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# STATESMAN OR SCRIBE? LEGAL INDEPENDENCE AND THE PROBLEM OF DEMOCRATIC CITIZENSHIP

*Aziz Rana\**

## INTRODUCTION

Lawyers today find themselves on the defensive, viewed by more and more Americans as “simply a plague on society.”<sup>1</sup> Public opinion polls routinely give attorneys low marks for honesty and ethical standards, ranking them behind virtually every occupational group except for insurance salesmen, advertising practitioners, and car salesmen.<sup>2</sup> Recent American Bar Association (ABA) surveys further confirm popular mistrust; they report that the profession’s public image falls at or near the bottom of all American institutions, ahead only of the media.<sup>3</sup> This mistrust captures an increasing sentiment among ordinary citizens that lawyers constitute a hidden and unelected elite and a threat to democratic ideals.<sup>4</sup> While all citizens are supposed to have an equal voice in controlling public policy, lawyers seemingly embody a separate caste, able to manipulate elected representatives and assert undue pressure on political life. The conservative

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1. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1240 (1991).

2. See John Tierney, *The Big City; Bar Sinister: Lawyers Earn Public’s Wrath*, N.Y. TIMES, May 13, 1999, at B1.

3. See LEO J. SHAPIRO & ASSOCS., AM. BAR ASS’N, PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 6 (2002) [hereinafter ABA, PUBLIC PERCEPTIONS] (reporting that only 19% of Americans say they are “extremely” or “very” confident in lawyers, as compared to 50% for doctors); see also M/A/R/C RESEARCH, AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 7 (1999) (similarly finding that only 14% of respondents asserted strong confidence in the legal profession).

4. According to one American Bar Association (ABA) study, the decline of professional reputation is directly tied to discomfort “with the connections that lawyers have with politics, the judiciary, government, big business, and law enforcement.” ABA, PUBLIC PERCEPTIONS, *supra* note 3, at 4. Americans fear that these connections allow lawyers “not only to play the system, but also to shape that very system.” *Id.*

call for tort reform, with its presentation of trial lawyers as wealthy elites preying upon middle-class doctors and businessmen, draws much of its appeal from these arguments. According to Walter Olson, an outspoken critic of the trial bar,

The new rule of lawyers brings us many evils, but perhaps the greatest is the way it robs the American people of the right to find its own future and pursue its own destiny. No doubt democratic processes often fall short of perfection . . . . But however uncertain the results of democracy, however slow and clumsy its procedures, we can feel quite sure that it is a better course than agreeing to turn over our rights of self-government to a new class of unaccountable lawyers.<sup>5</sup>

Moreover, this skepticism is not the exclusive domain of the American Right but extends across the political spectrum. In recent years, scholars and commentators on the left have found themselves in a heated debate about the appropriateness of pursuing transformative projects through the courts rather than in more popular settings. Disturbed by the political retreat of social movements representing labor interests, racial equality, and women's rights, these left commentators have blamed the turn to the judiciary (and the dominance of lawyers within these movements) as partly responsible for the collapse of mass backing and participation. The late social historian Christopher Lasch maintained that,

The great liberal victories—desegregation, affirmative action, legislative reapportionment, legalized abortion—were won largely in the courts, not in Congress, in the state legislatures, or at the polls. Instead of seeking to create popular consensus behind these reforms, liberals pursued their objective by indirect methods, fearing that popular attitudes remained unreconstructed.<sup>6</sup>

In his view, because lawyers—rather than the public at large—drove the enactment of such policies, they have been on shaky democratic footing ever since.<sup>7</sup> Within legal academia, Gerald Rosenberg is perhaps best known for articulating these claims.<sup>8</sup> He sees lawyer-driven reform as inevitably facing a democratic deficit, in which an elite bar imposes its ends on the public without ever gathering a meaningful mandate: “When courts decide things, for better or worse, I think that many Americans feel they are

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5. WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* 313–14 (2003).

6. CHRISTOPHER LASCH, *THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS* 37 (1991).

7. *Id.*

8. Gerald Rosenberg's book, *The Hollow Hope*, presents a left critique of *Brown v. Board of Education* and the capacity of court action to alter social life dramatically. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (arguing that the ruling had no meaningful effect on precipitating the end of segregation in the South).

unaccountable. They feel helpless. They feel there's little they can do. And that creates a sense of outrage."<sup>9</sup>

Confronted with the charge of being antidemocratic by both the Right and the Left, the modern legal profession appears gripped by a generalized version of the "countermajoritarian difficulty."<sup>10</sup> Over forty years ago, Alexander Bickel argued that when the U.S. Supreme Court declares legislative acts to be unconstitutional, "it thwarts the will of representatives of the actual people . . . it exercises control, not in behalf of the prevailing majority, but against it."<sup>11</sup> Similarly, today's claim that the profession as a whole faces a democratic deficit implies that whenever lawyers employ the courts to pursue their own political objectives, they usurp the authority of elected leaders and challenge the self-government of citizens. These views have clearly struck a sensitive nerve within the profession. In an effort to improve its public image, the Association of Trial Lawyers of America (ATLA) recently changed its name to the far vaguer American Association of Justice (AAJ).<sup>12</sup> In fact, the suspicion that including the word "lawyer" in the title of an advocacy group may undermine its popular support has affected more than just the trial bar. Even a public interest nongovernmental organization (NGO) like the Lawyers Committee for Human Rights concluded that a name change, in this case to Human Rights First, may be the best way to communicate with a public that is skeptical of the profession.<sup>13</sup>

In legal ethics, the problem of the bar's democratic illegitimacy manifests itself in a persistent disagreement about which principles should govern the activity of lawyering. In particular, it shapes a key debate about how to address the tension between an attorney's duties to her clients and to the public interest writ large. On one side are those who maintain that lawyers should balance client loyalty with a moral commitment to justice and a pursuit of valuable social ends.<sup>14</sup> They emphasize that, according to the ABA Rules of Professional Conduct, lawyers are not only client representatives but are also public citizens and officers of the legal

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9. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 819 (2006).

10. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–28 (1962).

11. *Id.* at 17.

12. Ann Knef, *ATLA Drops 'Trial Lawyer,' Adds 'Justice' to Name*, *W. VA. REC.*, July 19, 2006. This move led Lisa Rickert, president of the U.S. Chamber Institute for Legal Reform, to crow that the name change represented "an astounding admission of the unpopularity of trial lawyers in America." *Id.* (quoting Lisa A. Rickert, President, U.S. Chamber Institute for Legal Reform).

13. See Human Rights First, *Human Rights First Is the New Name of the Lawyers Committee for Human Rights* (Jan. 30, 2004), [http://www.humanrightsfirst.org/about\\_us/name\\_change/name\\_change.htm](http://www.humanrightsfirst.org/about_us/name_change/name_change.htm).

14. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083 (1988).

system.<sup>15</sup> On the other side are those who defend an ideal of “zealous advocacy within the bounds of the law,”<sup>16</sup> and contend that attorneys should be strongly partisan and motivated by a primary focus on client autonomy.<sup>17</sup> These critics of legal independence, found on both the left and the right, cast the promotion of the bar’s moral autonomy in a harsh light. They argue that ethical independence from clients and an orientation toward the lawyer’s distinct vision of justice or the public interest is tantamount to client domination.<sup>18</sup> Such domination allegedly reproduces in the representational context precisely the fears of elite control and unaccountability that mark the bar’s larger democratic predicament in public life.

If anything, the presumption of a democracy deficit has placed supporters of a morally reflective practice in the unenviable position of offering an apology for professional power. Since legal practice’s underlying lack of popular legitimacy is largely taken for granted, scholars are inevitably trapped into presenting either an explicit or an implicit defense of elite politics. The most common version of this defense reconceives the lawyer ideal as one of “statesmanship” rather than zealous advocacy.<sup>19</sup> It laments the bar’s decline from a class of “social trustee[s]”<sup>20</sup> who were once “guardian[s] of our material interests and political culture”<sup>21</sup> to little more than technical experts and autonomy agents—“a species of office management whose main virtue is efficiency rather than wisdom.”<sup>22</sup> Some supporters appear to do away almost entirely with the pretense of reconciling legal independence with democratic equality. Geoffrey Hazard, in his seminal piece, *The Future of Legal Ethics*, at one point waxes poetic about the benefits of aristocracy and elite rule, remarking that, “As a

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15. See MODEL RULES OF PROF’L CONDUCT pmbl. (2001).

16. For a description of this view, see W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364 (2004). See also Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 52 (2003).

17. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 57 (1990) (“[T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy . . . by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.”); see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976); Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614.

18. But see William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1101 (1994). In the article, Simon describes and ultimately rejects the call for client empowerment among poverty lawyers. *Id.* According to him, this call is tied to concerns that the bar unduly dominates its poor clients, substituting professional interests for those of marginalized communities. *Id.*

19. See generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

20. STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 9 (1994).

21. Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J.L. & HUMAN. 209, 277 (2003).

22. KRONMAN, *supra* note 19, at 4.

constitutional matter, Tocqueville could be right that the ‘aristocratic’ element—composed of a legal profession or other groups—serves the long-run good of society if it is suitably organized and restrained.”<sup>23</sup>

Ultimately, the prevailing debate leaves lawyers with a stark choice: they must decide between becoming statesmen or scribes, either standing above most Americans or rigidly enacting a client’s will, more or less irrespective of its ethical content. In conflating the activity of legal citizenship with an elevated status as a lawyer-guardian, proponents of professional independence often ignore the basic democratic premise that caring for the public must be a cooperative endeavor—one in which all individuals share jointly in the responsibilities of decision making. At the other extreme, client-centered accounts reduce the lawyer to simply a scribe or functionary, particularly when the client is a large corporate entity. They reach the problematic conclusion that respecting democracy requires adherence to neutral partisanship regardless of whether one’s actions actually undermine the foundations of popular self-rule. As a consequence, neither approach provides a truly democratic ethos for lawyers, one that informs both their legal practice and their broader public commitments as citizens equally charged with maintaining common institutions.

While scholarship in legal ethics by and large presupposes a claim about the lawyer’s democratic deficit, I argue that professional independence is not in tension with, but in fact is crucial to core principles of self-rule. In a sense, both sides of the current debate operate within a limited account of democratic imagination, which in practice forces lawyers to choose between adhering to democratic principles and exercising their independent judgment. Client-centered perspectives often reduce self-government simply to electoral mechanisms and formal procedures. And rather than expanding the substantive meaning of democracy beyond these formal characteristics, proponents of moral independence tend to present robust citizenship as the domain of elites.

Without a richer political theory of self-government, the debate in legal ethics remains subject to a seemingly irreconcilable binary. As such, this essay does not offer a new interpretation of the rules, but instead suggests a stronger and more coherent theoretical grounding for those who wish to defend the lawyer as an autonomous moral agent. I argue that embedded in the very nature of legal practice is an irreducible degree of discretion, in which lawyers face unavoidable conflicts about how to situate their clients’ objectives within a host of competing social ends. Moreover, lawyers cannot evade these choices by imagining themselves as mere instruments for the expression of an already formed and coherent client will. Central to the very nature of legal work is a basic question: How should the attorney

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23. Hazard, *supra* note 1, at 1277 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J. P. Mayer & M. Lerner eds., George Lawrence trans., Harper & Row 1966) (1835)).

relate to her own discretionary activity and what principles should guide her exercise of judgment?

This essay offers a preliminary answer by locating discussions of legal ethics within a broader American democratic tradition, one which is too often subsumed in today's public discourse.<sup>24</sup> According to this alternative tradition, democracy embodies a collective exercise in continuous and extensive self-rule in all social institutions. Such ideals do not detach political life from economic life, and imagine work as both a permanent education in citizenship and a central site for the everyday practice of moral reflection. Instead of conceiving of the legal profession as an aristocratic caste distinct from most Americans, thinkers in this tradition—including William Manning, Abraham Lincoln, and John Dewey—rejected any separation between learning and labor, and presented legal practice as one among many forms of ethical and autonomous work. Viewed through this political lens, the professional crisis of democratic legitimacy is not the product of legal independence *per se*. Rather, it is the result of long-term social trends that have undermined the institutional supports for a more expansive democratic culture and thus disconnected legal practice, particularly among the elite bar, from popular forms of work and political participation. This essay attempts to situate the modern profession within a larger democratic ethos, while acknowledging the degree to which ethical autonomy has diminished across economic and political settings. Drawing from an earlier tradition, it sketches out implications for the bar's role in society and highlights moral standards that might guide the contemporary lawyer's own discretionary activity. In developing this argument, it underscores a fact about legal discretion that none of the prevailing ethical approaches fully appreciates. Any attempt to articulate the legitimacy of professional independence is necessarily incomplete without a meaningful account of the political community within which lawyers exercise their judgment.

In addition, I aim to address practicing attorneys in two ways. First, I hope to strengthen the willingness of lawyers to engage in ethical reflection by offering a more compelling normative defense of morally aware legal representation—one that is grounded in a democratic political theory and that directly confronts countermajoritarian charges. Unlike notions of legal statesmanship, the defense I offer here employs an American political tradition that underscores the centrality of professional autonomy to robust citizenship. According to this vision, when corporate attorneys engage their clients in practices of ethical counseling or refuse to create elaborate tax schemes that contradict the spirit of the law, they actually fulfill a basic democratic function. Consistent with the hopes of Manning, Lincoln, and Dewey, these actions see work as a space in which individuals cultivate

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24. For more on the emergence and continued relevance of early American ideals of democratic practice and citizenship, especially their connections to the experience of colonial settlement and imperial expansion, see generally AZIZ RANA, *SETTLER EMPIRE AND THE PROMISE OF AMERICAN FREEDOM* (forthcoming 2010).

habits of responsibility and continually reflect on the moral and political implications of their own activities. Regardless of practice setting, lawyers have an obligation to balance client interests with ethical considerations.

Second, I maintain that lawyers should employ their professional discretion to expand the capacities of Americans to exercise economic and political autonomy. In many routine forms of legal practice, the opportunity to promote popular discretion and authority may not exist. But precisely because lawyers operate at the intersection of law, politics, and bureaucracy—whether they work in public interest litigation, administrative and regulatory practices, class action contexts, or matters of criminal law—questions of citizen engagement and control are more prevalent than one might initially suppose. To the extent that opportunities do arise, lawyers can help develop institutional solutions that deepen popular participation and draw on the knowledge and involvement of local communities. Such a representational approach will not provide a panacea for overcoming the bar's larger crisis of legitimacy or for ensuring that all acts of discretion fulfill democratic obligations.<sup>25</sup> Still, if attorneys infuse their practice with substantive ethical commitments, these practitioners can embody both an example of democratic lawyering and a method for reforming the bar's relationship to the wider community of citizens.

In Part II, I explore in greater detail the limits of the current debate in legal ethics about moral autonomy. In particular, I argue that most accounts of independence—even those that defend the ideal of a “people’s lawyer”—fall back on a version of republican elitism that inevitably distinguishes the activity of ruling from the practices of everyday participation. Part III then turns to the vision of democratic culture defended by Lincoln and others in which work provided an ethical training for citizenship as well as a crucial arena for its exercise. This discussion compares today’s claims regarding client domination with classic Jeffersonian and Jacksonian arguments about the bar’s elitism. Such nineteenth-century Democrats believed that legal privilege, entrenched by specialized education and powerful bar associations, transformed lawyers into mere dependents of wealthy benefactors unable to distinguish between gentry interests and the public good. Unlike today’s critics of professional power, these previous thinkers condemned lawyers for failing to demonstrate *enough* independent moral judgment—which they saw as integral to popular self-rule.

I return in Part IV to the question of why the profession faces a crisis of democratic legitimacy. I argue that the prevailing suspicion of lawyers cannot be solved through changes in legal ethics rules alone. It is the product of discontent with a broader political development: the division in American life between neutralized citizens and empowered experts. This shift is, in large part, the consequence of the increasing hierarchy and

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25. These problems are deeply entrenched; they are the product of massive sociological changes and are in many ways inherent in the nature of modern professional work (whether undertaken by doctors, engineers, or lawyers).



complexity that mark modern political and economic administration. Lawyers have borne the brunt of public opposition to these developments due to the profession's unique role at the intersection of law and politics. As I discuss extensively—through a rereading of Walter Lippmann and an assessment of recent legal ethics scholarship—such changes clearly threaten the vision of a local, highly participatory community espoused throughout the nineteenth century. However, Part IV also underscores what remains plausible about this more democratic mode of lawyering. In the context of energetic and engaged social movements, it emphasizes the importance for the legal profession of employing its own discretion to expand the capacity of the public to act informally and spontaneously to challenge entrenched hierarchies. I present this argument by exploring how lawyers have defended the right to strike—one such example of discretionary popular power—and by outlining how the democratic ethos for which I argue might in practice influence an attorney's representational approach.

The goal of this discussion is to highlight the extent to which an alternative theory of politics and law sheds light on the potential challenges facing modern lawyers concerned with the status of democracy. By way of a conclusion, I describe the democratic function that lawyers can play when social movements are in retreat—a circumstance far more akin to our current moment. With the participatory institutions that undergirded labor and civil rights activism steadily eroding, lawyers can no longer simply protect the spaces for informal protest and uphold constraints on bureaucratic power. Given the bar's position in legal and political life, attorneys have a professional responsibility to participate in rebuilding the institutional frameworks within which citizens can assert their voice and intervene in collective decision making. At the macrolevel, this means orienting courts toward citizens by simplifying key elements of the legal system, in the process more broadly dispersing ethical autonomy and political agency. In fact, lawyers should view such efforts as part of a wider effort to link administrative and regulatory policy to participatory modes of governance. Such governance would ideally combine the benefits of centralized accountability with the extensive devolution of actual control to those local constituencies directly affected by economic, social, and environmental concerns.

At the microlevel of daily practice, I suggest how the activities of popular organizing embody a means by which lawyers can integrate a democratic ethos within particular representational contexts. Class action litigation pertaining to school desegregation provides a useful lens for appreciating how this approach not only serves democratic ends but better fulfills professional duties of client representation. As a final note, these discussions of lawyers and organizing are not meant to exhaust the realm of democratic lawyering, but are offered as initial illustrations of how such practices might operate in one particular legal setting. In the end, to escape the statesman-scribe binary, any attempt to defend the attorney's moral

independence must emphasize how everyday choices made by lawyers can create the environment for effective collective action and control.

### I. DIFFERENTIATED CITIZENSHIP AND THE CALL FOR INDEPENDENCE

The debate about whether lawyers should be client-centered autonomy agents or ethically independent actors implicitly rests on a foundational disagreement in political theory about the nature of citizenship. Those arguing for independence almost always read legal education and practice as preparation for the exercise of public leadership. As such, they differentiate between the requirements and experiences of elite as opposed to popular forms of participation. In the following sections, I demonstrate how these arguments resonate with a republican tradition that emphasizes the benefits of “natural aristocracy.” The consequence is that even advocates who wish to reconcile professional power with democratic values inevitably find themselves constructing an apology for political elitism. These arguments begin from presumptions about the distinctive leadership capacities of the bar and then proceed to demonstrate how best to situate such necessary leadership within the framework of equality. As a result, only client-centered accounts appear to take seriously the democratic importance of undifferentiated citizenship, but at the cost of claiming that lawyers should assert minimal discretionary judgment. If the republican tradition presents lawyers as uniquely capable of wielding collective authority, the call for client autonomy reaches the opposite, yet equally problematic, conclusion: that the profession is the one social group uniquely disempowered from asserting its voice in public life. In essence, both approaches to the profession’s ethical duties presuppose a political theory that is incompatible with more substantive accounts of the lawyer’s democratic citizenship.

