

Stanford Law Review

Babbitt v. Brandeis: The Decline of the Professional Ideal

Author(s): William H. Simon

Source: *Stanford Law Review*, Vol. 37, No. 2, Symposium on the Law Firm as a Social Institution (Jan., 1985), pp. 565-587

Published by: Stanford Law Review

Stable URL: <http://www.jstor.org/stable/1228627>

Accessed: 27/04/2010 20:35

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=slr>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Stanford Law Review is collaborating with JSTOR to digitize, preserve and extend access to *Stanford Law Review*.

<http://www.jstor.org>

Babbitt v. Brandeis: The Decline of the Professional Ideal

William H. Simon*

The vision of professionalism that entranced the liberal legal elite for a century now strikes most lawyers and law students as implausible or uninteresting or both. The papers in this symposium by Robert Nelson and by Ronald Gilson and Robert Mnookin¹ are outstanding examples of two of the current modes of repudiation of this vision: the mode of skepticism and the mode of indifference. Nelson takes the claims of the professional vision seriously, and, using a methodology responsive to them, sets out to refute them. Gilson and Mnookin ignore the vision, and, using a methodology that assumes the vision's invalidity, construct a radically different account of law practice.

I want to rehearse some of the themes of the professional vision and compare them to the contrasting ones sounded by these critics. I do not propose exactly to rehabilitate the professional vision. In part, I am prompted simply by the thought that, in case this symposium should prove its final burial, the vision should have some memorial here. I am also prompted by a sense that some of its themes may be more valuable or more resilient than the critics allow.

I. THE PROGRESSIVE-FUNCTIONALIST VISION

The dominant account of professionalism in the past century can be called the Progressive-Functionalist Vision. Its most influential expositors have been the Progressive lawyer Louis Brandeis and the functionalist sociologist Talcott Parsons. The vision was elaborated by Brandeis in a series of articles during the first two decades of this century and by Parsons in strikingly parallel

* Associate Professor of Law, Stanford University.

1. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985); Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

but independently conceived articles during the 1930s through the 1950s.² This vision is still expressed or presupposed throughout the *Code of Professional Responsibility*.³

The Progressives and the Functionalists reacted against both the social system of the self-regulating market and the doctrines of classical liberalism that they associated with that system. Those doctrines, which today survive most vigorously in the style of economic analysis practiced by Gilson and Mnookin, accounted for society in terms of the principles of atomistic individualism and order through impersonal rule. The basic vision was one of selfish individuals pursuing material advantage constrained only by the coercive enforcement of the legal rules constituting the market. To the Progressives and the Functionalists, this vision was both inaccurate and repulsive, inaccurate because it ignored the most fundamental mechanisms of social order and repulsive because, to the extent that it did describe society, that society was economically inefficient and morally stultifying.

The first premise of the Progressive-Functionalist Vision was normative integration. Classical liberalism was wrong in suggesting that social order could ever be achieved simply through the coercive enforcement of impersonal rules. Viewing individuals in purely egoistic terms, it ignored more fundamental modes of social order: socialization and honor. Socialization refers to the process by which people internalize as their own goals and values the norms of the general moral order of their society. Honor refers to the process by which people seek to conform to the expectations of others in order to gain their approval or solidarity. Each process makes possible a more spontaneous, flexible, and less alienating mode of social coordination than does a regime of impersonal rule. Such a regime is at best a supplement to the shared goals and expectations that provide the most fun-

2. L. BRANDEIS, *Business—A Profession*, in BUSINESS—A PROFESSION 1 (1914); L. BRANDEIS, *The Opportunity In The Law*, in BUSINESS—A PROFESSION 313 (1914); Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916). T. PARSONS, *The Professions and Social Structure*, in ESSAYS IN SOCIOLOGICAL THEORY 34 (rev. ed. 1954); T. PARSONS, *The Motivation of Economic Activities*, in ESSAYS IN SOCIOLOGICAL THEORY 50 (rev. ed. 1954); T. PARSONS, *An Analytical Approach to the Theory of Social Stratification*, in ESSAYS IN SOCIOLOGICAL THEORY 69 (rev. ed. 1954); T. PARSONS, *A Sociologist Looks At The Legal Profession*, in ESSAYS IN SOCIOLOGICAL THEORY 370 (rev. ed. 1954). A full account of Brandeis' Progressivism and Parsons' Functionalism would mention the many differences between their visions as well as the parallels I emphasize here.

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) [hereinafter cited as MODEL CODE].

damental social cohesion.⁴

The second premise of the Progressive-Functionalist view was functional differentiation. Roles requiring extensive specialized training and skills proliferate in modern social systems. One consequence of this fact is that identity is increasingly defined by occupational role. This phenomenon makes the classical liberal focus on the atomistic individual all the more unsatisfactory. An adequate account of social order should not portray people as fungible monads; instead it should look to the way that roles differentiate people's attitudes and orientations and cluster them in occupationally defined organizations. The premise of functional differentiation qualifies the premise of normative integration in an important way. If an important part of a person's identity is formed in connection with occupational role, then an important part of the process of normative integration must occur within the occupational group and must involve values and goals peculiar to the specialized knowledge and skills that define the role. Thus, in addition to the primary socialization that orients people to the goals and values shared throughout the larger society, there is a secondary socialization that orients them to the distinctive normative culture of the occupational group.⁵ In addition to the tendency of people to seek a general approval from and solidarity with their neighbors and others, there is a tendency to seek a denser approval from and solidarity with peers in the occupational group.

The occupations that most correspond to this understanding of social order are the elite professions. The Progressives and the Functionalists saw the professions as the central institutions of modern society. They thought that the society would become

4. See MODEL CODE, *supra* note 3, Preamble:

Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.

One prominent manifestation of the theme of normative integration in the *Model Code* is the pervasive assumption that "respect for law" and "confidence in the legal system," rather than merely coercive enforcement, are essential to legal order. See, e.g., *id.* at EC 9-2.

