the Florida Bar requires applicants to swear to commit themselves to a position virtually indistinguishable from activism: “I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust….\textsuperscript{146} Lawyers take this oath explicitly upon pain of disbarment and presumably under penalties of perjury as well. But any such requirement in application must be read either so broadly as to be meaningless or so precisely as to violate first amendment protections.

Test Acts, of course, are notoriously at odds with liberal principles; they were a primary means of excluding religious non-conformists, including not only Roman Catholics and Jews, but also non-Anglican Protestants, from full civil and political rights after the collapse of the English Commonwealth and the restoration of the monarchy.\textsuperscript{147} Our constitution banned them explicitly even before the First Amendment banned them more generally with the Free Exercise and Establishment Clauses.\textsuperscript{148} To impose activism on lawyers by oath, of course, would hardly be to establish a traditional religion, any more than to require a renunciation of neutralism would be to ban the free exercise of another. But activism is certainly a distinctive set of beliefs, an ideology, and the constitutional power of the state to limit occupational licenses on ideological grounds is itself closely circumscribed.

The long line of loyalty oath cases, many involving admission to the bar, have left only the thinnest foundation for state-mandated ideological loyalty. An applicant to the bar may be denied admission on ideological grounds only if two strict conditions are met: knowing membership in an organization committed to the overthrow of the government of the United States or one of its political subdivisions by force or violence and the specific intent to further that end through those means.\textsuperscript{149} Under that test, even those explicitly committed to destroying both our capitalist market economy and our liberal democratic polity are admissible to the bar if they (nominally) renounce violence. It is hard to see how confessed neutralists could be excluded, under that standard, for failure to tow the activist party line on public-protective professional virtue.

\textsuperscript{146} See R. REG. FLA. BAR 2-2.1; for a full recitation of the Oath of Admission, see Henry Latimer Center for Professionalism, Oath of Admission to the Florida Bar, http://www.floridabar.org/tfb/TFBProfess.nsf/5d2a29f983dc81ef8525670906a486a/04e9eb581538255a85256b2006cdd7d?OpenDocument.


\textsuperscript{148} U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

And, of course, loyalty oaths are not just suspect in principle; they are also almost absurdly ineffective in practice against truly dangerous and diligent subversives. Otherwise, presumably, pledges of allegiance would replace luggage scans in airport security protocols. No one bothers to ask al Qaeda operatives to stand up and be counted; we need not expect high response rates from neutralists, either – nor, of course, from activists, were the shoe on the other foot.

Finally, even if such subversives were eventually caught, prosecuting them would land the law back in precisely the enforcement quagmire that drove us to this “upstream” approach in the first place. To prosecute those who violated their oath of public-protective virtue, the law would need to define the particular acts that constituted the violation. But the practical impossibility of that definition, of course, is precisely what the oath requirement is designed to avoid. We have come, then, full circle.

Pre-admissions screening by test or by oath, then, fails as an alternative to post-admission monitoring for the very reasons that post-admission monitoring itself fails. On the one hand, neutralism is sufficiently close to an ideology as to come within the spirit, if not the letter, of the first amendment. On the other hand, even if it were theoretically permissible to forbid it, it would be practically impossible to eradicate it. That effort would simply take us back to the enforcement problem that got us here in the first place: defining which particular action betrays a lack of commitment to justice.

(c) The Impossibility of Inculcating Public-Protective Virtue

There is, however, an even more elegant solution, at least in theory: Rather than try to identify public-regarding virtue at the point of entry into an occupation, or to monitor its presence in the field of practice, the law could simply ensure that all who approach the entry point have acquired the virtue already. If screening for public-protecting character or activist commitments cannot ensure public-protecting virtue, why not fall further back still, and ensure that all applicants have been given the right orientation in the first place? Even if we cannot test for character or ideologically purity, practically or Constitutionally, maybe we can simply implant it, in the course of legal education. If professionals with proper virtue are hard to find, and if those lacking it are even harder to find out, then maybe the law can simply make the one, or re-make the other.

