Remodeling the Temple, Phase I: Assessing the Foundations of Neo-Classical Professionalism in Law and Business

Robert E. Atkinson, Florida State University
Remodeling the Temple, Phase I:
Assessing the Foundations of Neo-Classical Professionalism in Law and Business

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,… [It] 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

1 Ruden McCloskey Smith Schuster & Russell Professor of Law, Florida State University. The FSU College of Law supported this project with generous research grants and equally admirable, if less readily measurable, institutional encouragements. Laurie Dietz-Jones, Stephanie Gamble, Mark Seidenfeld, and Lesley Wexler offered unfailing support and insight; Matthew Umbarger, FSU Law 2009, provided invaluable research assistance.

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).

Abstract

Both the management of private enterprise and the practice of corporate law must be radically remodeled if they are properly to serve their correlate values: prosperity and justice. In that remodeling, the cornerstone of professional status would be appreciation of the deepest values of our common culture, gained through liberal education in the humanities and social sciences. Lawyers and managers need this appreciation because, under the best available institutional arrangements, they together must actively shape our public world, both in the law and in the market, for the common welfare.

The professional’s requisite cultural appreciation has two essential components, one intellectual, the other moral: an understanding of our basic shared values and a commitment to their advancement. The former, intellectual, component can be guaranteed through some combination of market forces and legal mandates; putting the latter, moral, component in place poses greater problems. Yet it is equally basic, the foundation of public service on which both law and the market must rest in a capitalist republic.

Remodeling professionalism along these lines is not a mere academic exercise; it entails significant structural changes in both business and law. In business, elite management must be recognized and re-structured as a profession; in law, the lower levels of practice must be removed from the relatively protected, quasi-autonomous regime of professional self-regulation and treated as ordinary trades or businesses. This dual shift would draw the dividing line of professional status not vertically, between law and business, as in the Anglo-American tradition, but rather horizontally, across the two occupations, more in accord with the continental European model.

This shift would meaningfully respond both to early management reformers like Brandeis in the US and Tawney in the UK and to recent critics of the professions from the sociological left, like Magali Larson, as well as the economic right, like Milton Friedman. And this shift would integrate the “intramural” perspective of legal and business ethics with the “extramural” perspective of the sociology of work. The result would be a neo-classical professionalism in both law and business, a model for modern professionals seeking to serve classical republican values.

The remodeling recommended here proceeds in two phases. This first phase surveys the foundations of classic professionalism theory, points out their failure to be deep enough for law and wide enough for business, and suggests how they might properly be expanded in both directions. The second phase undertakes that expansion, providing a blueprint for neo-classical professionalism in law and business. It shows how law and business function together at the base of our modern society, how lawyers and managers as neo-classical professionals are essential to the proper functioning of both the law and the market, and how we can sustain neo-classical professionalism without traditional institutions of occupational self-regulation.
Table of Contents
Introduction........................................................................................................................................3

A. The Background: Getting Beyond the Current Crisis of Confidence in Corporate Leadership .................................................................................................................................3

B. The Substance: Neo-Classical Professionalism in Law and Business .............................................8

C. The Form: A Metaphor of Remodeling along Neo-Classical Lines .............................................11
   I. The Functionalist Thesis: Classical Professionalism Theory ............................................................15
      A. The Function of Professions: Providing Special Knowledge ...........................................................18
      B. The Institutions of Professional Autonomy: Form Follows Function .........................................22

   II. The Dominance Antithesis: The Paradoxes of Classic Professionalism ...................................27
      A. Questioning Professionalism’s Ends ...............................................................................................28
      B. Questioning Professionalism as a Means .....................................................................................29

1. Questioning Professional Knowledge ..............................................................................................30
   a. Denial of a Legitimate Need for Specialized Knowledge ...............................................................30
   b. Denial of a Distinct Category of Professional Knowledge ............................................................31
   c. Denial of a Necessary Nexus between Professional Knowledge and Professional Institutions ..........................................................................................................................36

2. Questioning Professional Virtue ........................................................................................................40
   a. Client-Protective Virtue: Putting Client Interest above Professional Self-Interest .........................41
      (1) Denial of Special Client-Protective Virtue ..................................................................................41
      (2) Denial of a Necessary Nexus between Client-Protective Virtue and Professional Institutions ..........................................................................................................................43
   b. Public-Protective Virtue: Putting Public Interest above Both Professional Self-Interest and Client Interest .........................................................................................................................46
      (1) Denial of Special Public-Protective Virtue ..................................................................................47
      (2) Denial of a Sufficient Nexus between Client-Protective Virtue and Professional Institutions ..........................................................................................................................52
Introduction.

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. The introduction first explains why the remodeling of business management and corporate law is timely and why it needs to integrate both occupations. It then outlines the substance of that remodeling, the restoration of both law and management to their foundations in the classic social scientific theory of professionalism, which itself is ultimately grounded in classical philosophy’s fundamental claim to unite individual knowledge and virtue to serve the public good. Finally, it explains why the metaphor of remodeling is particularly appropriate for that task.

A. The Background: Getting Beyond the Current Crisis of Confidence in Corporate Leadership.

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.

---

6 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.

Something more basic is the matter. Managers and lawyers must also have 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.

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 (never mind retention bonuses), but malpractice liability, if not jail sentences (even if members of Congress should know better than to propose retroactive bills of attainder, not to mention ritual suicide). Backsliding into their dirty hands hardly seems the right direction for change.

So, beyond the predictable scapegoating and political grand-standing, 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

---


10 U.S. CONST. art. 1, § 9, cl. 3.


13 See, e.g., Sarbanes-Oxley Act of 2002, § 301 (requiring the establishment of special independent audit committees for public companies); § 307 (requiring securities attorneys to “report up” through management tiers upon discovering violations). See also Edmund L. Andrews & Vikas Bajaj, U.S. Plans $500,000 Cap
necessary. Maybe we need to restore the Depression-era firewall between investment and commercial banking; perhaps we should extend the SEC’s jurisdiction to cover derivatives in the future as we did stocks and bonds in the past; possibly we should allow federal take-overs of troubled insurance and investment giants even as our forebears did savings banks and thrift institutions. If even France and Germany can agree to call for greater financial regulation, can we completely ignore their message?

But, in the longer view, this all has a distinctively “déjà-vu all over again” look about it. Are we not gearing up to fight the next war with the weapons of the last, prescribing for the coming flu season last winter’s vaccine? Even as we look to the lessons of the Great Depression, are we not marching off to another Maginot Line, inoculated for the pandemic of 1919? Isn’t at least part of the lesson of the present crisis that we do not know the potential harm 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 necromancers in alliance with either the Devil or any Evil Empire. We ourselves, and our students, are the sorcerer’s apprentices who conjured them up. Today’s virulently toxic assets did not naturally evolved in some distant jungle, nor were the ticking derivative time-bombs a new generation of IED planted among us by some shadowy foreign foe. These Frankenstein monsters were patched together by Eagle Scouts in our nation’s economic and political capitals, even as those pathogens were being brewed by wunderkinds fresh from our very own law schools and MBA programs. 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

---


15 See David E. Sanger & Mark Landler, In Europe, Obama Faces Calls for Rules on Finances, N.Y. TIMES, April 1, 2009, at A1.
and their principals in the short run, jeopardized the financial security of the entire world later in the day. Our regulatory Neros may have fiddled while Rome caught fire, but it was law-abiding corporate lawyers and managers who both lit the bonfire and fanned the conflagration.

Candidate Obama found it difficult to staff his reformist campaign without hiring the very lobbyists he deplored; his senatorial mentor, marked for a major cabinet post, had to be passed over for personal income tax improprieties (even as we forgot that his dammably under-reported earnings came from thoroughly routine revolving door deals). The Treasury Secretary has survived a similar problem, even as he escapes the ironically lesser stigma of sitting, in his immediately prior Federal Reserve post, at the center of the very fiasco he is now to fix. And his idea of a fix is noticeably like his predecessor’s: save the world economy by bailing out former Wall Street colleagues. We have to wonder: Would it be too much to ask those colleagues and their counterparts to keep the public interest in mind, as more than an after-thought, in private practice as well as in public employment?

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; Justice Brandeis, when he was more the bar’s whipping boy than its poster child, 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, but classically republican. Perhaps resentment at automobile executives who fly corporate jets to ask Congress for federal bailouts bespeaks, not so much lumpen class-envy, as nostalgia for more Spartan management modes. Proffering the bitter cup of dollar-a-year salaries to corporate CEOs may well be mostly grandstanding. But there may be something greater there, too, a bit of the compliment envy pays to virtue, an echo of Alexander’s refusal to drink in the desert while his troops went without water. Jefferson eschewed a regal coach, walking to his inauguration in the new republic; Haruka Nishimatsu, the CEO of Japan Airlines, eats in the workers’ cafeteria, at least on camera.

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,

19 FREIDSON, supra note 4, at 214.
even Randian reactions, 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” in 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, 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 Friedson reminds us, professionals have always said they are committed to serving.

More soaring rhetoric, some of it now a century old. But fine words, even those most to our liking, don’t butter parsnips any better, much less reduce budget deficits more quickly. 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 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.

---


22 See GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, & ROGER C. CRAMTON, 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.”).

23 See also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 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.”)

24 BRANDEIS, The Opportunity in the Law, supra note 9, 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’”).
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.

We need to re-examine how the combined functioning of law and business is foundational to our society, and how, in turn, those occupations invite, and even demand, professionals with classical knowledge and virtue. In giving that broader and deeper account of professionalism in law and business, we will see that prior efforts along those lines have gone seriously awry. A better descriptive and normative account of the symbiotic relationship between corporate law and business management will, in turn, redefine the very notion of professionalism itself.

This study asks us to look 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 one 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.

B. The Substance: Neo-Classical Professionalism in Law and Business.

The remodeling of law and business this study recommends must necessarily be a large undertaking; current conventions about the length of law review articles require that it be done in two phases. This first phase takes us back to the origins of classic professionalism in law and business, the effort of social reformers like Brandeis and Tawney early in the last century to rebuild both law and business on a foundation of knowledge of the public good and commitment to its advancement. 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 to 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, even constitutional prohibitions. Liberal theory renounces legal compulsion of precisely what classic professionalism requires: belief in a particular vision of the good life, both personal and social. And our current constitution is, at least in that respect, liberal. 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.

The full unpacking of those paradoxes must await the second phase of this project. The final part of this first phase outlines that next task, tracing 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 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

---

26 Rob Atkinson, Remodeling the Temple, Phase II: Another Elevation of Classical Professionalism in Law and Business, (forthcoming) (on file with author and available at SSRN) [hereinafter Remodeling the Temple II].
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.

Identifying that common foundation cannot but imply a refocusing of professional education. As Tacitus lamented, long ago, of decaying public institutions not, alas, unlike our own, “How few were left who had seen the republic!” His remedy, of course, was education, even as it must be at least a part of ours. The role of liberal education in the preparation of managers has a very short history: in the training of lawyers, it has been honored much more in the breach than in the observance. In the last decade, indeed, it has hardly been honored at all, and rather widely disdained. The organized legal profession has, with increased stridence, insisted on skills training, with only the shallowest bow to liberal learning. If the bar’s public pronouncements are any guide, its idea of literary heavy-lifting is less Homer or Tacitus, and more Harper Lee’s To Kill a Mockingbird.

Nor has legal academia itself offered much of an alternative. It has, instead, met the bar’s lowered intellectual aim with its own narrowing of intellectual horizons toward increased specialization, particularly in the non-humanistic disciplines, physical science as well as social.

As we shall see, greater sophistication in modern social science is absolutely vital for both law and business; both fields certainly need more social science, not less. And the primary goal of graduate study in both law and business must remain what it has vital for both law and business; both fields certainly need more social science, not less. The role of liberal education in the preparation of managers has a very short history: in the training of lawyers, it has been honored much more in the breach than in the observance. In the last decade, indeed, it has hardly been honored at all, and rather widely disdained. The organized legal profession has, with increased stridence, insisted on skills training, with only the shallowest bow to liberal learning. If the bar’s public pronouncements are any guide, its idea of literary heavy-lifting is less Homer or Tacitus, and more Harper Lee’s To Kill a Mockingbird.

Nor has legal academia itself offered much of an alternative. It has, instead, met the bar’s lowered intellectual aim with its own narrowing of intellectual horizons toward increased specialization, particularly in the non-humanistic disciplines, physical science as well as social.

