

# THE LAWYER AND PUBLIC SERVICE

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In this essay, I will suggest a framework for understanding the evolution of conceptions of lawyers' obligation to serve the public. Historically, the first way of viewing the lawyer's role was as a member of America's governing class. Second came cause lawyering on behalf of a particular issue. Third, and most recently, arose the idea of pro bono lawyering, a less ambitious incarnation of the governing class lawyer who contributes time to helping cause lawyers. These categories are not rigid: for each individual they may overlap to one degree or another. This framework is preliminary and requires further research and development. Nonetheless, it provides a useful tool for explaining how lawyers—and in particular the heroic lawyers described in this symposium—connect to public service and for identifying a basic strategic question the bar must answer in determining how best to encourage lawyers to engage in public service in the future.

## I. THE GOVERNING CLASS LAWYER

The original account of the American lawyer's role was that of America's governing class. The core of this approach was that lawyers—in contrast to business people—are above self-interest, and accordingly, they are uniquely able to discern and pursue the common good.<sup>1</sup> As America's governing class, lawyers manage society in the interest of promoting the rule of law. This idea is central to

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\* Professor of Law and Co-Director of the Louis Stein Center for Ethics and Law, Fordham University School of Law. I want to thank Susan Carle for her vision in putting this wonderful symposium together, as well as the other symposium participants for their inspiring contributions. Washington College of Law is a most appropriate location for a convocation on the "History of Pro Bono Lawyering," given that it serves as a model of strong commitment to the common good, both in the vision of its founders and in the leadership of its faculty and students today.

1. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professionalism Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1241 (1995).

republicanism, the dominant ideology of the legal elite in the 19th century,<sup>2</sup> as well as professionalism, the dominant ideology of the legal elite in the 20th century.<sup>3</sup> It can be found in Alexis De Tocqueville's description of lawyers as the American aristocracy,<sup>4</sup> George Sharswood's republican understanding of lawyers "provid[ing] the enlightened political leadership that protected 'life, liberty, and property,'"<sup>5</sup> Louis Brandeis's plea that lawyers take their rightful place as the people's lawyers,<sup>6</sup> and Anthony Kronman's recent call for lawyers to fulfill their obligations as lawyer-statesmen.<sup>7</sup> Indeed, the preambles to the 1908, 1970, and 1983 legal ethics codes promulgated by the American Bar Association claim that the very future of our system of government depends, in significant part, upon the ethical conduct of lawyers.<sup>8</sup> This does not mean that governing class lawyers were not zealous advocates for their clients. Rather, their zealous advocacy occurred within the bounds of governing class obligations.<sup>9</sup>

This symposium highlights a number of examples of lawyers who sought to promote the public good based on their governing class obligations. Susan Carle describes how Moorfield Storey, a former ABA President<sup>10</sup> and a lawyer at a law firm representing large corporations, "served as the NAACP's president and primary

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2. See *id.*; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992). See also Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14-15 (1988).

3. See Pearce, *supra* note 1, at 1238-42.

4. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 266-70 (J.P. Mayer ed. & George Lawrence trans., 1969).

5. See Pearce, *supra* note 2, at 254 (describing Sharswood's perspective). See also GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS*, 32 A.B.A. REP. 1 (5th ed. 1907). Sharswood was the father of the legal ethics codes. Pearce, *supra* note 2, at 243-48. In his essay, he offered a republican perspective premised on lawyers' superior ability to identify and promote the common good. *Id.* at 254-58.

6. See Louis Brandeis, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 313, 321 (1914) (stating that lawyers "hold a position of independence, between the wealthy and the people, prepared to curb the excess of either").

7. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

8. See ABA CANONS OF PROFESSIONAL ETHICS (1908) ("The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied"); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970) ("Lawyers, as guardians of the law, play a vital role in the preservation of society"); ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983) ("Lawyers play a vital role in the preservation of society").

9. See, e.g., Pearce, *supra* note 2, at 257-66 (describing Sharswood's balance of republican and adversarial obligations); ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964) (noting that while viewing themselves as client advocates, Wall Street lawyers recognized a higher duty as guardians of the law).