5. Thus, the *Model Code* justifies the prohibitions of unauthorized practice and lay intermediaries in part on the ground that lay people have not been socialized into the professional moral culture. See *id.* at EC 2-33, 3-3 to 3-8, 5-23, 5-24.

increasingly professionalized. In the professions, both the need for and the possibilities of the kind of order that the Progressives and Functionalists emphasized seems greatest. The need is greatest because the specialized nature of the professional disciplines makes them insusceptible to control through either the market or government regulation. Clients are vulnerable, and lay officials are incompetent to evaluate practice.⁶ The possibilities are greatest because the professional disciplines are relatively intellectually complex and morally charged with important values such as health and justice. These characteristics create possibilities for an occupational culture rich enough to engage and to stimulate its participants.

In the Progressive-Functionalist model of the professional role, the most important determinants of the professional's behavior are not self-interest and coercively enforced rules but the goals of perfecting and applying her discipline and, through that discipline, serving clients and society. This orientation is altruistic and idealistic, but it is not a matter of saintliness or self-sacrifice; it merely reflects the fact that the professional has been led to define her own goals in ways that mesh with those of the occupational group and the larger society. The Progressive-Functionalist model does not entirely deny individual material interests. The notion of an altruistic, idealistic moral orientation is subject to an important qualification: that the professions be organized so as to immunize their members from certain commercial pressures and to guarantee them a secure threshold of material welfare.⁷ Satisfaction of these baseline material interests is a precondition of professional culture.

The classical liberal or economic vision can be distinguished from the Progressive-Functionalist one in terms of methodological and substantive premises or emphases. An important methodological focus of the former is behaviorist; it directs attention to how people act, rather than to their attitudes and beliefs. On the other hand, the methodological focus of the Progressive-Functionalist Vision directs attention to attitudes and beliefs and to the processes by which they are acquired. The substantive distinction is that the classical liberal or economic vision tends to presume or anticipate a selfish, materialistic moral orientation, while the Progressive-Functionalist one tends to presume or an-

6. See *id.* at EC 3-3, 3-4, 3-8.

7. See text accompanying note 35 *infra*.

anticipate an altruistic, idealistic one.⁸ However, in both visions, these substantive emphases often involve an ambiguity. Sometimes the substantive moral premises appear as descriptive accounts or scientific hypotheses, but sometimes they appear more as ideal than as description. And perhaps most often the line between description and ideal is hard to draw.

Professional culture appears most frequently and explicitly as an ideal in the writings of the Progressives. They advanced professionalism as both a scientific project and a project of political and cultural transformation. They attacked classicism as both bad social science and the emblem of a degraded, stultifying culture. Brandeis himself served as an exemplar of the professional ideal for many Progressives who took his exploits as inspiration for a reformed legal role and culture.

The Progressives had more than one interpretation of the enemy culture of selfish materialism. Sometimes it was identified with the decadent, bellicose style of the robber baron plutocracy.⁹ But perhaps the most powerful portrayal of the enemy culture associated it with the petite bourgeoisie. This portrayal occurs in the novels of the Progressive writer Sinclair Lewis. The protagonist of Lewis's *Babbitt* incarnates the enemy culture. Although Babbitt mouths the rhetoric of professionalism, his basic belief is that "the one purpose of the real estate business [is] to make money for George F. Babbitt."¹⁰ He views his own knowledge and his relations with clients as assets to be exploited for their maximum financial return. He pursues his material self-

8. Of course, this distinction is much oversimplified. For one thing, it ignores the fact that both liberal economics and functionalist sociology often adopt a relatively formal or abstract perspective that tries to cut across distinctions such as that between selfishness and altruism. Thus selfishness may give way to minimal rationality in pursuit of whatever goals the individual happens to have; altruism can be diluted to mean simply orientation toward norms or toward others. In this manner, the substantive distinctions between the two approaches can be collapsed. See T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 43-74 (1949). At other times, however, economists and sociologists apply narrower and more controversial notions of moral orientation. This is true of Nelson and of Gilson and Mnookin. The hypothesis that Nelson tests imputes to lawyers a sense of public responsibility that implies a far stronger notion of altruism than simply norm-orientation or other-direction. On the other hand, Gilson and Mnookin's explicit premise of "rational maximization of tangible reward," *supra* note 1, at 376, clearly means something like selfish materialism. The entire problem that Gilson and Mnookin pose—"sharing among the human capitalists"—only *is* a problem from a perspective that assumes that people do not share for other than selfish, material reasons, and the solution they offer is to show that such sharing is compatible with selfish materialism.

9. See T. VELEN, *THE THEORY OF THE LEISURE CLASS* (1912).

10. S. LEWIS, *BABBITT* 42 (1922).

interest regardless of the consequences to his clients and the public-interest. Even without the benefit of the portfolio and agency theories that inspire the Gilson-Mnookin article, Lewis emphasized in his characters some of the personal traits to which these theories draw attention. Babbitt is risk averse and obsessively distrustful of his subordinates. Professionalism to him is part hypocrisy and part expression of a boundless capacity to delude himself that his own material self-interest invariably coincides with the interests of others.

Babbitt's limited education and status prevent him from articulating his world view in a way that might challenge the professional ideal in the language of science. But in *Arrowsmith*, Lewis' novel about the medical profession, Lewis produced a character who aspired to defend the enemy cultural ideal in the specialized scientific discourse of the professions themselves. The character is Dr. Roscoe Geake, who finds his vocation upon leaving a medical professorship for the presidency of the New Idea Medical Instrument and Furniture Company. His farewell address to his students defends the antiprofessional ideal:

Now that I am leaving this field where I have labored so long and happily, I want to ask every man jack of you to read, before you begin to practise medicine, not merely your Rosenau and Howell and Gray, but also, as a preparation for being that which all good citizens must be, namely, practical men, a most valuable little manual of modern psychology, "How to Put Pep in Salesmanship," by Grosvenor A. Bibby. For don't forget, gentlemen, and this is my last message to you, the man worth while . . . instead of day-dreaming and spending all his time talking about "ethics," splendid though they are, and "charity," glorious virtue though that be, yet he never forgets that unfortunately the world judges a man by the amount of good hard cash he can lay away.¹¹

Geake's particular fascination was the type of activity Gilson and Mnookin call "signaling":¹²