As we shall see, greater sophistication in modern social science is absolutely vital for both law and business; both fields certainly need more social science, not less. And the primary goal of graduate study in both law and business must remain what it has always been, preparation for practical work in the real world. But neither social scientific sophistication nor traditional skills training should come at the expense of the broad cultural education that Walter Scott and Lewis Brandeis had in mind, the kind of education that was supposed to be the very foundation of the traditional professions. To

---

28 Robert Aaron Gordon and James Edwin Howell, Higher Education for Business (1959) (“The vocational approach that has all too often characterized these schools in the past is now considered inadequate.”).
30 See Report of the [A.B.A.] Professionalism Committee, Teaching and Learning Professionalism 19 (1996) (“Providing a summer reading list on ethics and professionalism issues (e.g., To Kill a Mockingbird) to incoming students” recommended as means of teaching ethics and professionalism by the “pervasive method”).
33 See Anthony T. Kronman, Foreword to Legal Scholarship and Moral Education, 90 Yale L. J. 955, 959 (1981) (“The other techniques taught in law school can supplement this most basic skill, but despite the enormous curricular changes of the last sixty years, the skill of advocacy remains the cornerstone of all law-school instruction.”).
the extent that it has, we shall see, it hurts, rather than helps, law and business serve the public good. Precisely that fully-informed public service has always been the foundation for their claims to properly professional status, even as proper professionalism in law and business may now be our only real hope of sustainable economic and political recovery. In any case, it can hardly hurt to look; the opportunity costs are relatively low (and an unexamined life really may not be worth living).

C. The Form: A Metaphor of Remodeling along Neo-Classical Lines.

Before turning to the substance of our topic, consider what recommends the remodeling metaphor of my title. At the most general level, the use of metaphors is an ancient and honorable tradition in both political philosophy and the sociology of work. Perhaps most famously, theorists have always spoken of various occupations as parts of a “body politic.” When John of Salisbury elaborated this metaphor in the high middle ages, he both harkened back to the Apostle Paul’s Biblical metaphor of the Church as the body of Christ and anticipated Hobbes’s aggressively secular Leviathan.

Metaphors of buildings, like those of bodies, can also claim an ancient pedigree in social and political theory. In Plato’s Republic Socrates and his interlocutors set out to build a city of virtue; in the Jewish and Christian Scriptures the home of redeemed humanity is to be a city on a hill, the New Zion. Architectural metaphors have also long been applied to the legal profession; the American Bar Association itself has said, “Our profession is necessarily the keystone of the republican arch of government.” And architectural metaphors better fit our purposes here in several important ways. First, and most significantly, architectural metaphors are less deeply organic, and thus less implicitly essentialist, than anthropomorphic images. The latter heavily imply, not just that form follows function, but also that both form and function are pre-determined and fixed. Comparing society to a human body suggests not only that the systems and subsystems are as described, but also that they are as they should be, perhaps even as they must be.

To be sure, architectural metaphors also imply important, even essential, structures and systems – houses and cities, to cite the more common. But these structures...
and systems, essential though they are, are more amenable than the human body to alteration and re-design. The body politic as classically conceived cannot be re-engineered; at best, diseased members may have to be removed, crooked limbs straightened.

Individual buildings or entire cities, by contrast, can be remodeled, even razed.

This points to the second significant feature of the remodeling metaphor. It matches the scope of the project at hand: a blueprint for remodeling, not a masterplan for bulldozing and rebuilding. This project is admittedly radical but assuredly not revolutionary; it seeks to unearth the foundations of professionalism in order, not to destroy them, but to restore them, to shore them up.

On the one hand, as the metaphor of re-modeling implies, this project takes the foundations on which our legal and business systems respectively rest, our liberal democratic polity and our capitalist market economy, as basically sound and acceptable. The same even goes for much of the existing occupational structure of law and business themselves. This is not a plan to destroy these structures, much less to fundamentally disturb the deeper social institutions and value systems on which they rest.

On the other hand, the metaphor of re-modeling rightly implies that all is not entirely sound in the subject under study; rather, change is in order, and the extent of the change will be something more than routine maintenance and repair. And so the plan here is to make real, even radical, changes in corporate law and management. Before undertaking that, we must ensure that the structural changes we make in these occupations fit and follow their foundations without over-extending or straining them. To that end, we must begin with an examination of those foundations themselves. We must make sure that they are sound, able to support the structural changes we must make.

If the scope of this project is re-modeling, the style of that remodeling is distinctly neo-classical, in several basic respects. It attempts to restore the functionalist school of professionalism, traceable back at least to Weber, which flourished from Tawney and Brandeis early in the last century through Talcott Parsons at mid-century down to

---

44 Matthew 26:61 (Revised Standard) (“I am able to destroy the temple of God and rebuild it in three days”).
45 As we shall see, however, the neo-classical professionalism I outline is more liberal than democratic, and more capitalist than consumerist.
46 Cf. Matthew, supra note 44.
47 See Priest, supra note 4, at 108 (tracing notion of professions as modern “vocations” back to Weber’s work).
Eliot Friedson\textsuperscript{51} almost in the present day. This is, historically speaking, the classic theory of professionalism.\textsuperscript{52} As we shall see in more detail below, the hallmark of this school is that form follows function. In this respect, the classic social scientific theory of professionalism connects nicely with classical ethical and political theory, particularly that of Plato and Aristotle. For classical normative philosophers as for classic professionalism theorists, virtue is essentially a matter of form fitting and following function; more specifically, the ideal is that arrangement and operation of any given thing — object, person, or institution — in which it best performs its proper purpose.\textsuperscript{53}

This abstract, algebraic, understanding of virtue, form following function, is not all that the classic social scientific theory of professionalism shares with classical philosophy. The two also give their virtue essentially the same content: Flourishing individuals working together for the public good.\textsuperscript{54} In its Latin expression, of course, this focus on goodness in public affairs, or \textit{res publica}, makes classic professionalism theory, like classical political and ethical theory, literally republican. This brings us to another neo-classical element in my model. Mine, like theirs, is a republican theory, in several related ways. Most basically, following the functionalists,\textsuperscript{55} I ground it on a notion of the public interest identifiable above both what the aggregate of consumers demand in the market and what the majority of citizens vote for in elections. As a corollary, my version of republicanism welcomes a role for experts knowledgeable about the public good that is at least as great as that in classic professionalism\textsuperscript{57}, a role also reminiscent of the guardians of the republic in Plato’s \textit{Republic}.\textsuperscript{58}

But, of course, to invoke Plato’s \textit{Republic} is to invite censure in our own. As my title implies, my model is not strictly classical, but rather neo-classical. I readily concede that both the classic functionalist social scientists and the classical political and ethical...
theorists stand seriously in need of revision. In two critical respects, for our purposes, both were too confident of human rationality. In the first place, they both tended to believe that individuals, once shown the public good, will embrace it over against private interest; I am far less optimistic. In the second place, they both tended to believe that the public good was a matter of rational demonstration, rather than fundamental personal and political choice; I am deeply skeptical. Our neo-classical professional must address the very real possibility that, on both points, the personal and the political, classical philosophy and classic social science erred. We can safely defer discussing these twin problems until Phase II; here it is enough to say that my model reflects a much more chastened view of rationality than did the original. Its foundation is unashamedly classical virtue and republican values, but its structural integrity requires nothing more fundamental than shared knowledge of, and commitment to, those values and virtues.

My architectural metaphor does, however, foreground an even more worrisome aspect of my model. We can, and we do, design all sorts of buildings, from private homes to post offices, court houses, and capitols, in the neo-classical style. Why, then, have I chosen to remodel a temple? This seems in particularly great tension with the secular tendencies of both classical philosophy and modern social science, both of which my model must accommodate.

On closer inspection, the incongruity is not really great. At the very source of classical philosophy, we see a similar tension: Socrates always claimed both to listen to his own daemon and to take seriously the pronouncements of the oracle at Delphi; he emphatically pleaded innocent of the charge that he invented new gods and destroyed the old ones. Like the foundation of classical philosophy and its modern secular extensions, my system lets professionals hear their private daemons and take directions from them, but only so long as they themselves, in matters public, res publica, give public reasons.

---

59 PLATO, APOLOGY 38 (F.J. Church trans., Liberal Arts Press 1956) (Socrates’s reference to his having had from youth “a certain divine guide,” “a kind of voice” that sometimes held him back but never urged him to act).
60 Id. at 25-28; see also PLATO, PHAEDO 4 (F.J. Church trans., Liberal Arts Press 1951) (Stephanus IV) (Socrates’s heeding dream to practice music).
61 PLATO, APOLOGY, supra note 59, at 31-37.
The classic social scientific account of professionalism itself often employs a religious metaphor, the profession as priesthood. This was particularly common in the first phase of the movement, what we know in America as the Progressive Era. Thus, in recommending that the American Bar Association adopt its first code of ethics, the ABA’s exploratory committee declared “the lawyer is and must ever be the high priest at the shrine of justice,” wary of “enemies of the republic; not true ministers of her courts robed in the priestly garments of truth, honor and integrity.” These metaphors strike our post-modern ears as quaint, even jarring. But the religious metaphor has remained central, and with good reason, even in the work of the contemporary scholars like Eliot Freidson:

… it is because they claim to be a secular priesthood that serves such transcendent and self-evidently desirable values [values he elsewhere identifies as “Justice, Salvation, Beauty, Truth, Health, and Prosperity”] that professionals can claim independence of judgment and freedom of action rather than mere faithful service.

The temple of my title is nothing more – but also nothing less – than the shrine sacred to the drafters of the A.B.A.’s original Canons of Ethics, the meetinghouse of Freidson’s secular professional priesthood.

That metaphorical meetinghouse, then, should rest securely on its classical republican and modern social scientific foundations. That said, let me acknowledge a serious risk: My metaphor may alienate at least some readers, those who rightly fear incorporating religious idiom, much less religion itself, into public institutions. This is a fear I emphatically share; here I’m admittedly taking a risky turn. But the alternative, I need you to see, runs at least as great a risk.

Even as we try to avoid the notoriously unyielding ground of religious rhetoric, we must be mindful of an equally dangerous quagmire in the opposite direction. In trying to avoid making professionalism a religion or, worse still, a state religion, we risk reducing professionalism to a matter of purely private preference, even idiosyncrasy. My model offers a middle way, with these twin assurances: On the one hand, no one will be compelled to acknowledge the creed of the neo-classical professional temple or forced into its fellowship; on the other hand, no one who comes to share the faith of that temple will ever be alone, wondering if their way is merely idiosyncratic, even solipsistic. They will, rather, be backed by a host of heroes, ancient and modern secular saints, from

---

64 FREIDSON, supra note 4, at 122 (embedded citation omitted). See also THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA, supra note 9.
66 See FREIDSON, supra note 4, at 221 (“That refusal [to obey client, employer, or even legal demands] is based not on personal grounds of individual conscience or desire but on the professional grounds that the basic value or purpose of a discipline is being perverted.”); see also SIMON, supra note 49, at 15-18 (problems with grounding one’s professional responsibilities in private views of morality rather than in legal principles of justice).
Socrates through Lincoln to Brandeis and beyond, even as they are supported by a welcoming fellowship of friends.


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 an 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 Shaw, “conspiracies against the laity.” Thus, in its academic form, this position has

67 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).

68 For a brief but useful historical survey of this three-phased development, see Collins, Changing Conceptions, supra note 52, at 11-15.


70 G.B. Shaw, A Doctor’s Dilemma 16 (Penguin Books 1913).
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.\textsuperscript{71}

My own position belongs to a less tidy third group of theories, sometimes referred to as “post-revisionist.”\textsuperscript{72} These theories maintain, with more nuance if less grandness than either functionalist or dominance theory, that the truth lies between their extremes.\textsuperscript{73} 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, then, 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 essential kind of knowledge and virtue.\textsuperscript{74} According to the second

\textsuperscript{71} Collins, Changing Conceptions, supra note 52, at 13-14.

\textsuperscript{72} Id. at 14-15.

\textsuperscript{73} 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., FREIDSON, 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 (Roll Torstendahl & Michael Burrage, eds., (1990) (acknowledging she had initially “exaggerate[d] the importance of protected markets”).

\textsuperscript{74} 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
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. 75

**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 can secure from neither the market on the one hand nor the state on the other. 76 This answer was first theoretically articulated 77 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, strangers to the transaction between the provider of the service and its consumer. 78

With respect to consumers of professional services, the problem is what economists call information asymmetry. 80 The services in question are so unusual or complex that ordinary consumers cannot, at reasonable cost to themselves, independently possesses the character which knowledge of the subject confers… Then by the same reckoning a man who has learnt about right must be righteous. 79 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.

