How Should We Theorize Class Interests in Thinking about Professional Regulation: The Early NAACP as a Case Example

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HOW SHOULD WE THEORIZE CLASS INTERESTS IN THINKING ABOUT PROFESSIONAL REGULATION?: THE EARLY NAACP AS A CASE EXAMPLE

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INTRODUCTION

The Editors of the Cornell Journal of Law and Public Policy have specifically requested that I address in this essay some research I finished quite a while ago, but to which I hope to return in the near future, concerning the history of the first national legal committee of the National Association for the Advancement of Colored People (NAACP).¹ Therefore, I plan to raise a big picture question left unanswered by that earlier research here: how should we understand lawyers' class interests in relation to their involvement in the development of legal ethics rules concerning public interest law practice? This is a question that David Wilkins led me to think about as a result of his comments on some research I published on the first national legal committee of the NAACP.²

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² Wilkins Response, supra note 1.
I will argue here that a fruitful avenue for further research on the intersection between class interests and professional regulation in the arena of public interest\(^3\) law is a focus on the operation of elite lawyers' power in this context. This approach would seek to formulate ethical meanings and values that encourage lawyers to become involved in public interest projects, but also impose strong norms compelling restraint and critical reflection about lawyers' use of their power in this context.

To present this argument, I first briefly summarize my research on the first national legal committee of the NAACP and Wilkins' reaction to my conclusions. I then sketch some of the leading approaches to the question of how to theorize class interests in the development of professional ethics rules. Finally, I end with some preliminary conclusions and future research directions.

I. THE EARLY NAACP

I begin my summary of my research on the early NAACP by quoting heavily from my chief article on the subject, in order to dispel misconceptions that might otherwise be created by commentary later in this symposium edition.

I opened that article by setting the stage for the NAACP's founding, explaining:

By the late nineteenth century, African-American lawyers working in local communities had begun to experiment with the use of citizens' organizing committees to challenge racial injustice. *Plessy v. Ferguson* was such a case. African-American lawyer Louis Andre Martinet organized a Citizens Committee to oppose Louisiana's newly enacted "separate car" law which prohibited African-Americans from riding in train cars with whites and called for making a "test case" to challenge the law's

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\(^3\) I use the term "public interest" here, despite its highly contested meanings, because that is the term we have received historically to refer to lawyers' involvement in projects for progressive social change. *See generally* Susan Carle, *Re-valuing Lawyering for Middle-Income Clients*, 70 *Fordham L. Rev.* 719, 729–30 (2001) (discussing contested definitions of public interest law). The working definition of public interest law I like best is that which focuses on the representation of otherwise under-represented interests, as in the Council for Public Interest Law's definition:

Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

constitutionality... These efforts resulted in a carefully planned confrontation presenting the facts underlying *Plessy v. Ferguson*, which may be the first example of a civil rights organization using the "test case" terminology to describe a litigation strategy leading to the U.S. Supreme Court.

By the turn of the century several civil rights organizations aspiring to national status had adopted the test case concept to describe their litigation agendas. . . . [T]he Constitution League—founded by industrialist John Milholland and staffed by African-American lawyer Gildchrist Stewart, both of whom would go on to play roles in the NAACP—likewise articulated plans to sponsor test cases in the courts.

The most impressive effort to organize a national civil rights organization to sponsor test cases prior to the founding of the NAACP was the Niagara Movement, an African-American group organized in 1905 at a meeting in Niagara Falls, New York. . . . [T]he Niagara Movement's platform demanded civil rights in strong and unqualified terms. Its founding documents, drafted primarily by [W.E.B.] Du Bois, articulated a plan to "push test cases in the courts" challenging Jim Crow cars and other practices. To this end, the Niagara Movement's founders established a "legal department" to oversee nationally coordinated civil rights work. Active in the department were lawyers such as W. Ashbie Hawkins, who would later play a key role at the local level in early NAACP litigation campaigns. The Niagara Movement successfully challenged unequal accommodations in interstate carriers before the Interstate Commerce Commission and took part in other civil rights cases. . . .

I then described the founding and operation of the NAACP's first national legal committee, which directed the organization's legal strategy in its earliest years.

As I explained:

Many of the lawyers who were pioneering creative public impact litigation techniques in civil rights cases at the

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4 *Legal Ethics and the Early NAACP*, supra note 1, at 101–02 (footnotes and citations omitted).
time were African-Americans but none of them was on the NAACP legal committee. These lawyers included not only prominent activists such as McGhee and Hawkins, formerly of the Niagara Movement, but also African-Americans who were staff members at the NAACP's New York offices, such as C. Ames Brooks, an associate at William Wherry's law firm, who served for a short time as "general attorney" for the NAACP in its national office.

Another prominent African-American lawyer and civil rights activist, Gilchrist Stewart, had served on the New York City Vigilance Committee but was not among the lawyers transferred to the national committee. Stewart, an immigration lawyer in New York City, had been the head of the New York Vigilance Committee before its merger with the national committee. Active in organizing the Constitution League, Stewart had been employed as an organizer and lawyer for the Constitution League, with funding provided by John Milholland, the wealthy manufacturer who later served on the NAACP's Board of Directors. Stewart had also been allied with the Niagara Movement and was active in progressive Republican politics in New York City.5

I described the role Hawkins played in devising the argument underlying one of the NAACP's early victories, Buchanan v. Warley,6 as follows:

As was often the case, an African-American lawyer working at the local level had done the initial work in formulating the arguments to challenge these residential segregation ordinances. That lawyer was William Ashbie Hawkins, formerly of the Niagara Movement, who subsequently built an NAACP branch in Baltimore.7

And I contrasted the early NAACP national legal committee's role as follows:

The NAACP did not want to shut down all competing civil rights litigation, however; such local experiments were a source of new ideas that the NAACP might ap-

5 Id. at 113–14 (citations and footnotes omitted).
6 245 U.S. 60 (1917).
7 Legal Ethics in the Early NAACP, supra note 1, at 124-25.
appropriate for its national campaigns. On the other hand, the NAACP wanted sufficient involvement to allow it to take credit for as many civil rights victories as possible. Even more important, the NAACP wanted to be able to halt local efforts that appeared headed for disaster, since adverse decisions could damage the rapidly developing body of civil rights case law.\(^8\)

Here, I was describing the NAACP in its earliest years — the period between 1910 and 1920, right after its founding.\(^9\) This was at least ten years before the most visionary lawyers of NCAAP fame, such as Charles Hamilton Houston and Thurgood Marshall, arrived on the scene. During this very early period, a small group of mostly white, elite New York City practitioners managed the NAACP's national legal affairs.\(^10\) In another article, which I discuss further below, I contrasted this early period with Houston and Marshall's ethics experiences while at the NAACP’s helm in the 1930s and later.\(^11\)

A. MY RESEARCH QUESTION

I became interested in the first national legal committee of the NAACP because of a project I researched before turning to the NAACP, in which I investigated the lawyers involved in drafting the first national model canons of professional responsibility adopted by the American Bar Association (ABA) in 1908.\(^12\) I've told the story behind that ABA committee elsewhere,\(^13\) so I will not repeat myself; for the purposes of this topic, the relevant facts are that one of the commentators during the process surrounding adoption of the 1908 canons was Charles Anderson Boston. Boston practiced in a small, elite New York City law firm and spent most of his professional time as an organizer and leader of bar committees, especially in the area of legal ethics.\(^14\) Having read Boston's legal ethics speeches and reports, I knew that he was a fairly typical "Progressive Era"\(^15\) champion of moderate reform causes, who deeply

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\(^{8}\) Id. at 122–123; see also id. at 123–25 (describing NAACP's decision not to become involved in McCabe case pioneered by non-NAACP affiliated African-American lawyers).

\(^{9}\) See generally id. at 100–08.

\(^{10}\) Id. at 105–15.

\(^{11}\) See From Buchanan to Button, supra note 1.


\(^{13}\) Susan Carle, Lawyers’ Duty to Do Justice: A New Look At the History of the 1908 Canons, 24 LAW & SOC. INQUIRY 1 (1999).

\(^{14}\) Legal Ethics in the Early NAACP, supra note 1, at 109–10.

\(^{15}\) I use this term as shorthand to capture a certain kind of optimistic, “can-do” mindset among elite lawyer-reformer types in the early years of the twentieth century, rather than to designate a definitive period in United States history. Cf. Arthur S. Link & Richard L.
and passionately believed in the project of improving and enforcing legal ethics law. I then saw Boston's name on a list of national legal committee members for the NAACP, which had already begun devising test case litigation strategies that were in tension with traditional legal ethics laws, as I will explain further below. The more I looked into this topic, the more interested I became, as I found that the early NAACP was very actively pursuing some quite unconventional litigation strategies.

By unconventional, I do not mean that lawyers had not previously been using these strategies in civil rights litigation. To the contrary, as I have discussed at greater length in my previous article, African-American lawyers had begun using such strategies far earlier in local communities — starting, in fact, as research pioneers like J. Clay Smith have documented, quite early in the nineteenth century. By describing these strategies as unconventional, I mean that they involved lawyers in forms of conduct that were not, to put it delicately, patently permissible under traditional legal ethics rules. I won't go through an exhaustive listing of these contradictions or tensions since I've discussed them in detail elsewhere, but it is important at least to sketch them in order to convince you of some points I'm going to make later. Following is a list of just some of what the NAACP was doing prior to 1920.

First, it is clear that the NAACP was actively creating litigation where none would have existed otherwise. This practice violated traditional rules of ethics that prohibited lawyers from "stirring up" litigation, sometimes defined as barratry or champerty. The correspondence

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McCormick, Progressivism 3–25 (1983) (discussing many different approaches to defining progressivism as an historical period).