#### A. *Natural Aristocracy and Republican Faith in Lawyers*

In order to appreciate how ethical questions about legal practice imply normative claims about citizenship, it is necessary to take a step back and look more closely at the republican vision of natural aristocracy. Perhaps the best place to begin is with the idea’s cultural and political emergence in the years following the American Revolution. During the colonial period, a common republican position maintained that a well-functioning social order rested on virtue and thus required that political rulers transcend their own partiality and act on the basis of the general good.<sup>26</sup> As Lasch wrote,

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26. Along with virtue, the other central element of republicanism was the notion of balance in government. Following Aristotle’s classification, traditional republicans distinguished regimes by whether they lodged power in the one, the few, or the many, with each form embodying sources of potential corruption. ARISTOTLE, *THE POLITICS* 51–81 (Stephen Everson ed., Cambridge Univ. Press 1988). Thus, the goal of political construction was “to work out some principle of balance that would combine the advantages of each while nullifying the features that made them oppressive.” LASCH, *supra* note 6, at 173. Political theorist Philip Pettit writes that, for classical republicans, government actions

according to elite republicans, “virtue implied the fullest development of human capacities and powers. They condemned a life devoted to the pursuit of wealth and private comforts, not because it was selfish, but because it provided insufficient scope for the ambition to excel.”<sup>27</sup> Under this framework, political activity was both an education in virtue—through the Aristotelian experience of ruling and being ruled in turn—and the primary arena for its display. For such republicans, this focus on achieving excellence through action in the public sphere provoked grave suspicions about the drive for wealth acquisition or material well-being: “Republicanism condemned self-seeking when it tempted men to value the external rewards of excellence more highly than the thing itself or to bend the rules governing a given practice to their own immediate advantage.”<sup>28</sup> As a result, most members of the polity, especially ordinary laborers, were too bound to economic necessity—and thus too wedded to material self-interest—to exercise power in the name of excellence rather than personal advantage. This politics of virtue meant that a specific social group had to be separated out and designated as guardians of the larger polity.

In common seventeenth-century English accounts, only those few who were already wealthy and landed enough to be removed from material concerns should wield political responsibility. As owners of property, such elites held a continuous stake in collective life and were best situated to think in terms of the long-run interests of the larger polity. This linkage between virtue and property meant that traditional republicans were highly skeptical of democratic principles of majority rule or of broadening voting rights beyond a limited community of landholders. As Henry Ireton, Oliver Cromwell’s son-in-law, argued during the 1647 Putney Debates of the English Civil War, general well-being and social order would crumble if citizenship was seen as a birthright and suffrage extended to all white males. Since only landed elites had “a permanent fixed interest in [the] Kingdome,” they alone had the necessary virtue to combine participation with political excellence.<sup>29</sup> Echoing these sentiments a century and a half later, Seth Ames, the son of arch-Federalist Fisher Ames, declared that

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promoted liberty only “so long as they respect people’s common interests and ideas and conform to the image of an ideal law: so long as they are not the instruments of any one individual’s, or any one group’s, arbitrary will.” PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 36 (1997). In other words, the one, the few, and the many represented factions within society whose interests were not equivalent to the common good. Thus, true law had to result from a balancing process, in which the creation of a “mixed regime” would check attempts by partial groups to impose arbitrarily their own will on the collective. *Id.* at 20.

27. LASCH, *supra* note 6, at 174.

28. *Id.*

29. Barbara Taft, *From Reading to Whitehall: Henry Ireton's Journey, in THE PUTNEY DEBATES OF 1647: THE ARMY, THE LEVELLERS AND THE ENGLISH STATE* 175, 184 (Michael Mendle ed., 2001) (quoting Henry Ireton). The debate between Oliver Cromwell and Henry Ireton and their more radical officers over the relationship between citizenship and voting offers one of the great political discussions of equality and political participation. For more on the Putney Debates, see JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 44–46 (1991).

democracy was little more than class rule by the poor—those too economically dependent to think in terms of the common weal—and that it reduced political decision making to “present popular passions, independent of the public good.”<sup>30</sup> Accordingly, statecraft had to be insulated from a self-interested public and placed in the hands of a virtuous and hereditary elite.

Nonetheless, for the Framers of the U.S. Constitution, the revolutionary experience and the increasing political influence of small farmers and artisans<sup>31</sup> underscored the impossibility of limiting political power to a coterie of gentry elites and powerful families. The Framers appreciated that the new political community would have to be grounded in the democratic principle of majority rule and expand the domains of citizenship and voting. Still, profound skepticism regarding the capacities and interests of most ordinary individuals ran deep; as political theorist Sheldon Wolin writes, “[T]he Founders, almost without exception, believed that democratic majority rule posed the gravest threat to a republican system.”<sup>32</sup> In the *Federalist Papers*, James Madison famously remarked that, “Had every Athenian citizen been a Socrates[,] every Athenian assembly would still have been a mob.”<sup>33</sup> In essence, popular political involvement in the activity of ruling inevitably reduced the general good to the partisan commitments of the laboring masses. Thus, the great challenge facing Madison and others was to devise political institutions that protected majority rule and yet, at the same time, ensured that collective decision making would not be held hostage to the vagaries of public opinion. “[I]n order to avoid the confusion and intemperance of a multitude,” Madison believed that it was essential to create a detached national government that divided sovereignty across multiple branches.<sup>34</sup> Ideally, these institutional arrangements would limit popular pressure and, as Bruce Ackerman notes, “economize on virtue”—i.e., reduce the necessity for good government to rest on the public-mindedness and wisdom of ordinary people.<sup>35</sup>

Still, even if the system of government restrained popular power and successfully economized on virtue, no political framework could ever do without virtue entirely. To guard against threats to public well-being, there

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30. J. T. Kirkland, *Memoir*, in 1 WORKS OF FISHER AMES 21 (Seth Ames ed., 1854).

31. Historian Robert Wiebe describes the 1770s and 1780s as a period of rising egalitarian commitments, marked by the diffusion of political control and the creation of “[a] multitude of small political units, governmental and quasi-governmental, [which] rushed to fill the vacuum of British authority, [and] resisted the pulls from patriot capitals almost as stubbornly as they resisted the British.” ROBERT WIEBE, *THE OPENING OF AMERICAN SOCIETY: FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISUNION* 3 (1984); see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1991) (arguing that the American Revolution was a deeply radical event because it dramatically increased social equality among the colonists and undermined preexisting status hierarchies).

32. SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* 229 (2008).

33. *THE FEDERALIST* NO. 55, at 300 (James Madison) (J. R. Pole ed., 2005).

34. *Id.*

35. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 198–99 (1991).

still needed to be a group within society that stood independent of the dominant and competing factions and thus remained able to act on the basis of disinterested and autonomous reflection. For the Founders, prevailing egalitarian sentiment meant that such public excellence could no longer be tied to a hereditary aristocracy, grounded in wealth and property and enjoying special political privileges. As Thomas Jefferson wrote in a letter to John Adams, the only solution was the creation of a natural aristocracy, in which those individuals with the greatest “virtue and talents” nurtured their capacities through proper training and gained election to positions of leadership.<sup>36</sup> Jefferson concluded,

The natural aristocracy I consider as the most precious gift of nature for the instruction, the trusts, and government of society. And indeed it would have been inconsistent in creation to have formed man for the social state, and not to have provided virtue and wisdom enough to manage the concerns of the society. May we not even say that that form of government is the best which provides the most effectually for a pure selection of these natural aristoi into the offices of government?<sup>37</sup>

In Jefferson’s efforts to combine republican commitments to virtue with the democratic principle of majority rule, he provided the foundation for a new mode of stratified citizenship. For Ireton, citizenship and political self-rule were the exclusive domain of property owners, depicted as the sole body with a fixed interest in the community’s welfare. By contrast, Jefferson argued that citizenship was a broad right, carrying far different responsibilities depending on one’s position in society. For the ordinary laborer, the citizen’s basic function was to recognize and elect wise leaders—those better suited by training and intellect to wield actual political power. As for the talented few, citizenship meant holding office or positions of public importance and entailed the exercise of direct political participation—the Aristotelian vision of ruling and being ruled in turn. While such republicanism may have done away with hereditary nobility, it still presumed that collective decision making had to be separated from the public at large and controlled by responsible elites.

Yet, the question remained: Which social body would provide the backbone for the new political leadership? Given that lawyers at the founding, in the words of Robert Gordon, “furnished a disproportionate share of Revolutionary statesmen, dominated high offices . . . and the organs of elite literary culture, had more occasions even than ministers for public oratory, and were the most facile and authoritative interpreters of laws and constitutions,” it followed that they inevitably claimed the mantle of a natural aristocracy and with it the republican ideal of political excellence.<sup>38</sup> As members of a learned profession, bound by practical

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36. Letter from Thomas Jefferson to John Adams (Oct. 28. 1813), in 1 THE FOUNDERS’ CONSTITUTION 568–69 (Philip B. Kurland & Ralph Lerner eds., 1987).

37. *Id.*

38. Gordon, *supra* note 14, at 14 (citing ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11, 17, 66–72, 77–78 (1984); JOHN PHILLIP REID, CONSTITUTIONAL

knowledge rather than wealth or landed interests, leading lawyers of the age saw themselves as the entity best able to constrain popular passion and to protect the republican system of government. Articulating the special standing of the bar and the presumed need for a natural aristocracy, Alexander Hamilton wrote,

Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?<sup>39</sup>

While the Federalists themselves never overtly described why groups such as the bar should assume the responsibilities of political decision making, Alexis de Tocqueville made explicit the ties between elite citizenship and specialized education. Tocqueville believed that the United States was dominated by the two parties that “have divided mankind since free societies came into existence,” namely, the few and the many or the aristocratic and democratic elements.<sup>40</sup> In his view, lawyers were clearly members of the elite few and enjoyed “the tastes and habits of an aristocracy.”<sup>41</sup> In particular, legal education and training underscored the distinct social experience and values that constituted the life of a learned professional as opposed to that of a farmer or wage earner. “Study and specialized knowledge of the law give a man a rank apart in society and make of lawyers a somewhat privileged intellectual class. The exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science . . . .”<sup>42</sup> Moreover, special education did more than promote a sense of superiority; it provided training in political decision making that developed both the skills of rulership and an appropriate skepticism toward the judgment of everyday laborers. In essence, it made lawyers a natural aristocracy, whose talents, rather than unearned wealth or sheer power, distinguished them from both the landed gentry and the broader public. Equipped with this background, for Tocqueville, lawyers “serve[d] as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective [gave] them a certain scorn for the judgment of the crowd.”<sup>43</sup> He concluded that the legal profession was the one aristocratic body that could “unforcedly mingle with elements natural to democracy and combine with them on comfortable and lasting terms.”<sup>44</sup> As a consequence, he believed that the “permitted influence” of the bar would check the excesses of

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HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 283 n.45 (1956)).

39. THE FEDERALIST NO. 35, at 181 (Alexander Hamilton) (J.R. Pole ed., 2005).

40. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 178 (J. P. Mayer ed., George Lawrence trans., 1988).

41. *Id.* at 264.

42. *Id.*

43. *Id.*

44. *Id.* at 266.

popular passion and over time provide “the strongest [barrier] against the faults of democracy.”<sup>45</sup>

At the heart of arguments that linked Madison and Hamilton to Tocqueville was a basic assumption about the irrationality of ordinary citizens. While the populace embodied an indistinct mass, prey to its own self-interest and subject to demagoguery, the new natural aristocracy was taken to be composed of “rational actors,”<sup>46</sup> who, in the words of Sheldon Wolin, “weigh counterevidence carefully, employ power judiciously, and, above all, consider the consequences of a course of action, especially if it involves grave risks or harm.”<sup>47</sup> This distinction between the abilities of learned professionals and citizens indicated a troubling distaste for the attitudes of most Americans, who were depicted as fundamentally incorrigible. Equally disconcerting, it rested on the proposition that entities such as the bar, itself rife with partiality and self-seeking behavior, could and properly should embody a universal class. Still, as the next sections explore, despite these normative shortcomings, versions of republican elitism have come to dominate current defenses of the lawyer’s moral and political independence in legal ethics.

#### B. *The Lawyer-Statesman and Elite Despondency*

Potentially the most well-known defense of the lawyer’s moral and political independence, presented by Anthony Kronman’s *The Lost Lawyer*, relies heavily on such elite republicanism. Kronman’s primary concern revolves around whether legal practice continues to be a noble calling or has instead devolved into a form of expert labor indifferent to social ends.<sup>48</sup> He views the debate in legal ethics about how to balance duties to clients with those to the public writ large as suggesting a much more profound “crisis of values”—one that goes to the heart of the professional experience.<sup>49</sup> In reality, however, this existential crisis is limited to the most prestigious elements of the bar, some of whom worry that the profession no longer plays the role of the natural aristocracy imagined by Hamilton and Tocqueville. These arguments may well be right about the decline of a service ethic in the profession. Yet, by tying a defense of the lawyer’s independence to the reclamation of her lost status as a social guardian, the statesmanship discourse ends up presenting autonomous reflection and moral deliberation as the purview of elite actors.

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45. *Id.* at 263.

46. WOLIN, *supra* note 32, at 182.

47. *Id.*

48. This is not unlike a series of empirical studies in the sociology of the profession also published in the mid-1990s. Of particular note are BRINT, *supra* note 20, and ELLIOT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996), which each argue that professional work as a whole is increasingly transforming into expertise-for-hire due to market pressures and changes in state policy.

49. KRONMAN, *supra* note 19, at 4.

In Kronman's account, legal practice today seems reduced to an adjunct of either business or government, and lawyers are neither publicly minded statesmen nor even centrally motivated by this ideal. Kronman argues that attorneys face a deep uneasiness that "is the product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up"<sup>50</sup> and for the professional to be not just "an accomplished technician but a person of prudence or practical wisdom as well."<sup>51</sup> He hearkens back to an earlier period when lawyers took pride in the intrinsic worth of their profession, which at its best embodied the character virtues of independence, political sensitivity, and moderation. Rather than being bound to client interest, professionalism in this era emphasized "the need for deliberative judgment and a public-spirited concern for the good of the law as a whole."<sup>52</sup> Echoing these sentiments, the late Chief Justice William Rehnquist lamented that, while great lawyers like Thomas Jefferson, Alexander Hamilton, James Madison, John Marshall, and Abraham Lincoln "played a vital, perhaps a transcendent, role in steering the ship of state through the shoals that confronted it," most successful attorneys in contemporary life appeared uninterested in the greater good or public service.<sup>53</sup>

Despite the claim that legal practice as a whole faces a crisis of values and morale, Kronman overstates professional unhappiness among most lawyers. In the bar generally, there are few signs of existential malaise. Rather than mourning the loss of a noble calling, a slate of recent studies finds that practitioners are overwhelmingly content with their career choices. Data tracking attorneys who were admitted to the bar in 2000 reported that 80% of respondents expressed satisfaction with their occupation, leading the researchers to conclude that "there is no evidence in the AJD [(After the JD)] data of any pervasive unhappiness in the profession."<sup>54</sup> Such statistics mirror the findings of John Heinz and his coauthors in their far-reaching work on lawyers in Chicago.<sup>55</sup> If anything,

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50. *Id.* at 2.

51. *Id.*

52. *Id.* at 167 (citing Maxwell Bloomfield, *Law and Lawyers in American Popular Culture*, in *LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS* 132-43 (Carl S. Smith et al. eds., 1983)).

53. William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 *HARV. J.L. & PUB. POL'Y* 537, 537 (1986).

54. RONIT DINOVIETZ ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 47 (2004).

55. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 257 (2005) [hereinafter HEINZ ET AL., *URBAN LAWYERS*] (reporting that a 1995 survey revealed that 84% of all Chicago lawyers were satisfied or very satisfied with their work). In a previous article, John Heinz and his coauthors describe as "dreadful" most of the evidence cited for the low morale of lawyers. John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 *IND. L.J.* 735, 736 (1999). They see the declension thesis as a stock narrative of the profession, with little grounding in current circumstances. *Id.* at 735 n.3. "Every generation of lawyers appears to think that the golden era of the bar occurred just before they entered it. (Understandably, however, they never make the obvious cause-and-effect inference.)" *Id.*



the central concern of most ordinary lawyers is that monetary rewards and career options are deeply stratified between an elite bar where “business is booming” and a lower tier of solo and small-firm practitioners.<sup>56</sup> Among the latter groups, inflation-adjusted income has actually remained flat since the 1980s or, for some, has even dropped in the last five years.<sup>57</sup> Today, more and more recent law graduates who do not finish at the top of their class or attend highly ranked schools find themselves “taking temporary contract work, reviewing documents for as little as \$20 an hour, without benefits.”<sup>58</sup> For these attorneys, who took out sizeable student loans on the promise of enjoying big firm salaries, the hope was precisely to become well-paid expert laborers. Thus, their problem with the profession is not the collapse of meaning but a lack of opportunities and an unequal division of the spoils.<sup>59</sup>

In a sense, worries about the future of law as a noble calling speak more to despondency among the elite bar than to any generalized dissatisfaction. Writing and commentary in this vein has been the product of the most distinguished voices within the profession, including Supreme Court justices, law school deans, and bar association task forces.<sup>60</sup> One could argue that this despondency reflects status anxiety among top lawyers, who fear that their professional respectability and social standing have become compromised by market dictates and state supervision. Social critic and nonlawyer Fareed Zakaria, in his book *The Future of Freedom*, powerfully encapsulates these concerns about the bar’s lost authority. He concludes, “[L]ook at America’s professional elites—lawyers, most notably—who once formed a kind of local aristocracy with duties and responsibilities toward their towns and cities. They have lost their prestige and public purpose, becoming anxious hustlers.”<sup>61</sup>

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56. See Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW’S CENTURY 287, 287 (Austin Sarat et al. eds., 2002).

57. Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

58. *Id.*

59. Amir Efrati’s evocative piece in the *Wall Street Journal* captures the experience and fears of one recent graduate of Chicago-Kent College of Law. *Id.* “Despite graduating near the top half of her class, she has been unable to find a job and is doing temp work ‘essentially as a paralegal,’ she says. ‘A lot of people, including myself, feel frustrated about the lack of jobs,’ she says.” *Id.* (quoting Sue Clark, 2007 graduate of Chicago-Kent School of Law).

60. A classic illustration of this elite despondency comes from the late Chief Justice Warren Burger’s famous lament that lawyers suffered from a “decline in public confidence” because they had repudiated their obligations to the public good and thus faced a crisis of professionalism. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 62. As other representative examples see, MARY ANN GLENDON, A NATION UNDER LAWYERS 85–108 (1994); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS (1998); Am. Bar Ass’n Comm’n on Professionalism, “. . . In the Spirit of Public Service:” *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986); Hazard, *supra* note 1; Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998).

61. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 23 (2003).

The trouble with this line of reasoning is that even if lawyers today amount to “anxious hustlers” and are no longer “transcendent” statesmen, this fact does not self-evidently pose a broader social problem—especially in a society committed to democratic equality. It might raise existential concerns for top lawyers who see themselves as political guardians, but their reduced social standing could arguably bring with it the elevation of popular citizenship. In order to present the “crisis of values” as an actual social problem, Kronman and others find themselves presupposing the necessity of elite rule. According to the statesmanship discourse, the bar’s elite will inevitably exercise political control and is in fact essential to the maintenance of a stable and healthy social order. Therefore, the current dilemma is not a growing divide between administrative experts who enjoy the privileges of leadership and most citizens who are increasingly separated from political power, but that elites have become less capable leaders. Kronman writes,

In the future, the legal profession will continue to supply a large percentage of the country’s political leaders. But the demise of the lawyer-statesman ideal means that the lawyers who lead the country will on the whole be less qualified to do so than before. They will be less likely to possess the traits of character—the prudence or practical wisdom—that made them good leaders in the past.<sup>62</sup>

Rather than allowing the disappearance of “practical wisdom” among professional elites to raise foundational questions about the appropriateness of stratified citizenship, these arguments persist in hoping that lawyers can be made better rulers. Thus, when Kronman calls for a legal practice oriented toward “the good of the law as a whole,” his call rests on an explicitly antidemocratic stance that divides elite and ordinary participation. Following the old republican vision, moral independence is considered to be an essential characteristic of virtuous rulership. Thus, its defense through the lawyer-statesman ideal takes for granted both that lawyers should be elite citizens and that politics should be organized around a distinction between the few and the many. In doing so, such claims abandon the ground of democratic legitimacy entirely to those who emphasize client autonomy and are opposed to an ethic of independence. They also ignore a critical reason for the profession’s loss of popular reputation. What disturbs many Americans is not merely that lawyers use their influence poorly, but that the bar seems to exercise such profound influence in the first place.

