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PROFESSIONALISM AS CLASS IDEOLOGY: CIVILITY CODES AND BAR HIERARCHY

AMY R. MASHBURN*

*There's room at the top
they are telling us still,
but first we must learn
to smile as we kill¹*

Many commentators describe and define the professionalism crisis as if it were a disease—a cancer-like growth of unprofessional behavior that has invaded the previously healthy body of the legal profession, is distorting and disabling its essential functions, and will, if unchecked, cause its demise.² Lawyers have

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1. JOHN LENNON, *Working Class Hero*, on PLASTIC ONO BAND (Maclen (Music) Ltd. 1970).

2. Timothy P. Terrell & James H. Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 403-04 (1992) (defining the professionalism debate as “lawyers [seeking] a cure for a disease before agreeing on its nature, symptoms, and causes”); Richard D. Baldwin, *Rethinking Professionalism*—*And Then Living It!*, 41 EMORY L.J. 433, 433 (1992) (identifying the problem as a “professional malaise”); Paul Marcotte, *Reining in Rambo*, A.B.A. J., Nov. 1989, at 43, 43 (quoting a Texas court that adopted by judicial fiat a professionalism creed as observing “patterns of behavior that forbode ill for our system of justice”). The tendency to rely on metaphor may be attributable to the absence of consensus on the meaning of “professionalism.” See *American Bar Association Commission on Professionalism*, “. . . In The Spirit of Public Service:” *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261 (1986) [hereinafter *Blueprint*] (conceding that “[p]rofessionalism is an elastic concept the meaning and application of which are hard to pin down”); Monroe Freedman, *A Brief ‘Professional’ History: The Golden Era of Law That Never Was*, LEGAL TIMES, Dec. 17, 1990, at 22, 23 [hereinafter Freedman, *Brief History*] (noting the lack of agreement on meaning); Theodore Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate As A Case Study*, 35 ARIZ. L. REV. 363, 365-66 (1993) (calling the term “professionalism” a “notoriously vague and contested concept”).

For most commentators, Roscoe Pound’s often quoted definition—“pursuing a learned art as a common calling in the spirit of public service”—is, at best, underinclusive. Alternative definitions can be grouped into three broad categories. Those in the first group conceive of “professionalism” as a search for the definitive characterization of the lawyer’s role in society. See, e.g., Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1239-40 (1991) [hereinafter Hazard, *Future*] (grappling with the definitional question: who are lawyers?); Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (a book review of LAWYERS IN SOCIETY by Richard Abel that evaluates various normative defenses to the dominant conceptions of the lawyer’s role in society); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1-7* (1993) (arguing that professionalism is embodied in the historic ideal of the “lawyer-statesman”). Others use the term to denote a quest for the normative components of professional behavior. See, e.g., Terrell & Wildman, *supra*, at 424-31 (identifying six essential values that comprise “professionalism”: an ethic of excellence, an ethic of integrity,

been complaining about the symptoms for several years.³ Among other things, they point to escalating rudeness among attorneys, misbehavior at depositions, discovery abuse, misuse of Rule 11 motions, repetitive filings of frivolous

a respect for the system and rule of law, a respect for other lawyers and their work, a commitment to accountability, and a responsibility for adequate distribution of legal services); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 736-40 (1988) (promoting "progressive professionalism" with twin components of law reform and client counseling as a workable ideal for elite law firm practice); William T. Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, A.B.A. J., Sept. 1990, at 70, 73 (envisioning professionalism as a "kind of excellence or virtue"). A third definition of "professionalism" acknowledges the dynamic nature of the other usages and describes it as "a distinctive type of discourse, not a well-defined analytic concept." Schneyer, *supra*, at 365 n.14 (1993). Whatever form it takes, the discourse is almost always premised on the assumption that the behavior of lawyers has become less professional and that the practice of law has devolved into a business. *See, e.g.,* *Blueprint, supra*, at 251 ("today it may be asked: Has our profession abandoned principle for profit, professionalism for commercialism?"); Marvin E. Aspen, *Promoting Civility in Litigation*, FED. B. NEWS & J., Sept. 1993, at 496, 497, 501 [hereinafter Aspen, *Promoting Civility*] (defining the crisis as "an erosion of professionalism," noting the perception that the practice of law has changed "from an occupation characterized by congenial professional relationships to one of abrasive confrontations," and observing that the "general honorableness" of the profession is compromised now that the practice of law has become a business); Braithwaite, *supra*, at 72 (concluding that the "[p]rofession is moving away from its traditional self-conception as a noble and learned profession toward, on one hand, the model of commerce, and on the other, the model of partisan politics"); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 900 (discussing the universal "lament that the legal profession is devolving into a business"); Hazard, *Future, supra*, at 1239-40 (observing that "the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society").

3. Former Chief Justice Warren E. Burger was one of the first to publicly condemn the absence of civility among lawyers. Opening Remarks by Chief Justice Warren E. Burger, ALI PROCEEDINGS 1971, at 21-31 [hereinafter Burger, Opening Remarks]. For a brief history of the ABA's response to Justice Burger's exhortations, *see Blueprint, supra* note 2, at 248-50; Jill Nicholson, *Promoting Professionalism: ABA Committee is Catalyst For Goal Five Proposals*, A.B.A. J., Oct 1988, at 146. *See also Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371 (1991) [hereinafter *Interim Report*] and Marvin E. Aspen, *A Specification of Civility Expectations and Comments: Excerpts from the Seventh Circuit's Interim Report of the Committee on Civility*, 39 FED. BAR NEWS & J. 304-09 (1992) [hereinafter Aspen, *Civility Expectations*] (detailing the Seventh Circuit's efforts to address the perceived decline in civility); Geoffrey C. Hazard, *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13 [hereinafter Hazard, *Civility Code*] (opining that "there is no doubt that professionalism in the bar is sorely in need of repair"). Others have been more skeptical of assertions that the legal profession is in decline and have sought to debunk the myth that lawyers behaved more professionally in the past. *See, e.g.,* Freedman, *Brief History, supra* note 2, at 22-23 (demonstrating that lawyers have been complaining about a lack of professionalism throughout their history and contending that what we really need is a "Professionalism Non-Proliferation Treaty"); Ronald D. Rotunda, *Demise of Professionalism Has Been Greatly Exaggerated*, MANHATTAN LAWYER, April 4, 1988, at 12 (arguing that the weakening of historical anti-competitive restrictions on the practice of law, such as minimum fee schedules and the prohibitions against advertising, have made lawyers more, not less, professional); Stephen Gillers, *Words Into Deeds: Counselor, Can You Spare A Buck?*, A.B.A. J., Nov. 1990, at 80-81 [hereinafter Gillers, *Words Into Deeds*] (a cynical appraisal of the professionalism movement as a nostalgic, reassuring public relations effort).

claims, advancement of meritless legal positions, flagrant disregard for judicial authority, the prevalence of Rambo litigation tactics, and the abandonment of common courtesy.⁴

4. See, e.g., *Interim Report*, *supra* note 3, at 375, 380, 383, 388-89; Aspen, *Promoting Civility*, *supra* note 2, at 497-98 (Sept. 1993) (citing discovery abuse and the threat of Rule 11 sanctions as "incivility flash points" and the prevalence of Rambo litigation, "fight fire with fire" tactics); Burger, *Opening Remarks*, *supra* note 3, at 37 (attributing much of the criticism of the judicial process to discovery abuse); Mark Hansen, *Incivility a Problem, Survey Says*, A.B.A. J., July 1991, at 22 (stating that among lawyers who perceived incivility to be a problem, "94 percent targeted the discovery process as a source of uncivil conduct"). For a definition of "Rambo" litigation, see Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 81-82 & n.2 (1991) (equating "Rambo" with a "scorched earth," "take no prisoners," and "Godzilla" litigation); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79. Saylor captures the essence of "Rambo" litigation in six traits:

- (1) A mindset that litigation is war and that describes trial practice in military terms;
- (2) A conviction that it is invariably in your interest to make life miserable for your opponent;
- (3) A disdain for common courtesy and civility, assuming they ill-befit the true warrior;
- (4) A wondrous facility for manipulating facts and engaging in revisionist history;
- (5) A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding; and
- (6) An urge to put the trial lawyer on center stage rather than the client or his case.

Id. Construing the professionalism crisis as primarily a problem with attorney behavior raises another definitional issue, to-wit: what is the relationship between "professional" conduct and ethical conduct? The literature provides an ambiguous answer. Implicit in a number of discussions is the assumption that although "professionalism" includes conducting oneself in accordance with the dictates of the disciplinary codes, the doctrine encompasses more and is in fact primarily concerned with compelling behavior that the disciplinary codes would not mandate, including, for example, good manners, common courtesy, civility. See, e.g., Jack L. Sammons, Jr. & Linda H. Edwards, *Honoring The Law In Communities of Force: Terrell and Wildman's Teleology of Practice*, 41 EMORY L.J. 489, 513 (1992) (positing that professionalism should be the construction of a teleology of manners because civility, to the extent that it makes associations with others worthwhile, is at the heart of the matter); Catherine T. Clarke, *Missed Manners In Courtroom Decorum*, 50 MD. L. REV. 945, 950 (1991) (asserting that improving professionalism is "centrally related" to adherence to rules of courtroom etiquette). Others assume that "professionalism" is the functional equivalent of "ethical." See, e.g., Monroe H. Freedman, *Professionalism in the American Adversarial System*, 41 EMORY L.J. 467, 470 (1992). Freedman advances a definition of "professionalism" that ties it inextricably to the adversarial ethic, which is codified in the ABA *Model Code of Professional Responsibility* at Canon 7 and DR 7-101 (1990), and in the ABA *Model Rules of Professional Conduct* at the Preamble, Rule 1.2 and 1.3 (1990):

In a free society that emphasizes each individual's dignity and the right to due process and equal protection under the law, professionalism means that a lawyer should: first, help members of the public to be aware of their legal rights and of the availability of legal services to achieve those rights; second, advise each client fully and candidly regarding the client's legal rights and moral obligations; and third, zealously and competently use all lawful means to protect and advance the client's lawful interests as the client determines those interests to be; further, the fact that the lawyer is earning a living through the legal profession is immaterial.

This straightforward description of the ailment—a decline in professional behavior—seems accurate if one assesses the problem solely from the perspective of the patient, and, unfortunately, that is what the majority of the examinations of the professionalism problem do.⁵ The legal profession is a very powerful and autonomous patient. By monopolizing legal services, protecting the right to regulate itself, and engaging in *de facto* private lawmaking, the legal profession has consistently been able to make its concerns and perceptions about itself paramount.⁶ Predictably, however, the profession's

Id. See also Freedman, *Brief History*, *supra* note 2, at 22; Steven Lubet, *Civility: A Tale of Deconstruction and Constraint*, 1992 WIS. L. REV. 157, 159 (using "civility" synonymously with adherence to ethical rules). When the term "civility" is added to the rhetorical mix, the tautological nature of the endeavor surfaces. Aspen, *Civility Expectations*, *supra* note 3, at 304 (accepting that the Seventh's Circuit's Committee on Civility defined civility as "professional conduct" and did not limit the term to "good manners or social grace") and *Interim Report*, *supra* note 3, at 378 n.1.

5. Cf. *Interim Report*, *supra* note 3, at 427 (indicating that the survey of lawyers were asked only whether they believed "there [is] a 'civility' problem" without posing objective questions to determine what the lawyers meant by their responses); Aspen, *Civility Expectations*, *supra* note 3, at 304-09; Aspen, *Promoting Civility*, *supra* note 2, at 496-501. Scholars have begun to take professionalism seriously and are expanding the language of the dialogue. See, e.g., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION at ix (R. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS] (offering the essays therein as "an effort to create a greater understanding of the empirical issues that are behind the debate over whether in the practice of law the ideals of professionalism have been replaced by the demand of commercialism"); Gilson, *supra* note 2 (an interesting economic analysis of the professionalism issue contending that the lawyer's ability and inclination to say "no" to clients—to act as a gatekeeper—is what distinguishes the law from other professions and businesses); Lubet, *supra* note 4, at 157-69 (an analysis of civility comparing textualist, law and economics, and deconstructionist theories).

6. One representative of the legal profession, the American Bar Association, engages in autonomous (and essentially private) law-making through the dominance and wide-spread acceptance of its model disciplinary codes. The *Model Rules of Professional Conduct* have been adopted, without great modification, by thirty-seven jurisdictions. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 3 (Jeanne P. Gray ed., 2d ed. 1992). For an illustration of the contrast in tone and substance between insider and outsider perspectives on the problems plaguing the legal profession, compare RUDOPH J. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 105-115 (1989) (identifying the following as common "tricks of the litigation trade": "frivolous lawsuits" by "hungry" lawyers, shotgun complaints, tactical counterclaims, false claims of sexual abuse in divorce cases, "pettifoggery and stalling," overuse of expert witnesses, "sandpapering" witnesses, discovery abuse, mistreating witnesses on cross-examination, putting on "dumb" shows for the jury, coaching witnesses through objections, "bushwhacking" by making arguments beyond the merits, and outright lying) with JETHRO K. LIEBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 197-228 (1978) (advocating scrapping the ABA ethical codes, making the public responsible for disciplining lawyers, making bar committees more representative, giving regulatory power over lawyers to the legislative branches of government, establishing "unnecessary practice of law committees," ceasing harassment of paralegals and other semi-professionals who render legal services, drafting lawyers into mandatory public service after law school, monitoring the competency of judges, preventing public servants from simultaneously engaging in the practice of law, preaching ethics and morality, teaching ethics in law schools, and renouncing the acquisition of wealth as a primary professional goal).

self-assessment is constrained by a certain circularity in its diagnostic logic.⁷ The literature in legal trade journals reveals an almost obsessive focus upon the behavior of lawyers to the virtual exclusion of all other social, cultural, historical, and economic factors affecting the health of the profession and the well-being of its relationships with those whom it serves.⁸ Although the reasons for the profession's tendency to concentrate its rhetorical fervor exclusively on the conduct of its members are debatable, at least one consequence seems apparent: lawyers have found the very "crisis" for which they were looking and little else.⁹

Given the narrowness of the profession's investigation of the complaint, it is hardly surprising that civility codes are proffered as partial cures for what ails

7. Professor Schneyer has identified the manifestations of this closed debate, couched in what he calls the "idiom of professionalism," as follows: first, entertaining speculative, poorly analyzed concerns about a decline in the quality or availability of legal services, loss of independent professional judgment, threats to the reputation of the legal profession, loss of the bar's right of self-regulation; second, making a faulty analogy to the medical profession; third, being sentimental about lawyer's motives; fourth, mythologizing the small-town practitioner; fifth, making thoughtless appeals to tradition; sixth, privileging the lawyer's assessment of client interests; seventh, nurturing misplaced fears for the future of the adversary system, and eighth, yielding to the temptation to enact symbolic legislation. Schneyer, *supra* note 2, at 373-88.

8. A recent LEXIS-NEXIS computer search restricted in time from 1988 forward and requiring the word "civility" in the title produced almost 100 articles in legal trade journals dealing with some aspect of civility. The following titles are illustrative of the general tenor of these articles: Leonard M. Ring, *The Incivility Crisis*, TRIAL, Aug. 1993, at 78; Andrew Grene, *Civility Panel Considers 'Detention' for Rude Lawyers*, 139 CHI. DAILY L. BULL., April 8, 1993, at 1; Gordon James III, *A Call to Civility and Cooperation*, TRIAL ADVOC. Q., July 1992, at 5-6; Arthur Gilbert, *Difficult Judges (and Lawyers): A Decline in Civility in the Legal Profession*, BEVERLY HILLS B. ASS'N J., March 22, 1992, at 71; Maurice E. Bone, *A Lawyer's Choice: Civility or Hardball*, 79 ILL. B.J. 216 (1991); Arthur Gilbert, *Civility: It's Worth the Effort*, TRIAL, April, 1991, at 106; Roger S. Haydock, *Civility in Practice: Attorney, Heal Thyself*, 16 WM. MITCHELL L. REV. 1239 (1990); James W. Walker & Laura Cerniglia, *American Inns of Court; A Return To Civility in Practicing Law*, 52 TEX B.J. 1306 (1989); Larry Hicks, *Restoring Civility To The Practice of Law*, 52 TEX. B.J. 586 (1989). For a bibliography of articles addressing professionalism or civility—and revealing similar themes—see *Interim Report*, *supra* note 3, at 420-22.