And from a scientific standpoint, don't overlook the fact that the impression of a properly remunerated competence which you make on a patient is of just as much importance, in these days of the new psychology, as the drugs you get into him or the operations he lets you get away with . . . I don't care whether [a doctor] has . . . the surgical technique of a Mayo, a Crile, a Blake, an Ochsner, a Cushing. If he has a dirty old of-

11. S. LEWIS, *ARROWSMITH* 85 (1925).

12. Gilson & Mnookin, *supra* note 1, at 362.

face, with hand-me-down chairs and a lot of second-hand magazines, then the patient isn't going to have confidence in him; he is going to resist the treatment—and the doctor is going to have difficulty in putting over and collecting an adequate fee.¹³

Although Dr. Geake thinks of himself as cutting through the pretensions of professional idealism to get to the hard truth of practice, Lewis portrays him as parading pretensions of his own. Dr. Geake glamorizes in the language of science what Lewis considers the prostitution of knowledge and the exploitation of clients. In works such as Lewis', the moral and political dimensions of the professional ideal are prominent and explicit. In works such as Parsons', they are at best implicit; scientific language and goals take the forefront. Nelson and Gilson and Mnookin adopt this scientific perspective and are concerned with professionalism as a descriptive hypothesis. Yet in both Parsons' case and theirs, I think it ultimately proves difficult to interpret their efforts apart from the moral and political struggle between competing cultural ideals.¹⁴

II. NELSON: DO LAWYERS REGULATE THEIR CLIENTS?

Nelson takes the Progressive-Functionalist Vision seriously. He derives the hypothesis that he tests—that lawyers play a regulatory role with regard to their clients—from the basic Functionalist tenets; he focuses attention in the same direction as the Vision—on attitudes and beliefs; and he uses a favorite Functionalist methodology: the survey.

The picture of the ethos of the corporate bar that emerges from Nelson's survey is one of centrist tolerance toward government and business, mildly conservative reformism toward the legal system, and acquiescence in the specific projects of business clients. On a general level, Nelson's lawyers are content with both big business and the welfare-regulatory state and have difficulty imagining any but marginal improvements in either. (Indeed, they appear to have difficulty imagining even marginal improvements. Although Nelson invited them to suggest up to three desirable reforms, few respondents suggested more than

13. S. LEWIS, *supra* note 11, at 85–86. Though it exalts the professional ideal, *Arrowsmith* is extremely pessimistic about the political prospects of the ideal.

14. On the implicit moral and political commitments in Parsons' work, see A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 246–338 (1970).

one.¹⁵) Most of the reforms the lawyers suggest reflect a solicitude for business. (But they show no great support for the radical probusiness deregulatory reforms sponsored by Reaganites and Chicagoites.) The nonlegal advice that they give to clients appears to be of a mundane, pragmatic sort. Nelson's most striking finding is that the great majority of the lawyers surveyed have never been asked by a client to undertake a project that was contrary to their own values. In the few cases in which people have been asked to undertake such projects, the conflict most often arose because the project plainly violated the law, rather than because it threatened moral or policy commitments.¹⁶

Nelson acknowledges limitations and ambiguities in his data,¹⁷ but his picture of the ethos of the contemporary corporate bar seems quite plausible to me. I want to focus on the significance that Nelson attributes to his findings in the light of the Progressive-Functionalist Vision. Nelson believes that he has refuted the Vision. He suggests that one implication of the Vision is that lawyers play a regulatory role in regard to their clients by rechanneling client projects that conflict with important social goals or values. Since his survey indicates that, at least on the level of specific projects, lawyers' own values and goals are usually compatible with those of their clients, they could not play such a regulatory role.

I think that the Progressive-Fundamentalist Vision is immune to this type of critique. Looking at only one dimension of it, Nelson treats it as coherent but inaccurate. Considered as a whole, however, the Vision is internally contradictory but, in a limited sense, accurate. It is accurate in the sense that its conflicting premises express a deep, long-standing ambivalence among elite legal professionals.

Nelson derives his hypothesis about the regulatory role of the profession from the premise of functional differentiation. Because law is complex and differentiated, it is relatively inaccessible to lay people both in the sense that it is hard for them to learn and in the sense that they are not spontaneously disposed to comply with it. The job of the lawyer, who knows the law and is spontaneously disposed toward compliance, is to teach the client and to encourage him to comply. The lawyer is in a better posi-

15. Nelson, *supra* note 1, at 521.

16. *Id.* at 535.

17. *Id.* at 536.

tion to do so than is the government bureaucrat because the lawyer can establish a relation of relative trust and intimacy with the client that enables the lawyer to relate abstract legal principles to the client's concrete circumstances, to detect incipient deviance, and to persuade the client.¹⁸

The problem with this idea is that it contradicts important implications of the other major premise of the Progressive-Functionalist vision: normative integration, the notion that individuals and the various specialized roles in the society are held together by a general moral culture. In modern society, law is the most important component of this normative adhesive. Law is supposed to legitimate collective activity by enabling citizens to perceive it as an expression of norms that they recognize as their own. The dimension of universality is central to modern law.¹⁹ Thus, while the premise of functional differentiation implies a divergence between legal and lay moral orientations, the premise of normative integration implies a convergence. Law as the basis of the occupational culture of the legal profession appears as specialized and accessible only through elaborate training and initiation; law as the basis of the general moral order appears as universal.²⁰

This is a problem for any legal or social theory that would vindicate both the claim of law to universality and the claim of the legal elite to specialized competence. Marx pointed it out in his critique of Hegel's vision of the civil service as a "universal class." The role that law plays in the general moral culture