### *C. The People’s Lawyer and the Countermajoritarian Turn*

It should be noted that not all accounts of the lawyer’s moral and political independence are grounded in an elite discourse of statesmanship or are principally concerned with whether lawyering remains a natural aristocracy.

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62. KRONMAN, *supra* note 19, at 4.

Scholars like Robert Gordon, William Simon, and David Luban self-consciously seek to make the exercise of the lawyer's independent judgment compatible with democratic institutions and commitments.<sup>63</sup> Each sees the most grandiose claims about the profession's capacity for political leadership and its noble calling as antidemocratic defenses of legal privilege, based on historical suspicions of the poor and disenfranchised. For example, Gordon rejects as "ridiculous" the idea that "lawyers belong to a distinct elevated estate uniquely endowed with political wisdom and insight into everybody's long-term best interests."<sup>64</sup> He refuses to read legal independence as an argument for elite empowerment and writes that "lawyering is not a club for superhumans, and that especially in this century lawyers have been joined, and in many areas of political life displaced, by rival interpreters and articulators and mediators of social purposes."<sup>65</sup> Moreover, these scholars turn to Louis Brandeis's seminal 1905 lecture before the Harvard Ethical Society, entitled *The Opportunity in the Law*, for their model of the "people's lawyer" and seek to make professional independence an instrument for the fulfillment of popular needs and interests.<sup>66</sup> But by claiming Brandeis as their inspiration, such arguments also fall prey to Brandeis's own wariness of unchecked popular power. They carry through his vision of the people's lawyer as someone who stands above ordinary citizens, and whose technical skill allows her to shape public demands.

On its face, the desire to see legal practice as a means for articulating collective grievances appears far removed from the politics of legal statesmanship. If anything, it ties the people's lawyer as much to the tradition of social movement organizing as it does to that of ordinary legal craft—a move to which I am quite sympathetic, as will be discussed later. For Simon and Luban, the lawyer's independence and professional discretion are essential political tools that, when exercised properly, enhance the agency and social power of marginalized groups. Luban pictures lawyers and mass publics as ideally engaged in projects of "mutual political commitment,"<sup>67</sup> and Simon presents the lawyer as an organizer

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63. See, e.g., LUBAN, *supra* note 14; SIMON, *supra* note 60; Gordon, *supra* note 14.

64. Gordon, *supra* note 14, at 74.

65. *Id.* at 75.

66. Louis D. Brandeis, *The Opportunity in the Law*, Address Before the Harvard Ethical Society (May 4, 1905), in *BUSINESS—A PROFESSION* 329 (William S. Hein & Co., Inc. 1996) (1914). All three scholars have been deeply influenced by Louis Brandeis's lecture. Robert Gordon uses it at the beginning of *The Independence of Lawyers* as a definitive example of the professional ethic of independence. Gordon, *supra* note 14, at 2. He also ends a more recent article on the state of the profession by returning to Brandeis's vision of the "opportunity in the law" and the importance of lawyers to be more than autonomy agents for clients. Gordon, *supra* note 56, at 331. William Simon's account of "ethical discretion" draws directly from Brandeis's view of lawyering for the situation. Simon, *supra* note 14, at 1122. Finally, David Luban's account of how to reconcile the lawyer's moral activism with democratic ideals is explicitly presented as an updating of Brandeis's "people's lawyer." LUBAN, *supra* note 14, at 169–74.

67. LUBAN, *supra* note 14, at 329–35.

who “structures a situation to induce a sense of common interest, hope, and potency among the people she is trying to organize.”<sup>68</sup>

In the end, however, rather than repudiating a politics of stratified citizenship, the ideal of the people’s lawyer simply devolves into a softer version of the legal guardian. Like the statesmanship discourse, it reverts to a defense of professional independence in which the lawyer’s discretion constrains the vicissitudes of popular self-rule. For instance, Luban argues that in class action cases, there often exists intergenerational conflict between the interests of present groups and those of future ones. In this context, lawyers must use their independent judgment “to create the best possible world,” even if this contradicts the wishes of existing clients.<sup>69</sup> As his example, Luban discusses Derrick Bell’s famous article, *Serving Two Masters*, in which Bell suggests that the effort by the National Association for the Advancement of Colored People (NAACP) attorneys to pursue a vision of justice rather than the actual goals of their clients led them to file class action lawsuits aimed at desegregating schools—even though many black parents preferred improvements in educational quality to integration.<sup>70</sup> Luban defends the attorneys on intergenerational grounds, arguing that the parents of the community engaged in short-sighted thinking and that “it is surely in the best interests of future generations to live in an integrated society.”<sup>71</sup> In so concluding, Luban appears to ignore that the parents were also making pragmatic political judgments about the likely outcomes of various competing strategies. In particular, such parents worried that the backlash fostered by forced busing would produce a worst-case scenario, in which educational quality dropped in local schools and integration was never properly achieved. It is an open and deeply contested question whether the parents or Luban have ultimately been correct about the best interests of future generations. By simply dismissing parental judgments out of hand, Luban falls into the trap of presuming that lawyers are somehow better equipped than their clients to make difficult political decisions. In the process, his argument for professional independence replicates precisely what Bickel viewed as the root of the countermajoritarian difficulty—it trumps the will of “the actual people of the here and now” with the deliberative judgment of elite actors.<sup>72</sup> The consequence is that, like the ideal of the lawyer-statesman, the people’s lawyer also too often rests on an apology for legal privilege, with professional independence viewed as essential for directing and constraining popular voice.

This tendency within the discourse of the people’s lawyer derives from the fact that proponents never actually situate legal discretion in a set of

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68. Simon, *supra* note 18, at 1108.

69. LUBAN, *supra* note 14, at 348.

70. *Id.* at 347–48 (discussing Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976)).

71. *Id.*

72. BICKEL, *supra* note 10, at 17.

clear substantive goals. While asserting the value of ethical autonomy in the abstract, Luban and others are wary of providing a thick moral ethos to guide legal practice. The result is that people's lawyering often only provides a formal defense of legal independence—it gives little sense of the social community within which lawyers should be embedded or the practical ends that should govern independent judgment. This formalism means that when proponents seek to explain how professional independence operates, they tend to fall back on claims that legal practice and education somehow translate into enhanced capacities for prudence and ethical deliberation. Without a democratic political theory to direct the exercise of professional discretion, the lawyer becomes exalted as a political actor capable of constraining the competing elements in society. At its most extreme, people's lawyering collapses—almost by default—into a system-preserving function that checks popular impulses.<sup>73</sup>

These problems are powerfully illustrated by Brandeis's own accounts of democracy and legal practice. At key junctures, Brandeis reproduces the classic distinction between the few and the many, and ties the lawyer's independent judgment to the supposed leadership capacities of attorneys. In drawing from Brandeis and in failing to move beyond formal defenses, Luban, as well as Gordon and Simon, unwittingly reinscribe the vision of elite authority that they otherwise take pains to condemn. For Brandeis, the primary reason why lawyers were capable of thinking in terms of a greater good and “of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either,” derived from their unique professional skills fostered by higher education and practical experience.<sup>74</sup> These skills allowed the bar to remain a republican respite of prudence and practical wisdom in a broader social context of economic self-interest and factional conflict. In his opinion, the essence of legal training—as distinct from ordinary education—was the “the development of judgment,” in which attorneys learned the value of “patient research and develop[ed] both the memory and the reasoning faculties.”<sup>75</sup> Such professional education gave attorneys special capacities for rising above discord and for pursuing right policy rather than divisive politics. For Brandeis, it was this “training [that] fits [the lawyer] especially to grapple with the questions which are presented in a democracy.”<sup>76</sup> He believed that the lawyer's knowledge of law as a social science produced a set of moral characteristics that distinguished the legal profession from other forms of work. It made attorneys ideally suited to wielding political power and to enjoying the responsibilities of elite citizenship. According to Brandeis, the

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73. In spirit, this argument is similar to Russell Pearce's critique of the “legal profession as a blue state,” in which he sees liberal public philosophy's wariness of embedding moral values in the public sphere as partly responsible for the profession's supposed crisis of meaning. See Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339, 1342–43 (2007).

74. Brandeis, *supra* note 66, at 337.

75. *Id.* at 331.

76. *Id.*

lawyer “is an observer of men even more than of things. He not only sees men of all kinds, but knows their deepest secrets; sees them in situations which try men’s souls. He is apt to become a good judge of men.”<sup>77</sup>

Albeit in a more gentle form, these arguments embodied an early-twentieth-century updating of the long-standing republican position. Even the call to train people’s lawyers by no means took the further step of assuming that most citizens should actually direct political decision making. Rather, the people’s lawyer acted on behalf of the best interest of ordinary individuals and guided political life so that mass politics would not devolve into chaos. For Brandeis, while the public good should take account of the problems facing wage earners and agricultural workers, both corporations and the laboring masses were overly devoted to their partial interests and thus liable to reduce collective life to conflict and disorder. Surveying the industrial strife around him, Brandeis hoped that attorneys acting as social experts could steer society toward a stable accommodation. Like Tocqueville before him, Brandeis viewed the bar as the institutional entity best situated in a democracy to constrain the destructive impulses of popular power. Speaking to his fellow lawyers of the threats posed by mass politics, he concluded,

The people’s thought will take shape in action; and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution.<sup>78</sup>

In these few sentences, Brandeis echoed Madison’s fear of the “intemperance of a multitude” and acceded completely to the distinction between elite virtue and mass irrationality.

In locating contemporary defenses of independence within the tradition of a people’s lawyer, Gordon, Simon, and Luban never squarely confront the republican discourse of elite citizenship on which this tradition is based. In fact, at times, they too ground a professional ethic of public service on the same arguments about the bar’s special capacities. When justifying why lawyers can be trusted to use their judgment to act on the best future interests of clients, Luban returns to the old republican theme of elite leadership. As part of his discussion of Brandeis in *Lawyers and Justice*, Luban concludes, “But it is not too farfetched to expect that legal training with its cultivation of practical judgment should enable lawyers to form a better picture of the human consequences of institutional arrangements than can those of us who have no comparable training.”<sup>79</sup> By failing to find a substantive ethical ground for structuring a vision of professional independence, such arguments in favor of the bar’s independent judgment are inevitably trapped by the countermajoritarian difficulty. Thus, for all

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77. *Id.* at 332 (internal quotation marks omitted).

78. *Id.* at 343.

79. LUBAN, *supra* note 14, at 171.

the dissimilarities between the ideal of the lawyer-statesman and that of the people's lawyer, both find themselves offering an apology for professional power. Given the apparent inconsistencies between lawyer discretion and popular self-rule, defending independence reduces to an effort to rehabilitate the profession's legitimacy—in some cases by simply reasserting old presumptions about elite capacities. As the following section indicates, this leaves the client-centered position as the only ethical stance seemingly untainted by a democratic deficit.

#### D. *Lawyer Domination and the Call for Client Autonomy*

Echoing popular critiques of the profession as an unaccountable elite, client-centered approaches to legal ethics also make strange academic bedfellows of the Left and the Right. What unites these scholars is a common view that professional discretion amounts to an illegitimate imposition of lawyer ends on clients. While these arguments oppose an elite discourse of differentiated citizenship, they reduce democracy solely to electoral mechanisms or present accounts of citizenship that disconnect work life from political participation. The consequence is that they too fail to ground legal ethics in a political theory that links the lawyer's role to the requirements of a democratic culture.

In the field of poverty law, academics and practitioners argue against the notion of a people's lawyer committed to the best interests of marginalized groups, holding that such "lawyer driven decision-making" actually has the reverse effect of further diminishing the ability of those disadvantaged to assert their own political voice.<sup>80</sup> These scholars reject a professional ethic based on the attorney's independent judgment and focus instead on developing methods for "client empowerment."<sup>81</sup> They see ideals of independence and "disinterestedness embedded in traditional lawyering approaches" as means by which lawyers substitute their own goals for those of poor clients, in the process restraining, rather than facilitating, popular self-rule.<sup>82</sup> In their view, given the inevitable countermajoritarian difficulty faced by an ethic of independence, the only way to conform legal practice to democratic values is by refraining from efforts to structure client objectives. As Derrick Bell concludes in his discussion of NAACP lawyers, to do otherwise would constitute both inadequate representation and a profound form of democratic disrespect. Instead of "undertaking responsibilities that should be determined by their clients and shaped by the

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80. Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1025 (1994); see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992). Scott Cummings and Ingrid Eagly provide an essential summary of much of the writing in this vein. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 458 (2001) ("Poverty lawyers were characterized as potential 'oppressors' who actually contributed to the subordination of their disadvantaged clients by forcing them to rely on the lawyers' expertise.").

81. Cummings & Eagly, *supra* note 80, at 459.

82. Buchanan, *supra* note 80, at 1026.

community,” he maintains that “[i]t is essential that lawyers ‘lawyer’ and not attempt to lead clients and class.”<sup>83</sup> Similarly, poverty law scholar Ruth Buchanan argues for abandoning presumptions about the value of independent judgment and, as the only democratic option for lawyers, working “to rethink [one’s] own advocacy efforts in nonhierarchical ways.”<sup>84</sup>

Legal academics on the other side of the political divide, who champion the value of the free market, have reached virtually identical ethical conclusions. For example, Charles Fried views the belief that professional work should be marked by a disinterested commitment to the public good as “nonsense on stilts” and holds that the notion that attorneys have “a kind of distance, judgment and almost academic posture toward the law which allows them to serve clients particularly well” amounts to “a self-serving fantasy.”<sup>85</sup> For Fried, the idea that lawyers provide a public function, which should temper one’s duty of client loyalty, carries with it unacceptable aristocratic assumptions. It presupposes that lawyers are somehow better skilled than ordinary Americans in making collective judgments. In his opinion, the only individuals who have the legitimate authority to make social decisions on behalf of others are elected representatives. Since the bar has no similar democratic credibility, lawyers should not imagine themselves as political guardians; rather, they should operate as service providers in a legal market and orient their practice to fulfilling client goals. Fried asserts that, not only does this market-driven ethic provide the best quality of legal service, but also that its flourishing indicates the community’s democratic health. According to Fried, the belief that political life requires “a mediating priesthood between the regulators and the regulated is itself a sign of social illness,” suggesting deep distrust among professional elites for the everyday functioning of elected institutions.<sup>86</sup>

Yet, as proponents of moral and political independence have illustrated in great detail, client-centered accounts are riddled with ethical and practical difficulties. Robert Gordon emphasizes that the drive for client autonomy rests on a basic implausibility: the notion that both client interests and the law’s self-evident meaning are fully formed in advance of legal consultation and thus all that lawyers must do is translate these interests into terms judicially accessible.<sup>87</sup> By contrast, he underscores the irreducible discretion at the heart of legal practice, since even this process of translation generally requires the competent attorney to offer

a number of possible alternatives that until that moment might never have been thought of, then asking for a ranking of alternatives, and then

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83. Bell, *supra* note 70, at 512.

84. Buchanan, *supra* note 80, at 1026.

85. Charles Fried, *The Trouble with Lawyers*, N.Y. TIMES, Feb. 12, 1984, § 6 (Magazine), at 56, 56.

86. *Id.*

87. Gordon, *supra* note 14, at 72–73.



estimating the possible consequences of each. Through this back-and-forth dialectical interaction, both the client's 'interests' and the 'law' governing the situation will gradually take the shapes sculpted by the social agents who interpret and transmit them.<sup>88</sup>

In this inherently dialectical encounter, having lawyers employ their own "political judgments," which advocates of client autonomy view as illegitimate acts of domination, is "virtually *inescapable*."<sup>89</sup> William Simon goes so far as to refer to the fact that "effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments" as "The Dark Secret of Progressive Lawyering."<sup>90</sup> In other words, even when lawyers believe that they are simply following the predetermined goals of their clients, they are still constructing the meaning of these goals. For Simon and Gordon, faith in client autonomy provides no end-run around the inevitable discretion embedded in legal work.

Just as problematically, client-centered approaches, while claiming the mantle of democratic legitimacy, carry with them a remarkably hollow account of citizenship. For example, Fried's vision of democracy may not stratify citizenship between virtuous elites and irrational publics, but it too is premised on a truncated account of popular participation. For Fried, most Americans simply pursue their private interests through the market and are utterly unconstrained by commitments to the general good. Rather than envisioning a collective responsibility that colors all aspects of one's public life, he implies that only elected representatives are tasked with the work of maintaining the vitality of political and economic institutions. Under this view, democratic equality among social groups, and between lawyers and their clients, means that all are equally indifferent to the public interest. The people writ large merely pursue their own ends and displace concern for shared practices onto selected representatives. Rather than elevating everyone to the level of practical decision maker—regardless of group or professional status—Fried's market-oriented approach seems to do away with citizenship entirely as a meaningful popular category.

As for fears of client domination arising from the Left, these also appear to embrace consequences that in fact undermine more robust possibilities for democracy. In particular, the concern with client empowerment in its own way ignores the persistent inequalities in bargaining position and resources between dominant social groups and those less privileged. As Simon makes clear, in actual practice, lawyers for wealthy individuals and corporations do far more than just translate client interests: "they assist them in reflecting on their goals by offering a detached perspective, they give strategic advice, and they try to persuade third parties to support the client."<sup>91</sup> Asking attorneys for the disenfranchised to limit their own

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88. *Id.* at 73.

89. *Id.* at 26.

90. Simon, *supra* note 18, at 1102.

91. *Id.* at 1105.

discretionary judgment means reducing the already scarce resources of the disadvantaged. While this may create the fiction of a nonhierarchical exchange between lawyer and client, it ignores the very reason that those without access to networks of legal and political power seek out lawyers in the first place—for advice when placed in situations of great vulnerability. Just as with market-oriented defenses of client autonomy, radical arguments employ democratic language to reach conclusions that compromise actual democratic values. In this case, they seem to ask those lawyers most committed to enhancing the strength and social voice of marginalized communities to serve these interests without the benefit of their own considered judgment and knowledge—with one hand effectively tied behind their back.

In the end, though, it is not surprising that both radical and free market versions of the client-centered account share similar intuitions—in particular, the notion that lawyer discretion is democratically illegitimate. As previous sections have explored, there no doubt exist antidemocratic elements in accounts of the attorney as an independent moral actor, even in those arguments that call for a people’s lawyer. Given the parameters of the prevailing debate in legal ethics, we are left with a set of seemingly inescapable questions. Is it possible to defend legal independence without relying on an underlying vision that separates between elite and ordinary citizenship? Is the only way to avoid the profession’s countermajoritarian difficulty to transform the lawyer into a scribe or functionary of client interests regardless of the larger social costs? Without a richer theory of democratic culture, the debate over the profession’s ethical commitments necessarily reinscribes this binary, in which lawyers must decide between democracy and moral autonomy but cannot have both. Part II seeks a way out of this impasse, but not through an alternative conception of the lawyer’s practical duties. Instead, it attempts to situate the lawyer’s ethical independence within a broader political theory, one which links to a long-standing American tradition that usefully draws out the responsibilities of citizenship in work and politics.