9. See Randall Samborn, *Taming the Loose Cannons; Is Incivility Plaguing the Nation's Bench and Bar?*, NAT'L L.J., Jan. 15, 1990, at 1 [hereinafter Samborn, *Taming Loose Cannons*] (quoting Judge Marvin Aspen, member of the Seventh Circuit's civility committee as stating, "[W]e don't assume there is a problem, but a significant number among the bench and bar say there is," including apparently Seventh Circuit Chief Judge William J. Bauer who was quoted as saying "the problem of civility is becoming more acute"); *What the Members Think: Expectations and Priorities Solicited Through an In-Depth Survey of the ABA Membership*, A.B.A. J., Nov. 1992, at 60, 61 (stating that 68% of respondents to a survey of ABA members indicated that improving lawyers' image was very important); Baldwin, *supra* note 2 (condemning the professionalism debate as "shallow because we have talked only about how we see ourselves" and wondering whether we are accepting a conveniently superficial diagnosis of our "professional malaise").

us.¹⁰ After all, these codes attempt to micro-manage the conduct of lawyers by introducing fixed categories of professional and unprofessional behavior, and specifying, in advance and across the board, desirable and undesirable acts.¹¹ The drafters of civility codes justify them, even when they are not mandatory, as benign (but presumably compelling) expressions of shared values—the statement of the legal community's ethos.¹² Advocates predict that civility codes will, at a minimum, have a salutary placebo effect¹³ and do no harm.¹⁴

10. *Interim Report*, *supra* note 3, at 379-80 (stating that 53% of judges and 50% of lawyers responding to a survey favored court-adopted civility codes). By "civility code," I mean any codified effort to address or mandate tenets of professionalism or courtesy, including creeds of professionalism and standards of practice or conduct, but excluding disciplinary codes. For a recent compilation of these codes, see *Interim Report*, *supra* note 3, at 422-24. For a short history of the ABA's involvement in the promulgation of such codes and a sampling of ABA, state, and federal civility codes, see STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* (1993) [hereinafter GILLERS & SIMON, *REGULATION OF LAWYERS*]. In fairness, the ABA's Commission on Professionalism recommended a number of broad regulatory reforms and did not expressly encourage the promulgation of civility codes. Cf. *Blueprint*, *supra* note 2, at 263-65 (stating that the Commission Report did suggest that the Bar "[r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules of Professional Conduct").

On December 14, 1992, the Seventh Circuit became the first federal circuit to promulgate such a code when it formally adopted the recommendation of the Committee on Civility of the Seventh Federal Judicial Circuit and promulgated *Standards for Professional Conduct of Litigation*. Martha Middleton, *7th Circuit OKs Rules on Civility*, NAT'L L.J., Jan. 11, 1993, at 18; *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441-52 (June 1992) [hereinafter *Final Report*].

11. See, e.g., *Final Report*, *supra* note 10, at 448-52; *ABA Creed and Pledge of Professionalism*, in GILLERS & SIMON, *REGULATION OF LAWYERS*, *supra* note 10, at 564-68. For a comprehensive economic assessment of the relative costs of promulgating legal commands in the form of definitive rules (as the civility codes do) rather than broader standards, see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

12. See, e.g., *Blueprint*, *supra* note 2, at 251 (optimistically concluding that "the future of the legal profession will be bright if all elements of the profession resolve to confront their problems and deal with them forthrightly"); *Final Report*, *supra* note 10, at 443, 444-47 (in a letter to Judge Bauer, Judge Aspen summarized the Committee's sentiment as hope that "this Report will be a catalyst for the judiciary, the bar and our law schools to work together to stem the erosion of civility"); Terrell & Wildman, *supra* note 2, at 403 (justifying the search for professionalism norms because the "legal system embodies our last vestiges of a sense of community—of shared expectations and values"); Schneyer, *supra* note 2, at 365-66 (arguing that even though the ideals of professionalism may be mere "rhetorical virtues," invoking their names can "mobilize lawyers and enhance their sense of community"). But see Robert E. Rodes, Jr., *Professionalism and Community: A Response To Terrell and Wildman*, 41 EMORY L.J. 485-88 (1992) (challenging the notion that the legal profession is, or should be considered, a community with shared values).

13. See, e.g., Aspen, *Promoting Civility*, *supra* note 2, at 501; *Interim Report*, *supra* note 3, at 371, 377, 414-15; Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison*, 44 U. MIAMI L. REV. 807, 830-38 (1990) (advocating civility codes in the name of collegiality); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS*, *supra* note 5, at 230 (suggesting that the broader professionalism debate may facilitate reform). But see Schneyer, *supra* note 2, at 365

To test that optimistic prediction, this essay examines much of the same information advocates advance in support of civility codes, but from a less restrictive perspective. In particular, it explores how an awareness of the stratifications of power and prestige in the legal profession alters one's assessment of these codes. This exercise reveals several troubling aspects of the professionalism crisis and strengthens suspicions about the beneficence of civility codes. Among other things, a critical evaluation suggests that the organized bars may unconsciously perpetuate the notion that many of the problems confronting the legal profession are attributable to an epidemic of bad behavior among attorneys, because doing so serves the interests of a powerful minority within the profession. That observation compels one to question to what extent the civility codes embody that minority's collective biases. If the skewed perceptions of a privileged few are at the heart of these codes, then they may express flawed values, promote a false community, and constitute potentially dangerous exercises of hierarchical power.

Exploring the manner in which civility codes arguably give form and content to the partisan views of the bar's powerful elite is illuminating in other respects as well. It reveals that these codes implicate a number of fundamental problems, including: the fallacies and pitfalls of viewing the profession as an occupation with unified goals and shared practices; the infirmities of current systems of attorney regulation and discipline; and the dysfunctional, essentially mistrustful, relationship between the public and the profession. Consequently, this essay also contemplates whether an elitist bias explains the drafters' avoidance of these difficult issues and the resulting superficiality and tentativeness of their reform efforts.

The analysis begins in Part I with a description of how a power elite in the organized local, state, federal, and national bars functions like a privileged class within the legal profession and uses its power to determine the content of the codes regulating lawyers against the interests of those who have less power in the bar, including, new entrants, lawyers who represent individuals, and those who do not—or cannot—conform to an upper-middle-class code of conduct.¹⁵ The essay then considers four ways in which the resultant “class bias” taints civility codes.¹⁶ Part II suggests that the codes manifest the privileged

(cautioning that debating the merits of ethical rules in the “idiom” of professionalism is “needlessly divisive”).

14. The Hippocratic Oath is often cited as authority for the “first do no harm” notion. Although those exact words do not appear in the oath, the frequency of citation to the oath indicates that many believe it implicitly includes the directive. See, e.g., Eleanor D. Kinney, *Legal and Ethical Issues in Mental Health Care Delivery: Does Corporate Form Make a Difference?*, 28 HOUS. L. REV. 175, 202 & n.166 (1991).

15. See *infra* notes 22-134 and accompanying text.

16. See *infra* parts II-V.

minority's desire to avoid confronting directly the economic difficulties and moral ambiguities of rendering essential legal services in a capitalistic society where the majority of people are poor, working class, and middle class.¹⁷ Part III contends that civility codes are a patrician reaction to the shortcomings of the attorney disciplinary and regulatory systems and a paradoxical application of the ethics of liberalism.¹⁸ Part IV explores how the professionalism crisis furthers the interests of large law firms by deflecting attention away from the problems generated by the way they do business and acculturate lawyers to the practice of law.¹⁹ Part V considers whether civility codes reflect unconscious desires to impose a reactionary and authoritarian conformity upon a rapidly diversifying profession and to resist redistributions of power to those who have been historically excluded from the practice of law and denied access to legal services.²⁰ Finally, in Part VI, this essay details the class-contingent risks inherent in enacting these problematic codes (whether they are enforced or not) and concludes with the prognosis that civility codes will prove to be unsatisfactory therapy for the misunderstood professionalism crisis, in part, because of the deficits exposed by a more "class-conscious" examination of professionalism issues.²¹

I. POWER, CLASS, AND BAR HIERARCHY

The American Bar Association's influential report, ". . . *In The Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*," concludes with an appraisal of the legal profession written by Louis D. Brandeis in 1905:

Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class.²²

The Report's observation that "one might think these words were written today," is both ironic and telling.²³ The irony is that the ABA's Commission on Professionalism ignored the obvious inference that the perceived decline in professionalism among lawyers today might be an exaggerated, if not contrived,

17. See *infra* notes 135-51 and accompanying text.

18. See *infra* notes 152-62 and accompanying text.

19. See *infra* notes 163-98 and accompanying text.

20. See *infra* notes 199-253 and accompanying text.

21. See *infra* notes 254-67 and accompanying text.

22. *Blueprint*, *supra* note 2, at 304.

23. *Id.*

crisis.²⁴ The Commission's oversight is meaningful whether it was intentional or not. At the very least, it indicates a lack of professional self-consciousness and an incomplete sense of history. Furthermore, the discontinuity between Brandeis's commentary and the Commission's response mirrors uncertainties at the heart of the Commission's Report. It never confronted the legitimacy of generalizing about the legal profession as a collective entity, the impact of a historical perspective on the professionalism crisis, or the validity of regarding lawyers as a "distinct professional class." Civility codes, the offspring of the inbred professionalism enterprise, inherited its core ambivalence, but in an even more concentrated (less apologetic) form. This analysis therefore begins with a critical examination of what may be congenital defects in lawyer codes of conduct.

A. *The Legal Profession as an Occupational Community*

Regarding the legal profession's collective identity, the ABA's Commission on Professionalism tentatively asserted that, "[w]hile one must always be conscious of the variety within the legal profession, more unites than separates us."²⁵ The pensive quality of this characterization seems to echo contemporary discomfort with generalizations. The traditional notion of a profession was one of a "community within a community."²⁶ These so-called "occupational communities" result "when people see themselves as people with a shared investment in an occupational world of values and interests."²⁷ Lawyers can be deemed members of an occupational community if they

see themselves in terms of their occupational title, orient their behaviour towards their occupational colleagues (or some section of them), share an occupationally based value and belief system, associate in their non-work time with these colleagues and base their interests on their work in some way.²⁸

While many would agree that this accurately describes lawyers,²⁹ others

24. Some historical studies show that the legal profession has been in a constant state of "crisis." See, e.g., Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS*, *supra* note 5, at 144-73.

25. *Id.* at 262.

26. DONALD D. LONDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 3-4 (1990).

27. Graeme Salaman, *Occupations, Community and Consciousness*, in *WORKING-CLASS IMAGES OF SOCIETY* 221 (M. Bulmer ed., 1975).

28. *Id.* at 221-22.

29. See, e.g., TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: *NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (ABA, July 1992), at 110-11 [hereinafter *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT*] (concluding

look at the legal community and see primarily differences. Accordingly, they stress the functional and demographic diversity of the contemporary bar.³⁰ Indeed, the changes in the lawyer population and practice settings in the past fifty years have been dramatic.³¹ For example, the average age of American lawyers is remarkably younger,³² and the number of women in the profession has increased rapidly.³³ According to some sociologists, the implications of these changes are far-reaching:

They suggest a decline in cohesion, consensus, and community within . . . the legal profession. New groups, specifically younger lawyers and women lawyers, have emerged with views and interests potentially divergent from those of senior members in established careers. Such changes might also be construed as the legal profession's inability to control the size and composition of its membership in the face of changes in its environment On the basis of these changes, the legal profession is less likely to be a "community with a community" . . . but to be more of a[n] . . . " . . . amalgamation[] of segments pursuing different objectives in different manners and more or less delicately held together under a common name at a particular period of history"³⁴

This view may be more accurate because, in fact, fundamental differences among lawyers stemming from a variety of factors, including functional specialization, rank, status, authority, influence, and esteem, flourish beneath a deceptively cohesive surface.³⁵ The legal profession may be a community, but only in the sense of being as differentiated within itself as any other

that "the American legal profession to this time has succeeded in maintaining its overall identity and seems in some respects to have come together as possibly a more unified profession than in the past," and that "the bar of America is today a more organized and unified profession than at any time in its history, despite its great size and diverse fragmentation").

30. Hazard, *Future*, *supra* note 2, at 1257; LONDON, *supra* note 26, at 3-4.

31. See generally RICHARD L. ABEL, *AMERICAN LAWYERS* 40-74, 166-212, 249-318 (1989) (a definitive empirical analysis of the lawyer population detailing barriers to entry, changing demographics, differentiation within the profession). See also LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT, *supra* note 29, at 18-103.

32. BARBARA A. CURRAN, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980's* 5-8 (1985).

33. *Id.* at 9-11, 38-50.

34. Sharyn L. Roach Anleu, *The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?*, 19 *WORK & OCCUPATIONS*, May 1992, at 184, 188 (May 1992).

35. WILBERT E. MOORE, *THE PROFESSIONS: ROLES AND RULES* 149 & n.2 (1970) (citing William J. Goode, *Community Within A Community: The Professions*, 22 *AM. SOC. REV.* 194-200 (Apr. 1957)); ABEL, *supra* note 31, at 40-74, 166-212, 249-318.

community.³⁶ In other words, the legal profession is really a suburb where the uniformity of the facade hides real distinctions, particularly of rank and prestige, that should not be ignored.³⁷

Given this, can one in any sense accurately speak about the legal profession as if it were a collective entity? Certainly, the organized voluntary bar associations are not actual surrogates for the legal profession as a whole.³⁸ The membership of voluntary bar associations is not representative,³⁹ and lawyers from large firms—a minority of American lawyers—dominate committee membership in those organizations.⁴⁰ Moreover, the so-called “integrated” (mandatory membership) bar associations are local entities that do not act solely at the direction of their membership and often adopt official positions at variance with the views of rank and file bar members.

Notwithstanding such diversity and stratification, the concept of a legal occupational community, properly defined and limited, can be a useful tool to identify and analyze “the determinants and nature of conceptions of group interest.”⁴¹ The organized bar can be deemed a collective when, and only insofar as, it acts for the profession as a whole. In those instances, it acquires a collective history, personality, and ideology that may provide insights of a general—though qualified—nature. The American Bar Association is a historically powerful organization and has dominated lawyer regulation through the adoption of its model codes and their influence upon other forms of regulation.⁴² In the arena of lawyer regulation, the ABA has become a surrogate for the legal profession as a whole because the entities with the constitutional or legislative power to regulate attorneys have implicitly ceded their prerogative to this private organization. Since the mid-1980s, jurisdictions throughout the country have taken the ABA’s initiative and made its professionalism agenda their own. Thus, the ABA and jurisdictions that have

36. *Id.*

37. WILLIAM H. DOBRINER, *CLASS IN SUBURBIA* 11-12 (1963).

38. *See, e.g.*, Hazard, *Future*, *supra* note 2, at 1279 (expressing doubts about the cohesion of the organized bar).

39. LIEBERMAN, *supra* note 6, at 33-34 (observing that “most lawyers know little of the ABA” and only half of all American lawyers join the organization and the majority of those are interested in periodicals and insurance rather than committee work or the ABA’s position on issues).

40. *Id.* at 64.

41. Salaman, *supra* note 27, at 221.

42. *See* GILLERS & SIMON, *REGULATION OF LAWYERS*, *supra* note 10, at 563. *Compare* *ABA Creed and Pledge of Professionalism*, in GILLERS & SIMON, *REGULATION OF LAWYERS*, *supra* note 10, at 564-68 with *Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*, 143 F.R.D. 448-52 (1992). *See also* J. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75 (Gerard W. Gawalt ed., 1984) (calling the ABA “one of the most influential private interest groups in American political life”).

followed its lead, like the Seventh Federal Judicial Circuit, are the legal profession's occupational community where matters of professionalism and, more particularly, the ideology of civility are concerned.⁴³

B. Lawyer Codes of Conduct in Historical Perspective

The early history of the American legal profession can be seen as a battle between aristocratic and democratic forces for domination of the professional culture.⁴⁴ Representatives of the aristocratic conception saw the legal profession as a way to acquire "money without sully[ing] one's hands with a job or trade."⁴⁵ The practice of law was not to be equated with business or "the unseemliness of money changing hands."⁴⁶ Elite and dominant lawyers served the wealthy classes and performed essentially aristocratic functions in the spheres of both the government and the marketplace by managing authority, protecting property, and advancing the interests of business and industry.⁴⁷

From the beginning, however, the practice of law was highly stratified.⁴⁸ Although entry to the profession may have been open in the formal sense, significant barriers of class and background existed.⁴⁹ Furthermore, the social status of a lawyer's clientele governed the nature of the lawyer's practice and also determined the lawyer's social position within the profession.⁵⁰ Thus, the prestige and ranking of practice specialties was directly attributable to the socio-economic status of a lawyer's clients.⁵¹ Although the practice of law may have been more of a "bread and butter affair" to the rank and file lawyers of mid-nineteenth-century America,⁵² a powerful, dominant minority within the profession had a more aristocratic vision. Their mission was to establish lawyers as an intellectual elite in the eyes of the public.⁵³ They prevailed and,

43. *But see* RONALD NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 283 (1988) (arguing that the bar is not a collectivity).