18. See T. PARSONS, *A Sociologist Looks at the Legal Profession*, *supra* note 2, at 378-81.

19. See T. PARSONS, *Evolutionary Universals in Society*, in *SOCIOLOGICAL THEORY AND MODERN SOCIETY* 510-14 (1967).

20. Why can't the problem be resolved by asserting that law is only superficially differentiated and becomes transparent and authoritative to lay citizens through the mediating efforts of lawyers? This is a weaker notion of differentiation than the one Nelson tests, since he interprets differentiation to imply deviant client goals that persist even after the lawyer's mediating efforts. This revised version is probably compatible with Nelson's survey results, but it runs up against a variety of criticisms. For one thing, the revised version ignores both important aspects of the legal culture that seem to imply that citizens do or should have immediate understanding of the law—for example, the principle that ignorance of the law is no excuse—and the fact that most people do not have substantial access to legal assistance. A second type of criticism asserts that it is not possible to define a coherent and plausible body of legal discourse differentiated from nonprofessional forms of moral and political discourse. See Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 567-76 (1983). A third type of criticism denies that, where clients do find the legal culture alien, lawyers in fact mediate so as to make it accessible to them. See Blumberg, *The Practice of Law As Confidence Game*, 4 *LAW & SOC'Y REV.* 15 (1967).

makes its status as a specialized discipline uniquely problematical. The fact that other disciplines are not immediately accessible to lay people merely reflects the finitude of the individual life. But the fact that the law is not so accessible condemns the citizen to alienation from the experience of justice that law promises him.²¹

This theoretical problem corresponds to a tradition of ambivalence toward business among elite professionals. At times, professional institutions and ideologies have served as bases for some nonbusiness elites to attack or at least dissociate themselves from business elites.²² At other times, however, the professional mood has been one of more uniform solidarity with business. In moods of intra-elite tension, the theme of a differentiated legal culture may fuel a sense of moral emancipation or superiority on the part of professionals. At other times, the theme of a universal legal culture may express a sense of intra elite solidarity. Both postures can be found in the work of Brandeis and Parsons. Brandeis was a famous critic of business, and his famous struggles with his business clients are the paradigm of the notion of the lawyer-as-regulator that Nelson invokes.²³ Parsons emphasized the role 'strain' that lawyers would experience as a result of the divergence between their values and those of their clients.²⁴ Yet both Brandeis and Parsons thought that business would itself evolve to a state of professionalism, a state in which, through socialization and a sense of honor, business people would spontaneously comply with the values and goals of the larger society.²⁵ In this state, the lawyer's role as regulator would become obsolete.

21. In a rational state it would be more appropriate to ensure that a cobbler passed an examination than an executive civil servant; because shoe-making is a craft in the absence of which it is still possible to be a good citizen and a man in society. But the necessary 'knowledge of the state' is a precondition in the absence of which one lives outside the state [*i.e.*, general moral order], cut off from the air one breathes and from oneself.

K. MARX, *Critique of Hegel's Doctrine of the State*, in EARLY WRITINGS 112 (Q. Hoare ed. 1975).

22. R. HOFSTADTER, *THE AGE OF REFORM* 148-63 (1955); see also L. AUCHINCLOSS, *THE PARTNERS* 112 (1973) ("The law was what the church had been in the Middle Ages: the only ladder available for the elevation of the reflective, the introspective, the non-competitive in a society of brigands.").

23. See generally A. MASON, *BRANDEIS—A FREE MAN'S LIFE* (1946).

24. T. PARSONS, *A Sociologist Looks at the Legal Profession*, *supra* note 2, at 378.

25. See, e.g., L. BRANDEIS, *Business—A Profession*, *supra* note 2; T. PARSONS, *The Professions and Social Structure*, *supra* note 2.

From the point of view of functional differentiation, Nelson's findings are, as he suggests, troubling to the Progressive-Functionalist Vision. But from the point of view of normative integration, they come as a relief. They can be interpreted to indicate that the larger project of integration is being perfected, that the society does in fact share a common moral culture. Had Nelson's findings been otherwise, they would have fueled concerns about lawyer elitism or alienation from the general moral culture.²⁶

Moreover, if Nelson had discovered a distinctive set of professional commitments, these commitments would in all likelihood be recognized, not as an expression of "social needs" or an uncontroversial "public interest," but as a particular political program, most probably the center liberal regulatory-welfare program of the Progressives, the New Deal, and the liberal legislation of the 1960s and early 1970s. At least since World War II, when the Progressive-Functionalist literature has talked about lawyers' ethical autonomy, it usually has had in mind a commitment to this program.²⁷ When it has spoken of a regulatory role for lawyers, it has usually meant a role in enforcing this body of legislation. The typical illustration involves the lawyer's effort to prevent the client from thwarting a Progressive or New Deal statute. (The examples given by practitioners at the Symposium of circumstances in which they or colleagues had played a regulatory role involved the Sherman Act and the securities acts.)

From this perspective, one might ask whether the absence of divergence between client goals and lawyer values that Nelson finds may be a more transitory phenomenon than he suggests. Perhaps his results simply reflect the collapse of liberal reformism in the past few years and the relative paralysis of center liber-

26. See, e.g., Krash, *Professional Responsibility to Clients and the Public Interest: Is There A Conflict?*, 55 CHI. B. REC. (n.s.) 31 (1974) (suggesting that it would be elitist for lawyers to claim a better understanding of the "public interest" than that of nonlawyers).

27. See Berle, Book Review, 76 HARV. L. REV. 430, 431-33 (1962) (reviewing B. LEVY, *CORPORATE LAWYER . . . SAINT OR SINNER? THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY* (1961)); J. HURST, *THE GROWTH OF AMERICAN LAW* 355-56 (1950). The other major candidate as a substantive basis for a differentiated legal ethic is concern with the integrity of legal procedure. With the notable exception of Lon Fuller, see L. FULLER, *THE MORALITY OF LAW* (1964), most Progressives and Functionalists seem not to have been attracted to this option. One reason may be that, even broadly conceived, proceduralism is so bound up with litigation that it seems inapplicable to the vast range of nonlitigation practice. Another reason may be that proceduralism was at least partially discredited by its use in the conservative resistance to the New Deal when it became associated among Progressives with irresponsible, antisocial business behavior. See Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934).

alism before the claims of business. The moral orientation that Nelson describes of deference to established welfare and regulatory institutions, moderately probusiness reformism, and acquiescence in most of the specific projects of business pretty much describes the program of most liberal politicians these days. At least for the moment, the collapse of liberal reformism has made it harder for corporate lawyers to give substance to whatever longings they may have for autonomy from their clients.²⁸