17 See Legal Ethics in the Early NAACP, supra note 1, at 101–03.


19 See Legal Ethics in the Early NAACP, supra note 1, at 134–38.

20 See, e.g., id. at 116 (describing examples of the early NAACP's engineered, test case litigation experiments); see also id. at 101–02 (describing earlier test case litigation experiments of African-American civil rights groups).

21 Canon 28 of the ABA's 1908 Canons of Professional Responsibility reads as follows:

28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or
files of several of the major actors on the NAACP's first legal committee are full of plans to create test case litigation. In one case, legal committee members met with non-members and went out to New York City theaters in mixed-race pairs to test compliance with a city ordinance prohibiting race discrimination in places of public accommodation. The committee planned a similar strategy, complete with plans for a press conference at the end, in which one of the committee's members would travel with an African-American friend on trains in the South that offered overnight sleeping berths.

Another apparent ethical violation involved the solicitation of strangers as plaintiffs for NAACP litigation. At least for a time, an NAACP staff lawyer systematically solicited such strangers, as he proudly reported to the NAACP Board of Directors in 1913. This lawyer explained his methods at the annual meeting. He had engaged a news clipping service to look for reports from across the country of potential civil rights violations. After reading these clippings, he would instruct the NAACP's national secretary to write letters to the victims of such incidents, offering the NAACP's services should they wish to pursue legal remedies. It appears that more experienced hands on the NAACP's legal committee put a stop to this practice, but, for a time, the NAACP, by its own staff lawyer's report, was engaging in blatant solicitation of clients, again in violation of legal ethics mandates.

Even when the NAACP wasn't soliciting strangers as clients, its lawyers were frequently engaged in "client-construction" practices, of
which the legal ethics bar establishment had disapproved. These involved the NAACP's legal representatives speaking at large meetings to describe the organization's legal work and urge members of the audience to contribute funds or sign up as plaintiffs. This activity does not appear remarkable today, but it violated the bar associations' legal ethics opinions of the period.

I could go on in this vein, but the basic point is that even with legal advisors drawn from the highest echelons of the bar establishment, the early NAACP was aggressively experimenting with unconventional ways of mixing litigation and organization building goals.

All of this is not, of course, to say that what the NAACP was doing was in any way "wrong" or "bad." To the contrary, what the NAACP

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27 E.g., Legal Ethics in the Early NAACP, supra note 1, at 121–22, 126–27 (describing such speaking engagements and mass meetings in which early NAACP lawyers participated).

28 I describe these legal ethics opinions in detail in Legal Ethics in the Early NAACP, supra note 1, at 133–38. One example of many includes an opinion concluding that it would be "improper professional conduct" for an attorney, retained by a stockholder to bring suit against a company, to advertise for other similarly situated stockholders and request them to join with the client and contribute to the expense of such action. 2 COMMITTEE ON PROF. ETHICS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, QUESTIONS AS TO PROPER PROF. CONDUCT SUBMITTED TO AND ANSWERED BY THE COMMITTEE FROM MAY, 1925 TO JUNE, 1926 19–20 (1925). In another opinion, the Association of the Bar of the City of New York (ABCNY) asked whether it would be "professionally proper for an attorney who has been consulted by several members of a club as to their legal rights" to address other members of the club who had not sought such consultations and to offer to represent them professionally, replied that "the proposed solicitation constitutes a breach of Canons 27 and 28." Association of the Bar of the City of New York, Op. 13 (1925), in OPINIONS OF THE COMMITTEES ON PROF. ETHICS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION 8 (Arthur A. Charpentier ed., 1956) [hereinafter OPINIONS OF THE NY COMMITTEES ON PROF. ETHICS].

Similarly, the American Bar Association (ABA) decided that it would be unethical for an association of lawyers to write letters to men in the armed services advising them of a potential claim for back pay. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 4 (1924), in OPINIONS OF THE COMMITTEE ON PROF. ETHICS AND GRIEVANCES WITH THE CANONS OF PROF. ETHICS ANNOTATED AND THE CANONS OF JUDICIAL ETHICS ANNOTATED 43–44 (1931) [hereinafter OPINIONS OF THE ABA COMMITTEE ON PROF. ETHICS]. Another ABA advisory opinion found it unprofessional for lawyers employed by an automobile club to hold a meeting to speak to the club's membership to organize support and raise funds for litigation to challenge a new state licensing fee that would have adversely affected some of the club's members. Opinions of the ABA COMMITTEE ON PROF. ETHICS, Formal Op. 8, at 53–58.

Even when no attempt was made to represent the persons advised of their legal rights, the bar associations disapproved this practice. The New York County Lawyers Association (NYCLA), for example, when asked whether "it [is] professionally improper for an attorney, voluntarily and unsolicited, to communicate to strange persons apparently ignorant of facts upon which claims of substantial right might be urged or prosecuted by them . . . without soliciting employment to prosecute such rights," responded that, "for an attorney voluntarily and unsolicited to communicate to a stranger . . . facts within the knowledge of the attorney, upon which claims of substantial right might be urged or prosecuted, is tantamount to volunteering advice to bring a law suit and is comprehended within the condemnation of Canon 28." New York County Lawyers Association Op. 199 (1922), in OPINIONS OF THE NY COMMITTEES ON PROF. ETHICS, at 632, 633–34.
did represents one of the most extraordinary achievements of collective agency of the twentieth century. What I’m most interested in is how it was that the rather conservative, establishment-type, primarily Anglo-Saxon men who sat on the NAACP’s first legal committee championed this work despite its tension with then-extant legal ethics rules.

One plausible explanation might be that these lawyers were not aware of, or at least not thinking about, these rules. But Charles Anderson Boston and others were directly and simultaneously involved in the project of codifying, proselytizing about, and building enforcement mechanisms in connection with the bar associations’ legal ethics projects. This fact rules out the explanation that no one was aware of what legal ethics law proscribed, nor does it seem likely that Boston’s attitude was simply to overlook the NAACP’s potential ethics breaches with a wink and a nod. Boston was not that kind of a lawyer; his writings are full of passionate sincerity about the ethics enforcement project.

Thus, some other explanation must account for the NAACP’s first legal committee’s apparent disregard for the dictates of legal ethics. I concluded that the NAACP’s legal committee members thought that their actions were not subject to the ethics rules that applied to others because they were doing “public interest” work. The NAACP was not billing its clients, and the elite lawyers who sat on the national legal committee were not championing a cause on behalf of their own self-interests. These lawyers either ran the bar associations or were close associates of those who did. They knew their own motives were beyond reproach, and they also knew that no one would misunderstand this. They did not have to worry about being held accountable under rules designed for others—that is, for practitioners far lower down in the profession’s status hierarchy, such as one unlucky lawyer who was disciplined in New York City in 1915 for advertising that he was a “white lawyer who is a colored man’s friend.”

The early NAACP lawyers, in contrast, by virtue of their class standing and position within the bar, had the ability to adopt informal practice norms that deviated from traditional legal ethics dictates. Their ability to do so, I further suggested, aided the NAACP’s national organization building efforts in its early years.

In another essay, I explored how these informal practice norms eventually blossomed into a specific conception of how to practice public interest law that had important implications for progressive legal reform.

29 Legal Ethics in the Early NAACP, supra note 1, at 108–09 (describing involvement of another NAACP Legal Committee member, William Wherry, Jr., in legal ethics regulation).
30 Id. at 142–43.
31 Id. at 143–44.
32 In re Neuman, 169 A.D. 638, 639 (N.Y. 1915). Neuman was later charged with ambulance chasing and resigned from the bar. Legal Ethics and the Early NAACP, supra note 1, at 135 n.136.
work in the United States throughout the twentieth century. Almost half a century later, the NAACP's conception of public interest law practice received the U.S. Supreme Court's imprimatur in *NAACP v. Button*. *Button* held that the First Amendment protects nonprofit organizations involved in political reform work from some forms of state legal ethics disciplinary sanctions. Later cases followed *Button*, such as *In re Primus* and its companion case, *In re Ohralik*, in protecting public interest lawyers, but not lawyers acting for private interests, from some forms of legal ethics discipline.

*Button* and its progeny reflect the important distinction drawn in U.S. public interest law between legal work in the public interest—that is, work for others, undertaken through not-for-profit organizations without payment from clients—and work in the private interest—meaning work for which a lawyer accepts fees from clients. But that second model was closer to the kind of civil rights work African-American lawyers were performing in their local communities at the time. Their work combined political, self-help, and remunerative considerations, rather than separating each of these from the others, as in the elite lawyers' model. I have argued elsewhere that we should re-examine the present-day implications of how we have drawn these lines defining public and private interest law. I will not pursue those arguments here; what is most relevant is the way in which the NAACP's first elite lawyers managed to project one particular model of public interest law far into the future.

I also reflected on the contrast between the early lawyers' approach to legal ethics regulation and the very different attitude toward legal eth-

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33 See From Buchanan to Button, supra note 1, at 300-07.
37 See, e.g., National Association for Law Placement, Jobs & J.D.s: Employment and Salaries of New Law Graduates—Class of 2000, at 109 (2001) (defining public interest employment as "positions funded by the Legal Services Corporation and others providing civil legal services as well as positions with private non-profit advocacy or cause-oriented organizations, ... non-profit policy analysis and research organizations and public defenders").
39 See, e.g., Carle, Re-envisioning Models for Pro Bono Lawyering, supra note 38, at 94 (questioning effects of defining public interest law as only that law practiced by lawyers located in law jobs in which they can afford to accept no fees from clients in their "pro bono" representations); Re-Valuing Lawyering for Middle-Income Clients, supra note 3, at 742 (arguing for creation of an alternative prestige hierarchy that would avoid the trap of the binary public/private dualism and instead assign public interest value to legal representations in inverse relation to the social, economic, and political power of a lawyer's clients).
ics stricutures at a later period in the NAACP's history, during the time of Charles Hamilton Houston and Thurgood Marshall. As I document with particular focus on Houston, and as Mark Tushnet first documented with respect to Marshall, these African-American lawyers were extremely concerned about the NAACP's vulnerability to legal ethics charges — and for good reason, since prosecuting the NAACP for alleged legal ethics violations constituted one of the southern states' most vicious means of assault on the organization following its victory in *Brown*.