44. For a brief history of the legal profession and the ABA's role in creating a professional legal culture that synthesizes the theses of the major works in this area, see KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 211-25 (1989).

45. JOEL E. GERSTL, PROFESSIONS FOR THE PEOPLE: THE POLITICS OF SKILL 3 (Joel E. Gerstl & G. Jacobs eds., 1976).

46. *Id.*

47. Hazard, *Future*, *supra* note 2, at 1268-73 (referring to lawyers as an "elite political force" and "privileged intellectual class").

48. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 303-33 (1985).

49. *Id.* at 305. *See also* ABEL, *supra* note 31, at 40-73, 166-211 (1989).

50. MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 176 (1977).

51. *Id.*

52. MAXWELL H. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 151 (1976).

53. *Id.*

as we shall see, the American Bar Association and the so-called "professionalism project" were instrumental in their success.⁵⁴

At its inception, the American Bar Association was an organization with an exclusive membership and elitist agenda.⁵⁵ It was founded by the self-styled "best men of the bar,"⁵⁶ a small group of economically and socially powerful corporate lawyers.⁵⁷ Although they were representative of a numerically small percentage of lawyers, they perceived that they had the power to make the public's perception of the bar in their own aristocratic image and believed that a selective professional organization was the way to accomplish that goal.⁵⁸ Most commentators agree that their efforts were successful,⁵⁹ but scholars differ sharply on the level of purposefulness or intent that can be imputed to ABA members.

Some suggest that conservative corporate lawyers engineered their ideological domination of the ABA in reaction to populist forces, primarily a mid-nineteenth-century egalitarian movement to reform the profession. According to this view, the power of the aristocratic bar was threatened by a Jacksonian-era distrust of the elite and by fear that professionals would establish themselves as a privileged class.⁶⁰ In fact, the Jacksonian era did see some lowering of the historical barriers to entry into the practice of law. Elitist lawyers saw the democratizing trend as the beginning of an era of decadence. Simply put, the wrong sort of people were becoming lawyers. A "great democratic flood" of lower caste lawyers, those "slovenly in dress, uncouth in manners and habits, ignorant even of the English language . . . [were] jostling and crowding and vulgarizing the profession."⁶¹ The elite could not restrict admission to the legal profession itself, but they could establish exclusionary professional organizations that would control the public's perception of lawyers

54. See ABEL, *supra* note 31, at 112 (describing the components of the "professionalism project"); Kenneth L. Penegar, *The Professional Project: A Response To Terrell and Wildman*, 41 EMORY L.J. 473, 473 (1992) (calling lawyers today "a privileged elite").

55. JERALD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICAN* 63-64 (1976); Matzko, *supra* note 42, at 75-96.

56. Matzko, *supra* note 42, at 75-96 (describing the ABA founders as the "decent part" of practicing lawyers, "primarily well-to-do business lawyers, of old American stock").

57. LARSON, *supra* note 50, at 170. See also FRIEDMAN, *supra* note 48, at 650 (pointing out the absence of "ambulance chasers, sleazy lawyers who hung around the rear of criminal courtrooms and small time debt collectors" from early ABA membership).

58. LARSON, *supra* note 50, at 170-77.

59. FRIEDMAN, *supra* note 48, at 648-54.

60. Matzko, *supra* note 42, at 76-77.

61. *Id.* at 78.

and distance themselves from the professional “riff raff.”⁶² They perceived the mission of the ABA to be nothing less than restoring and preserving the honor of the profession.⁶³

Others appraise the motivations of the ABA in an even harsher, more conspiratorial light. First, they challenge the notion that the early organized bars were under any populist pressures at all.⁶⁴ Second, they argue that the founders of the ABA consciously intended to do indirectly what they could not do directly: restrict entry to the practice of law to the right sort of people, those who were conservative, upper-middle class, Anglo-Saxon, White, male, and Protestant.⁶⁵ As the historian Lawrence Friedman has observed: “[n]othing so dissatisfied the ‘decent part’ of the bar as the fact that it was so easy to set up as a lawyer.”⁶⁶ It is difficult to deny that the organized bar’s efforts to upgrade the profession were overtly biased. According to sociologist Magali Larson:

The fight for higher standards was aimed in principle against incompetence, crass commercialism, and unethical behavior; but it was clear in the language of the leaders of the bar that “the poorly-educated, the ill-prepared, and the morally weak candidate” meant chiefly those growing numbers of the metropolitan bars who were foreign-born, of foreign parentage, and, most pointedly, Jews.⁶⁷

The metaphors chosen tend to signal how benevolent or critical the assessment of the bar will be. Significantly, some commentators compare the early bar to a “club,” explaining that

[i]n situations of great uncertainty—where social circumstances are in flux or the nature and quality of a product are not readily apparent—individuals with similar interests may organize to provide each other with consistent, comprehensible feedback, and to provide outsiders with a standard against which the members of the club may be assessed. The essential function of the group, consequently, is informational.⁶⁸

62. *Id.*; HALL, *supra* note 44, at 211-25 (characterizing the founding of the ABA as “an effort by the most prestigious element of the bar to differentiate itself from other professional groups and foster a sense of professionalism consciousness”).

63. Matzko, *supra* note 42, at 88.

64. BLOOMFIELD, *supra* note 52, at 136-90.

65. LARSON, *supra* note 50, at 166-67; *see also* AUERBACH, *supra* note 55, at 3-129.

66. FRIEDMAN, *supra* note 48, at 652.

67. LARSON, *supra* note 50, at 173.

68. Terrell & Wildman, *supra* note 2, at 409.

We are reassuringly told that the power and self-interestedness of club members is neither intrinsically bad, nor a necessarily negative force in society.⁶⁹ The club analogy aptly captures, perhaps unintentionally, the tendency of voluntary organizations to exclude qualified persons on the grounds of, among other things, race, ethnicity, and gender.⁷⁰

A competing, less benign analogy likens the ABA to a medieval guild.⁷¹ Guilds were powerful, self-governing trade associations that effectively “restricted competition, set prices, defined the quality [of the service rendered or the product produced], controlled entrance [to the profession], and training, and generally developed ordinances governing ‘every conceivable relationship’ involving members.”⁷² To this view, the ABA’s exclusionary and anti-competitive actions were not innocent, unintended consequences, but rather were the results of an influential guild-like organization flexing its muscles.

Interestingly, these analogies also offer similarly disparate explanations for the bar’s tendency to concentrate on codes of conduct. Advocates of the bar-as-club position argue that the promulgation of ethics rules was an economically efficient and ideologically neutral response to diversification of club membership. They assert:

In moving from moral clubishness to moral diversity, Bar membership *could have* become virtually meaningless. If no particular set of values could be ascribed to lawyers—indeed, if the public could no longer ascribe *any* values *at all* to a lawyer that might limit or channel her conduct—then being a member of the Bar would say very little of any significance to anyone. Neither lawyers nor non-lawyers would be able to predict the kind of interaction they would have with each other in professional contexts. This sad state of affairs would then be economically inefficient: without information, everyone would waste much of their time and energy protecting themselves from the unscrupulous, and trying to determine whom they *could* trust.⁷³

This purported inefficiency could presumably be alleviated by codes of ethics and professionalism creeds because they provide useful moral information by announcing values common to all bar members.⁷⁴

69. *Id.*

70. MOORE, *supra* note 35, at 115.

71. GERSTL, *supra* note 45, at 2.

72. *Id.*

73. Terrell & Wildman, *supra* note 2, at 413.

74. *Id.* at 413-14.

Those ascribing to the guild analogy focus more on the uses to which power can effectively be put by a professional organization.⁷⁵ The power to draft codes of conduct is the power to define—for the public and guild members—the very essence of what it means to be professional and, perhaps more importantly, unprofessional. The guild theory would predict that the ABA would use conduct codes to consolidate its authority over matters of lawyer regulation and to advance the interests of its dominant members.

The guild analogy more precisely predicts the history and consequences of the ABA's involvement with ethics codes and codes of conduct. The professionalism project has been an enduring passion of the organized bar since its inception.⁷⁶ The effort began (for our purposes, significantly) with a flirtation with codes of etiquette,⁷⁷ but soon settled upon domination of lawyer regulation through the promulgation of disciplinary codes, specifically the *ABA Model Code of Professional Responsibility* and *ABA Model Rules of Professional Conduct*.⁷⁸ Lately, the ABA's objective of rekindling professionalism has shifted the focus and prompted numerous jurisdictions to adopt some form of professionalism creeds or civility codes.⁷⁹

If the content of these codes were neutral, the nature of the forces that produced them might be irrelevant.⁸⁰ Such is not the case, however. The substance of the ABA's ethics codes replicates the hierarchy and prestige strata of the legal profession by codifying the self-serving judgments of those who had (and still have) power in the ABA.⁸¹ The rules promulgated by the "best men of the bar" are predictably elitist in a number of respects. Among other things, they reflect the biased assumption that ethical problems in the bar were coming from new entrants, "shysters," ambulance chasers, and members of the lower classes who were stigmatized as immoral mostly because of their ethnic background.⁸² As a consequence, the ABA's model ethics codes embody all sorts of status-contingent judgments about what type of conduct should be

75. GERSTL, *supra* note 45, at 14-15.

76. ABEL, *supra* note 31, at 142-211; AUERBACH, *supra* note 55, at 3-129.

77. LIEBERMAN, *supra* note 6, at 54-56 (noting that the earliest ethical codes were little more than codes of etiquette that promoted punctuality, restraint, honor, "a potpourri of manners"); Matzko, *supra* note 42, at 89 (stating that the bar's early, seemingly modest objective was "the establishment of cordial intercourse among members of the bar").

78. *Blueprint*, *supra* note 2, at 257-59.

79. *ABA Recommends Creeds for Bar Associations*, A.B.A. J., Jan. 1989, at 58; Nicholson, *supra* note 3, at 146.

80. EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 6-8 (Cornelia Brookfield trans., 1958) (advancing the theory that "special moral groups" and their collective judgments are both necessary and good). *But see* T.H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT* 152-53 (1964) (arguing that individual judgment is the essence of professionalism).

81. ABEL, *supra* note 31, at 142-211; AUERBACH, *supra* note 55, at 3-129.

82. LIEBERMAN, *supra* note 6, at 59-62.

regulated or deemed to be against the public's interests.⁸³

In sum, the ABA's shortcomings in the professionalism arena cannot be denied no matter what level of self-consciousness or intent one ascribes to its members. As Professor Friedman has pointed out, the ABA's performance,

compared to its ballyhoo, has been retrograde and weak. In times when justice or civil liberty were in crisis, the organized bar was not on the side of the angels. It was racist in the early part of this century (no blacks were allowed in the ABA); during the McCarthy period, the ABA was eager for loyalty oaths and purges. Its "ethics" meant, for the most part, squelching advertising and protecting lawyers from competition.⁸⁴

Some might argue that dredging up the past in this manner is unnecessary because the modern bar has cleansed itself and is now a heterogeneous, egalitarian, and representative organization.⁸⁵ An awareness of its problematic history, however, coupled with a resurgence of institutional interest in one of the oldest forms of lawyer regulation—courtesy codes—counsels caution. At a minimum, these concerns suggest that it would be appropriate to explore whether some mechanism by which the taint of bias has been transmitted to the current civility movement exists.

C. Lawyers as a Distinct Professional Class

Studies of the current class structure of the American legal profession reveal that, despite the demographic diversification of the bar, the historic patterns of influence and prestige have remained relatively unchanged.⁸⁶ The result is that a privileged, powerful group of elite lawyers continues to control the collective identity of the occupational class, defines its distinctive traits, and determines the components of the profession's dominant ideology. This raises three issues, which we will consider in turn. First, who are elite lawyers? Second, how did they acquire and exercise power and influence in professionalism matters? Third, what are the implications for the presence of class bias in civility codes?

83. Advertising is an example. Law firms that served an elite corporate clientele did not need to advertise; lawyers who represented individuals did. LIEBERMAN, *supra* note 6, at 59-62.

84. FRIEDMAN, *supra* note 48, at 690-91.

85. See, e.g., Terrell & Wildman, *supra* note 2, at 409-13 (arguing that the bar has "reversed all of the negative characteristics of the past").

86. See generally ABEL, *supra* note 31, at 40-211, 249-318 (1989).

1. The Powerful Elite

The professionalism project has not changed much. Lawyers who are or have been employed by large law firms remain in control of the ideological agenda despite their atypicality. Lawyers who practice in large firms are atypical for that reason alone. A recent statistical study shows that two-thirds of all lawyers in private practice are either solo practitioners or practice in association with only one or two other lawyers.⁸⁷ Approximately thirteen percent of lawyers practice in firms with more than twenty-one lawyers, but firms of more than one hundred employ a very small percentage of the nation's lawyers.⁸⁸ Additionally, large firms are urban and concentrate their practice in metropolitan areas.⁸⁹

Although the number of lawyers from non-traditional backgrounds has increased in the practice of law as a whole, the demographic profiles of large law firms still bear the scars of what one commentator has termed the "brutal selectivity" and "overdiscrimination" those firms employed in the past to ensure race, religion, and gender homogeneity.⁹⁰ Lawyers in large law firms are typically male, Anglo-Saxon, upper-class Protestants who attended elite law schools.⁹¹ In fact, the quality of the law school attended is still the principal criterion of admission to elite law firms and, therefore, remains a good predictor of the setting in which a lawyer will practice.⁹² Studies also demonstrate a correlation between professional success and an upper-class background.⁹³ Professionals tend to have fathers who were professionals.⁹⁴ In addition, upper-middle-class White Protestants are conservative, and very high-income Protestants are Republicans by a four-to-one ratio.⁹⁵

In an influential study of a Wall Street firm in the 1960s, Erwin Smigel described a professional culture that was elitist and conformist.⁹⁶ Lawyers dressed conservatively, behaved discreetly, lived in the right neighborhoods, and

87. CURRAN, *supra* note 32, at 1, 12-15.

88. *Id.*

89. *Id.* For an excellent study of the divergent demographics and stratification of a rural practice, see LANDON, *supra* note 26.

90. LARSON, *supra* note 50, at 177; AUERBACH, *supra* note 55, at 3-129.

91. NELSON, *supra* note 43; HALL, *supra* note 44, at 212-13; LIEBERMAN, *supra* note 6, at 57. A *National Law Journal* survey conducted in February, 1988, found that 90% of the partners at the nation's largest firms were White males. Edward Frost & Margaret C. Fisk, *The Profession After 15 Years*, NAT'L L.J., Aug. 9, 1993, at 40.