III. GILSON AND MNOOKIN: ARE LAWYERS AND CLIENTS COMMODITIES?

Gilson and Mnookin focus on a phenomenon that they describe as "sharing": Income is distributed within many corporate law firms in ways that disregard the marginal productivity of individual partners, often in "lock-step seniority" patterns. They summon the language of economics, first to define this phenomenon as problematical, and then to resolve the problem. It is an indication of the decline of the Progressive-Functionalist Vision that Gilson and Mnookin never refer to its account of their subject, even though much of the account is implicit in the *Code of Professional Responsibility*. The Progressive-Functionalist answer to the question of why income is not divided in accordance with marginal productivity is—in a phrase—that lawyers do not regard themselves or their clients as commodities.²⁹

In the Progressive-Functionalist Vision, the lawyer-client transaction has a "fiduciary and personal character."³⁰ It is not defined by arm's length bargaining or by the impersonal forces of a market. It is a relation in which the lawyer's preeminent con-

28. In Louis Auchincloss' novel, *The Partners*, the central character, who stands for both the professional ideal and New Deal politics, is sexually—and one assumes, symbolically—impotent. See L. AUCHINCLOSS, *supra* note 22.

29. The principle that clients are not commodities is most frequently expressed in connection with the prohibition of the sale of a practice, that is, the "good will" constituted by the lawyer's relations with her clients. *Dwyer v. Jung*, 133 N.J. Super. 343, 346, 336 A.2d 498, 499 (1975) ("A lawyer's clients are neither chattels nor merchandise . . ."); H. DRINKER, *LEGAL ETHICS* 189 (1953) ("A lawyer's clients are not merchandise, nor is a law practice the subject of barter."); ABA Comm. on Professional Ethics and Grievances, Formal Op. 266 (1945) ("The good will of the practice of a lawyer is not, however, of itself an asset, which . . . he . . . can sell.").

For an illustration of the related principle that lawyers are not commodities, see MODEL CODE, *supra* note 3, at DR 2-102 (lawyer may not license his name for use in connection with the practice of another).

30. MODEL CODE, *supra* note 3, at EC 3-1.

cerns are not material self-interest, but the client's welfare and the public interest. For her part, the client does not view lawyering as a commodity to be shopped for.

The notion of the lawyer-client interaction as a relationship and as a matter of personal service underpins a variety of precepts designed to inhibit its commercialization. For example, the *Code of Professional Responsibility* discourages the lawyer from investing in the client's activities. The rule expresses concerns that negotiating for a commercial interest with the client will preclude disinterested loyalty to her, and that pursuing such an interest with the client will preclude disinterested loyalty to the public in handling the client's affairs.³¹ Another such precept holds that the lawyer may ask compensation from the client only on the basis of "the services performed and the responsibility assumed."³² This precept traditionally is interpreted to preclude taking a fee merely for referring the client to another lawyer.³³ The underlying belief is that taking a fee in these circumstances is like treating the client's trust in the referring lawyer as an asset of the lawyer on which he might earn a return. The *Code* also requires the lawyer to charge the client only on the basis of the "reasonable" value of the lawyer's services.³⁴ Unlike "market value," "reasonable value" is not primarily a function of self-interested dealing and the vicissitudes of supply and demand. It connotes a relatively stable set of distributive social norms that rank different types of activities and occupations. The norms express a vision of a hierarchical social order regarded as intrinsically valuable. People conform their economic behavior to these norms because in doing so, they reproduce an order to which

31. *Id.* at EC 5-2 to 5-8.

32. *Id.* at EC 2-22.

33. MODEL CODE, *supra* note 3, at EC 2-22. The principle would seem to preclude compensation for "rain-making," or other client-getting activities within a firm, but the currently operative rule in the Code exempts intrafirm referrals. *Id.* at DR 2-107. The exemption for intrafirm referrals is sometimes said to rest on the fact that the referring lawyer "remains vicariously liable for the work of his or her partners." Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 720 (1977). However, this explanation seems unresponsive to the concerns of the rule which, when applicable, requires that compensation be proportional to the "responsibility assumed by each" lawyer. Since the rule permits any referring lawyer to charge a fee commensurate with any vicarious liability assumed (e.g., his pro rata share of the portion of the firm's malpractice insurance premium allocable to the new case), the blanket intrafirm exemption is unnecessary to deal with this concern, and, of course, it allows intrafirm referrers to charge far more than the amount necessary to compensate them for such responsibility.

34. MODEL CODE, *supra* note 3, at EC 2-17, DR 2-106.

they are committed. Among occupational groups, the principal norm is merit (itself a bundle of ascriptive and achievement-oriented criteria); within occupational groups, the principal criterion is seniority.³⁵ To say that the price of a service reflects its "reasonable value" is to say that it accurately reflects the relative position of the activities and actors involved in the occupational hierarchy defined by such norms.

This Vision does not ignore or deny material self-interest. However, it treats this orientation as partial and discontinuous. It supposes that there is a socially determined threshold of material well-being that must be met before the altruistic, idealistic orientation of professionalism becomes possible.³⁶ Only when this threshold is guaranteed can there be confidence that the ideal of the professional service relation can be implemented. Moreover, this threshold must be achieved in ways that do not subject the professional to impersonal, competitive market pressures. The professional's capacity for responsibility to clients and the public and for peer solidarity are eroded by the experience of impersonal competition and enhanced by the experience of material security.

One way that the Progressive-Functionalist Vision proposes to satisfy this material prerequisite to professionalism is through an institutional structure that accords professionals a panoply of exemptions from the general regime of the market. These exemptions would inhibit competition through restrictions on entry into the profession, prohibitions of price-cutting (charging less than "reasonable value"), and limitations on advertising and solicitation.³⁷ However, the attainment both of the threshold and of the other aspects of the professional ideal depends more fun-

35. See T. PARSONS, *An Analytical Approach to the Theory of Social Stratification*, *supra* note 2, at 78-79. For survey evidence concerning such criteria, see Alves & Rossi, *Who Should Get What? Fairness Judgments of the Distribution of Earnings*, 84 AM. J. SOC. 541 (1978). For arguments that these criteria explain important economic behavior more adequately than do neoclassical economic models, see L. THURLOW, *GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY* 104-13 (1975); *UNEMPLOYMENT AND INFLECTION: INSTITUTIONAL AND STRUCTURALIST VIEWS* 63-154 (M. Piore ed. 1979).