So that, in a nutshell, is an overview of my research on the NAACP's first legal committee and its relationship to legal ethics regulation. The question becomes: What conclusions should we draw from this story? Here the territory is so rich that I hate to try to fit it into conceptual boxes, but try I must, since the professional norms of my own place and time require this kind of scholarship. So here it is: I suggest that the early NAACP legal committee members' lack of concern about legal ethics norms reflected the operation of power in relation to those norms, manifested outside formal institutional mechanisms such as rules revision commissions or legislative processes. In other words, to finally bring this talk around to the theme of this Symposium, the NAACP's elite early legal committee members operated outside the realms traditionally defined as "politics" or "policy" in shaping legal ethics norms to fit their agendas and world views. That was my thesis, but Professor Wilkins did not completely agree with it.

B. Wilkins' Response

In response to my argument, Professor Wilkins suggested — very kindly, but disagreeing nonetheless — that perhaps I spent far too many pages worrying about what the early lawyers on the NAACP's legal committee thought they were doing. Instead, Wilkins suggested, a far shorter and analytically cleaner way of capturing the phenomenon about which I was writing was to conceive of the involvement of elites in public interest law movements as an effort to uphold their class advantages by mitigating the harshness of the political regimes that upheld their
privilege.\textsuperscript{44} On this theory, by advocating the elimination of overt, de jure racism, the NAACP lawyers in my study were working to soften the edges of a political and legal system that kept African-Americans at the bottom of the heap. This argument posits that these lawyers were working in their own class self-interest even when they purported to be, and believed themselves to be, engaging in public interest work in the interests of others of a different, less advantaged class.

In support of these general observations, Wilkins highlights historian Jerold Auerbach’s highly engaging accounts of lawyers’ ethical self-regulation projects at the turn of the twentieth century.\textsuperscript{45} As Wilkins explains, Auerbach argues that “the lawyers who drafted the original canons of ethics were quite clear in their belief that the rules they crafted were intended to stamp out the practices of the new generation of immigrant lawyers whom these Brahmans viewed as a threat to their status as independent professionals.”\textsuperscript{46} Extrapolating from the motives Auerbach detects in the early twentieth century campaign to standardize and promote legal ethics codes for the practicing bar, Wilkins suggests that it similarly “is not surprising that Boston and his colleagues did not believe that rules against such ‘crass’ commercial practices as ambulance chasing applied to their own noble endeavors.”\textsuperscript{47}

I disagreed with Wilkins in part, for reasons I will discuss further below. Our exchange led me, however, to think more about how we should understand class interests in thinking about the intersection of professional regulation and public interest practice. That thinking is far from complete, but what I want to do in the following two parts of this Essay is, first, to note briefly some of the leading approaches to understanding lawyers’ self-regulation in this context, and second, to make some tentative suggestions about future research directions.

II. SOME LEADING APPROACHES TO THE QUESTION OF CLASS INTERESTS IN PROFESSIONAL REGULATION

Instead of attempting to survey the theoretical literature on professional regulation here, I will focus on several approaches advocated by some leading scholars in the U.S. legal community who study professional regulation. The four scholars whose approaches I will briefly examine are: Jerold Auerbach, the source on which Wilkins primarily

\textsuperscript{44} \textit{Id.} at 151 (“By supporting the work of public interest organizations like the NAACP, elite lawyers from Boston’s day to our own have been able to portray the bar’s public aspirations as reality without having to significantly alter their own practices, which frequently undermine the public framework that advocacy organizations seek to protect.”).

\textsuperscript{45} \textit{Id.} at 148 (citing \textit{Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America} (1976)).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}
relies; Terrence Halliday, who conceives of legal ethics regulation as a solution to collective action problems in much the same way as commentator Jeffrey Standen does in this Symposium; Richard Abel, who adopts a far more cynical view of most professional regulation, yet takes a different approach to public interest law; and Robert Gordon, who uses an historical, interpretative perspective to examine late nineteenth-century lawyers’ understanding of what they were doing in their civic reform projects.

I have already touched on Auerbach in relation to Wilkins’ response to my NAACP research. Wilkins’ vast and powerful opus of legal ethics scholarship takes sociological and analytical tracks very different from Auerbach’s, so it would be incorrect to associate Auerbach’s approach with Wilkins generally. As Wilkins notes in his response to my article, Auerbach most powerfully presents his view in a scathing critique of the

48 David Wilkins’ legal ethics scholarship is characterized by a great breadth of interests and concerns. In his earlier work, Wilkins applied a new institutionalist framework to assess the question of the comparative institutional competence of varying approaches to legal ethics regulation. See, e.g., David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799 (1992) (evaluating comparative institutional competence of various enforcement mechanisms for regulating lawyer conduct); David B. Wilkins, Afterword, How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation, 65 Fordham L. Rev. 465 (1996) (responding to various critiques about an earlier article). He is also renowned for his major contributions in pioneering the conceptual apparatus for thinking about contextual approaches to legal ethics regulation. See, e.g., David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholar, 66 S. Cal. L. Rev. 1145 (1993) (arguing for greater attention to varying practice contexts in setting regulatory policy on lawyers’ professional conduct). He has served as an insightful and timely commentator on variety of legal ethics issues, such as the Kay Scholer/thrift savings and loans fiasco. See, e.g., id.

But the work of his I most admire includes his prodigious empirical and theoretical examination of the career trajectories of African-American lawyers with the most elite law school educations, see, e.g., David B. Wilkins & G. Muti Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis, 84 Cal. L. Rev. 493 (1996); of the subtle but extremely powerful force of continuing race discrimination in the legal profession, see, e.g., id.; and of complicated and difficult questions involving the intersection of race identity and legal ethics, see, e.g., David B. Wilkins, Identities and Roles: Race, Recognition, and Professional Responsibility, 57 Md. L. Rev. 1502 (1998) (criticizing “bleached out” professionalism, which views lawyers’ professional identities as subsuming all of other prior aspects of identity); David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 64 Geo. Wash. L. Rev. 1030 (1995) (exploring ethical considerations in African-American lawyer’s decision about whether to represent the Ku Klux Klan on freedom of speech issue); David B. Wilkins, Straightjacketing Professionalism: A Comment on Russell, 95 Mich. L. Rev. 795, 819 (1997) (“it is critical that black Lawyers find creative ways to balance their competing commitments to their communities, to their jobs, and to their unique aspirations as human beings”); David B. Wilkins, Two Paths to the Mountaintop?: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1981 (1993) (arguing for the importance of exploring in the course of legal education questions concerning black corporate lawyers’ moral obligations running to the black community).

ABA’s initiative in drafting the national model legal ethics canons in 1908. I will therefore focus on Auerbach’s treatment in *Unequal Justice*\(^{50}\) of that early twentieth-century legal regulation project.

A. **AUERBACH’S APPROACH**

Auerbach and I have both studied the historical record underlying the ABA’s initiative in drafting the first national model legal ethics canons, finalized in 1908. In some respects, I agree with Auerbach’s characterizations when he describes the leading ABA players’ motives in that project as crassly and obviously based in class and, as he also emphasizes, in ethnic self-interest. Auerbach documents the desire of ABA leaders to keep newcomers out of the profession so as to preserve their traditional market monopoly on the “gentlemanly”\(^{51}\) profession of law. And, indeed, these lawyers’ self-articulated explanations of their conduct are rife with blatant admissions as to these less-than-laudable motives.

One example is particularly relevant because the speaker was none other than Charles Anderson Boston, a figure active both in the legal ethics codification project and the early NAACP.\(^{52}\) In his writings, Boston frequently argues in favor of stronger legal ethics regulation in such terms as the need to combat “the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals,”\(^{53}\) or the need to prevent the practice of law in New York City from passing “into the hands of those, who, if their names are significant, are not schooled by previous environment in the high traditions of the English and American Bar.”\(^{54}\) Thus, I have no quarrel with

\(^{50}\) This work has become almost a canonical text today, excerpted in many of the leading legal ethics textbooks on the market today. *See, e.g.*, DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 58–61 (3d ed. 2001) (excerpting *Unequal Justice*); *see also* RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* xi–xiii (2d ed. 2001).

\(^{51}\) The powerful historical resonance of lawyering as a “gentlemanly” profession takes various forms in contemporary legal ethics scholarship. *See, e.g.*, ANTHONY T. KRONMAN, *THE LOST LAWYERS: FAILING IDEALS OF THE LEGAL PROFESSION* 11–17 (1993) (lamenting the decline of the image of the gentleman lawyer); THOMAS L. SCHAFFER & MARY M. SCHAFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* 30–126 (1991) (arguing that the vision of lawyers as gentlemen can be resurrected while also expanding this concept so as to include traditionally excluded outsiders, such as women and lawyers of color). The conceptions of class identity powerfully embedded in the concept of a “gentleman” merit far greater exploration. Indeed, the historical connections between being a gentleman and a member of the upper class in relation to conceptions of lawyering present one of many possible examples of the rich territory yet to be explored in examining the connections between issues of class and lawyers’ ethical norms.