75 See Parsons, The Professions and Social Structure, supra note 50, at 458 (“…[T]he 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.”).
76 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.”).
77 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 SIMON, supra note 49, at 123 (noting close parallels between Progressives like Brandeis and functionalist sociologists like Parsons).
78 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).
80 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (Wolters Kluwer for Aspen Publish. 2007); MARK SEIDENFELD, MICROECONOMIC PRECURSORS 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?”).
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, caveate 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 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.

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--are 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. In the paradigmatic context of legal services--litigation--two examples,

---

81 DEBORAH L. RHOE & 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 79, at 490 (O'Connor, J., dissenting) (noting that ordinary fraud provisions cannot protect clients from lawyers' abuse of specialized knowledge).

82 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); BODEY 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).

83 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.").

84 See SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 123 ("The market is not viable because consumers lack the expertise to evaluate the quality of such services.").

85 See STEPHEN BREYER, REGULATION AND ITS REFORM 23 (1982) (presenting the elimination of "spillover" costs as the classical rationale for governmental regulation).
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.

The second example of an external cost in litigation is excessive zeal, here the problem is more a matter of degree than kind. 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.

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 better.

---

86. See Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 HARY. 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.”).
87. See Shapero, supra note 79, at 489 (citing “abuse of the discovery process” as an example of “overly zealous representation of the client's interests”).
88. See RHODE & LUBAN, supra note 81, 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, 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).
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 benefitting the client, and benefitting the client must be subordinate to, or coordinated with, benefitting, or at least not excessively harming, the public.

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.

More succinctly, if saccharinely, Roscoe Pound’s oft-quoted definition of profession, commissioned by the ABA, declares:

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.
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 serve.” As illustrations of such values, Freidson lists “Justice, Salvation, Beauty, Truth, Health, and Prosperity.” 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.

Furthermore, in functionalist theory, just as the values that professions purportedly 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.

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.

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 co-ordinate value of prosperity. Both to see why this recognition has not come to management in particular

94 ROYCE 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’LISM.
95 FREIDSON, supra note 4, at 122.
96 Id. at 122. For similar discussion, see also BRANDEIS, BUSINESS—A PROFESSION, supra note 3, at 4; R.H. TAWNEY, supra note 48, at 91-122 (“Industry as a Profession”); see also SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 123 (citing Brandeis and Talcott Parson’s argument for “the transformation of business management into a professional activity”).
97 Id. at 122. For similar discussion, see also BRANDEIS, BUSINESS—A PROFESSION, supra note 3, at 4; R.H. TAWNEY, supra note 48, at 91-122 (“Industry as a Profession”); see also SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 123 (citing Brandeis and Talcott Parson’s argument for “the transformation of business management into a professional activity”).
98 FREIDSON, supra note 4, at 59.
99 Id. at 161-62.
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 Professional Autonomy: Form Follows Function.**

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

---

100 Atkinson, *Dissenter’s Commentary*, supra note 65, at 272-73.
101 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”).
102 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 90, 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.”).
to the extent of expulsion, of those admitted. The reason for these putatively 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. 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, which is, by its very nature, difficult to reduce to bright-line, categorical rules. 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, then, 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.

What of the other problems with provision of professional services? We saw that professionals may not merely lack professional knowledge; they may also abuse it, 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, padding bills, overcharging. On the other hand, externalities pose the problem

103 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 “basic operating structures of the professions” as “corporate membership, controlled markets for their services, and monopolistic practices in training and recruitment”).

104 As we shall see, however, it need not be difficult for professionals in the employ of the law to assess.

105 FREIDSON, supra note 4, at 31. See also LUBAN, LAWYERS AND JUSTICE, supra note 91, at 170; SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 21-25 (identifying “practical reason” with his fundamental lawyerly attribute, “contextual judgment”).

106 FREIDSON, supra note 4, at 31; SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 123 (“Because such services depend on technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization.”).

107 FREIDSON, supra note 4, at 31-32.

108 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.
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.\textsuperscript{110}

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.\textsuperscript{111} 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.”\textsuperscript{112}

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. Lawyer may omit critical measures because they do not know those measures are critical; they may also \textit{omit} them, essential though they know them to be, as a means of cutting costs without corresponding reducing fees, thus improperly increasing their private gains. In either case, capturing the proper measure of effort in a mathematically precise rule is equally problematic.

With respect to public-protective virtue, there is a parallel problem:\textsuperscript{113} 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 overzealously, 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.

355 F.Supp. 491 (1973) (minimum fee schedules held to violate Sherman Act); \textit{see also} SIMON, \textit{THE PRACTICE OF JUSTICE}, supra note 49, at 125 (“The effort at market control has been largely abandoned.”).

\textsuperscript{110} Atkinson, \textit{Dissenter’s Commentary}, supra note 65, at 272-73.

\textsuperscript{111} \textit{See Edwards, Growing Disjunction, supra note 31, at 66 (“Good lawyers ... must sometimes ignore their own self-interest, or the self-interest of their clients”); SIMON, \textit{THE PRACTICE OF JUSTICE, supra} note 49, 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”).

\textsuperscript{112} Shapero, supra note 79, at 488-89 (O’Connor, J., dissenting).

\textsuperscript{113} Note that these problems apply both to regulations applied by the state and to laws invoked by private parties in litigation.
with Euclidian clarity, even though an expert may be able to mark it, in practice, to a
single moment.\footnote{See, e.g., \textit{Model Rules of Prof’l Conduct}, supra note 90, 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….”).}

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.\footnote{See Deborah Rhode, \textit{Moral Character as a Professional Credential}, 94 \textit{Yale L.J.} 491 (1985).} Second, the profession denies admission into its ranks to those lacking in the relevant virtues, under its “character and fitness” requirements.\footnote{See also \textit{Model Rules of Prof’l Conduct}, supra note 90, 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”); \textit{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.”).} 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.\footnote{Talcott Parsons, \textit{The Professions and Social Structure}, supra note 50, at 43-45; \textit{Freidson}, supra note 4, at 108. \textit{See also Model Rules of Prof’l Conduct}, supra note 90, 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”); \textit{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.”).}

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.\footnote{Talcott Parsons, \textit{The Professions and Social Structure}, supra note 50, at 43-45; \textit{Freidson}, supra note 4, at 108. \textit{See also Model Rules of Prof’l Conduct}, supra note 90, 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”); \textit{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.”).} Armed with this more extensive arsenal and able to take more precise aim at the problems of

\footnote{See, e.g., \textit{Model Rules of Prof’l Conduct}, supra note 90, 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….”).}

\footnote{\textit{Freidson}, supra note 4, at 95.}

\footnote{See Deborah Rhode, \textit{Moral Character as a Professional Credential}, 94 \textit{Yale L.J.} 491 (1985).}

\footnote{See also \textit{Model Rules of Prof’l Conduct}, supra note 90, 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”); \textit{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.”).}
professional misconduct, professions are actually able both to set their standards higher and to apply them with greater precision than either the law or the market. 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.” 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,” 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. 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.

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 sheeps’ clothing.

II. The Dominance Antithesis: The Paradoxes of Classic Professionalism.

---

120 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).

121 See SIMON, THE PRACTICE OF JUSTICE, supra note 49, 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.”).

122 MODEL RULES OF PROF’L CONDUCT, supra note 90, at Preamble [12].

123 FREIDSON, supra note 4, at 2.

124 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.”).

125 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 49, at 123 (noting Progressives’ and Functionalists’ expanding view of professions).
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 measure up against 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, more an identifiable tendency than a self-conscious movement. This tendency, theoretically if not quite perfectly historically, divides along two fault lines. One fault line divides those critics who question functionalism’s end from those who question its means. The critics on the former side of the line attack the underlying market capitalist, liberal democratic society that professionalism is said, in functionalist theory, to serve. The critics on the other side of this first fault line attack professionalism as a means of serving that society, but not that society itself.

The other fault line dividing dominance theorists runs through this second set of critics. It follows a distinction we have already identified within functionalist theory itself, between the virtue that restrains professions from harming their clients and the virtue that restrains them from harming third parties and the public. These instrumentalist critics of professionalism divide into those who focus on professionalism as a means to secure service to clients, protecting them from overreaching by the professionals they employ, and those who focus on professionalism as a means of protecting public interests from professionals in the employ of private clients.

The following analysis maps out these divisions of dominance theorists. It begins with the most radical school of critics, those who question the ends, rather than the means, of professionalism. As we shall see, this critique, though perhaps ultimately unanswerable, is for present purposes easily bracketed. Those who question professionalism as a means, on the other hand, raise much more serious problems, problems that functionalism, in its own terms, cannot solve.

A. Questioning Professionalism’s Ends.

Functionalists, as we have seen, hold that professions serve to provide a kind of knowledge and virtue not otherwise available from either the market or the state. This

---

assumes a vital, but typically only implicit, premise: that the kind of society that creates the need for this particular kind of knowledge and virtue is itself good, or desirable. Serving that kind of society is the end to which professions are merely a means. The most radical critics of professionalism question that end, more precisely, they question either or both of its two basic components, liberal democracy or market capitalism.

Answering those 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? The case for professionalism, thus stated, becomes an examination of the minor premise of a hypothetical imperative: If we want a society with a liberal democratic polity and a capitalist market economy, then you must have traditional professions as the necessary means to that end. Admittedly taking the major premise, the choice of liberal democracy and market capitalism, as given, we can now turn to those who question the minor premise: Are professions really necessary means to that kind of society?

B. Questioning Professionalism as a Means.

The bulk of functionalism’s critics share with functionalism itself a commitment to modern Western society. They question, not that society as an end, but professionalism as a means of advancing that end. If their critique is logically less

127 I’m obviously, though only implicitly, trading here on an ambiguity between that which is, as a matter of fact, desired, and that which should be, as a matter of obligation, desired. This distinction points to the possibility of an even deeper criticism of functionalism: that of metaethical skepticism. See J. L. Mackie, ETHICS: INVENTING RIGHT AND WRONG (1977). According to this position, we cannot objectively say of our society, or of anything else, that it is either good or bad. As Weber himself said, “speaking directly, the ultimately possible attitudes toward life are irreconcilable, and hence their struggle can never be brought to a final conclusion.” Max Weber, THE INTERPRETATION OF SOCIAL REALITY 152 (J. E. T. Eldridge ed. 1971). Post-modern political theory and moral philosophy have both pointed out the difficulty, perhaps impossibility, of proving ultimate visions of the public good, a fundamental assumption of original functionalists and their Progressive allies. See Simon, THE PRACTICE OF JUSTICE, supra note 49, at 124-25 (Progressives’ and Functionalist assumption that “the professionals’ own values converged with broader social norms”). I address that problem in Phase II. Here we need only note that my theory will be explicitly neo-classical. Classical theory assumed that the public ends of the professions were demonstrably good; my theory does not. It examines the foundations and shows that, even if they are not what the functionalists thought they were, they are sound enough.

128 Sometimes this is nostalgic, looking back to simpler, pre-industrial times. Sometimes it is Utopian, looking forward to a way of organizing complex industrial societies without the need for professional expertise. See Randall 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.”).

129 In questioning functionalism as a means, dominance theorists have open to them two basic tacks: They can and do argue, along consequentialist lines, that professionalism does not deliver as promised. They could also argue, along deontological lines, that professionalism, whether or not it delivers the knowledge
radical, in that it does not attack the end that professionalism is said to serve, it is nonetheless much more serious, precisely for that reason. It is an in-house, at-home critique from within the ranks of our society’s own supporters. It is to these positions that we now turn, taking them up in terms of the claim of the functionalist program that they attack: 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. To preview, again, our conclusion: 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.

1. Questioning Professional Knowledge.

Functionalists claim that professions provide their clients with a certain distinct and essential knowledge; critics raise two basic objections. First, and more radically, they argue that the necessity of putative professional knowledge is itself unnecessary; it 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, then exploit consumers of those services by dominating that market. Second, and less radically but more plausibly, dominance theorists maintain that, even if there is some such special knowledge, it is not analytically distinguishable from other 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.

a. Denial of a Legitimate Need for Specialized Knowledge.