36. See, e.g., MODEL CODE, *supra* note 3, at EC 2-17 ("adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession").

37. See MODEL CODE, *supra* note 3, Canon 2. The Supreme Court struck down more extensive restrictions on price competition under the Sherman Act, see *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and on advertising and solicitation under the First Amendment, see *Bates v. State Bar*, 433 U.S. 350 (1977), each time rejecting Progressive-Functionalist arguments advanced in favor of the restrictions.

damentally on the fact that the notion of the lawyer-client transaction as a personal relation densely implicated in a legitimate background social structure is widely shared throughout the society. Neither lawyers nor clients act as they would in a market because they share, to some extent, the values and expectations of the professional ideal.

The problem of “sharing” that Gilson and Mnookin confront when they portray lawyers as “human capitalists” and their relations with clients as market relations simply never arises in the Progressive-Functionalist Vision. For one thing, “sharing” is not anomalous within the Vision. More fundamentally, the distributive pattern in question can only be characterized as “sharing” by reference to a baseline measure—marginal productivity—that has no meaning in the Progressive-Functionalist Vision. In that vision, the “lock-step seniority-based” system is an expression of the notion that seniority is an important criterion of desert, of the principle of compensation for the “reasonable” value of service, and perhaps of the goal of insuring disinterested service by securing a threshold of material welfare. Moreover, the phenomena of “grabbing,” “leaving,” and “shirking” that loom so large in Gilson’s and Mnookin’s view are less threatening. They are constrained by socialization and honor.

Because Gilson and Mnookin start from a perspective that stipulates a culture in which the only moral orientation is one of selfish materialism and the only constraints are the impersonal rules of the promulgated law, they are driven to find more ingenious explanations than the ones suggested by the Progressive-Functionalist Vision. Their approach to sharing directs attention to the function that these distributive patterns might play in allowing selfish, materialistic people to “diversify” their human capital investments and insure against the risk of decline of the market value of their particular skills or practices. Their approach to “leaving” and “grabbing” directs attention to the way that “firm specific capital” (long-term relations between the firm and its clients) constrains such behavior.

The important contribution of this analysis is to show how nonmarginal productivity distributions might arise even in a culture of selfish materialism. This demonstration is interesting because it appears that the culture of corporate practice is becoming increasingly selfish and materialistic. Publications like *The American Lawyer* (in addition to often providing some very

good journalism) now perform the function that Grosvenor Bibby's *How to Put Pep In Salesmanship* once performed for the students of Dr. Roscoe Geake. In recent years, this kind of message seems to have become increasingly influential with a growing audience.

Like Dr. Geake, Gilson and Mnookin see their work not as promoting a particular culture, but as a matter of science. They want to "explain observed behavior" and to generate "testable hypotheses."³⁸ However, Gilson and Mnookin try to avoid the mistake that makes Dr. Geake's philosophy appear so transparently ideological: the arbitrary assumption that the premise of selfish materialism accurately describes all relevant behavior. They acknowledge two kinds of behavior that they feel cannot be explained by their model—the absence of shirking among partners who are guaranteed a large draw regardless of productivity and the refusal of lawyers like Lloyd Cutler with personal reputations that attract clients to "grab" or "leave." Although they do not try to explain the second phenomenon, for the first they call up their own version of functionalism or "firm culture."³⁹ Despite their qualifications, I think that Gilson and Mnookin exaggerate the power of their model and the explanations that they derive from it.

First, Gilson and Mnookin sidestep at least two facts that seem to pose problems for their model. One is the fact that, according to Gilson and Mnookin, a large part of the "firm-specific capital" (stable long-term client relations) that constrains "grabbing" and "leaving" has accumulated because until recently corporate clients were "unsophisticated" in economic dealings with their lawyers.⁴⁰ These clients tended not to develop the expertise to bring work in-house, to engage in comparative shopping, and to monitor closely financial arrangements with outside counsel. Surely in the Gilson-Mnookin universe, it is at least anomalous that such quintessentially rational and maximizing actors should have behaved in such an irrational and nonmaximizing way for so long. On the other hand, in the Progressive-Functionalist Vision, the explanation for this phenomenon is obvious: Clients share a normative view of the social order in which lawyering is presumptively a long-term personal relation, not a commodity to shop

38. Gilson & Mnookin, *supra* note 1, at 376.

39. *Id.* at 321.

40. *Id.* at 363.

for.⁴¹

Another anomaly that Gilson and Mnookin address in only a question-begging manner is this: If lawyers adopt “sharing” selfishly and materialistically as a form of investment diversification, then they would seem to have a strong incentive to preclude by contract conduct such as “leaving” that would deprive some people of the gains of the initial bargain. Yet they do not enter into such contracts. Gilson and Mnookin explain this fact by pointing to another one: Such contracts are unenforceable. For example, the *Code* and some state statutes prohibit covenants not to compete by lawyers.⁴² However, this further fact—the unenforceability of contractual arrangements that facilitate diversification—itself demands explanation. Gilson and Mnookin treat nonenforceability as a constraint that they can use to explain the absence of contracts. But it is more plausible to view nonenforcement as a form of lawyer behavior. Lawyers, after all, have not been without influence over laws governing their profession. Indeed they are entirely responsible for the *Code*. That lawyers should enact a rule that makes more difficult the kind of risk-pooling that Gilson and Mnookin see them as striving for and that serves no apparent material self-interest weighs against their theory.

On the other hand, this behavior is readily explained in terms of the Progressive-Functionalist premise that lawyers do not regard themselves as commodities. For the lawyer to accept compensation in return for an agreement not to practice would involve treating her abilities as an asset and accepting compensation other than on the basis of a reasonable fee for the provision of service. It would also preclude her from fulfilling her duty to serve clients in need of assistance.