## II. THE LAWYER AS DEMOCRATIC LABORER

Within the lawyer-statesman discourse, the view that work autonomy is crucial to a fulfilling professional life is central to the desire to protect legal practice as a noble calling. Rather than being distinct from public life, the workplace for both the people’s lawyer and the lawyer-statesman is a key site for the expression of one’s social values and for the activity of citizenship. While such arguments for ethical independence rightly maintain the importance and inevitability of discretionary judgment in legal practice, they hardly ever base their claims on a general defense of workplace autonomy in all its professional and nonprofessional settings. Instead, advocates of morally reflective lawyering often fall into the trap of reading the discretionary nature of legal work as both distinctive and a justification for elite leadership. Client-centered accounts take just the

opposite tack, viewing the lawyer's discretionary judgment as a democratic threat. Rather than seeing work as the ethical foundation of political life, they present the two as essentially unconnected. Moreover, as opposed to imagining ways to make the experience of professional autonomy a more generalized condition, they attempt to limit those few sites that do remain for the expression of workplace independence. Both approaches seem to have lost sight of what previous Americans once saw as the heart of the democratic experiment.

For an American political tradition that linked Abraham Lincoln to Jacksonian Democrats, independent judgment at work was considered the essence of free citizenship. Such thinkers believed that a democratic society could not be marked by a distinction between a laboring mass and a class of educated decision makers. Rather than viewing the lawyer's capacity for independent judgment as the unique privilege of the learned, they sought to infuse all forms of labor with similar opportunities for moral deliberation and to imagine legal practice itself as one of many arenas of productive work. In the following pages, I discuss how these arguments about the inseparability of learning and labor connected to broader expectations for robust citizenship. Jacksonian and Jeffersonian critiques of the bar did not revolve around the legitimacy of independent judgment, but rather focused on the bar's assumption that it embodied a distinct caste that enjoyed a monopoly on knowledge and deliberative authority. According to radical Jeffersonian writers, these sentiments of a unique role actually weakened autonomy and had the reverse effect of tying the profession more closely to moneyed interests and distancing it from justice and the public good. Thus, instead of repudiating the lawyer's ethical commitments, as do some democratic critics of today's bar, this previous tradition viewed workplace independence more generally, including lawyer independence, as essential to a vibrant democratic culture. In recovering such arguments, I hope to move defenses of the lawyer as a moral agent beyond their reliance on an elite republican theory of politics.

#### A. *Dewey, Lincoln, and the Ideal of Independence*

In the early decades of the twentieth century, philosopher John Dewey surveyed a political landscape that had shifted dramatically since his Vermont youth in the 1860s and 1870s. Corporate concentration had drastically undermined popular power, and the new modes of mass communication similarly compromised the ability of ordinary citizens to intervene cogently in politics. Moreover, these developments were reinforced by the rise of state bureaucracies and heightened governmental centralization. In *The Public and Its Problems*, Dewey referred to the new social paradigm as the "Great Society," an impersonal and increasingly authoritarian end product of the machine age and technological development.<sup>92</sup> In response, Dewey hearkened back to a long-standing

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92. See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 126–27 (1927).

democratic tradition that sought to instill the principle and practice of direct popular control within all collective institutions. He wrote of the promise of democracy,

From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in participating according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common.<sup>93</sup>

For Dewey, the democratic project was, at base, an effort in expanding the conditions of independence, ensuring that everyone had the opportunity to exercise discretion over which moral ends to pursue, whether in economic or political life. Throughout the nineteenth century, such ethically directed work had been referred to as “free labor,” or as political theorist Michael Sandel writes, “labor carried out under conditions likely to cultivate the qualities of character that suit citizens to self-government.”<sup>94</sup> By exploring what Dewey, and before him Abraham Lincoln, imagined by free labor, we can develop a better sense of how legal practice can connect to ideals of equal and authentic citizenship.

For Dewey, the necessity that all individuals achieve moral independence at work and in politics meant that there could exist no permanent class of laborers, who went through life solely as dependent employees or rural tenants. The problem with such activity was that it disconnected independent judgment and ethical reflection from everyday economic practices. In *Democracy and Education*, he argued that a truly democratic community had to combine the activity of “producing commodities and rendering service” with the experience of “self-directive thought.”<sup>95</sup> Under this view, democracy was more than simply a form of government; it was a general mode of social life that took as its basis the contention that all citizens should continuously engage in autonomous deliberation and thus cultivate the habits of self-discipline and hard work. In particular, a commitment to universalizing moral independence meant doing away with old notions of a divide between virtuous elites and irrational publics, which cleaved “society into a learned and an unlearned class, a leisure and a laboring class.”<sup>96</sup> With the aid of a reconstructed educational system that intertwined “culture and utility,”<sup>97</sup> Dewey hoped to transform individuals into both laborers and thinkers capable of asserting a free and ethical will in public life. This required rejecting all forms of aristocracy, “natural” or otherwise, including what he viewed as the most pernicious—the

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93. *Id.* at 147.

94. See MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 169 (1996).

95. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 299 (1916).

96. *Id.* at 298.

97. *Id.*

emergence of a distinct class of professionals that saw learning as their exclusive possession. As he concluded,

The price that democratic societies will have to pay for their continuing health is the elimination of an oligarchy—the most exclusive and dangerous of all—that attempts to monopolize the benefits of intelligence and of the best methods for the profit of a few privileged ones, while practical labor, requiring less spiritual effort and less initiative, remains the lot of the great majority.<sup>98</sup>

In rejecting any division between learning and labor,<sup>99</sup> Dewey situated himself as an intellectual heir to no less a central political figure than Abraham Lincoln. In Lincoln's 1859 *Address Before the Wisconsin State Agricultural Society*, he argued that the "mud-sill theory" was more than simply a defense of slavery; it was also a claim about the imprudence of combining independent judgment with ordinary labor.<sup>100</sup> He declared, "By the '*mud-sill*' theory it is assumed that labor and education are incompatible" and that "the education of laborers, is not only useless, but pernicious, and dangerous."<sup>101</sup> Such education enhanced the intemperance and passions of the multitude and threatened the capacity of prudent elites to exercise collective power. Under the "mud-sill" theory, Lincoln continued, "it is . . . deemed a misfortune that laborers should have heads at all," which are "regarded as explosive materials, only to be safely kept in damp places, as far as possible from that peculiar sort of fire which ignites them."<sup>102</sup>

According to Lincoln, this view was premised on "[t]he old general rule . . . that *educated* people did not perform manual labor. They managed

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98. JOHN DEWEY, *Education from a Social Perspective*, in 7 THE MIDDLE WORKS, 1899–1924, at 111, 127 (Jo Ann Boydston ed., 1979).

99. I draw the phrase "learning and labor" from Christopher Lasch's excellent and formative essay *Opportunity in the Promised Land*, discussing the relationship between the two concepts in American political thought. See CHRISTOPHER LASCH, *Opportunity in the Promised Land: Social Mobility or the Democratization of Competence?*, in THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 50, 50–79 (1995). In Lasch's account, these arguments suggest that professional work, since it is not manual, is ultimately outside the framework of free labor. *Id.* at 60–61 (emphasizing how free labor combines mind and "muscle" and thus is crucially tied to manual work). It leads Lasch to the nostalgic and counterproductive conclusion of decrying "the reign of specialized expertise" and with it most forms of specialized knowledge as threats to the democratic community of small producers. *Id.* at 79. As the remaining sections explore, I think this overlooks how broadly Americans imagined the category of free labor as well as the efforts by thinkers and political actors throughout the nineteenth century to make professional work—particularly legal practice—consistent with notions of universal moral independence. For more on how America hoped to democratize education and to link knowledge and autonomous reflection to work life, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

100. See Abraham Lincoln, *Address Before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin* (Sept. 30, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 471, 477–78 (Roy P. Basler ed., 1953).

101. *Id.* at 479.

102. *Id.*

to eat their bread, leaving the toil of producing it to the uneducated.”<sup>103</sup> In sharp contrast, the belief in free labor and moral independence took for granted the value of “universal education,” in which all individuals were raised to the level of deliberative and knowledgeable citizens.<sup>104</sup> Lincoln maintained that, “as the Author of man makes every individual with one head and one pair of hands, it was probably intended that heads and hands should cooperate as friends; and that that particular head[] should direct and control that particular pair of hands.”<sup>105</sup> Emphasizing the need to unite labor and learning, and to ensure that everyone participate in the practices of independent ethical judgment at work and in politics, Lincoln concluded, “[E]ach head is the natural guardian, director, and protector of the hands and mouth inseparably connected with it; and that being so, every head should be cultivated, and improved, by whatever will add to its capacity for performing its charge.”<sup>106</sup>

Today, the tendency is to see arguments in favor of universal education as tied to a belief that all Americans should have the opportunity to rise in social standing. This suggests that a democratic culture is one in which those most talented from all walks of life enjoy status as learned professionals, creating a true natural aristocracy based on merit and skill. For example, Gordon makes precisely this point in defending the value of the lawyer’s independent judgment. While he admits that “the service ethic originated in the ideology of a privileged class” and that it “continued to justify the privileges of that class even when most of its members did little to live up to it,” he argues that the bar itself has been thoroughly democratized in recent years.<sup>107</sup> Since legal education and practice are now pursued by communities long marginalized, a profession oriented toward the public interest no longer presumes that only specific social groups should exercise power. “[L]awyers who seek fulfillment in public service are the children of patricians, professionals, academics, union members, political activists, members of victimized minority groups, graduates of elite and non-elite schools.”<sup>108</sup>

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103. *Id.*

104. *Id.*

105. *Id.* at 479–80.

106. *Id.* at 480. Abraham Lincoln’s evocative language of uniting heads and hands was not unique to him. Throughout the nineteenth century, educators, moral reformers, and labor activists commonly referred to creating, what historian Nick Salvatore refers to as, “the harmony of the head and the hand” in order to elevate all citizens to the status of independent moral agents. See NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 229 (2d ed. 2007). For instance, as trade unionist and presidential candidate, Eugene V. Debs continually invoked the same imagery to emphasize that workers were more than just “hands” for a corporate employer. *Id.* at 228 (quoting Eugene V. Debs). By combining labor and learning, they had the potential to assert their own political voice. *Id.* In speech after speech, Debs declared, “A thousand heads have grown for every thousand pairs of hands, a thousand hearts throb in testimony of the unity of heads and hands, and a thousand souls, though crushed and mangled, burn in protest and are pledged to redeem a thousand men.” *Id.* (quoting Eugene V. Debs).

107. Gordon, *supra* note 14, at 71.

108. *Id.* (footnote omitted).

Putting aside the question of how close we are to achieving the meritocratic goal, even in its idealized form it is still far removed from the vision articulated by Lincoln or Dewey. For them, democratization did not result from fluid social mobility, and education was not meant as an instrument for gaining higher rank. Rather, the democratic hope was that common education at school, and most critically at work, would provide everyone with the chance to participate on an equal footing in economic and political life—regardless of standing. As one Indiana school superintendent noted in 1875, “If we shall limit the education of the masses, and trust to the extended education of the few for directive power and skill, we must expect to be ruled by monopolies, demagogues and partisans.”<sup>109</sup> In fact, the wariness of distinguishing between an educated elite and a laboring mass led many nineteenth-century Americans to seek a thorough reformation of the legal profession—which some feared embodied an aristocratic and priestly class. As the following section highlights, the goal of such reform was not the elimination of a morally reflective practice of lawyering, but an attempt to buttress the lawyer’s ethical autonomy by disconnecting the bar from elite interests and connecting it instead to the wider community of free laborers.

### B. *The Jacksonian Critique of Lawyering*

The Jacksonian period is often viewed by legal scholars as an era in which rural farmers, artisans, and their advocates attempted to eliminate the legal profession’s political independence and social power entirely, comprising what Roscoe Pound famously called “The Era of Decadence.”<sup>110</sup> Spurred by the combination of universal white male suffrage and the relative equality of frontier life, the early nineteenth century witnessed the steady dismantling of the bar as a separate entity.<sup>111</sup> The colonial distinction between barristers and solicitors quickly collapsed. Bar associations, which had once asserted control over admission in parts of New England, either disappeared completely or were reduced to city associations of little political weight.<sup>112</sup> Apprenticeships, at the time the only meaningful requirement for entrance to the bar, were either limited or abolished entirely.<sup>113</sup> Historian Richard Abel writes that,

In 1800, fourteen out of nineteen jurisdictions required all lawyers to complete an apprenticeship, often extending five years (the period then

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109. SALVATORE, *supra* note 106, at 10 (quoting an Indiana school superintendent).

110. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223–49 (1953).

111. This brief historical overview of the strains on the legal profession in the early nineteenth century draws from three key sources: RICHARD L. ABEL, *AMERICAN LAWYERS* 40–44 (1989); RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 148–51 (1979); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 249–311 (1950).

112. See ABEL, *supra* note 111, at 40; POUND, *supra* note 110, at 223–24.

113. A few jurisdictions continued to have bar exams, but these were “usually oral and administered in a very casual fashion.” See COLLINS, *supra* note 111, at 149.

required of most English solicitors); by 1840 only a third of the states did so (eleven out of thirty), and twenty years later the proportion had dropped to less than a fourth (nine out of thirty-nine).<sup>114</sup>

These efforts reached a high watermark with Indiana's 1851 constitution, which declared that, "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."<sup>115</sup> For the legal community, the tides of democracy had produced a startling state of affairs. Professional institutions and lawyer control over admission had been thoroughly repudiated. Even more remarkably, legal work itself was recast as a right of citizenship rather than a unique product of technical expertise.

Yet, it is important to appreciate that these efforts were not meant to eliminate lawyering as a form of work, but instead constituted an attempt to unify labor and learning. What Jacksonian politicians and their radical Jeffersonian predecessors opposed was the idea that lawyers constituted a separate educated caste, uniquely knowledgeable about collective life and privileged to intervene in politics. The existence of such a social group presupposed a division of labor between what Dewey would eventually call "culture and utility," and thus a rejection of the democratic project of universal moral independence. When the social critic and Jacksonian pamphleteer Orestes Brownson argued for "the utter extinction of all privilege," he saw his primary ambition as elevating each laborer to the level of autonomous citizen and decision maker.<sup>116</sup> In words that Dewey would echo eighty years later, Brownson wrote, "There must not be a learned class and an unlearned, a cultivated class and an uncultivated, a refined class and a vulgar, a wealthy class and a poor. . . . There shall be no division of society into workingmen and idlers, employers and operatives."<sup>117</sup>

Two Jeffersonian thinkers, William Manning and Matthew Lyon, vividly conveyed the problems with the prevailing position of lawyers in early American public life, as well as how radical democrats imagined that the legal profession could be successfully reconstituted. Manning was a self-educated farmer of moderate status who lived in Billerica, Massachusetts until his death in 1814. In the late 1790s he wrote a pamphlet entitled *The Key of Liberty*.<sup>118</sup> Although unpublished in his lifetime, Manning's text

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114. See ABEL, *supra* note 111, at 40 (citing Robert Stevens, *Two Cheers for 1870*, 5 PERSP. AM. HIST. 403, 412–13, 417 (1971)).

115. HURST, *supra* note 111, at 250 (quoting IND. CONST. art. VII, § 21 (repealed 1932)).

116. Orestes Brownson, *Brownson's Defence: Defence of the Article on the Laboring Classes*, BOSTON Q. REV., at 1, 60 (Boston, Cambridge Press 1840).

117. ORESTES BROWNSON, *Our Future Policy*, in 15 THE WORKS OF ORESTES A. BROWNSON 124 (Harry F. Brownson ed., Detroit, Thorndike Nourse 1884).

118. William Manning, *The Key of Liberty: Showing the Causes Why a Free Government Has Always Failed and a Remedy Against It. Addressed to the Republicans, Farmers, Mechanics, and Laborers in America by a Laborer [1799]*, in THE KEY OF LIBERTY: THE LIFE AND DEMOCRATIC WRITINGS OF WILLIAM MANNING, "A LABORER," 1747–1814, at 117, 117 (Michael Merrill & Sean Wilentz eds., 1993). For more on the life of William Manning



provides particular insight into popular understandings of how legal practice connected to democratic goals. What makes the pamphlet so unusual is the fact that most ordinary farmers, not to mention the true rural poor, had limited educational means and rarely expressed their political views in writing at all, let alone with such depth and clarity. Manning, like Brownson, Lincoln, and Dewey in later years, also saw free labor as essential to proper citizenship. In keeping with many classical republicans, he argued that every society faced a basic divide between the majority of individuals, whose hard labor was “the parent of all property,” and a select few—landed gentry, merchants, and priests—whose wealth allowed them to live without laboring.<sup>119</sup> Manning believed that such a leisure class embodied a constant threat to democratic freedom, just as did a permanent class of wage laborers.

According to Manning, since these elites were skeptical of popular self-rule and committed to maintaining a stranglehold on political authority, the self-interest of the privileged few necessarily led them to subvert public institutions. For the small farmer or artisan, one’s property in land or tools was directly tied to an immediate experience as a laborer. By contrast, for landed gentry and merchant elites, their wealth derived from income generated by the hard work of others, particularly tenants and employees.<sup>120</sup> In order to justify their position of privilege as members of a leisure class, Manning believed that such elites belittled the value of labor and championed idleness as a social good. For instance, the landed gentry made arguments on behalf of hereditary aristocracy, claiming that only those removed from economic necessity or the experience of hard work were capable of thinking in terms of the common weal. For Manning, because these elites lived off the labor of others, they possessed a fundamental interest in defending inequality and social hierarchy—and particularly, in protecting a divide between a leisure class and a permanent majority of dependent hirelings. In his view, the American promise of free labor would remain plausible only as long as ordinary citizens were able to claim political power from such groups in order to protect their autonomy and independence at work.

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and his relationship to American politics in the late eighteenth and early nineteenth centuries, see Michael Merrill and Sean Wilentz’s comprehensive essay introducing his collected writings. Michael Merrill & Sean Wilentz, *William Manning and the Invention of American Politics*, in *THE KEY OF LIBERTY*, *supra*, at 3–86.

119. Manning, *supra* note 118, at 135. All quotations from *The Key of Liberty* refer to the 1799 version edited by Merrill and Wilentz, with grammatical and spelling corrections made including to the title.

120. Manning describes the self-interest of the few in these terms:

As the interests of the Few—and their incomes—lie chiefly in money at interest, rents, salaries, and fees that are fixed on the nominal value of money, they are interested to have the money scarce and the prices of labor and produce as low as possible. . . . [T]he fall of the price of labor and produce, and the scarcity of money, always bring the Many into distress and compel them into a state of dependence on the Few for favors and assistances in a thousand ways.

*Id.* at 137.

As for lawyers, Manning maintained that—like wage earners and tenants—attorneys also suffered from a condition of fundamental dependence, which posed a particular threat to the functioning of democratic institutions. He wrote, “The greatest danger [to liberty] is from the judicial and executive departments of governments, especially from lawyers.”<sup>121</sup> Since lawyers gained their livelihood from “fees and salaries,” they were often the functionaries of landed elites and thus extensions of their domineering authority.<sup>122</sup> Rather than exercising independent judgment on behalf of the whole community, lawyers used their special role in legal and political life to maintain hereditary privileges and social hierarchies. They did this by creating ambiguities in legislation, and employing these ambiguities to manage politics according to “the interests of the Few.”<sup>123</sup> Manning believed that for Americans to exercise self-government, ordinary citizens had to be able to discern and shape the laws. This meant that “[n]o care, pains, or precautions ought to be spared to make them as few, plain, comprehensive, and easy to be understood as possible.”<sup>124</sup> Despite this need, the bar, due to its dependence on mercantile clients, made sure that “no person can understand what is law and what not but by applying to a lawyer.”<sup>125</sup> The ultimate result was a steady erosion in the ability of citizens to direct the activities of public life.