92. LARSON, *supra* note 50, at 176.

93. FRIEDMAN, *supra* note 48, at 305.

94. MOORE, *supra* note 35, at 66-69.

95. RICHARD F. HAMILTON, CLASS AND POLITICS IN THE UNITED STATES 197-98 (1972).

96. ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 311-38 (1964).

generally emulated a professional style that was in keeping with their cultural and socio-economic profile, that is, conservative, methodological, prudent, tactful, and disciplined.⁹⁷ Lawyers who were from atypical backgrounds either conformed to the dominant eastern, upper-middle-class style or suffered severe, negative career consequences.⁹⁸

Robert Nelson's definitive study of large firms, *Partners With Power: The Social Transformation of the Large Law Firm*, supplements and refines Smigel's portrait of large firms with a thorough, sociological analysis of their structure and function.⁹⁹ Among other modifications, Nelson found that lawyers in large firms are not necessarily as independent or autonomous as Smigel assumed because elite lawyers identify with their clients and maximize clients' interests.¹⁰⁰ Greatly simplified, Nelson's thesis is that although large firms appear on the surface to lack organizational rules, they are in reality rigid hierarchies.¹⁰¹ The social organization of the large firm mirrors its privileged status in the legal profession.¹⁰² The large firm uses the concept of professionalism—the ideals of professional conduct—to obscure firm hierarchy and “channel or defuse” conflicts within the firm.¹⁰³ In this way, Nelson argues:

The large law firm has therefore been a central institution in the development of the distinctive norms and cultural understandings that define the ideal of professionalism for American lawyers [and promoting] . . . law as something more than a business.¹⁰⁴

2. Power, Prestige, and Deference

We must now consider the precise means by which the large law firm culture described by Nelson continues to dominate the professionalism project. The analysis thus far suggests two mechanisms. First, professionalism creeds and civility codes are products of the ABA's influence over the entities that have the power to regulate lawyers. The ABA, like most professional organizations, “is under the effective control of a minority.”¹⁰⁵ Large law firms dominate the active center of the legal profession's organizations and associations.¹⁰⁶

97. *Id.*

98. *Id.* at 316, 318.

99. NELSON, *supra* note 43.

100. *Id.* at 5.

101. *Id.* at 16.

102. *Id.* at 27.

103. *Id.* at 4, 93, 211.

104. *Id.* at xi.

105. MOORE, *supra* note 35, at 166.

106. *Id.* at 166 (distinguishing between the “active center” and “passive periphery” of professional organizations).

Their members occupy positions of leadership in bar associations and have an impact disproportionate to their representiveness of the larger legal profession.¹⁰⁷ The ABA and other professional associations are the preserves "of those whose practices provide[] them with a sufficient margin of wealth and leisure to pay fees, attend conventions, and participate in committee work."¹⁰⁸

Second, large firms are invariably at the top of the prestige hierarchy within their occupational communities.¹⁰⁹ In the legal profession, high prestige translates into the moral authority to make judgments about the standards of professional behavior that will bind others in the following manner. "Prestige" can be defined either as deference entitlements that engender deferent behavior or, more specifically, as "a particular form of social power and advantage that is of a symbolic rather than of an economic or political character, and which gives rise to structured relationships of deference, acceptance and derogation."¹¹⁰ Either way, prestige is always a two-dimensional form of power or influence because it requires the complicity of another who must defer to a higher status person in order for prestige to exist.¹¹¹

A very interesting image of the prestige hierarchy of the Chicago legal community emerged from a 1977 statistical study of a large, random sample of Chicago lawyers.¹¹² In general, those who did big business law for large, collective clients were at the very top of the prestige hierarchy.¹¹³ At the low end of the prestige spectrum were lawyers whose work required them to represent individuals, that is, general family practice, divorce, personal injury (plaintiff's work), consumer law, and criminal law. Low prestige stemmed from two sources: the socio-economic status of a lawyer's client and the nature of the work performed. Lawyers apparently deem some legal work inherently distasteful and unsavory, likening lawyers who do that work to "refuse collectors."¹¹⁴

107. NELSON, *supra* note 43, at x-xi, 1, 231.

108. AUERBACH, *supra* note 55, at 63. See also Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1 AM. B. FOUND. RES. J. 155, 207-08 (1977) (finding a statistically significant correlation between holding a position of leadership in the Chicago Bar Association and practicing in a high-prestige specialty, lending support to the notion that prestige yields influence in bar matters).

109. NELSON, *supra* note 43, at 37.

110. Laumann & Heinz, *supra* note 108, at 159-64.

111. *Id.* at 162.

112. *Id.* at 177.

113. *Id.*

114. *Id.* See also Jack Ladinsky, *The Impact of Social Backgrounds of Lawyers on Law Practice and the Law*, 16 J. LEGAL EDUC. 127, 139 (1963) (defining the "dirty work" of the bar as personal injury cases, divorces, criminal defense, collections, and title-searching).

The study considered whether a correlation existed between prestige and a lawyer's reputation for ethical behavior, which was defined as the ability to provide zealous representation within the bounds of the ethical rules. The researchers' findings were significant. Practitioners in high-prestige specialties received ethical scores well above average, with most of the high ethics scores assigned to those who represented big business clients. The lowest ethics scores were given to those who practiced in the unsavory, low-prestige areas of plaintiff's personal injury work, divorce, and criminal defense.¹¹⁵ Not surprisingly, high prestige was also disproportionately associated with graduation from six elite law schools.¹¹⁶ Within existing prestige hierarchies, women are generally accorded less prestige, respect, and credibility than are men.¹¹⁷

An earlier study of lawyers in Detroit reached similar conclusions.¹¹⁸ The study painted a picture of a bar stratified into concentric circles, the inner ring of which was occupied by those who represented businesses. The next circle consisted of a narrow fringe of lawyers whose clients were primarily plaintiffs suing or dealing with businesses. Outside these two circles was a vast area of "outer darkness" populated by a large number of lawyers who eked out a living scrambling for the remaining legal crumbs.¹¹⁹ The researchers' model also corroborated the existence of direct and indirect causality from background characteristics to type of law practice. The characteristics studied were basic socio-economic indicators, including father's occupational stratum, race, ethnicity, and family ancestry. These ascriptive criteria were strongly associated with early job placement and, to some extent, replaced talent, education, and experience in law firm recruitment.¹²⁰ Other profiles of lawyers in non-urban practice settings confirm that the existence of the Chicago/Detroit style prestige hierarchy is tied to demographic heterogeneity in the lawyer population and differentiation among clients. A recent analysis of lawyers with rural practices showed that when the attorney population was ethnically and culturally homogeneous and most of the clients were individuals, the prestige hierarchy was income, rather than client, driven.¹²¹

Some might argue that large law firm practice is changing in ways that may affect the prevalence of the Chicago/Detroit style prestige hierarchy. If one assumes, for example, that competition for business clients is greater than it

115. Laumann & Heinz, *supra* note 108, at 180-81.

116. *Id.* at 185.

117. Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941, 951-57 (1991); Ricki Lewis Tannen, Reporter, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 918-20 (1990).

118. Ladinsky, *supra* note 114, at 127.

119. *Id.* at 128.

120. *Id.* at 136.

121. LONDON, *supra* note 26.

used to be and that large firms are increasingly more likely to represent individuals because that work has become more available and lucrative, one might conclude that high prestige will cease to be correlated with the representation of business clients. That prediction, however, is probably incorrect to the extent that it relies upon the inference that high prestige for large firms is currently tied to a clientele comprised exclusively of businesses. It is not the absence of individual clients that sets large law firms apart, but rather their access to business clients in an urban environment that distinguishes—and will continue to distinguish—them.

In any event, lawyers held in high esteem acquire power within the profession (which means others defer to their wishes) because lawyers with lower prestige attribute a host of good qualities to them and deem it appropriate that they rule in bar matters (even though their views may be authoritarian and unrepresentative).¹²² In fact, high-prestige lawyers are seen as particularly qualified to determine the ideals of professional behavior because they are viewed as embodying those very traits—the legal community's defining "core values"—that are the essence of its occupational ideology.¹²³ In this manner, the patterns of power, prestige, and influence replicate themselves and ensure that only a privileged few remain at the active center of the profession's influential associations.¹²⁴

3. Occupational Ideology

An occupational ideology is a collectivity of specific views on the proper nature of the occupation's tasks and a profile of the characteristics of a real member of the occupation.¹²⁵ Normal and deviant occupational behaviors are determined by their proximity to the ideological ideal. The legal profession's occupational ideology is largely the product of large law firm notions about what it means to behave like a real lawyer or true professional.¹²⁶ The collective self-interest of large law firms was, and remains, the primary determinant of the legal profession's occupational ideology. As Nelson's analysis shows, large law firms fully ascribe to what he terms "the ideology of professionalism."

122. As Nelson's hierarchy theory would predict, large firms reproduce the same cycle of power, prestige, and deference within the firm's internal hierarchy. See NELSON, *supra* note 43, at 217 (quoting an associate within a large firm as saying that he viewed the firm's governing lawyers as "the cream that had risen to the top").

123. *Id.* at 162.

124. MOORE, *supra* note 35, at 149-56. Political theory calls this process "legitimation," defined as the majority's belief that institutionalized inequality in the distribution of primary resources is right and reasonable. L. Richard Della Fave, *The Meek Shall Not Inherit the Earth: Self-Evaluation and the Legitimacy of Stratification*, 45 AM. SOC. REV. 955, 955 (1980).

125. Salaman, *supra* note 27, at 225.

126. NELSON, *supra* note 43, at 3.

Consequently, those who openly espouse a law-as-business mentality are, in accordance with the dominant occupational ideology, categorized as deviants even though they may be representative of the majority of lawyers.¹²⁷

My thesis is that the interplay between large law firm occupational ideology and two other related factors is responsible for the existence of class bias in civility codes. The first factor is that prestige-based professional power produces a paradoxical relationship with others in the profession. The very things that distinguish the high-status lawyer from his peers, generate prestige, and propel him to the active center of the profession, also guarantee that his interests are often at odds with those of lower status lawyers.¹²⁸ Large law firms tend to rationalize their often self-serving and aggrandizing actions in the name of professionalism. While that may "increase the power and prestige of [the] elite . . . and add[] to the appearance of autonomy and impartiality [for] the legal professional as a whole,"¹²⁹ it also widens the gap between professional ideals and actual conduct for the majority of lawyers. Thus, in the context of civility codes, large firm influence will result in codifications of professional standards of behavior that: (1) are descriptive of the existing conduct of high-status/high-prestige lawyers (thus making compliance easier for elite lawyers and more difficult for lower status/lower prestige lawyers); and (2) advance the interests of large law firms and their clients which are often at odds with the interests of the majority of lawyers and their clients.¹³⁰

The other factor at work here is the disparity between the ideal cultural and socio-economic lawyer profile, upon which the profession's occupational ideology is based, and the actual demographic diversity of the legal profession. The standards of appropriate professional conduct for lawyers were extracted from mid-nineteenth-century American culture. As one scholar has explained:

The middle class in America matured as the Mid-Victorians perfected their cultural control over the release of personal and social energies. And the professions as we know them today were the original achievement of Mid-Victorians who sought the highest form in which the middle class could pursue its primary goals of earning a good living, elevating both the moral and intellectual tone of society, and

127. *Cf. id.* at 283-85 (questioning the continuing validity of the class alliance theory of large law firms).

128. MOORE, *supra* note 35, at 167.

129. LARSON, *supra* note 50, at 168.

130. NELSON, *supra* note 43, at 232 (large firms enthusiastically attempt to maximize their clients' interests).

emulating the status of those above one on the social ladder.¹³¹

As we have observed, during that critical period, the ABA and large law firms were in the hands of a demographic aristocracy.¹³² Those elite lawyers shared certain cultural traits in common—they were upper-middle class, Anglo-Saxon, male Protestants. The culturally contingent components of their behavior, although no longer typical, have been idealized and embodied in modern professional ideology and, more recently, in civility codes.¹³³ This anomaly occurred because civility code drafters confused historical symbol with substance. They observed characteristics which were common at one point in time and mistakenly made “those attributes . . . definitional to all parties,” including elite lawyers (who are, of course, more likely to conform to the cultural ideal) and other lawyers who came from more diverse socio-economic and cultural backgrounds.¹³⁴ Thus, the social and cultural components of the ideals of professionalism are to some extent anachronistic.

The preceding analysis suggests that civility codes are heir to two particular forms of class bias. First, the codes maximize the interests of large law firms and their clients; and second, they codify Victorian notions of professional and civil behavior. Parts II, III, and IV explore manifestations of the first form of bias; Part V addresses the second.

II. AVOIDING CONSUMER-ORIENTED REFORM THROUGH RHETORIC

The legal profession is under pressure from powerful external and internal forces.¹³⁵ Among other things, court resources are strained to the breaking point, and civil cases routinely take years to come to trial. Many members of the public do not know their legal rights or have the resources to vindicate them. The system of lawyer self-regulation is deemed by many to be a failure.¹³⁶ Other factors are reshaping, perhaps fundamentally, the practice of law. Most notable among these forces are greater competition among lawyers, greater competition from clients, greater competition from lay people, the blurring of the lines between law and other occupations, new disloyalty of lawyers to firms, and increased judicial control of lawyer conduct.¹³⁷ The exigency of these conditions makes the civility codes, which are advanced as a remedy to this

131. BURTON J. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* 80 (1976).

132. GERSTL, *supra* note 45, at 14-15.

133. BLEDSSTEIN, *supra* note 131, at 185-86.

134. MOORE, *supra* note 35, at 116-19.

135. *Interim Report*, *supra* note 3, at 391-405 (identifying case management demands and overloaded dockets as cause of incivility).

136. LIEBERMAN, *supra* note 6, at 197-211.

137. Gillers, *Words Into Deeds*, *supra* note 3, at 80-81.

situation, seem naive and quietistic.

The profession's discordant response is not unusual, however. In the past, the bar has avoided confronting overwhelmingly difficult realities by retreating to dreamy, romantic, normative visions of the lawyer's role and the practice of law.¹³⁸ In this idealized world, there are dragons to slay. In the late 1970s and early 1980s, elite lawyers aimed their rhetorical wrath at perceived pervasive lawyer incompetence.¹³⁹ In the mid-1980s, scrutiny shifted from competency to professionalism. The bar has now narrowed its focus to civility.

The escapism and conservatism of the normative vision embodied in the civility codes can be discovered by asking how the practice of law would change if everyone complied completely with their dictates. In the first instance, the status quo in the provision of legal services would not change dramatically. More lawyers would donate legal services to the poor, but the vast majority of poor, working class, and middle class people would have no greater access to legal services. Consequently, a large portion of the existing need for legal services would remain unfulfilled. Continuing problems with scarce court resources and congestion would mean that those with few resources to withstand expense and delay would remain disadvantaged. Those with greater resources would be better equipped, as they are now, to pursue their rights notwithstanding the scarcity of legal resources. Very few lawyers would be disciplined for any form of unethical conduct, and velvet-gloved (courteous) misbehavior would not be sanctioned. The entities with authority to discipline lawyers would continue to ignore the vast majority of consumer complaints. No organization representing lawyers would lobby for higher taxes to pay for improving the justice system by hiring more judges and creating alternative forums for dispute resolution.

What would change? Life for lawyers and judges would be smoother, more pleasant, because they would be less fractitious in their dealings with one another. Some lawyers (probably high-prestige lawyers or those whose backgrounds make them value civilized combat) would be happier and feel more

138. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 804 (1991) (calling the normative visions that dominate legal discourse "dreamy" and "romantic").

139. See generally Bryant G. Garth, *Rethinking The Legal Profession's Approach To Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639-87 (arguing that the bar's approach to competency issues was anti-competitive and elitist, and, at 650, that it was "primarily the profession's issue—not that of the general public"). What clients were complaining about then, as now, mostly was neglect. *Id.* at 675. A true consumer-oriented perspective on the competency question would "preserve the pro-access, pro-client autonomy direction of recent professional reforms while providing the means for clients: (1) to make intelligent choices regarding legal services investment; (2) to evaluate the results of professional services; and (3) to obtain redress if lawyers have provided less than was promised." *Id.* at 671.

fulfilled as professionals. The public's awareness of litigation as a brutal battle pitched on an uneven field would be lessened. Conflict would be obscured and suppressed beneath a layer of bland and courteous exchanges among lawyers. Lawyers would strive to please and impress other lawyers with their good manners and avoid communicating single-minded devotion to their clients' interests.

Some might find this scenario desirable, but the profession's history with this sort of endeavor suggests its efforts will, in any event, come to naught. The bar's experience with pro bono service illustrates why this is so. The traditional view of pro bono service is that providing legal services to the poor is integrally related to professionalism.¹⁴⁰ The professionalism-based rationale is three-fold. First, pro bono service meets a critical societal need for legal services. Second, it is a quid pro quo for the privilege of self-regulation. Third, it helps make true public-spirited professionals out of lawyers and counter-balances their greed. The second rationale is by far the most important to lawyers who see pro bono service as a way to demonstrate their "institutional commitment to altruism ahead of self-gain."¹⁴¹

The singularity of the focus on pro bono service as the symbolic centerpiece of the profession's commitment to public service betrays an aristocratic, *noblesse oblige* attitude toward societal problems. Lawyers associated with large firms favor voluntary pro bono, but consider more exacting proposals to be an unnecessary and unseemly interjection of politics into an otherwise genteel discourse.¹⁴² But even that aspect of the debate is suffused with upper class biases. Studies show that the willingness of lawyers to engage in pro bono service is directly tied to their income.¹⁴³ A pro- pro bono attitude is, therefore, correlated with professional prestige. The unspoken quid pro quo may not be as high-minded as the bar's rhetoric makes it sound. Pro bono service can be viewed as token charity to stave off more far-reaching reform efforts. In other words, the privileged are philanthropic to ensure that the public does not seriously challenge a system that guarantees lawyers a monopoly and authorizes them to extract exorbitant fees for their services.