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Silly as it seems on its face, this radical reliance on professional education has had very serious proponents. But several problems with this approach are immediately apparent. The law could not, of course, forbid the teaching of neutralism, any more than it could forbid the teaching of Nazism or neo-Platonism. That would violate both well-established First Amendment precedents and the marketplace of ideas principle that underlie them. Nor, on the other hand, could the state require the teaching of the activist position on public-protecting virtue as the one true way of proper professionalism. That, too, would likely be unconstitutional; it would certainly be illiberal. But neither banning of neutralism as heresy nor establishing activism as orthodoxy need be essential to a plausible state program of mandatory education in professional virtue.

What if the state need only mandate the teaching of activism as an available option, one plausible way to conduct oneself as a professional? This, surely, would violate neither the First Amendment nor liberal principles. The state could certainly require those who earn religion degrees in its public universities to know what Buddhism is, though of course the state cannot require anyone to profess to be a Buddhist; the state can certainly require professors of religion in its universities to understand Buddhism, again, of course, without requiring that they actually be Buddhists. Similarly, the state could require its lawyers to understand the basics of a prominent school of professional ideology, even as it could require them to know the Federalist Papers. Just as the state could mandate that graduates of its law schools know the basic positions of Federalists and anti-Federalists, so it could require that they understand the fundamental positions of neutralism and activism on the question critical to classic professionalism: Whether professionals should ever subordinate the interests of private clients to what, in their own professional judgment, are the higher claims of the public good.

Good opinions as the cure for bad, of course, is a theme of liberal thought that has run from Milton's Areopagitica down through the Supreme Court's contemporary free speech

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151 See, e.g., FREIDSON, supra note 4, at 123.
152 See Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down state prohibition against teaching German).
154 See SIMON, THE PRACTICE OF JUSTICE, supra note 36, at 196 (arguing that voluntary codes of activist professionalism could be sponsored not only by mandatory as well as voluntary professional organizations, but also by "courts, legislatures, and public regulatory bodies"); Atkinson, Dissenter's Commentary, supra note 30, at 333 (outlining ways for courts to encourage activist professionalism without trying to make it mandatory).
jurisprudence.\textsuperscript{156} Although it rests, at bottom, on a most optimistic empirical claim about human nature, it is a claim that is, in a sense, now an article of both liberal faith and fundamental Constitutional law. What we need to see here is that, even if true, this marketplace of ideas, truth-will-win-out-in-the-end, notion does not guarantee the kind of professional virtue that functionalism requires. The marketplace of ideas notion, remember, is not that all those who hear the conflicting ideas -- right versus wrong, truth versus error or lies – will embrace the better view right away. It may well be that only a small minority will perceive and follow the right way right away; it is enough that they are allowed to carry their light forward into a more receptive future without fear of persecution by a benighted majority here and now.

Functionalist professionalism, by contrast, needs to ensure that professionals themselves embrace the proper view of public service right now, in numbers large enough to ensure that the opposed view, neutralism, is effectively eliminated. Neither Milton’s faith in the marketplace of ideas nor the First Amendment’s protection of free speech gives any such assurance. To believe that virtually all students of law and management will follow the activist path once presented it as one alternative among others is at least at some odds with the evidence of our eyes. Activism, as I have said, is a widely held position among scholars of both business ethics and legal ethics;\textsuperscript{157} it is prominent in all the major textbooks in both fields, and it has been widely taught in the required ethics courses in both law schools and MBA programs for at least a generation.\textsuperscript{158} If it had been embraced and practiced by all who had heard it, it is hard to see how we could be in the mess we are in today.

That, of course, is itself an empirical claim, most assuredly an unprovable one. We cannot really know whether, if activism were “properly” presented as an alternative to neutralism, law students and management students would embrace it in the necessary numbers to drive neutralism near enough to extinction to have a discernable effect on the decisions actually made by lawyers and managers in practice. But, here again, that proof is not necessary for our analysis; either answer, affirmative or negative, places a serious burden on functionalist defenders of professionalism. If the answer is positive, they must show why schools under state control cannot deliver the critical message as well as schools under professional control. On the other hand, if the answer is negative, they must show how the other institutions of professional autonomy – pre-admission screening or post-admission regulation – can succeed