Writing at virtually the same time, Matthew Lyon further articulated why lawyers were so committed to defending elite interests. Lyon was an outspoken Jeffersonian politician and journalist from Vermont who became famous as the first person brought to trial by the Federalists under the Sedition Act of 1798. To this day, he is the only individual ever elected to Congress from jail.<sup>126</sup> Throughout most of the 1790s, Lyon published a newspaper called the *Farmer’s Library* and wrote extensively about the role of lawyers in postrevolutionary America. His most stinging attack was entitled *Twelve Reasons, Against a Free People’s Employing Practitioners in the Law, as Legislators*. Lyon believed that the bar’s technical training actually undermined morally reflective legal practice because it cultivated the cultural ties between lawyers and the privileged few and fostered distaste for the capacities and commitments of most citizens. Like Manning, Lyon viewed lawyers as unfree dependents of wealthy elites; they therefore stood up “for the claims of landlords, landjockies and overgrown land jobbers, in preference to the poorer sort of people.”<sup>127</sup>

Yet, Lyon went further and argued that the reason why lawyers identified their interests with the privileged few was not simply because of material

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 140–41.

125. *Id.*

126. For more on Matthew Lyon’s remarkable life and career, see ALEINE AUSTIN, *MATTHEW LYON: “NEW MAN” OF THE DEMOCRATIC REVOLUTION, 1749–1822* (1981).

127. Matthew Lyon, *Twelve Reasons, Against a Free People’s Employing Practitioners in the Law, as Legislators*, *FARMERS’ LIBR.*, Aug. 19, 1794.

dependence. The very nature of legal training rejected the ideal of universal education, which held that all individuals should be equally skilled in practices of deliberation and self-rule. By contrast, lawyers were taught to believe that they embodied a learned caste specially endowed with social knowledge and that popular citizens were rife with ignorance and destructive passions. Moreover, while legal work should be seen as one form of labor among many, professional education led lawyers to

consider themselves excluded from the solemn denunciation of our Maker; which says to man, that “in the sweat of thy face thou shalt eat bread,” an exclusion by which they [lose] the benefit of a qualification that legislators have; who by experience, and their own personal labors, have become acquainted with the feelings and the habits, as well as of the mode of thinking of their constituents.<sup>128</sup>

Legal education trained lawyers in a Mandarin language whose purpose was to “mak[e] the laws obscure” and render ordinary political participation impossible.<sup>129</sup> It taught lawyers that politics was a site for elite wisdom and that most citizens were fundamentally incapable of wielding collective authority. It therefore bred in the bar a respect for hierarchy and deference, which threatened the basic principles of self-rule.

In Lyon’s view, this tendency derived in part from the profession’s use of British common law as the foundations of its practice, which encouraged lawyers to see the oppressive and antiquated rulings of old English judges, rather than social need or everyday experience as the appropriate basis for the rule of law: “They are early taught to revere the opinions of, and look up to, ancient British Judges, for authorities and presidents, who have derived their greatness and sucked their principles from the very poisonous breast of monarchy itself.”<sup>130</sup> While members of the bar believed that this education promoted virtue and the capacities of statesmanship, Lyon argued just the opposite. By teaching deference to a hierarchical past, it undermined the ability of lawyers to reflect autonomously on the public good and to see how discretion in legal work was tied to the larger democratic goal of universalizing free labor. Combined with the profession’s financial dependence on the privileged few, extended education in the common law reinforced the bar’s tendency to reduce justice to the goals of wealthy clients. Even when claiming to act in the interests of all, legal training stripped lawyers of the skills for independent reflection and undermined their ethical commitment to democracy.

This view of lawyers as dependent laborers, not unlike wage earners or tenants, lasted long into the nineteenth century. Nearly one hundred years after Matthew Lyon wrote his pamphlet on the bar, labor activists like George McNeil declared that lawyers had become little more than

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128. *Id.*

129. *Id.*

130. *Id.*

“administrators of estates, and not of justice.”<sup>131</sup> In other words, while legal practice inherently enjoyed opportunities for independent moral action, lawyers as a whole—due to education and practice—were incapable of thinking autonomously and acting on the basis of the common good. The profession’s dependence on the privileged few meant that most of what attorneys did amounted to settling financial disputes between elites and supervising the inheritance of wealth. As “administrators of estates” they may have been more highly paid than wage employees, but they were still essentially dependent laborers.

Thus, when Jacksonians during the “Era of Decadence” attempted to do away with specialized legal education and colonial era bar associations, they sought to disconnect the profession from a vision of itself as a priestly class. Rather than being salaried dependents of the wealthy, they hoped that lawyers would situate their practice within communities of ordinary citizens and see their activity as a form of free labor that mirrored the autonomy of small property holders. Instead of basing their practical judgments in common-law training, lawyers would see themselves as no different from other laborers who grounded their ethical commitments and knowledge in collective needs made evident by everyday experience. For our purposes, the critical point is that Jacksonians and others did not consider democratic values to be incompatible with the lawyer’s exercise of independent ethical standards. In fact, they believed just the opposite: sustaining a democratic culture meant ensuring that lawyers continuously reflected on the community’s basic interests. Moreover, such a legal orientation would only emerge if two conditions were met. First, lawyers had to become small proprietors who did not rely on elite benefactors and thus were financially independent of any social constituency. And second, attorneys had to appreciate that the defense of their own ethical autonomy was intrinsically tied to protecting the free labor and economic independence of all citizens.

### C. *The Cultivated Thought of the Democratic Lawyer*

At first glance, President Abraham Lincoln appears to be an archetype of the lawyer as wise political guardian, playing a “transcendent” role in collective life. Yet, in many ways, this presentation of Lincoln as republican statesman misreads his broader political theory, which fundamentally repudiated the stratified account of citizenship espoused (implicitly or explicitly) by Jefferson, Madison, Brandeis, and others. It thus misconstrues his rationale for why the legal profession must be oriented toward the public good. In particular, Lincoln’s vision of legal independence reinforced the long-standing goal of universal moral independence, which was present in earlier thinkers such as Manning and Lyon and in Jacksonian critics of professional privilege. By reflecting on

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131. See *THE LABOR MOVEMENT: THE PROBLEM OF TO-DAY* 456 (George E. McNeil ed., New York, M. W. Hazen 1891) (1887).

this tradition as a whole, one can begin to assess the continuing relevance of past notions of democratic ideals and the lawyer's ethical duties for today's drastically changed circumstances.

In the legal ethics debate, Lincoln is often presented as a classic example of how lawyers should be moral activists reflecting on the worthiness of their clients' ends. In his Springfield practice, he once famously told a prospective client,

Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.<sup>132</sup>

For Kronman, the exercise of such judgment made Lincoln an exemplar of the ideal of statesmanship and illustrates the continuing capacities of the well-trained lawyer to serve as political guardians for our collective institutions. In his view, Lincoln, the lawyer-statesman, acted on the basis of his learned reflection and wisdom, "his prudent sense of where the balance between principle and expediency must be struck."<sup>133</sup> Similarly, for Luban, Lincoln suggests the possibilities for a people's lawyer to embody an exemplary "*phronimos*," or Aristotelian moral expert, capable of appreciating the likely consequences of social action and thus directing clients and citizens toward the common weal rather than their private interests.<sup>134</sup> In essence, both base Lincoln's commitment to infusing work life with independent judgment in the lawyer's distinct status as a learned professional who, unlike the ordinary individual, develops the qualities of deliberation and is thus suited for political and moral decision making. In the process, these arguments tie Lincoln's ethically reflective practice to older republican notions of stratified citizenship and transform Lincoln the lawyer into an embodiment of elite participation and virtue.

Yet, for Lincoln, the lawyer's exercise of ethical judgment was not the result of professional education and thus the possession of any natural aristocracy or distinct class of virtuous elites. Rather, the lawyer, who enjoyed a small practice that served the needs of the local community, was at heart no different than a farmer or a craftsman. He imagined that all free citizens, regardless of standing, should be "trained to thought[]" in the

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132. LUBAN, *supra* note 14, at 174 (quoting 2 WILLIAM H. HERNDON & JESSE W. WEIK, *HERNDON'S LINCOLN: THE TRUE STORY OF A GREAT LIFE* 345 n.\* (1889)).

133. KRONMAN, *supra* note 18, at 3 (citing BICKEL, *supra* note 10, at 65–69; HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 363–86 (Univ. of Chi. Press, 1982)).

134. LUBAN, *supra* note 14, at 170–74.

country school[] or higher school,”<sup>135</sup> and that such training would instill in everyone an appreciation for the values of “book-learning,” which gave “access to whatever has already been discovered by others. . . . [and] a relish, and facility, for successfully pursuing the [yet] unsolved ones.”<sup>136</sup> When combined with the everyday experience of participating as equals in public life and of shaping the ends of their work life, such universal education would foster the skills of moral reflection and practical wisdom. According to Lincoln, and like John Dewey at the beginning of the twentieth century, this combination of learning and labor had the potential to create democratic citizens of remarkable intelligence and foresight. In such a political community, legal craft would come to embody one more form of “thorough work”—labor that Lincoln believed united “cultivated thought” with the practices of ethical care, self-discipline, and comprehensiveness.<sup>137</sup> Thus, when a lawyer made judgments about the worthiness of clients’ goals, he acted as a free laborer in a society of equals whose considered judgment grounded work life in the values of autonomy and critical self-reflection.

Lincoln’s vision of the democratic lawyer took as given a variety of background conditions. He imagined a world without extremes of wealth and poverty, in which virtually every citizen was a small property owner who situated his work life in local communities. Under these circumstances, cultivated thought and thorough work would be accessible to all. Lincoln declared,

The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is free labor—the just and generous, and prosperous system, which opens the way for all—gives hope to all, and energy, and progress, and improvement of condition to all.<sup>138</sup>

By reconceiving the relationship between work and citizenship, Lincoln hoped that the old aristocratic divide between the few and the many could be overcome once and for all. As a consequence, lawyers would no longer be the dependent subjects of elite benefactors or a priestly class claiming a monopoly on political knowledge. Instead, they would constitute one category of free laborers among many, who employed discretionary judgment and ethical care to sustain collective institutions.

One might argue that Lincoln’s defense of the lawyer’s moral independence—of a piece with Jacksonian hopes for a reconstructed ideal of legal practice—was tied to a set of social conditions that no longer mark contemporary life and whose disappearance renders this defense obsolete as well. Indeed, bureaucratization and the rise of an industrial economy,

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135. LINCOLN, *supra* note 100, at 480.

136. *Id.* at 480–81.

137. *Id.* at 481.

138. *Id.* at 478–79 (emphasis added).

which went hand in hand with the decline of independent proprietorship, present a clear challenge to imagining the modern bar as anything other than a distinct political class or a source of technical expertise. Nonetheless, the essential elements of this earlier democratic lawyer remain as relevant today as ever. For one, they emphasize the centrality of embedding the legal profession within a community of citizens equipped with the material resources and cultural knowledge to intervene meaningfully in legal and political processes. To the extent that most citizens understood how the law operated and had the economic independence to defend their interests and rights, professional discretion would no longer be a special privilege but would instead become simply one form of citizen autonomy.

The remainder of this essay attempts to translate this professional vision into the present context. I detail how institutional and intellectual shifts in the last century have radically altered the nature of American economic and political life and have stripped most citizens of a daily experience in collective self-rule. I then turn to the role that lawyers *qua* lawyers may play in facilitating discretionary popular power and in expanding institutional sites for the broad exercise of moral independence. This discussion focuses heavily on the relationship between attorneys and social movements, both during periods of citizen assertiveness and during times of organizational and collective retreat. Such lawyers, acting on behalf of a democratic ethos, do so not simply as individual moral agents but as legal professionals committed to a specific account of the rule of law and its substantive aims. This vision of the lawyer's responsibilities is part and parcel of an alternative legal tradition, one that Manning, Lyon, and Lincoln struggled to situate as the basis of the rule of law.

### III. LEGAL DISCRETION UNDER MODERN BUREAUCRACY

Reflecting on the arguments of Lyon, Lincoln, and Dewey from our current vantage point, the idea of the legal profession as one among many economic and political sites for the exercise of citizenship and moral agency can appear quaint. Lincoln's nineteenth-century hope for an America composed of decentralized and producerist democracies has long since receded into the collective past. In today's environment of administrative complexity and bureaucratic governance, even the dominant accounts in legal ethics of independence and client control seem to overestimate the rationality and social knowledge possessed by both elites and ordinary citizens. The rapid growth of specialization within the bar raises doubts about the capacity of contemporary attorneys to develop the generalized experience and cultural sensitivity that supposedly grounded the lawyer-statesman's practical wisdom. As for client-centered approaches, the rise of the administrative state and the insulation of most individuals from sites of political power challenge the extent to which clients—and citizens at large—are actually capable of recognizing their own interests, let alone coherently acting on them in legal and political arenas. At present, if

the plausibility of even these truncated theories of democratic life is under assault, one is left to wonder what remains of more substantive commitments to self-rule.

Over the next three sections, I elucidate both the difficulties and the possibilities for this democratic vision in the current moment. I begin by exploring the bar's prevailing concerns about its own democratic illegitimacy and the extent to which these concerns are tied to transformations in the relationship between legal and political life. In particular, this discussion emphasizes the increased disconnect between the ideal of universal moral independence and the contemporary experience of diminished access to actual sites of political and economic decision making. In the second section, I highlight how these changes have fostered a profound pessimism among public intellectuals and legal scholars, exemplified by Walter Lippmann's classic texts on public opinion, regarding the future of robust participation under administrative hierarchy. Legal ethics has not been immune to this pessimism, as some scholars wonder whether all that lawyers can do is serve as functionaries of the bureaucratic state and ensure that legal order is maintained—almost irrespective of the ends pursued by that state.

By contrast, I argue that at present, the goal of the democratic lawyer should be precisely the opposite of defending the "authority of the law." Instead, attorneys should employ their discretionary judgment to strengthen the capacity of social groups to intervene in administrative decision making and to create more participatory modes of economic and political governance. Depending on whether strong social movements exist to channel popular sentiment, the lawyer's approach to her discretion and to a community of citizens may well be distinct. During periods of extensive mobilizing and collective self-assertiveness, the profession should focus on protecting the ability of groups to respond spontaneously to the decisions of elites and to create institutional frameworks for entrenching popular voice. To articulate how this might operate, I end by drawing from James Gray Pope's excellent historical work on how labor lawyers in the 1920s and 1930s developed approaches for defending the union's right to strike<sup>139</sup>—one such embodiment of popular political action. I use the example as a thought experiment, which attempts to illustrate both the practical distinctions between democratic lawyering and alternative ethical approaches and the political stakes in how lawyers select between competing accounts of representation.

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139. See generally James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor's Constitution*]; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002) [hereinafter Pope, *Thirteenth Amendment*]. My description of the competing rationales for the right to strike is taken from a reading of these two articles, and thus is highly indebted to James Gray Pope's research.



A. *The Attorney's Role at the Intersection of Law and Politics*

As Part II explored, there is nothing inherent in the attorney's legal discretion that makes it incompatible with popular self-government. In fact, for the competing legal tradition developed by Jacksonians, the lawyer's potential to exercise independent moral judgment provided a framework for how learning and labor could be combined in a society of autonomous citizens. Today, however, the lawyer's discretion carries with it a far different set of implications. With the collapse of the social conditions that might have sustained a community of small producers, legal discretion has come to symbolize the separation of most citizens from practical decision making. Moreover, it underscores profound uncertainty among public intellectuals and legal academics about the possibility of reviving participatory citizenship in the face of bureaucratic complexity. This shift is in large part due to twin developments in the relationship between law and politics. By delineating these developments, we can assess both the extent to which the profession actually faces a democratic deficit and the reasons for the increasing pessimism among scholars about the potential for a more substantive vision of democratic life.

The first of these twin developments is that political practices and decision making in the United States are increasingly legalized.<sup>140</sup> As critics of legal privilege like Gerald Rosenberg rightly point out, our most contentious social problems, from affirmative action and gay rights to emergency powers, have become matters of judicial adjudication in which lawyers play a central role. This has made law into a primary discourse for articulating grievances and for expressing our political disagreements. On the other hand, just as politics has become more legalized, the law itself seems subject to heightened political influence and control. Nothing embodies this emergence more than the rise of "transformative judicial appointments," the self-conscious use by Presidents of court nominations to construct an ideologically supportive federal judiciary.<sup>141</sup> Legal actors themselves appear more and more like politicians, bound to networks of patronage and common policy. In the words of Bruce Ackerman, post-New Deal judges on both the left and the right are not traditionalists; they are in fact "prepared to support and elaborate a transformative vision of constitutional law."<sup>142</sup>

On initial inspection, neither of these developments are particularly novel. American institutions and collective practices have long been marked by a remarkable interpenetration of law and politics. Heightened legalization and the focus on law as a basic mode for decision making date back to the very beginning of the republic. Political scientist Stephen Skowronek describes the early American state as one dominated by courts

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140. For a recent discussion in political science and law, see MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002).

141. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 25–27 (1998).

142. *Id.* at 26.

and parties. As he comments, “It fell to the courts at each level of government to nurture, protect, interpret, and invoke the state’s prerogatives over economy and society as expressed in law.”<sup>143</sup> The result, as Tocqueville so famously wrote, was precisely the legalization of politics: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions.”<sup>144</sup> For this very reason, American legal practice historically has been an inherently political enterprise. Without the existence of a European-style civil service, legal activity in the United States often became indistinguishable from the political work of policy formation and statecraft. Gordon remarks that “[c]orporate lawyers did a lot of the design of the legal forms of state-business relations that in Europe was done by central bureaucracies.”<sup>145</sup> Moreover, the legal profession provided the United States with a substantial portion of its political class. In fact,

[t]he work entrusted to senior career ministers in Europe devolved upon lawyers in the United States. Since the founding of the republic, about two-thirds of the U.S. Senate and half the House of Representatives have been lawyers, and lawyers are the largest occupational group in most state legislatures as well.<sup>146</sup>

It was for all these reasons that Jacksonians like Brownson were so wary of the legal profession and the capacity of the bar to institute itself as a learned class usurping collective authority and acting in the interests of a privileged few.

Still, if the interpenetration of law and politics as such is hardly a new phenomenon, the contemporary moment is distinct for at least one crucial reason: state and economic institutions have become far more intricate and disconnected from actual communities. If the average citizen in the nineteenth century wished to see firsthand the workings of government, he simply had to visit two institutional spaces: the local legislature and the courthouse. The legislature provided easy access to the disagreements and competing goals of the community’s various social groups and political parties. As for a trip to the courthouse, it allowed one to witness the inner workings of the state’s primary functions. This was because, along with addressing ordinary civil and criminal cases, the courts “had become the American surrogate for a more fully developed administrative apparatus.”<sup>147</sup> Importantly, both spaces were utterly public and readily

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143. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 27 (1982).

144. TOCQUEVILLE, *supra* note 40, at 270.

145. Gordon, *supra* note 56, at 306.

146. *Id.* (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 647 (1985); MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 62–63 (1995)).

147. SKOWRONEK, *supra* note 143, at 28.

available to citizens in a local community. Such publicity meant that not only could ordinary individuals keep continual tabs on the activities of their representatives, but they could also organize popular power spontaneously to intervene in decisions that were inimical to basic social needs—through actions ranging from petitions and protests to mobbings and court closings.<sup>148</sup> All of these conditions checked the capacity of elites, including powerful lawyers and judges, to substitute their own will for a collective one. Even members of a gentry bar, who saw themselves as republican statesmen wary of the multitude, were still largely rooted in particular communities and bound to other citizens—if for no other reason than by the capacity of local publics to assert a direct and immediate political voice.

By contrast, the current interconnection of law and politics takes place against a backdrop in which the publicity and accessibility of key institutions are deeply limited.<sup>149</sup> At present, administrative elites appear to have greater control over political and economic processes than ever before, with citizens largely removed from the arenas of decision making. Moreover, the political actors who operate at the center of these institutions are increasingly less rooted in local communities or the concerns of most individuals. As public mediators between Americans and their judicial and political systems, lawyers in many ways typify such trends. In particular, the stratification of the bar between elite attorneys who work on behalf of powerful clients in practice settings such as securities, corporate tax, and antitrust, and a lower tier who struggle to make a living and who provide legal services for debt, divorce, and immigration highlights the popular separation from actual political power.<sup>150</sup> Those lawyers with the greatest wealth and opportunity to participate in decision making are often precisely those most removed from everyday interaction with average Americans. One could argue that in today's profession the prestige and quality of representation is inversely correlated with actual human suffering or with

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148. For more on popular political action in the early republic, see generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); WOOD, *supra* note 31.