\(^{52}\) *Legal Ethics in the Early NAACP*, supra note 1, at 109–10.


\(^{54}\) Charles A. Boston, *The Recent Movement Toward the Realization of High Ideals in the Legal Profession*, in *37 REPORT OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AM. BAR ASS’N* 761, 784 (1912) (emphasis added) (citing list of names reflecting diverse ethnic ori-
Auerbach's claims that a salient motive in the turn of the century professional regulation project was the preservation of insiders' monopoly on law practice.

Nevertheless, while excluding outsiders and protecting traditional insiders' monopoly over law practice clearly explains some of the motivations underlying the 1908 canons and provides the main purpose underlying some of their provisions, this does not necessarily mean that the same motivations and purposes underlie all of the proposed regulations. One example concerns an issue Auerbach incorrectly characterizes in his discussion in Unequal Justice, that concerning the ABA's debate over the ethical permissibility of charging contingent fees. I will examine this debate in some depth here to demonstrate concretely how an oversimplistic Auerbachian approach to the U.S. bar's professional regulation projects could lead us astray.

In order to understand the contingent fee debate that took place during the ABA meeting where the 1908 Canons finally won approval, it is helpful to understand the chronological sequence of ethical pronouncements on contingent fees that preceded the 1908 debate. Pennsylvania lawyer George Sharswood's 1854 essay on professional ethics, which is commonly but mistakenly assumed to be the direct basis for the 1908 canons, resoundingly condemned contingent fees, stating as follows: "[A]greements between counsel and client that the compensation of the former shall depend upon final success in the lawsuit—in other words contingent fees—however common such agreements may be, are of a very dangerous tendency, and to be declined in all ordinary cases."57

In the place of this blanket condemnation of contingent fees, the 1887 Alabama Code of Professional Ethics, which was the direct antecedent to the 1908 canons, permitted the use of contingent fees but continued to contain language disfavoring and criticizing the practice.58 Thus,
Section 51 of the Alabama Code of Professional Ethics stated: "Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred."\(^{59}\) This language appeared without modification in the first circulating draft of the 1908 Canons proposed by the ABA ethics committee charged with the task of drafting the first national model ethics code.\(^{60}\)

In response to comments from Charles Biddle of Philadelphia,\(^{61}\) a prominent outside commentator on this draft, the committee modified the language quoted above to provide: "Contingent fees may be contracted for; but they lead to many abuses, \textit{and should be under the supervision of the court}."\(^{62}\) The committee sent this language to the ABA in 1908, and it sparked the debate about contingent fees that Auerbach interprets in \textit{Unequal Justice}.\(^{63}\)

Auerbach correctly explains that a progressive senator, Thomas J. Walsh of Montana, challenged the ABA ethics committee’s language on contingent fees and argued that the provision should be struck. A lengthy debate ensued, in which many strong voices argued on both sides of the issue and several participants acknowledged that they sometimes accepted contingent fees in their own practices.\(^{64}\) These facts belie Auerbach’s overly dramatic characterization that “nothing plunged the professional elite deeper into despair than contingent fees and the proliferation of negligence lawyers whose practice depended upon them.”\(^{65}\) Even among the elite lawyers present at the ABA’s annual drafting of 1887 Alabama Code, see Allison Marston, \textit{Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association}, 49 ALA. L. REV. 471, 471–507 (1998).

\(^{59}\) \textsc{Report of the Thirtieth Annual Meeting of the Am. Bar Ass’n 710 (1907)} (quoting the Alabama code provision on contingent fees).

\(^{60}\) \textit{Id}. at 710 (§ 57).

\(^{61}\) See Lucien H. Alexander, \textit{Memorandum for Use of ABA’s Committee to Draft Canons of Professional Ethics }2, 70 (1908) [hereinafter 1908 Committee Memo]. This was an invaluable historical document, marked “strictly confidential,” which I found through the help of librarian Adeen Postar of the Georgetown University Law Center when I was researching my article of the 1908 canons. It had been misfiled in a microfilm collection of old ABA materials housed at the Catholic University Law Library (under call number KF 325.1276.M45 1908), and probably was not available to Auerbach in his research.

\(^{62}\) \textit{Id}. at 70 (emphasis supplied to replacement language).

\(^{63}\) See \textit{Auerbach, supra} note 44, at 43-48 (discussing debate within ABA about 1908 canon provision on contingent fees).

\(^{64}\) \textit{See, e.g., Am. Bar Ass’n, Report of the Thirty-First Annual Meeting of the Am. Bar Ass’n 77 (1908)} [hereinafter 1908 Report] (comments of J.R. Keaton, of Oklahoma) ("I think most of us have on occasions accepted employment on contingent fees and I don’t think any of use could be accused of anything dishonorable, or violating professional ethics in accepting that employment."); \textit{id}. at 84 (comments of F.C. Robertson) ("[His] services have been sought, as have those of many other attorneys, by men who have not the means to pay a lawyer to represent them.").

\(^{65}\) \textit{Auerbach, supra} note 44, at 45.
meeting, there was a deep division of opinion. The context in which the debate about the ethics of contingent fees took place is more complicated than Auerbach allows.

The floor debate produced the final compromise language that appears in the 1908 version of the canons. Jacob M. Dickinson, a member of the ABA ethics committee that had presented the draft version to the full meeting, offered this language. Dickinson argued "because there are some states that do not permit" contingent fees, "I do not think we ought to give an expression on that subject, and we ought not to go on record as making a general declaration." Instead, Dickinson proposed the canons read as follows: "Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges." It is this language that appears in the 1908 version of the Canons of Professional Ethics.

Auerbach claims that the final language adopted in 1908 was "more restrictive" than the original language proposed by the ethics committee. This claim is dubious. In the first place, the ABA removed the language that disapproved of contingent fees—namely, that referring to contingent fees "leading to many abuses." This change made the language somewhat less condemnatory; as Charles Wolfram, author of a definitive treatise on legal ethics explains, the contingent fee language adopted by the 1908 ABA Annual Meeting was "slightly less wary" than language originally proposed. Secondly, attendees at the ABA meeting accepted this language as a compromise between those who wanted to condemn and those who wanted to remain neutral on the ethics of contingent fees as a general matter. Indeed, a fact that Auerbach neglects to mention is that some of those opposing the ethics committee's originally offered language supported the compromise version.

In support of his interpretation, Auerbach claims that the "critical change was to couple judicial scrutiny with a states-rights position that limited ABA acquiescence to those jurisdictions that permitted contin-

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66 On the elite professional status of the lawyers involved in the ABA during these years, see Matzko, supra note 54, at 229–30.
67 For biographical information on Dickinson, see Carle, supra note 13, at 34, 38.
68 The ABA again amended this language at its annual meeting in 1933 to provide that "[a] contract for a contingent fee where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court, as to its reasonableness." ABA Canons, supra note 12, at 12.
69 Id. at 12 n. to Cannon 13.
70 Auerbach, supra note 45, at 46.
72 See, e.g., 1908 Report, supra note 61, at 78 (comments of David Withington of Hawaii, Francis James of Ohio, and James Gibson of California) (moving to strike out the words "lead to many abuses"); id. at 80 (speakers Withington and James) (withdrawing their amendment in favor of Dickinson's amendment).
gent-fee arrangements." But this analysis misrepresents the ABA’s authority to promulgate model rules. Dickinson was right that the ABA’s jurisdiction did not extend to overruling existing state laws. To the extent that state law conflicted with the model rules, state law clearly trumped the ABA’s proposals. Therefore, the ABA had little choice but to acknowledge the potential existence of state law restricting use of contingent fees and to tailor its model rule to accommodate this potential circumstance.

Auerbach further asserts that the “legality of the contingent fee—[was] assumed to be ‘beyond legitimate controversy’.” He cites Stanton v. Embrey as his sole authority for this broad claim, but in fact that case simply holds that contingent fee arrangements are legal in that court, acknowledging that, “in some jurisdictions,” a defense against enforcement of a contingent fee contract “would be a good one.” Wolf-ram states that prohibitions against contingent fees “obtained for a long time in many states in the United States” and that the last state to repeal such statutory prohibitions did not do so until 1965. Indeed, it is easy to find cases decided between 1900 and 1908 in which state courts disapproved the use of contingent fee arrangements in particular cases.

In short, a careful examination of the historical record reveals that the conclusions to be drawn from the debate about contingent fees during the 1908 canons approval process are far more complex that Auerbach intimates. To be sure, some vocal participants spoke against contingent fees, but others spoke in the opposite direction. Speakers in the debate, and in earlier internal deliberations of the ethics committee, openly aired the issues about access to justice for impoverished accident victims that Auerbach highlights. Finally, and most significantly, Auerbach erroneously claims that the floor amendment, brought on by Walsh’s attack on

73 Auerbach, supra note 45, at 47.
74 Id. at 45 (quoting Stanton v. Embrey, 93 U.S. 548 (1876)).
75 93 U.S. 548 (1876).
76 Id. at 556.
77 Wolfram, supra note 71, at 527. The last state to repeal its statutory prohibition on contingent fees was Maine. Id.
78 See, e.g., Dorr v. Camden, 46 S.E. 1014, 1018 (1904) (disallowing contingent fee collection where attorney had not shown sufficient skill and judgment to warrant such a fee); Newman v. Freitas, 61 P. 907, 910 (1900) (holding contract requiring payment of contingent fee in divorce action void and unenforceable as against public policy); cf. Taylor v. Enthoven, 88 N.Y.S. 138 (1904) (voiding contingent fee contract in which attorney also agreed to advance court costs). Some of the limitations on contingent fees recognized in these cases still survive, including, as Wolfram explains, in “criminal defense, domestic relations, and, in some states, lobbying.” Wolfram, supra note 71, at 527.
79 At the committee deliberations stage, for example, New York City lawyer Edward B. Whitney, who was active in the tenement house movement, argued that the “contingent fee is much the fairest to a poor client” and stated that he personally preferred to use contingent fees “when I am representing a person who would suffer hardship if he paid anything like a reasonable fee in the case of defeat.” 1908 Committee Memo, supra note 61, at 71–72.
the committee's language disfavoring contingent fees, was worse than the original language; it was in fact somewhat less condemnatory, having been offered as a compromise position.