As we have seen, all but the most radical critics of functionalism, including the principal exponents of the dominance school, embrace the functionalism’s chief end, a modern industrial economy and a rule-of-law polity. Significantly, no such society has ever existed without something readily recognizable as the kind of expert legal and virtue promised, delivers it in a way that is inherently wrong – as, for example, by elevating some members of society socially, economically, or otherwise over others, or by requiring professionals themselves to engage in inherently inappropriate role-determined behavior. This sort of argument is not typical of the mainstream of scholarly critiques, though it does sometimes figure into more popular accounts. It also shades imperceptibly into the critique of the ends of functionalism: Functionalism is an unacceptable means because it serves or produces an improperly hierarchical society. For both these reasons, I focus on consequentialist, as opposed to deontological, critiques.

130 See Margalit Larson, The Rise of Professionalism, supra note 69, at 14–16; Randall Collins, The Credential Society, supra note 128, at 1–21; Richard L. Abel, United States: The Contradictions of Professionalism, supra note 69. See also Collins, Changing Conceptions, supra note 52, 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”).

131 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.
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 and short on explaining away their apparently essentiality. 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 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. I will, accordingly, 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

---

133 See, e.g., Collins, Changing Conceptions, supra note 52, 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.

134 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.).

135 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).

136 Infra Part II. A.

137 Phase II, Part I, explores in more detail why this complexity is necessary in both law and management.

138 Modern China.
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.

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?\(^\text{140}\) 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 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 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.

\(^\text{140}\) See Collins, Changing Conceptions, supra note 52, at 13 (In the revisionist phase of theorizing about professionalism, “the question became more pointed as to what constituted the difference between professions and ordinary occupations.”).
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.”\(^{141}\) 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.\(^{142}\) But functionalists insist that professional knowledge is nonetheless distinct, in several related ways. Most fundamentally, professional education requires a university foundation.\(^{143}\) 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,”\(^{144}\) the ideal type professional “school is attached to institutions of higher learning.”\(^{145}\) 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.”\(^{146}\)

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,\(^{147}\) and it is taught at the university level.\(^{148}\) 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

---

\(^{141}\) Brandeis, Business – A Profession, supra note 3, at 2.

\(^{142}\) Freidson, supra note 4, at 22 (“it is possible to delineate skilled work as a discretionary specialization based upon everyday and practical, but not necessarily formal knowledge.”).

\(^{143}\) See Freidson’s own account, id. at 123: “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.” See also id. at 84, 86.

\(^{144}\) Id. at 91.

\(^{145}\) Id. at 92.

\(^{146}\) Id. at 92.

\(^{147}\) Brandeis, Business – A Profession, supra note 3, at 2-3.

\(^{148}\) See id. at 1 (“The establishment of business schools in our universities is a manifestation of the modern conception of business [as a profession].”).
that managers would invoke them as qualifications for their positions. Rather, they are more likely to invoke a capacity to rise above specialization….

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 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 general generalism, according to Friedson, “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

\[\text{\footnotesize 149} \text{ Freidson, supra note 4, at 121.} \]
\[\text{\footnotesize 150} \text{ Id.} \]
\[\text{\footnotesize 151} \text{ Id.} \]
\[\text{\footnotesize 152} \text{ See e.g., F. K. Ringer, Education and Society in Modern Europe 21 (1979) (“The ability to do without any special competence was clearly honorific…suggest[ing] the power to direct others, as against having to be useful and usable oneself.”); Collins, The Credential Society, supra note 128, at 189 (“It has been by the use of educational credentials that the lucrative professions have closed their ranks and upgraded their salaries, and it has been in imitation of their methods that other occupations have ‘professionalized.’“). See also Griggs v. Duke Power, 401 U.S. 424 (1971) (inappropriate to require higher education of employees when their job performance did not require that education and when that requirement tended to exclude Black applicants).} \]
\[\text{\footnotesize 153} \text{ See Max Weber, quoted in Collins, The Credential Society, supra note 128, at vii (“The old requirements of a knightly style of life … is nowadays in Germany replaced by the necessity of }\]
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.\footnote{See \textsc{Larson}, supra note 69; \textsc{Abel}, supra note 69.}

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,”\footnote{\textsc{Freidson}, supra note 4, at 103.} 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.\footnote{\textit{Id. at} 104.}

“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.\footnote{\textit{Id. at} 104.}

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 Phase II, 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 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 Friedson’s marriage of technical and general knowledge. Phase II of this project makes the case for precisely this kind of hybrid knowledge in management as well as in law. What we need to see here is that, even if such professional knowledge is necessary, it is not at all clear that it would require professional institutions to sustain it.

c. Denial of a Necessary 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 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.

See, e.g., MODEL RULES OF PROF’L CONDUCT, supra note 90, 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.

To explore this possible way of delivering on the functionalists’ promise to identify a specifically professional knowledge, we will have to go back in Phase II 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.”

158 See, e.g., MODEL RULES OF PROF’L CONDUCT, supra note 90, 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.

159 To explore this possible way of delivering on the functionalists’ promise to identify a specifically professional knowledge, we will have to go back in Phase II 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.”

37
To take the former problem first, as the functionalis\textsuperscript{160}ts themselves admit, 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-America 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 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 need, that is to say, shoring up, rather than abandoning. But that question may be mooted by another, more fundamental, question: Whether this element of professional control is necessary at all, or whether either the market or the state might be an equally or more effective guarantor of appropriate professional knowledge.

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.

\textsuperscript{160} FREIDSON, supra note 4, at 97.
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 of other systems of similar antiquity and

161 See id. at 19.
162 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 49, at 197-202. But the sanctions here are typically compensatory damages, and the level of performance they require may be quite low. As he points out, “malpractice is a matter of both tort liability and professional discipline.” As the Bar has always insisted, however, the standards of performance may not be the same, and those of professional discipline may be higher. My suggestion is that even these supposedly higher standards could be taken out of the hands of the profession itself and placed, not in the hands of lay jurors, but rather in the hands of professionally-educated, state-employed regulators.
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.\(^{163}\)

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, then, 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.

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.\(^{164}\)

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.\(^{165}\) And the choice

\(^{163}\) 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 1998) (discussing the tension between a “mechanical” jurisprudence and a discretionary one).

\(^{164}\) And, as we shall see, this difference itself is, upon deeper analysis, much more less significant than it seems on first face. At bottom, all professional self-regulation is itself dependent on the force of law, in all three of its phases, education, admission, and compliance monitoring. On the one hand, professional regulators have force of law; on the other hand, they are limited to same due process and other constraints as more direct means of state regulation. See infra, Denial of the Adequacy of Professional Institutions to Sustain Public-Protective Virtue, p. 52.

\(^{165}\) See COLLINS, THE CREDENTIAL SOCIETY, supra note 128, 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
between self-regulation and state-regulation need not be absolute.\textsuperscript{166} The state could be limited to the applying lesser penalties for violations of more demanding standards, leaving it 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. 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 institutions, even as dominance theorists assert. If we are to find a special need for professional organizational forms, we will have look for them elsewhere, as guarantors, not of professional knowledge, but of professional virtue.

2. Questioning 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.

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,\textsuperscript{168} there are two basic economic rationales for regulating the 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.”

\textsuperscript{166}See Simon, Practice of Justice, supra note 49 at 195-215 (outlining a system of lawyer regulation that incorporates elements of both state and professional enforcement).

\textsuperscript{168}See infra. Part I.a.
Critics attack professional virtue as a means of protecting both clients and the public. But these attacks come from very different directions, and one fares much better than the other. As to client protection, the challenge has not been rebutted; whether or not it can be rebutted, as we shall see, makes ultimately little difference to functionalism’s fundamental claim. 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 will prove to be distinct to proper 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. In this section, we simply identify that challenge, bracketing our response until Phase II.

What we need to see here is a derivative point, which is itself an irreparable breach in classic functionalism. Even if functionalists are right about the need for special public-protecting virtue, they are certainly wrong about its relationship to professional institutions. Unfortunately for functionalist theory, what we find when we look more closely at its claims about professional virtue is another, deeper paradox. Professions may well require a special virtue, even as they require a special knowledge. But professional institutions fare even more poorly as guarantors of professional virtue than they do as guarantors of professional knowledge. We saw in the last section that they are not necessary to guarantee professional knowledge; we will see in this section that they are profoundly inappropriate institutions to even undertake to guarantee the essential professional virtue. Professional institutions are very probably not necessary to guarantee true professional knowledge; professional institutions are demonstrable unfit, in both theory and practice, to ensure true professional virtue.

This paradox of professional virtue that we identify in this section is even more damaging to functionalist theory than the paradox of professional knowledge that we identified in the last section. To see why this is so, we must first examine each putative professional virtue, the client-protective and the public-protective, in greater detail, then examine functionalism’s claim that professional institutions are appropriate and adequate means for sustaining them.

### a. Client-Protective Virtue: Putting Client Interest above Professional Self-Interest.

Dominance theorists concede, even insist, that clients are indeed at risk of abuse by professionals of their special knowledge. But behind this concession are two critical points we need to notice. First, even if profession knowledge is special, the virtue required to protect clients from its abuse is not. Second, precisely because the client-
protective virtue required of professionals is not special, no special professional institutions are needed to guarantee it. We take up these two points in turn.

**1. Denial of Special Client-Protective Virtue**

A fundamental feature of advanced capitalism is what theorists long ago identified as the separation of ownership and control. The owners of most modern corporations are essentially passive investors who rely on the corporation’s management 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.

The first thing to note about these twin problems is that they 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.

As to stealing, the second risk professionals pose to their clients, the same considerations generally apply. A bunk janitor’s pocketing a few bundles of hundred dollars 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 didn’t fudge 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 the stuff of moral heroism than diligently doing the work one is paid for, whatever it is. By the same token, 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; as the legal profession itself concedes, essentially the same virtues underlie the very rule of law itself. If functionalism is to rely on virtue to distinguish professions from other occupations, it would do well to do better than this.

---


172 See MODEL RULES OF PROF’L CONDUCT, supra note 90, 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.”).
There is, of course, this difference. Professional lapses from garden variety “work ethic” virtue may not differ in kind from those of other agents, but they typically occur at a higher operational level. The job of lawyers and managers often is, structurally speaking, to ensure that subordinate agents do not shirk or steal. Not only are lawyers and managers sub-principals over lower-level agents; they are also sub-agents of higher-level principals. Ensuring that these watchers, as intermediate agents, actually do their watching raises the theoretical problem of infinite regress, the proverbial practical question of who watches the watchers.

Ideally, the question would be mooted by the presence of virtue, understood, in classical terms, as an internal orientation of the agent’s character that operates directly rather than through external monitoring or coercion. But there are two points to note here. First, even on this analysis, virtue that is needed is distinctly non-professional, or, more precisely, sub-professional. It is not related directly, if at all, to the specifically professional, as opposed to technical, knowledge that we have identified. To see why this is so, consider this: The problem of shirking and stealing would be solved even more elegantly in theory, and at far lower cost in practice, if we could instill work ethic virtue in non-professional workers themselves; diligence and honesty on the line would not only moot the question of diligence and honesty on the part of the staff designated to monitor that aspect of the line; it would also make that part of the staff redundant. If your herd never grazes past the pasture perimeter, you have no need for a border collie.

This is the second, and more significant, point. To assume the presence of work ethic virtue on the part of meta-agents like lawyers and managers is not to moot the question of who watches the watches; it is, rather, to beg it. Manifestly, not all managers and lawyers, left to their own devices, will be honest and diligent. Efforts to redress these problems are, of course, at the forefront of corporate law today. We cannot go into the full details of that debate here. But we do need to focus on one salient feature. Many of the remedial measures recommended and enacted aimed at market and legal, as opposed to professional, reforms: 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.\(^\text{174}\) This feature, of course, raises an obvious question: Are professional institutions really necessary to maintain the ordinary, work ethic virtues, of their members?

\(\text{2) Denial of a Necessary Nexus between Client-Protective Virtue and Professional Institutions.}\)

This is precisely the question dominance theory raises: 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? And this question can be, and has been, ratcheted up a notch: Don’t these professional institutions actually make clients worse rather than better off, if

not in an absolute sense, then relative to where they would be under some practicable combination of market and regulatory regimes? The special regime of professional self-regulation, on this view, does not protect lay principals from their professional agents; quite the opposite: It protects those agents themselves from both ordinary market forces and routine public regulation. Let us, then, re-examine each alternative, the market and the state, in turn.