149. Moreover, the federal government's transparency policies—which aim to provide citizens with usable information about state and corporate behavior—often serve the opposite function, by making decision-making processes even more opaque. A recent book by Archon Fung, Mary Graham, and David Weil assesses eighteen federal disclosure systems, covering issues as diverse as corporate finance, workplace safety, school performance, and terrorist threat levels. See generally ARCHON FUNG ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007). They find that policies meant to enhance public awareness instead produced information that was “incomplete, inaccurate, obsolete, confusing, or distorted.” *Id.* at 7. For example, in conveying information about the safety of drinking water, “Congress crafted a [disclosure] requirement that employed technical terms, produced inaccurate and out-of-date information, failed to link contaminant data to health risks,” and left citizens with the “daunting task of interpreting complex documents.” *Id.* at 7–8.

150. See HEINZ ET AL., *URBAN LAWYERS*, *supra* note 55, at 84 (providing a table illustrating the breakdown in prestige between various legal specializations, with services to ordinary citizens systematically falling at the low end of the scale).

the lawyer's location in a community of citizens. Thus, it is not surprising that when the bar's elite seeks to defend the profession's independent judgment it turns to republican discourses of statesmanship and differentiated participation. Due to prevailing hierarchies within the bar, let alone in society at large, the power and privilege of the most prestigious lawyers appear to have little in common with ordinary forms of citizenship or work life.

These circumstances clearly place pressure on the potential of legal work to provide an example for universal moral independence. Crucially, however, they put the dominant frameworks in legal ethics under severe strain as well. Republican defenses of legal independence—calling either for statesmanship or a people's lawyer—themselves rely on a vision of legal practice threatened by the rise of modern bureaucracy. When Brandeis defended the wisdom of lawyers, he was specifically referring to a generalized legal practice, in which the attorney's clients were not only corporate entities, but individuals of various backgrounds widely dispersed throughout society. In his words,

If the lawyer's practice is a general one, his field of observation extends, in course of time, into almost every sphere of business and of life. The facts so gathered ripen his judgment. His memory is trained to retentiveness. His mind becomes practi[c]ed in discrimination as well as in generalization.<sup>151</sup>

By contrast, one is left to wonder whether a profession marked by specialization, in which the most prestigious attorneys hardly ever interact with individual clients, is similarly capable of prudent judgment and republican virtue—and therefore worthy of political leadership. At the same time, client-centered approaches from the Left and the Right argue that lawyers should hew closely to client wishes because they take for granted that ordinary citizens understand their own interests and recognize how best to achieve them. Yet, the very isolation of most individuals from political and legal institutions, as well as the increasing complexity of the administrative state, also leaves open the extent to which these assumptions are sustainable.

This suspicion of the capacities of both lawyers and ordinary citizens means that, for some public intellectuals and legal scholars, collective life must aim much lower than a substantive democratic vision of participatory politics and continuous popular involvement. As the next section discusses, in the legal ethics debate over professional independence, these views are implicit in a growing tendency to view lawyers as ultimately little more than civil servants of an administrative state. W. Bradley Wendel and Daniel Markovits both see democratic politics under modern bureaucracies as subject to irreconcilable normative disagreements, which make social order fragile and a site for permanent instability. In this context, all that lawyers can do is employ their discretionary judgment to contain collective

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151. Brandeis, *supra* note 66, at 332.

disagreement. Rather than pursue their own autonomous moral ends or uncritically maximize client autonomy, the lawyer as bureaucratic servant remains faithful to the law of the administrative state, regardless of whether social institutions embody ideal ethical practices. In many ways, these views underscore the sense that meaningful citizenship—in either elite republican or radical democratic varieties—are at root incompatible with the prevailing specialization and institutional hierarchy. Thus, confronting such approaches is essential to clarifying what remains feasible about any account of legal citizenship, whether elite republican or democratic.

B. *Lippman, Amateur Executives, and the Obedient Lawyer*

In order to appreciate fully the current pessimism regarding robust citizenship and popular self-rule, it is essential to begin with our country's most unabashed and sophisticated twentieth-century critic of democracy, journalist Walter Lippmann. Writing in the 1920s during the same period as Dewey, Lippmann too saw America as fundamentally distinct from the decentralized economic and political community it had been. With the rise of an industrial economy, the growth of bureaucratic institutions, the increasing centralization of corporate power, and the emergence of professional groups such as doctors, social workers, teachers, and lawyers, society appeared more impenetrable than ever before. While Dewey sought to conform the new landscape to long-standing respect for free labor and robust citizenship, Lippmann argued that the time was appropriate to put to rest—once and for all—popular faith in the value and sustainability of self-government. Over the last century, his arguments have become the theoretical touchstone for a vision of politics that de-emphasizes an ethics of citizenship and ties the practice of lawyering to specialized service in the activist state.

In many ways, Lippmann's efforts connected him to an elite republican discourse that dated back to the founding, which stressed the limits of ordinary citizenship and presumed the need for a separate political class, often comprised of lawyers. However, Lippmann was also skeptical of the potential for professionals to embody a natural aristocracy capable of thinking broadly in terms of the general good. In his view, specialization and hierarchy meant that most individuals, including administrative elites, had limited social experiences and were knowledgeable only about their immediate economic tasks. As a result, groups such as lawyers should conceive of their role as serving a particular function within a complex social apparatus rather than as statesmen or wise rulers. Instead of asserting its own independent and competing accounts of the public interest, the primary purpose of the bar was to uphold legal and political institutions and assist bureaucratic executives in distributing economic abundance.

These arguments were a far cry from those offered by Brownson, Lincoln, or Progressives like Walter Weyl. Weyl, who coedited the *New Republic* in the first decades of the twentieth century, contended that the problems of social complexity had to be addressed by elevating the citizen

and creating within individuals the ability to direct new institutions and economic practices. Through the instrument of public education, Weyl, not unlike Dewey, hoped that all citizens could learn how to express their political will to elected representatives as well as how to bind new markets to actual consumer needs.<sup>152</sup> More than protecting self-rule, he hoped that “[t]he higher education of the multitude . . . would create a revolutionary force in the community of astounding power and magnitude.”<sup>153</sup> It would allow ordinary men and women to reclaim control “in their industrial pursuits, in their political activities, and in their private life outside of industry and politics.”<sup>154</sup>

By contrast, Lippmann argued that any educational system committed to instructing the public at large in how to exercise practical authority was bound to fail. Given the specialization of modern societies, the everyday citizen would always be an amateur when it came to politics, necessarily more concerned and knowledgeable about her own work and private life. Lippmann argued that, “[n]o scheme of education . . . can endow [the citizen] during a crisis with the antecedent detailed and technical knowledge which is required for executive action.”<sup>155</sup> Thus, the purpose of a well-ordered system of training was to prepare each individual for their allotted task within society’s division of labor. If individuals could not be broad-minded citizens oriented toward a general public interest, they could be made experts of a corner of the bureaucratic framework and thus able to perpetuate the smooth functioning of collective life. According to him, American education had always been falsely tied to outmoded assumptions about omniscient citizenship, either elite republican or radical democratic, in which individuals were presumed to be capable of comprehending the entirety of social experience and thus acting on the basis of truth rather than mere opinion or conjecture. Lippmann argued that nineteenth-century attitudes had “aimed not at making good citizens but at making a mass of amateur executives.”<sup>156</sup> In his view, since administrative hierarchy was a social necessity, which any educative scheme had to appreciate, only those at the very top of the bureaucratic structure—his institutional executives—were required to access more comprehensive knowledge. But crucially, even they relied on specialized experts rather than their own gathered wisdom for this knowledge, and so operated within the framework of society’s extensive division of labor.

For Lippmann, when individuals, whose work life and general circumstances were narrow and highly distinct, pursued larger accounts of the common weal or invested politics with totalizing ideologies, the result was that they threatened social order and left public life “flounder[ing] in a

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152. See generally WALTER E. WEYL, *THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES* (1913).

153. *Id.* at 329.

154. *Id.* at 330.

155. WALTER LIPPMANN, *THE PHANTOM PUBLIC* 147 (1925).

156. *Id.* at 148.

chaos of local opinions.”<sup>157</sup> This danger was all the more relevant for professionals and specialized experts such as lawyers. These groups possessed valuable knowledge in the functioning of particular institutions or bureaucratic practices and thus could help integrate society’s competing elements and factions. Yet, when they acted on the basis of contested moral ends, or sought to champion the interests of particular groups, they simply aided the forces of chaos and instability. In order to avoid these problems, Lippmann believed that Americans should in the end refuse to “hang[] human dignity on the one assumption about self-government.”<sup>158</sup> Instead, he contended that government’s primary purpose was to distribute economic abundance, a task that experts, including lawyers, could perform through the operation of their own scientific knowledge and technical skill. Such a social order was the best that industrial societies could hope for and constituted a new variation of democratic life. While this distributive community would no longer be grounded on meaningful self-rule, it nonetheless combined stability with a broad enjoyment of material and social goods. Lippmann insisted that,

The criteria which you . . . apply to government are whether it is producing a certain minimum of health, of decent housing, of material necessities, of education, of freedom, of pleasures, of beauty, not simply whether at the sacrifice of all these things, it vibrates to the self-centered opinions that happen to be floating around in men’s minds. In the degree to which these criteria can be made exact and objective, political decision, which is inevitably the concern of comparatively few people, is actually brought into relation with the interests of men.<sup>159</sup>

In this account of an activist state, Lippmann saw even the practice of voting, what Jefferson once viewed as the primary domain of ordinary citizenship, as playing only a marginal practical role. For Lippmann, voting embodied the last widely accessible vestige of the nineteenth century’s commitment to popular participation. Nonetheless, he argued that voting was ultimately not about expressing popular interests regarding the direction of collective life. As suggested by his views of education, Lippmann believed that most people were ill equipped under industrial society to develop any political projects or to display collective agency. Therefore, “calling a vote the expression of our mind,” as Weyl maintained, was little more than “an empty fiction.”<sup>160</sup> Instead, voting embodied a receptive act of selecting an already fully formed product. He wrote, “The public does not select the candidate, write the platform, outline the policy any more than it builds the automobile or acts the play. It aligns itself for or against somebody who has offered himself, has made a promise, has produced a play, is selling an automobile.”<sup>161</sup> Citizens chose leaders from

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157. WALTER LIPPMANN, PUBLIC OPINION 293 (Macmillan 1960) (1922).

158. *Id.* at 313.

159. *Id.* at 313–14.

160. LIPPMANN, *supra* note 155, at 56.

161. *Id.* at 57.

lists of preapproved candidates and then departed the political stage, leaving actual policy questions to executives and those administrative experts scattered throughout economic and political institutions.

In the current debates in legal ethics about the status of professional independence, one can see Lippmann's own skepticism about democratic possibility and meaningful citizenship seeping into accounts of lawyering. In particular, two recent and thought-provoking assessments of the function of the bar in modern life are deeply animated by Lippmann's distrust of popular participation. In his article *Civil Obedience*, W. Bradley Wendel attempts to step outside the dominant debate between defenders of professional independence and their client-centered opponents, by offering a competing argument about how lawyers should exercise their inherent discretion.<sup>162</sup> Like Lippmann, Wendel argues that society is marked by unavoidable ethical pluralism, or what he calls a "diversity of reasonable moral beliefs."<sup>163</sup> This pluralism makes the coordination of social activity a source of profound difficulty, and active popular participation a continual pressure on the sustainability of collective institutions. Wendel argues that law's primary purpose is to provide a framework for integration, one that contains the public's "persistent moral disagreement."<sup>164</sup>

In this context, lawyers are neither independent moral agents nor solely the zealous advocates of their clients' interests. Instead, they are "quasi-political actors" armed with significant public responsibilities; in particular, lawyers are meant to remain faithful to the law and to ensure that legal institutions resolve disputes in keeping with established rules.<sup>165</sup> Given the fragility of political settlement, Wendel argues that the profession's governing principle should be respect for the "authority of law"<sup>166</sup> and its primary role to protect "social stability" from the ever-present danger of politics "slipping into either anarchy or a police state."<sup>167</sup> As Wendel argues,

Under the authority conception of legal ethics, lawyers are duty-bound not to frustrate the achievement of law by reintroducing contested moral values into the domain of law, either in the guise of principles of interpretation or as the basis for an ethically motivated decision to act or not to act on behalf of a client.<sup>168</sup>

Like Lippmann, not to mention elite republicans, Wendel imagines popular self-government as a "chaos of local opinions." The moral force behind his call for "civil obedience" is the fear that the public, when actively involved in politics, is as likely to promote disorder as it is to pursue any recognizable common good. Yet, unlike Jefferson's and Tocqueville's faith

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162. Wendel, *supra* note 16.

163. *Id.* at 381.

164. *Id.* at 364–65.

165. *Id.* at 384.

166. *Id.* at 364.

167. *Id.* at 366.

168. *Id.*



in natural aristocracy, Wendel also shows little hope that the legal profession has the prudence to navigate contested moral questions and to act on the basis of wisdom. For him, the lawyer's skill is merely enforcing the government's interest in upholding the law, and thus the attorney is at root a bureaucratic functionary—a scribe not of the client but of the administrative state. As such, Wendel carves out a particular path for how lawyers, in keeping with Lippmann's vision of specialized expertise, may relate to their own capacity for discretion. On the one hand, he concludes that lawyers should not pursue client interests that, although technically legal, undermine the larger authority of the law. Nor, however, can they resist lawful aims for purely moral reasons. In doing the latter, the lawyer would “simply reinscrib[e] in the attorney-client relationship the very moral disagreement the law was intended to preempt.”<sup>169</sup> Instead, the attorney is under the permanent obligation, regardless of the administrative state's actual ethical validity, “to preserve the common framework of law.”<sup>170</sup>

In *Legal Ethics from the Lawyer's Point of View*,<sup>171</sup> Daniel Markovits reaches surprisingly similar conclusions. Like Lippmann, Markovits also maintains that the discrete social function played by lawyers makes them unlikely to display republican virtue. In his view, the modern lawyer is an expert in the skill of argumentation and bound most closely to the established procedures and rules embedded in government bureaucracies. According to Markovits, the attorney's “capacity to argue all sides and his allegiance to procedures rather than outcomes, makes him unsuited to moral leadership” as well as “render[s] him incapable of leading” political life.<sup>172</sup> Yet, in keeping with both Lippmann and Wendel, these very qualities also provide the attorney with unique skills within the administrative state for integrating diverse social elements and protecting public order. For Markovits, this legal function as a bureaucratic servant is critical precisely because of the dangers posed by democratic politics. Without mechanisms to regulate competing groups, “all forms of social order”<sup>173</sup> would find themselves threatened by “the ‘perpetual conflicts between rival impulses and ideals.’”<sup>174</sup> Given this fact, attempts by attorneys to act on the basis of their own moral autonomy would place the entire edifice of collective life in peril. As Markovits concludes of the ideologically motivated or “realist” lawyer, “The realist lawyer cannot help the law preside over the conflict because she self-consciously declares herself to be outside of the law and a part of the conflict, and this is why modern society has never allowed all, or even most, of its lawyers to act like realists.”<sup>175</sup>

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169. *Id.* at 382.

170. *Id.* at 366.

171. Markovits, *supra* note 21.

172. *Id.* at 276.

173. *Id.* at 289.

174. *Id.* at 288 (quoting STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 189 (1989)).

175. *Id.* at 289 (footnote omitted).

In the end, the vision of social life espoused by Lippmann, Wendel, and Markovits goes too far in repudiating both legal citizenship and popular participation, even acknowledging the pressures of heightened bureaucracy. They seem to suggest that contemporary politics is frequently and unacceptably on the precipice of disorder, and thus efforts by citizens to intervene in public life are as much a source of danger as they are one of potential renewal. This implies not only a rejection of Lincoln's commitment to universal moral independence, but also pessimism about the very possibility for politics to be a site for collective improvement. In essence, such arguments, by invoking the specter of social collapse, undermine attempts to see political and legal frameworks as fundamentally malleable—the product of our own agency and thus open to reform or even transformation.

Moreover, given their emphasis on respect for established rules, it is not surprising that Wendel and Markovits tend to read popular political activity as a form of unruliness. Precisely due to the rise of modern bureaucracies and social complexity, collective action in twentieth-century social movements has inevitably moved “out-of-doors.”<sup>176</sup> As Wolin notes, for most individuals, “[b]ecause of the exhausting demands of making a ‘living,’ surviving under harsh circumstances, dedication to a political life is hardly a conceivable vocation.”<sup>177</sup> By and large, most citizens have neither the energy nor the desire to develop the forms of specialized knowledge necessary to intervene cogently within the frameworks offered by administrative institutions. According to Wolin, what reinforces this tendency is the fact that popular interventions are rarely triggered “by a yearning for political participation,” but instead emerge from “felt grievances” regarding one's everyday circumstances and experiences.<sup>178</sup> As a consequence, political activity under modern bureaucracies is often “informal, improvised, and spontaneous”<sup>179</sup>—taking the shape of mass protests, extralegal assemblies, boycotts, petitions, and strikes. From the perspective of the administrative state and Wendel's obedient lawyer, these actions may well appear as threats to social integration. Still, they also represent a genuine display of democratic sentiment about social ends and the course of collective life. To the extent that modern hierarchies undermine local self-government as a general method of economic and political decision making, modes of mass dissent offer a critical avenue for sustaining democratic vitality. In embodying what Franz Neumann once described as “spontaneous responsiveness to the decisions”<sup>180</sup> of elected representatives and bureaucratic elites, such public pressure in both the

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176. For a general discussion of the rise of informal protests and public actions by social groups in the face of administrative hierarchy, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977).

177. WOLIN, *supra* note 32, at 255.

178. *Id.*

179. *Id.* at 254 (internal quotation marks omitted).

180. FRANZ NEUMANN, *The Concept of Political Freedom, in THE DEMOCRATIC AND AUTHORITARIAN STATE* 160, 192 (Herbert Marcuse ed., 1957).

workplace and politics presents a central mode for social groups to intervene directly in institutional decisions.

One concrete means by which the modern lawyer can fulfill the democratic hope of making legal autonomy a basis for widespread moral agency is to protect the public's capacity for "fugitive" or "spontaneous" acts of political assertiveness during periods when social groups are politically active and engaged. In many ways, this is precisely the opposite of envisioning attorneys as actors that employ legal process to dampen points of conflict and disagreement. As Neumann wrote, democracy under conditions of mass bureaucracy "requires that social bodies such as political parties and trade unions remain free of the state, open, and subject to rank and file pressure; and that the electorate, if faced with serious problems, be capable of spontaneously organizing itself for their solution."<sup>181</sup> Since attorneys find themselves at the intersection of law and politics, they can employ their discretionary judgment to enhance and protect the conditions by which popular groups express their own democratic energy. In doing so, lawyers do not use their moral and political independence to act as prudent leaders in the long-run best interest of other social groups, as both Tocqueville and Brandeis imagined. Rather, in defending sites for popular discretion and dissent, modern lawyers can see ethical autonomy in work and politics as a broad social good, as opposed to the purview of professional elites alone.