10. Susan D. Carle, *From Buchanan to Button: Race, Class, and Legal Ethics in the Early History of the NAACP, 1910-1920*, 32-33 (unpublished manuscript on file with author).

Supreme court advocate in the 1910s and first half of the 1920s.”<sup>11</sup> Elite lawyer and later Supreme Court Justice Louis Brandeis and his protégé, Harvard Law School Professor and later Supreme Court Justice Felix Frankfurter, were leaders in the legal efforts of the National Consumers League.<sup>12</sup>

One interesting glimpse of the operation of the governing class perspective is Susan Carle’s observation that elite lawyers for the NAACP viewed the NAACP’s legal work as exempt from certain legal ethics requirements because the NAACP’s work was done without financial compensation.<sup>13</sup> This sounds like a perspective of governing class lawyers. Placing the common good above financial self-interest was their hallmark.<sup>14</sup> The legal ethics codes and professionalism resulted from an acknowledgment at the turn of the 20th century that some lawyers were putting their financial self-interest first.<sup>15</sup> The legal elite responded by organizing the bar and imposing ethics codes as way of policing proper conduct by lawyers.<sup>16</sup> In taking no fee for its legal advocacy, the NAACP was acting in the tradition of the governing class lawyer. There was no danger that financial interest would interfere with its pursuit of the common good. Therefore, the NAACP did not need to be policed in the same way as paid lawyers.

## II. THE CAUSE LAWYER

While the governing class lawyer draws her inspiration from her role as a lawyer, the cause lawyer’s public service arises from her personal moral commitments.<sup>17</sup> A good example of cause lawyering is Richard Hamm’s description of Alice Paul and many of the other lawyers and non-lawyers affiliated with the National Woman’s Party.<sup>18</sup> Their goal was not primarily improvement of the legal system for its

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11. Susan D. Carle, *Lawyering for Others: A Comparative Study of Lawyers for the National Consumers League and the Early NAACP*, 9 AM. U. J. GENDER, SOC. POL’Y & L. 81 (2001). When Storey’s understanding of himself as a guardian of the law conflicted with the goals of the NAACP, Storey chose to follow his obligation to law.

12. *See id.*

13. *See id.* For a more extended treatment of this topic, *see* Carle, *supra* note 10.

14. *See supra* discussion p. 2.

15. *See* Pearce, *supra* note 1, at 1240-42.

16. *See id.*; *supra* note 8.

17. *See, e.g.*, Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Austin Sarat & Stuart Scheingold eds., 1998) (identifying cause lawyers as moral activists “committed to using their professional work as a vehicle to build the good society”).

18. Richard Hamm, *Mobilizing Legal Talent for a Cause: The National Woman’s Party and the Campaign to Make Jury Service for Women a Federal Rights*, 9 AM. U. J. GENDER, SOC. POL’Y & L. 97 (2001).

own sake but rather promotion of equal rights for women.<sup>19</sup> Martha Davis provides other examples of cause lawyers: Ed Sparer and the poverty lawyers who sought to end poverty in the 1960s;<sup>20</sup> Martha and her colleagues at the National Organization for Women Legal Defense and Education Fund (NOW LDEF) who fight for women's rights.<sup>21</sup>

Sometimes governing lawyering and cause lawyering overlap. Judith Kilpatrick suggests that African American lawyers in Arkansas fought for racial justice because of both their commitment to that cause and to lawyers' "duty to the public."<sup>22</sup> Another example of overlap is Moorfield Storey, a governing cause lawyer who had a personal moral commitment to the work of the NAACP.<sup>23</sup>

Another way cause lawyering and governing class lawyering overlap is in a symbiotic relationship where cause lawyers and activists used governing class lawyers who were often among the bar's elite to "gain credibility" for their arguments.<sup>24</sup> Moorfield Storey provided such credibility to the NAACP, as did Louis Brandeis and Felix Frankfurter for the National Consumers League.<sup>25</sup> More recently, for similar reasons, legal services lawyers asked Archibald Cox, a prominent Harvard Law School Professor and former Solicitor General, to argue *Shapiro v. Thompson* before the United States Supreme Court and Kathleen Sullivan, a leading constitutional law scholar and current Dean of Stanford Law School, to argue before the Supreme Court in *Green v. Anderson*.<sup>26</sup>