\textsuperscript{156} Shapero, supra note 31.
\textsuperscript{157} Id. pp. 47-51.
where, as we have already seen, those very means cannot succeed in the hands of the state. Thus either answer to the question of inculcating public-regarding professional virtue as part of professional education turns us to the larger issue: Can professional institutions succeed in guaranteeing public-protective virtue where both the market and the state cannot?

b. Inefficacy of Professional Institutions

The functionalist’s institutional claim as to guaranteeing professional virtue has two critical components: First, that the ordinary institutions of government and the market are inadequate guarantors and, second, that the special institutions of professionalism are superior. We have just seen that the market and the state are not able to guarantee public-regarding professional virtue. If we want professionals to act this way, we cannot expect them to be drawn to it by their normal compensation arrangements nor forced to it by any feasible law. In an unregulated market for professional services, clients could purchase the services of public-disregarding neutralists much too easily, and neutralist professionals would supply those services all too readily. Nor could routine regulation solve these market failures. The regulatory regime of law cannot weave its regulatory net tightly enough to exclude neutralist practices, much less neutralists themselves.

Those twin failures of the market and the state bring us to the second element of functionalism’s institutional claim about professional virtue, the claim that professional institutions can do a better job. The simple answer is this: No, they cannot. The reasons are basically two: first, and somewhat surprisingly, all the traditional institutions of professionalism ultimately rely on the state’s coercive power, even as functionalists themselves admit. Those institutions are thus restricted to the same limits as the state itself. That problem forces professionalism back to non-coercive measures, and here we find the second reason for its failure. The persuasive methods of professionalism are, in theory and practice, precisely at their weakest under the very conditions in which neutralism flourishes: in a word, our world.

(i) The Legal Limits of Professional Coercion

There are, remember, three fundamental institutions of professionalism: control of the education of its members, screening of members for admission, and regulation of members in their practice. At each phase, we must now see, the institutions of professionalism

159 See FREIDSON, supra note 4, at 3 (“monopoly is essential to professionalism”); 123 (“Ideal-type professionalism is always dependent on the direct support of the state....”).
all require, as a last resort, recourse to the coercive power of law. The monopoly that the profession must maintain at each point is, necessarily, a legally sanctioned and enforced monopoly. Without the legal authority to limit admission to those educated at professionally accredited schools, aspiring members of the profession could, and would, seek their training elsewhere; conversely, without the legal authority to exclude from practice those whom the profession has not certified, the profession could not guarantee that only its members deliver the relevant services. And, without the legal authority to sanction those members who, once admitted, fall below the prescribed professional standards, the profession could not ensure compliance with the standards it sets. The profession’s ability to mandate educational requirements, to impose admissions requirements, and to implement a regulatory regime with penalties ranging up to expulsion all rest on the state’s enforcement of those requirements. The state, in effect, delegates its own licensing and regulatory authority to the profession. At every critical juncture – education, admission, and regulation – the law backs the profession’s mandates with coercive force.

But this backing comes at a necessary, if not obvious, cost: at each phase, the institutions of professionalism must themselves comply with the requirements of law; the profession cannot implement standards that are not, ultimately, subject to the same legal standards with which the state itself must comply. Thus, even as we move from state-regulation to autonomous professional self-regulation, we recapitulate in the latter all the problems we have just encountered with the former. The profession’s educational requirements, like the state’s, cannot properly either instill their own functionalist vision as the one true way or exclude the expression of the neutralist alternative. Although the profession, like the state, could require knowledge of the public good, the profession could, no more than the state, require commitment to advancing it as functionalism suggests. Similarly, the profession, like the state, cannot use their admissions screening process to exclude those who do not share their vision. And, even if their autonomous disciplinary mechanisms could define lapses in public protective virtue, it could not legitimately sanction them.

This fundamental feature of “professional autonomy” is a profound paradox: Every phase of the professions’ much-vaunted self-governance is in fact part of a larger legal regime and subject to its limits. Functionalists claim professions regulate the delivery of their services better than the instrumentalities of the state. But they never deny that the professions’ regulation is backed by the state. To the contrary: they insist upon it, and so they must.