### *C. The Strike, Popular Citizenship, and the Democratic Lawyer*

Perhaps the strike is the most classic informal means by which citizens, organized as employees, challenge the prerogatives of corporate and administrative employers. Such challenges are of utmost importance in contemporary democratic life, particularly given the general loss of control experienced by wage earners since the entrenchment of modern corporations. In essence, the strike embodies a remaining form of discretionary popular power that allows citizens to assert their own authority over the economic domain. No doubt, legal questions surrounding the right to strike present only one potential embodiment of how lawyering connects to popular power and assertiveness. Still, the topic provides a clear issue area in which to delineate the practical differences between competing legal ethics frameworks—such as people's lawyering, client-centered views, and Wendel's model of "civil obedience"—in the context of mobilized and self-assertive constituencies. As a launching point, I revisit James Gray Pope's research on how Progressive attorneys addressed the constitutional arguments of their unionist clients in the years prior to and during the New Deal—a peak of labor organizing and activity. This discussion is not an effort at historical reconstruction; rather, it employs the basic contours of the events Pope describes as a fact pattern for thinking through how lawyers might have behaved differently under similar

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181. *Id.*

circumstances. As a thought experiment, the example illuminates the extent to which distinct schools of legal ethics, including the democratic ethos I espouse, recommend alternative approaches for an attorney's interaction with her clients and with social movements. Each account of legal ethics implies divergent understandings not only of how lawyers relate to their political communities, but also of the strike's social meaning and legal status.

Pope's work presents a basic dilemma in the purpose of legal advocacy, one that labor attorneys were continually confronted by in the early decades of the twentieth century. Unions perceived the right to strike as a crucial element in their ability to resist employers equipped with far greater wealth, resources, and relative bargaining position. Furthermore, unions saw the strike as essential to sustaining the wage earner's economic and ethical independence under vastly changed conditions. If laborers could no longer directly dictate how their labor was to be employed, at least they could use spontaneous and collective power to reassert some degree of economic control. For labor leaders ranging from Samuel Gompers to Andrew Furuseth and John Lewis, the strike was believed to be a fundamental right, given constitutional life by the Thirteenth Amendment's proscription of "involuntary servitude."<sup>182</sup> According to unionists, the Supreme Court's decision in *Bailey v. Alabama*,<sup>183</sup> invalidating the state's debt peonage law, stood for the claim that the Thirteenth Amendment sought "to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit."<sup>184</sup> They argued that the individual worker by himself was helpless against the combined power of corporate institutions. The strike, as a form of popular political action, not only protected individual employees against the coercive strength of their employers, but also established the moral conditions for free labor. As Pope writes, it provided workers with "effective freedom," or "the ability not only to influence the conditions of working life, but to do so consciously, in combination with one's coworkers, using forms of action that yield immediate, unambiguous evidence of personal and collective potency."<sup>185</sup>

Yet, Pope tells us that overwhelmingly the lawyers who represented union clients and were supportive of labor legislation rejected such political and legal reasoning as the basis for defending the right to strike. Like Felix Frankfurter—who was eventually appointed by Franklin D. Roosevelt to the Supreme Court—these Progressive and New Deal attorneys were steeped in Brandeis's vision of a people's lawyer and committed to constraining the power of corporate interests in the defense of general public good. But, rather than presenting the strike as a fundamental right

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182. U.S. CONST. amend. XIII, § 1.

183. 219 U.S. 219 (1911).

184. Pope, *Thirteenth Amendment*, *supra* note 139, at 17 (quoting *Bailey*, 219 U.S. at 241).

185. Pope, *Labor's Constitution*, *supra* note 139, at 942.

embedded in the Thirteenth Amendment—in either the court or the public sphere—union attorneys decided to emphasize Congress’s commerce power as a basis for pursuing labor legislation. Instead of a matter of basic constitutional freedom, Frankfurter and others framed the strike as part of the broad category of “economics,” which under the Commerce Clause depended for its legality “upon a judgment about practical matters” made by Congress.<sup>186</sup> As Frankfurter asserted, “[T]hat which is reasonably defensible on economic or social grounds, whether or not it accords with our individual notion of economics . . . cannot be offensive on constitutional grounds.”<sup>187</sup> By the end of the New Deal, arguments grounded in the Commerce Clause gained the status of unquestioned law and came to undergird the legitimacy of various labor provisions, not least of which was the right to strike. In the process, they also ensured that the strike would never achieve the level of a fundamental right, but rather would rest upon “the ordinary political process subject only to deferential review by the courts.”<sup>188</sup>

This example raises the basic issue of whether the attorneys should have developed an approach to legal representation that affirmed the constitutional vision asserted by their unionist clients. From today’s perspective, the answer seems fairly straightforward. The entrenchment of the New Deal’s legal account of the activist state makes reasoning from the Commerce Clause appear as the self-evidently correct strategy. At present, it would be the only legally viable approach; for a contemporary attorney to argue otherwise might well evince a basic lack of professional competence. Given the current state of the law, a focus on other legal rationales could actually contravene guiding ethical commitments to providing clients with adequate representation.<sup>189</sup> However, the power of Pope’s historical exegesis is to demonstrate that in the years preceding the New Deal, both an argument from the Commerce Clause and from the Thirteenth Amendment were highly controversial. If anything, Thirteenth Amendment reasoning had more popular purchase and embodied a key means by which both unions and their allies in Congress spoke of the right to strike.<sup>190</sup> Each constitutional approach would have been deeply inconsistent with existing Supreme Court doctrine, which emphasized economic due process, limited the power of Congress to intervene on behalf of labor, and viewed such efforts as unconstitutional “class legislation” that violated Fourteenth

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186. Pope, *Thirteenth Amendment*, *supra* note 139, at 27 (quoting Felix Frankfurter, *Taft and the Supreme Court*, reprinted in FELIX FRANKFURTER ON THE SUPREME COURT 49, 62–63 (Philip Kurland ed., 1970)).

187. *Id.* at 30 (quoting Felix Frankfurter, *The Zeitgeist and the Judiciary*, Address at the Harvard Law Review Twenty-Fifth Anniversary Dinner (1912), in FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 186, at 1, 5).

188. *Id.*

189. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2007) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

190. See Pope, *Thirteenth Amendment*, *supra* note 139, at 30–46.

Amendment principles of equality.<sup>191</sup> Under these conditions of judicial hostility, one could imagine thoughtful practitioners taking seriously the unionist vision of constitutionalism and constructing a legally savvy analytical framework to enable arguments from the Thirteenth Amendment—whether they be directed at judges or fellow citizens. As one element of such a framework, lawyers could show how fundamental rights need not be absolute; as with freedoms of speech and assembly, the reality of heightened scrutiny may well be compatible with legislative infringement. The fact that union attorneys chose not to pursue this path ultimately had far less to do with self-evident success or failure in court, especially given that Commerce Clause arguments only eventually succeeded as a result of profound political changes during the Great Depression.<sup>192</sup> In essence, the ideological commitments of the profession at the time shaped in advance what such lawyers deemed politically appropriate and possible.<sup>193</sup>

Given that prevailing doctrine questioned the legitimacy of both accounts, what does the representational approach actually pursued by attorneys indicate about how they related to union clients and perceived the meaning of their own discretion? In light of Pope's historical work, the debate over the status of the strike provides a thought experiment for imagining the practical implications of different approaches to legal ethics. To begin with, unionist attorneys—self-conscious embodiments of the people's lawyer—approached this dilemma in a manner that might be familiar from this essay's discussions of Luban and Simon. Rather than shying away from the realities of ethical discretion, they sought to expand the space for the lawyer's own moral agency and political independence. In thinking about this discretion, it is important to appreciate that whether the unionist constitutional vision amounted to legal strategy or client goal was itself deeply contested. Today's Model Rules of Professional Conduct assert that while a "lawyer shall abide by a client's decisions concerning the objectives of representation," he or she has wide latitude in developing the means for achieving these objectives.<sup>194</sup> Yet, here, it remained unclear precisely how to distinguish between client objectives and lawyer means. Were the unions interested in solely vindicating the right to strike no matter

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191. *Id.* at 18–25.

192. For a discussion of the how political conditions transformed constitutional order such that previously unacceptable modes of legal reasoning became the basis in the 1930s for the legitimacy of the New Deal's activist state, see Bruce Ackerman's discussion of "constitutional moments." ACKERMAN, *supra* note 141.

193. It also underscores the extent to which many lawyers viewed the U.S. Constitution as ultimately a legal document, which should be treated as a site for expert elaboration. Thus, unionist theorizing struck some lawyers as both unsophisticated and an unwelcome intrusion into their proper sphere of authority. Pope quotes one union lawyer as dismissing Andrew Furuseth's constitutional vision by commenting that, "if you have an automobile and it needs fixing you take it to an automobile mechanic . . . and if you have a legal ill you necessarily go to a lawyer." Pope, *Thirteenth Amendment*, *supra* note 139, at 26 (citation omitted).

194. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(a) (2007).

the rationale, or in championing an account of fundamental rights protected by the constitution? For American Federation of Labor (AFL) leader Andrew Furuseh, it was acceptable in crafting federal legislation to make compromises concerning everyday politics. However, he saw the right to strike as a fundamental value, for which there could be no legislative compromise. As Pope quotes him, Furuseh believed that the strike should be seen as comparable to hallowed freedoms such as speech. On these matters, legal strategy and client objective merged because “there [could be] no half loaf on fundamental principles. . . . Whether a man or woman shall belong to himself or herself or not is fundamental, as is the question whether or not that man or woman shall have a right to combine with others for the purpose of mutual aid.”<sup>195</sup>

However, exercising his professional autonomy, Frankfurter and others read client ends narrowly, as committed solely to legalizing the right to strike regardless of its constitutional status. While unions may have had suggestions about legal strategy, it was the province of technical experts to reach broad judgments about how best to pursue this far more limited objective. Perhaps more importantly, the lawyers’ strategy was invested with deep political meaning. Like Brandeis, Progressive and New Deal attorneys viewed themselves as acting in the best-considered interest of the public writ large and thus as a crucial check against all competing factions. As one such lawyer commented, the bar “‘alone of all the orders of men represents not force but justice, not caprice but law.’”<sup>196</sup> To argue for a fundamental right to strike based on the Thirteenth Amendment would have been considered antithetical to the lawyer’s unique responsibility as social guardian to constrain mass publics when popular action veered from the presumed common weal. It was to place laboring groups above the good of the people as a whole.<sup>197</sup> For this brand of people’s lawyering, attorneys embody a natural aristocracy whose education and technical skill supposedly imply practical wisdom and prudent judgment. Thus, when a lawyer behaves as an independent moral agent, her agency devolves into a form of republican elitism, in which she sees herself as acting on behalf of client interests—but more broadly and “temperately” construed.

Both Wendel’s account of “civil obedience” and client-centered lawyering are similarly prey to problematic conclusions. Committed to the “authority of law,” Wendel’s lawyer placed in this union representational context would defend the right to strike, but ideally by employing strategies that preserved the finality of legal settlement. In other words, he would—in

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195. Pope, *Thirteenth Amendment*, *supra* note 139, at 30 (citation omitted) (internal quotation marks omitted).

196. Pope, *Labor’s Constitution of Freedom*, *supra* note 139, at 1014 (quoting *The Era of Law*, 23 LAW NOTES 1, 1 (1919)).

197. Pope tells us that, “While unionists argued that the Constitution precluded equivalent treatment of capital and labor, progressive reformers contended that legislators should have discretion to formulate legislative classifications—favorable or unfavorable—concerning both capital and labor.” Pope, *Thirteenth Amendment*, *supra* note 139, at 30 (footnote omitted).

this case, not unlike the people's lawyer—deemphasize the discretionary popular authority of social groups to challenge the framework of procedural legitimacy. A fundamental right to strike, grounded in the Thirteenth Amendment, would expand the discretionary power not of government but of labor; it would thus potentially destabilize the finality of law and reopen divisive moral disagreements. By contrast, client-centered accounts would likely present a competing approach. According to this vision of legal ethics, Progressive lawyers should have acted to reduce to a minimum their independent discretion and therefore followed both the political ideals and practical strategy presented by unions. Treating clients nonhierarchically would entail rejecting lawyer presumptions of superiority, regardless of the reality of technical specialization, and attempting to operate as an instrument actualizing the client's already fully formed will. At the extreme, the lawyer might pursue client-articulated strategies even if they would be significantly less effective than those suggested by expertise. Equally importantly, the lawyer would effectuate client ends broadly understood, even if they compromise a more substantive vision of citizenship and democratic life.

What might a democratic ethos indicate as a way to organize the attorney's representational approach? As with the people's lawyer, this viewpoint refuses to negate the bar's autonomy or to confine citizenship solely to an electoral domain distinct from everyday employment. As such, it sees professional discretion as more than an extension of technical expertise. But unlike with legal statesmanship or people's lawyering, moral agency is not defended out of a belief that lawyers possess (or should possess) prudence. Rather, independence is defended to the extent that it promotes a particular substantive principle and is exercised in a manner that is consistent with democratic ambitions. Thus, a defense of the lawyer's own ethical agency and reflectiveness is essential to meaningful citizenship—to protecting and expanding the sites that remain for citizens to enjoy autonomy over decisions that shape their lives in work and politics. In keeping with the arguments of Manning, Lyon, and Lincoln, the lawyer's individual discretion is taken as an exemplar of the forms of independence that should be invested throughout social institutions.

To the extent that dictates of competence allow, or that the democratic ideal is relevant to the particular representational context, this ideal should infuse and organize a lawyer's advocacy inside and outside the courtroom. Given the fact that the lawyer exists at the intersection of law and politics, representation almost inevitably involves a wide range of practices. As part of negotiation, client counseling, and trial advocacy, lawyers find themselves (self-consciously or not) developing a legal discourse that often structures what arguments and modes of reasoning become politically available. This means that lawyers must be attentive to the public consequences of both their larger advocacy approach and their particular legal strategies, and have the flexibility to use their discretion accordingly.



In some cases this might involve reading client ends narrowly while in others it might mean just the opposite.

To return to Pope's strike illustration, a democratic defense of professional autonomy would mean taking a more expansive approach to client ends. Under conditions in which organized social movements confront entrenched and centralized bureaucracies, strengthening democratic life is crucially tied to whether these groups can act informally and extraprocedurally to contest the decisions of elites and to propose their own solutions to collective problems. The strike embodies a definitive expression of such discretionary popular power, and its protection is a crucial avenue for a mobilized mass constituency to act independently of the directives of economic and administrative authorities. In other words, the reason for defending the Thirteenth Amendment approach would not be to avoid "client domination" or to create a "nonhierarchical" practice encounter. Due to the specialization that marks contemporary institutions, there is no avoiding the reality that lawyers have superior technical skills in legal domains. The challenge is how to make those skills serve critical social ends, in particular efforts to extend the capacity of citizens to dissent from those features of social life they find oppressive. The reason why Progressive lawyers should have pursued the Thirteenth Amendment argument as their primary focus is because it would have shaped the manner in which their own clients and the public in general—not simply judicial actors within the courtroom—conceived of the meaning of their collective practices. During a period of energized popular participation, imagining the strike as a fundamental right, rather than as a prerogative of congressional power, would have shifted the framework for political discussion and activity. Such democratic lawyering would have highlighted and sharpened the essential disagreements between competing social elements and reinforced the capacities of popular groups to dissent from established practices.

On first glance, it might appear counterintuitive that the lawyer, who Wendel primarily tasks with upholding the authority of the law,<sup>198</sup> should instead be committed to expanding discretionary popular power and thus the ability of citizens to impose their goals—even if it means acting outside government's procedural framework. Yet, on closer inspection, this vision of the democratic lawyer is not incompatible with respect for legality. As has been argued previously, such lawyering is itself steeped in a long-standing legal tradition, one that articulated the ties between participatory citizenship and the domains of law and politics. This tradition provided generations of political and legal actors with an account of the lawyer's place in a community of citizens. While the rise of corporate institutions and the administrative state may have undermined the social conditions for robust citizenship, this alternative legal framework still underscores the

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198. W. Bradley Wendel's account itself draws from the Model Rules, which presents as one of the central professional roles the notion that the lawyer is "an officer of the legal system." See MODEL RULES OF PROF'L CONDUCT pmb. (2007).

duty of lawyers in their professional role to take seriously the aspiration to broad moral autonomy.

Moreover, at present, the ability of social groups to act spontaneously to assert their own interests and grievances has declined sharply. In this context, in which the central social movements of the twentieth century have largely collapsed as means for organizing and expressing popular dissent, democratic lawyering cannot simply rely on protecting sites for spontaneous action or maintaining the separation between government and society. The profession must actively participate in generating new organizational structures for the articulation and enactment of constituent goals; it must also help to reform the administrative state itself to include far greater opportunities for participatory intervention and governance. In the final pages of this essay, I draw out the lawyer's ethical responsibilities for creating the social conditions necessary for robust citizenship inside and outside the framework of everyday legal representation. In doing so, I hope to suggest how linking professional discretion to a vision of democratic community allows the lawyer to exercise her autonomy in ways that move well beyond the prevailing binary between statesman and scribe.

#### CONCLUSION: THE LEGAL ROLE TODAY IN REVIVING DEMOCRACY

The current debate in legal ethics over whether attorneys should be independent moral actors or client-centered autonomy agents presents a strangely upside-down account of democratic life. Those who defend independence assume the role (often unwittingly) of apologists for the bar's countermajoritarian status. Rather than tying legal deliberation to the democratic goal of elevating all citizens, their argument for moral discretion rests on a theory of elite republicanism and promotes assumptions about the virtue of professional leadership. Today's most outspoken defenders of democratic legitimacy in legal ethics appear to conclude just the reverse, namely that ethical independence for the lawyer is incompatible with self-government. If nothing else, this essay hopes to recast the debate by situating the lawyer's ethical activism within a richer account of participation and autonomy. Throughout the nineteenth century, a wide spectrum of American thinkers and political actors sought to reject notions of political elitism and natural aristocracy, and instead imagined a social community that combined labor and learning to inculcate citizenship with practical control. Jacksonians, and their radical Jeffersonian predecessors, saw the legal profession as both a threat and a potential aid in pursuing this democratic promise, and hoped that lawyers could be persuaded to employ their own moral agency to enhance that of their fellow citizens. In the face of massive transformations that undermined the historical frameworks for everyday economic and political participation, twentieth-century public intellectuals questioned whether this earlier vision remained feasible. In this context, it is not surprising that some legal scholars today are increasingly pessimistic about either the moral capacities of the bar or the potential for citizens to construct and impose an actual political will.

Still, in our era of mass demobilization, in which social movements have in large measure receded as mechanisms for organizing dissent and presenting ideological alternatives, the responsibilities placed on the bar are more pressing than ever. Today's dominant discourses revolve around either the security claims of the state or the market dictates of corporate entities. Given the prevalence of these modes of authority, the profession can employ its own social power to speak on behalf of a distinct set of values and to interject these values into our shared practices. In particular, it can employ its discretion to strengthen the social bases required for participatory citizenship and thus to link lawyering to a democratic community. Such professional efforts should take place both at the macrolevel of pursuing policies that open up the legal and political system to greater contestation and popular involvement, and at the microlevel of reframing client relationships in times of demobilization.

To begin with, this means confronting the complexity and seeming impenetrability of prevailing institutions and reclaiming the radical Jeffersonian and Jacksonian hope of creating more transparent and accessible legal processes. Following Manning, Lyon, and Brownson, such a template highlights the importance of simplifying the legal system and, perhaps counterintuitively, enhancing the capacity of individuals to defend their interests without recourse to lawyers. Recall that in legal ethics discussions, the fear of domination, emphasized in radical client-centered accounts, rarely refers to the lawyer's interactions with corporate entities or wealthy individuals. Simon points out that for powerful clients—although lawyers clearly do much more than merely translate their interests—the exercise of this discretion hardly indicates that attorneys are in a position of superiority. Precisely because powerful clients have an array of independent material and cultural resources, legal discretion actually extends rather than compromises their capacity to pursue selected ends; if anything, it makes lawyers the dependents of wealthy benefactors. By contrast, for poor or disenfranchised clients, both the lack of independent resources and the fact that legal services are generally provided through private markets dramatically alter the nature of client-attorney encounters.