At times, however, the governing class lawyer's higher duty to the law resulted in conflict with cause lawyers and activists. Moorfield Storey undermined the NAACP's campaigning for federal anti-lynching legislation when he withheld support on the ground that he believed the legislation unconstitutional.<sup>27</sup> Similarly, Felix Frankfurter opposed as inappropriate the National Consumer League's efforts to gain "passage of a constitutional amendment that would prohibit the U.S. Supreme Court from striking down state

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19. *See id.*

20. *See* Martha Davis transcript, at 69-72; MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995).

21. Martha Davis transcript at 71-72.

22. Judith Kilpatrick, *Race Expectations: Arkansas African-American Attorneys (1865-1950)*, 9 AM. U.J. GENDER, SOC. POL'Y & L. 63 (2001).

23. *See* Carle, *supra* note 11.

24. *See id.* at 5.

25. *See* Carle, *supra* note 11, at 5-6, 8.

26. Martha Davis transcript at 64-65.

27. Carle, *supra* note 12, at 6.

labor legislation.”<sup>28</sup>

### III. THE PRO BONO LAWYER

The third approach of lawyers to public service is unpaid pro bono services, often referred to by the short hand “pro bono.” It refers to lawyers who for no fee donate a limited amount of their work to public service. In the ABA’s Rules of Professional Conduct, Model Rule 6.1 urges lawyers to devote a “substantial majority” of these efforts to assisting persons of limited means.<sup>29</sup>

Rob Atkinson describes how the pro bono concept arises from a belief that lawyers have special obligations to the public.<sup>30</sup> While similar in that regard to the governing class approach, the pro bono approach is a very thin application of the governing class role. The traditional governing class lawyer is a public servant even in her paying work—always placing the good above self-interest. The pro bono lawyer serves the public primarily in her pro bono work. Otherwise, she is a hired gun for her clients.

This distinction mirrors the shift in ideology among elite lawyers in the past generation. As recently as the early 1960s, a survey of elite lawyers indicated that they saw themselves as members of the governing class first and as client advocates second.<sup>31</sup> Twenty-five years later, surveys published as a part of a Stanford Law Review symposium indicated that elite lawyers now saw themselves primarily as mouthpieces for their clients lacking in special obligations to the common good.<sup>32</sup>

Interestingly, the very concept of pro bono work arises during—and perhaps in response to—this shift in ideology. According to the Oxford University Press Dictionary of Modern Legal Usage, the widespread use of the term pro bono or pro bono publico dates only from the 1970s.<sup>33</sup> Indeed, Martha Davis’s account of the Vera Institute for Justice’s plan in 1963 to mobilize volunteer lawyers for MFY Legal Services through Democratic clubs<sup>34</sup> suggests that the

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28. *Id.* at 9.

29. ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 6.1(a).

30. Rob Atkinson, *Why the Good Has Become the Enemy of the Best*, 9 AM. U. J. GENDER, SOC. POL’Y & L. 129 (2001).

31. See SMIGEL, *supra* note 9.

32. See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985).

33. Bryan A. Garner, *pro bono publico*, in A DICTIONARY OF MODERN LEGAL USAGE 695 (2d ed. 1995).

34. See Davis transcript, at 69; DAVIS, *supra* note 20.

option of seeking pro bono assistance through the organized bar, pro bono clearinghouses, or large firm pro bono departments was not available.