The debate is hypocritical at another level as well. Studies indicate that,

140. Jennifer G. Brown, *Rethinking "The Practice of Law,"* 41 EMORY L.J. 451-66 (1992); *Blueprint*, *supra* note 2, at 297-99 (encouraging increased voluntary participation in pro bono activities as a way of alleviating the unavailability of legal services).

141. Gillers, *Words Into Deeds*, *supra* note 3, at 81.

142. *See e.g.*, Terrell & Wildman, *supra* note 2; Sammons & Edwards, *supra* note 4, at 489 (identifying the authors Terrell and Wildman of *Rethinking "Professionalism,"* 41 EMORY L.J. 403 (1992), as members of the King & Spaulding law firm and concluding that "[a]ll of us profit when a powerful law firm searches for itself").

143. Schneyer, *supra* note 2, at 375 n.77.

in the final analysis, lawyers do not actually value public service, because lawyers generally hold law firms known for altruism in low esteem.¹⁴⁴ As one scholar has stated: "We'd rather wave the flag of professionalism, and insist that everyone else salute it, than dig into our pockets and help realize the promise of equal access to justice as our institutional responsibility."¹⁴⁵

For the public, ensuring the availability of legal services to everyone is not a controversial issue—they see it as a straightforward priority.¹⁴⁶ Viewed in that clear light, the profession's efforts seem dreadfully anemic in the face of the enormity of the unmet need for legal services.¹⁴⁷ Continuing to issue calls for voluntary pro bono service is an enigmatic response to the reality that the profession's pro bono contribution has never made a dent in the need.¹⁴⁸

If the profession continues to utilize rhetoric and symbolic legislation as a preferred alternative to institutional reform, it might, at a minimum, consider less aristocratic, more consumer-oriented, themes than advocating pro bono service. For example, the bar could focus on increasing the number of minority lawyers.¹⁴⁹ It could also explore why legal fees have not dropped to the extent they should have after barriers to competition (like minimum fee schedules and prohibitions against advertising) were removed.¹⁵⁰ Finally, the bar could initiate a program to educate the public about the importance of the contributions made by lawyers who represent individuals on a contingency fee basis, strive to inform all citizens about their legal rights, and make renewal of public confidence in the adversarial system and ethic a primary goal.¹⁵¹

III. REVERSE EVOLUTION

Discussions about professionalism and civility tend to devolve into ill-informed analyses of matters that are also governed by the disciplinary rules regulating lawyers. This phenomenon may be symptomatic of the arbitrariness

144. Laumann & Heinz, *supra* note 108, at 202 (finding that the higher the reputation of a specialty for altruism, the lower its rank in the professional prestige order).

145. Gillers, *Words Into Deeds*, *supra* note 3, at 80, 81.

146. *What America Really Thinks About Lawyers (And What You Can Do About It)*, NAT'L L.J., Aug. 18, 1986, at S-8 (a 1986 poll showed that 94% of the public believes that the right to a lawyer should not be conditional on the ability to pay for one).

147. Brown, *supra* note 140, at 457.

148. Baldwin, *supra* note 2, at 439-50 (arguing that legal services programs are not addressing the vastness of the unmet need for legal services).

149. Talbot D'Alemberte, *Racial Injustice and American Justice*, A.B.A. J., Aug. 1992, at 58-60 (detailing the underrepresentation of minorities in the legal profession and the lack of legal services to the poor and minorities).

150. Penegar, *supra* note 54, at 479.

151. Freedman, *Brief History*, *supra* note 2, at 22.

of the distinctions between civility and disciplinary matters. Some argue that civility codes are distinctive because they impose obligations above and beyond the minimum requirements of disciplinary rules and ethics codes. The overlap may, however, be unavoidable because of the drafters' assumptions about the relationship between civility and lawyer regulation. Significantly, they assumed that the objectives of the civility codes could not be accomplished through proper enforcement of the disciplinary rules, rules of civil and criminal procedure, and other existing mechanisms of lawyer regulation. One wonders why civility advocates gave up on mechanisms that are already in place in favor of new, symbolic codes. In crafting the civility codes, they may have abandoned potentially effective means of controlling behavior in favor of replicating, in yet another legislative context, what we know does not work. In other words, lawyer regulation may be evolving backwards.

Civility codes are imprinted with the same biased ideological stamp that mars the *ABA Model Code of Professional Responsibility* and *ABA Model Rules of Professional Conduct*. These documents, as previously shown, are products of the profession's skewed occupational ideology. If the civility codes reproduce the worst aspects of the *Model Code* and *Model Rules*, then one might conclude that they will, at the very least, experience similar difficulties. Civility codes appear to have inherited five infirmities from the *Model Rules*.¹⁵²

First, these codes are premised upon a too generous view of human nature and adherence to the ethics of liberalism. At first blush, it may seem anomalous to argue that the mindset of conservative lawyers would produce a professional code that embodies an optimistic view of human nature and implements liberal ethical tenets. Upon closer examination, however, this seeming contradiction dissolves into paradox. Although lawyers' creeds may be substantively liberal (defined as public-spirited), the altruistic provisions of their codes are rarely enforced. Unlike their creeds, the behavior of lawyers is, in practice, quite cynical and mostly beyond the reach of censor or discipline. Lawyers have "developed a group spirit and a group conscience, but the[] general attitude [of the members] . . . [is] one of intense individualism . . . unsympathetic to social planning, but strongly disapprov[ing] of competition and self-interest."¹⁵³

Civility codes presume that people are either good and self-motivatingly courteous or beyond the pale of civilized conduct. Professor Sam Dash has,

152. See generally Amy Mashburn, *Pragmatism and Paradox: Reinhold Niebuhr's Crucial Social Ethic and the Regulation of Lawyers*, 6 GEO. J. OF LEGAL ETHICS 737, 782-95 (1993) (demonstrating that the *ABA Model Rules of Professional Conduct* fail to implement five strategies that a Niebuhrian ethic would suggest). The five infirmities discussed *infra* in part III are based on those that a Niebuhrian analysis identified in the *Model Rules*.

153. MARSHALL, *supra* note 80, at 151.

perhaps inadvertently, captured this sentiment:

The only way lawyers are going to change the image is by their daily conduct . . . not by creeds they put on their wall. If you're a professional, you don't need a Boy Scout oath. If you're not a professional, a Boy Scout oath is flim-flam.¹⁵⁴

The drafters' decision to make compliance voluntary is a tell-tale manifestation of a liberal approach to bad behavior. Civility is deemed as "an attitude, a closely held value that is not taught by rule or sanction, but rather by example."¹⁵⁵

One might consider what the drafters would have done differently if they reasoned from a less charitable view of human nature—one that presumes that most people are self-interested and have the capacity and, in varying degrees, the inclination, to misbehave. This alternative path leads to the conclusion that everyone would benefit from explicit, carefully crafted, consistently enforced limitations. It may offend aristocratic sensibilities, but a more conservative appraisal of human nature comprehends that discipline requires force. If we really believed that people can be encouraged to treat others better, why not value that judgment with sanctions? We know from our experience with disciplinary systems that unenforced rules are routinely broken. The converse is also true. Studies suggest that the threat of sanctions effectively deters misconduct.¹⁵⁶ Before investing resources in a new code, it seems sensible first to explore whether the existing structure might work if modified and enforced.

Second, the civility codes bear the imprint of the collective's inevitably lower standards of ethics and morality. Being well-mannered and courteous is, in the great sweep of the legal profession's history and mission, a relatively minor virtue. The profession as a collective predictably values the lesser virtues of conformity and the suppression of conflict above all else. Should society automatically validate those egoistic judgments? If we do, we may not be able to encourage individuals to be sufficiently courageous in the advancement of the rights of individuals, and that quality is an essential component of a properly functioning adversarial system. Many of the lawyers who were instrumental in expanding legal rights and making the courts more accessible to those who were historically excluded were not models of civility and decorum. In order to

154. *ABA Recommends Creeds for Bar Associations*, *supra* note 79, at 58.

155. Aspen, *Civility Expectations*, *supra* note 3, at 307.

156. See, e.g., Harold Grasmick & R. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 *LAW & SOC'Y REV.* 837 (1990) (finding that a study showed that threats of shame and legal sanctions inhibited the inclination to commit subsequent offenses of tax cheating, petty theft, and drunk driving).

advance the law and represent their clients adequately, they had to rock the boat and annoy judges and other lawyers.

No matter how many times we recite that lawyers are officers of the court, we know that elite lawyers effectively maximize the interests of their powerful clients. Those same lawyers dominate the legal occupational community and determine its agenda. One must, therefore, question the objectivity of a judgment that the adversary system has failed and is in need of serious modification. The adversary system is under attack in an era when individuals are, for the first time in American history, vindicating their rights in court in significant numbers. Those who represent powerful clients with adequate resources might not be harmed if the adversary ethic is compromised by courtesy requirements, but those who represent individuals occupy a lower rung on the power and prestige ladder. They need institutional reinforcement and encouragement to fight the system, rather than pressure to please other lawyers and be perceived as courteous team players. Depending on one's perspective, much good has been done by lawyers who did not view their primary obligation to be allegiance to the justice system or see other lawyers as their constituency.

If one believes that a lawyer's paramount obligation is to her client, then these codes are troubling because they send profoundly mixed messages about the type of behavior that is valued by other lawyers. They are founded on the aristocratic assumption that being well-mannered is the equivalent of being ethical, moral, or professionally competent. Because of the centrality of the adversarial ethic to our legal system, the exact opposite may be true in some situations. The less courteous lawyers—the real troublemakers—may be advancing the profession's most ideologically cherished goals. On this score, one can justifiably conclude that the system is functioning better today than it ever has. Large corporations and big businesses may prefer a legal culture modeled after the nineteenth-century when very few individuals had access to the justice system and big business dominated and monopolized the demand for legal services. Civility codes are dangerous precisely because they are premised on the notion that things were better in that era.

These codes, like attorney disciplinary systems, underestimate the demoralizing effect on other lawyers when we send ambiguous signals about the value of certain behavior. Why should we assume that lawyers are any more likely to comply with these aspirational creeds than they have adhered to the aspirational rules (or functionally aspirational provisions) in the *Model Rules*? The drafters presume that it costs us nothing to promulgate aspirational codes. That assumption ignores one of the most debilitating characteristics of collectives—their hypocrisy. Making symbolic gestures expends precious credibility capital. Promulgating unenforced conduct codes adds to the accretion of instances in which lawyers say one thing, but do another. Moreover, to

whatever extent informal sanctions (such as the disapproval of one's peers or reference to civility codes to shore up decisions based on other authority) are used, these codes are an invitation to selective, hierarchical enforcement. They may unintentionally lend moral authority to decisions made in other contexts and thereby expand the sphere of their influence beyond that intended by the drafters.¹⁵⁷

Third, civility codes are replete with words like "integrity," "civilly," "courtesy," "professional integrity," "uncivil," "abrasive," "abusive," "hostile," and "obstructive."¹⁵⁸ The drafters apparently believed that these terms have determinant and transcendent meaning. In fact, they are highly contingent, contextual, and indeterminate. Using them in a non-contextual, abstract manner imparts virtually no information at all and creates a dangerous void. These words mean very different things to different people. Perhaps nothing varies more from culture to culture than the rules of etiquette and good manners.¹⁵⁹ Whatever one may think about the relativist debate in ethics generally, civility and courtesy are undeniably contingent on context. Thus, while it may be appropriate to instruct a lawyer to contact opposing counsel before scheduling a motion to compel discovery, it is quite another in our heterogeneous culture to instruct her not to be "disparaging" of opposing counsel.

Fourth, as we have seen, the occupational ideology upon which these codes are based was exclusionary. Specifically, the interests of the public, individuals, other low-status consumers of legal services, and non-elite lawyers are not represented in their foundational value consensus. Because these matters are so indeterminate and contingent, outsiders who are typically under-represented on bar committees, must be included in the power base that produces a legitimate consensus on what values are actually shared by the legal community. In the civility debate, a broader-based coalition might have produced significantly

157. See *Final Report*, *supra* note 10, at 448 (stating that the civility standards "shall not be used as a basis for litigation or for sanctions or penalties," and that they do not affect existing discipline codes or "alter[] existing standards of . . . lawyer negligence").

158. See, e.g., *Final Report*, *supra* note 10, at 448-52 (condemning "[c]onduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive," and directing lawyers to treat others "in a civil and courteous manner, not only in court, but also in all written and oral communications," "abstain from disparaging . . . remarks or acrimony," and "not engage in any conduct that brings disorder or disruption to the courtroom").

159. See generally ROGER E. AXTELL, *GESTURES: THE DO'S AND TABOOS OF BODY LANGUAGE AROUND THE WORLD* (1991) (cataloging the dramatically different, often contradictory, meanings of common gestures and body stances in contemporary cultures). Notions of courtesy, civility, and good manners change over time within any given culture. For an illustration of the extent to which nineteenth-century etiquette ideals were inextricably bound up with the concept of good breeding and emulating the behavior of upper class ladies and gentlemen, see generally JOHN H. YOUNG, *OUR DEPARTMENT* (1881); RICHARD A. WELLS, *MANNERS* (1893).

divergent results, including the possibility of a decision not to spend scarce resources on symbolic gestures at all.

Fifth, and finally, civility codes are built upon a subsurface pessimism about the possibility of governing human behavior through institutional control. This is ironic because the most enduring legacy of liberal political theory has been modern society's faith in the ability of institutions to promote and effectuate reform. By abandoning the existing systems of attorney regulation in favor of the symbolic gesture of adopting a permissive, aspirational code, the drafters betray a lack of faith in the possibility of governance and regulation.

The drafters' expectations that their efforts will have a beneficial effect is all the more puzzling and contradictory in light of our experience with judicial regulation of attorney conduct. Judges currently have broad-ranging powers to constrain and channel the conduct of lawyers, including various statutory and rule-based powers and the inherent authority to regulate the conduct of lawyers. Yet, judicial reluctance to enter the fray and impose order by sanctioning lawyers is often cited as a primary source of escalating incivility among litigators.¹⁶⁰ We also know that lawyers have not been willing to voluntarily conform to civility standards.

We thus arrive full circle at another reason why our abandonment of the lawyer regulatory systems is unfortunate. The code drafters might have considered expanding and strengthening the lawyer regulatory system so that it could adequately perform the function that judges and lawyers are either unwilling or perceive themselves as unable to accomplish. The public is clearly interested in toughening up lawyer regulation; one wonders why lawyers have not made it a centerpiece in their reform efforts.¹⁶¹ Undoubtedly, the system would need to be revamped in order to have any impact at all on the misbehavior of lawyers.¹⁶² Those obstacles, however, are an insufficient reason

160. Aspen, *Promoting Civility*, *supra* note 2, at 498 (judges bear "considerable responsibility" for the rise in incivility); Kanner, *supra* note 4, at 81-83 (growing incivility is attributable to judges' tolerance and unwillingness to do anything about it even when it occurs right in front of them); Marcotte, *supra* note 2, at 43 (noting that a civility code adopted by the Texas Supreme Court uses only the court's inherent powers and existing legal authority and does not create new sanctions); *Blueprint*, *supra* note 2, at 264-65 (judges should take a more active role in litigation and impose sanctions for abuse of the litigation process).

161. Gary A. Hengstler, *Vox Populi*, A.B.A. J., Sept. 1993, at 60 (stating that an ABA poll of the public rated holding lawyers to tougher disciplinary standards as a high reform priority).