See id. at 95 n.13 (“…unless the state exercises control over the number of applicants admitted, it is empirically unlikely for market projects to be successful.”);
(ii) The Practical Limits of Professional Persuasion

Faced with these legal impediments to using coercion at each phase of regulation – education, admission, and discipline – the legal profession has predictably come to rely on persuasive measures instead. This is particularly clear with respect to the latter two phases, admission and discipline. As we have seen, neither the state itself nor the profession acting with the force of law can make commitment to pursuing justice a condition of either admission to the bar or the continued practice of law. Precisely these problems with legally mandating a particular vision of professional virtue have pressed the organized bar toward hortatory, voluntary statements of professional virtue: Codes and Creeds and Oaths and Pledges of Professionalism and Civility. These are the stock-in-trade of the contemporary professionalism movement. Important as these may prove – and here I am a respectful skeptic\(^{161}\) – they cannot bear the weight that classical functionalism requires, guaranteeing public professional virtue more effectively than other social institutions, private or public.

As professional organizations try to increase their size as voluntary organizations, they run afoul of two related problems. On the one hand, they must dilute their message to attract members. But, even as they increase their membership, that very increase undercuts the efficacy of the persuasive means that voluntary organizations must use to discipline their members. The current professionalism crusade, now over two decades old, nicely illustrates both problems.

Consider, first, the pressure to dilute content as membership expands. Although, as we have seen, the profession cannot mandate belief in full-blown activist notions of public-protecting virtue, nothing forbids the profession, any more than the state, from holding activism up as a legitimate, even preferred, alternative. And yet, in no case, is that what the professionalism movement within the official bar has done.\(^{162}\)

Significantly, none of its professional manifestos – no, not one – includes any call to do substantive justice by sometimes elevating

\(^{161}\) Atkinson, \textit{Dissenter's Commentary, supra} note 30.

\(^{162}\) Indeed, upon close inspection, it becomes clear that the calls for doing substantive justice have actually declined over time, and that the current movement has done nothing to revive them. And the ABA has come nowhere close to calling for activism's public-protective virtue, even though it is a voluntary bar. One has to note the discouraging conclusion of William Simon: “In fact, inclusive bar associations have tended to use their authority over the regulation of the practice to shear off the aspirational aspects of the professional vision, to replace contextual with categorical norms, and to minimize responsibility to nonclients.” \textit{Simon, The Practice of Justice, supra} note 36, at 196 (citation omitted).
public over client interests. They tend to categorically forbid aggressive tactics, whether used to advance justice or mere client interests, and they tend to enjoin universal “niceness,” a hale and hearty handshake even to lawyers firmly committed to advancing client interests they themselves believe iminical to the public interest, and likely to prevail over it. They are all and always about means, never, even in the slightest way, about ends. They are, in effect, a kind of implicit truce between moderate activists and neutralists, in which activists agree to ignore the publicly harmful ends that neutralists serve, in return for neutralists’ renouncing means that make the lives of other lawyers and judges miserable: rudeness, over-aggressive trial tactics, discovery abuse. The new professionalism standards say, in effect, it is okay to serve evil, even be evil, as long as you are procedurally punctilious – and nice to your professional neighbors. They never even hint that a latter-day Lincoln should sometimes forbear helping a client foreclose on a single parent and drive orphan children from their home – as long as the lawyer acts courteously toward all, with proper regard for procedural regularity.

And the large membership bought at the price of this one-size-fits-almost-all dilution of professional norms is doubly dear. The very kind of informal encouragement and professional admonition that tend to work well in small, face-to-face, “gemeinschaft” communities tends to work badly in large, anonymous “gesellschaft” societies. For conformity to social norms in these latter, larger groups, one needs the force of law, precisely the force that, for the reasons we have reviewed, professional organizations cannot invoke to enforce the norm of public-regarding virtue.

The predictable failure of the profession’s persuasive measures at the points of admission to the bar and on-going practice of law leaves the profession with one last and logical phase of professional life as the focus for its efforts to ensure a distinctive professional virtue: professional education. But, here again, the profession faces all the limits on coercion that limit state control of professional education. The profession, like the state, can both mandate professional education and require the study of certain subject matter. But the profession is every bit as legally limited as the state in what it can forbid its professors to teach and every bit as practically limited in what it can expect its students to come to believe. Like the state, the profession can neither silence the teaching of neutralism nor expect the teaching of activism to fall on universally receptive ears.