All of this is not to say, of course, that the ABA's final action on the contingent fee issue was the best that progressive forces could have hoped to achieve. Instead, it is simply to say that, within its historical context, Auerbach is overreaching in claiming that the "class and ethnic biases that appeared in the Canons were nowhere more evident than in the special treatment reserved for contingent fees." Auerbach's account does not capture the complexity of motives and outcomes, even with respect to the very provision of the 1908 canons on which he focuses in making his case.

Thus, one problem with forcing explanations of complex historical phenomena into an all-encompassing theoretical approach is that this tends to distort the complexity of the historical record. Still another problem is that this approach tends to explain both too little and too much. It explains too little because it completely dismisses what the actors it studies thought they were doing. The early NAACP lawyers I studied did not think of themselves as trying to preserve their class interests through their involvement in the NAACP; they thought they were helping others and that doing so was a good, altruistic thing to do. But Auerbach and others working in the same vein dismiss the actors' self-conceptions of their motivations as irrelevant.81 Now, I agree that it is legitimate to say that such self-conceptions can be seriously misguided, but to say that they are in no way relevant is to lock us into a world that fails to account for the richness and power of internally constructed meanings and motivations. Thus, if only from the perspective of aesthetics or intellectual taste, arguments that all legal ethics regulation is based exclusively on the promotion of lawyers' class interests seem to prove too little.

On the other hand, such arguments can also prove too much. It is of course true that many people—or, at least, those who feel an obligation to devote some of their professional energy to public service—try to

80 AUERBACH, supra note 45, at 44 (emphasis added).

81 In a similar way, for example, Auerbach argues that the professional self-regulation project aimed at raising standards for admission to law school and to the bar, though self-professedly directed at improving the quality of legal services to the public, in fact had the very different, self-interested motive of keeping out of the profession those so-called "newcomers"—immigrants and those of lower socio-economic classes—who were beginning to compete with the traditional "blue blood" insiders who had previously enjoyed a monopoly in law practice. AUERBACH, supra note 45, at 74--101. Auerbach is not the only one to make this point, as I will discuss further below, but the fact that a very convincing story can be told with respect to the bar's efforts to impose and raises "barriers to competition" on these issues does not necessarily mean that the same explanatory paradigm can be imposed with respect to all dimensions of professional regulation.
work toward creating a “better” world. These social reformers tend to use the values in their historical and social circumstances that they endorse to challenge the aspects of their historical and social circumstances that they find less than ideal.\textsuperscript{82} Thus, for example, it seems correct at one level to say that the early NAACP lawyers were working to soften the edges of capitalism by eliminating de jure racism.\textsuperscript{83} But if it is true that all reformers work at some level to preserve what they value in their social world and at the same time to change what they oppose about it, then an approach to explaining lawyers’ social reform efforts focused exclusively on the promotion of their class interests proves too much. All reformers seek to retain aspects of their social environment to which they do not object along with advocating for change in features they oppose.

A final reason why I think strong arguments following Auerbach’s theories are not sufficiently useful or interesting is because of their normative implications. That a theory has unattractive normative implications does not, of course, provide sufficient grounds to reject it if it seems to have superior explanatory power. When none of a number of competing explanations seems to have the upper hand, however, it seems entirely relevant to compare the explanations’ normative dimensions. This is especially germane in the context of social science because, as philosophers of the social sciences have pointed out, explanations of human behavior shape the behavior observed.\textsuperscript{84}

The normative implications of arguments that lawyers always and only promote their class interests in engaging in social reform efforts are far from appealing. If the best way to think about elite lawyers’ involvement in public interest work is that it is in fact directed at preserving their

\textsuperscript{82} This is the theory of social change held by the American pragmatists. See, e.g., John Dewey, \textit{Outline of a Critical Theory of Ethics: the Formation and Growth of Ideals}, in \textit{The Collected Works of John Dewey}, 3 Early Works 1882–1898, at 359 (Jo Ann Boydston ed., 1969) (arguing that reflective intelligence cross questions existing morality and criticizes it by pointing out “the inconsistencies, incoherencies, compromises, and failures between actual practice and the theory at the basis of this practice”); Cornel West, \textit{Radical Historicism}, in \textit{Cornel West, The Ethical Dimensions of Marxist Thought} 1, 3 (1991) (“The point is not to lift oneself out of the flux of history—an impossible task—but rather to immerse oneself more deeply into history by consciously identifying with—and digesting critically the values of—a particular community of tradition.”).

\textsuperscript{83} There is, indeed, literature on this point. See, e.g., B. Joyce Ross, J.E. Spingarn and the Rise of the NAACP, 1911–1939, at 13–14 (1972). Among many other important roles in the early NAACP, Joel Spingarn was a non-lawyer member of the NAACP’s first national legal committee. Spingarn’s biographer points out that Spingarn strongly endorsed capitalism as a method of economic organization, and that he and his close friend, W.E.B. Du Bois, whose views on the need for economic redistribution were far more radical, frequently clashed on this issue.

\textsuperscript{84} See, e.g., 2 Charles Taylor, \textit{Philosophy and the Human Sciences: Philosophical Papers} 104 (1985) (noting that because “political theories are about our practices . . . their rise and adoption can alter these practices.”).
own class privilege, then the best message to send elite lawyers about whether they should care about social reform is: "No, please stay out of this!" Now that may in fact be the right message, but it is not self-evidently obvious that it is. It does appear to be the attitude of a great many practicing corporate lawyers today, who stay away from civic reform activities. The ethic of civic participation and pro bono service that motivated the early NAACP lawyers seems to have greatly diminished in the profession. But a great many advocates who are committed to providing more legal services to the poor and disenfranchised have argued that the decline in pro bono service hours among lawyers in corporate law firms is a very bad development. Thus, I think we need to think more about how, and to what extent, our professional norms should expect social reform work from the profession's elite, and that a perspective along the lines of Auerbach's analysis is largely unhelpful in that thinking. We must look elsewhere for sources of theory helpful to our query.

B. THEORIES BASED ON SOLVING MARKET FAILURE PROBLEMS

A second popular theoretical approach to the study of legal ethics regulation views the development of lawyers' ethics rules as a response to problems of market failure. There are many variants of this approach. One nicely presented by commentator Jeffrey Standen applies a law-and-economics analysis to the issue. Standen argues that my concern with Wilkins' claims that the early NAACP lawyers may have been using their positions "to promote personal or class interests, instead of the interests of the litigation clients that the NAACP served," is misplaced. This is because, on Standen's theory, lawyers acting in their self- or class interests in regulating their profession nevertheless can be expected to, and in fact have, "produced a body of rules that serve the public good." Standen gives some examples to support his theory. But many other ex-

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85 See, e.g., 1990-1999 The Way We Were, AM. LAW 100 at http://www.law.com/special/professionals/amlaw/amlaw100/amlaw100_the_way.html (last visited Feb. 11, 2003) (detailing the increase in earnings in the top 100 law firms in the 1990s and corresponding thirty-five percent decrease in pro bono activity).

86 See, e.g., THE LAW FIRM AND THE PUBLIC GOOD (Robert A. Katzmann, ed. 1995) (exploring through a collection of essays the importance of public service pro bono commitments as a vital component of law firm practice); Deborah Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 FORDHAM L. REV. 2415 (1999) (arguing for the importance of pro bono lawyering because it provides justice to the poor as well as an opportunity for many attorneys to have "their only direct contact with what passes for justice among the poor"); Tigan W. Eldred & Thomas Schuenherr, The Lawyers Duty of Public Service: More Than Charity?, 96 W. VA. L. REV. 367 (1993) (posing that lawyers have a fundamental duty to provide legal service to the poor because of the legal profession's control of the provision and distribution of legal services).

87 Jeffrey Standen, The Production of Pro Bono, 12 CORNELL J. L. & PUB. POL'Y 631.

88 Id. at 632.
amples can be given of rules that point in the opposite direction, suggesting that lawyers' self regulation in their own self- and class interests can work against the public interest. One such example involves the recent debate—surrounding the ABA's adoption of new model rules at the start of this century—about whether lawyers should continue to be prohibited from disclosing financial wrongdoing by their clients. To argue that lawyers' self-regulation is always in the public interest surely is Panglosian to the extreme. Indeed, even classic law-and-economics theory would predict otherwise, and would explain the need for regulation by the fact that in imperfect markets collective action problems must be solved by means other than the self-interested actions of economically rational actors.

Standen is on more stable footing to the extent that he claims that the emergence of informal ethics norms can in particular instances serve public interest objectives by meshing lawyers' self-interest with the public interest. Standen makes an interesting and provocative point in suggesting that the pro bono ethic endorsed by elite lawyers at the turn of the twentieth century served the function of signaling class and professional standing—in other words, of signaling that one was doing well enough professionally to have substantial time and resources to spare to serve the public interest. There is clearly something to this argument, and it indirectly supports my argument that the elite lawyers' model we sometimes assume to be the only model for "pro bono" lawyering is not the only available model. Elite lawyers may want to signal their professional standing by accepting work for no fee, as the term "pro bono" connotes, but that is not the literal meaning of the words "for the public good."