To appreciate dominance theorists’ case for market measures, we must remember the way that law routinely guarantees performance of promises and other private obligations, ordinary civil suits for breach of contract or fiduciary duty. What we have already seen with respect to professional incompetence, or lack of professional knowledge, applies with equal force to professional malfeasance, lapses in professional virtue. Civil suits for intentional breach of professionals’ contracts and fiduciary duties are every bit as real an option as civil suits for inadvertent failure to perform up to requisite standards. Professionals implicitly promise honesty and reasonable diligence as well as competence; their loyalty is a fiduciary duty co-ordinate with their care.

We have seen how, in controlling incompetence, the law itself may supplement or supplant rigid rules with flexible standards, contrary to the functionalist assumption that such standards are the special province of professional, as opposed to state, regulation. The same may be true of malfeasance. Here, too, collective action problems associated with private enforcement, even of essentially private rights of contract and fiduciary duty, may be efficiently overcome by public monitoring and enforcement. And, here as there, prevention may, in some kinds of cases, be more cost-effective or fair than post hoc remedial measures. What is needed to supplement the market may be a knowledgeable, publicly subsidized monitor, not necessarily monitoring by the profession itself.

A plausible case can thus be made that some combination of market forces and state regulation already do work, or could readily be made to work, at least as well as, if not better than, autonomous professional discipline in matters of professional shirking and stealing. This is obviously an empirical question, and a fairly focused one. Everyone agrees on the underlying normative goal, client-protective virtue. No one denies that managers and lawyers, like other agents, should seek the good of their principals before their own; no one doubts that sometimes, left to their own devices, they don’t. Which regulatory regime best ensures that they do is what we need to know to answer the dominance critique at this point. That would involve a weighing of relative costs and benefits well beyond the scope of our inquiry (not to mention my competence).

---

175 See Abel, Why Does the ABA Promulgate Ethical Rules?, supra note 165, at 651 (“While government officials and isolated private lawyers have pushed for change [in the direction of more client-protective and public-protective rules], the organized profession has fought back and given in only under compulsion.”).
176 See supra, Part II.b.1(c), Denying the Nexus Between Professional Knowledge and Professional Institutions, p. 26.
177 See SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 125-26 (noting the declining importance of professional discipline relative to “extra-professional lawyer regulation through the malpractice system, court and legislature-imposed litigation rules, and the activities of specialized agencies like the Securities and Exchange Commission and the Office of Thrift Supervision” and concluding that this development “is desirable and does not threaten the important aspects of the professional project.”).
In the face of these imponderables, defenders of traditional professional autonomy can raise another point. Our analysis so far has focused only on detecting and sanctioning lapses of conduct after they occur; ideal-type professions have two other means at their disposal to help ensure client-protective professional virtue. As we have seen, ideal-type professions control both the education of their members and the entry of prospective members into full professional status. Here as elsewhere, an ounce of prevention may well be worth a pound of cure; here professional institutions may provide a particularly potent measure of prevention: Not the merely deterrent effect of threatened punishment, but the engrained inclination to do what the law requires even in the absence of credible threats of external punishment. What professionalism’s institutions may provide, in other words, is not practitioners who always get it right for clients, but professionals who really try to do what’s right for clients, in a way that the law’s regulatory regime cannot effectively replicate. This is not professional discipline for those who lapse, but rather professional encouragement of those who try hard, or professional recruiting of those who will try hard, be both competent and honest.

Plausible though this account is, it nonetheless raises an obvious question about each professional institution: How effectively can professional schools inculcate the appropriate values, and how effectively can the professional admissions process screen for the relevant character traits? Serious doubts have long been raised on both points.

Even granting professional claims on all these points, though, we come immediately to another problem, which is simply the other side of this story. Just as the state can offer a post-admission regulatory regime parallel to that of the professions themselves, so also the state can operate its own educational and admissions systems. As we shall see in more detail later, the state does similarly screen for “bad apples” in both non-professional occupations and traditional professions other than the law. And, in education as in admissions screening, state institutions also parallel those of the professions. Take the case of what many consider a paradigmatic if pre-modern profession, the higher levels of military command.

---

178 See FREIDSON, supra note 4, at 101 (“In all, it is reasonable to assume that one consequence of ideal-type professional schooling is to the students’ commitment to and identification with the occupation.”).
179 See Deborah Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491 (1985); ABA Blueprint, supra, at 16 (noting that “Some observers might suggest that the values and mores of law students are fixed before they enter law school.”).
181 See Thomas D. Morgan and Ronald D. Rotunda, Professional Responsibility 24 (10th ed. 2008) (“In the Middle Ages, it was said that there were four professions: the military, who professed peace; the medical doctors, who professed health; the clergy, who professed God; and lawyers, who professed justice.”); see also SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND THE POLITICS OF CIVIL-MILITARY RELATIONS 7 (19th ed., Harvard University Press 2002) (1957) (“The modern officer corps is a professional body and the modern military officer a professional man.”).
has always been of the utmost importance; here our government, like virtually every other, undertakes the relevant training in institutions of its own. Our service academies don’t just teach weapons handling and military strategy and tactics; they also teach “officer and a gentleman” values, especially a “chain of command” ethos that ensures, at the outer margin, absolute loyalty to civilian authority, subject to international human rights law.

Faced with these state-run alternatives to professional control of education and entry, we come to a familiar impasse: unproved, probably unprovable, empirical claims of relatively greater efficacy. We cannot know, with respect to screening and education before admission, any more than with respect to regulation after admission, whether traditional professional control ensures client-protective virtue better than the state itself could.

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. But functionalists also have little to lose, because 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.


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-protecting 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

182 See Philip H. Hope, An Explanation of Ancient Terms and Measures of Land, with Some Account of Old Tenures 40 (2008) (describing the elaborate oaths of homage and fealty required of tenants during the time of Edward II. The oath of homage had an immediate relation with tenants’ service in war: “I become your man from this day forth, for my life, for my member, and for worldly honour, and shall owe you my faith for the land I hold of you; saving the faith that I owe unto our Sovereign Lord the King, and to mine other lords.”).

183 Roberto J. Gonzalez, American Counterinsurgency: Human Science and Human Terrain (Prickly Paradigm Press 2009); Victor Davis Hanson, Carnage and Culture: Landmark Battles in the Rise of Western Power (Doubleday 2001).
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.** The fatal flaw lies in functionalism’s demand on professionalism’s distinctive institutions: Even assuming functionalists could mend the split between occupational ethicists on public-regarding virtue, they fail to show how that virtue could be sustained by professionalism’s special institutions. 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.

**(1) Denial of Special Public-Protective Virtue.**

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…. [It 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.]

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.

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, and he rightly insists that that call strikes at the very soul of classic professionalism. He fails to see, however, that threat cannot be met within the framework of traditional professional institutions.

---

184 Freidson, supra note 4, at 122 (embedded citation omitted).
185 Id.
186 Id. at 179-96 (“The Assault on Professionalism”).
187 Id. at 197-222 (“The Soul of Professionalism”).
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 neoclassical professional must be structured, but whether it need exist at all, 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

189 LUBAN, LAWYERS AND JUSTICE, supra note 91, at 174 (quoting WILLIAM H. HERNDON & JESSE W. WEIK, 2 HERDON’S LINCOLN 345 (1889)).
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?

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 and lay their charge much deeper and more precisely: Professionals’ subordination of clients’ interests to the supposed public interest is much too real; it is but 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. By constraining their efforts on behalf of clients within limits narrower than profitability in the market and legality in the law, 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.

On this view, when professionals practice incompetently or cut corners, they 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

---

191 See Luban, Lawyers and Justice, supra note 91, at 160-61 (using the term moral activism for this position in legal ethics); see also Atkinson, Come, Let Us Reason Together, supra note 7, at 485-87 (discussing various other terms for this position).
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
principals’ legal and moral entitlements.

Nor, from this perspective, is that the end of the problem with activism, or even
the worst of it. Activism 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, activist lawyers’ and
managers’ efforts to impose public norms on their clients breach the agents’ duty to both
the public and the client. Activism is a breach of 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 activism is a breach of duty to the public, because it is through the
market and the law that public ends are systemically advanced 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. On 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 activist in business and legal ethics, the
absolute negation of functionalism’s claims about professions’ distinctive virtues.192
Where activism urges lawyers and managers 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.193 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

192 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.
193 See Atkinson, Come, Let Us Reason Together, supra note 7, at 487.
194 Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE
L.J. 1060 (1976) [hereinafter Lawyer as Friend].
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 goodservice.”195 Similarly, the corporate manager’s proper occupational role is to maximize profits; as stated by its one its earliest and most aggressive advocates, “the social responsibility of a corporation is to make a profit.”196

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 doubled 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 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.\textsuperscript{197}

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 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. 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 Phase II.\textsuperscript{198}

Here, we need only to see that the very difficulty, if not impossibility, of proving neutralism wrong 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.

\textsuperscript{197} SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 7-8 (on “Dominant View.”)

\textsuperscript{198} 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.”).
Denial of a Sufficient Nexus between Client-Protective Virtue and Professional Institutions.

The very existence of neutralism as an articulable (even if not particularly plausible) 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 look, first, at why neither the market nor routine legal regulation could produce the requisite professional virtue of functionalism. This conclusion, of course, is good news for functionalism; it strongly suggests the need for professional institutions as a necessary corrective.

But then we reach rock bottom, and there we find, not a fitting foundation for functionalism’s cornerstone, but a chasm it cannot bridge, the irreconcilable split between activists and neutralists about the need for public-protective virtue. The very existence of neutralism in law and business means that traditional institutions of professionalism cannot guarantee the kind of activist, client-protective virtue that functionalism needs to ground one of the twin bases of classic professionalism, the necessary complement of professional knowledge. Neutralism, as we have seen, is the very antithesis of the public-regarding, activist virtue that functionalism claims the institutions of professional must establish and sustain. The division between neutralism and activism, we must now see, denies functionalism its necessary foundation.

To make that point, we must proceed hypothetically; we must assume, without proving, the necessity of functionalism’s special public-protecting virtue. We must assume, that is, that professionals should sometimes subordinate client interests, though both legal and profitable, to opposed public interests. Even assuming functionalism has made the case for this substantive thesis about professionalism’s essential virtue, it cannot ground its essential formal thesis about professionalism’s institutions as sufficient guarantors of that virtue. Taking functionalism’s substantive thesis about professional virtue as given, then, we raise 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?

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 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) Comparative 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 or 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. 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 a more than plausible economic argument can be made that 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 deflection 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.\textsuperscript{201} 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, from penalty fees (discouraging some behavior by internalizing external costs) and incentive payments (encouraging other behavior by internalizing external benefits), through outright prohibition of the inefficient practice or mandating of the efficient practice, to the outer limit of direct state provision of the relevant services. This spectrum of statist measures should be employed, in theory, up to the point at which the cost of implementing and operating them equals the benefits they provide, 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.

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\textsuperscript{203} and client-protecting virtue,\textsuperscript{204} law as a functioning system has long

\textsuperscript{201} See FREIDSON, supra note 4, at 179-96.
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.

To see why this is so, we must look in some detail at what a legal regime to ensure public-regarding virtue would have to do. As a first step, consider how much more the law would have to do here than with respect to what we have already considered, the guaranteeing either professional knowledge or client-protective virtue. As we have seen, that latter task, stating and applying the appropriate metric, even in the form of flexible standards rather than rigid rules, was difficult enough. In general, did the lawyer deploy the right mix of skills to advance the client’s legitimate legal claim? More specifically, did the lawyer not only properly invoke the right rules, but also apply them properly to balance likely costs to the client against likely benefits to the client? Did the litigator, for example, not only know when it was technically proper to object to opposing counsel’s proffers of evidence or line of questions, but also when it was tactically appropriate to forgo objections that might have cost too much in sympathy with the jury or tried beyond limit the patience of the judge?

At the end of this admittedly difficult set of calculations, according to classic professionalism, the lawyer faces a distinctly different, and even more difficult, set of issues: Is there some way that I can use the rules of procedure, broadly defined, to the advantage of my client and the expense of my opponent, even though that use is not how those rules were intended? Can I use the rules of discovery, not to uncover information helpful to my client, but to bury my client’s opponent in the proverbial avalanche of paperwork? Can I exploit gaps in the rules of evidence to introduce evidence which, even though the judge instructs the jury to disregard it, will nevertheless taint their thinking in a way those very rules are designed to avoid? In its more aggressive modes, neutralism countenances, even requires, just such conduct.