See Ferdinand Tönnies, Community and Society (Gemeinschaft und Gesellschaft), (trans. 1957).
And, with respect to these latter, the profession is a good bit more embarrassed than the state. For one thing, the legal profession has never taken the first step in this direction; nowhere has the teaching of public-protective virtue ever been required of any law school – nor, so far as I know, even recommended. Nor is that the worst of it: not only has the profession not pressed for the teaching of public-protective virtue; that virtue hardly has the unanimous assent of professional academics. As we have seen, advocates of classic professionalism (particularly those in the academy) have always placed an extraordinary faith in professional education at precisely this point. They see it as laying the capstone of the arch that connects the twin pillars of professional knowledge and professional virtue. Consider this summary of their position:

Once established, the institutions of professionalism themselves support and encourage the ideal of independent service even though they are always under some pressure to serve the needs of the state and the ruling class. This is because the formal professional school supports a faculty whose task is to codify, refine, and extend the profession’s body of knowledge and skill, and also to elaborate and clarify the values served by their discipline. The professional school is where ethics is elaborated as well as taught and where that can be done somewhat independently of the market and the polity. Indeed, the very organization of academic disciplines encourages critical thought rather than acceptance of received ideas and methods and practical compromises, for that is how its practitioners make their mark. Thus, idealypical professions may be part of a service class, but they cannot be described as belonging to a servant class. Their service is to the differing substantive goals appropriate to their specialized disciplines.\footnote{Freidson, supra note 4, at 123.}

This statement, unfortunately for functionalism, stands much more nearly as a statement of the ideal than as a description of the real. Sound though it surely is as a statement of the classic professional faith, it is subject to deep doubt, if not conclusive disproof, at every critical point.

As we have seen, academics in the two occupations most relevant to our analysis, law and business, have produced not a monolithic theory of professional virtue in public service but an embarrassment of riches. The activist school of occupational ethics, in both law and business, has elaborated powerful statements of the need for public-protective professional virtue. On that view, professionals must sometimes place the “values served by their discipline” – justice and prosperity, in the case of law and business – above interests of private clients (or, if you prefer, “the needs of the
That view, as we have seen, is perfectly compatible with – indeed, the necessary complement of – functionalists’ view of professions as always “a service class,” never a “servant class.”

But “encourag[ing] critical thought rather than the acceptance of received ideas and methods” has proved a two-edged sword. Academics in both law and business have produced the antithesis of the activist-functionalist view of proper professional virtue, neutralism. Under that view, a professional is always to serve client interests, never to subordinate those interests to the public values the occupation itself ultimately advances. The balance between private interest and public values, instead, is itself set, not by professionals’ direct action, but by the essentially automatic, mutually self-sustaining interactions of the market and the law. Functionalists’ claims that academic professionals have found the one true way to public service, the way of public-protective virtue, are, to put it most charitably, greatly exaggerated.

Thus it is not merely that professional institutions can neither legally impose the necessary public-protective professional virtues nor adequately encourage them by persuasive means. The very core of what distinguishes professions from other occupations, an academic theory of how the special knowledge that professions provide is linked with a specific professional virtue, is woefully wanting. Contrary to functionalist theory, law schools do not inculcate a clear vision of professional virtue, albeit subject to the receptiveness of students and the pressures of the state and the market. Law schools, quite on their own, have produced not one unified field theory of professional virtue, but two. This is an unbearable embarrassment of riches. Academic theorists of professional virtue do not merely disagree about the details of their deity; they denounce each other’s deity as the very devil.

3. Summary: The Paradox of Professional Virtue

This, then, is the paradox of professional virtue: The professions’ claim to uniqueness among occupations rests ultimately on a virtue that professional institutions cannot guarantee. On the one hand, the only real distinction that functionalists can find between professions and other occupations is professionals’ commitment to placing public needs over clients’ legal entitlements; this is their essential, defining virtue. On the other hand, this very commitment to place public over private interests cannot be guaranteed by traditional professional institutions against those who assert that it is not a virtue but a vice. Our search for a distinctive virtue to complement professionalism’s particular knowledge has led,
not to nothing, but to something that classic professional institutions cannot provide.