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91 Standen, supra note 87 at 635.

92 See, e.g., Brophy, supra note 56, at 624 (arguing that public interest work "is different from soliciting clients for money") (emphasis in original).

93 Carle, supra note 3, at 731–32. No fee representation is not, after all, the only way in which public interest law could be practiced. The assumption that public interest and no-fee lawyering are synonymous blocks recognition of creative arrangements that depend on accepting some fees from clients, and which could provide new viable models for public interest law in today's resource-scarce era. See Carle, supra note 3, at 731–32.
Standen uses law and economics to arrive at an approach that explains the existence of norms promoting elite lawyers' public interest involvement by pointing to the "public goods" these norms promote—as, for example, the public benefits of the NAACP's work dismantling de jure race discrimination.\footnote{See Standen, supra note 87, at 633-34 (arguing that the lawyers who became involved in the NAACP and furthered its agenda produced "desirable public goods," and that the NAACP, in competing with other civil rights organizations to establish a national organization as I describe, "generated substantial public benefits that continue to accrue to this day.").} In this respect, Standen's approach is very much like another leading theoretical approach: Parsonian structural-functionalism. The structuralist-functionalist approach to understanding lawyers' civic service commitments is used by some sociologists of the profession, such as Terrence Halliday, to explain these commitments in terms of the "functions" they serve—most often, the collective action problems they solve.\footnote{See, e.g., Terrence C. Halliday, Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment (1987).} Just as Standen suggests that the public service ethic of the lawyers in my study led them to donate social capital to the fledgling NAACP, which in turn allowed that organization to work against racial injustice in U.S. society, Halliday argues that the elite bar's public service ethic motivated the profession to tackle problems the state would otherwise have been unable to address due to limited resources or other constraints.\footnote{See id. at 370.}

This explanation, however, bears the classic flaw of all functional explanation. It tautologically explains the existence of the institution under study—here, the early NAACP legal committee members' public service ethic—by what that institution ended up accomplishing—namely, aiding an organization that made outstanding contributions in the public interest. In addition, this approach fails to give us a framework to ask the many important critical questions that arise from the involvement of elite lawyers in public interest law movements. It does not help us distinguish when or how elite lawyers' involvement in public interest issues is for the good and when or how it may be more problematic.

In short, a focus on how elite lawyers' involvement in the early NAACP helped produce public goods does not get us far enough in theorizing about the relationship between elite class interests and the development of public interest law.

C. RICHARD ABEL'S DUAL APPROACHES

If neither Auerbach nor Halliday, despite their widely different perspectives, gets us far enough in conceptualizing the issues raised by elite lawyers' involvement in shaping legal ethics norms regarding public in-
terest practice, then perhaps other leading theorists' approaches can help us more. One such approach might be found in the sociological work of Richard Abel, a leading expert on many of the world's legal professions.\(^9\) In some of his work, Abel applies what he calls a "Weberian social closure model" to analyze the professional regulation project.\(^9\) As he notes, he chooses this approach over several alternatives,\(^9\) including structural functionalism, because he is interested in studying the legal profession primarily in its economic dimension, as an organized group activity based on enhancing its members' competitive advantage with goals including "economic rewards and social status."\(^1\) In this respect, the Weberian social closure model has a similar focus to Auerbach's, as just discussed. It is an improvement, however, because, as applied, social closure theory limits its asserted scope to those areas of professional regulation that involve enhancing members' competitive advantage. In other words, social closure theory seeks to understand professional regulation in its economic dimensions but does not, at least as Abel presents it, insist that all professional regulation projects have no purpose or effect other than enhancing lawyers' economic and status rewards.

Nevertheless, given our focus on the legal profession's largely unremunerative activities in the public service arena, the Weberian social closure model appears to offer only limited assistance. Applying social closure theory, one might argue that the involvement in the early NAACP of the lawyers I studied was indirectly motivated by a desire to advance their social status, and thus their opportunities for remunerative work in the future. That hypothesis does not convincingly account for


\(^9\) E.g., Richard L. Abel, American Lawyers 17 (1989) (stating that he finds the Weberian approach the most illuminating.)

\(^9\) The two main alternative approaches Abel identifies include a Marxist focus on class conflict, which Abel rejects because the questions surrounding how to conceptualize lawyers' professional regulation do not readily lend themselves to a class conflict analysis, and Parsons' structural functionalism, which theorizes professions as serving socially integrative functions. See id. at 14–40. Abel rejects the later structuralist functionalist approach, discussed supra text accompanying notes 96–97, on the grounds that law firms "as economic groupings, are marginal to structural functionalism, which is concerned with community, altruism and self-governance." Id. at 15–21. As I have already discussed, I concur with Abel's conclusion that it is not particularly helpful to apply either of these approaches to the problem of understanding lawyers' class status and their involvement in public interest law, because neither offer enough explanatory power to understand this phenomenon. Even though a structural functionalist approach might appear to have relevance to my questions, since the focus of my exploration is on lawyers' public service work, that approach simply posits that the lawyers in my study were seeking to advance the public good and solve market failure or collective action problems through their public service.

\(^1\) Id. at 15.
the motives of the early NAACP lawyers I describe, however, for at least two reasons. First, racial equality was not a popular cause at the time.\footnote{See \textit{Link} \\ & \textit{McCormick}, supra note 15, at 32-33, 96-97 (noting racism of the Progressive period).} Second, some of the lawyers I studied, such as Arthur Spingarn (a largely unsung hero who deserves further study by a biographer), worked much harder and longer for the NAACP than ever could be accounted for by any reasonable expectation of increased status or other external reward.\footnote{Wilkins Response, supra note 1, at 155.}

But one aspect of Abel’s approach to analyzing the legal profession as a profit-making enterprise is worth noting—namely, the fact that Abel generally endows his legal actors with a relatively self-aware sense of their motives. Unlike approaches such as Auerbach’s, which tend to talk in terms of actors who believe themselves to be engaged in one project while they are in fact carrying out an entirely different one, Abel’s actors tend to have a pretty good sense of what they are doing. In engaging in “strategies of social closure,”\footnote{ABEL, supra note 98, at 15.} for example, the actors involved in the early twentieth-century campaign to raise the educational and entrance examination bars to legal practice acknowledge that the empirical evidence does not support the public interest rationales for their initiatives, yet they take these steps anyway.\footnote{\textit{Id.} at 47; see also \textit{Id.} at 72 (noting that the “more candid” bar examiners sometimes explicitly admit their motives of controlling the lawyer supply flow by manipulating bar passage rates).} In this respect, Abel’s approach to professional regulation is refreshing. Even if lawyers’ motives in professional regulation projects are not the altruistic ones commonly ascribed to them, these lawyers are at least fairly aware of what they are trying to do. Under Abel’s account, the effects of these lawyers’ actions generally fall somewhere within the range of what they are trying to accomplish, rather than absolutely nowhere near their stated objectives.

Another strikingly refreshing aspect of Abel’s work—which he shares with most of the other theorists I discuss here—is his deep commitment to public interest law and to fostering future generations of lawyers who decide to use their law degrees for purposes more socially beneficial than making large sums of money. Abel has written a great deal about this,\footnote{See, e.g., \textit{Richard L. Abel, Politics by other means: law in the struggle against apartheid, 1980–1994} (1995) (chronicling efforts of legal activists in struggle against apartheid); \textit{Richard L. Abel, Lawyers and the Power to Change, 7 L. \\ & Pol. 5} (1985); \textit{Richard L. Abel, Taking Professionalism Seriously, 1989 Annual Survey of American Law} 41, 63 (arguing that “[t]aking professionalism seriously will require profound social change”); \textit{Richard L. Abel, What is the Assistance of Counsel Effective For?}, 14 N.Y.U. Rev. L. \\ & Soc. Change 165 (1986) (discussing and critiquing values implicit in legal requirements to effective assistance of counsel).} and, as one would expect in light of the manner in
which he carefully conceptualizes his theoretical approach to the study of
the U.S. legal profession as an economic enterprise, he does not try to fit
his examination of public interest lawyers into a Weberian social closure
framework.

Instead, Abel’s foremost concern in his writing about public interest
law is with questions of meaning and identity construction. In one recent
article, for example, he asks how we can create alternative prestige hier-
archies and systems of values within law schools that will define public
interest law as a high status, appealing career alternative.106 Here he
strives mightily to come up with approaches with immediate practical
applications. Abel wants to buck the observed trends that show declines
in new lawyers’ entrance into jobs that have significant public interest
dimensions. Studying the processes by which an alternative culture of
committed public interest lawyers arose and maintained itself in the
1970s, Abel looks for ways to recreate such a culture today, advocating,
for example, the setting of competitive admissions criteria and valuable
perks for law students enrolled in public interest law programs at some of
the nation’s leading law schools.107 What interests him in this context is
creating and promoting meanings that lawyers can ascribe to public inter-
est work.

Abel is not one to argue nostalgically for a return to the “good old
days,” but one does get the impression that he is very much a pragma-
tist—in the nontechnical sense—in his approach to fostering new genera-
tions of public interest lawyers. Even conceding all of the flaws and
problems with our historically received models of how to engage in pro-
fessional practice, including public interest law, Abel enthusiastically ad-
vocates the continuance of public service traditions, because the alterna-
tive—no such tradition at all—is far worse.

Here I wholeheartedly agree with Abel. It seems important to find
models for thinking about elite lawyers’ involvement in public interest
law movements that encourage, rather than discourage, such involve-
ment, but do so in a way that promotes thoughtful reflection about how
lawyers’ class status and concomitant social, economic, and political
power operate in the context of such movements. Thus Abel’s work pro-
vides us with some helpful directions in considering how to theorize class issues in the context of the development of ethics norms concerning
public interest law.