The prevailing rules of professional conduct clearly forbid such conduct, upon pain, at least in theory, of their full range of sanctions, from reprimand to disbarment, enforceable in separate disciplinary matters brought before the bar’s quasi-autonomous regulatory regime. Thus, for example, A.B.A. Model Rule 3.2 goes beyond forbidding dilatory tactics to requiring lawyers to expedite litigation; its official comment makes clear that delay only to gain client advantage is sanctionably improper. In the same vein, Model Rule 3.4 forbids both “fail[ure] to make reasonably diligent effort to comply with a legally proper discovery request” and “allud[ing] to any matter that the lawyer does not reasonably believe is relevant or will be supported by admissible evidence.” Significantly, judges also have it in their power to sanction this conduct, both as an

205 Model Rules of Prof’l Conduct, supra note 90, at R. 3.2.
206 Id. at R. 3.4 (d).
207 Id. at R. 3.4 (e).
inherent attribute of their office and as an explicit grant of the rules of professional misconduct in most jurisdictions.\footnote{See, e.g. R. Reg. Fla. Bar 3-3.1.} In both contexts, we need to see, this kind of conduct is profoundly difficult to detect, even under the most flexible set of standards.

What these particular rules seem to derive from can be stated quite easily as a meta-standard of proper professional conduct in matters of procedure: \textit{Use the rules of procedure, broadly defined to include the rules of evidence, only as they were meant to be used, that is, as adjuncts to producing a trial on the appropriate evidence, to a procedurally correct outcome.}\footnote{See Lon Fuller and John D. Randall, Professional Responsibility: Report of the Joint Conference 44 A.B.A. J. 1159, 1161 (1958).} This procedural meta-standard would thus mandate, in effect, that the first order procedural rules be followed in spirit, not merely to the letter.

If we adopted an especially aggressive form of activism, favored by some of its more recent and sophisticated proponents,\footnote{Simon, The Practice of Justice, supra note 49, at 173-74.} we would make our meta-rule even more problematic: \textit{Apply the rules, not merely to guarantee fair procedure, but also to promote a substantively just outcome.} Thus, for example, lawyer would be called on to make their own independent judgment of whether discrediting a truthful witness, although perfectly in accord with proper procedure and conducted completely in the presence of a neutral judge, was in fact appropriate as a means of arriving at a just result. Not all activists go that far; we ourselves need not, to see the critical point: Although such a meta-procedural principle can thus be specified in the abstract, it is hard to see how it could ever be given adequate content, much less effectively enforced, even in its weaker, fair-process version, much less its more aggressive, fair-outcome version.

Here the regime of legal regulation runs into a basic problem, essentially a paradox, if not an antinomy: To ensure that lawyers provide the public benefits associated with the proper practice of law, we would need the letter of the law to compel compliance with the spirit of the law. But this threatens to place us in an infinite regress: Lawyers inclined to bend other laws to the will of their clients would be inclined to bend this law in just the same way, creating the need for yet another law, calling for this meta-law, too, to be used in the proper way, and so on, potentially ad infinitum.\footnote{See John F. Sutton, Jr., Outlawing Unjust Rules of Law: A Response to Quibbles, 67 Tex. L. Rev. 1517 (1989) (parodying as a solution to legal but unjust results obtained by litigation a proposal to “Enact yet another law — but this time, an awesomely overriding law that outlaws lawyers’ ‘quibbling.’”)} The law, that is, would need not only to specify the difficult line at which appropriate pro-client zeal becomes excessive; it would also need to mandate that the lawyer actually try to strike that ideal balance rather than try systematically tip it, in application, always in favor of the client. The letter of a particular law that would require lawyers to seek the spirit of all law is thus paradoxical on its face, and almost certainly impossible to apply.
In the words of one commentator, “How is it possible for rules to mandate higher standards than the rules require?”²¹²

To offset complexity and rigidity, the system’s designers could build in relatively more standards than rules. But the gain in simplicity and flexibility would surely come at the cost of predictability. The more play in the system for discretionary enforcement, the more difficulty lawyers would have knowing, in advance, which of their “calls” would be “safe,” and which subject to sanction.²¹³

This problem, in turn, would force system designers to run either of two risks. On the one hand, they could err on the side of caution, relying only on less severe sanctions like public, or even merely private, reprimands.²¹⁴ At some point, however, such sanctions would surely pale into insignificance, perhaps not before the cost of imposing them on a wide range of conduct in a large number of cases became unbearably expensive. On the other hand, at the risk of over-deterrence, designers could impose relatively harsh penalties. But, at some point, the application of harsh penalties for violation of vague standards would run afoul of fundamental notions of fairness, notions embedded in constitutional requirements of clear penal statutes and voiding for vagueness even overly hazy civil prohibitions, particularly where fundamental rights are involved.²¹⁵ Surely such interests would be implicated if, for example, lawyers were threatened with disbarment as the penalty for failing adequately to balance the wide and shifting array of factors we have identified as relevant to determining when a particular procedural move was intended to advance strategic client advantage rather than the rule’s proper, process-enhancing purpose (not to mention failing adequately to assess how to apply the relevant procedural rules to advance a just outcome).

And this is only the beginning; ensuring public-protective virtue of the kind essential to classical professionalism would place much greater demands on the law. So far, we have been considering only procedural law, albeit in the broad sense that includes evidence as well as “civil procedure” proper. Even here, as we have seen, it is essentially impossible to design a meta-law that would compel professionals to use the law only for

²¹³ See Atkinson, Dissenter’s Commentary, supra note 65, at 298-302 (summarizing arguments against excessive discretion in sanctioning litigational abuse).
²¹⁵ See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L.REV. 67, 75-85 (1960) (“[T]he doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.”); see also Abel, Why Does the ABA Promulgate Ethical Rules, supra note 165, at 542 (“The very lawyers who drafted the [ABA Model] Rules would be the first to attack them as unconstitutionally vague if they were defending a client accused of violating them.”) (citation omitted).
the public good, to achieve “procedurally proper” results (let alone right outcomes on the merits). It is important to see that, even if such a law were possible, it would not be nearly enough to ensure the public-protective virtue that is essential to functionalist professionalism.

For one thing, the line between process and substance is notoriously unstable. Sometimes process simply consumes substance. Consider, again, the example of Lincoln.217 Suppose that the widow debtor did once lawfully owe Lincoln’s client six hundred dollars, but that that debt is now past the relevant statute of limitations. If she has no lawyer, and if Lincoln is under no obligation even to tell her to consult a lawyer before paying off the loan, she may well unknowingly forfeit her right not to pay under a body of law that stands ambiguously at the border of substance and process.

Or, to move into ground that is most certainly substantive, assume her debt is not time-barred, but superseded by a statutory homestead protection.219 If she has a competent lawyer, that lawyer will almost certainly assert that protection and prevail against Lincoln’s client; if she has no lawyer, she will lose her home despite a directly relevant substantive legal protection. Here the necessary step in achieving the legally appropriate result is one the widow may not know, without benefit of counsel, to take: Consult a lawyer. (All the worse, of course, if she can’t afford a lawyer.) Thus Lincoln faces a dilemma: To ensure that the legal issues are fairly aired in the homestead situation we have described, Lincoln should suggest that the widow consult a lawyer; if he does suggest that, he essentially undercuts his client’s personal interest in getting paid.

Such examples could, of course, be multiplied at will; this one is enough to see the problem of assuring public-protective virtue with a purely meta-procedural rule: Applied in this case, it will not have Lincoln do what we know he would do, what we admire him for doing, what functionalist professionalism needs all lawyers to be required to do. If Lincoln would not help his client assert a claim to which the client is indisputably entitled as a matter of law, then he surely would not help him collect on a debt that is, also as a matter of law, not due him at all.

What impresses us in the Lincoln anecdote is not that Lincoln litigated the young creditor’s case against the poor widow with scrupulous attention to guaranteeing her a procedurally fair trial before a neutral tribunal. That would be the Lincoln neutralists would admire. Rather, we are impressed that Lincoln at least tried to talk his client out of pursuing his perfectly legal claim at all, and apparently refused to help him if he did. As this example indicates, we want our public-protective virtue to apply to substance as well as process; we want our lawyers to ensure, not just fair trials, but also just outcomes.

217 LUBAN, LAWYERS AND JUSTICE, supra note 91, at 174 (quoting WILLIAM H. HERNDON & JESSE W. WEIK, 2 HERDON’S LINCOLN 345, supra note 189).

219 See 735 ILL. COMP. STAT. 5/12-901.
What’s more, it is not just our incipient activist sentiments that are in play here. We also need a substantive component of our public protective virtue to complement what we identified as truly professional knowledge, the combination of both technical expertise and deep humanistic learning. Only technical expertise is really required of public-protective virtue to implement fair and efficient procedure; all the lawyer would need to know is the way a trial is supposed to work, and perhaps why it is supposed to work that way, not what a substantively just outcome would be in any given case. Even in deciding whether to let procedure overwhelm substance, all the lawyer would need to know is the legal substance. Thus, in our homestead example, in order to know that he should recommend that the widow consult a lawyer of her own, all Lincoln would need to know is the (likely) validity of her defense against his client’s claim.

By contrast, to produce the kind of result that our Lincoln anecdote actually holds up to us, we need much more. The lawyer needs to know, as we believe Lincoln knew, which legally meritorious cases are nonetheless inappropriate to bring on account of the interests of third parties or the public. To know that, a lawyer must know what justice is only then can the lawyer determine when to pursue it.

In making this determination, in Lincoln’s case and many others, the letter of the relevant substantive law will not be very helpful. The law of creditors’ rights does not say, nor can it be expected to say, “In deciding whether to press an otherwise valid claim, factor in these elements: debtor need as compared to creditor need, including, on both sides of the equation, the declining marginal utility of money.” And yet that is precisely the result we admire Lawyer Lincoln for promoting, and, more generally, the kind of result classic professionalism needs lawyers to promote. Classic professionalism is not merely about what means are appropriate for professionals to take to advance their principals’ ends; it is also about whether to override principals’ ends in the name of conflicting, public ends. This is the claim that Friedson rightly sees as the foundation of classic professionalism: The professional ideology of service goes beyond serving others’ choices. That result flows from a meta-substantive law nicely parallel to our meta-procedural law: In applying all law, seek to do substantive justice.\(^{220}\)

Unfortunately for functionalism, no meta-law of substance, supplemental to our “primary” law of matters like debt, can work any better here than our parallel meta-law of procedure worked to constrain procedural abuses. We can, again, imagine such a meta-law: Advance the legal rights of your clients only to the extent that that will promote the public good, or justice. Here again, though, it would be impossible to formulate that standard with enough clarity to avoid void-for-vagueness challenges. We need lawyers to exercise their own conscientious discretion in such matters, and “abuse of discretion” is a notoriously porous standard of review. As with our procedural meta-law, the more we try to write a rule specifying all the relevant factors and striking the right balances among them, the more hopelessly complex and unhelpfully rigid our substantive meta-law becomes; on the other hand, the more we move in the other direction, toward the

\(^{220}\) It is no accident that the title of the two leading texts on activism in legal ethics make this point: LUBAN, LAWYERS AND JUSTICE, supra note 91; SIMON, THE PRACTICE OF JUSTICE, supra note 49.
generality and flexibility of standards, the less guidance we give conscientious lawyers and the more maneuvering room we give to the unscrupulous.

All this added weight – consideration of third party concerns along with those of the client – and all this added scope – covering advising as well as litigating – would make a legally enforceable regime of public-protected virtue hopelessly difficult to design, much less operate. It would inevitably fail, and fail it has – more precisely, so have failed the law’s effort to solve two related, but much less complex problems, the assertion of substantive claims that are either legally groundless or maliciously motivated. A brief examination of these twin failures underscores the hopelessness of the much more ambitious goal of legally enforcing public-protective virtue.\(^221\)

Let’s consider, first, the law’s failure meaningful to limit the assertion of claims beyond the limits of current law. So far, we have been considering the application of a primary substantive law already “on the books.” We first assumed, with Lincoln, that the widow was legally obliged, beyond dispute, to repay his client’s loan; we then assumed that she had some valid defense or other under existing law: the statute of limitations, a homestead exemption, or a usury prohibition. To get at the insurmountable difficulty of a meta-substantive law requiring the application of such primary laws to achieve justice, we need to add a slight complication to our hypothetical. We need to assume that, although the widow has a substantive defense under existing law, it is a defense that Lincoln could legally attack.