162. Geoffrey C. Hazard, *Ethics*, NAT'L L.J., July 6, 1992, at 15-16 (stating that provisions need to be made to provide redress to grievants and to deal more effectively with lawyer neglect and incompetence); *see also* ABEL, *supra* note 31, at 42-157, 297 (arguing that the record of self-regulation is lackluster at best and that lawyers are not very likely to be sanctioned for misconduct); *Blueprint*, *supra* note 2, at 294-95.

to ignore a realistic possibility for consumer-oriented reform that could also potentially accomplish the profession's civility objectives.

IV. SCAPEGOATING CONVENIENT OTHERS

A direct correlation exists between the escalating economic problems of large law firms in the mid-1980s and the profession's increasingly insistent affirmations of a crisis in lawyer misbehavior. This is no mere coincidence. As one scholar has opined, "the fate of professionalism within the American legal system is very much connected to the changes taking place in large firms."¹⁶³ To understand why perpetuation of the civility crisis might be a response that serves the interests of large firms and a characteristically evasive response to economic stress and competition, we must explore the relationship among economic pressures, elite professional imagery, and bar hierarchy.

Large law firms are under intense economic pressures and are pervaded by a sense of anxiety.¹⁶⁴ In the early 1980s they specialized narrowly, billed too many hours, and abandoned public service and social commitments. Lawyers working at Wall Street firms and those modeled after them experienced intense competition for clients, and getting one's bills paid became a preoccupation for many members of the bar.¹⁶⁵ Large firms lost market power when corporate clients moved lawyers in house.¹⁶⁶ Overhead expenses rose dramatically and hourly rates and billable budgets were driven up correspondingly.¹⁶⁷ The starting salaries of young associates rose rapidly. Consequently, despite their *noblesse oblige* pretensions, large firms became known as the places where the "greediest" lawyers go.¹⁶⁸ Billing requirements and the demands of running a law firm as a business in the 1980s were cited as specific causes of incivility among lawyers.¹⁶⁹

This harsh appraisal contrasts sharply with the large law firm's ideal image of itself. That ideal has real value because large firms use imagery to convince their clients that they are the repository of high quality legal services that are worth the high prices charged and unattainable elsewhere.¹⁷⁰ Large firms are able to successfully use their prestige power to cement in the minds of their

163. NELSON, *supra* note 43, at xi.

164. *Id.* See also Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *LAWYERS' IDEALS*, *supra* note 5, at 61 (observing that "distress about lost virtue" is a constant feature of elite law practice).

165. *Blueprint*, *supra* note 2, at 259-61.

166. Gilson, *supra* note 2, at 913-16.

167. *Blueprint*, *supra* note 2, at 253.

168. *Interim Report*, *supra* note 3, at 391-405.

169. *Id.*

170. NELSON, *supra* note 43, at 3, 62-64.

clients, other lawyers, and the public, the conviction that lawyers in large firms are not only more competent than other lawyers, but more ethical as well. To that end, large firms typically refuse to do dishonorable legal work such as divorce law and criminal law.¹⁷¹ The emerging discrepancy between the real and ideal images was, therefore, very threatening to large firms.

Their response, through the organized bars, was to cure the image incongruity by focusing attention elsewhere, on what one historian calls "convenient others," and their perceived shortcomings.¹⁷² This tactic was successful in the broader professionalism project which had previously showcased the ethical shortcomings of solo practitioners. The "subtle or, at least, hidden violations of law and public interest that occur in corporate practice" were obscured by "professional solidarity and at least the appearance of professional behavior" that large firms so effectively portray.¹⁷³ We know that the professionalism movement's convenient other, the solo practitioner, occupied a low rung on the prestige ladder.¹⁷⁴ Not surprisingly, these low-status lawyers have demographic profiles that differ sharply from those of the lawyers who are the majority in large firms. Unlike lawyers in large firms, solo practitioners were from decidedly middle-class socio-economic backgrounds, were of non-northern European ethnicity, attended law school part-time, and were generally regarded as "mediocre performers."¹⁷⁵ They were also easy targets.

Just as the stereotypical marginal solo practitioner was the whipping boy of the competency movement,¹⁷⁶ new entrants, who are portrayed as brash, greedy youths, are becoming the convenient others of the civility crisis. Significantly, the first change in the profession identified in the *Report of the ABA's Commission on Professionalism* as a contributing factor to the professionalism crisis was the increase in the number of lawyers licensed to practice law in the

171. *Id.* at 27. *But see* Schneyer, *supra* note 2, at 391 (questioning whether large law firms are conscious of using professionalism ideology to advance their self-interests).

172. PETER GAY, *THE CULTIVATION OF HATRED* 68-95 (1993).

173. LARSON, *supra* note 50, at 176-77. One commentator has argued that legal ethics is moving towards a paradoxical ethics of appearances: "Grand Blifil is the paradox of an ethical system that promotes the appearance of propriety at the expense of substance—one which rewards people for concealing vices rather than for cultivating virtues." Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 610-17 (1992).

174. LARSON, *supra* note 50, at 176; CURRAN, *supra* note 32, at 1, 12-15.

175. LARSON, *supra* note 50, at 176.

176. Garth, *supra* note 139, at 641 ("The competency concern can be seen as a response to the emergence of an increasingly diverse, fragmented profession dominated by the market rather than by the profession's traditional institutions. It appears to be an attempt to reaffirm the traditional ideal of a homogeneous, highly respected and self-regulating legal profession."). Astonishingly, the ABA, on the basis of a recent poll of the public, has concluded that it "seems the profession has overcome the problem, if it ever existed." Hengstler, *supra* note 161, at 61.

United States.¹⁷⁷ Many others have echoed the sentiment that the proliferation of lawyers is a major component of the civility problem.¹⁷⁸ Of those surveyed by the Seventh Federal Judicial Circuit's civility committee, fifty-two percent agreed that civility problems are most prevalent among young, inexperienced attorneys.¹⁷⁹ Its *Interim Report* tells us that these "young lawyers want to act in the dramatic, abrasive way they see lawyers act on TV."¹⁸⁰ The anti-new-entrant sentiment is evidenced by one of the committee's original recommendations, which targeted "newly hired lawyers" for civility training, but no others. The final report abandoned that telling limitation.¹⁸¹

Despite the power of large firms in professionalism matters, their image initiative may not be working because it, paradoxically, conflicts sharply with the profession's ideology and has not persuaded the public. This image paradox can be illustrated by looking again at solo practitioners. They epitomize the old entrepreneurial dream of succeeding at an independent avenue of social mobility. Nevertheless, solo practitioners are reviled by large firm professional ideology.¹⁸² As Jerold Auerbach has observed: "Ironically, however, it was the low-status lawyer, the target of the Canons, whose generalized practice and range of human contacts most closely approximated the traditional professional ideal of the accessible generalist."¹⁸³

While the targets of the civility movement may not be able to avail themselves of Auerbach's ideological defense, they will find comfort in their clients' assessments of them. Public opinion polls indicate that lawyers who represent individuals are held in higher esteem by their clients than are lawyers who represent highly educated, wealthy, powerful clients. That fact suggests that a small minority of American lawyers, those at large law firms, are the ones who have the most serious image problem with their clients. Their efforts to persuade their clients and the public that the problem lies elsewhere—with solo practitioners, those who represent individuals, or new entrants—has apparently been unsuccessful.

That conclusion finds further support in a recent survey, which showed that African-Americans, Hispanics, the poor, and women have a more favorable opinion of the legal profession than do college-educated White males with above-

177. *Blueprints*, *supra* note 2, at 251-52.

178. Samborn, *Taming Loose Cannons*, *supra* note 9, at 1; *cf. Blueprint*, *supra* note 2, at 271-73.

179. *Interim Report*, *supra* note 3, at 380.

180. *Id.* at 375.

181. *Compare Interim Report*, *supra* note 3, at 377, with *Final Report*, *supra* note 10, at 447 (recommending civility training for all lawyers).

182. LARSON, *supra* note 50, at 176.

183. AUERBACH, *supra* note 55, at 51.

average salaries. Those who deal with lawyers more regularly, such as businessmen, tend to have the most negative perceptions of the profession.¹⁸⁴ Those who held lawyers in the lowest regard were forty-five to fifty-nine years of age, knew a lot about the legal system, were upper-middle class, and had high incomes. In particular, college graduates, professionals, executives, retirees, and Whites thought the least of lawyers.¹⁸⁵ The new "rights consciousness"¹⁸⁶ and the lifting of market restrictions against advertising may be fueling some sort of image crisis, but, generally speaking, the public does not think poorly of lawyers who represent individuals rather than businesses.

The image paradox is now fully apparent. Large firms, through the professionalism project, are deflecting attention to the shortcomings of convenient others within the profession, but the public and many members of the profession perceive large law firms themselves to be a major part of the problem.¹⁸⁷ Statistically, heightened perceptions of incivility among lawyers are directly correlated with the presence of large law firms. According to the Seventh Circuit's study, perceived abuses were highest in the area that included Chicago, where sixty-one percent of respondents found civility lacking (as compared to forty-two percent of all respondents).¹⁸⁸ More pointedly, in a survey of 234 corporate executives and judges conducted by the ABA's Commission on Professionalism, only six percent of corporate users of legal services rated "all or most" lawyers as deserving to be called professionals. Only seven percent saw professionalism increasing among lawyers, while sixty-eight percent said it had decreased over time.¹⁸⁹

What emerges from the surveys is a picture of large law firms as a deviant subculture where bad behavior is reinforced and rewarded.¹⁹⁰ Gung-ho associates, desperate to meet billable hour requirements, make life miserable for everyone. Downtown firms are deemed arrogant and disdainful of their opponents.¹⁹¹ In fact, many sources of the perceived rise in incivility are exclusively attributable to large firms, such as escalating Wall Street salaries,

184. Hengstler, *supra* note 161, at 61.

185. Randall Samborn, *Anti-Lawyer Attitude is Up*, NAT'L L.J., Aug. 9, 1993, at 20.

186. Terrell & Wildman, *supra* note 2, at 415.

187. Kenneth Jost, *What Image Do We Deserve?*, A.B.A. J., Nov. 1988, at 461 (quoting Professor Monroe Freedman) (noting that the Bar Association does nothing to correct the public's misunderstanding of the role of criminal defense lawyers).

188. Hansen, *supra* note 4, at 22.

189. *Blueprint*, *supra* note 2, at 254.

190. By deviant subculture, I mean one where offending, delinquent behavior is so prevalent that members actually conform by offending and violating the norms of the larger culture in which the subculture resides. M. PHILIP FELDMAN, *CRIMINAL BEHAVIOUR: A PSYCHOLOGICAL ANALYSIS 196-97 (1977)* (espousing the deviate subculture theory of delinquent behavior).

191. Kanner, *supra* note 4, at 98-99 n.81.

large bonuses, lawyers' roles in the savings and loan crisis, and the greed-driven collapses of mega-firms like Finley, Kumble.¹⁹² Lawyers complain that large firms are hypocritical and arrogant. The same lawyers who preach professionalism and civility at bar meetings work at firms that "pride themselves on being A-- H----"¹⁹³ and "threaten[] everyone with Rule 11 sanctions."¹⁹⁴ Elite lawyers also approve far-reaching ethical prohibitions against discriminatory conduct,¹⁹⁵ but work in an environment generally perceived to have serious problems with sexual harassment and gender discrimination.¹⁹⁶

Many believe that large firms simply see themselves as untouchable.¹⁹⁷ They are at the top of their world,¹⁹⁸ where high prestige entitles them not only to deference from other lawyers, but to the benefit of every doubt in disciplinary situations. A class-conscious appraisal of the civility problem suggests that large law firms may be using civility codes to avoid addressing problems for which they are largely responsible.

V. CLAMPING DOWN ON NON-CONFORMITY

Diversification of the legal profession is one of the frequently cited causes of the civility crisis.¹⁹⁹ Some scholars soundly condemn the suggestion that compliance with ethical requirements or conformance to the ideals of

192. Jost, *supra* note 187, at 46.

193. Aspen, *Promoting Civility*, *supra* note 2, at 501 (Aspen "suspects" that he did not mean what he said).

194. *Id.* at 497 (quoting as illustrative of the Committee's survey results a lawyer who decries large firms' policy of seeking Rule 11 sanctions as a "routine strategy").

195. That rule provides:

It is professional misconduct for a lawyer to:

(g) manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not preclude legitimate advocacy with respect to the foregoing factors.

The Standing Committee on Ethics and Professional Responsibility addition to Model Rule 8.4 of the A.B.A.'s *Model Rules of Professional Conduct*. Memorandum of Tom C. Smith, dated October 19, 1993, Council Agenda Item 27—Revision of Amendment to Rule 8.4.

196. Thom Weidlich & Charise K. Lawrence, *Sex and the Firms: A Progress Report*, NAT'L L.J., Dec. 20, 1993, at 1, 22-25.

197. LIEBERMAN, *supra* note 6, at 57 (recounting an instance in which a judge told a lawyer "Wait a minute, counsel, . . . [t]he firm you're talking about is [Davis, Polk & Wardwell], [y]ou can't charge them with fraud!"); Monroe Freedman, *Law In The 21st Century*, 60 FORDHAM L. REV. 503, 505 (1991) (painting a picture of the future not too different from the present where ethical obligations are enforced only against solo practitioners and those who represent poor people).

198. MARSHALL, *supra* note 80, at 161 ("[I]n law . . . a man at the head of his profession is on top of the world.").

199. See, e.g., Terrell & Wildman, *supra* note 2, at 413-14 (positing that demographic diversification has created "moral diversity").

professionalism might be tied to gender, race, ethnicity, or class origin. The following is illustrative of their outraged response:

To conclude from these changes that democracy is the enemy of conformity to ethical standards is preposterous. If lawyers no longer *resemble* each other as much as they once did, or if they *sound* different, or do not exhibit identical social graces, there is no basis in these outward indices of greater heterogeneity even to speculate that attitudes toward or capacities for promoting ethically responsible behavior had changed accordingly. It would reflect the rankest class consciousness to suppose a more demographically diverse legal profession is one that includes more lawyers than a less diverse one who are more likely to lie to courts, cheat their clients, violate confidences or over-reach their adversaries. These are relevant issues of integrity. The capacity for responsible moral choice is highly *individualistic*. Accordingly, if one were to suggest that a correlation exists in these terms, then it would have to be assumed that the new entrants to the profession from hitherto under-represented segments or groups implies that such persons have come, not merely from across town, so to speak, but from a different civilization!²⁰⁰

However appropriate these observations may be in the larger context of morality or ethics, they have an entirely different meaning in the admittedly contingent arena of manners and deportment. Civility codes are not neutral; they carry the imprint of a class-contingent image of civility and courtesy. The prestige hierarchy, patterns of deference, and the drafter's patrician notions of civility suggest that the behavior of lawyers will be perceived differently along class lines. Accordingly, lawyers who cannot or will not conform to those class-contingent conceptions of well-mannered and properly deferential behavior will fare differently than those whose cultural profile and inclinations correspond more closely to the image embodied in the codes. The drafters adopted, explicitly and by omission, an upper-middle-class view of professional conduct. Behavior that deviates from upper-middle-class norms will be more likely to be deemed discourteous.

We have previously seen that a rigid prestige hierarchy exists within the bar. The flip side of prestige is an entitlement to deference. Deference often means "commitment by lower social groups to a moral order which legitimates their own subordination."²⁰¹ The behavior that prompted the promulgation of the civility codes was a perceived breakdown in the system of civilized

200. Penegar, *supra* note 54, at 478 n.13.

201. R. Martin & R. Fiyer, *The Deferential Worker*, in WORKING CLASS IMAGES OF SOCIETY 98 (1975).

discourse. The codes, however, are completely open-ended; they prescribe some behavior, but the directives to avoid engaging in discourteous conduct are without content. Leaving these dangerous gaps without content means that the prevailing power structure within the bar will be able to fill the void with its self-serving norms. Those norms are, both historically and ideologically, patrician and hierarchal.²⁰²

A deference-based civility code is essentially aristocratic in nature because it embodies the upper class's ideal of polite deference to one's civil and political superiors. Patrician notions of civility are "rooted in conventions of polite intercourse and automatic deference associated with the dominance of a patrician elite in English civil society" and require "a private and personal attentiveness to the forms of polite and 'civil' interaction between superiors and inferiors in a rank-ordered society."²⁰³ It is hardly coincidental that calls for civility resonate with comparisons to a British system perceived to be a model of decorum and restraint.²⁰⁴ These favorable comparisons are ironic because the British system is so bounded by the class origins of its distinctions among lawyers²⁰⁵ and the notoriously exclusionary practices of the Inns of Court.²⁰⁶

With a patrician, deference-based system of social interaction, the elite espouse a political formula that identifies and rewards their traits as superior by attributing to those traits intrinsic rationality, intelligence, and morality. The powerful are seen as having more positive characteristics than those with less power (prestige).²⁰⁷ As the ideology of professionalism would predict, high-prestige lawyers are seen as embodying the most cherished values in greater measure than lower status lawyers. In this manner, the ruling elite persuade others that they deserve to rule because they more closely approximate the biased ideal.²⁰⁸

202. Nineteenth-century manners were openly conceived as an "expression of submission from the weaker to the stronger." WELLS, *supra* note 159, at 26.