106 Richard L. Abel, Choosing, Nurturing, Training and Placing Public Interest Law Stu-
dents, 70 FORDHAM L. REV. 1563 (2002) (outlining proposals to foster public interest law
students and lawyers).

107 See id. at 1568. These schools include UCLA, Fordham, and American University
Washington College of Law.
D. ROBERT GORDON

The last theorist I will consider here, Robert Gordon, is an historian rather than a social theorist per se. Gordon advocates an approach I find most helpful in thinking about the questions raised by my research on the NAACP. In a series of articles aimed at studying the public service ideologies of elite corporate lawyers in the late nineteenth and early twentieth centuries, Gordon has proposed a thesis that is elegant in both its simplicity and its explanatory power.

Gordon’s main focus is on late nineteenth and early twentieth century lawyers who were engaged in moderate reform causes—lawyers who might have moved in the same professional circles as the NAACP lawyers I studied. Gordon is interested in understanding what ideologies motivated the elite corporate lawyers he studied to engage in public service work. In thinking about this question, Gordon rejects the “instrumental” approaches other legal historians have used to assess these lawyers’ roles in defending and advancing the cause of capitalism. Gordon argues against the position that these lawyers should be understood as having been primarily engaged in manipulating law to serve their clients’ ends. Instead, Gordon suggests that we should seek to identify the purposes of the moderate reform projects in which these lawyers were engaged “precisely where instrumental explanations decline to search for it”—not in any ulterior motives that these lawyers may have held while working with legal doctrine, but in the substance of the legal ideas they were developing.

What Gordon finds most interesting about these lawyers’ reform projects is the way in which they were working to develop ideologies

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109 Here it is worth noting that the race reform project of the NAACP’s early lawyers was also a fairly moderate cause; these lawyers were far from radicals, and some held views on race issues, such as interracial social mixing, that would be viewed as appallingly prejudiced today. See Carle, Legal Ethics and the Early NAACP, supra note 1, at 104 & nn. 28, 29 (describing these attitudes and citing additional sources). I do think it fair to say, however, that the NAACP legal committee members had quite a bit of backbone, relatively speaking, in championing political equality among the races. As other historians have noted, this was not a particularly popular Progressive reform cause, so that, on this issue at least, the lawyers I investigated were probably somewhat farther “to the left” than were many of those Gordon studied. The way in which they were very similar to Gordon’s lawyers was in their socio-economic and professional status.

110 See Legal Thought and Legal Practice, supra note 109, at 71 (rejecting instrumental approaches to legal history of the late nineteenth century for failing to take account of the “doctrinal content of law on its own terms”).

111 Id. at 81.
that allowed them to reconcile their ideals about law with the realities of their law practice. This approach, as Gordon notes elsewhere, allows us to approach the study of lawyers' reform projects by looking at what these lawyers "were thinking and doing more or less as they themselves saw it."\(^{112}\)

Gordon proposes that what these lawyers were doing, and what they thought they were doing and wanted to be doing, was seeking to develop a coherent and rationalized unitary "science of law," which they could then apply to help them represent their clients in a manner that served both their clients and the public interest.\(^{113}\) Gordon sees a similar purpose in the slightly later Progressive lawyers' notions of law as "a tool for the efficient management of the social order in the public interest."\(^{114}\) These ideas likewise came to provide the dominant understanding of lawyers' appropriate role in shaping law and legal institutions. In short, what matters to Gordon is how these lawyers, at the top of the profession's status hierarchy, were creating ideas—ideologies, if you will—about law that have continued to play influential roles on the development of legal doctrine in the United States throughout the twentieth century.

Similar points can be drawn from my research on the NAACP. That research highlights the power a small band of elite lawyers could have over the development of legal ethics norms for the practice of public interest law. They, along with many others affiliated with other public service causes,\(^{115}\) practiced public interest law according to one particular model, pro bono work while maintaining well-funded, corporate law practices. But in the same time period, others with less elite standing and fewer resources practiced public interest law according to a very different, grass roots model, which blended public and private work and accepted legal fees wherever possible, in order to keep these small practices afloat.\(^{116}\) In the end, the model of public interest law endorsed by the U.S. Supreme Court was that of the elite practitioners, maintaining a strict separation between public and private interest and thus rendering invisible non-elite models of how public interest practice could or should be practiced.

Gordon is far from a naive booster of this public service ethic of elite, turn-of-the-century corporate lawyers. He does, however, argue

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\(^{112}\) Gordon, *Ideal and Actual*, supra note 109, at 53.

\(^{113}\) *Id.* at 55.

\(^{114}\) *Id.* at 66.


\(^{116}\) See Carle, *Legal Ethics and the Early NAACP*, supra note 1, at 113–14, 120–21 (making this point).
strenuously that at least some aspects of what these lawyers were doing through their involvement in civic reform projects were valuable and worth preserving—or, more accurately, restoring, since, as Gordon laments, much of the public service ethic that motivated these lawyers to devote substantial time to civic reform work has faded today.117 As Gordon puts it, quoting Vaclav Havel and opposing doctrinaire Marxists, “there are no privileged locations or levers for social change, and also no positions from which pressure for change, involving whatever tiny, modest risks the participants are willing to take, is not possible.”118

This quote captures part of what I find most refreshing about Gordon’s analysis of the operation of class and class privilege in studying lawyers’ public service involvements. Gordon argues that lawyers who have power by virtue of their elite professional and socio-economic class positions should try to use this power for positive, public interest purposes: they should care about how the world around them could be improved, and should strive for those improvements. He recognizes that these efforts may miss the mark—that the reforms such lawyers envision and strive to achieve will inevitably be shaped by these lawyers’ personal perspectives, and thus may not lead to the kinds of profound or fundamental change really needed. But despite his strong awareness of how elite lawyers’ reform projects can never go far enough, he supports their former ethic of public service because it is better than the alternative. That alternative is a “law as business” mentality that sees lawyers merely as hired guns and debunks the idea of law as a public service profession. As reflected in the recent declines in pro bono hours reported by major law firms,119 the “law as business” viewpoint seems to be growing increasingly dominant, perhaps in part because attitudes towards the “good” lawyers who can achieve through public service work have been so heavily critiqued. Gordon stands as an important example of nuanced approaches to the study of class in the legal profession because, despite

117 See, e.g., Robert W. Gordon, Corporate Law Practice as a Public Calling, 49 Md. L. Rev. 255, 265-66 (1990) (calling for corporate lawyers to establish an ethic that understood lawyering work as a public calling, guided by “a lively sense of social responsibility” for their own and their clients’ practices); Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 2 (1988) (calling for a return to lawyers’ earlier ethic of relative independence from their corporate clients) [hereinafter Independence of Lawyers].

118 Gordon, Independence of Lawyers, supra note 118, at 83.

119 See, e.g., Lisa G. Lerman, The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity, 30 Hofstra L. Rev. 879, 885 (2002) (emphasizing a thirty-five percent drop in the 100 top-earning law firms’ average pro bono hours between 1992 and 1999, despite an increase in earnings); Deborah L. Rhode, Access to Justice, 69 Fordham L. Rev. 1785, 1810 (2001) (“[O]nly eighteen of the nation’s 100 most financially successful firms meet the ABA’s standard of hours per year of pro bono service.”); Greg Winter, Legal Firms Cutting Back on Free Services for Poor, N.Y. Times, Aug. 17, 2000, at Al (detailing a significant decline in the number of pro bono hours performed by top law firms in the 1990s).
his piercing understanding of the limited results of lawyers' civic reform projects at the turn of the last century, he nevertheless champions a revival of this effort. He assumes that it is better to make some contribution than to give up altogether on the project of using elite lawyers' vast political and social power for the public good.

I confess to some initial ambivalence (sometimes even expressed in print) about the call, led by scholars such as Gordon, William Simon, and David Luban, for a return to the public service mentality of the elite lawyers of the Progressive Era, or, as other leading legal ethicists such as Russell Pearce have suggested, to even earlier eras, such as to the models of lawyering embedded within traditions of "civic republicanism." But I now understand why these scholars fought against the complete debunking of such flawed historical traditions, and I join the suggestion, even if only implicit in their work, that there are insights of great value to be obtained by investigating the internal world views of lawyers engaged in sustained public service, including—but, I would strongly emphasize, not limited to—those of the bar's economic and social elite.

CONCLUSION

What then do I think my study of the NAACP's first legal committee members might contribute to these efforts to better understand the bar's public service traditions and to resurrect and refurbish them for a new century? This is a very broad topic, and I will therefore limit myself here to three major points in conclusion.

First, I think it is important to understand elite public service traditions in comparison to activist traditions that tend to be overshadowed by

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120 See, e.g., Carle, Re-valuing Lawyering, supra note 3, at 741–42 (questioning some aspects of Simon's approach); see also Spillenger, Elusive Advocate: Reconsidering Brandeis as People's Lawyer, supra note 116 (questioning the unqualified praise given to the elite, independent public interest lawyer model personified by Louis Brandeis).