Lawyers who today engage in pro bono work are within the framework of their professional roles and in that way distinct from cause lawyers. Nonetheless, many lawyers use their cause commitments as a basis for choosing their pro bono service. Martha Davis describes how women lawyers might choose to work for NOW LDEF<sup>35</sup> and politically conservative lawyers might choose to work for right-wing legal defense funds.<sup>36</sup>

In other ways, though, pro bono lawyering conflicts with cause lawyering. Rob Atkinson's emphasis on the value of full-time public interest lawyers<sup>37</sup> reminds us that the pro bono approach tends to leave these lawyers in a nether world. They are doing their public service for a fee—their salary—and don't fit within the ambit of voluntary unpaid pro bono work.

The narrow pro bono perspective also excludes many lawyers whose public service is less than full time but who seek compensation for their work. While Kilpatrick's study of African-American lawyers in Arkansas identified many contributions to the public interest, only four of the seventy-one lawyers made contributions which met the strict pro bono standard.<sup>38</sup> Susan Carle observes how the policy "of the NAACP's first legal committee in separating fee for service work from lawyering in the 'public interest' disadvantaged African-American lawyers in competing to handle the NAACP's high profile test cases."<sup>39</sup>

The pro bono approach differs from both the governing class and cause lawyer approaches in its preference for work for the poor, as opposed to other work to promote the good.<sup>40</sup> This view, which was hotly contested within the ABA,<sup>41</sup> would exclude many of the lawyers discussed in this symposium—lawyers for the NAACP, NOW LDEF, National Women's Party, and the National Consumers League, including Alice Paul, Josephine Goldmark, Moorfield Storey, Scipio

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35. Davis transcript, at 72.

36. *See id.* at 74-75.

37. *See* Atkinson, *supra* note 30.

38. *See* Kilpatrick, *supra* note 22.

39. *See* Carle, *supra* note 11.

40. *See generally* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1(a).

41. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 1998, 323 (describing opposition to "urging lawyers to allocate most of their pro bono hours to serving the poor" and noting the closeness of the 228-215 vote adding that language).

Jones, and Louis Brandeis—from the ranks of preferred pro bono service.

#### IV. CONCLUSION

Now that consideration of the changing conceptions of lawyers' obligations to the public interest have brought us to the current day, I would like to conclude with two observations about the symposium and today's crisis of professionalism.

Laments about the decline of professionalism are a mainstay of the organized bar and legal literature.<sup>42</sup> Some of the leading commentators on this topic have suggested that one of the reasons for this decline is the increased diversity of the profession.<sup>43</sup> The argument goes as follows. When a relatively homogenous white male protestant elite dominated the profession, it was able to maintain a culture of commitment to the common good.<sup>44</sup> The addition of elite lawyers from diverse backgrounds who did not share these values made it impossible for the white protestant elite to maintain this culture.<sup>45</sup> I have been skeptical of this argument<sup>46</sup> and was delighted that this symposium documented numerous African-American and women lawyers who devoted themselves to pursuing justice and not solely their financial self-interest.<sup>47</sup>

Last, in recounting heroic lawyers who pursued the public interest from governing class, cause lawyering, and pro bono perspectives, this symposium puts front and center the question of how best to motivate today's lawyers and law students to seek the common good. Do we appeal to their special obligations as lawyers based either on the governing class or pro bono perspectives? Or, in the manner of the cause lawyers, do we appeal to the obligation that all human beings have to promote the good through whatever work they choose?<sup>48</sup>

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42. Pearce, *supra* note 1, at 1230, 1256-57.

43. See, e.g., ANTHONY KRONMAN, *THE LOST LAWYER* 273-300 (1993).

44. *Id.* Mary Ann Glendon offers a slightly different version, which includes both "WASP" and "old world" values falling victim to "deracinated technocrat class." MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 84 (1994).

45. See KRONMAN, *supra* note 43.

46. See, e.g., Russell G. Pearce, *Law Day 2020: Post-Professionalisms, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 19 (1999).

47. See, e.g., Carle, *supra* note 11; Hamm, *supra* note 18; Kilpatrick, *supra* note 22; Davis transcript, at 71-72.

48. For an insightful discussion of the motivation of cause lawyers, see Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING*, *supra* note 17, at 31.

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Answering these questions is one of the great challenges facing the legal profession in the 21st century.