But the paradox of classic professionalism can also turn us around, prepare us to return to the vision of Brandeis and Lincoln, a creed of substance above form, spirit before letter, justice over legality. We must not lose sight, in this depressing survey, of the excluded middle, the admittedly earth-bound Republic of Brandeis and Lincoln. Here and now, admittedly, the letter of the law cannot keep the lion from the throat of the lamb; Lincoln’s prosperous client, with the law on his side, can foreclose on the widows’ hearth and home – provided, of course, she has proper notice and opportunity to be heard. But lawyers like Lincoln can refuse to help him in the process, can appeal to the “better angels of his nature,” can even work against him in all the fora of the law, guided, not merely by private sentiments, but also by the spirit of the law, which they believe to be justice, in substance as well as in form. And business managers, even as Brandeis imaged, can be their allies.

III. THE NEO-CLASSICAL SYNTHESIS: TOWARD A NEW PROFESSIONALISM IN LAW AND BUSINESS

In Part I, we examined the classic functionalist theory of professionalism, in Part II, we took up the dominance theories’ revisionist critique of functionalism. Where does our analysis of the competing claims of functionalism and dominance theory leave us, and where do we go from here? This final part first briefly takes our bearings, then surveys the way ahead.

The entire edifice of classic functionalism rests on two fundamental tenets, one about function, the other about form. According to the first tenet which gives functionalism its name, proper professions alone provide a socially essential kind of knowledge, a unique combination of technical skill and liberal education, along with a complementary virtue, the professional’s commitment to use that knowledge for the public good, sometimes even against the will of private clients. According to the second tenet of classic functionalism, form follows function. The necessary and sufficient guarantees of professional knowledge and virtue are the special institutions of professionalism – occupational control of professional education, admission, and practice – for which neither the market nor the state can provide adequate alternatives.

Functionalism’s opponents, the various revisionist schools of dominance theory, challenge both of functionalism’s fundamental tenets, the substantive need for special professional knowledge and virtue and the institutional need for special organizational forms to guarantee them. Our analysis of the dominance critiques revealed, not a disproof of either of functionalism’s tenets, the substantive or
the institutional, but twin paradoxes, precisely at the points where
functionalism’s substantive and institutional claims intersect.

With respect to professional knowledge, we found this
paradox: Even if professions provide a unique combination of
technical skill and liberal education, functionalism has not shown the
need for special, professional institutions to guarantee that
knowledge. Indeed, dominance theorists plausibly argue that a
routinely regulated market can provide the necessary combination
without being supplemented or supplanted by professional
institutions.

Similarly, with respect to professional virtue, we found this
second paradox: Even if professions uniquely need their members to
place the public good above their individual clients’ advantage,
functionalism has not shown how this can be guaranteed by
traditional professional institutions. Indeed, the very presence of
neutralists, theorists of occupational ethics in both law and business
who categorically reject this unique form of professional virtue,
suggests that even to try to guarantee it by traditional professional
institutions is to violate not only basic norms of our liberal society
but also fundamental protections of our constitutional law.

Combining these paradoxes of knowledge and virtue places
functionalist professionalism at this impasse: Professionalism’s
claim to be a necessary form of occupational organization depends on
a kind of knowledge for which the institutions of professionalism are
not necessary and a complementary virtue for which those
institutions are not only insufficient but radically inappropriate.
Professionalism is not necessary to guarantee the knowledge it
requires; even worse, professionalism is not sufficient to guarantee
the virtue. What functionalism insists classical professionalism must
deliver in knowledge and virtue, our analysis has shown that its
institutions need not guarantee in the case of the one and cannot in
the case of the other.

But this apparently grim assessment of functionalism’s
foundational tenets should not be taken as a counsel of despair. To
say that traditional institutions cannot guarantee a match of
professional virtue with professional knowledge is not to say that
such a match is either unnecessary or unattainable. Indeed, as we
have also seen, dominance theorists themselves have given us little
reason to think that a society like ours – an advanced capitalist
market economy with a liberal democratic polity – can do without the
very kind of specialized knowledge and associated virtue that
functionalists claim for the professions. If anything, the necessary
knowledge seems to be both deeper and broader, and the associated
virtue more closely connected with it, than functionalists themselves
have realized, or at least demonstrated.