To see the problems such an attack poses, let us set an admittedly radically counter-factual stage. Assume Lincoln survived the fateful night at Ford’s Theater, successfully ushered the Civil War Amendments to ratification, and finished out his second term in triumph. Following Washington in the tradition of Cincinnatus, he retired from public service to his previous private employment, not as a gentleman farmer, but, better for our purposes, as a country lawyer. Suppose Lincoln’s current creditor-client is an old established Chicago bank. The bank wants to challenge long-standing state usury laws as violating the newly-minted Fourteenth Amendment on “substantive due process” grounds. This would be a case of emphatically first impression.\(^223\)

What should Lincoln consider in deciding whether to attack the statute as violating, say, the obligation of contract? Note, first, that, under neutralist principles, he would have only one relevant consideration: Is there any legal impediment to bringing this substantive claim? Were he trying to answer that question under modern procedural

\(^221\) The following analysis builds upon that of Atkinson, Dissenter’s Commentary, supra note 65, at 283-84.

\(^223\) Unless the meaning of the Fourteenth Amendment is clear and the court is profoundly originalist, Lincoln, to prevail, as we shall see, must argue that what’s good for the bank is good for the country; this, in turn, requires him to know, or plausibly claim to know, the public good.
law, he would encounter this restriction in Federal Rule of Civil Procedure 11: By presenting any paper to the court, a lawyer is certifying that “the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”

With the benefit of our hindsight, we know how very nearly totally the law has failed to give enforceable meaning to that restriction. What we need to see now is one particularly discredited step in the evolution of modern Rule 11, the so-called “clean heart, empty head” defense. Before Rule 11’s amendment in 1983, the term modifying “argument for the modification… or reversal of existing law” was “good faith,” rather than “non-frivolous.” “Reading ‘good faith’ to protect arguments made in innocent ignorance of existing law gave rise to a hopelessly open-ended ‘pure heart, empty head defense that was explicitly rejected by both the 1983 amendments to Rule 11 and the ABA’s 1983 Model Rules.”

But removing radical subjectivity of the “pure heart, empty head” defense, has led to an equally open-ended reading of the supposedly objective standard of frivolity. Now lawyers cannot claim the safe harbor of the clean heart/ empty head defense, but neither are they much at risk of being sanctioned for arguing for a change in existing law. About all that aspect of Rule 11 now forbids is patently ridiculous arguments, or arguments that would essentially make a mockery of stare decisis, i.e., calling for the overruling of yesterday’s precedent almost literally tomorrow. To cabin purely strategic lawsuits filed for no legitimate public purpose, Rule 11 tries to bar claims that are not merely likely to lose, but utterly without legal foundation; to avoid chilling conscientious efforts to expand the law in legitimate directions, Rule 11 allows all arguments for legal change that are “nonfrivolous”—without defining that critical term. If this is not question-begging, it is very close indeed.

Our own public-protective meta-substantive law, we can now see, would have to undertake two tasks even more ambitious than the one at which Rule 11 has conspicuously failed. First, as to arguments for change in law, we need to ensure the lawyer’s belief, not merely that the change is legally plausible, but also that it is a movement in the right direction, or at least what the lawyer believes is the right direction, toward what is actually just, truly in the public interest. What we need is not merely a law that forbids lawyers to bring frivolous claims, claims that would move the law too far (or too fast), but also a law that forbids lawyers to bring claims that they believe are against the public interest, that is, in the wrong direction. Here we would need a rule just against claims that cannot be argued as likely changes in law, but also claims that should not be argued as changes in law because such a change would contravene the public interest. It would have to invoke, that is, not just objectively identifiable standards of future legality, but, beyond that, objectively identifiable standards of future justice.

225 See Atkinson, Dissenter’s Commentary, supra note 65, at 289.

226 Id. at 292.
Nor is that all our own meta-substantive law would require; what activists want, and what classic professionalism demands, is for the law to manage an even more ambitious task. It must deploy the pro-justice filter, not just to arguments for the changing of law, but also for the invocation of any law, including existing law. The meta-standard that functionalism needs here would have vastly greater scope than Rule 11: not just claims beyond the edge of existing law, but claims squarely in the center of the most firmly established law. That, remember, was precisely our paradigm case: Lincoln’s widow with her debt legally due. The history of Rule 11 indicates that law cannot effectively stop lawyers from filing plausible arguments for a change in legally valid defenses to that debt, much less arguments for changes that the lawyer does not believe would be substantively just. It would be much more of a stretch to require that lawyers decline to press claims under current law on the grounds that they were unjust.

Here the utter failure of a second prong of meta-substantive law is also relevant: Efforts to forbid asserting legally valid claims for improper purposes. The law has tried and failed, not only to forbid the bringing of objectively frivolous claims, but also the bringing of objectively legitimate claims for bad motives. Three identifiable bodies of law have tried to forbid, under three different regulatory regimes and three distinct systems of sanctions, bringing even entirely legitimate claims for purely malicious purposes: Federal Rule of Civil Procedure 11, ABA Model Rule 3.1 and its predecessors, and the common law tort of malicious prosecution. The appealing assumption of each of these parallel efforts seems to have been this: Even though a client may have an entirely legitimate entitlement, its exercise is of no benefit, from the public perspective, if the client’s motive is solely to enjoy the vexation of another. Modern Shylocks, on this view, should not be allowed to extract their metaphorical pounds of flesh simply to have their Antonios harmed, even if that harm is not literally fatal. And thus, in some cases, the law is still so: I cannot build a high wall, even entirely on my own land, simply to watch the flowers on your northerly neighboring land shrivel in the permanent shadows I could cast upon you.

Beyond such spite fence cases, however, the anti-malice rules have utterly failed, and have been withdrawn or abandoned. One reason is directly relevant to the problem of ensuring public-protecting virtue by legal means. Malice, being a mental state, is hard, and thus costly, to prove, and corresponding cheap, and easy, to deny and conceal. What is more, false denials may be especially easy for the least honest, and those may well include, perversely, the most malicious. The anti-malice rules thus proved virtually impossible, and perhaps even perverse, to enforce; it has collapsed not once, but three times, in three distinct areas of law.

The same enforcement problems would occur with even greater force to a law mandating public-regarding virtue on the part of lawyers and managers. Malice, even if it could be prohibited, would be both under- and over-inclusive for our purposes. It is

---

227 The following analysis builds upon that of Atkinson, Dissenter’s Commentary, supra note 65 at 28-37. See Timothy G. Ash & Timothy Snyder, Ukraine: The Orange Revolution, The N.Y. Rev. of Books, April 28, 2005 for a treatment of the sequence of peaceful, democratic “color” revolutions in Central and Eastern Europe over the past twenty years.
over-inclusive because, at least in some cases, it might be outweighed by other, publicly beneficial factors outside the client’s ill will. Thus, for example, even if a client sues to close down a terribly polluting factory solely because he hates the owner or manager, closing down the factory is entirely appropriate on independent grounds. A rule forbidding all suits brought out of malice would thus, for our purposes, be overly broad.

Conversely, we do not particularly care if Lincoln’s creditor is Springfield’s Protestant Christian Shylock; on his motives, our anecdote is tellingly silent. It’s not his motive, however bad they may be, that bother us; it’s the bad effect of his law suit on the widow and her family. This points to the other problem with the prohibition of maliciously motivated suits: it would be under-inclusive as well as over-inclusive. Its aim is merely to eliminate an identifiably bad motive, spite; we need a law that mandates broader and vaguer good motives, namely, acting in the public interest. This latter, affirmative requirement would inevitably produce many plausible differences of opinion – some doubtlessly genuine, some undoubtedly feigned. Any latitude allowed for honest differences of opinion could be exploited as a cover for what some, in their true but secret opinion, believe to be only the interest of their client, not in the interest of the public. Any “tightening” to catch such dishonesty would threaten to chill conscientious, public-spirited assertions of client rights.

This problem would be compounded to the extent that the appropriateness of asserting a legally valid claim is broadly rather than narrowly framed. Our rule would have to incorporate the wisdom of the mandate “Choose your battles” and a complementary prohibition against being Quixotic. What seems to benefit the client at the expense of the public in the short run may be defended as public-spirited in the long run. After the Velvet Revolution, countless time-serves and apparatchiks claimed, sometimes quite plausibly, always to have been “reform Communists” in the closet, secretly but bravely boring from within; Mr. Schindler, for all the manufacturing he did for the Reich, undeniably saved the lives of many Jews. And yet, taken to its logical extreme, this broadening of perspective collapses into neutralism itself, the argument that pursuing what is good for the client redounds, generally if not inevitably, to the public good.

Practical problems in implementation, then, would almost certainly preclude both the procedural and substantive meta-rules the law would need to guarantee public-protective virtue of activism against its neutralist, client-before-public antithesis. Now we need to face an even more basic problem, a problem with our meta-rules in principle, not just in practice. To get at this problem, we need to turn from advising clients and litigating on their behalf to legislative lobbying for them. This last is the most serious example of how the liberal law cannot, consistent with its own substantive constraints, compel public-regarding virtue with a meta-substantive standard. And, as we shall see, that difficulty infects the application of any such standard in both litigation and advising as well.

---

Suppose Lincoln loses his Fourteen Amendment challenge to Illinois’ usury statute; the federal courts hold, up to the United States Supreme Court, that Illinois’s statutory restrictions on interest rates do not deny lenders (or borrowers) any substantive due process right, under the new Fourteenth Amendment, to freedom of contract. Down but not out, the Chicago bank asks Lincoln to try another line of attack. They want him to help them lobby for legislative relief, either an Illinois repeal of the state usury statute or a federal statute preempting it under, say, the commerce clause. Under neutralist principles, Lincoln should be prepared to make whatever argument is most compelling for the position of his client; under the activist principle that functionalist professionalism implies, he should consider whether that position advances the public interest as well.

Here the proto-typical activist, Brandeis himself famously balked at lawyer “neutralism.” 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; in legislation, he observed, these critical protections were absent, and the risk of publicly harmful outcomes correspondingly great. He called, accordingly, for lawyerly self-constraint to protect the public interest, and that call is still at the foundation of activist public-protective virtue.

But, it is important to note, Brandeis’s call was 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, consistent with his own principles and those of liberalism more generally. The point to see is this: Any meta-law embodying Brandeis’s principal is not only unworkable; 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: Lobby or otherwise petition government only for laws you believe to be in the public interest; conversely, 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 would 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.

---

232 **BRANDEIS, The Opportunity in the Law, supra** note 9, at 340. See SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 133 (“Brandeisians tended to ignore litigation, and by implication to concede that the Dominant View [neutralism] might still be appropriate there.”).

233 **BRANDEIS, The Opportunity in the Law, supra** note 9, at 340-41.

234 Id. at 343.

Litigation, of course, is simply another form of petitioning government; a ban on improper motivation would hardly withstand constitutional challenge there. Consider, again, the failed rule against maliciously-motivated law suits. We have already examined one problem with that rule, the difficulty of isolating the bad motive. Now we need to consider an even more intractable problem.

To state the matter most starkly, Shylock has always had his defenders (and not just against the anti-Semitism of his nominally Christian compatriots). No less a jurisprudential luminary than von Jhering, indeed, makes Shylock the very model of law’s proper development.236 If, so the argument runs, one has a legal right, why should he not be allowed to exercise it, whatever his motive, be it malice toward one or misanthropy toward all? On this view, Shylock lost, not because his motive was homicidally malicious, but because the law blinked, rightly or wrongly, about having quite so direct a role in quite so severe a physical injury. On both the left and right of the modern political spectrum, one hears distinct echoes of von Jhering. On the left, “Whim, caprice, irrationality and “antisocial” activities are given the protection of law: the owner [of property] may do what all or most of his neighbors decry”237; on the right, “Those who exercise absolute rights in a capricious fashion pay for their folly by losing their markets.”238 Lest there be any doubt, neutralists explicitly embrace representing Shylock’s position as professionally appropriate.

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.

239 See Fried, Lawyer as Friend, supra note 195, at 1088.
240 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).
State-mandated public-protective virtue is thus impossible, both in practice and in principle. Procedural activism would require that lawyers only use procedural rules according to their fundamental purpose, achieving fair resolution of conflicting legal claims. But such a principle, though easy to state, would be practically impossible to meaningfully enforce. More importantly, even if it worked, it would not do the work functionalism requires of its public-protecting virtue: declining, at least at some points, to pursue clients’ ends against the interest of the public. For that, functionalism needs substantive activism, the mandate of which would be to use all law, not just procedural law, to advance the public interest. But the legal enforcement of that mandate is doubly damned: it would far more practically difficult than enforcing procedural activism, and it would involve violation of fundamental values of liberal law, if not the letter of the First Amendment itself.