Second, where their observations are consistent with their model, Gilson and Mnookin ignore that they are equally consistent with the Progressive-Functionalist model. They show no interest in Progressive-Functionalist explanations until they encounter the nonshirking phenomenon that they feel their model cannot explain. Then they invoke a Progressive-Function-

41. Of course, the clients' more recent economic behavior seems more problematic in the Progressive-Functionalist vision than it does in the Gilson-Mnookin model. However, there is a Progressive-Functionalist explanation for this behavior. See text accompanying note 45 *infra*.

42. Gilson & Mnookin, *supra* note 1, at 335. See MODEL CODE, *supra* note 3, at DR 2-108.

alist explanation for *this* phenomenon. But the Progressive-Functionalist approach is a sufficient explanation for *all* the sharing phenomena that they discuss. It accounts for both the nonmarginal distribution patterns for which they call up agency and portfolio theory and the nonshirking phenomenon for which they throw up their hands. Moreover, the “testable hypotheses” that they generate involve the same ambiguity. For example, one of their hypotheses is that firms with “sharing” practices will recruit more lawyers from elite law reviews, where (they assume) antishirking values are instilled through socialization.⁴³ But if the test confirms this hypothesis, it will not necessarily confirm the Gilson-Mnookin model. It would be at least as plausible to suppose that the law reviews instill, along with the antishirking norms, a commitment to the professional principles of service and peer solidarity and an indifference to marginal product considerations.

Third, Gilson and Mnookin treat altruistic, idealistic behavior as problematic in a peculiarly arbitrary way. Where they find seemingly selfish, materialist behavior, they take its selfishness and materialism for granted and concern themselves with the specific institutional arrangements that such moral orientations might explain. But when they find seemingly altruistic, idealistic behavior, they call for explanations of altruism and idealism. They congratulate economics on its capacity to point out, in instances in which its premises do not apply, “the direction further inquiry should take.” That direction turns out to be an inquiry into “the process by which lawyers are socialized” to behave altruistically and idealistically.⁴⁴ But economics never inquires into the process by which people are socialized to behave selfishly or materialistically; it simply stipulates these characteristics and attempts to derive predictions from them. It treats this moral orientation as self-explanatory. Economics can be said to “trigger”⁴⁵ inquiry into the socialization of altruism and idealism only to the extent that economics rests on a totally ungrounded assertion that selfishness and materialism are more natural or fundamental than other moral orientations.

Finally, Gilson and Mnookin treat people’s attitudes ahistorically. They assume that the extent to which a person is selfish,

43. Gilson & Mnookin, *supra* note 1, at 376-77.

44. *Id.* at 376.

45. *Id.*

materialistic, and risk averse does not vary with her circumstances. They are thus disabled *a priori* from considering any explanation for the recent changes in corporate law practice that relies on changes in people's attitudes. Now history is not the strong suit of the Progressive-Functionalist Vision either, but its marginally more complex notion of human nature gives it a little more flexibility in historical explanation.

The Progressive-Functionalist Vision suggests that a person's capacity for altruistic, idealistic behavior depends importantly on attainment of a (in the case of lawyers, fairly high) threshold of material welfare and on immunization from competitive pressures. Material insecurity and the experience of competition create a more general kind of risk aversion than the kind Gilson and Mnookin discuss: a fear of nonreciprocal or nonsolidaristic behavior by others. Selfish material behavior represents a quest for invulnerability to such dangers, a quest for a state of autarky in which one does not have to depend on the good will of others. Nevertheless, this kind of invulnerability has its costs even in narrow economic terms; it entails transaction costs and costs in terms of lost cooperation. A person's willingness to bear these costs depends on how averse she is to the risk of dependence on others. The Progressive-Functionalist Vision suggests that this kind of risk aversion declines sharply as the material threshold is secured and that it is reduced by the experience of voluntary reciprocity and solidarity.

From this perspective, one might relate the increasing commercialization of practice that Gilson and Mnookin discuss to the decline of threshold economic security and immunity from competitive pressures. This decline may be due in part to the elimination of some of the formal exemptions from the market that have resulted from the Supreme Court's decisions rejecting minimum price regulation and advertising and solicitation prohibitions,⁴⁶ though it seems more plausible to relate the decline to the changes in client practices that Gilson and Mnookin emphasize (which are in turn due in some instances to recently intensified competitive pressure experienced by clients). Perhaps another relevant development is the apparent increase in the number of law graduates relative to jobs in corporate firms and an increase within firms in the number of associates relative to

46. See *Bates v. State Bar*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

partners. All these developments may have increased the difficulty of attaining a secure threshold of material welfare and have subjected even those who have attained the threshold to intensified competition and insecurity in the course of getting there. That these developments should be accompanied by increasingly selfish and materialistic behavior both toward clients and toward colleagues seems consistent with the Progressive-Functionalist Vision.⁴⁷

Gilson's and Mnookin's article is a pioneering effort to develop a scholarly perspective on law practice, but its analysis has to be understood as ethics and politics as well as science. Whether we call Lloyd Cutler's economic behavior "a contribution of human capital" to his partners or a refusal to commercialize a professional relation, whether we call taking a larger draw for bringing in clients maximizing return on human capital or a form of exploitation, does not depend on "observed behavior." It depends in part on the subjective understandings that the actors involved impute to their own behavior and the behavior of those with whom they interact⁴⁸—understandings that economics has often committed itself to disregard. It also depends to an ambiguous but important extent on the understandings that we as observers impute to that behavior, including the understandings that arise from our own ethical and political commitments.

Sharing Among the Human Capitalists is an episode in the cultural battle portrayed in Lewis' novels. It contributes to the armory of what the Progressives and Functionalists considered the enemy culture a language that confers the prestige of science on that culture and that understates its ambiguity, partiality, and contingency.

IV. CONCLUSION

At the risk of seeming perverse, I want to pay a little (but only a little) more respect to the Progressive-Functionalist Vision than Nelson and Gilson and Mnookin do. If the Vision is understood,

47. For an argument that economic decline increases competitiveness and, in turn, selfish, materialistic behavior throughout the society, see P. BLUMBERG, *INEQUALITY IN AN AGE OF DECLINE* (1980). For analyses by economists who try to treat selfishness and materialism as historically contingent rather than as given and constant, see F. HIRSCH, *SOCIAL LIMITS TO GROWTH* (1976); A. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982).