203. Andrew Fraser, *Turbulence in the Law School: Republican Civility vs. Patrician Deference?*, 5 AUSTL. J. L. & SOC'Y 44, 45 (1988-89).

204. John R. Lane, *Civility in the Practice of Law: An Anglo-American View*, FED. B. NEWS & J. 310-12 (June 1992) (arguing that the English Inns of Court have successfully "institutionalized civility"); Burger, *Opening Remarks*, *supra* note 3, at 24-25, 27 (describing English courts as a "model of disciplined and calm civility"; referring to English barristers as "the most tightly regulated, the most tightly disciplined advocates in the world, and nowhere can we find more zealous and more effective advocacy than in the courts of England").

205. BLEDESTEN, *supra* note 131, at 20.

206. J. RAYNOR, *THE MIDDLE CLASS* (1969) (study of the British middle class); G. ROSE, *THE WORKING CLASS* (1968) (study of the British working class); GEORGE D.H. COLE, *STUDIES IN CLASS STRUCTURE* 120, 150 (1955) (study of the highly structured and complex British class system, "top class" comprised of higher professions, including lawyers).

207. Fave, *supra* note 124, at 962.

208. *Id.* at 956-58.

Elite lawyers have thus rigged the deal: they will be seen as more courteous because of their high status, and their high status will entitle them to deference from others, which will in turn facilitate their capacity to appear more courteous than others. They will be challenged less frequently than other lower-status lawyers, and if they are challenged and a credibility battle ensues, they are more likely to be believed by others. The process by which the deal is rigged is called "staging." As one sociologist explains: "Highly placed individuals, by virtue of their greater wealth and power, are able to control or stage their encounters with subordinates in such ways to impress them. Appearing calm and in control are staging devices."²⁰⁹ Through staging, high-status lawyers may accomplish two things. First, they may develop a common law of civility that showcases their strong points, and, second, they will be able to shield their shortcomings from scrutiny.²¹⁰ The less powerful cannot stage their encounters with others in this way. Consequently, their deviance from behavior norms is more often visible and verifiable.²¹¹

Even though high-status individuals are interested in appearances, underneath the polite facade they are, in fact, the least inclined to acquiesce to any form of authority.²¹² This trait, perhaps more than any other, sets them apart from members of the lower classes. Studies show that social class status is positively associated with levels of personality development and that members of the lower classes attain lower levels of personality development.²¹³ The working class personality is other-directed, meaning "dominated by an insatiable need for . . . approval and by the rather diffuse anxiety which accompanies this need."²¹⁴ In contrast, members of the middle classes are internally focused and do not seek or need the same level of approval. Not surprisingly, members of the working classes value behavioral conformity rather than resistance to authority.²¹⁵

That result has been confirmed by studies that take another approach.

209. *Id.* at 963.

210. *Id.*

211. The Rambo metaphor is instructive in this regard. Those who use it typically focus on Rambo's inappropriate, excessive, and unlawful actions. At the beginning of his saga, however, Rambo was a law-abiding citizen who was victimized by those with authority and staging power. He was brutalized while in the custody of law enforcement officials who were punishing him for refusing an unreasonable request to leave a small northwestern town. The transgressions of those with the imprimaturs of authority and approval do not concern the commentators, whereas Rambo's take-no-prisoners response has become synonymous with "unprofessional." *FIRST BLOOD* (Carolco Pictures Inc. 1982).

212. Fave, *supra* note 124, at 962 n.10.

213. MARGARET J. LUNDBERG, *THE INCOMPLETE ADULT: SOCIAL CLASS CONSTRAINTS ON PERSONALITY DEVELOPMENT* 182 (1974).

214. *Id.* at 124.

215. MELVIN L. KOHN, *CLASS AND CONFORMITY: A STUDY IN VALUES* 21 (1969).

These other studies establish a connection between low self-esteem and socio-economic class. Among adults, objective socio-economic "position does bear a strong and clear relationship to where one sees oneself in the stratification system"²¹⁶ These studies detail the relationship between low self-esteem and plasticity, a concept that refers to susceptibility to external and particularly to social forms of influence. The studies show a correlation between plasticity and low self-esteem. Thus, the behavior of those with low self-esteem tends to be more greatly influenced by social cues than is the behavior of those with high self esteem.²¹⁷ Plasticity, like other-directedness, signals a tendency to yield to external cues and seek the approval of others and conform to their wishes.²¹⁸

Outrage at the suggestion of a connection between the civility crisis and demographic diversification of the legal profession may be rooted in a generalized discomfort with class issues. Notwithstanding the scientific evidence supporting class-based distinctions, Americans do not like to talk about class and, compared to other cultures, have an impoverished class language.²¹⁹ Class issues are important, however, because studies show that socio-economic class is strongly correlated to the development of certain personality traits and values. In fact, one such study concluded that "class is more powerfully related to values than is any other relevant social factor . . . more controlling than the totality of all other factors."²²⁰ Moreover, civility necessarily implicates individual personality traits and values.

By way of contrast, consider the differing treatment of gender and matters of ethics, morality, professionalism, and etiquette. We may disagree with the notion that one's ability to conform to the adversarial ethic and gender roles are related,²²¹ but we do not consider such discussions illegitimate. Scholars have described what they perceive to be a gender double-bind for women who must rid themselves of traditional feminine characteristics (which include being deferential and submissive to men) to be taken seriously, but may not "play the law game as a man does," which violates sex role norms—"a transgression that

216. M. Rosenberg & L. Pearlin, *Social Class and Self-Esteem Among Children and Adults*, 84 AM. J. OF SOCIOLOGY 53, 57, 67-69, 71 (1978).

217. Fave, *supra* note 124, at 963.

218. Joel Brockner, *Low Self-Esteem and Behavioral Plasticity: Some Implications*, in 4 REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 237, 264-65 (Ladd Wheeler & Phillip Shaver eds., 1983).

219. DOBRINER, *supra* note 37, at 33.

220. KOHN, *supra* note 215, at 71.

221. RAND JACK & DANA JACK, MORAL VISION AND PROFESSIONAL DECISION: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 130-55 (1989).

is negatively judged by others and that can create anxiety in the transgressor."²²² Similarly, in matters of etiquette, some commentators have asserted that "men wrote the unwritten code that governs behavior" and have explored the implications of a lesser tolerance for women's behavior.²²³ One such scholar has concluded that "[s]imply put, in subtleties of custom, structure, and decorum law is still a man's game."²²⁴

My thesis is that the professionalism project seeks to make the practice of law an *upper-middle-class* man's game.²²⁵ Much of the sociological literature describing the changes in the legal profession in the last ten years label it the "proletarianization" of the profession.²²⁶ These works articulate a relationship between the greater heterogeneity of the legal profession and its slipping class status.²²⁷ The choice of terminology is not inadvertent. "Proletarianization" reflects and taps into a sentiment that the diversification of the bar has meant that the legal profession is losing class. Paul Fussell has humorously coined this inevitable downward slide as "prole drift," which he defines as "the tendency in advanced industrialized societies for everything inexorably to be proletarianized."²²⁸

The civility codes are, in part, the legal community's response to prole drift. One hears, in the debate, the condemnation of behavior, that, in the eyes of high-status lawyers, is low class. Evidence of that sentiment is scattered throughout the literature. For example, Judge Bauer has attributed the civility crisis, in part, to the belief that "the way to handle problems is to beat someone up"²²⁹ and former Chief Justice Warren E. Burger objects to shouting and

222. *Id.* See also Gellis, *supra* note 117, at 952-53 (describing survey results that confirm that women lawyers experience the double-bind situations); Tannen, *supra* note 117, at 921-22 (defining as a "catch-22" long-standing beliefs about proper behavior for women that penalize them for assertive advocacy, but punish them for timidity as well).

223. Clarke, *supra* note 4, at 1009-11.

224. JACK & JACK, *supra* note 221, at 132; see also LUCILE DUBERMAN, GENDER AND SEX IN SOCIETY 113 (1975) (characterizing law as a clearly masculine occupation).

225. The prestige hierarchy is also rank-ordered along gender lines. Women lawyers receive less respect, are viewed as less credible, and are assigned lower prestige than similarly situated male lawyers. Gellis, *supra* note 117, at 951-57; Tannen, *supra* note 117, at 918-20.

226. I use this term in a broad sense to encompass both the social and cultural diversification of the profession and the so-called "proletarian thesis" which asserts that the professions are being transformed by a "deskilling" and alienating process analogous to the industrial revolution. Robert Nelson & David Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS, *supra* note 5, at 202-05.

227. Anleu, *supra* note 34, at 184-85.

228. PAUL FUSSELL, CLASS (1983) (containing a humorous description of the structure and attributes of the classes in America).

229. Samborn, *Taming Loose Cannons*, *supra* note 9, at 1.

shrieking lawyers who are ill-mannered and noisy.²³⁰ One of the persistent themes of the civility crisis is that lawyers no longer know how to fight fairly. Instead, they treat opposing counsel like the enemy rather than an "honored opponent,"²³¹ strive to convince their clients that they are "street fighter[s],"²³² and need to be reminded that the law is a "profession and not a street fight."²³³ The underlying fear is that the wrong sort of lawyers are being rewarded with notoriety and clients for bad behavior,²³⁴ "unclean" advertising,²³⁵ rudeness,²³⁶ and "bad taste."²³⁷ Commentators fret that:

Today our talk is coarse and rude, our entertainment vulgar and violent, our music is hard and loud, our institutions are weakened, our values superficial, egoism has replaced altruism and cynicism pervades.²³⁸

Low-class Rambo lawyers are thus portrayed as Hun-like hords threatening the civilization built by upper-middle-class Atticus Finches.²³⁹ In sum, to advocates of civility codes, nothing less than civilization itself is at stake because being civil is the very essence of being civilized.²⁴⁰

The middle-class values etiquette and sees it as integrally related to one's identity as a professional.²⁴¹ A proper attorney is the embodiment of middle-class virtues: "neat, accurate, punctual and honorable."²⁴² Low-class lawyers, on the other hand, are, as Justice Burger points out, rude and noisy. Interestingly, nothing so identifies one as low class as the absence of patrician silence:

230. Burger, Opening Remarks, *supra* note 3, at 23, 26, 27, 30 ("When men shout and shriek and call names, we witness the end of rational thought process if not the beginning of blows and violence and combat"; comparing lawyers who do not know how to behave to "soiled linen or dirty scalpels"; complaining about "insolence and bad manners" and the "ill-mannered and undisciplined noisemakers").

231. *Interim Report*, *supra* note 3, at 390-91.

232. *Id.* at 400.

233. Middleton, *supra* note 10, at 18.

234. *Interim Report*, *supra* note 3, at 384.

235. *Blueprint*, *supra* note 2, at 276.

236. *Interim Report*, *supra* note 3, at 387.

237. *Id.* at 394.

238. *Id.* at 445.

239. Kanner, *supra* note 4, at 107.

240. *Id.* at 101 (containing allusions to chivalry: "The lawyer's equivalent of the code of chivalry—the idea that one is free to deliver hard blows but is not at liberty to strike foul one—is growing quaintly anachronistic.").

241. Clarke, *supra* note 4, at 985-1011.

242. LIEBERMAN, *supra* note 6, at 60.

[T]he prole must register his existence and his presence in public. Thus the conversations designed to be overheard (and admired) in public conveyances The middle class doesn't do these things. Noise is a form of overstatement, and one reason the upper orders still regard selling anything as rather vulgar Thus minimal utterance is high class, while proles say everything two or three times.²⁴³

The bourgeois desire to emulate upper-class behavior is manifest in Victorian directives to lower class aspirants to "bridl[e] . . . [their] tongue" and "always speak in a low voice, and study mildness and sweetness in . . . tone[]." ²⁴⁴ The middle class's aversion to loudness and volatility is not merely a preference for a certain style of deportment. Good manners are equated with virtue because the self-control that conformance to those codes both requires and evidences is, to the bourgeois mind, the epitome of rationality and refinement. "[G]overn[ing] [their] voice" was the precise mechanism by which members of the middle class could obtain and demonstrate mastery over their violent natures and restrain their anti-social impulses.²⁴⁵

According to historian Peter Gay, the notion that anger and aggression can be moderated, managed, cloaked, disciplined, and sublimated was a central tenet of bourgeois ideology.²⁴⁶ Gay discusses two important manifestations of that belief. First, as set forth above, it resulted in efforts to bring rage under the control of rational rules.²⁴⁷ Second, the desire to squelch all evidence of aggression²⁴⁸ "co-existed with aggressive ideas and acts that were not recognized as such."²⁴⁹ These unconsciously aggressive ideas and acts, according to Gay, were directed at others upon whom the Victorians projected the traits they could not tolerate in themselves, including an inability to control their baser nature and impulses. In this respect, bourgeois ideology transmitted "permission[] to hate" those upon whom undesirable traits were projected.²⁵⁰

Other scholars have commented upon the relationship between aggression and etiquette. In a fascinating analysis of the history and meaning of table manners, Margaret Visser argues that:

[t]able manners are social agreements; they are devised precisely

243. FUSSELL, *supra* note 228, at 196-97.

244. GAY, *supra* note 172, at 498.

245. *Id.* at 494, 498.

246. *Id.* at 502.

247. *Id.* at 498.

248. *Id.* at 512.

249. *Id.* at 5-6.

250. *Id.* at 68.

because violence could so easily erupt at dinner. Eating is aggressive by nature, and the implements required for it could quickly become weapons; table manners are, most basically, a system of taboos designed to ensure that violence remains out of the question. But intimations of greed and rage keep breaking in²⁵¹

At mealtime, we, of course, fear that those present will fight over food. Our complicated system of table manners, however, is also directed at preventing a much more threatening and loathsome possibility: cannibalism. Visser explains:

Somewhere at the back of our minds, carefully walled off from ordinary consideration and discourse, lies the idea of cannibalism—that human beings might become food, and eaters of each other.²⁵²

. . . .

Behind every rule of table etiquette lurks the determination of each person present to be a diner, not a dish. It is one of the chief roles of etiquette to keep the lid on the violence which the meal being eaten presupposes.²⁵³

Visser's discussion supports a more generally applicable thesis. It is that in situations where forced interactions between community members necessarily involve conflicts over highly valued resources, rules of etiquette governing those interactions will spring up. Those rules will be elaborate in design, strictly enforced, and conscientiously protected from historical modification. The analogy to the practice of law is apparent. Litigation is a fight over food, a battle for the precious commodities of life, liberty, and property. The process is society's substitute for more violent forms of conflict resolution, but inevitably involves ritualized violence (such as imprisonment) or disguised force (for example, the execution of judgments and the enforcement of injunctions). Lawyers use professionalism ideals and ethical precepts to prevent themselves from becoming dinner in this process.

The assumptions behind the rhetoric fueling the professionalism debate and the attitudes codified in the civility codes are strikingly Victorian in several aspects. Initially, they reflect that era's obsession with suppressing aggression and curbing advantage-taking. Commentators attribute the civility problem to the street-fighting mentality of those who do not understand or will not ascribe to a chivalric tradition of the good, clean, fair, honorable battle. That conclusion is supported by two beliefs that are also reminiscently bourgeois.

251. MARGARET VISSER, *THE RITUALS OF DINNER: THE ORIGINS, EVOLUTION, ECCENTRICITIES, AND MEANING OF TABLE MANNERS*, at xii (1991).

252. *Id.* at 3-4.

253. *Id.* at 4.

The first of these is the surprisingly naive conviction that codes of conduct, however enforced, can effectively defuse rage, constrain brute force, or moderate exercises of power. A more critical appraisal suggests that these codes are successful only in changing the form and appearance of aggression. The lessons of history and human nature teach us that such fundamental and powerful forces simply cannot be managed discreetly or indirectly.