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. It would make sense to see if the state might utilize either of these other approaches. But neither of these will work here, for reasons closely parallel to those we have already seen undermine any possible legal regime of post-admission sanctions. Neither could work in practice; neither would be allowed in principle.

Consider, first, the possibility of screening applicants at the point of admission. Rather than try, hopelessly, to catch those who violate the law’s purpose after admission, why not simply screen out those who would not even try? What we need, after all, is virtue, commitment to the public good. Why not simply screen out those who lack it, up front, applying sort of legal filter for professional commitment to doing “the right thing.”

The law clearly operates on similar premises with respect to other occupations. No convicted pedophiles shall be kindergarten teachers; no one with contagious TB shall work in food services. Few felons of any kind may serve as military officers or public school teachers. 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.” As with regulation of lawyers once admitted, however, this screening already shows signs of strain, 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 devilish difficult to test for, and exceptionally easy to fake. Character and fitness screening, as we have seen, is a weak

---

244 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).
245 See, e.g. RULES OF THE FLORIDA SUPREME COURT RELATING TO ADMISSION TO THE BAR R. 12-2.
246 See Deborah Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985).
and dubious method of identifying even garden variety virtue like honesty.\textsuperscript{247} 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 have, or 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, 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{248} 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{249} Our constitution banned them explicitly even before the First Amendment banned them more generally with the Free Exercise and Establishment Clauses.\textsuperscript{250} 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{251} Under that test, even those

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{247} See supra pp. 41-42.
\item \textsuperscript{248} 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.floridabaronline.org/tnb/TFBProfess.nsf/5d2a29f983dc81ef85256709006a486a04e9eb581538255a85256b2f006ced?OpenDocument.
\item \textsuperscript{249} See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1421 (1990) (recounting the history of British Test Acts).
\item \textsuperscript{250} 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.”). \textsuperscript{251} See Law Students Civil Rights Council, Inc., v. Wadmond, 401 U.S. 154 (1971); see also Thomas D. Morgan and Ronald D. Rotunda, Professional Responsibility: Problems and Materials 36 n.6 (9th ed. 2006) (summarizing Supreme Court cases).
\end{itemize}
\end{footnotesize}
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
tow the activist party line on public-protective professional virtue.

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.\textsuperscript{252}
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.

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.

Silly as it seems on its face, this radical reliance on professional education has had
very serious proponents.\textsuperscript{253} Several apparent problems are easily dismissed. The law
could not, of course, forbid the teaching of neutralism, any more than it could forbid the

(noting the ineffectiveness of loyalty oaths used to uncover subversives).
\textsuperscript{253} See, e.g., FREIDSON, supra note 4, at 123.
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 jurisprudence. 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.

256 See SIMON, THE PRACTICE OF JUSTICE, supra note 49, 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 65, at 333 (outlining ways for courts to encourage activist professionalism without trying to make it mandatory).
258 Shapero, supra note 79.
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; 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. 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 where, as we have seen in the section, 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; the regulatory regime of law, by contrast, cannot weave its regulatory net tightly enough to exclude neutralist practices, much less neutralists themselves.

259 See supra pp. 47-51.
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 no, they cannot; the somewhat surprising reason is that 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.

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

---

261 See FREIDSON, supra note 4, at 3 (“monopoly is essential to professionalism”); 121 (“Ideal-type professionalism is always dependent on the direct support of the state….”).

262 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.”);
This fundamental feature of “professional autonomy” is a profound paradox: Every phase of the professions’ much-vaunted self-government 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.

Professions are, in this critical respect, like vassal fiefdoms within a feudal kingdom, not fully independent realms. Professions make the regulations applicable to their members, police those regulations through their own internal enforcement mechanism, and adjudicate alleged violations of those regulations in their own tribunals. At each phase, they claim to perform better than the state operating through its routine instrumentalities: the legislature, the civil administrative agencies and public prosecutors, and the courts. But the effect of the professions’ internal regulations is, critically, extraterritorial; it affects, not just their internal affairs, but their members’ interactions with outsiders in the market. In a liberal state, limitations on any citizen’s basic liberty of trading their labor in the market must be in accord with the full panoply of legal protections, including procedural and substantive due process. As we saw in the last section, those limitations prevent the state itself from mandating public-regarding virtue; those same limitations, we now need to see, apply with equal force to the profession, which in this vital respects are but vassals of the sovereign state.

Put another way, the limited autonomy of the professions is closer to that of an established religion like the Church of England than that of any American counterpart. Professions members are thought to perform vital public functions, and are accordingly granted a state-backed monopoly over the delivery of those services. But that monopoly comes at a cost: Subordination to the state’s ultimate regulatory authority. Only the Archbishop of Canterbury can perform the baptisms and marriages and funerals of the English monarchs; he serves, if not at the pleasure of the monarch, then fully subject, in the performance of all his official duties, to the laws of the King or Queen in Parliament. “Dissenting” Protestant ministers, Roman Catholic priests, Jewish rabbis, and Islamic imams all answer only to their denominations in matters of faith; every Church of England official answers, in all official functions, to the law. And so it is with law’s metaphorical ministers, lawyers, and all other professionals as well.

This legal impasse has led, as I have argued elsewhere, to the contemporary professionalism crusade. Precisely these problems with legally mandating a particular vision of professional virtue has 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\textsuperscript{263} – they cannot bear the weight that classical functionalism requires, guaranteeing public professional virtue more effectively than other social institutions, private or public.

\textsuperscript{263} Atkinson, \textit{Dissenter’s Commentary}, supra note 65.
Most basically, their very structure precludes their even purporting to serve this purpose. They would need to do they cannot do legally. They cannot, by their very nature, be either universal or binding. If they were, they would simply run afoul of the problems we have already examined; if they are not, then they cannot, *ex hypothesi*, guarantee the required virtue on the part of all professionals.

For another thing, these same non-coercive, hortatory means are also be available to the state, at least to some extent. Surely the courts, even the legislature or the executive, could take steps to make the activist alternative known, even if the state could not recommend it as superior, much less mandate it to the exclusion of neutralist alternatives. As we have seen, the state could surely require the teaching of activism in its schools of law, even as it can require the teaching of Buddhism. Similarly, the state itself could directly sponsor programs on activism, along the lines of Radio-Free Europe’s promotion of democracy and capitalism.

If the state did even a very little along these lines to promote activism, it would be substantially ahead of the organized legal profession. Here we need to note something else, quite significant, about the current spate of “professionalism” standards, and about the professionalism movement more generally. 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.  

Significantly, none of its professional manifestoes – no, not one -- includes any call to do justice by sometimes elevating 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 inimical 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 homes.

---

264 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.” SIMON, THE PRACTICE OF JUSTICE, supra note 49, at 196 (citation omitted).
home – as long as the lawyer acts courteously toward all, with proper regard for procedural regularity.

There is, it must be noted, one final way for the profession to promote activist professionalism. It could come, not from practicing members of the profession, but from academic professionals. Thus, in the case of the legal profession, the ultimate support of distinctly professional virtue would come, not from practicing lawyers or sitting judges, but from the writings and teachings of law professors. Not, on its face, a particularly prepossessing prospect. But advocates of classic professionalism (particularly those in the academy) have always placed an extraordinary faith in professional education at precisely this point. 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, ideal-typical 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.\(^\text{266}\)

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 relevant to us, 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 state and the ruling class”). 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.”

\(^{266}\) Freidson, supra note 4, at 123.
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.

The persistence of neutralism as an alternative vision of professional virtue not only demands at least the deferral of functionalist’s dream of academically-ensured professional virtue. It also places the profession in precisely the position of the state on this point. As we have seen, the internal regulations of the profession must ultimately pass all the requirements of liberal theory and constitutional law; as relevant here, the profession, like the state, is precluded from banning the teaching of neutralism or, on the other hand, mandating the teaching of activism as the one true way.

That limit still leaves open one educational option. We saw in the last section that the state itself could undertake one plausible approach to promoting public-regarding virtue without violating either liberal principles or Constitutional protections: Require that public protective virtue be taught to all aspiring professionals, not as the one true way, but as one possibly viable way among others, including among those others its nemesis, neutralism. The profession itself could certainly impose the same requirement, and aspiring professionals might choose the activist way over against all opposed alternatives. As we have already seen, however, this is a dubious claim; it seems unlikely that, presented in this way, public protective virtue would sweep all before it, as functionalists implies would be necessary for professional services to be properly delivered.

Furthermore, even this educational regime worked, that itself would place functionalism in the bind we have already indentified. It would have to show that professionalism’s own educational institutions are somehow superior to those of the state in making this sort of presentation. It should come as a least something of an embarrassment that 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.

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 classic professionalism cannot provide. This can, as we have seen, lead to the pure proceduralism and emphatic politeness of the contemporary professionalism movement, a dead end of classic professional aspiration.

To read these latter-day professionalism statements is to be reminded of Grant Gilmore’s grim old dichotomy:

The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb.... The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.\(^{267}\)

To the pure process of this legalistic Hell, today’s professionalism movement has nothing to add but a veneer of professional courtesy, a fig leaf that is barely a cover, much less a corrective. From this antinomian Heaven, classic professionalism has nothing to hope, law itself has no help to offer.

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.


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 functionalist rests on two fundamental tenets, one about function, the other about form. According to the first, functional tenet, 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.

What is more, we have 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. 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 framework of what our survey has found may be sound and

269 See supra p. 32.
salvageable – lawyers’ and managers’ knowing and serving the public good -- we may be able to re-found the temple of neo-classical professionalism. But we cannot fully explore that prospect here; that must be the job of Phase II of my re-modelling project, *An Elevation of Neo-Classical Professionalism in Law and Business*. The recent trend toward shorter law reviews\(^{270}\) requires that Phase II, though already written,\(^{271}\) be published elsewhere.

The space remaining here only permits an outline of what that second phase must involve. 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 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 existence means that professional institutions cannot guarantee what functionalism holds to be an essential virtue in their members.

\(^{270}\) See Joint Statement Regarding Articles Length, supra note 25.

\(^{271}\) Atkinson, Remodeling the Temple II, supra note 26.
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 temple of neo-classical professionalism will thus be best situated in a neo-classical republic, even a remodeling of Plato’s republic. Our temple would not displace that city’s capitol or executive offices or court house, much less its stock market or commodities exchange. But that city’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 to the Republic

In the perfect polity, Plato is often thought 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.272

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 of 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.

272 *Plato, The Republic*, supra note 37, at 280-81 (Steph. 592).
This needs to be moved below. Professionals will certainly disagree, not just whether a particular course of action advances the public good in a particular case, but also over what the public good really is in that case. They will disagree, for example, not only over how much harm a particular course of action causes the public, as compared to the good it does for a client, but also on where that balance should be struck. Here we have a difference of opinion that is not empirical — the determination of what the cost/benefit balance is — but purely normative, what that balance should be.

[moved from above; needs moving below and smoothing in] In the case we are now considering, the conflict between activists and neutralists, it will always be possible to make a critical, non-empirical claim: In an imperfect world, it is better — normatively superior — to have the second-best outcome produced by one system over the other. [this last sentence needs unpacking.] This move is possible because the two systems do not merely make competing claims about how well they advance shared values; they also rank those values differently. Social justice on the part of traditional professionalism; individual autonomy on the part of its laissez-faire alternatives. We do not need to resolve that dispute here; we take it up again in Part II. All we need to here is recognize it as a dispute, and a dispute that is normative, not empirical.

Perhaps also over who should strike the balance, private lawyers like Lincoln acting privately, or public officials corralling only violations of the letter of the law.

We set such balances all the time; the problem here is that we are trying to take debate about balance-setting off the table. This is a kind of meta-balance, a decision, not about a particular balance, but about how balancing should be done. Thus even more radical than anti-petition rule about slavery. That took one issue off the table; this takes a whole mode of otherwise legal issue-resolution off the table.

[maybe drop this reference] We have had just such a rule, although on a much smaller scale; it became the by-word for anti-liberalism in our law: the notorious prohibition on opening up anti-slavery debate in Congress.¹

¹ Cite. [Mr. A: I cannot find the rule to which you refer. Matt: don’t worry for now; I may drop this anyway]