165 See supra Part II.A.1.a.
We have also seen that the characteristically professional knowledge and associated virtue may be required of occupations other than the classical professions. Thus, as particularly relevant to our project, business management may need a special combination of technical and liberal knowledge to advance its prime value, prosperity, even as law requires that combination to advance the prime legal value, justice.

Nor should we be overly discouraged that traditional professional institutions have not guaranteed the necessary knowledge and cannot guarantee the corresponding virtue. To show that the need cannot be met one way is hardly to prove that it cannot be met in another. All through our analysis, after all, we have had before us the lives of Lincoln and Brandeis, two paragons of classical professionalism's knowledge and virtue. In at least their cases, then, the two essential functional elements of classic professionalism have been fused, if not through traditional professional institutions, then through some other means. If we would have more professionals like them, we now know, we cannot look to the traditional institutions of professionalism, the occupational control of education, admission, and practice. But we can look, more closely than we yet have, at other social institutions, those that have shaped our Lincolns and our Brandeises. If we can find and fortify the foundations of those institutions, we can begin to re-build a new professionalism, a neo-classical professionalism, for the new millennium.

What is more, the collapse of functionalism's institutional claims not only leaves intact the possibility of providing knowledge of the public good and public-regarding virtue in the traditional professional of law. Equally important, for our purpose, that collapse also removes the principal hurdle to recognizing business management as a profession in its own right. As we have seen, Brandeis and others pointed to a deepening and broadening of managerial knowledge, with a university base of its own, and a corresponding need for public-spirited application of that knowledge; what functionalist theorists found lacking in business was any appreciable measure of occupational control of education, entry, or practice.166 Having seen that these institutions of professional autonomy are not essential even to the paradigmatic profession of law, we can now look anew at the prospect of grounding business management on the same neo-classical foundations, knowledge and virtue, without worrying about the absence of adventitious occupational autonomy.

We have reached, then, what would have to be the foundations of a neo-classical professionalism in law and business – if there is to be any such professionalism at all. On the foundation and

166 See supra p. 32.
framework of what our survey has found may be sound and salvageable – lawyers’ and managers’ knowing and serving the public good -- we may be able to re-found a form of neo-classical professionalism. Here we can only outline that prospect. 167

To see where we must go from here, we must remember how we have proceeded thus far. Unpacking the twin paradoxes of classical professionalism will require delivering two proofs promised but deferred in our analysis thus far. Each paradox arose, remember, when we moved beyond functionalism’s substantive claim to its corresponding institutional claim. Functionalism claims that professions’ special knowledge requires special professional institutions; we saw that it most likely does not, that some combination of the market and state regulation might work equally well. Similarly, functionalism claims that professions’ special virtue can be guaranteed by professional institutions; we have seen that it cannot.

To arrive at these negative conclusions about functionalism’s institutional claims, we took both of functionalism’s substantive claims, special knowledge and special virtue, as given. First, we saw that functionalist theory makes a plausible claim for a distinct kind of professional knowledge, a hybrid of narrow technical expertise and broad liberal learning. But we also saw that functionalism has not shown how that hybrid works; it has not answered dominance theorists’ claim that the liberal education requirement is a sham, a false distinction that excludes otherwise eligible providers of the relevant service, even as it improperly elevates the status – economic and social if not political – of those who have the resources to cross the artificial barrier to entry. To rehabilitate functionalism, then, we must give content to its promising but unproved claim to wed technical expertise with liberal learning.

Second, we saw that functionalism’s complement in occupational ethics, activism, makes a plausible case that professionals need a special virtue to ensure that they apply their special knowledge in the public interest. Not only must professionals know the public good; sometimes they must also subordinate pursuing clients’ ends to pursuing that good. But neutralism maintains precisely the opposite: professionals need not – more strongly, should not – pursue the public good directly, sometimes placing it above service to private clients. They should, instead, leave identifying and advancing the public good to public institutions, the market and the law. This position, we saw, posed two fundamental problems for functionalism: if neutralism is right, then functionalism’s critical claim to special professional virtue collapses; even if neutralism is wrong (or cannot be proved right), its very

167 Fuller elaboration must await the second phase of this project, An Elevation of Neo-Classical Professionalism in Law and Business, supra note 18.
existence means that professional institutions cannot guarantee what functionalism holds to be an essential virtue in their members.