121 See, e.g., Gordon, Independence of Lawyers, supra note 118, at 80–83 (refuting leftist critiques of modest reform power of elite lawyers in Progressive, New Deal, and Great Society generations); David Luban, The Noblesse Oblige Tradition in the Practice of Law, 41 Vand. L. Rev. 717, 736 (1988) (arguing for return to "progressive professionalism," which "presents an ideal for elite law firm practice that is infinitely more attractive than ... law practice that serves no purpose but to help the rich get richer"); William H. Simon, Babbitt v. Brandeis: The Decline of the Professional Ideal, 37 Stan. L. Rev. 565 (1985) (suggesting that some of the traditional themes of professional vision of Brandeis and others are worth retaining); William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1083 (1988) (arguing that lawyers should seek to "do justice" in their cases).

elite models of public interest law. Thus, for example, as I examined in my earlier research, one of the most important dynamics at work in the NAACP's first legal committee were those between more and less privileged lawyers and activists. The more privileged lawyers had more resources and the luxury of working for free, and thought, sometimes correctly and sometimes not, that they knew a great deal more and should be controlling the direction of the early NAACP's legal work. These more privileged lawyers further embraced the idea that lawyering in the public interest should not involve accepting fees, and, for obvious practical reasons, there was much tension between the national NAACP office and outside counsel, including African-American counsel, over questions of how the organization's very limited funds should be allocated.

These tensions reflected in a microcosm tensions that exist in public interest practice generally: in history, in the U.S. Supreme Court's jurisprudence on constitutional protections for public interest practice, and in prevailing paradigms concerning the definition of public interest

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123 I thus disagree with my commentator who states that we need to talk about people outside the mainstream, "rather than focusing on legal elites." Brophy, supra note 56, at 625 (emphasis added). I think we need to talk about reformers of all types, and examine their relationships to each other.

124 See, e.g., Carle, Legal Ethics and the Early NAACP, supra note 1, at 113–14, 122–25 (describing these dynamics between privileged, white lawyers and less privileged African-American lawyers within the early NAACP); Carle, Re-envisioning Models for Pro Bono Lawyering, supra note 37, at 84–92 (describing these dynamics within both the NAACP and the National Consumers League).


126 See, e.g., Carle, Legal Ethics and Early NACCP, supra note 1 at 118–119 (describing some of these tensions).

127 See, e.g., Spillenger, supra note 116, at 1449 (critiquing ideas underlying famous early public interest lawyer Louis Brandeis' refusal to accept fees from clients when undertaking public interest representations).

128 See, e.g., NAACP v. Button, 371 U.S. 415 (granting constitutional protection under the First Amendment to lawyers engaged in public interest practice, defined as work related to public political issues, carried out in the nonprofit organizational form); In re Primus, 436 U.S. 412 (extending Button approach to ACLU attorney who solicited client); Ohralk v. Ohio State Bar Association, 436 U.S. 447 (1978) (distinguishing and refusing to grant any constitutional protections in solicitation case involving an attorney in private practice); see also Derrick Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L. J. 470 (1976) (critiquing the way in which Button contributed to the construction of a non-client focused for civil rights lawyers litigating school desegregation remedies in the post-Brown era).
practice today. These conceptions in turn influence how, by whom, and where public interest law is currently practiced.\footnote{129}

The story of the NAACP thus presents one example illustrating the importance of studying the activities of elite lawyers \textit{relationally}. One such relationship is that between elite lawyers and their far less powerful clients, as a large and growing body of literature investigates.\footnote{130} Another such relationship that I believe legal ethics scholarship should explore in greater depth is that between elite and less elite lawyers and sectors of the bar.

Second, I think it is worth focusing on the ideas about public service practice that the lawyers themselves express. Those ideas may be misguided, but they are at least part of the story, especially to the extent one’s scholarship is in part motivated by a desire to find or generate ideas that might help sustain future lawyers’ motivations to engage in public interest practice.\footnote{131} Put otherwise, what lawyers think they are doing often may not be what they actually achieve, but it is at least part of the story and deserves careful attention.

Third, and finally, it seems to me that an important issue for future study involves tracing the specific details of the operation of elite lawyers’ power in public interest law movements. The concept of power, of course, is very much in vogue in some parts of the legal academy today, often borrowed from so-called “post-modern”\footnote{132} French social theorists such as Michel Foucault and Pierre Bourdieu. Foucault has traced the operation of power in the construction of changing conceptions of human

\footnote{129 See Carle, Revaluing Lawyering for Middle-Income Clients, \textit{supra} note 3, at 739.}


\textit{Cf.} Abel, \textit{Choosing, Nurturing, Training and Placing Public Interest Law Students}, \textit{supra} note 107, at 1571 (expressing importance of finding ideas conferring status and honor on students who choose career paths in public interest law).

\textit{Questions concerning the definition of the term post-modern and who should be classified as such are highly contested. \textit{See, e.g., Structuralism and Poststructuralism} (interview by Gerard Raulet of Michael Foucault), in \textit{MICHEL FOUCALUT, AESTHETICS, METHOD, AND EPISTEMOLOGY} 433, 448 (James Faubion, ed., New York Press 1998) (Foucault stating that “I do not understand what kind of problem is common to the people we call ‘post modern’ or ‘poststructuralist’”); see generally Kathryn Abrams, \textit{Afterword: Critical Strategy and the Judicial Evasion of Difference}, 85 \textit{CORNELL L. REV.} 1426, 1437 n. 52 (2000) (discussing working definitions for post modernism and related terms).}
agents, or "Subjects," in a series of historical inquiries addressing a variety of topics including sexuality, punishment, and mental illness.\textsuperscript{133} Convincingly demonstrating the many different ways power has worked historically to construct reigning discourses about human subjects with respect to these topics, Foucault conceives of power as a force involving complex, historically variable, and multidimensional forces.\textsuperscript{134} As Foucault explains, power "must be analyzed as something which circulates."\textsuperscript{135} It is never localized here or there . . . never appropriated as a commodity."\textsuperscript{136}

Foucault's compatriot, Bourdieu, has studied the operation of power specifically in relation to class identity, showing how the processes that shape human identity also create and perpetuate socioeconomic classes.\textsuperscript{137} As Bourdieu documents in a multimedia presentation of photographs, statistics, newspaper clippings, and charts, the development of class-based aesthetics in turn affects every aspect of life, including one's taste in politics, dress, food, art and careers.\textsuperscript{138} A fruitful area of legal ethics scholarship might explore similar themes concerning the correlations between lawyers' class locations and their professional practice styles, values, and aspirations.

The question thus becomes: How useful might these so-called postmodern conceptions of class and power be to the project of legal ethics scholarship? To my view, these conceptions are very helpful, to a point—provided that their chic French origins do not disguise either an absence of analysis or a lack of skepticism about the flaws in these, as in all, theoretical approaches. Foucault and Bourdieu, each from somewhat different angles, could potentially help jumpstart a conversation about class and legal ethics norms that is currently being held too infrequently and among too small a set of legal ethics scholars in the United States—with some notable exceptions, of course, including Abel and Gordon, who both do place class at the center of their analyses, as already discussed. Foucault heightens our awareness of the many ways in which power operates through informal mechanisms, presenting "force fields" that bend human intent to purposes other than those of the intenders.


\textsuperscript{135} Id.

\textsuperscript{136} Id.


\textsuperscript{138} Id.
Bourdieu likewise emphasizes the pervasive, all-encompassing nature of socialization—into socio-economic classes, and, we might posit, into sectors of professional endeavor as well. Both offer approaches that reject vulgar materialism and instead focus on historical contingency, local variability and detail. In this way, both theorists provide models of the kind of work that could be done by focusing on the operation of power within the legal profession and in the relationships among various sectors of the legal profession and other institutions.

In short, it seems to me that a particular focus on the operation of power in various locations within the legal profession could be a very illuminating avenue for further scholarship. This, indeed, is one way of viewing the approach Robert Gordon takes in his work, as already summarized above. Gordon shows how elite lawyers’ power in the decades prior to and following the turn of the twentieth century served to map an agenda in legal doctrine that had sustained force through that century. Turning back to the example of the early NAACP with which I opened this Essay, I concluded that the existence of great professional power among the profession’s elite sometimes historically provided—and could still potentially provide, as I have just argued—a helpful asset for struggling public interest law movements, as the elite members of the first NAACP legal committee offered the early NAACP on the legal ethics front, for example. At other times, however, as I have also suggested, such power has been counterproductive to the achievement of the goals public interest activists defined for themselves.

It thus seems to me, in final conclusion, that the careful study of how elite lawyers’ power operates in the construction of ethics norms and traditions for public interest law practice presents an important area for additional research. To be most fruitful, that research should avoid both of two unhelpful extremes, either assuming that the operation of such power is always bad, as a strong version of Auerbach’s approach might conclude, or, in what seems to me the equally dangerous, opposite extreme, assuming that the unreflective use of such power in the context

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139 Bourdieu has been criticized, somewhat convincingly in my view, for having an unduly static conception of class arising out of the particular historio-political situation he studied in modern France. See, e.g., James Bohman, Practical Reason and Cultural Constraint: Agency in Bourdieu’s Theory of Practice, in BOURDIEU: A CRITICAL READER 129, 143 (Richard Shusterman ed., 1999) (arguing that Bourdieu’s conception of socioeconomic class is too rigid and “eliminates the very possibility of transformation that it is supposed to describe”).

140 See Carle, supra note 38, at 84–92 (discussing the way in which both the NAACP and the National Consumers’ League’s heavy reliance on elite lawyers for legitimacy and legal direction can be argued to have interfered with or slowed down those organizations’ advocacy agendas).
of public interest law practice is always to the good.\textsuperscript{141} The real trick, it seems to me, is to construct ideas that both motivate lawyers to use their social, political, and economic power for progressive reform, and impose, as a matter of legal ethical norms, restraints on the use of that power to avoid the dangers of its misuse in the fragile context of public interest law movements.

\textsuperscript{141} This is a criticism, for example, that can be leveled against Parsonian structuralist-functionalist models for analysis of the legal profession, as noted previously in text. See text following note 100.