48. See, e.g., P. WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (1958).

not as a theory of functional necessity, but as an expression of a political project, it has a modest role to play in understanding the modern history of the profession. This interpretation is inspired most basically by my own experience in corporate practice and by conversations with colleagues and students about theirs, but it is at least consistent with the evidence discussed by Nelson and by Gilson and Mnookin.⁴⁹

The Functionalist-Progressive political project is in important respects a “collective mobility project,”⁵⁰ a quest for economic status and security. But it is also more than that. Elite corporate law jobs have long been distinctively attractive to people who aspire to get more out of their jobs than material reward (but who also want to be sure to get that), to people aspiring to achieve economic status and security without surrendering to the culture of Babbitry. Thus, the political project has involved two additional elements. One is the quest by professionals for an opportunity to express in their legal work a vision of the general social good, a vision since World War II most often derived from center liberal Progressive-New Deal reformism. The professionals have sought to incorporate in their everyday practice an important role in the vindication of this national political program. The second element is an attempt to organize work to foster a culture of peer solidarity. At different times and to different segments of the corporate bar, these two nonmaterial goals have been perceived as requiring varying degrees of autonomy from corporate clients. The norms of commitment to the liberal regulatory-welfare state and of peer solidarity in the elite workplace have often been embraced within the business sector, but they have rarely seemed as secure in business as in law.

Of course, this project has never been more than a partial suc-

49. This interpretation has also been influenced by several diverse accounts of professionalism. See, e.g., M. LARSON, *THE RISE OF PROFESSIONALISM* (1977); P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982); R. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 111–32 (1967); Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS* 51 (G. Gawalt ed. 1984).

The professional political project is not easily mapped in terms of conventional distinctions between right and left. There are left and right versions of both the Progressive-Functionalist Vision and the critique of it. Moreover, some elements of the critique—for example, the analysis of the profession’s attempts to prohibit price competition and advertising as a form of illegitimate economic privilege—seem equally compatible with both right and left perspectives.

50. M. LARSON, *supra* note 49, at 66–79.

cess, and it seems to be encountering increasing trouble. Few lawyers ever achieved the ability of Brandeis to express their public commitments in their work. As Nelson notes, much corporate law work is too routine to allow for much creativity, and few clients demand or permit the kind of autonomy that Brandeis exemplified.⁵¹ Nevertheless, a substantial number of lawyers do seem to have found some public dimension in both uncompensated *pro bono* and compensated work. Many lawyers have plausibly believed that the opportunities for achieving such a public dimension have been greater in corporate law than in business. The aspect of the professional project concerning workplace organization seems to have been more successful. Perhaps the most striking political achievement of corporate lawyers in this century is the establishment of “outside” counsel rather than “inside” counsel or nonlawyers as the norm for a variety of significant corporate tasks. Although this organizational autonomy has rarely meant the autonomy on substantive issues contemplated by the Brandeis model, it does seem to have had an impact on the internal design of the legal workplace. Compared to their clients, firms have been relatively free of bureaucratic organization and relatively effective in inducing a sense of collective responsibility and collegiality. (Of course, these achievements have recently come under great pressure as a consequence of the developments mentioned in Part III.)

This interpretation differs from the orthodox Progressive-Functionalist Vision in denying that the public values of elite legal professionals represent any universal or uncontroversial “public interest” or set of “social needs.” The recent dismantling of a variety of Progressive and New Deal reforms underscores a central point of the scholarly critiques of Progressivism and Functionalism of the past two decades: Almost any area of society can be organized in a variety of ways, and the choice among them depends on controversial moral and political commitments, not on social necessity. In addition, the interpretation also denies that the distinctive organizational structure that became the norm among elite firms from early in the century until recently has been in any way necessary to the performance of the tasks of corporate lawyering. Again, the recent developments such as the move to in-house counsel and the bureaucratization and commercialization of a variety of tasks in private practice

51. Nelson, *supra* note 1, at 540.

have confirmed that technical constraints do not mandate a specific form of work organization.⁵² Yet the interpretation differs from the more extreme critiques of the Progressive-Functionalist Vision by treating the professed commitments to responsibility and solidarity as real goals that motivate behavior, and to the extent they are unachieved, that generate disappointment.⁵³

If the Progressive-Functionalist Vision suggested that lawyers were entitled to the experience of public commitment and solidarity in work as a matter of social necessity, the more extreme critiques of the Vision seem to imply that lawyers' ambitions for such experiences are either frivolous or futile or both. To treat them as frivolous seems to run the risk of a view of human nature considerably more narrow than that of the Progressive-Functionalist Vision. To treat them as futile seems to run the risk of a notion of social necessity as mysterious and dubious as those of the Progressive-Functionalist Vision.

52. For a critique of the functionalist theme of social necessity, see Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). At the Symposium, Robert Gordon illustrated this point by emphasizing that two firms represented there were widely regarded as the most successful in New York, yet had radically opposed compensation practices. Cravath, Swaine & Moore exemplifies the "lock-step" seniority approach, while Skadden, Arps, Slate, Meagher & Flom exemplifies the marginal productivity approach.

53. The interpretation also differs from the Progressive-Functionalist account in attributing the political project not to the profession as a whole, but to a narrow segment of it—the elite corporate bar. Both espousal of the Progressive-Functionalist Vision and the distinctive type of autonomous work organization that the vision prescribes have been associated with big firm lawyers with a relatively secure corporate client base. The large segment of the private bar composed of solo and small firm practitioners serving small business and middle income individuals has been relatively indifferent to the Progressive-Functionalist Vision and has practiced in more conventionally commercial settings. The novel aspect of the commercial ideals and practices described and promoted in publications like *The American Lawyer* is not that they are being applied to law practice, but that they are penetrating the precincts of elite corporate practice. See J. CARLIN, *LAWYERS' ETHICS* (1966); J. CARLIN, *LAWYERS ON THEIR OWN* (1962); J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 137–66 (1983).