We have thus sketched out plausible versions of functionalism's claims about professional knowledge and virtue, but we did not explore them in any depth. We were able to do this because, even assuming functionalism could deliver on its substantive claims about knowledge and virtue, we saw it founder, in each case, on its corresponding institutional claim. Having shown the problems with professionalism's institutional claims, we must now go back and examine the underlying substantive claims that we took for granted.

This will require three related steps. First, we must show why both our polity and our economy require an occupation the members of which combine technical knowledge of their respective field with general knowledge of how that field serves the good of society as a whole. Second, we must show how, in order for our polity and our economy to perform optimally, their respective experts, lawyers and managers, must not only know the public good, but also be prepared, at appropriate points, to place the advancement of that good over service to clients' private interests. Finally, we must show how social institutions other than those of classical professionalism can generate and sustain professionals, lawyers and managers, with the necessary knowledge and virtue. With these three accounts — the relation of law and the market to our social system generally, the role of lawyers and managers in making that relationship work, and the institutions needed to foster properly professional lawyers and managers — we will have what we seek, an elevation of neo-classical professionalism.

Like classical professionalism, it will require special knowledge and special virtue; unlike classical professionalism, it will not rely for the guarantee of that knowledge and virtue on traditional professional institutions. Instead, it will rely on more basic institutions of classical republicanism, education and deliberation in particular; in turn, it will promote and sustain those institutions themselves. Our neo-classical professionalism will thus be best situated in a neo-classical republic. That republic's polity and economy would be guided, even if its justice and prosperity could not be guaranteed, by lawyers and managers who are philosophers as well as technocrats. They would be educated not only in the highest refinements of their respective occupational skills, but also in our culture's deepest insights about the true, the beautiful, and the good. The measure of that republic's prosperity and justice would be precisely this: Its capacity to offer each of its citizens, and eventually the whole of humanity, the full opportunity to be one of its best lawyers or managers, where best means most knowledgeable of the public good and most committed to, and successful in, its service.
CONCLUSION: FROM THE REPUBLIC OF PLATO TO THE REPUBLIC OF PROFESSIONALS

In the perfect polity, Plato is often believed to have thought, philosophers must be kings and kings, philosophers. Perhaps, you may be thinking, I am thinking that, too. I am not. I share your belief that, by the end of the twentieth century, if not the eighteenth, we should have learned to beware of all Utopias. The regime I have in mind – the regime Lincoln and Brandeis both believed in and worked toward – is no Utopia. Nor, I think, was the republic of Plato’s Republic. That classic of classics was, to be sure, the place where all utopias in the West had their beginning, at least literally. But it might also have been the place where they had their end, very much for the better. Here is the pivotal passage:

“I understand,” he [Glaucon] said. “You speak of the city whose foundation we have been describing, which has its being in words; for there is no spot [upotia] on earth, I imagine, where it exists.”

“No,” I [Socrates] said; “but perhaps it is laid up in heaven as a pattern for him who wills to see it, and seeing, to found a city in himself. Whether it exists anywhere or ever will exist, is no matter. His conduct will be an expression of the laws of that city alone, and of no other.”

“That is likely enough,” he said.168

The impossibility of institutional guarantees of professional virtue, the public-protecting virtue that would fit a philosopher to be king, ends this phase of our inquiry, even as the likely impossibility of founding a perfect republic on earth ends Plato’s Republic. So, too, that impossibility begins our re-modeling of classical professionalism, just as it must be the beginning of any republic we would build on truly classical foundations. For our professionalism, as for Plato’s republic, we need only find a way for professionals to make an imperfect world better; we need only show how, in that process, they can make their own lives, professional as well as personal, public no less than private, worth living. That way will be enough for professionals in our republic, even as Socrates seems to have brought Glaucon to understand in Plato’s.

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