That observation is related to the second bourgeois fallacy upon which courtesy codes are founded—an inability to see, or a refusal to recognize, the force and brutality that have always been required to maintain the illusion of gentility and civility in litigation. In the past, it was probably not much of a strain for elite lawyers to be civil to one another because almost all of them belonged to a homogeneous culture that highly valued that behavior. These lawyers were also secure in the knowledge that their clients' money and their firms' prestige and power would assure that they would be dealt with fairly in the inevitable conflicts among equals. If their opponent was not an elite lawyer, their power and prestige put opposing counsel at an insurmountable disadvantage. Because deference could be compelled, conflict was suppressed, hidden, and avoided. Although it is more difficult to compel deference today, the civility codes can be viewed as an effort to do precisely that.

We also see in these efforts the bourgeois penchant for projecting undesirable traits onto convenient others whom we are then given permission to hate. One could reasonably conclude that large law firms, elite lawyers, and their clients are largely responsible for much of the perceived misconduct cited in support of these codes. The civility codes, however, do not result from that insight or have that awareness as a guideline. Instead, we see evidence primarily of the fervent belief that new entrants and certain types of practitioners are the troublemakers. Consequently, the civility codes, just like the model disciplinary codes before them, give us permission to hate certain practitioners by, among other things, proscribing the very behavior in which the convenient others are more likely than their upper-middle-class colleagues to engage. If, for example, discovery abuse is a major source of incivility, why not address the fundamental advantage that a corporate litigant who can afford to pay its lawyer to engage in extensive discovery has over an opponent with significantly less resources? Why not address the disdainful, "no settlements authorized" attitude that many insurance companies adopt throughout litigation? Perhaps the drafters of the civility codes should have addressed some of the sources of rage, aggression, and advantage-taking rather than attempting to force them under a veneer of politeness. In any event, the adopted strategy will be successful only in giving an additional advantage to those who were already privileged in the litigation process because of their high status and entitlements to deference.

Finally, the tone of the civility reform movement contains strands of a

Victorian fear, rejection, and intolerance of behavior that deviates from White, male, upper-middle-class standards. Significantly, one finds no mention in these reports of the possibility that the observed increase in incivility may be stemming from misinterpretations of primarily *stylistic* differences that reflect radical changes in the social and cultural composition of the legal community. Instead, the lack of self-consciousness about the aggression that always bubbled beneath the surface of even the most genteel law practice, coupled with an over-reaction to the signs of overt aggression in others, caused the drafters of these codes to conclude (I think, erroneously) that the lid is about to blow on the adversarial system. The increasing diversification and inexorable proletarianization of the legal profession are powerful tides that, history predicts, cannot be dammed, harnessed, or channelled very effectively. If that is the case, civility codes probably will neither achieve the stated goal of improving lawyers' manners nor fulfill unarticulated desires to suppress aggression and ritualize conflict.

VI. THE COSTS OF CIVILITY

To observe that civility codes will likely be unsuccessful in accomplishing either the conscious or unconscious objectives of their advocates, however, does not compel the conclusion that these codes are innocuous or can be enacted without costs. An analysis sensitive to the stratifications of power and prestige within the bar suggests, to the contrary, that these types of enactments may be quite costly and dangerous. To reveal the potential costs and risks attributable to class bias in particular,²⁵⁴ one must consider the way these codes would function and compare them with similar regulatory efforts. A jurisdiction contemplating implementing a civility code or professionalism creed can take one of two paths. It can make the provisions mandatory and enforce them through the authority of the courts or the disciplinary system. Alternatively, a jurisdiction can enact a code that is officially unenforceable and designed to function aspirationally, to educate the uninitiated or ignorant, and to encourage compliance through the imposition of informal or social sanctions. Each option produces different problems.

Examining our experience with *Federal Rule of Civil Procedure 11* provides some insight into the problems that may be associated with a judicially

254. Of course, not all of the potential problems with civility codes are attributable to class bias. For example, several commentators have pinpointed possible conflicts between the civility provisions and disciplinary rules. See Hazard, *Civility Code*, *supra* note 3, at 13. Those issues are beyond the scope of this analysis.

enforced civility code or professionalism creed.²⁵⁵ The history of Rule 11 is replete with evidence of the impact that perceptions about lawyers and their clients have had upon the sanctioning process. Studies show that judges tended to regard the lawyers who filed Rule 11 motions as "above average" or "outstanding." Those same judges viewed the lawyers against whom such motions were filed as "below average" or "below minimum standards."²⁵⁶ A corresponding pattern emerged when surveys compared moving attorneys and sanctioned attorneys' assessments of each other's professional reputations. Sanctioned attorneys were more likely to rate opposing counsel as "above average" to "outstanding," whereas moving attorneys were more likely to rate sanctioned lawyers as "average" to "below minimum standards."²⁵⁷

Implicit in the views expressed in these studies are beliefs that certain types (classes) of lawyers are more competent and rule-abiding than others or that certain types of claims are more likely to be frivolous. Some might argue that those opinions are objectively correct. In order to make that argument, however, one would have to demonstrate that certain types of litigants and their lawyers are, by virtue of their status alone, more likely to be rule-breakers. And that argument would be difficult to make because studies show that Rule 11 motions are filed in disproportionate numbers against plaintiffs' lawyers and in certain types of cases. These studies confirmed anecdotal observations that plaintiffs' lawyers were much more likely than defendants' lawyers to have Rule 11 motions filed against them. Plaintiffs' lawyers were the targets of sixty-six percent of the total number of Rule 11 motions filed in the jurisdictions studied. Plaintiffs' lawyers were also more likely to be sanctioned when Rule 11 motions were filed against them than were defendants' lawyers. The surveys also revealed that civil rights cases generated a disproportionately high percentage of Rule 11 motions.²⁵⁸ Most importantly, studies demonstrated that Rule 11 has

255. Parts I.B and III, *supra*, identify many of the difficulties that might predictably result from assignment of enforcement of civility provisions to existing disciplinary systems based on the *ABA Model Rules of Professional Conduct* or the *ABA Model Code of Professional Responsibility*. Among other things, those systems are plagued by problems of selective, hierarchical enforcement and, in general, under-enforcement of mandatory rules. See generally ABEL, *supra* note 31, at 142-57, 290-97 (describing the bar's disciplinary record as underinclusive, ineffective, lax, and selective).

256. THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 150 (Federal Judicial Center 1988).

257. *Id.*

258. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at xiv, 55-72 (Am. Judicature Soc'y 1989). For other studies confirming or analyzing the disproportionate impact and chilling effect of Rule 11, see also Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Georgine M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943

had a chilling effect on the assertion of certain types of rights in federal courts.²⁵⁹

The implications for judicial enforcement of civility codes are apparent. Troubling themes of class bias resurface and suspicions of differential—prestige and power-based—enforcement are substantiated. As Karl Llewellyn has observed: “[C]ourts are made and shaped more by the character of the bar before them than by any single factor. Courts, over the long haul, tend in their standards and in their performance to fit the character of the bar with whom they deal.”²⁶⁰ Judges are not immune to class-contingent perceptions and biases. Among the most dangerous of these misconceptions and generalizations are perceptions that high-status (high-prestige) lawyers are more ethical and professional than other lawyers and are entitled to deference from lower-status (low-prestige) lawyers and the benefit of the doubt from judges when credibility is an issue. Thus, when we involve judges in resolving civility disputes among lawyers, the potential for biased judgments is high notwithstanding the superficial neutrality of the provisions being enforced. In fact, these codes are potentially more problematic than Rule 11 because the dictates of courtesy codes and creeds of professionalism are far more open-ended, lacking in content, and ambiguous than the language in Rule 11.

Furthermore, our experience with Rule 11 suggests that the risks associated with legitimation may be substantial. Low-status lawyers may accept and internalize biased judgments that they are less civil than high status lawyers. A possible outgrowth of legitimation in the civility context is the same type of chilling effect on the assertion of certain types of claims associated with Rule 11. The potential conflict between the implicit demands of a patrician-based civility code (including, among other things, deference to one’s superiors) and the adversarial ethic (which mandates that lawyers confront and challenge others who may have greater power, prestige, and credibility) could jeopardize zealous advocacy on behalf of powerless or unpopular litigants.

In contrast, the history of judicial enforcement of the discovery provisions of the *Federal Rules of Civil Procedure* indicates that the primary problem with mandatory civility codes may not be hierarchical enforcement, but rather, the absence of enforcement altogether. Judges have been surprisingly reluctant to

(1992); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study* 75 MARQ. L. REV. 313 (1992).

259. WILLGING, *supra* note 256, at 157-68.

260. Karl Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS 179 (1993), quoted in Ladinsky, *supra* note 114, at 143.

sanction lawyers who violate discovery rules.²⁶¹ Given the consensus that discovery abuse is a major incivility flash point, the drafters of civility codes should have given the judges' intransigence a closer look because that attitude may signal an unwillingness to compel compliance with mandatory civility codes. Several factors relevant to civility codes contribute to the problem. Judges resist expending scarce court time resolving disputes between lawyers who appear to be squabbling over relatively inconsequential matters. They do not sanction lawyers because in doing so, they may inadvertently punish innocent clients. Often, in order to impose discovery sanctions, judges must reach difficult and time-consuming conclusions about events based on the credibility of lawyers and determine the willfulness of a lawyer's conduct. All of these determinations—and more—would be required routinely if civility codes were enforced.

Significantly, judicially implemented sanctions for discovery abuse and incivility both have the capacity to force judges into openly adversarial, parental, authoritarian relationships with lawyers. Perhaps judges sense what advocates of judicially enforced civility codes ignored: courts may not realistically be able to control the conduct of lawyers outside the courtroom, and charging them with remedying attorney misbehavior that is not integrally related to the merits of a pending case may be prohibitively inefficient and difficult. These matters are collateral disciplinary issues and might be resolved more efficiently and neutrally by a specialized administrative forum. The biases and misconceptions that I have identified may have obscured the views of advocates of civility codes and prevented them from reaching a similar conclusion.

The difficulties posed by non-mandatory civility codes are more subtle, but are ultimately more troubling. Lawyers and the public may be demoralized by the existence of yet another body of law that lawyers ignore as they ignore the aspirational (and functionally aspirational) provisions of the disciplinary rules.²⁶² The proliferation of symbolic, permissive codes of conduct may actually encourage more rule-breaking by communicating inherently contradictory messages about the importance of rule-abiding. Although the formal rules require courtesy, the operational rules (of, for example, large law firm culture) may promote and in fact reward incivility. The absence of sanctions may tell lawyers that the rule-abiders are powerless to enforce the very

261. Stanley J. Levy, *Discovery—Use, and Abuse, Myth and Reality*, 17 FORUM 465, 472 (1981). See also John W. Heiderscheid III, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57, 73-85 (1989); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 2 AM. BAR. FOUND. RES. J. 219 (1980); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 4 AM. B. FOUND. RES. J. 787 (1980).

262. ABA/BNA LAWYERS' MANUAL 210 (0740-4050, 1988).

norms that presumably share such wide acceptance. Without civility codes, many lawyers are civil voluntarily, but their courtesy to one another may be motivated, in part, by fear of some sort of informal sanction. By refusing to sanction lawyers who violate a written code, we may be sending a subliminal message that we do not really value these virtues after all and are unwilling to enforce them either formally or informally. The enactment of aspirational civility codes may make matters worse because they confirm our impotence to those inclined to take advantage.

Other issues arise if one assumes that lawyers will actually attempt to conform their conduct to the codes. First, as we have seen, the lawyers who represent individuals are more susceptible to other-pleasing directives. In order for the adversarial system to function properly, however, these very lawyers, because of their lower status and their clients' lesser power, are the ones most often required to challenge and confront their superiors. Concerns about civility may have a disproportionate impact upon these particular lawyers' zealous advocacy of their clients. If that happens, certain classes of litigants or types of claims may be routinely disadvantaged.

Finally, aspirational codes create opportunities for unintended consequences to become institutionalized. Those with authority over lawyers or their clients may use these codes outside the civility context as authority for determining appropriate conduct.²⁶³ When that happens, the codes are expanded beyond their intended reach and have an influence beyond what was envisioned by their drafters. Along those same lines, lawyers may confuse the "shoulds" of the civility codes with the "musts" of the disciplinary regulations and breach the latter at their peril.²⁶⁴ That outcome is not unlikely given the similarity between some of the disciplinary rules and the civility provisions and the substantial overlap in content.

A class-conscious appraisal of aspirational and mandatory civility codes suggests that the drafters' diagnosis of the problem may be erroneous and the proposed cure ineffective. Stylistic changes in the practice of law may be

263. See, e.g., Aspen, *Promoting Civility*, *supra* note 2, at 501 (describing an instance in which a judge cited the Seventh Circuit's civility report as authority for rebuking another court for language it used in criticizing him and asserting that such a use of the report was "certainly never contemplated by the committee").

264. *ABA Recommends Creeds For Bar Associations*, *supra* note 79, at 58, 58 (quoting Professor Sam Dash). Professor Dash expressed similar concerns at the ABA's 14th National Conference on Professional Responsibility. He argued against one model creed on the basis of its ambiguous relationship to the disciplinary codes, tracking some provisions, duplicating some, omitting some, and stating others in different ways. He argued that, if the provisions that caused serious confusion with the disciplinary process were removed, not much is left and advocated instead an educational program. *ABA/BNA LAWYERS' MANUAL* 210-11 (0740-4050, 1988).

symptomatic of fundamental alterations in the distributions of rights and powers in our society.²⁶⁵ An era such as this one, characterized by significant expansions of some rights and contractions of others, may not be an appropriate time for the old guard or their younger allies to impose restrictions on lawyers whose behavior is so centrally related to the assertion and vindication of developing rights.²⁶⁶ It may be particularly risky for the legal profession during this transitional period to attempt to use manners to cloak conflict and etiquette to suppress overt aggression. The proletarianization of the legal profession may mean that the profession is transitioning away from a deference-based hierarchy toward a more egalitarian occupational community. In that event, patrician notions of civility would have to give way to republican ideals of facilitating honest confrontations among equals and "cultivat[ing] the courage and prudential understanding necessary [to empower all lawyers] to act and speak publicly in pursuit of some particular substantive vision of the good."²⁶⁷

265. Our tendency to believe that the sky is falling when the consensus on appropriate behavior breaks down during such a period is understandable. As one historian of manners has explained:

In our time cataclysmic social revolutions have made large numbers of rules and conventions redundant, and many of them have not yet been replaced with new signs and voluntary constraints that are broadly recognized and accepted. This is a time of transition, when old manners are dying and new ones are still being forged. A good many of our uncertainties, discomforts, and disagreements stem from this state of flux. Sometimes we hold the terrifying conviction that the social fabric is breaking up altogether, and that human life is becoming brutish and ugly because of a general backsliding from previous social agreements that everyone should habitually behave with consideration of others.

VISSER, *supra* note 251, at 25.

266. In the past, custom, ceremony, popular culture, and folklore have often been battlegrounds for class struggle. For example, nineteenth-century movements to modify popular culture and customs in England were invariably bound up with the upper classes' desires for order and stability in a time when society appeared to be without consensus on essential moral values. The upper classes' normative views of the proper social order, however, involved reconstituting crumbling lines of deference, imposing patters of patronage, and reestablishing the moral authority of the upper classes. BOB BUSHAWAY, *BY RITE: CUSTOM, CEREMONY AND COMMUNITY IN ENGLAND 1700-1880*, at 12-13, 21-22 (1982); Robert D. Storch, *Introduction: Persistence and Change in Nineteenth-Century Popular Culture*, in *POPULAR CULTURE AND CUSTOM IN NINETEENTH-CENTURY ENGLAND 1-4* (Robert D. Storch ed., 1982). According to one historian, a basic paradox emerges: "While [folklore] plays a vital role in transmitting and maintaining the institutions of a culture and in forcing the individual to conform to them, at the same time it provides socially approved outlets for the repressions which these same institutions impose upon him." BUSHAWAY, *supra*, at 12-13 (quoting William Bascom, in *1 COUNTRY FOLKLORE 115* (Edwin S. Hartland ed., London 1885)). So it is with manners and etiquette.

267. Fraser, *supra* note 203, at 45.