For many Americans, inequalities in legal access often reduce the courts to a space for harassment and vulnerability, instead of a means for asserting one's rights. In her book *Access to Justice*, Deborah Rhode presents a picture of a legal system in which

[m]illions of Americans lack any access to justice, let alone equal access. According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet. Government legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low-income litigants.<sup>199</sup>

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199. DEBORAH RHODE, *ACCESS TO JUSTICE* 3 (2004).

Under these circumstances, Richard Zorza tells us that, “[i]n many courts, well over 50 percent of litigants appear without lawyers. For example, in California, a court study found that in child support cases, only 15.95 percent of the cases had counsel on both sides, and that in 63 percent of cases *neither* parent was represented (let alone the children).”<sup>200</sup> Moreover, the bar’s general solution to such systematic inequality—increasing the number of attorneys for the poor through government funding and greater pro bono hours—only underscores the depth of the problem. Over the last thirty years, government subsidies for legal services have dropped dramatically, as national spending on legal aid has dipped by one-third and heightened restrictions have been placed on both the types of clients and the causes that state-supported lawyers can pursue.<sup>201</sup> As Rhode writes, federally funded programs often refuse to represent clients deemed “unworthy,” a category that has expanded over time to include “prisoners, undocumented aliens, women seeking abortions, and school desegregation plaintiffs.”<sup>202</sup> Yet, Russell Pearce notes that even with far greater government support, equalizing access simply by increasing the number of lawyers is an inherently flawed strategy. To begin with, providing quality service to all low-income individuals would require dramatically increasing the number of lawyers, perhaps by as much as tenfold.<sup>203</sup> Moreover, to the extent that market relations still dictate the primary provision of legal services, “[p]arties with greater resources would be able to purchase a higher quality of legal services and better absorb the costs of litigation.”<sup>204</sup>

Of equal importance, simply increasing the number of lawyers would not shift how the legal profession is currently embedded in communities. At present, to the extent that poor or marginal litigants have attorneys at all, these attorneys are often either high-priced corporate lawyers engaged in

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200. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 423 n.1 (2004).

201. See RHODE, *supra* note 199, at 3–4.

202. *Id.* (internal quotation marks omitted).

203. See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 975 (2004). Pearce quotes from Gary Bellow and Jeanne Kettleson in arguing that

society could never provide the resources necessary to provide quality legal services to low-income people. [Bellow and Kettleson] noted that “even if demand for legal services remained constant . . . it would not be possible or desirable to expand the bar to meet the need.” They explained that “to equalize the number of lawyers available to the very poor and the rest of the population” would require “[a] tenfold increase in the existing public interest bar” and that “to begin to provide the whole population with the same legal services that the affluent presently enjoy . . . would require something on the order of a tenfold increase in the size of the entire bar.”

*Id.* (quoting Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Security and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 380 (1978)).

204. *Id.* at 974.

pro bono practice<sup>205</sup> or, more commonly, legal aid advocates with limited time or money to devote to representation. Each circumstance emphasizes the vulnerability of the client as well as the sense that the lawyers involved do so out of noblesse oblige or a vision of public service—one that actually reaffirms elite republican notions of excellence and professional leadership. Rather than a fundamental good experienced by all, the protection of basic rights often devolves into a philanthropic grant impermanently and unequally distributed. This reality embodies Manning's central fear about the bar's potential role in American life: namely, that the legal system would become so complicated and riddled with material disparities that most individuals would have neither the capacity nor the opportunity to defend their rights and interests as equals in the public arena. Faced with these conditions, citizens would be incapable of comprehending—let alone controlling—their own institutions and thus become entirely dependent on forms of elite leadership.

In reflecting on the present moment, radical Jeffersonian and Jacksonian calls for greater simplicity present one practical means for strengthening the social prerequisites necessary for a democratic community. Rhode, Zorza, and Pearce all focus on methods of enhancing the ability of individuals to make sense of the legal system and to articulate their rights in court, even without the aid of lawyers. Such scholars argue for expanding the use of small claims courts; they also defend “implement[ing] proposals to place self-represented parties who cannot afford a lawyer on more equal footing by providing them with basic information on the law and procedures, as well as . . . forms and . . . assistance in drafting pleadings and other court papers.”<sup>206</sup> These changes would go hand in hand with moving the judge

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205. One recent example is the law firm Wilmer Hale's representation of six Algerian detainees held indefinitely without charge by the U.S. government in Guantánamo Bay, Cuba. See Farah Stockman, *Detainee Fight Gets Bigger, Costlier for Long-Battling Boston Law Firm*, BOSTON GLOBE, June 25, 2008, at A1. Their representation ultimately precipitated the U.S. Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which found that the right of habeas corpus applied to persons held in Guantánamo and to those imprisoned there as “enemy combatants.” According to the *Boston Globe*, “Since 2004, lawyers with the firm [Wilmer Hale] have provided 35,448 billable hours of legal help, worth an estimated \$17 million, making this case the largest pro bono effort in the 90-year history of the firm.” Stockman, *supra*.

206. Pearce, *supra* note 203, at 976. Deborah Rhode provides a powerful encapsulation of this approach to legal reform in describing various means for creating “law without lawyers”:

Eliminating archaic jargon, extended delays, and fragmented court structures are crucial steps in that direction. Other key strategies include extended hours and adequate pro se services in community and courthouse settings. Some courts permit handwritten petitions and electronic filings; others offer hotlines, on site childcare, and form preparation assistance through websites and computer kiosks. A growing number provide at least some personal assistance in multiple languages for pro se litigants through centers in courthouses, community organizations, or even traveling outreach units. A few jurisdictions have substantially raised the dollar limits of small claims courts, offered assistance to their users, and banned appearances by lawyers in all cases or in proceedings where the opponent is unrepresented. Such reforms should be more widely adopted and courts should

toward a more active role—especially in pro se litigation—by ensuring that parties fully understand the nature of proceedings and settlements as well as by remedying procedural errors that would keep courts from hearing crucial evidence or legal arguments.<sup>207</sup> Again, at stake would be more than confronting the inequities in legal access. Greater simplification would expand the cultural resources at the disposal of most individuals and help to reframe how clients confront both the legal system and the bar. By spreading legal information and access widely, these changes would help reconstruct the manner in which lawyers are situated within communities. While clearly only a limited step, they seek to ensure that when the bar exercises its legal discretion, this discretion takes place against a backdrop in which citizens too possess knowledge about their governing institutions as well as some measure of autonomy in court practices.

In fact, these attempts to simplify legal process and expand citizen resources should be considered part of a broader reform effort to expand popular participation throughout regulatory institutions, wherever such participation can be made feasible and institutionally effective. Given the centrality of lawyers within the administrative state, the legal profession has the opportunity to promote regulatory mechanisms and policies consistent with what political scientist Archon Fung has called “accountable autonomy.”<sup>208</sup> This approach combines devolution, in which citizens have extensive authority over social decision making, with centralized monitoring—mitigating pathologies both of administrative hierarchy and local parochialism.<sup>209</sup> In describing recent participatory experiments, Fung highlights how administrative actors and local groups have attempted to solve problems of bureaucratic failure by drawing on constituent knowledge and involvement in areas often viewed as too complex for ordinary citizenship. At the municipal level, these examples include the development of neighborhood councils in Chicago to address challenges in public education and policing, which by the late 1990s incorporated

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develop policies, training, and monitoring structures to promote fair treatment of unrepresented parties.

RHODE, *supra* note 199, at 86.

207. For more on injecting adversarial processes with a “managerial judge,” see Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1987–92 (1999); Pearce, *supra* note 203, at 975–79; Zorza, *supra* note 200, at 440–48.

208. See ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* 5–8 (2004).

209. *Id.* Such institutional approaches are comparable to what Michael Dorf and Charles Sabel have described as “democratic experimentalism.” See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998). They argue for a vision of participatory politics in which

subnational units of government are broadly free to set goals and to choose the means to attain them. Regulatory agencies set and ensure compliance with national objectives by means of best-practice performance standards based on information that regulated entities provide in return for the freedom to experiment with solutions they prefer.

*Id.* at 267.

thousands of local residents into the direct activity of allocating budgetary resources and developing basic policy strategies.<sup>210</sup> In the context of federal environmental regulation, often seen as far too intricate for popular intervention, reforms to the Endangered Species Act have created participatory processes by which stakeholders including developers, community groups, and environmental activists work jointly to create Habitat Conservation Plans (HCPs). According to Fung, “[t]hese plans aim to devise durable ecosystem-management strategies that simultaneously protect endangered species and allow human development.”<sup>211</sup> Such experiments in participatory governance, alongside a transformation in court process, suggest the type of macro-reform initiatives that can reduce administrative complexity and strengthen the social conditions for widespread self-rule.

Ultimately, however, moving courts away from an exclusive orientation toward lawyers and altering regulatory processes only speak to one side of the current predicament. Attorneys themselves must confront the meaning of their own legal practice at a historical moment when professional autonomy is no longer a widely shared experience but rather an elite privilege. With the decline of broad-based social movements, democratic lawyering also requires far more than what it might have during the heyday of labor activism. Rather than focusing simply on informal or spontaneous modes of social pressure, it means no less than employing one’s professional power and experience to help construct the very associations and institutional frameworks—inside and outside of the administrative state—that can house popular participation. As articulated by Scott Cummings and Ingrid Eagly, such an emphasis on “law and organizing” entails that attorneys “focus their efforts on facilitating community mobilization.”<sup>212</sup> But unlike with some “law and organizing” approaches—often associated with radical client-centered views—lawyers should not refrain from infusing their practice with a guiding normative vision out of fear that it may lead to client domination.<sup>213</sup> By returning once more to the classic debate between Bell and Luban over class action litigation, we can highlight how such a substantive focus provides attorneys with methods

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210. Archon Fung and Erik Olin Wright argue that such neighborhood councils have “created the most formally directly democratic system of school governance in the United States. Every year, more than 5,000 parents, neighborhood residents, and school teachers are elected to run their schools. By a wide margin, the majority of elected Illinois public officials who are minorities serve on these councils.” Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 3, 8 (Archon Fung & Erik Olin Wright eds., 2003).

211. See FUNG, *supra* note 208, at 234.

212. Cummings & Eagly, *supra* note 80, at 447.

213. Cummings and Eagly note that when grassroots initiatives are too beholden to postmodern fears of client domination, they avoid constructing any “comprehensive alternative social vision, which ultimately prevents them from developing institutional structures and challenging the hegemony of liberal capitalism.” *Id.* at 486.

both for avoiding the statesman-scribe binary and for combining professional obligations with broader democratic commitments.

At the heart of the Bell-Luban debate over whether NAACP lawyers should have pursued their own accounts of the best interest of black parents was the reality of what Rhode calls “class conflicts in class actions.”<sup>214</sup> Parents represented by the NAACP Legal Defense Fund themselves disagreed deeply over the proper framework for confronting the racial discrimination embedded in the American education system. As previously discussed, to some extent these disagreements were practical and concerned simply whether integrationist strategies like busing would actually enhance or reduce the overall quality of schools. Yet, Gary Peller powerfully captures how black communities were also torn between two competing ideological visions of racial equality.<sup>215</sup> On the one hand, groups like the NAACP advocated an integrationist stance that “locate[d] racial oppression in the social structure of prejudice and stereotype based on skin color, and that identifie[d] progress with the transcendence of a racial consciousness about the world.”<sup>216</sup> Thus, NAACP attorneys informed local communities that they would refuse desegregation cases unless integration was a central objective.<sup>217</sup> On the other hand, Peller notes that many in black communities opposed the idea that race consciousness should be overcome at all. Articulating a commitment to black nationalism, these individuals “asserted a positive and liberating role for race consciousness[] as a source of community, culture, and solidarity to build upon rather than transcend.”<sup>218</sup> As Malcolm X famously argued, all-black schools need not be viewed as the product of discrimination:

[I]f we can get an all-black school, that we can control, staff it ourselves with the type of teachers that have our good at heart, with the type of books that have in them many of the missing ingredients that have produced this inferiority complex in our people, then we don't feel that an all-black school is necessarily a segregated school. It's only segregated when it's controlled by someone from outside.<sup>219</sup>

Neither Luban's nor Bell's ethical accounts of legal representation offer a compelling method for attorneys to navigate these ideological disagreements. Without offering a serious argument, Luban essentially stipulates as a matter of fact that the integrationist ideology amounted to the long-term best interest of the class as a whole and that the NAACP lawyers

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214. Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1211 (1982).

215. See generally Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

216. *Id.* at 759–60.

217. See Rhode, *supra* note 214, at 1216. Rhode notes that in one Pennsylvania school case, “Legal Defense Fund attorneys indicated that they would not represent the plaintiff class if its objective was simply to upgrade ghetto schools rather than to achieve desegregation as well.” *Id.* at 1213 n.121.

218. Peller, *supra* note 215, at 761.

219. *Id.* at 763–64 (quoting Malcolm X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS AND A LETTER 16–17 (G. Breitman ed., 1970)).



were right to pursue their own moral worldview regardless of the actual community of parents. In his view, the matter was self-evident: “a racially integrated future is better than a racially segregated one.”<sup>220</sup> Not only does such presumptuousness collapse into legal-statesmanship at its most high-handed, one could also argue that it fails to represent adequately the litigation class that would be affected by desegregation suits. Given that the NAACP was the only organization pursuing class actions, its effective monopoly meant that black parents opposed to the integrationist approach had no viable legal alternative and would have to live with court remedies to which they fundamentally objected but were nonetheless instituted on their behalf. As Bell notes, this embodied a situation in which lawyers contravened the spirit of ethical rules stipulating that attorneys should keep their personal interests from interfering with client representation.<sup>221</sup> Unfortunately, Bell’s solution of following parental dictates is equally problematic. By simply transforming the lawyer into a functionary for those parents already mobilized, his client-centered approach would have done little to guarantee that legal representation conformed to the wishes of the class as a whole rather than an active minority within it.

By contrast with each of the preceding frameworks, democratic lawyering sees the creation of processes for participatory citizenship as a potential solution to class disagreement. According to this competing ethical approach, attorneys should have pursued the formation of inclusive parental associations, aimed at offering a mechanism for black communities to consider distinct ideological visions of racial equality and to discuss the likely educational outcomes. Particularly at a juncture in the civil rights movement when mobilized constituencies were receding from the public sphere, lawyers had the opportunity to develop organizational frameworks to sustain popular involvement. Such frameworks, which harness citizen voices, ensure not only that client goals are actually assessed but also that any exercise of independent judgment by the lawyer is part and parcel of a more general exercise in popular discretion. As a consequence, organizing drives would have been far more broad-ranging than the plebiscites or public hearings courts often employ to poll class views.<sup>222</sup> Historically, open meetings in school desegregation cases yielded very poor turnout—a fact that is unsurprising given the exhausting work and family demands

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220. LUBAN, *supra* note 14, at 348.

221. Under the American Bar Association’s Model Code of Professional Responsibility, the bar’s ethical model at the time,

[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE OF PROF’L RESPONSIBILITY EC 5-1 (1983) (citing ABA CANONS OF PROF’L ETHICS Canon 35 (1908)).

222. On the limits of court-imposed “majoritarian” solutions to problems of intraclass conflict in class action litigation see Rhode, *supra* note 214, at 1232–42.

placed on many low- and middle-income Americans.<sup>223</sup> Crucially, these public hearings were not part of larger collective projects, which tied parental involvement to clear mechanisms for pursuing their interests. While the difficulties of mobilizing poor constituencies have been well documented,<sup>224</sup> organizers also have numerous tools at their disposal to foster meaningful participation.<sup>225</sup> In deciding how to strengthen parental voice, lawyers could have employed their own judgment to decide which tools would best promote associational activity. In a context like school desegregation—in which parents were deeply invested in the future of their schools and previous civil rights associations were decaying—a judicious combination of organizing practices had the possibility of renewing participatory energy. At their best, such efforts may have provided the seeds for more permanent institutions, affording local communities with a setting for asserting control over key social and political decisions.

Crucially, this mode of legal organizing not only fulfills the democratic commitment to disperse moral autonomy widely, it combines such commitments with the lawyer's duty to provide competent legal representation free of conflicting interests. To the extent that associations were inclusive and created fair procedures for generating and voicing collective demands, these parental groups could have articulated which client ends to pursue—integrationist or black nationalist—in class action lawsuits. There is no doubt that ideological disagreements would be deep and potentially impossible to overcome. Nonetheless, making such disagreement explicit—rather than cloaking it by imposing a false normative agreement—would still have played a critical function. In the case of sustained opposition, it would have made apparent the internal tensions within the community and highlighted the professional inadequacies of majoritarian polling solutions or of simply bundling all parents together. By the same token, the opportunity to engage with ideological disagreement may well have produced the opposite effect—emphasizing shared interests and affording parents a framework to reach consensus over questions of profound social significance. In each case, the lawyer's role in promoting participatory mechanisms would have tied duties of representation to the goal of robust citizenship. Moreover, one should note that this entire process would have been permeated by professional

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223. Rhode tells us that, “[i]n a Pittsburgh school desegregation case, 25 to 30 individuals out of a class of 2,000 students and 4,000 parents typically attended open meetings.” *Id.* at 1234 n.207.

224. Along with Rhode's discussion in *Class Conflicts in Class Actions*, *supra* note 214, at 1234, see also political theorist Carole Pateman's seminal account of the reasons for low levels of participation among marginal social groups. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 45–66 (1970). On the specific case of the structural difficulties faced by attempts to mobilize welfare recipients in the welfare rights context see PIVEN & CLOWARD, *supra* note 176, at 296–354.

225. Cummings and Eagly discuss a variety of strategies for enhancing low-income participation including educational efforts, signature gathering, demonstrations, media pressure, popular involvement in drafting proposed legislation, and, eventually, institution building. *See* Cummings & Eagly, *supra* note 80, at 480–84.

discretion, evident in everything from initial efforts at organizing to constructing strategies needed to implement stated ends.

By creating mechanisms for popular participation, such democratic lawyering provides one example of how legal independence can embody a general social template. Unlike the lawyer-statesman, the focus on organizing does not presume that the lawyer's moral independence derives from unique insight into how best to reconcile ideological disagreements or to construct a general public good. And, in contrast to radical client-centered accounts, the attorney need not shrink from her position of technical expertise and independent judgment. Instead, the democratic lawyer ties the profession's irreducible discretion to a guiding substantive principle—the desire to instill all economic and political arenas with opportunities for popular decision making. In doing so, the attorney, in his or her own legal practice, combines duties of competent representation with an overriding democratic ethos. By drawing from a long-standing legal tradition, such lawyering suggests that a commitment to moral independence—if grounded by a political theory that gives substance to the meaning of this independence—need not be trapped within the rubric of statesman or scribe.

In reorienting the ethical commitments of the profession, the lawyer's own independence and discretionary judgment can be a potential basis for social renewal. The problem with most accounts in legal ethics that attempt to take democracy seriously is that they fail to address the consequences of the public's separation from the sites of political authority. With powerful economic actors as well as the state's coercive capacity seemingly unrestrained by popular sentiment, the legal profession—if armed with political and moral independence—has the opportunity to supply a critical check on elite institutions. When legal scholars seek to limit the lawyer's discretion as an ethical actor, they not only do a disservice to the ideal of morally reflective work, they also further negate those tools still within reach for challenging the hierarchy of contemporary practices. Just as for past Americans, the ultimate ambition of legal independence must be to protect the democratic promise at the core of collective life. At present, we are clearly a long way from the hope of citizens equally engaged in and reflective about their work lives and political conditions. As a result, the project facing both lawyers and the public at large is ultimately one of recovery. This task entails reclaiming lost democratic ground and safeguarding essential building blocks of autonomy and moral independence—both inside and outside of legal practice. These building blocks are imperiled not by the expression of popular power, but instead by its notable absence.